View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by The Research Repository @ WVU (West Virginia University)

WestVirginiaUniversity
THE RESEARCH REPOSITORY @ WVU

Volume 96 | Issue 1 Article 9

September 1993

Hunter Harassment Statutes: Do They Shoot Holes into the First Amendment

John A. Grafton
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Animal Law Commons, and the First Amendment Commons

Recommended Citation
John A. Grafton, *Hunter Harassment Statutes: Do They Shoot Holes into the First Amendment*, 96 W. Va. L. Rev. (1993).
Available at: https://researchrepository.wvu.edu/wvlr/vol96/iss1/9

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

HUNTER HARASSMENT STATUTES: DO THEY SHOOT HOLES INTO THE FIRST AMENDMENT?

I. INTRODUCTION: SETTING THE SCENE

Hunter harassment statutes struggle to survive the rigorous demands of the First Amendment. The following quotation sets the scene for this struggle:

> Hunting is perfectly legal in the USA. Harassing hunters is not. It's pretty simple. . . .
>
> Public outrage with anti-hunters is evident by the actions of 38 states which have found it necessary to protect hunters, fishermen and trappers by enacting hunter-protection laws . . . .
>
> . . . The legislation was drafted with the intention of preventing harassment, while fully recognizing First Amendment rights. There's a time and place for animal rightists to attempt to effect societal change. *The woods, during hunting season, is neither.*[1]

1. Jim Glass, *Protect Hunters from Harassment*, USA TODAY, Aug. 6, 1990, at A8

Published by The Research Repository @ WVU, 1993

Animal rights activists and other individuals who are morally opposed to hunting, trapping, and fishing have sometimes resorted to drastic means to interfere with the lawful activities of hunters, trappers, and anglers. Such means have included shadowing sheep hunters and scaring away wildlife,[2] donning wetsuits to remove fish from hooks,[3] getting between a hunter with a loaded rifle and a bison and shouting "Don't shoot!,"[4] putting nails in a road leading to a hunting area,[5] and setting traps and poison intended for hunting dogs.[6] In response to such actions, nearly every state has enacted legislation commonly known as "hunter harassment statutes."[7] These statutes are designed to

---

(emphasis added).

2. For a dramatic account of a woman who battled nearly constant harassment from animal rights activists to become the thirteenth hunter and only the second woman to get a bighorn sheep in California in 115 years see Beverly Conner, *Hunter Harassment: Plaguing Our American Heritage*, OUTDOOR LIFE, Oct. 1990, at 83.

3. Kent Mitchell, *OUTDOORS: Animal Rights Group Takes on Anglers Saying Fish Suffer, PETA to Campaign; Anti-harassment Laws Cover Subject*, THE ATLANTA J. & CONST., Aug. 1, 1993, at F4 (describing that members of People for the Ethical Treatment of Animals (PETA) in England apparently put on wetsuits and attempted to remove hooks from the mouths of fish so that they would not feel pain).

4. State v. Lilburn, No. DC 92-70 (Mont. D.C., Gallatin Co. 1993) (order dismissing charge).

5. *See Hunting Sabotaged by Terrorists*, AMERICAN HUNTER, Vol. 4, No. 4, April 1990, at 4 (reporting that several spikes and roofing nails were found along the road, some by the tires of the hunters).

6. *Id.* (explaining how a hunting dog ran off in pain through the woods after haplessly stepping into a trap; a warning note was found above a container of poisoned dog food).

7. Conner, *supra* note 2, at 83. *See, e.g.*, ALASKA STAT. §§ 16.05.790 to 791 (1992); ARIZ. REV. STAT. ANN. § 17-316 (1984); ARK. CODE ANN. § 5-71-228 (Supp. 1991); CAL. FISH & GAME CODE § 2009 (Deering 1989); COLO. REV. STAT. § 33-6-115.5 (Supp. 1993); CONN. GEN. STAT. ANN. § 53a-183a (West Supp. 1993); DEL. CODE ANN. tit. 7, § 731 (1991); FLA. STAT. § 372.705 (Supp. 1993); GA. CODE ANN. §§ 27-3-150 to -152 (Michie 1993); IDAHO CODE § 36-1510 (Supp. 1993); ILL. ANN. STAT. ch. 720, paras. 125/0.01 to 3 (Smith-Hurd 1993); IND. CODE ANN. §§ 14-2-11-1 to -3 (Burns 1990); IOWA CODE ANN. § 481A.125 (West Supp. 1993); KAN. STAT. ANN. § 32-1014 (Supp. 1992); KY. REV. STAT. ANN. § 150.710 (Michie 1992); LA. REV. STAT. ANN. § 56:648.1 to 3 (West 1987 & Supp. 1993); ME. REV. STAT. ANN. tit. 12, §§ 7541 to 7542 (West Supp. 1992); MD. NAT. RES. CODE ANN. § 10-422 (1990); MASS. ANN. LAWS ch. 131, § 5C (Law. Co-op Supp. 1993); MICH. STAT. ANN. § 13.1262(1) (Callaghan Supp. 1993); MINN. STAT. ANN. § 97A.037 (West Supp. 1993); MISS. CODE ANN. § 49-7-147 (Supp. 1993); MO. ANN. STAT. §§ 537.524 & 578.151 to 153 (Vernon Supp. 1993); MONT. CODE ANN.

protect hunters from irrational harassment by animal rights activists.[8] In addition, Congress is currently considering specific legislation designed to protect sportsmen who hunt, fish or trap on federal lands.[9] The general aim of these statutes, which are vigorously advocated by pro-hunting groups,[10] is to protect sportsmen from undue interference into their lawful activities.[11] Despite the fact that these statutes have

---

§§ 87-3-141 to -144 (1993); NEV. REV. STAT. § 503.015 (1992); N.H. REV. STAT. ANN. § 207:57 (Supp. 1992); 1993 N.J. Sess. Law Serv. ch. 11 (West) (to be codified at N.J. Stat. Ann. §§ 23:7A-1 to 2); N.Y. ENVTL. CONSERV. LAW § 11-0110 (McKinney Supp. 1993); N.C. GEN. STAT. § 113-295 (1990); N.D. CENT. CODE § 20.1-01-31 (1991); OHIO REV. CODE ANN. § 1533.03 (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 29, § 5-212 (West 1991 & Supp. 1993); 34 PA. CONS. STAT. ANN. § 2302 (Supp. 1993); R.I. GEN. LAWS § 20-13-16 (1989); S.D. CODIFIED LAWS ANN. § 41-1-8 (1991); TENN. CODE ANN. §§ 70-4-301 to -303 (1987); TEX. PARKS & WILD. CODE ANN. § 62.0125 (West 1991); UTAH CODE ANN. § 23-20-29 (1991); VT. STAT. ANN. tit. 10, § 4708 (1984); VA. CODE ANN. § 29.1-521.1 (1992); WASH. REV. CODE ANN. §§ 77.16.340 & 350 (Supp. 1993); W. VA. CODE § 20-2-2a (1989); WIS. STAT. ANN. § 29.223 (West Supp. 1992); WYO. STAT. § 23-3-405 (1991); *see also* OR. REV. STAT. § 498.006 (1991) and 34 PA. CONS. STAT. ANN. § 2162 (Supp. 1993) (prohibiting the harassment of wildlife or game). *See also* Dorman v. Satti, 678 F. Supp. 375 (D. Conn.), *aff'd*, 862 F.2d 432 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989).

