SHOOT FIRST, TALK LATER: BLOWING HOLES IN FREEDOM OF SPEECH

By
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When a five-step doctrinal analysis is applied to hunter harassment statutes, it is clear that the statutes are content-based and subject to the strictest of scrutiny. Because the statutes fail the strict scrutiny test, they therefore violate the American citizenry's First Amendment right to free expression.

I. INTRODUCTION

Hunter harassment statutes limit anti-hunting protesters' rights to free expression and peaceable assembly[1] by regulating expressive conduct, both verbal and non-verbal. The statutes deny anti-hunters their right to protest at the scene of the hunt, in part, because the government disagrees with their message. As such, the statutes are content-based and subject to the strictest scrutiny. Lawmakers, how-

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1 U.S. Const. amend. I.

ever, claim the statutes are content-neutral and serve a compelling state interest. The argument that a statute that prevents protesters from talking to hunters serves a compelling state interest is highly debatable.[2]

Without question, hunter harassment statutes were intended to suppress expressive conduct. When challenged, courts have narrowed and clarified these broad and vague statutes through "judicial surgery."[3] However, even after narrowing the language, the majority of anti-harassment statutes continue to restrict anti-hunting messages by proscribing speech. The statutes should be questioned because they restrict speech based on content. Instead of enacting statutes that proscribe expression, states should vigorously prosecute violence and vandalism by anti-hunting protesters, thereby accommodating the states' compelling interest in protecting hunters at the scene of the hunt without suppressing one side of the hunting debate.

Part II of this article suggests a five-step approach to analyzing whether statutes that restrict speech violate the First Amendment. Part III discusses the results of previous challenges to hunter harassment statutes in the courts. Applying the five-part analysis discussed in Part II, Part IV of this article argues that hunter harassment statutes are content-based and, therefore, are subject to the strictest of scrutiny. After careful analysis, this article concludes that less restrictive means exist than harassment statutes by which states can meet their policy goal of managing wildlife.

II. FIVE-STEP DOCTRINAL ANALYSIS

Many people view the right to hunt as a fundamental right—part of our American heritage. Sixty-five percent of Americans say they approve of hunting as long as the meat is used for food (as opposed to mere sport hunting), compared to just 4.5 percent who oppose hunting of any type.[4] Therefore, harassment statutes have met with majority approval. However, the First Amendment is meant to protect the rights of every American, whether she holds the popularly held opinion or speaks with a lone, politically out-of-favor voice. "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees" of the Constitution unless other, more important, interests prevail.[5]

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[2] Katherine Hessler, *Where Do We Draw the Line Between Harassment and Free Speech? An Analysis of Hunter Harassment Law*, 3 Animal L. 129, 151 (1997).

[3] *Binkowski v. State*, 731 A.2d 64, 74 (N.J. Super. App. Div. 1999).

[4] Jeffrey S. Thiede, *Aiming for Constitutionality in the First Amendment Forest: An Analysis of Hunter Harassment Statutes*, 48 Emory L.J. 1023, 1032 (1999).

[5] *Roth v. U.S.*, 354 U.S. 476, 484 (1957) (holding that the mailing of obscene speech was unprotected by First Amendment and statute neither violated the sender's right to free speech nor was unconstitutionally vague).

While an anti-hunter is part of a small minority, she must nevertheless be able to express her opinion free from restrictions. The United States Supreme Court has held that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[6] There must be ample room for expression, however unpopular, because today's dissonant voice may become tomorrow's foreteller of truth.[7]

In 1994, with no committee hearing or debate on the floor, Congress passed the Federal Recreational Safety and Preservation Act, also known as the Hunter's Rights Amendment.[8] In addition, forty-seven states have enacted hunter harassment statutes. The goal of these statutes is to prevent anti-hunting protesters from interfering with a hunter's lawful right to hunt. Harassment statutes permit the government to support hunting while simultaneously protecting hunters from dissent and disturbance.[9]

According to lawmakers, hunter harassment statutes are necessary tools for managing wildlife populations. Hunting is a "government methodology" employed to control large deer populations in order to maintain numbers that do not adversely affect the environment.[10] The argument is that hunting by private citizens prevents species' overpopulation.[11] Even if that were true, no anecdotal evidence indicates that harassment of the hunt by protesters prevents the killing and culling of animals in the quantities necessary to meet state wildlife management needs.[12]

Furthermore, assuming that the government is correct and hunters are needed to manage wildlife populations, it is still not clear that state wildlife interests justify the regulation of anti-hunters' expressive verbal conduct. Any potential harm resulting from persuading hunters not to hunt pales in comparison to the harm resulting from the restriction of anti-hunters' right to free expression.[13]

Hunter harassment statutes prohibit all protest activities intended to discourage hunters from hunting. For example, Illinois' Hunter Interference Prohibition Act states that "[a]ny person . . . with intent to dissuade or otherwise prevent the [lawful] taking" of a wild

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6 *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

7 John Stuart Mill, *On Liberty and Other Writings* 20 (Stefan Collini ed., Cambridge U. Press 1989).

> If all mankind minus one were of one opinion and only one person were of the contrary opinion, mankind would not be more justified in silencing that person than he, if he had the power, would be justified in silencing mankind . . . If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose . . . the livelier impression of truth.

Id.

8 16 U.S.C. §§ 5201–5207 (2000); Hessler, *supra* n. 2, at 135–36.

9 Hessler, *supra* n. 2, at 158.

10 *Binkowski v. State*, 731 A.2d 64, 71 (N.J. Super. App. Div. 1999).

11 *State v. Ball*, 2000 Conn. Super. LEXIS 3003 at *27 (October 3, 2000).

