



Know Your Rights

Free Speech, Protests and Demonstrations in the State of Arkansas: An Activist's Guide

"The free communication of thoughts and opinions, is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right..." --Article II, Section 6 of the Arkansas Constitution

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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." --The First Amendment of the U.S. Constitution

"Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary...They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." --*Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

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INTRODUCTION

If you are holding this booklet in your hands you probably care as deeply about free speech as we do. And you may need some very practical advice.

We produced this guide for people like you: people who are not afraid to stand up for what they believe; and people who may have never thought of themselves as protesters but who find themselves forced into action to protect a precious freedom or right. Native Arkansan or newly-arrived immigrant; student or worker; environmentalist or pro-choice activist-- if you want to speak out, this guide is for you.

Both the Arkansas Constitution and the First Amendment of the United States Constitution protect your right to free expression. But there are many questions you face when you decide to organize and speak out. When do you need a permit? Are there things you cannot say or do? Are there any limitations on when or where you can demonstrate? What about civil disobedience? We hope that this guide will help answer these questions for you.

For the past 75 years, the ACLU has supported the right of individuals from all walks of life to dissent, demonstrate and make their voices heard. Today, you are contributing to this rich tradition of activism. Whatever you believe, we urge you to stand up and speak out. Our future lies in your hands.

THREE PRINCIPLES TO REMEMBER

CONDUCT, NOT CONTENT

It's not what you say; it's the way that you say it. Your right to express your opinion is protected no matter what beliefs you hold. What matters is *how* you use that right. If you organize a protest that causes serious disruption, the government may be able to intervene. But with a few notable exceptions, nobody can restrict your rights because they don't like what you say.

FREE SPEECH IS FOR EVERYONE

Young or old; anarchist or evangelical; pacifist or hawk; Mormon or Muslim; these rights apply to *you*. It doesn't matter whether you're a U.S. citizen, whether you're of voting age, or whether you speak English. Free speech rights are for *everybody*. Don't let anyone tell you otherwise.

WHEN, WHERE AND HOW

Consider *when*, *where* and *how* you use your free-speech rights. If you organize a rally that causes violence or unnecessary disruption, your event may be disbanded. Every municipality has regulations and it's your responsibility to understand them. You must observe reasonable regulations on *time*, *place*, and *manner* when you exercise your rights to demonstrate and protest. These restrictions are created to preserve public order; however, they must be narrowly tailored to serve a significant government interest, must be content-neutral, and must leave open ample alternative channels of communication.¹

ABOUT THIS GUIDE

This guide is designed to answer common, general questions.

It does:

- Outline your free-speech rights under the U.S. and Arkansas constitutions;
- Define the limits to your rights, including when speech may *not* be protected;
- Outline the steps you may take to keep your demonstration lawful;
- Give you the tools to recognize when your rights have been violated.

It does **NOT**:

- Advise on political strategy or on the nuts and bolts of how to organize a protest;
- Provide specifics on local ordinances or on state laws outside Arkansas;
- Replace legal counsel, especially if you are arrested, or believe your rights have been violated.

SIDEBAR: Snapshots in History:

Free Speech is for Everyone: When the Nazis Came to Town

Date: 1977

Location: Skokie, Illinois

At Issue: Local officials knew trouble was brewing when the American Nazi party sought a permit to march through Skokie, where thousands of Holocaust survivors lived. After the U.S. Supreme Court overturned an injunction stopping the rally, Skokie officials struck back. They passed ordinances banning the dissemination of materials or the wearing of symbols that promote hatred based on race or religion. That's when the Nazis called the ACLU.

Result: The ACLU represented the Nazis in the U.S. Supreme Court and in its subsequent challenge to the ordinances. In an historic affirmation of the First Amendment's prohibition against government restriction of speech based on its message or ideas, the Court invalidated the ordinances, ruling that: "If these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises."

SIDEBAR: Snapshots in History

Only in California: Free Speech as a State Right

Date: 1979

Location: Pruneyard Shopping Center, San Jose, California

At issue: When a group of high-school students took to the halls of a privately-owned shopping mall with a petition soliciting support for a United Nations resolution, it didn't take long for security guards to eject them. The students took the owner of the mall to court, launching a legal tug-of-war that pitted property rights against Californians' free-speech rights.

Result: In a delicate balancing act, the California Supreme Court found that the freedom of speech guaranteed by the California Constitution does apply to private shopping centers -- as long free-speech activities do not interfere with normal business operations.* By upholding this decision, the U.S. Supreme Court established a fundamental principle: **State constitutions may guarantee greater protections for freedom of speech than the U.S. Constitution.**

CAN YOU SAY THAT? WHERE PROTECTIONS END

Is *all* speech protected?

The First Amendment protects your right to express your opinion, even if it's unpopular. You may criticize the President, the Congress, or the Chief of Police without fear of retaliation. But this right doesn't extend to libel, slander,² obscenity,³ "true threats,"⁴ or speech that incites imminent violence or law-breaking.⁵ If you grab a megaphone during a riot and yell "shoot the cop" or "loot the shop," you may reasonably expect trouble.

It is sometimes difficult to distinguish between legal and illegal speech. It is legal to demonstrate against draft registration, but it is illegal to knowingly counsel an individual to evade registration. It is legal to use public spaces to picket a store, but it is illegal to block entry to the store. It is legal to preach that our form of government is wrong, but it is illegal to directly encourage a crowd to storm the White House or State Capitol.