8. "Animal rights terrorists" may be more appropriate terminology for some (but certainly not all) of these groups. The "Animal Liberation Front" (ALF) is currently the only domestic group on the FBI's list of terrorist organizations. The group has been involved in more than fifty separate incidents of vandalism, harassment, or arson since 1982. Susan Reed and Sue Carswell, *Animal Passion ("Valerie," Pseudonym for Founder of the U.S. Animal Liberation Front)*, PEOPLE WEEKLY, Jan. 18, 1993, at 34. A fire set by members of the ALF at a University of California veterinary center in 1987 caused $3.5 million in damages. Katie Monagie, *Are Animals Equal?*, SCHOLASTIC UPDATE, April 16, 1993, at 19.

9. S. 187, 103d Cong., 1st Sess. (1993); S. 388, 103d Cong., 1st Sess. (1993).

10. Some of the nation's most powerful lobbying groups, including the National Rifle Association (NRA), support the passage of hunter protection statutes. *See* Dorman v. Satti, 678 F. Supp. 375, 377 n.1 (D. Conn. 1988). The Wildlife Legislative Fund of America drafts model legislation that is designed to protect hunters, anglers, and trappers. *See* Jim Glass, *Protect Hunters from Harassment*, USA TODAY, Aug. 6, 1990, at A8.

11. *See* Conner, *supra* note 2, at 83. The Wisconsin statute exemplifies the typical hunter harassment statute. It provides:

> Section 29.233. Interference with hunting, fishing or trapping
>
> (1) Definition. In this section, "activity associated with lawful hunting, fishing or trapping" means travel, camping or other acts that are preparatory to lawful hunting, fishing or trapping and that are done by a hunter, fisher or trapper or by a member of a hunting, fishing or trapping party.
>
> (2) Prohibitions.

previously withstood constitutional challenges,[12] a pressing dilemma

---

(a) No person may interfere or attempt to interfere with lawful hunting, fishing or trapping with the intent to prevent the taking of a wild animal by doing any of the following:

1. Harassing a wild animal or by engaging in an activity that tends to harass wild animals.

2. Impeding or obstructing a person who is engaged in lawful hunting, fishing or trapping.

3. Impeding or obstructing a person who is engaged in an activity associated with lawful hunting, fishing or trapping.

4. Disturbing the personal property of a person engaged in lawful hunting, fishing or trapping.

5. Disturbing a lawfully placed hunting blind.

(b) No person may knowingly fail to obey the order of a warden or other law enforcement officer to desist from conduct in violation of par. (a) if the order is based on any of the following:

1. The warden or other law enforcement officer personally observed such conduct by the person.

2. The warden or other law enforcement officer has reasonable grounds to believe that the person has engaged in such conduct that day or that the person intends to engage in such conduct that day.

(3) Exemptions. This section does not apply to actions under sub. (2)(a) 1 to 5 performed by wardens and other law enforcement officers if the actions are authorized by law and are necessary for the performance of their official duties.

(3m) Affirmative defense. It is an affirmative defense to the prosecution for violation of this section if the defendant's conduct is protected by his or her right to freedom of speech under the constitution of this state or of the United States.

(4) Civil actions.

(a) A person who is adversely affected by, or who reasonably may be expected to be adversely affected by, conduct that is in violation of sub. (2)(a) may bring an action in circuit court for an injunction or damages or both.

(b) The circuit court may enter an injunction under ch. 813 against conduct in violation of sub. (2)(a) if the court determines any of the following:

1. The defendant is threatening the conduct.

2. The defendant has engaged in the conduct in the past and that it is reasonable to expect that the defendant will engage in the conduct that will adversely affect the plaintiff in the future.

(c) The circuit court may award damages to the plaintiff if the defendant's conduct in violation of sub. (2)(a) has adversely affected the plaintiff. The damages awarded may include punitive damages and any special damages. Special damages may include approval fees, travel costs, camping fees, costs for guides, and costs for equipment or supplies to the extent that the plaintiff did not receive the full value of any of these expenditures due to the unlawful conduct of the defendant.

WIS. STAT. ANN. § 29.233 (West Supp. 1992).

12. State v. Bagley, 474 N.W.2d 761 (Wis. Ct. App. 1991); State v. Ball, 627 A.2d

arises when they infringe on the First Amendment Rights of individuals who wish to protest the taking of wildlife.[13] The questions then become: (1) are anti-harassment regulations that limit free speech valid, and (2) if so, how restrictive may the regulation be?

This Note analyzes hunter harassment statutes to the extent they raise First Amendment concerns. Part II presents the case for the statutes by analyzing the positive aspects of hunting and the reasonableness of the restraints that such legislation imposes. Part III addresses the First Amendment implications and discusses both the standards which must be met to withstand a facial challenge and the criteria that support a valid time, place, and manner restriction. Part IV provides a model hunter harassment statute that addresses these First Amendment concerns and urges legislatures to amend their statutes to ensure compliance with the First Amendment. Part V analyzes the West Virginia statute and provides guidance for amending it. Finally, Part VI concludes that "hunter harassment statutes" may be upheld as valid time, place, and manner restrictions if they are carefully drafted.

II. THE CASE FOR THE STATUTES

States have a substantial interest in preventing the obstruction of hunting, fishing, and trapping. Hunter harassment statutes promote the substantial state interests in managing wildlife populations and maintaining order and safety in the taking of wildlife. Hunting, fishing, and trapping are useful tools in managing wildlife populations. These activities also contribute financially to wildlife conservation and many local economies. The state has a legitimate interest in managing wildlife and the means by which it regulates wildlife populations. As long as the state allows hunting, fishing, and trapping, the state also has an inter-

892 (Conn. 1993).

13. A classic case of the conflicts that this situation presents may be found in the story of Francelle Dorman. Ms. Dorman was arrested after approaching several goose hunters, following them, and expressing her point of view (she was morally opposed to hunting and killing animals). The charges were subsequently dropped. However, Ms. Dorman successfully challenged the statute in a declaratory judgment action. The law was overturned because it was unconstitutionally vague and overbroad as written. *See* Dorman v. Satti, 678 F. Supp. 375, 377-78 (D. Conn. 1988).

est in maintaining safety and order at the locations where this activity takes place. Hunter harassment statutes help to meet these substantial state interests.