12 Hessler, *supra* n. 2, at 153.

13 *Id*. at 161.

animal is guilty of a misdemeanor.[14] Similarly, Wisconsin's statute declares that "[n]o person may interfere with . . . lawful hunting [by] impeding . . . a person who is engaged in lawful hunting."[15] Connecticut's statute reads: "[a] person violates this section when he intentionally or knowingly . . . blocks, impedes or otherwise harasses another person . . . engaged in the process of lawfully taking wildlife."[16]

On their faces, these statutes do not appear to restrict free speech. While it is clear that hunter harassment statutes prohibit interference with the hunt by a protester's conduct, it is somewhat less obvious that the statutes also proscribe speech. In hunter harassment statutes, "establishing the line between 'permissible speech' and 'impermissible conduct' is constitutionally challenging."[17]

To determine if a particular statute violates a person's First Amendment right to free speech, five analytical doctrines have been applied. These doctrines test the constitutionality of statutes and regulations and include content-based versus content-neutral analysis; time, place, and manner; overbreadth; vagueness; and pubic forum analysis.[18]

In analyzing a hunter harassment statute, a court must first establish that the restriction is one that has been imposed by the government, and therefore implicates the free speech clause.[19] If the statute meets this threshold, a court must then determine whether the prohibited conduct is "sufficiently expressive" to be protected by the First Amendment.[20] In order to warrant this protection, the speaker must intend to "convey a particularized message," and it must be likely that the message is understood by those who perceive it.[21]

A. Content-Based Versus Content-Neutral

To determine if a statute restricts expressive content, the principal inquiry is "whether the government has adopted a regulation of speech because of the disagreement with the message it conveys."[22] A restriction is deemed content-based if it limits communication based on the content of the message.[23] Content-based restrictions are subject

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14 720 Ill. Comp. Stat. Ann. § 125 (West 2001).

15 Wis. Stat. Ann. § 29.083 (West 2000).

16 Conn. Gen. Stat. Ann. § 53a–183a(b) (West 2000). A violation of this law is a Class C misdemeanor. *Id*. § 53a–183a(d).

17 Hessler, *supra* n. 2, at 129.

18 Kevin Francis O'Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 SW. U. L. Rev. 223, 226 (2000).

19 *Id.*

20 Hessler, *supra* n. 2, at 140.

21 *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

22 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

23 Geoffrey R. Stone, *Restrictions on Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. Chi. L. Rev. 46, 47 (1978).

to strict scrutiny because such restrictions prevent certain messages from being heard.[24]

When restrictions are deemed content-based, courts will uphold them only if they are narrowly drawn and serve a compelling state interest.[25] The government may proscribe a message either directly or indirectly. In hunter harassment statutes, the message is proscribed directly by targeting specific topics.[26] The statutes also restrict the message indirectly, as they prohibit "undesirable *conduct* . . . as a means of punishing controversial *speech*."[27]

Content-neutral restrictions, on the other hand, are aimed at "non-communicative impact."[28] With content-neutral restrictions, the government can restrict the flow of information to meet other, broader goals. A regulation that is unrelated to the content of expression is considered content-neutral despite an incidental effect on the speaker's freedom of expression,[29] provided the impact is not unnecessarily restrictive.[30]

Regulations that restrict speech in specific contexts present courts with a unique challenge. These "situational restraints" are not content-neutral, yet they do not affect a large number of people. Situational restraints "deliberately or negligently distort the 'marketplace of ideas' in favor of a particular viewpoint."[31]

Where a court determines that a statute is content-neutral, the government can restrict otherwise protected speech regardless of its content.[32] Even if a content-neutral statute has a discriminatory impact on speech, it is still deemed to be content-neutral if its objective "neither advances nor inhibits a particular viewpoint."[33] Content-neutral speech must withstand intermediate scrutiny, which requires that the speech restriction be justified by the government without reference to content of the regulated speech and that it be narrowly tailored.[34] In addition, there must be adequate alternative channels of communica-

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[24] Bradford J. Roegge, *Survival of the Fittest: Hunters or Activists? First Amendment Challenges to Hunter Harassment Laws*, 72 U. Det. Mercy L. Rev. 437, 451 (1995).

[25] O'Neill, *supra* n. 18, at 227.

[26] *Id.* at 228.

[27] *Id.* at 229 (emphasis in original).

[28] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 313 (1984) (Marshall & Brennan, JJ., dissenting).

[29] Lance J. Schuster, *State v. Lilburn and State v. Casey: Harassing Hunters with the First Amendment,* 32 Idaho L. Rev. 469, 477 (1996) (citing *Ward v. Rock Against Racism*, 491 U.S. 791 (1989)).

[30] *See e.g. State v. Lilburn*, 875 P.2d 1036, 1042 (Mont. 1994).

[31] Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1225 (1984).

[32] O'Neill, *supra* n. 18, at 245.

[33] William J. Thurston, *Shh . . . Be Vewy, Vewy Quiet . . . We're Hunting Wabbits. . . . (And a Proper Interpretation of the Illinois Hunter Interference Prohibition Act)*, 24 S. Ill. U. L.J. 181, 187 (1999).

[34] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (three-prong test for intermediate scrutiny).

tion available.[35] The court must decide whether incidental restrictions on freedom of expression are warranted by the purpose of the government regulation.[36] An alternative channel of communication is deemed adequate if a speaker can reach her intended audience.[37]

B. Time, Place, and Manner

If a statue or regulation is determined to be content-neutral, then it is subject to analysis to determine whether it is a reasonable time, place, and manner restriction.[38] Time, place, and manner restrictions do not regulate the content of a message but rather when, where, and how a message can be communicated.[39]

Proponents of harassment statutes contend that the statutes are content-neutral because they are intended to prevent interference with the hunt, regardless of the particular message. In other words, proponents would say that it would not matter whether someone interfered with the hunt by yelling "good morning," by holding up a placard that read "Happy Birthday, Bill," by softly singing a hymn, or by repeatedly slamming a car door. Proponents of the statutes argue that it is the act of intentional interference with the hunt, not the expressive message being communicated, that the statutes prohibit. Many consider hunter harassment laws constitutionally permissible time, place, and manner restrictions because expression is only restricted during a lawful hunt.[40]

C. Overbreadth

A statute is analyzed for overbreadth to determine if it is tailored narrowly enough to achieve its goal. If the court finds that the law under which a person is convicted is so broad that it could be used against persons engaging in protected First Amendment activities, then it is deemed unconstitutional under the overbreadth doctrine.[41]

Statutes that are more concerned with regulating conduct rather than speech are less likely to be struck down under the overbreadth doctrine.[42] Accordingly, supporters of hunter harassment laws argue that the statutes are not overbroad because they restrict all conduct, verbal and non-verbal, that interferes with the hunt.[43] Hunters argue that the verbal expression that accompanies the conduct is not rele-

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[35] *U. S. v. Grace*, 461 U.S. 171, 177 (1983).