What about breaking the rules?

Demonstrators are encouraged to abide by reasonable rules. They should not harass passersby or cause unreasonable disruptions. If you are instructed not to speak, demonstrate, or engage in some other free speech activity—whether by a law, a police officer, or other government official—continuing to engage in the activity may result in criminal charges. As is the same with any interaction with law enforcement, you should obey the order of a police officer even if you think that the order is a violation of your free speech rights. Stay calm and do not resist the police officers. If you believe your right to free speech or assembly has been unreasonably restricted by regulation, law, or the actions of law enforcement, please contact the ACLU of Arkansas. Remember, comply now and take action later.

Can I talk about government overthrow or taking over the streets?

Yes, for the most part. In the 1940s and '50s, suspected subversives or Communists were often charged with 'incitement to illegal activity,' but subsequent courts have interpreted this more narrowly. The government can't stop you from talking generally about ideas or future events. But it may ban speech that's "*directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*"⁶ Broadly speaking, we are free to communicate our ideas, but not to encourage immediate crimes.

What if others react violently to what I say?

You are not responsible for the presence of hecklers, angry listeners, or for the way your own supporters react to your speech. The presence of hecklers or counter-demonstrators is not, by itself, enough to justify an order to disperse the crowd or arrest the speaker. As long as your words don't directly incite violence or law-breaking, it's the police's responsibility to control the crowd and they cannot hold you responsible for the actions of supporters or counter-demonstrators.⁷

Can I use profanity?

Your right to use profanity is constitutionally protected by the First Amendment, but sometimes law enforcement may still arrest you (unlawfully) if you use profanity. The U.S. Supreme Court in *Cohen v. California* held that a voice cannot be muzzled to protect a “captive audience.” More particularly, the Court stated, “we cannot indulge in the facile assumption that one can forbid particular words without a substantial risk of suppressing ideas in the process.”⁸ The right to use profanity includes the right to speak it, wear it, and display it on signs.

As long as your use of the profane word(s) is not characterized as a “fighting word,” which is a personally abusive and insulting word that “by its very utterance” inflicts injury or provokes “an immediate breach of the peace,” then it is constitutionally protected.⁹ In simpler terms, as long as your use of profanity is not meant to provoke a violent reaction or incite a crime, it is protected speech.

SIDEBAR: Snapshots in History

You Can't Say That.... Can You?

Date: 1969

Location: Hamilton County, Ohio

At Issue: *Firearms, cross-burning, and the promise of vengeance against “niggers and Jews.” These were just a few features of the Klu Klux Klan rally that landed KKK spokesperson Clarence Brandenburg a conviction for advocating violence under Ohio’s Criminal Syndication statute. Until the U.S. Supreme Court weighed in.*

Result: *The Court struck down Brandenburg’s conviction, holding it unconstitutional to punish the abstract advocacy of violence or law-breaking. The Justices cemented into law a new test for seditious speech: that it must be “directed to inciting or producing **imminent** lawless action and is **likely** to incite or produce such action.”*

RED TAPE: NAVIGATING THE PERMIT PROCESS

Permit Ordinances

When do I need a permit?

Whether you're marching on City Hall, holding a candlelight vigil, or rallying outside the statehouse or private business, you should check your local permit ordinance before you put on your marching shoes and pull out the megaphone. While regulations vary, here are some guidelines:

- The government can't prohibit marches on public sidewalks or streets, or rallies in most public parks or plazas. But it can often require a permit to regulate competing uses of the area and to ensure you respect reasonable time, place and manner restrictions.¹⁰
- You shouldn't need a permit for demonstrations that don't present serious traffic, safety concerns, or competing-use concerns; also, you shouldn't need a permit as long as it is found that the "convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed."¹¹ If you hold a small rally in a public park or march on the sidewalk and obey traffic laws, you generally won't need a permit. However, the city may suspend your spontaneous event if it's unduly disruptive.
- Permits may not be withheld because of the philosophy, political ideas, or message of the speakers; they must not unduly burden free speech.

When should I apply for my permit?

Most permit ordinances require that an application be submitted a few days in advance, so be sure to give officials sufficient notice. Notice periods should be days, not weeks, and there should be an exception to allow demonstrations in response to breaking news, or to allow for spontaneous demonstrations. Lengthy "advance notice requirements" (requirements that you apply for permits weeks or months in advance) may unreasonably burden speech; the deadlines cannot be so unreasonable so as to burden your rights.¹² Some activists have successfully challenged ordinances that fail to meet these standards.

For information on whether you need a permit, and how to obtain a permit, contact the appropriate city, county, or state department in advance of the event.

Overbroad Ordinances

When is an ordinance invalid?

An ordinance is invalid if it's unreasonably or unnecessarily burdensome, if it prevents you from communicating your message, or if it's selectively enforced. Remember: the government can't discriminate against you for the *content* of your speech. This means that city officials may not impose additional burdens or costs on you because your message is controversial.¹³

When can the city deny my permit?

The deciding body must not have complete, undefined, discretion to deny a permit. There must be *precise* and *specific* standards regulating the evaluation of an application for a permit. An ordinance with no standards or with vague standards such as "will not disturb others" or "in the public interest" or "in the interests of vehicle and pedestrian safety" gives individual officials too much discretion.¹⁴ Such an ordinance is unconstitutional and you should not be lawfully punished for violating it.¹⁵ Should you encounter an ordinance or permit requirements you believe to be unlawful, the best course of action is to contact the ACLU of Arkansas or other legal counsel. Otherwise, you could be charged with a violation of the ordinance. If the government denies you a permit for expressive activity, it should tell you why it has done so.¹⁶

Can the city tell me to change my route?