The United States has a long history of permitting hunting, fishing, and trapping and of regulating the taking of wildlife to insure that species are not hunted, fished, or trapped into extinction.[14] On the other hand, if wildlife populations are not controlled through human intervention, many animals will starve to death or die from disease.[15] While some feel that it is cruel to hunt, fish, and trap, these activities form an integral part of a comprehensive program to preserve wildlife populations at optimal levels.[16] State departments of wildlife carefully control the numbers of hunting, fishing, and trapping permits and licenses they issue in an effort to maintain the proper balance in the natural habitat.[17] Additionally, when certain species of wildlife become too populous, these larger populations interfere with human activities. The result is that many animals are inhumanely killed by incidental contact with human activities.[18] Proper wildlife management minimizes the numbers of cruel deaths caused by starvation, disease, and incidental contact with humans.

Hunting, trapping, and fishing also make significant economic contributions. Sportsmen's contributions through taxes, permits, stamps, and licenses support the conservation of wildlife.[19] These funds are used to foster all wildlife populations, not just the ones that are pur-

14. NATIONAL SHOOTING SPORTS FOUNDATION, THE HUNTER AND CONSERVATION 6, 7 (1991).

15. For example, if a deer population is left uncontrolled it can double in size in just two years. This overpopulation can lead to a depletion of food sources and mass starvation. *Id.* at 5.

16. *See* ALDO LEOPOLD, GAME MANGEMENT 208-29 (Univ. of Wis. Press 1986) (1933).

17. *Id.*

18. In West Virginia alone, 10,965 deer were killed by automobiles in 1992. WEST VIRGINIA DIVISION OF NATURAL RESOURCES—WILDLIFE RESOURCES SECTION, 1992 BIG GAME BULLETIN (1993).

19. During the 1990-91 hunting season, licensed hunters paid $422 million in state fees for licenses, stamps and permits. More than $160 million in taxes on sporting arms and ammunition was collected in 1991. All of these funds go to state wildlife programs. WILDLIFE MANAGEMENT INSTITUTE, PLACING HUNTING IN PERSPECTIVE 13 (1992).

sued by sportsmen.[20] People who enjoy these recreations also spend substantial sums of money to purchase items necessary for their sports. Providing supplies to hunters, trappers, and anglers is a big industry that supports many local economies.[21] Through financial support, sportsmen provide for the conservation of wildlife, which in turn benefits society as a whole.

On a more practical level, there are legitimate concerns for safety and order that hunter harassment statutes are designed to protect. Sportsmen who enjoy hunting, trapping, and fishing are not likely to be persuaded into discontinuing their sports because of the protests of animal rights activists and others morally opposed to hunting.[22] There is an obvious possibility that individuals in the woods who have weapons may become quite irritated and respond with violence if prevented from pursuing their lawful activities.

The following are some examples of the types of behavior that sportsmen may face while hunting, fishing, or trapping. These examples show the possible hostile conflicts that could occur when animal rightests attempt to interfere with the sport. 1) Animal rightests followed Beverly Conner and her hunting companions and frustrated several attempts to shoot bighorn sheep.[23] The protestors also falsely alleged to game officers that Mrs. Conner had irresponsibly wounded a bighorn ram.[24] 2) A protestor in Montana refused to move from a position between a hunter with a loaded rifle and a bison.[25] 3) In Maryland, a group of anti-hunters frustrated the success of bowhunters

---

20. Only about one-third of the average state's wildlife agency funds were used specifically to manage hunted wildlife in 1990. *Id.* at 14.

21. Each year hunters spend more than $10 billion on lodging, taxidermy, transportation, and shooting schools. Alan Farnham, *A Bang that's Worth Ten Billion Bucks*, FORTUNE, March 9, 1992, at 80.

22. Montey Embrey, co-owner of a Gaithersburg, Maryland fishing and archery shop, said that anti-hunters "made fools of themselves" by attempting to thwart a hunt by following hunters around in street clothes through briers, swamps, and pouring rain. Angus Phillips, *Protestors Begin Attempts to Disrupt Local Hunting*, WASH. POST, Sept. 19, 1989, at E2.

23. Conner, *supra* note 2, at 83.

24. *Id.*

25. State v. Lilburn, No. DC 92-70 (Mont. D.C., Gallatin Co. 1993) (order dismissing charge).

by following them and rustling leaves while claiming that they were watching birds.[26] In each of these cases there is the obvious possibility of danger. Sportsmen greatly enjoy the solitude of the woods and rivers. Being approached and frustrated by animal rights advocates definitely tests their patience.

Hunter harassment statutes help to diffuse these possible confrontations between sportsmen and protesters by affording sportsmen with a less violent alternative. In other words, hunters, anglers, and trappers can remain calm and simply have game wardens inform the protestors that they are breaking the law and that they will be arrested if they do not cease and desist.[27] In fact, pro-hunting groups educate their members of the existence of hunter harassment laws and encourage their use to prevent hostilities.[28] Consequently, hunter harassment statutes serve an important governmental interest in maintaining safety and order in the woods and waters.

III. THE FIRST AMENDMENT QUESTIONS

In their attempts to fulfill the governmental interests, hunter harassment statutes may offend free expression. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble . . . ."[29] While the language of this amendment seems to be absolute, the United States Supreme Court has allowed certain restrictions to be placed on these rights.[30] These restrictions, however, are subject

26. Retha Hill, *Five Protesters Arrested in Face-Off with Md. Hunters,* WASH. POST, Nov. 25, 1990, at B1.

27. This has occured on several occassions. *See, e.g.*, Henry v. State, 797 S.W.2d 281 (Tex. Ct. App. 1990); State v. Ball, 627 A.2d 892 (Conn. 1993); State v. Bagley, 474 N.W.2d 761 (Wis. Ct. App. 1991); Retha Hill, *Five Protesters Arrested in Face-Off with Md. Hunters*, WASH. POST, Nov. 25, 1990, at B1.

28. The National Rifle Association encourages hunters, trappers, and fishers to call (202) 828-6029 to locate the proper authorities or contact local police and sheriff's departments instead of provoking animal rights activists. NATIONAL RIFLE ASSOCIATION, ANIMAL RIGHTS TERRORISTS & THEIR WAR AGAINST MAINSTREAM AMERICA (1990).

29. U.S. CONST. amend. I, § 1.

30. Hunter harassment statutes are a means to regulate the time, place, and manner of speech. Content neutral time, place, and manner restrictions must be narrowly tailored to

to close and careful scrutiny.[31] The First Amendment's broad language helps to insure that there is frank and robust debate over competing issues and interests.[32] Thus, laws that restrict speech and expression meet a host of burdens before being upheld.[33] Because hunter harassment statutes prevent some persons from expressing their opposition to the taking of wildlife, these statutes must overcome all of the First Amendment's challenges.