[36] Thiede, *supra* n. 4, at 1043.

[37] *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1229 (9th Cir. 1990).

[38] O'Neill, *supra* n. 18, at 227.

[39] Schuster, *supra* n. 29, at 479.

[40] Thurston, *supra* n. 33, at 185.

[41] *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (holding that overbroad statutes are forbidden unless they are subject to a limiting construction).

[42] *Id*. at 615–16.

[43] Schuster, *supra* n. 29, at 481.

vant, and therefore analysis under the overbreadth doctrine is inappropriate for hunter harassment statutes.[44]

D. Void for Vagueness

Next, a court determines whether the statute is void for vagueness, a test which applies in criminal as well as constitutional law cases.[45] The void-for-vagueness doctrine requires that all laws be drafted with sufficient clarity, to inform individuals of precisely what actions are prohibited under the statute.[46] A statute must provide a "person of ordinary intelligence [with] a reasonable opportunity to know what is prohibited" and must provide "explicit standards" to ensure that the statute is not enforced arbitrarily.[47] Without such clarity, a person could be subject to prosecution even though she reasonably believed her conduct to be lawful.

Vague and unclear statutes can have a chilling effect on expression. To survive a void-for-vagueness challenge, a statute must be drafted narrowly and with specificity,[48] because clear statutes are more likely to reflect the goal of the legislature to regulate certain categories of speech.[49]

E. Public Forum

Finally, to determine if a speech-restrictive statute is constitutional, courts apply the forum principle.[50] The forum is the location where the challenged speech occurs. There are three types of fora: traditional, designated or limited, and non-public.[51] Depending on whether the forum is public, designated or limited, or non-public, the court applies either heightened or lowered scrutiny to the speech restriction.[52]

A traditional public forum is a location where the express purpose of the forum is public assembly and communication of ideas.[53] The designated or limited public forum is a government-provided location meant to support indiscriminate public speech and assembly.[54] A non-public forum is a place not traditionally viewed as a platform for unrestrained communication. Even in a non-public forum, the government

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[44] *Id*.

[45] *Id*.

[46] *U.S. v. Grace*, 461 U.S. 171, 181 (1982) (holding that statutory language did not encompass the activities for which arrests were threatened).

[47] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[48] Thiede, *supra* n. 4, at 1041.

[49] John E. Nowack & Ronald D. Rotunda, 4 *Treatise on Constitutional Law* § 20.9 (3d ed., West 1999) (citing *NAACP v. Button*, 371 U.S. 415, 432–33 (1963).

[50] O'Neill, *supra* n. 18, at 225.

[51] *E.g. U.S. v. Fee*, 787 F. Supp. 963, 968 (D. Colo. 1992).

[52] Schuster, *supra* n. 29, at 488.

[53] *Hague v. CIO*, 307 U.S. 496, 515 (1939).

[54] *Perry Educ. Assn. v. Perry Loc. Educ. Assn.*, 460 U.S. 37, 45 (1983) (citing *Hague v. CIO*, 307 U.S. 496, 523 (1939)).

may not grant use of the forum to "people whose views it finds acceptable, but deny use to those wishing to express less favored views."[55]

In *U.S. v. Fee*,[56] environmental protesters intentionally entered a closed portion of a National Forest to "protest the cutting of ancient forests."[57] The court did not decide the issue of whether the area was a limited or traditional public forum. It did, however, say that the legal analysis was the same for both,[58] and that "[t]he Government may regulate expressive activity in a public or limited forum by reasonable restrictions . . . [if they are] tailored to serve substantial government interests."[59] In a public forum, content-based restrictions are subject to strict scrutiny. In a non-public forum, the regulation must be merely reasonable.[60] The United States Supreme Court has held that the threshold issue in determining whether a forum is public or non-public is the government's intent to open up public property for expression.[61]

The forum principle has led to constitutional challenges to hunter harassment statutes.[62] Even though public park hunting grounds are not places traditionally set aside by the government for free expression of ideas, public parks are places where vast numbers of citizens congregate. Nonetheless, the government has argued that the purpose of public hunting grounds is to manage natural resources while permitting hunters to experience nature in a traditional manner—not to provide citizens a place to express their ideas.[63]

III. COURT CHALLENGES TO HUNTER HARASSMENT STATUTES

The preceding section provided the analytical framework to help distinguish between the overlapping doctrines and their relationship to one another and to the speech being restricted. What follows are judicial applications and interpretations of these doctrines in the context of hunter harassment statutes.

One autumn morning, part-time waitress Francelle Dorman was arrested for walking and talking with goose hunters.[64] Dorman asked the hunters,

> "Why is it you can't admit that you get a thrill out of killing?" but they didn't say too much. They were kind of disgusted with my views. Then I said to them, "You wound and mutilate more than you kill, and leave the geese to die a terrible death." One of the hunters had a beautiful dog and I

[55] *U.S. v. Kokinda*, 497 U.S. 720, 725–26 (1990) (holding that decisions as to who may use a public forum cannot be "arbitrary, capricious, or invidious").

[56] 787 F. Supp. at 963.

[57] *Id.* at 965.

[58] *Id.* at 968.

[59] *Id*.

[60] Roegge, *supra* n. 24, at 457.

[61] *Cornelius v. NAACP Legal Def. Educ. Fund*, 473 U.S. 788, 802 (1985).

[62] *State v. Ball*, 627 A.2d 892, 896 (Conn. 1993).

[63] Thiede, *supra* n. 4, at 1047.

[64] *Dorman v. Satti*, 678 F. Supp. 375, 378 (D. Conn. 1988).