The government may impose *reasonable* restrictions on the time, place, and manner of your event in order to reduce the amount of disruption it will cause. However, a demonstration should take place within "sight and sound" of its intended audience.¹⁷ Such restrictions must leave ample alternative channels open for you to communicate your particular message.¹⁸ You can challenge efforts to re-route your march away from busy crowds or main streets or to dictate when it must start and end -- because you can't communicate your message if there's nobody to hear it.

What if past marches have turned violent?

The government can't deny a permit just because past demonstrations by your group or others ended in civil disobedience or a disorderly brawl.¹⁹ Likewise, officials can't ask you to promise that protesters will obey the law before agreeing to issue your permit because this would constitute a "prior restraint" that prevents expressive activity from occurring.²⁰

Can the city ask me to cover the costs of my protest?

Cities may charge for the actual costs of a demonstration, including the costs of processing permits (filing fees), traffic control, insurance requirements and some clean-up costs, but you may challenge excessive, arbitrary fees. Fees may not be imposed in order to discourage permit applications and must

cover only the administrative expenses; they may not be a tax on speech. Groups have successfully challenged burdensome fees by arguing that:

- The fee or costs have been imposed or increased because the **content** of the event is controversial and may provoke counter-demonstrations or require more police;²¹
- The city's interests can be adequately protected without the fees;²²
- The regulation doesn't include a waiver for groups that can't afford the charges and have no other way to publicize their views, or²³
- There's no justification for imposing liability on demonstrators because liability should not extend beyond injuries caused by your own actions or negligence.²⁴

What should I do if I believe a city's permit ordinance violates my rights?

Although the ACLU cannot provide legal services to all, we may be able to provide you with helpful information and referrals. If you believe your rights have been violated, contact the ACLU of Arkansas at 904 West 2nd St., Little Rock, AR 72201.

SIDEBAR: Snapshots in History

Nationalist Marchers Invalidate Overbroad Ordinance

Date: 1992

Location: Forsyth County, GA

At Issue: Racially-charged Forsyth County had a history of violent demonstrations. In 1987, after confrontations between civil rights marchers and rock-throwing nationalists catapulted police protection costs to over \$670,000, the county enacted an ordinance requiring permit applicants to pay in advance for police protection and instructing county administrators to set the amount. Two years later, the Nationalist Movement filed suit, protesting the \$100 fee levied for a proposed march to protest the Martin Luther King, Jr. federal holiday.

Result: The Supreme Court held that it was unconstitutional to permit an administrator to examine the content of the message and the likely reaction, and to vary the fee based on the estimated cost of maintaining public order. Capping the fee at \$1,000, the justices said, did not render the ordinance valid.

SPEECH PLUS: BEYOND THE SPOKEN WORD

How much noise can I make?

The answer varies from city to city but one general principle applies: *You may use amplification devices as long as your intent is to communicate your message, not to disturb the peace.* The government may require permits for music, drums and loudspeakers, but ordinances should be narrowly tailored so that they prevent excessive noise without interfering with your free-speech rights. Government limits on the volume of sound equipment (measured by decibel level) may limit use to certain times or certain areas, but the restrictions must be related to a substantial government concern (e.g. traffic safety). Check your local regulations. You may not need a permit to use a bullhorn or megaphone, but the government may ban noisy parties without a purpose or sound “amplified to a loud and raucous volume.”²⁵

Can I stop people on the sidewalk?

Yes. You have the right to approach *willing* (you cannot use force) passersby to hand them a leaflet, engage them in conversation, or ask them to sign a petition.²⁶ You should not need a permit to leaflet on public sidewalks or in parks or public plazas, or even to go door-to-door as these places have traditionally been considered public forums.²⁷ Generally speaking, as long as your picketing or leafleting is done in an orderly fashion and you do not physically disrupt passersby or block the sidewalk, you will be engaging in a protected form of speech.

Where can I solicit contributions?

The First Amendment protects your right to ask people for money. However, this right is more tightly regulated than other forms of speech as it’s considered more disruptive, particularly if you are asking for them to give you the money on the spot.²⁸ The Supreme Court has held that regulation on solicitation of financial support must be “undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money.”²⁹

The courts have also ruled, for example, that you don’t have a right to solicit money inside an airport terminal.³⁰ You shouldn’t require a permit to sell newspapers or pamphlets in the street, but you may need one to go door-to-door soliciting funds. Many localities make it illegal for you to solicit funds at a house where “no solicitation” signs are posted.³¹ Check your local regulations to be sure, and remember: if an ordinance is unreasonably burdensome or if it discriminates based on what you want to say, it may be unlawful.

Can I set up a table to hold my literature or a chair so I can sit down?

The First Amendment protects your right to use a table or newsrack to display materials, subject to the usual time, place, and manner rules.³² People who have a physical condition that substantially limits their ability to stand have the right to sit down.³³ In either case, the police can prohibit you from blocking the sidewalk.

Can I burn the American flag as a sign of protest?