A. *The Facial Challenges*

The first hurdles that any legislation affecting free speech must cross are the facial challenges.[34] Facial challenges attack a statute as it is written. Under these challenges the court makes no determination of whether the defendant (or speaker in a noncriminal case) was actually engaged in constitutionally protected speech.[35] Instead, the sole concern is whether the statute is constitutional on its face. If the statute substantially infringes on free speech, it is invalid.[36]

Facial challenge analysis is rarely employed. However, the United States Supreme Court has determined that the First Amendment right

---

reach a substantial state interest and leave alternative means of communication available. Frisby v. Schultz, 487 U.S. 474 (1988).

31. *See generally* Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883 (1991).

32. The broad protection of the First Amendment helps to ensure that ideas are free to enter the marketplace. The classic statement is:

> when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

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

33. Frisby v. Schultz, 487 U.S. 474 (1988). Because a hunter harassment statute is likely content-neutral, State v. Ball, 627 A.2d 892 (Conn. 1993), this article does not consider content-based regulation that must meet a compelling state interest. *See* R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992).

34. Robert A. Sedler, *The First Amendment in Litigation: The "Law of the First Amendment,"* 48 WASH. & LEE L. REV. 457, 463 (1991).

35. *Id.* at 465.

36. *Id.*

to free speech is so fundamental, even persons engaged in properly prohibited conduct may challenge the validity of statutes that interfere substantially with free speech.[37] The rationale behind this approach is that free speech is chilled when people are not sure whether they could be prosecuted under a poorly drafted statute.[38]

There are two types of facial challenges that are very similar but distinct in their analyses: overbreadth and vagueness. Because substantial free speech concerns are present in the hunter harassment situation, these statutes must be carefully drafted to avoid being overbroad and/or vague.

1. Overbreadth

An overbroad statute is analagous to shooting a shotgun at a small target. The target is hit, but many pellets also strike the area surrounding the target. Similarly, an overbroad statute is also successful at reaching the desired conduct. However, protected speech that surrounds the conduct is struck as well.[39] If a statute is substantially overbroad, thus chilling too much protected speech, it is invalid.[40] In order to pass the overbreadth analysis, a statute must be drafted with rifle-like precision to hit only the intended target.

The overbreadth doctrine in relation to hunter harassment statutes is best exemplified in *Dorman v. Satti*.[41] In this case, Francelle Dorman brought a declaratory judgment action to challenge the constitutionality of the Connecticut hunter harassment statute.[42] The charges against her had been dropped since she had simply approached hunters

37. *Id.*

38. *Id.* at 463.

39. Thornhill v. Alabama, 310 U.S. 88 (1940). For a more comprehensive discussion of overbreadth see Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).

40. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

41. 678 F. Supp. 375 (D. Conn.) (invalidating the Connecticut Hunter Harassment Act as unconstitutionally overbroad and vague), *aff'd*, 862 F.2d 432 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989).

42. *Id.* at 376.

and expressed her point of view.[43] However, she successfully challenged the validity of the statute under the overbreadth and vagueness tests.[44]

In *Dorman,* the Connecticut statute was drafted to prohibit "interference" with and "harassment" of persons taking wildlife.[45] The court decided that, because the term "harass" included verbal actions as well as physical ones, the statute was overbroad.[46] Additionally, the word "interfere" was not given a limiting definition under the statute.[47] If "interference" had been limited by more precise language, then the statute would not have been overbroad.[48] Because the Connecticut statute reached the free speech surrounding the hunting situation, it was overbroad.[49]

Not all hunter harassment statutes have been found to be overbroad. Despite the fact that it prohibits "interfere[nce]," the Wisconsin Court of Appeals upheld that state's hunter harassment statute in *State v. Bagley.*[50] *Bagley* upheld this statute against a facial challenge made by defendants that allegedly blocked Indian spearfishers' access to a public lake.[51] The Wisconsin court reasoned that the words "impede" and "obstruct" gave a clear indication that the statute reached only physical acts and not speech.[52] Because any overbreadth must be both real and substantial,[53] the attack on the statute was quashed.[54] Therefore, when statutes are drafted to avoid obvious encroachment on free expression, problems with the overbreadth doctrine can be avoided.

---

43. *Id.*
44. *Id.*
45. CONN. GEN. STAT. § 53a-183 (Supp. 1993) *amended by* 1990 Conn. Acts 90-322 (Reg. Sess.). *See also Dorman,* 678 F. Supp. at 375, 377.
46. *Dorman,* 678 F. Supp. at 381-82.
47. *Id.*
48. *Id. See also* Houston v. Hill, 482 U.S. 451 (1987).
49. *Dorman,* 678 F. Supp. at 381-82.
50. 474 N.W.2d 761 (Wis. Ct. App. 1991).
51. *Id.*
52. *Id. See also* WIS. STAT. ANN. § 29.223 (West Supp. 1992).
53. *Broadrick,* 413 U.S. 601, 615 (1973).
54. State v. Bagley, 474 N.W.2d 761 (Wis. Ct. App. 1991).

2. Vagueness

Although overbroad statutes are often vague and vague statutes are often overbroad, this is not always the case.[55] Vagueness analyzes whether or not a person of common understanding can determine precisely what conduct is prohibited.[56] The object is to make sure that there is no arbitrary or discriminatory enforcement.[57] Therefore, a statute could be overbroad because it reaches protected speech but worded so that everyone could understand what was prohibited. Such a statute would be overbroad but not vague.[58] Conversely, a statute could be vague as to precisely what it regulated but be drafted so that it only prohibited unprotected conduct. This type of statute would be vague but not overbroad.[59] Thus, while the two doctrines are very similar, their concepts are distinct.

Hunter harassment statutes may be vague if precise and limiting language is not employed. This was the case with the Connecticut statute overturned in *Dorman v. Satti.*[60] The statute in question was poorly worded.[61] It provided that: "No person shall: (1) Interfere with the lawful taking of wildlife by another person, or acts in preparation for such taking, with intent to prevent such taking; or (2) harass another person who is engaged in the lawful taking of wildlife or acts in preparation for such taking."[62] In particular, the court held that the words "interfere" and "harass" did not lend themselves to a limiting construction within the context of the statute.[63] The judge stated that these words encompassed a wide range of activity that includes speech.

55. *See Dorman*, 678 F. Supp. at 380 n.6.

56. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

57. Grayned v. City of Rockford, 408 U.S. 104 (1972).

58. An example of a statute that is overbroad but not vague is: "No person may expressly advocate criminal conduct." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1128 (Little, Brown & Company, 2nd ed. 1991).

59. An example of a statute that is vague but not overbroad is "No person may engage in any speech that the state may constitutionally restrict." *Id.*

60. 678 F. Supp. 375 (D. Conn. 1988).