> asked him, "Suppose someone shot your dog? Wouldn't you be outraged?" Basically, I tried to reason with them. I didn't yell or raise my voice.[65]

The hunters characterized the exchange differently. Roger Hurley, one of the hunters with whom Dorman spoke, stated:

> [She] laid into us about hunting and killing wildlife. She made it clear that she was going to stay there and not let us hunt. She was relentless. . . . We were very polite to her and took turns talking to her, but we weren't out there to talk. . . . We wanted to hunt.[66]

As a result of this interaction, Dorman was charged with violating the Connecticut Hunter Harassment Act.[67]

To date, the United States Supreme Court has refused to hear challenges regarding the constitutionality of hunter harassment statutes. However, individuals have challenged such statutes in many lower courts across the United States, with the judgments disappointingly inconsistent.

In *State v. Lilburn*, Montana's hunter harassment statute was deemed constitutional.[68] In *State v. Casey*, Idaho's statute was held to be vague and overbroad.[69] In *People v. Sanders*, a portion of Illinois' statute was held to be unconstitutional and was severed from the statute, with the remainder left intact.[70] In *Dorman v. Satti*, the court ruled that Connecticut's statute violated the First Amendment.[71]

Most courts presented with the issue have held that hunter harassment statutes are unconcerned with the messages of speakers and are therefore content-neutral. Because they do not prohibit particular messages, the statutes are subject to time, place, and manner analysis, rather than the strict scrutiny analysis required for content-based restrictive speech.[72] However, in their current state, hunter harassment laws allow "police to arrest a person for quietly asking a hunter not to kill a deer."[73]

In *Sanders*, the court held that a "dissuade clause" contained in the statute made a portion of the statute content-based and therefore unconstitutional.[74] A dissuade clause carries a connotation of using argument, reasoning, entreaty, admonition, advice or appeal to convey a

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65 Sharon L. Bass, *Law Shielding Hunters Put to the Test,* N.Y. Times 11C, (Apr. 13, 1986).

66 *Id.*

67 *Satti v. Dorman*, 490 U.S. 1099 (1989) (denial of certiorari).

68 875 P.2d 1036, 1044 (Mont. 1994)(holding that hunter harassment statute was content-neutral and neither unconstitutionally overbroad nor vague).

69 876 P.2d 141 (Idaho 1994).

70 696 N.E.2d 1144, 1149 (Ill. 1998) (holding a portion of Illinois Hunter Interference Prohibition impermissibly vague and overbroad).

71 *Dorman v. Satti*, 678 F. Supp. 375, 377 (D. Conn. 1988).

72 Aileen M. Ugalde, *The Right to Bear Arms: Activists' Protests Against Hunting*, 45 U. Miami L. Rev. 1109, 1134 (1991).

73 *Id.*

74 696 N.E.2d at 1144.

message."[75] By making dissuasion illegal, the Illinois legislature essentially shut off one half of the debate about hunting.[76]

Despite these holdings, proponents of the statutes still do not agree that a dissuade clause unconstitutionally attempts to silence persons intending to convey a particular message.[77] According to one legal scholar, the real issue is to the intended effect of the message, not the content of the message *per se*.[78]

A. People v. Sanders

On its face, it would seem that the five-part doctrinal analysis lends itself to a fairly straightforward application in determining First Amendment violations. However, the application of the doctrines in the courts has been less straightforward.

For example, in 1996, Robert Sanders was charged with interfering with the lawful taking of a wild animal when he yelled at a hunter to dissuade her as she attempted to shoot a deer.[79] Sanders argued that the harassment statute was overbroad. The Illinois Appellate Court agreed, and held that the term "dissuade" in the statute was "vague, overbroad, and violative of due process with respect to the protection of freedom of speech."[80]

The State, arguing that the statute was not overbroad, appealed to the Illinois Supreme Court.[81] Although Sanders agreed with the lower court's result, he asked the Illinois Supreme Court to first subject the statute to a content-neutrality inquiry. As a result of that inquiry, the court held that the Illinois Hunter Interference Prohibition Act was a "content-based regulation not justified by a compelling state interest."[82] Both the Illinois Supreme Court and the trial court were concerned with the word "dissuade" in the statute.[83] The Illinois Supreme Court "fixed" the statute by severing the portion of the statute that contained the "dissuade" clause, a process known as "judicial surgery," and left the rest of the statute intact.[84] Thus, the court "neutralize[d] a constitutional infirmity without altering any of the remaining prohibitions in the act."[85]

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[75] *Id*. at 1147.

[76] *Id.*

[77] Thurston, *supra* n. 33, at 189.

[78] Thiede, *supra* n. 4, at 1051 ("As long as the dissuasion is disruptive to the hunt, the state has the same interest in regulating and protecting the hunting ground. The subjective intent of the individual dissuader is irrelevant.").

[79] 696 N.E.2d at 1146.

[80] *Id*.

[81] *Id*.

[82] *Id*. at 1149.

[83] *Id*. at 1148.

[84] *Id*. at 1149.

[85] *Id*.

B. State v. Miner

In *State v. Miner*, Jesse Miner was charged with hunter harassment after he and other anti-hunting protesters asked a group of bow hunters to consider changing their decision to kill deer. One of the protesters called the hunters "Bambi killers," and shortly thereafter, Miner was arrested.[86] At trial, the state argued that Miner and the others had interfered with the hunters' ability to hunt, in violation of the state harassment statute.[87]

On appeal, the Minnesota Court of Appeals held that the inclusion of the word "dissuade" in the Minnesota hunter harassment statute made the statute "a content-based regulation of speech and expressive conduct."[88] Justice Peterson wrote:

> The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.[89]

The court concluded that "to the extent that [the statute] applies to a person whose only intent is to dissuade the taking of a wild animal . . . the statute is impermissibly content-based."[90]

C. State v. Casey

In 1994, Claire Casey was charged with hunter harassment after she tried to explain to hunters that the birds they were preparing to kill were relatively tame and unafraid because they had been hand-fed by humans.[91] When the hunters ignored her, she stood in front of them and shouted profanities.[92] Because of Claire's conduct, the hunters missed their opportunity to kill the birds.[93]

The Idaho Supreme Court held that the statute was overbroad and that the statutory language "intent to interfere" reached a significant amount of speech protected by the Constitution.[94] As a result, the court vacated Claire's conviction.[95]

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[86] *State v. Miner*, 556 N.W.2d 578, 580 (Minn. App. 1996).