Yes. In 1989, a landmark U.S. Supreme Court case invalidated the federal Flag Protection Act, along with flag desecration laws in 48 states.³⁴ A Flag Desecration Amendment to the Constitution, which was recently proposed and is likely to surface again, would permit Congress to pass a law barring the desecration of the U.S. Flag, but no such law is currently on the books.

SIDEBAR: Snapshots in History

An Inarticulate Grunt? Flag Burning as a Form of Protest

Date: 1989

Location: Dallas, Texas

At Issue: When Gregory Lee Johnson touched a match to kerosene during an anti-Reagan demonstration, he ignited more than an American flag. Charged with violating a Texas law protecting respected objects, Johnson brought the red-hot debate between free expression and the sanctity of the flag all the way to the steps of the Supreme Court.

Result: In a 5-4 opinion that reflected the rift in the nation, the Court ruled it unconstitutional to ban “the expression of particular political views” by banning the burning of flags. The “principal function of free speech under our system of government is to invite dispute” wrote Justice William Joseph Brennan, Jr. He continued, “it may indeed best serve its high purpose when it induces conditions of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” Justice William Renquist, in the dissenting opinion, called flag-desecration the equivalent of an “inarticulate grunt.”

SIT-INS TO HANDCUFFS: BRUSHES WITH THE LAW

Civil Disobedience

What if I'm planning civil disobedience?

Civil disobedience is the active refusal to comply with certain laws as a form of protest. If you're planning to block an intersection or lie down in the middle of the street, make sure you know your rights *before* you begin. Take time to familiarize yourself with the practical consequences of civil disobedience, and with the steps you can take to minimize your chances of an extended stay in jail:

- Carry current identification. If you don't have ID, you may be jailed for a very minor offense instead of getting a ticket.
- Familiarize yourself with your rights on arrest (see page 12) and make sure you understand the likely charges and court outcomes of your activity (see "What Can the Police Charge Me With" below).
- Be aware of any consequences particular to *you*, such as:
 - If you're a *non-citizen*, the government may communicate your arrest to the U.S. Immigration and Customs Enforcement, which could affect your immigration status and even result in deportation.
 - If you apply for a job, you may be asked about arrests and may be refused employment.
 - If there is a *warrant* out for your arrest, you may be held in custody.

What can the police charge me with?

Even if *you* view your expressive activity as lawful, there's a chance that the police will regard it as over the line. So, whether you're planning to engage in civil disobedience or not, you should be familiar with the Arkansas statutes most often invoked against demonstrators:

- Obstructing Governmental Operations (Ark. Code Ann. § 5-54-102 to 132)
 - Resisting or Refusing to Submit to Arrest (Ark. Code Ann. § 5-54-103)
 - Interference with a Law Enforcement Officer (Ark. Code Ann. § 5-54-104)
 - Hindering Apprehension, Prosecution, Conviction, or Punishment of Another (Ark. Code Ann. § 5-54-105)
 - Refusing to Assist a Law Enforcement Officer (Ark. Code Ann. § 5-54-109)
 - Fleeing (Ark. Code Ann. § 5-54-125)
- Riot and Unlawful Assembly (Ark. Code Ann. § 5-71-201 to 205)
- Failure to Disperse (Ark. Code Ann. § 5-71-206)

- Disorderly Conduct (Ark. Code Ann. § 5-71-207)
- Harassment and Harassing Communications (Ark. Code Ann. § 5-71-208 to 209)
- Ejectment and Trespass (Ark. Code Ann. § 18-60-201 to 202)
- Loitering (Ark. Code Ann. § 5-71-213)
- Obstructing a Highway or Other Public Passage (Ark. Code Ann. § 5-71-214)
- Promoting Civil Disorder (Ark. Code Ann. § 5-71-301 to 302)
- Compliance with Police Directions [in regard to traffic] (Ark. Code Ann. § 27-49-107)
- Using force, a threat of force, or physical obstruction to interfere with a person's right to reproductive health services or to attend a place of religious worship (18.U.S.C. § 248)

Some sections of these laws are unconstitutionally overbroad as written, and sometimes they are unlawfully applied to the public. Some general tips to help keep your liberty and avoid arrest are available on our Bust Card. Please visit our webpage to download a copy of our Bust Card.

Your Rights on Arrest

What should I expect if I'm arrested at a protest?

It depends on what you are arrested for. Under Arkansas law there are three different types of offenses: infractions (i.e. citations), such as jaywalking or failing to yield to traffic in the street; misdemeanors, such as obstructing an officer or disorderly conduct; and felonies.

Infractions (citations)

For almost all infractions, if you can show a government-issued ID, the police must give you a citation (formerly known as a "promise to appear") and release you on the spot unless you refuse to sign the citation.³⁵

Misdemeanor

The police will usually take you to the station to be fingerprinted and photographed, but they may release you if you have identification and you sign a promise to appear.

Felony

The police may keep you in jail, but you have a right to bail immediately. If you don't bail out, you must be seen in court without unnecessary delay to be informed as to whether you're being charged with a crime.³⁶ Unnecessary delay may, however be 3-4 days.

Many people arrested at protests are never charged and are released without going to court. *If you aren't ever charged, you haven't technically been arrested.*

If you're arrested in a federal facility, national park, or in some other situation where federal law applies, then the process will be different.

What exactly are my rights on arrest?