61. *Id.*

62. *Dorman*, 678 F. Supp. at 377.

63. *Id.* at 382.

Additionally, the phrase "acts in preparation for" did not have any clear limitations.[64] The court said that this phrase could include purchasing ammunition or getting a good night's sleep before the hunt since hunters, anglers, and trappers engage in such conduct in preparation for their sports.[65] The scope of these words made the statute insusceptible to curative construction so the courts involved invalidated the entire statute due to its vagueness.[66]

Challenges under the vagueness doctrine are not a concern when a legislature has passed a carefully worded statute like Wisconsin's hunter harassment statute.[67] The Wisconsin Court of Appeals found that the sportsman interference law was not vague.[68] Clearly, the statute only prohibited physical interference with hunting or fishing.[69] Therefore, it is imperative that legislatures carefully word hunter protection statutes so that they will withstand facial attacks under the vagueness doctrine.

B. Regulating Free Expression on Public Property

A hunter harassment statute that is worded well enough to withstand a facial challenge on overbreadth or vagueness grouds must still pass additional tests if it implicates First Amendment free expression concerns. In other words, such a regulation must meet the guidelines for a legitimate time, place, and manner restriction. In making this determination, first, the statute must be content-neutral.[70] Second, a determination must be made as to whether the area in which the speech is regulated is a traditional public forum. If the area is a tradi-

---

64. *Id.* at 383.
65. *Id.*
66. *Id.* at 384.
67. WIS. STAT. ANN. § 29.223 (West Supp. 1992).
68. State v. Bagley, 474 N.W.2d 761 (Wis. Ct. App. 1991).
69. *Id.*
70. If the statute regulates the content of speech it is presumptively invalid and must be narrowly tailored to reach a compelling state interest. R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992). For a more comprehensive discussion of *R.A.V. v. St. Paul*, *see* Joseph E. Starkey, Jr., Comment, *R.A.V. v. St. Paul: The Debate Over the Constitutionality of Hate Crime Laws Ends; Or is This Just the Beginning?*, 95 W. VA. L. REV. 561 (1992-93); *see also* Texas v. Johnson, 491 U.S. 397 (1989); Boos v. Barry, 485 U.S. 312 (1988).

tional public forum the state must have a substantial interest in regulating expressive conduct.[71] If it is not a traditional public forum, then the state needs to advance only a reasonable interest.[72] Finally, the statute must be narrowly tailored to reach its goals[73] and leave alternative means of communication open.[74] The following sections focus on these concerns.

1. Content Neutrality

The first concern is whether the statute is content-neutral. A statute that incidentally encroaches on First Amendment rights to free speech is content-neutral only if the restrictions do not discriminate as to the content of the speech.[75] This means that the statute may not prohibit a certain type of speech, but instead must treat all expression the same. The test for content-neutrality looks to the restrictions on speech to see if there is any reference to the *content* of the restricted speech. If there is no reference to a particular type of speech or viewpoint then the statute is content-neutral.[76]

The Connecticut statute that was struck down in *Dorman* was later revised[77] and judged to be content-neutral in *State v. Ball*.[78] *Ball* concerned a challenge to the conviction of a group of defendants

71. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983); *see also* International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992); Frisby v. Schultz, 487 U.S. 474 (1988).

72. *Perry Educ. Ass'n*, 460 U.S. at 37; *see also International Soc'y for Krishna Consciousness*, 112 S. Ct. at 2701; *Frisby*, 487 U.S. at 474.

73. Schneider v. State, 308 U.S. 147 (1939).

74. United States Postal Serv. v. Council of Greenburgh Civic Assns., 453 U.S. 114 (1981).

75. Kovacs v. Cooper, 336 U.S. 77 (1949); *see also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Boos v. Barry, 485 U.S. 312 (1988).

76. *Kovacs*, 336 U.S. at 77; *see also Playtime Theatres, Inc.*, 475 U.S. at 41; *Boos*, 485 U.S. at 312.

77. The Connecticut legislature amended its huter harassment statute in 1990 after it was declared facially overbroad and vague in Dorman v. Satti, 678 F. Supp. 375 (D. Conn. 1988); *see* CONN. GEN. STAT. ANN. § 53a-183a (West Supp. 1993).

78. State v. Ball, Nos. CR 18 74479 thru CR 18 74482, 1992 WL 229201 (Conn. Super. Ct. 1992), *rev'd and remanded*, 627 A.2d 892 (Conn. 1993).

that blocked a bowhunter's line of fire.[79] The trial court observed that the statute would be applied the same regardless of the speaker's message. Thus, the court explained that:

> [A]n individual reciting a prayer or whistling a song is as guilty of violating the Act as the individual who launches into a dissertation on the evils of hunting and the sanctity of the rights of animals, provided that both individuals' intent was to interfere with or obstruct the hunters' lawful taking of wildlife. The dispositive element, then, is the intent of the violator, not the message articulated thereby. Consequently, the Act is content-neutral.[80]

On appeal, the Supreme Court of Connecticut agreed with the trial court that the statute was content-neutral.[81] Thus, the *Ball* decision demonstrates that carefully drafted hunter harassment statutes may be content-neutral.

2. Traditional Public Forum

Once a statute regulating free expression is determined to be content-neutral, the next step in First Amendment analysis is to make a determination of whether or not the area in which the speech is regulated is a traditional public forum.[82] In *Ball*, the Supreme Court of Connecticut did not make a determination of the public forum issue because further factual development was necessary.[83] Unfortunately, no court has determined this issue in the context of hunter harassment statutes. Therefore, the factors of the traditional public forum will be analyzed without the benefit of specific case law directly applicable to the hunter harassment setting.

A traditional public forum is an area in which free expression has commonly been permitted. Examples of traditional public forums include: city streets,[84] public parks,[85] and even public libraries.[86] Tra-

---

79. *Ball*, 1992 WL 229201.
80. *Id.* at *4.
81. State v. Ball, 627 A.2d 892, 897 (Conn. 1993).
82. *Id.* at 898.
83. *Id.* at 899.
84. *See* Hague v. CIO, 307 U.S. 496, 515 (1939), explaining that:

ditionally, in determining whether an area is a public forum, courts determine if "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[87] A question exists as to whether the woods, rivers and lakes used for hunting, fishing, and trapping fall into the category of a traditional public forum. Obstruction of hunting, fishing, and trapping is not compatible with these activities. Even if the woods and waters are deemed to be a public forum, the governmental interest may still outweigh the right to engage in First Amendment free expression.

If the prohibited area is a traditional public forum, the state must meet a burden of proving a substantial interest.[88] In the case where the regulated area is not a public forum this burden is lessened to a reasonable state interest.[89] The regulation of free expression on public property used for hunting, fishing, and trapping is undoubtedly a substantial state interest.[90] This conclusion is supported by dicta in the *Dorman* decision stating that the state's interest in maintaining safety and order in publicly owned hunting areas is substantial.[91] Although

---

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515; *see also* Schneider v. State, 308 U.S. 147 (1939) (holding a prohibition of distributing leaflets in the interest of clean streets invalid).