[87] *Id.* The protesters videotaped hunters and asked them why they wanted to kill deer. A park ranger arrested Miner and another protester after they refused to obey his order to leave the park. *Id*. at 580–81.

[88] *Id*. at 582.

[89] *Id*. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[90] *Id.* at 583.

[91] *State v. Casey*, 876 P.2d 138, 139 (Idaho 1994).

[92] *Id.*

[93] *Id.*

[94] *Id*. at 140 (holding that statute proscribes a significant amount of constitutionally protected conduct and thus is overbroad).

[95] *Id.* at 141.

D. State v. Ball

In a Connecticut case, Catherine Ball and other protesters approached a bow hunter preparing to enter a state wildlife management area.[96] The protesters told the hunter that they intended to follow him into the park.[97] After a conservation officer warned the protesters not to harass the hunter, the protesters followed the hunter into the park.[98] Once the hunter got into position to hunt, the protesters formed a semicircle around the hunter and tried to dissuade him from hunting.[99] The hunter then called the conservation officer, who arrested the protesters.[100]

At her hearing, Ball argued that the hunter harassment statute was content-based for three reasons.[101] First, the provision insured that only those citizens whose words or conduct conveyed an anti-hunting message would be prosecuted.[102] Second, the statute was created solely to protect hunters from anti-hunting protests.[103] Third, the restrictions fell "disproportionately upon the shoulders of anti-hunting groups."[104]

The Connecticut Supreme Court disagreed and found the statute content-neutral because:

> it restricts *all* the expressive conduct . . . whenever such expressive conduct intentionally or wrongfully interferes with hunting . . . we see no viable distinction between the regulation of camping in a public park and the regulation of interference with hunting in a public park.[105]

However, the court remanded the case to the trial court to determine the nature and extent of the public interest served by the hunter harassment statute and whether the regulation met that interest.[106] Although this was not an issue at trial, the court believed an evidentiary inquiry was necessary to determine whether the public parks are public fora.[107]

Justice Berdon's dissenting opinion in *Ball* agreed that the statute was content-neutral, but he was troubled by the phrase "otherwise harasses"[108] therein contained:

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96 *State v. Ball*, 627 A.2d 892, 895 (Conn. 1993).
97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.* at 897.
102 *Id.* at 897–98.
103 *Id.* at 898.
104 *Id*.
105 *Id*. (emphasis in original).
106 *Id.* at 899–900.
107 *Id*. at 899.
108 *Id*. at 900 (emphasis in original) ("[The] trial court's attempt to narrow this broad sweeping text with limiting judicial gloss is inappropriate when the plain language of the statute is not susceptible to that construction.").

> I do not believe that the remand should focus on whether the legislation advances a *significant* state purpose . . . [but] whether the statute is *narrowly tailored* to achieve that end. . . . The Connecticut Hunter Harassment Act, stripped of its garb, was enacted to suppress speech.[109]

On remand, the trial court held that public lands used for hunting are not public fora.[110] In addition, it held that the hunter harassment statute had been narrowly tailored to meet the State's needs.[111] The court stated that "human activity must be guided by and in harmony with the systems of relationships among the elements of nature . . . that the state may fulfill its responsibility as trustee of the environment for the present and future generations."[112]

E. Satti v. Dorman

Waitress Francelle Dorman was arrested after talking with goose hunters. The prosecutor later dismissed the charges against Dorman.[113] Following this dismissal, Dorman filed an action in federal court claiming that the Hunter Harassment Act was unconstitutional under the First, Fourth, and Fourteenth Amendments.[114]

Dorman's attorney contended that under the harassment statute, "the moment the hunter leaves the door, the wildlife belongs to him. If he feels anyone is trying in any way to interfere with the taking of his game, then he can call the police."[115] The attorney feared that such harassment statutes represented the beginning of a tidal wave of "singling out special-interest groups and giving them legal privileges" that the rest of society did not possess.[116]

The District Court agreed and declared the Hunter Harassment Act constitutionally overbroad. The court stated that the Act swept "beyond the legitimate scope of the state's regulatory power over hunting and taking of wildlife."[117] Additionally, because the purpose of the Act was to restrict conduct intended to prevent hunting, the statute "clearly encompasses communicative content."[118] As such, the Act criminalizes a citizen's right of free expression.[119]

The Second Circuit affirmed the District Court's judgment.[120] Thus, the Connecticut Hunter Harassment Act was declared unconsti-

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109 *Id*. at 901 (emphasis in original).

110 *State v. Ball*, 2000 Conn. Super. LEXIS 3003 at *21 (Oct. 3, 2000) ("[The] fact that the state forests and parks are used by certain groups for expressive purposes does not change the essential nature of the public property in question.").

111 *Id*.

112 *Id*. at *14–15 (state argued land not dedicated for purpose of expression).

113 *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988).

114 *Id*.

115 Bass, *supra* n. 65.

116 *Id.*

117 *Dorman v. Satti*, 678 F. Supp. 375, 383–84 (1988).

118 *Id.* at 383.

119 *Id.*

120 *Dorman v. Satti*, 862 F.2d 432, 437 (2d Cir. 1988).

tutional because it was content-based and designed to proscribe expression that would interfere with hunting. The Second Circuit held that the state made "no showing that protecting hunters from harassment constitutes a compelling state interest."[121]

F. Binkowski v. State

Animal advocate and veterinarian Dr. Binkowski was not charged with violating New Jersey's hunter harassment statute.[122] She nonetheless filed a complaint, alleging that the statute was unclear regarding which protest activities it made criminal.[123] Rutgers University law professor Gary Francione drafted Binkowski's complaint, arguing that because New Jersey's hunter harassment statute was unclear, Binkowski felt that even a peaceful protest could lead to an arrest, and thus stifled her constitutional rights of free speech and assembly.[124]