- You have the right to remain silent. Use it. Give your name and address but don't say anything else. You cannot be punished for refusing to answer questions related to suspected criminal activity, and the officer cannot use your silence as a basis for searching you. If you believe that you are being investigated for or suspected of committing any crime, it is usually best to assert your right to remain silent and wait to speak to an attorney.³⁷
 - There are three exceptions to the general rule that you do not have to answer questions from officers:
 - **Driving:** If you are driving and you are pulled over for a traffic violation, the officer can require you to show your license, vehicle registration, and proof of insurance.³⁸
 - **Stop and Identify:** Arkansas is one of the several states which have a "stop and identify" law. In Arkansas, this law gives law enforcement officers the authority to require you to identify yourself if the officer reasonably suspects you are committing, have committed, or are about to commit a crime.³⁹ (Warning: It is illegal to lie to a police officer or to provide false identifying information.)⁴⁰
 - **Non-citizens:** Certain immigration status' (but not all) require production of particular information upon request of authorized law enforcement.
- You have the right to legal counsel. Ask for an attorney. Don't discuss your case with the police without consulting your attorney.
- You have the right to ask for the officer's badge number, name, or other identifying information.⁴¹ The officer may not retaliate against you for simply asking for this information. If an officer refuses to identify him or herself when asked or retaliates against you for asking for identification, you may want to register a complaint with that law enforcement jurisdiction.⁴²
- An officer may approach you on the street and ask you questions for any reason. If you are not being detained or are not under arrest, you have the right to not talk to the officer. If you want to exercise that right, simply ask, "Am I free to go?" If the answer is yes, you have the right to say, "I do not want to talk to you" and walk away. However, Arkansas law requires your cooperation in producing identifying information (e.g. Driver's license, ID card), etc., but this legal obligation only exists if the officer is requesting the information during the investigation or prevention of a crime.⁴³

- If the officer says that you are not free to go, then you are being detained. A police officer may detain you for a reasonable period of time if he or she has a reasonable suspicion that you are involved in criminal activity.⁴⁴ Being detained is not a full arrest, though an arrest could follow.
- If you remain in custody, a judge will review your case within 48 to 72 hours and you must be taken to court without unnecessary delay.⁴⁵

Limits to Police Power

When can the police break up a protest or demonstration?

The police are charged with safeguarding the public during a demonstration, but they can't use their powers to stop you from exercising your free-speech rights. As long as you're observing reasonable time, place and manner restrictions, the police may not break up a gathering unless there is a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety."⁴⁶ And police officers may not use their powers in a way that has a "chilling effect" on ordinary people who wish to express their views.

When can the police use force? How much force is legitimate?

The police may use reasonable force to break up a gathering or to detain or arrest a person who is violating the law. What is "reasonable" depends on all the circumstances. This gives the police some leeway while prohibiting force that any trained officer should know is excessive.⁴⁷

Are there Constitutional Limits to Police Intelligence-Gathering and Surveillance of Political Activists?

Overly intrusive and unnecessary police spying and intelligence gathering activities may violate constitutional guarantees of freedom of speech or privacy if it is targeting groups or individuals engaged in First Amendment activity absent some connection to suspected criminal activity.

The USA Patriot Act significantly altered First Amendment rights for non-US citizens who are not permanent residents. Section 215 of the Act allows surveillance and investigation of people based solely on their First Amendment activities. Non-citizens who are not permanent residents are subject to harsher penalties if their actions are labeled "domestic terrorism." Immigrants who engage in protest should be aware of this increased authority permitted by law enforcement and prepare accordingly.⁴⁸ Proper preparation may include carrying the telephone numbers of friends and relatives, as well as the telephone numbers of an immigration attorney or an immigrant advocacy organization.

Can uniformed officers take photographs or gather information at a protest?

Yes. The police may lawfully photograph or videotape events that are open to the public. However, our right to privacy prohibits state and local officials from maintaining unnecessary information about the people of our state, so tapes that do not show any unlawful conduct should be destroyed.⁴⁹

Can the police demand that protesters remain inside a 'free speech zone'?

Sometimes. For the government to restrict protesters to a certain space – or to keep them from a space that is otherwise open – it must follow the usual rules regarding time, place, and manner. Restrictions must be reasonably related to legitimate goals, *e.g.* reducing an identifiable security risk; restrictions must not substantially prevent more expression than is necessary to achieve those goals; and the restrictions must not be motivated by the protesters' message. The restrictions must also allow protesters to have a reasonable opportunity to effectively communicate their message to their intended audience.⁵⁰

SIDEBAR: Snapshots in History

The Chilling Effect: Limiting Police Power

Date: 2003

Location: Port of Oakland

At Issue: It was a peaceful anti-war protest -- until the police tried to break it up. They opened fire with wooden dowels, sting-ball grenades and shot-filled bean bags, scattering terrified protesters, dockworkers and passers-by, and wounding more than 50. The ACLU, civil rights and labor groups filed suit, charging that the excessive use of force violated protesters' free-speech rights and had a chilling effect on the speech of others.

Result: In an out-of-court settlement, the Oakland Police Department agreed to a new crowd control policy, which bans the use of these types of weapons against demonstrators. This makes Oakland the first city in the nation where demonstrators do not risk serious injury from these weapons when they exercise their free-speech rights.

LOCATION

Public Property

What's the best location for my free-speech activity?