85. *Hague,* 307 U.S. at 496.

86. Brown v. Louisiana, 383 U.S. 131 (1966).

87. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

88. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983); *see also* International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992); Frisby v. Schultz, 487 U.S. 474 (1988).

89. *Perry Educ. Ass'n,* 460 U.S. at 37; *see also International Soc'y for Krishna Consciousness,* 112 S. Ct. at 2701; *Frisby,* 487 U.S. at 474.

90. *See* discussion *supra* part II.

91. The court in *Dorman* explained that:

> The state has a legitimate and substantial interest in managing and regulating the public lands designated for the preservation, enjoyment or taking of wildlife; the wildlife itself; and the activities of persons on those lands, including hunters. So long as the legislature elects to permit hunters to pursue their activity on property, during times, and under circumstances set aside for that purpose, it may also regulate the conduct of nonhunters in those contexts. Considerations of safety, alone, would justify such regulation, even [if it] impinges incidentally upon protected

this is no guarantee that the state will win every case, it is a positive sign that careful regulation of the hunting environment is valid.

3. Narrow Tailoring

If a statute is content-neutral and meets the requisite state interest, it must still be narrowly tailored to reach the targeted conduct.[92] This requirement is similar to the overbreadth concern.[93] The object is to limit the scope of the statute to make sure that it only reaches conduct that interferes with the governmental interest.

Schneider v. State[94] presents a classic case of the United States Supreme Court requiring that a statute be narrowly tailored. In *Schneider*, the Court struck down various municipal ordinances that prohibited the distribution of leaflets.[95] The purpose of these ordinances was to prevent littering of city streets.[96] The Court held that this purpose could be accomplished in a narrower fashion (such as punishing the persons who actually litter) that did not infringe on the right to expression through leaflets.[97] Similarly, hunter harassment statutes must be narrowly tailored to protect only the legitimate state interests in managing wildlife populations and maintaining public safety.

4. Alternative Means of Communication

A content-neutral statute that is narrowly tailored to reach a substantial or reasonable state interest must allow for alternative means of communication.[98] This requirement insures that the government cannot silence speech by prohibiting it in every time, place, and manner.

---

speech.

Dorman, 678 F. Supp. at 383.

92. Schneider v. State, 308 U.S. 147 (1939).

93. They are similar in that they both seek to limit the scope of the prohibited conduct.

94. 308 U.S. 147 (1939).

95. *Id.*

96. *Id.* at 156.

97. *Id.* at 162.

98. United States Postal Serv. v. Council of Greenburgh Civic Assns, 453 U.S. 114 (1981).

There has been no analysis of this factor in the hunter harassment setting. Therefore, reliance once again must fall on case law providing the appropriate guidelines. This in turn must be analogized to the hunter harassment situation.

A clear example of restricting communication while allowing ample alternative means is provided in *United States Postal Service v. Council of Greenburgh Civic Associations.*[99] In *Greenburgh*, the United States Supreme Court upheld a statute prohibiting the deposit of unstamped, "mailable matter" in a letter box approved by the United States Postal Service.[100] This effectively prevented persons from distributing flyers, pamphlets or other written materials in individuals' mailboxes.[101] While this regulation hampered the ability of organizations to express their opinions, several options were still available.[102] Because adequate alternative means of communication were left available, the Court upheld the statute.

A statute that prohibits animal rights activists from obstructing or interfering with the taking of wildlife will still leave ample alternative means for persons to engage in free expression. For example, if interested persons are permitted to demonstrate near the entrances to hunting, trapping, and fishing areas without obstructing the free passage into and out of these areas, animal rights activists or others would be able to express their concerns without intruding onto the legitmate rights of the sportsmen to pursue their quarry. Thus, hunter harassment statutes can effectively limit harassment to appropriate times, places, and manners without critically injuring the debate over the merits of sporting activities.

5. The Abortion Protest Analogy

In determining the appropriate time, place and manner restrictions to impose in the hunter harassment arena, it is helpful to look to simi-

99. *Id.*

100. *Id.* (upholding the constitutionality of 18 U.S.C. § 1725 (1988)).

101. *Id.* at 120.

102. The organizations could pay postage, put the notices under doors, or attach them to the doorknob. *Id.* at 127, 135.

lar regulation in the anti-abortion protest context. The two situations are analogous in many ways. In both situations the protested subjects are lawful, and there is legitimate criticism of the lawful activities. Also, there are legitmate governmental interests in maintaining order in both settings. Those who engage in hunting, trapping, and fishing may not wish to hear the protests against their activities. Similarly, those seeking to obtain a lawful abortion may not wish to hear that their actions are wrong. However, in the interests of free expression and debate, all must occassionally hear opposing views.

A good example of valid time, place, and manner restrictions in the abortion protest situation is provided in the case of *Pro-Choice Network of Western New York v. Project Rescue Western New York.*[103] This case involved an injunction that was issued to impose time, place, and manner restrictions on pro-life protestors at abortion clinics.[104] The injunction was held to be content neutral because it made "no mention whatsoever of abortion or any other substantive issue . . . ."[105]

The injunction was also narrowly tailored to serve a significant government interest.[106] Virtually unquestioned was the fact that the state has a substantial interest in protecting the right of individuals to freely choose an abortion.[107] The prohibitions against "obstructing" and "impeding" travel to and from abortion clinics, the requirement of fifteen foot "clear zones,"[108] the allowance of "sidewalk counselors,"[109] the "cease and desist" provision,[110] and the ban on loud

---

103. 799 F. Supp. 1417 (W.D.N.Y. 1992); *see also* Schultz v. Frisby, 619 F. Supp. 792 (E.D. Wis. 1985), *aff'd,* 807 F.2d 1339 (7th Cir. 1986), *rev'd,* Frisby v. Schultz, 487 U.S. 474 (1988); New York State Nat'l Organization for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989), *aff'd,* 886 F.2d 1339 (2d Cir. 1989).

104. *Pro-Choice Network of Western New York,* 799 F. Supp. at 1417.

105. *Id.* at 1433.