Binkowski's complaint alleged that the hunter harassment statute restricted citizens' rights to peaceably assemble and engage in speech and expressive conduct in a traditional public forum, that it restricted peaceful protests, and that it regulated speech based upon its content.[125] The complaint also alleged that the statute infringed on hunting opponents' rights of freedom of speech and assembly, whereas hunting supporters were immune from the threat of criminal penalty.[126] In addition, Binkowski's complaint alleged that the statute was overbroad because it prohibited the right to protest on public land, that it was vague because it did not state specifically what expression was prohibited, and that it restricted Binkowski from exercising her freedom of religion (because she adheres to the "principle of sanctity of life," which motivates her to communicate with hunters and others).[127]

The Superior Court of New Jersey, Appellate Division, held the statute constitutional because it did not restrict speech, but rather was intended to prohibit physical interference towards hunters by anti-hunters. The court found the statute was not substantially overbroad or vague, and stated:

> We are satisfied that the statute is narrowly directed at preventing only the physical interference with hunting by those who have the purpose to interfere. By defining interference as a form of physical impediment, coupled with the general and specific intent requirements that solely implicate

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121 *Id*.

122 *Binkowski v. State*, 731 A.2d 64 (N.J. Super. App. Div. 1999).

123 Gary L. Francione & Anne E. Charlton, *Animal Rights Law, Complaint in Binkowski v. State of New Jersey* <http://www.animal-law.org/hunters/complaint.html> (accessed Nov. 9, 2001).

124 *Id*.

125 Gary L. Francione & Anne E. Charlton, *Animal Rights Law, Binkowski v. State of New Jersey Brief* <http://www.animal-law.org/hunters/bnjbody.htm> (accessed Nov. 9, 2001).

126 *Id.*

127 *Id.*

conduct, the statute is not an overbroad regulation of First Amendment rights.[128]

The Court believed the statute was intended to "advance public safety and welfare," not to protect hunters from protesters.[129]

Because the language of hunter harassment statutes differs from state to state, it is understandable that judicial holdings have been inconsistent. However, the difference in statutory language is not significant enough to explain how one state court can hold one hunter harassment statute unconstitutional and another not. The five-part doctrinal application is meant to determine whether a statute violates the First Amendment.[130] The incongruous holdings by the courts suggest that the doctrines are being applied in a capricious manner.

IV. ANALYSIS

To evaluate whether a hunter harassment statute is constitutional, one must first determine whether the statute is content-neutral or content-based. A law is content-based if it distinguishes "favored speech from disfavored speech on the basis of ideas or views expressed."[131] Although states employ different statutory language in their hunter harassment statutes, in general, the statutes single out all conduct that intentionally interfere with the lawful taking of wildlife—apparently even speaking out softly and politely against hunting to a hunter.[132]

Accordingly, an avid hunter could stand at the scene of a hunt extolling the virtues of hunting by banging cymbals and twirling burning sparklers. Even though the hunter would be interfering with the hunt through excessively noisy and distracting conduct, she would not be prosecuted for hunter harassment because she lacks the intent to interfere with the lawful taking of wild animals. Conversely, a hunting opponent who performed the same actions with the intent to scare away wildlife would be subject to prosecution. One can only assume that the government criminalized the hunting opponent's expression in an effort to regulate the message she conveys.

It is clear that anti-hunting protests are intended to express a message.[133] If a hunting proponent cheers on hunters with sparklers and cymbals, the message she conveys is not one of disapproval and

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128 *Binkowski*, 731 A.2d at 75.

129 *Id.* at 71 (recognizing hunting as the major method employed by the state for controlling deer population to minimize environmental impacts).

130 O'Neill, *supra* n. 18, at 225.

131 *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643 (1994) (holding that a provision requiring cable operators to carry signals of specified numbers and local non-commercial educational television stations was a content-neutral restriction, but still required a factual showing of economic necessity).

132 Ugalde, *supra* n. 72, at 1118.

133 Hessler, *supra* n. 2, at 143.

protest. Although her expressive conduct may interfere with the lawful taking of wildlife, she lacks the intent to interfere.

If a statute simply made it illegal to interfere with the lawful taking of a wild animal, then a fossil hunter, a nature photographer, or even a flutist welcoming the sunrise through her music could be charged with hunter harassment if the individual's behavior prevented a hunter from taking a wild animal. However, hunter harassment statutes make it illegal to interfere with hunting only when an individual intends to prevent the taking of an animal. As such, no one but a hunting opponent would, through her expressions, interfere with the lawful taking of an animal.

Proponents of hunter harassment statutes argue that the statutes restrict all expressive conduct intended to interfere with the hunt and are therefore content-neutral, as they do not target a specific point of view.[134] However, the sole purpose of the statutes is to insulate hunters from verbal and nonverbal expressive conduct by "those who are morally or philosophically opposed to capturing or killing animals" . . . and thus are not "enforced against anyone other than an anti-hunting protester."[135] If the statutes were genuinely viewpoint-neutral, then a photographer, a confused hiker, or even another hunter could be charged with interference.

To survive the strict scrutiny applied to content-based restrictions, a statute must be narrowly tailored and serve a compelling state interest. Tennessee's statute, which makes it a misdemeanor for a person to "disturb or engage in an activity that will *tend* to disturb wild animals, with intent to prevent their lawful taking,"[136] can hardly be considered narrowly tailored.

Furthermore, Tennessee's statute defines "taking" to include "acts *preparatory* to taking."[137] Conduct that is "preparatory" and "tending to" could mean that a hunting protester violates the statute by talking to hunters as they leave a hunting supply store the morning of a hunt. Likewise, a hunting protester acts illegally when she arrives at a coffee shop at 4 a.m. on the first day of deer season and sits in a booth behind several hunters to discuss the morality of hunting. Such an activist engages in expressive conduct tending to interfere with the preparation to take wildlife. There is no doubt that the activist's conduct is intended to convey a message and that the hunters understand the message. According to the test articulated by the United States Supreme Court in *Spence v. Washington*, the anti-hunter's conduct is expressive.[138]

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134 Thiede, *supra* n. 4, at 1045–46.

135 *People v. Sanders*, 696 N.E.2d 1144, 1152 (Ill. 1998).