Although the First Amendment gives you the right to decide where best to express yourself, your ability to exercise your free-speech rights may hinge upon exactly *where* you choose to exercise those rights. The U.S. Supreme Court uses a *federal forum analysis* to determine what kinds of speech are appropriate in which publicly-owned locations:⁵¹

- a) **Traditional Public Forums:** Is it a public sidewalk, a public street, a public area immediately adjacent to a street, or a public park? If the answer is yes, you're holding your protest at a "traditional public forum." These traditional public forums are reserved to the people for the free exchange of ideas. In these forums, speech may *only* be restricted through reasonable time, place and manner restrictions.⁵²
- b) **Designated Public Forum:** Other spaces may receive the same protection as traditional forums because the government has opened them up to be used for speech activities. Once the government treats a public venue as available to *some* for non-commercial speech, it must be made available to *all*. Common examples of designated public forums include public auditoriums, the steps of city hall, and plazas in front of public buildings.⁵³
 - a. The nature of the regulation(s) the government may impose in "designated" public forums can depend on the type or location of the speech. Relevance matters; the location of your speech is more likely to be acceptable to the courts when it is an actual or symbolic target of your protest or the venue is one which is particularly suited for broadcast of your message.
- c) **Non-Public Forum:** In other venues, your rights are less clearly protected. At military bases, airport terminals, or the entrance to a post office, for example, *reasonable* prohibitions and restrictions may be upheld, as long as they are objectively applied and do not favor one side of an issue over the other. The government cannot discriminate based on viewpoint, even in a non-public forum.⁵⁴

Schools, Campuses, Medical Centers, and Houses of Worship

Can public universities or college campuses restrict protests?

You should be allowed to protest on the outdoor streets and plazas of public college and university campuses, subject to reasonable time, place, and/or manner restrictions. A public college cannot allow protests on one side of an issue but prohibit protests on the other side. But it may restrict speech activities that unduly interfere with classes or other campus activities.⁵⁵

Universities and college campuses may require that a non-university entity obtain a permit before engaging in protests on campus grounds. However, the permit may only be imposed if it (1) “does not delegate overly broad licensing discretion to a government official; (2) is content-neutral; (3) is narrowly tailored to the “University’s significant governmental interests; and (4) leaves “ample alternative channels for communication.”⁵⁶ In other words, the permit requirement will be subjected to a strict scrutiny test.

Are there special rules for medical centers or Places of Worship?

Yes. You may not physically obstruct or intentionally interfere with the staff members, patients, or building of a medical clinic offering reproductive health services.⁵⁷ These statutes also apply to houses of worship.

Private Property

Can I protest on private property?

As a rule, the First Amendment doesn’t give you the right to engage in free speech activities on private property unless you own or lease the property, or the owner has given you permission to use the property for speech. You may, however, canvass door-to-door in residential areas, unless the homeowner has put up a “no solicitors” sign.⁵⁸

Do shopping malls count as private property?

The right to free speech and assembly on private commercial property in Arkansas is a difficult question and the law is not yet settled. Although there is no right to engage in free speech and assembly on private commercial property (e.g. shopping malls) under the First Amendment, other states have held that because of the “public function” and “public involvement” regarding *particular* shopping malls, the right to engage in non-violent political speech by distributing political pamphlets and gathering signatures is protected.⁵⁹

These types of rulings depend heavily on the facts and characteristics of the private property (shopping mall). Before engaging in free speech activity at private commercial property, you can ask the property manager what they believe to be the rules and regulations governing free speech activity on their property. Keep in mind that failing to obey a request to leave private commercial property could result

in a charge such as trespass. Regardless, you always have the right to engage in free speech and assembly on the public sidewalks near private commercial property.

Can shopping malls regulate my expressive activities?

Yes. It is also important to note that; even if it becomes established that there is a right under the Arkansas Constitution to engage in free speech on private commercial property, the property owners are still permitted to reasonably regulate the time, place, and manner of the speech.

What if I violate a shopping mall's rules?

If you exercise your free speech rights in violation of the shopping mall's rules, you may be excluded from the mall. You may also be charged for trespass if the mall is private commercial property (Arkansas law is undecided on this as mentioned above). However, you cannot be arrested for trespass, under state law, in an area that is open to the public unless you intentionally interfere with the establishment's business (e.g. by obstructing or intimidating its customers) and have refused to leave after being asked to do so by the owner of the premises.⁶⁰

LEGAL SERVICES

ACLU of Arkansas Services

The ACLU of Arkansas is not a legal aid services organization. We bring a select number of impact cases to defend and promote the fundamental guarantees of individual liberties protected by the federal and state constitutions. Unfortunately, due to limited resources, the ACLU of Arkansas cannot receive e-mails or live phone calls; however, if you feel that your constitutional rights have been violated in Arkansas, you can request information, write to us, or download and complete the complaint form at <http://www.acluarkansas.org/content/intake/ACLU-Complaint-Form.pdf> and return it to **ACLU of Arkansas, 904 West 2nd Street, Little Rock, AR 72201.**

If you feel the matter is urgent or you believe that serious harm is about to occur, you may leave a message on the answering machine at **(501) 374-2660**, it is checked all day long; however, we cannot return every phone call we receive. If we feel it is a matter that requires our immediate attention, falls within our mission, and we are able to address it right away, we will get back to you. Most of the time, however, we respond only to written requests for legal assistance and need a written request from everyone and a written agreement for representation before we can help.