106. *Id.*

107. *Id.*

108. The "clear zones" applied to the areas around entrances and walkways to the clinics. *Id.* at 1434.

109. The protestors were permitted to have a maximum of two "sidewalk counselors" that could approach individuals wishing to exercise their choice to have an abortion in a nonthreatening manner and express their views. *Id.*

110. Since the "sidewalk counselors" were expressing their views to a captive audience,

speakers or sound amplification devices were carefully crafted to prevent only the disruptive conduct of the defendants while not infringing on their free expression rights.[111]

Because the defendants were still permitted to protest near the clinic and directly approach individuals wishing to enter the clinics through the "sidewalk counselors," the defendants' were free to express their views. Thus, there were ample alternatives available for the defendants to communicate under the injunction.[112]

The same situation can exist in the hunter harassment setting. The individuals who wish to voice their concerns may be permitted to do so as long as they do not infringe on the activities of the sportsmen. This may be accomplished by allowing protestors to peacefully demonstrate adjacent to the woods and waters where the taking of wildlife occurs. Reasonable restraints may be imposed in this area as well. Restrictions on making loud noises, preventing free passage into and out of the hunting, trapping, or fishing areas, and limiting protests to the adjacent areas would be legitimate in maintaining safety and order. Interested parties would still be able to express their points of view in an area where their communication is likely to be heard and seen. A carefully drafted hunter harassment statute can address these concerns and minimize conflicts.

IV. A MODEL STATUTE

It is appropriate at this point to suggest a model statute that considers the First Amendment concerns. The statute provided herein is only a starting point for legislatures. If the particular situation of a state demands modification, the additional or amended language should be analyzed using the First Amendment discussion above. Hopefully, legislatures will consider their respective state's statute and make any changes needed to bring it into compliance with constitutional standards.

---

they had to immediately terminate their speech when the individual indicated that she did not wish to listen to the counselor's message. *Id.* at 1436.

111. *Id.* at 1437.

112. *Id.*

The following model hunter harassment statute is drafted to avoid conflict with the First Amendment rights of demonstrators:

SECTION 1: OBSTRUCTION OR IMPEDENCE OF LAWFUL HUNTING, TRAPPING, OR FISHING: A MISDEMEANOR.

(1) No person may obstruct or impede[113] another person who is engaged in the lawful taking of wildlife at the location where the activity is taking place[114] with the intent[115] to prevent such taking.

(2) A person violates this section when he or she intentionally or knowingly: (a) Drives or disturbs wildlife for the purpose of disrupting the lawful taking of wildlife where another person is engaged in the process of lawfully taking wildlife; (b) obstructs, blocks, or otherwise impedes another person who is engaged in the process of lawfully taking wildlife; (c) uses natural or artificial visual, aural, olfactory or physical stimuli to affect wildlife behavior in order to hinder or prevent the lawful taking of wildlife; (d) erects barriers with the intent to deny ingress or egress to areas where the lawful taking of wildlife may occur; (e) interjects himself into the line of fire with the intent to prevent the lawful taking of wildlife; (f) affects the condition or placement of personal or public property intended for use in the lawful taking of wildlife in order to impair its usefulness or prevent its use; or (g) enters or remains upon private lands without the permission of the owner or his agent, with intent to violate this section.[116]

(3) This section does not apply to actions performed by game wardens and other law enforcement officers if the actions are authorized by law and are necessary for the performance of their official duties.

---

113. The words "obstruct" and "impede" as found in the Wisconsin statute, *see* WIS. STAT. ANN. § 29.223 (West Supp. 1993), were upheld against the overbreadth and vagueness facial challenges. State v. Bagley, 474 N.W.2d 761 (Wis. Ct. App. 1991).

114. The language "at the location where the activity is taking place" avoids the overbreadth and vagueness problems that the language "acts in preparation for" causes. *See Dorman*, 678 F. Supp. at 375. This language also limits the scope of the statute in order to comply with the narrow tailoring requirement for a legitimate time, place, and manner restriction. *See* Schneider v. State, 308 U.S. 147 (1939).

115. The intent element helps to show that the statute is content neutral. No reference is made to the content of the exression. The statute only prohibits the intentional acts of a person without regard to that person's motive. *See* State v. Ball, 627 A.2d 892, 897 (Conn. 1993); *see also* R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992).

116. The specific violations listed in subsection (2) help to define the scope and set the limits of the statute. They help the statute meet the overbreadth and vagueness challenges and the narrow tailoring requirement. *See Dorman*, 678 F. Supp. 375; Schneider v. State, 308 U.S. 147 (1939).

(4) This section shall not apply to landowners, tenants, or leaseholders exercising their legal rights to the enjoyment of land, including, but not limited to, farming, ranching, and restricting trespass.[117]

(5) It is an affirmative defense to the prosecution for violation of this section if the defendant's conduct is protected by his or her right to freedom of speech under the constitution of this state or of the United States.[118]

(6) Any interested parties may engage in protests or other free speech activities adjacent to or on the perimeter of the location where the lawful taking of wildlife is taking place provided that none of the provisions in subsections (1) or (2) is being violated.[119]

(7) Any person who violates the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than $500 or imprisonment of not more than 30 days, or both fined and imprisoned.[120]

SECTION 2: INJUNCTION TO PROHIBIT CONDUCT IN SECTION 1.

Any person who is affected or who may be affected by the prohibited conduct of section 1 may petition for an injunction that prevents violation of this section upon a showing that such conduct is threatened or that such conduct has occurred at a particular location in the past and that it is not unreasonable to expect that similar circumstances will occur.[121]

---

117. Subsections (3) and (4) allow for the very practical considerations of not applying the restrictions to situations where the state's interest does not exist. The rights of sportsmen and women must be limited by the privileges that the state gives in permitting these activities. Additionally the property rights of individuals must not be subordinated by the rights of hunters, trappers, and fishers. These limitations further the narrow tailoring requirement. *See* Schneider v. State, 308 U.S. 147 (1939).

118. The provision in subsection (5) shows that the statute is not intended to reach free speech or expression. This limitation helps to defend against overbreadth and vagueness challenges. *See* State v. Bagley, 474 N.W.2d 761 (Wis. Ct. App. 1991).

119. This provision recognizes that there is a need to allow legitimate criticism or any other free speech activities that may otherwise be prohibited by the section. This subsection provides for alternative means for this expression. *See* United States Postal Serv. v. Council of Greenburgh Civic Assns, 453 U.S. 114 (1981); Frisby v. Schultz, 487 U.S. 474 (1988).

120. This subsection imposes penalties for violating the section. The penalties are in line with several existing state statutes. *See, e.g.,* ALASKA STAT. § 16.05.790(f) (1992); ARK. CODE ANN. § 5-71-228(c) (Supp. 1991); COLO. REV. STAT. § 33-6-11.5(3) (Supp. 1993); ME. REV. STAT. ANN. tit. 12, § 7541(3) (Supp. 1992); MONT. CODE ANN. § 87-3-143 (1993); OKLA. STAT. ANN. tit. 29, § 5-212(B) (West 1991 & Supp. 1993); R.I. GEN. LAWS § 20-13-16(3) (1989).

121. The provision for injunctive relief can allow a judge to carefully craft provisions similar to the ones upheld in the abortion protest situation. *See* Pro-Coice Network of Western New York v. Project Rescue Western New York, 799 F. Supp. 1417 (W.D.N.Y. 1992).