136 Tenn. Code Ann. § 70-4-302(2) (2001) (emphasis added).

137 *Id.* § 70-4-301(1) (emphasis added).

138 418 U.S. 405, 410 (1974) (courts must look to the nature of activity combined with the factual context and the environment where the activity occurred to analyze whether an activity constitutes expressive conduct).

Two questions emerge from these scenarios: 1) does the restriction on expressive conduct serve a compelling interest; and 2) how does preventing an activist from interfering with the preparatory acts serve that compelling interest? It is unlikely that statements by activists occurring days or even hours before a hunt would cause hunters to cancel the hunt. Assuming the interest served by Tennessee's statute is to prevent hunting opponents from dissuading hunters from hunting, thus resulting in wildlife population management problems from decreased hunting, the government must establish that the statute is narrowly tailored to serve this interest.

In addition, considering that there have been no reports of unarmed anti-hunting protesters harming armed hunters,[139] it is difficult to believe that the state has a compelling interest in preventing violence between the two groups. In fact, it is unlikely that unarmed anti-hunting protesters pose a threat to anything at all, except perhaps to the consciences of Americans.

Assuming the government can establish a compelling state interest, a statute must be narrowly tailored.[140] The majority of state hunter harassment statutes are overbroad in that they do not distinguish between peaceful protests and violent protests, nor do they differentiate between verbal expression and physical conduct. There is an enormous difference between an anti-hunting protester walking next to a hunter, speaking quietly about the beauty of living wildlife,[141] and the protester who positions herself between the hunter's gun and its intended target.[142] Furthermore, there is clearly a distinction between preparatory acts and acts occurring during the hunt.

In *U.S. v. Fee*, the government cited protection of public health and safety and protection of property as its reasons for closing a timber area to protesters.[143] If those were the principal reasons for adopting hunter harassment statutes, then the statutes could be drafted to restrict fighting words and threatening postures, and not mere interference with the taking of wildlife through expressive conduct such as talking and walking with a hunter.

If a court severs a content-based section from its statute[144] so that the statute is deemed content-neutral, then it is subject to analysis as a time, place, and manner restriction.[145] To survive this analysis, the United States Supreme Court has held that in addition to being narrowly tailored, the statute must "leave open ample alternative channels" for communicating the message.[146]

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139 Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 Buff. L. Rev. 765, 779 (1995).

140 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

141 *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988).

142 *State v. Lilburn*, 875 P.2d 1036 (Mont. Sup. 1994).

143 *U.S. v. Fee*, 787 F. Supp. 963, 969 (1992).

144 *See e.g. Sanders*, 696 N.E.2d 1144 (Ill. 1998).

145 *Ward*, 491 U.S. at 791.

146 *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

If a statute restricts an anti-hunter from protesting peacefully at a hunt, then the government effectively strips the protester of the most effective place to protest.[147] Protesting a mile away from the hunt, or protesting a week after the hunt, or being forbidden from discussing the hunt with hunters as they enter public hunting grounds, takes away the protester's most effective channels of communication. The Supreme Court has held that it is difficult to "justify a prohibition on *all* uninvited approaches . . . regardless of how peaceful the contact may be."[148] Hunter harassment statutes that restrict the time, place, and manner of protests effectively gag protesters, preventing them from reaching their intended audience—hunters.

In *Perry Education Association*, the critical inquiry regarding time, place, and manner was not whether the defendants had a right of access, but whether they were denied equal access.[149] It is specious to argue that hunters do not engage in expressive conduct that favors one viewpoint while expressing that view on government property. Anti-hunters are being discriminated from expressing their viewpoints on that same government-owned property, because their conduct sends the message to government-favored hunters that hunting is immoral.

In applying the forum principle, no site could be more appropriate for the communication of ideas about the immorality of hunting than the public hunting grounds, where pro-hunters express their pro-hunting viewpoints. This is especially true considering that the government allows hunting on public lands, while it simultaneously protects hunters from interference by anti-hunting protesters.

Hunters, through their expressive conduct, send the message that hunting is morally and philosophically acceptable. Local television crews arrive on opening day of deer hunting season at many of the public hunting grounds. The media captures on film the first big buck taken, reporters discuss the money hunters contribute to the local economy, and they interview local restaurant and hotel operators.[150] The repeated message is that hunting is great for business, wildlife management, family bonding, and preservation of American heritage.

Americans are bombarded with pro-hunting messages that emanate from the places in the community where hunters prepare for the hunt and at the public parks. Public parks are where the pro-hunting message is most effectively communicated. By disallowing the alternative anti-hunting message, the government inhibits a particular viewpoint, as public hunting grounds are the most meaningful place for anti-hunting protesters to peaceably assemble and express their alternative points of view.

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147 Ugalde, *supra* n. 72, at 1116.

148 *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 774 (1994) (emphasis in original) (upholding buffer zone around abortion clinic entrances and driveway).

149 460 U.S. 37, 63 (1983).

150 Support for this assertion derives from the author's own experiences and analysis from living in an area where deer hunting is prevalent.

Because the government continues to sanction the hunting and killing of millions of animals each year, citizens ethically opposed to hunting have had to step up their protest efforts to get their message heard.[151] Mass petition mailings to legislators and the initiation of lawsuits against certain types of hunting are but small steps in the right direction. Therefore, anti-hunting activists have had to "design demonstrations with dramatic appeal to pierce the insensitivity" that pervades a segment of society in their acceptance of hunting.[152] It is when activists conduct their protests at the actual site of the hunt that the protests become especially effective, for it is then that the protests have "dramatic media potential,"[153] and the protesters have the best chance of altering a pro-hunter's mindset.

The definition of communication changes over time and so should the definition of public forum.[154] Public hunting lands are maintained and paid for by taxpayers and held in trust for public use.[155] Whether public parks were previously used for communicative activity becomes irrelevant if hunters are allowed to assemble freely and express their views that hunting is moral and ethical, while at the same time, anti-hunting protesters are denied the same right of access and expression.