Arkansas Legal Services

The Arkansas Legal Services Partnership is a statewide collaboration between Legal Aid of Arkansas (LAA) and the Center for Arkansas Legal Services (CALs) and provides free civil legal assistance to low-income Arkansans. You must meet the requisite income requirements and be in need of non-criminal assistance. You can visit www.arlegalservices.org for more information or contact the Help Line at 800-952-9243.

ENDNOTES

¹ *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983); *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006).

² *Little Rock Newspapers, Inc. v. Fitzhugh*, 330 Ark. 561, 572, 954 S.W.2d 914, 920 (1997); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343, 345-46, 347 (1974) (holding that the First Amendment permits a private figure in a libel action to recover damages without showing of actual malice).

³ *Roth v. U.S.*, 354 U.S. 476, 484 (1957).

⁴ *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 622-624 (8th Cir. 2002).

⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1968).

⁶ *Id.* at 447 (emphasis added).

⁷ *Cox v. Louisiana*, 379 U.S. 536, 550-51 (1965); *Frye v. Kansas City Missouri Police Dept.*, 375 F.3d 785, 790-792 (8th Cir. 2004) (holding that the right to free speech includes the right to attempt to persuade others to change their views, and may not be stopped simply because the speaker's message may be offensive to an audience; however, it may not be the content of the speech, as much as the deliberate verbal or visual assault that justifies proscription).

⁸ *Cohen v. California*, 403 U.S. 15, 26 (1971).

⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 588, 571-73 (1942).

¹⁰ *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Bowman*, 444 F.3d at 975 (holding that the government may enforce a reasonable, content-neutral time, place and manner restriction in a traditional public forum if the restriction is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication).

¹¹ *Shuttlesworth v. City of Birmingham, Alabama*, 394 U.S. 147, 150-51, 158 (1969).

¹² *Douglas v. Brownell*, 88 F.3d 1511, 1523-24 (8th Cir. 1996); *Shuttlesworth*, 394 U.S. at 163 (Harlan, J., concurring); *Carroll v. President and Com'rs of Princess Anne*, 393 U.S. 175, 182 (1968) (holding that a delay of even a day or two may be intolerable when applied to "political" speech in which the element of timeliness may be important).

¹³ *Forsyth County*, 505 U.S. at 134-35; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment") (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)).

¹⁴ *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769-70 (1988); *Jacobsen v. Howard*, 109 F.3d 1268, 1272-73 (8th Cir. 1997); *Thompson v. Arkansas Social Services*, 282 Ark. 369, 376, 669 S.W.2d 878, 881 (1984).

¹⁵ *Craft v. City of Fort Smith*, 335 Ark. 417, 424-25, 984 S.W.2d 22, 26 (1998).

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- ¹⁶ *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002);
- ¹⁷ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 305 (1984); *Phelps-Roper v. Nixon*, 545 F.3d 685, 693-94 (8th Cir. 2008).
- ¹⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Kirkeby v. Furness*, 92 F.3d 655, 662 (8th Cir. 1996).
- ¹⁹ *Kunz v. People of State of New York*, 340 U.S. 290, 294-95 (1951); *Collins v. Jordan*, 110 F.3d 1362, 1372 (9th Cir. 1996).
- ²⁰ *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976); 36 C.F.R. § 2.51.
- ²¹ *Forsyth County*, 505 U.S. at 136; *Arkansas Writers’ Project*, 481 U.S. at 227-29.
- ²² *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 113-17 (1943); *United Youth Centers, Inc. v. City of Ames*, 412 F.Supp.2d 994, 1009-10 (S.D. Iowa 2006).
- ²³ *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F. 2d 1515, 1523-24 (11th Cir. 1985); *United Youth Centers*, 412 F.Supp.2d at 1009-10.
- ²⁴ *Rock Against Racism v. Ward*, 658 F.Supp. 1346, 1356 (S.D.N.Y. 1987), *overruled on other grounds by*, *Ward v. Rock Against Racism*, 492 U.S. 781 (1989).
- ²⁵ *Saia v. People*, 334 U.S. 558, 562 (1948); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *Stokes v. City of Madison*, 930 F.2d 1163, 1168-69 (7th Cir. 1991); *Maldonado v. Monterey County*, 330 F.Supp. 1282, 1286 (N.D. Cal. 1971) (the “absolute prohibition of the use of loudspeaking equipment on the public roadways is unconstitutional.”).
- ²⁶ *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939); *Frye v. Kansas City Mo. Police Dept.*, 375 F.3d 785, 796 (8th Cir. 2004).
- ²⁷ *Watchtower Bible and Tract Soc’y of N.Y. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002) [hereinafter “Watchtower Bible”]; *Marsh v. State*, 326 U.S. 501, 504 (1946); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938); *Pursley v. City of Fayetteville, Ark.*, 820 F.2d 951, 954-55 (8th Cir. 1987) (holding that peaceful picketing on the public streets and public sidewalks in residential neighborhoods constitutes expressive conduct which falls within the protections of the First Amendment because removing streets and sidewalks located in residential areas from the classification of public forum would result in removing “vast areas of this country” from the protection of the First Amendment); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Madsen v. Woman’s Health Center*, 512 U.S. 753 (1994).
- ²⁸ *Watchtower Bible*, 536 U.S. at 162-63, 174; *National Federation of the Blind of Arkansas v. Pryor*, 258 F.3d 851, 854-55 (8th Cir. 2001) [hereinafter “Blind of Arkansas”].
- ²⁹ *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980).
- ³⁰ *Int’l Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 683-85 (1992) (upholding a ban on solicitation in an airport terminal).
- ³¹ *Watchtower Bible*, 536 U.S. at 168-69.