SECTION 3: CIVIL LIABILITY FOR VIOLATION OF SECTION 1.

A person who engages in conduct in violation of section 1 shall be civilly liable to any other person who is adversely affected by such conduct, and any award for damages may include punitive damages. In addition to any other items of special damage, the measure of damages may include expenditures of the affected person for license and permit fees, travel, guides, and special equipment and supplies to the extent that such expenditures were rendered futile by violation of this section.[122]

This model statute incorporates provisions from actual statutes and is supplemented with additional provisions to insure its compliance with First Amendment rights. While it is not the only valid wording, it provides guidance to legislatures for determining whether their state's statute should be amended and for new legislation in states that do not already have such a statute.

V. THE WEST VIRGINIA STATUTE

West Virginia's hunter harassment statute should be amended to ensure its compliance with First Amendment rights.[123] West Virginia's statute currently reads:

§ 20-2-2a. Interference with hunters, trappers and fishermen.

A person may not willfully obstruct or impede the participation of any individual in the lawful activity of hunting, fishing or trapping. Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned in the county jail for not less than ten days nor more than one hundred days or both fined and imprisoned. Also, any person convicted of a subsequent violation of this section shall be fined not more than one thousand dollars or imprisoned in the county jail not more than one year or both fined and imprisoned. For the purpose of this section a subsequent violation is one which

122. This section creates civil liability for the violators of the hunter harassment statute. It provides additional deterence for prohibited conduct and an incentive to use lawful means of expression. Several states already have such a provision. *See, e.g.,* ALASKA STAT. § 16.06.791 (1992); COLO. REV. STAT. § 33-6-115.5(4) (Supp. 1993); GA. CODE ANN. § 27-3-152(b) (Michie 1993); TENN. CODE ANN. § 70-4-303(b) (1987); UTAH CODE ANN. § 23-20-29(2) (1991); WASH. REV. CODE ANN. § 77.16.350 (Supp. 1993); W. VA. CODE § 20-2-2a (1989).

123. W. VA. CODE § 20-2-2a (1989).

> has occurred within two years of any prior violation of this section and which arises out of a separate set of circumstances. Any person convicted of any violation of this section shall be liable to the person, whom they interfered with, for all costs and damages resulting therefrom and if such offender holds a West Virginia hunting, fishing or trapping license at the time of conviction, such license shall be revoked.[124]

It is likely that this statute would survive a facial challenge to its validity.[125] However, it probably would not survive as a conduct prohibiting statute that incidentally affects free expression.[126]

Statutes which incidentally restrict free expression must be narrowly tailored to further a substantial governmental interest.[127] Also, the governmental interest must not be related to the suppression of free expression.[128] The West Virginia statute is drafted so that the interest in prohibiting the "obstruction" or "impedence" of hunting, fishing, and trapping is unrelated to the suppression of free expression. The goal of the statute is to reach disruptive conduct, not the expression of ideas. However, the statute could be viewed as an encroachment on free expression since it may stifle the desires of protestors to express themselves. Since the statute is not carefully drafted to avoid conflict with the First Amendment rights of protestors, it would likely fail. In other words, the restriction on free exression that the statute imposes are greater than necessary to carry out the purpose of maintaining safety and order in the taking of wildlife.[129]

The statute should be improved by redrafting it to take free expression into account and regulate it as to time, place, and manner. Specifically, the scope of the statute should be limited to the location

---

124. *Id.*

125. The words "obstruct" and "impede" are the same as the Wisconsin statute that was upheld in State v. Bagley, 474 N.W.2d 761 (Wis. Ct. App. 1991); *see also* WIS. STAT. ANN. § 29.223 (West Supp. 1992).

126. The West Virginia statute does not constrain speech to particular places, times, or manners. It aims only at the conduct of "obstruction" or "impedence." Thus, a slightly different analysis is employed. This analysis is very similar to that used to judge the validity of time, place, and manner restrictions. United States v. O'Brien, 391 U.S. 367 (1968).

127. *Id.*

128. *Id.*

129. *Id.*

at which the hunting, fishing and trapping takes place as the model statute does in Section 1, subsection (1). The scope could be further limited by adding specific violations like the ones enumerated in Section 1, subsection (2) of the model statute. These considerations would help the statute comply with the narrow tailoring requirement.[130]

Providing for alternative means of communication would also strengthen West Virginia's statute.[131] Since there is a paucity of language in the statute, it is not clear that free expresion rights are even recognized. An amendment that added wording like that found in subsections (5) and (6) of section 1 of the model statute would recognize the First Amendment concerns and provide a forum for expression without creating excessive burdens on hunting, fishing, and trapping.

Hopefully, West Virginia and other states which are similarly situated will amend their statutes before they are tested in the courts. This could help avoid confusion over the validity of these statutes and make compliance with the law more certain.

VI. CONCLUSION

Hunter harassment statutes certainly fulfill a legitimate and substantial state interest. These statutes allow for proper wildlife management to take place without obstruction. They also help to minimize the volatile confrontations that can occur when animal rights activists and others oppposed to hunting, trapping and fishing come into close contact with sportsmen engaged in lawful activities. These statutes diffuse potentially explosive situations by keeping the two groups separated and allowing for the intervention of law enforcement officials. Maintaining safety and order in the taking of wildlife is clearly a substantial state interest.

Even though hunter harassment statutes fulfill a substantial state interest they must be carefully drafted to avoid infringing on First Amendment rights. The facial challenges make sure that the statutes

130. *See* Schneider v. State, 308 U.S. 147 (1939).

131. *See* United States Postal Serv. v. Council of Greenburgh Civic Assns, 453 U.S. 114 (1981); Frisby v. Schultz, 487 U.S. 474 (1988).

are clear and limited to avoid unnecessary chilling of free expression. In order for the hunter harassment statutes to be applied to conduct occurring on public property they must meet the requirements for a legitimate time, place, and manner restriction. These requirements are that the statute must be content-neutral, narrowly tailored to reach a substantial state interest, and leave alternative means of communication available. The abortion protest situation provides a useful analogy which exemplifies legitimate time, place, and manner restrictions. Hunter harassment statutes may be upheld as legitimate time, place, and manner restrictions if they parallel the restrictions in the abortion protest situation.

A model hunter harassment statute that incorporates the free speech and expression concerns is also presented. This model incorporates all of the First Amendment concerns in an effort to provide a statute that will be upheld as a legitimate time, place, and manner restriction. State legislatures and Congress can use this model as a guide in drafting and amending their laws to conform to First Amendment protections. The final section provides specific advice to the West Virginia legislature for repair of the West Virginia statute. In conclusion, hunter harassment statutes that are carefully aimed hit only the prohibitable conduct of animal rightists without shooting holes into the First Amendment.

John A. Grafton