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- ³² *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 771-72 (1988) (newsracks).
- ³³ 42 U.S.C.A. § 12132; *Klingler v. Dir., Dept. of Revenue, State of Mo.*, 455 F.3d 888, 896-97 (8th Cir. 2006).
- ³⁴ *Texas v. Johnson*, 491 U.S. 397, 399 (1989); *Id.* at 429 (Rehnquist, C.J., dissenting).
- ³⁵ Ark. R. Crim. P. 5.2.
- ³⁶ Ark. R. Crim. P. 8.1.
- ³⁷ Ark. R. Crim. P. 4.5.
- ³⁸ Ark. R. Crim. P. 2.2(a)
- ³⁹ Ark. R. Crim. P. 3.1.
- ⁴⁰ A.C.A. § 5-54-102(a)(4)
- ⁴¹ Ark. R. Crim. P. 4.4; A.C.A. § 12-12-1403(a)(4)
- ⁴² A.C.A. § 16-123-108(a)
- ⁴³ Ark. R. Crim. P. 2.2.
- ⁴⁴ Ark. R. Crim. P. 3.1.
- ⁴⁵ Ark. R. Crim.P. 8.1; *Brown v. State*, 276 Ark. 20, 23, 631 S.W.2d 829, 831 (1982) (holding that a delay of 3 and one-half-day is reasonable and not unnecessary); *Allen v. State*, 297 Ark. 155, 158-59, 760 S.W.2d 69, 70 (1988) (determined that a delay of one month was unnecessary).
- ⁴⁶ *Cantwell v. State of Connecticut*, 310 U.S. 296, 308 (1940).
- ⁴⁷ Ark. R. Crim. P. 3.3.
- ⁴⁸ 50 U.S.C.A. § 1861 (2006).
- ⁴⁹ Ark. Const. Art. II § 15 (recognizing a right to privacy); *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004).
- ⁵⁰ *Phelps-Roper*, 545 F.3d at 693-94.
- ⁵¹ For a summary of this doctrine, see *Pleasant Grove v. Sumnum*, 555 U.S. 460, 129 S.Ct., 1125, 1132 (2009).
- ⁵² *Id.*
- ⁵³ The steps of city hall and public plazas may also constitute traditional public fora. See *Pouillon v. City of Owosso*, 206 F.3d 711, 716-17 (6th Cir. 2000).
- ⁵⁴ *Perry Educ. Ass'n. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983).

⁵⁵ *Bowman v. White*, 444 F.3d 967 (8th Cir. 2006); A.C.A. § 5-71-226.

⁵⁶ *Bowman*, 444 F.3d at 980.

⁵⁷ 18.U.S.C.A. § 248; In *Hill v. Colorado*, 530 U.S. 703 (2000), the U.S. Supreme Court upheld a state law that protected persons entering abortion clinics by establishing “floating buffer zones” around persons entering a medical facility. The Court’s opinion is based largely on the particular vulnerability of people seeking medical attention and the need to allow unimpeded access to health-care facilities.

⁵⁸ *Watchtower Bible*, 536 U.S. at 165-66; *Frisby v. Schultz*, 487 U.S. 474, 482-83, 488 (1988) (showing that lower courts are divided as to how far a law can push protestors away from a residence); *Pursley*, 820 F.2d at 954-55, *supra*, note 41; *Veneklase v. City of Fargo*, 248 F.3d 738, 743-44 (8th Cir. 2001).

⁵⁹ *Bock v. Westminster Mall Co.*, 819 P.2d 55, 62 (Colo. 1991); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83-84 (1980).

⁶⁰ *Culhane v. State*, 282 Ark. 286, 288-89, 668 S.W.2d 24, 25 (1984).

SPEAK OUT: AN ACLU TIP CARD

Speech rights are for EVERYONE. Don't let anyone tell you otherwise. Nobody can discriminate against you or stop your protest because of the CONTENT of your speech.

Plan your activity carefully. Apply for your permit ahead of time if possible. But remember, permit ordinances should allow for spontaneous demonstrations.

Excessive noise or disruption, obstructions of sidewalks or doorways, or harassment of unwilling passersby may give police grounds to end your activity.

Avoid directly advocating violence or imminent lawless activity. This may cause the police to intervene to stop your demonstration and land you in trouble.

Kee a valid ID and a list of phone numbers on your person. You may request an attorney and make a phone call if you are arrested. Remember that unless you are talking with an attorney, a phone call from jail may be recorded or eavesdropped upon by police and used against you.

Observe traffic rules and other reasonable time, place and manner restrictions. But remember, you have a right to be heard. Officials can't direct you to a route that doesn't reach your target audience.

Understand the most common charges filed against protesters before you leave the house.

There are different rules for different locations. Make sure you know who owns the venue and which rules apply before your activity begins.

Speak out, Speak up, Speak freely!

For More Information

A copy of other Know Your Rights materials is available on our webpage, including a complete KYR Protest guide entitled, "Free Speech, Protests, and Demonstrations in the State of Arkansas: An Activist's Guide," and also our "KYR When Encountering Police" Guide and corresponding KYR pocket card.

This is intended only as general guidance and not intended as legal advice.



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For more information, visit www.acluarkansas.org.

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