If public hunting grounds are deemed not to be public fora, will environmentalists be prohibited from assembling, protesting, and potentially interfering within a public park after they learn of the government's decision to allow thousands of acres to be clear-cut? Will bird enthusiasts be forbidden from assembling and protesting on public land when the state says it has a compelling interest in eradicating one million crows and grackles? When the parks department announces its decision to have sharpshooters annihilate five hundred overbrowsing deer, is the state's interest so compelling that protesters opposed to the decision will be barred from the park?

If public parks are not considered public fora, could the state step in to arrest and imprison environmentalists when they taunt bulldozer operators? Could it prohibit and arrest protesters who scream, "stop, you butchers," at a public park that borders a government-subsidized factory farm where pigs are housed under inhumane conditions?

Historically, courts have held public hunting grounds to be non-public fora in hunter harassment challenges. Considering that public hunting grounds are only considered hunting grounds during hunting season and the rest of the year considered public parks, the non-public fora distinction is plainly wrong. Public fora have traditionally included public streets, parks, and sidewalks.[156] Non-public fora have traditionally included locations that are "not appropriate platforms for

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151 Kniaz, *supra* n. 139, at 780.

152 Ugalde, *supra* n. 72, at 1116.

153 *Id.*

154 Hessler, *supra* n. 2, at 156.

155 *State v. Ball*, 2000 Conn. Super. LEXIS 3003 at *22 (Oct. 3, 2000).

156 *Cornelius v. NAACP Legal Def. Educ. Fund*, 473 U.S. 802 (1985).

unrestrained communication,"[157] such as federal workplaces[158] and utility poles.[159] Public fora are afforded greater First Amendment protection than non-public fora,[160] since speech restrictions on public fora are subject to strict scrutiny, whereas the standard for non-public fora is reasonableness.[161]

In *U.S. v. Fee*, the court held the National Forest to be a limited public forum, and the restrictions on expression were subject to strict scrutiny.[162] Conversely, proponents of hunter harassment statutes claim that public hunting grounds are non-public fora, and therefore are subject to a considerably lower standard of review. It is clear that a section of the National Forest open for logging is more like a public park and public hunting ground than is a military installation or a telephone pole.

Unfortunately for anti-hunters, the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.[163] Therefore, in order to decide whether a park is a public forum or non-public forum, the court must ascertain the primary purpose of a park. While it is true that traditionally the primary purpose of a park has not been for citizens to congregate and express their beliefs, neither was the primary purpose of the highway on which the Selma protesters marched for civil rights.[164] Nonetheless, states continue to make a successful legal argument that the primary purpose of parks has never been for expression of speech, and therefore the land is a non-public forum and restrictions on expressive conduct are merely subject to a reasonableness standard.[165] However, as Justice Brennan wrote in his dissenting opinion in *Perry*:

> In focusing on the public forum issue, the Court disregards the First Amendment's central proscription against . . .viewpoint discrimination, in any forum, public or non-public. . . .[Such viewpoint discrimination] can be sustained 'only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.'[166]

Streets and parks have immemorially been held in trust for the use of the public and have been used for purposes of assembly and discussing public questions.[167]

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157 *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991).

158 *Cornelius*, 473 U.S. at 810.

159 *Members of City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 794 (1984).

160 *U.S. v. Fee*, 787 F. Supp. 963, 968 (1992).

161 *U.S. v. Kokinda*, 497 U.S. 720, 726–27 (1990).

162 *Fee*, 787 F. Supp. at 968.

163 *U.S. Postal Service v. Greenburgh Civic Assns*., 453 U.S. 114, 129 (1981).

164 Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 Yale L.J. 1141, 1142 (1995).

165 Roegge, *supra* n. 24, at 458.

166 *Perry Educ. Assn. v. Perry Loc. Educ. Assn.*, 460 U.S. 37, 57, 66 (1983) (Brennan J., dissenting) (internal citations omitted).

167 *Hague v. CIO*, 307 U.S. 496, 515 (1939).

The government may not grant use to people whose views it finds acceptable and deny use to those whose viewpoints it does not support.[168] Arguably, a hunter expresses her views when she parks her vehicle, adorned with National Rifle Association decals and bumper stickers, in the parking lot of a public hunting ground, or when she gathers with fellow hunters on a public hunting ground to discuss the joys of the hunt. The government has the right to exclude speakers based on their message but may not discriminate based on viewpoint.[169] Clearly, some state governments do not support the anti-hunting message and stifle the expressive conduct of that message through harassment statutes.

Finally, under the five-part doctrinal analysis, the vagueness and overbreadth analyses must be applied to hunter harassment statutes.[170] Some state statutes have failed under these doctrines. For example, the New Jersey Hunter Harassment Act states that no one may "block, obstruct, or impede . . . a person lawfully taking wildlife."[171] The dictionary definitions of "block," "obstruct," and "impede" provide little insight as to exactly what kinds of conduct are illegal. If an anti-hunter sings and this impairs a hunter, is the conduct of singing prohibited under the statute? If an anti-hunter flies a kite over the hunt which says "hunting is murder" and causes such anger in a hunter that he loses his ability to aim and fire, has that anti-hunter obstructed the hunt?

The majority of state hunter harassment statutes make it difficult for a protester to know how and where she is permitted to protest. This lack of certainty is overly burdensome to free expression.[172] Under the five-part doctrinal analysis, "fixing" overbroad or vague harassment statutes is easy and has been the remedy for many states whose harassment statute has been challenged.[173]

V. CONCLUSION

Hunters comprise just seven percent of the U.S. population and, not surprisingly, they feel threatened by the passionate and thought-provoking messages expressed by anti-hunting protesters. That is undoubtedly one reason why trophy hunters[174] and the National Rifle Association vigorously support all laws that make it a crime to speak out against hunting.[175]

It is difficult to find a compelling state interest in hunter harassment statutes that warrants restriction on expression. There have

168 *Perry*, 460 U.S. at 64.

169 *Id.* at 63.

170 *Dorman v. Satti*, 678 F. Supp. 375, 380 (1988).

171 N.J. Stat. Ann. § 23:7A-2 9 (2001).

172 *Binkowski v. State*, 731 A.2d 64, 76 (N.J. Super. App. Div. 1999).

173 Note that even after narrowly tailoring statutory language, a statute still requires strict scrutiny for its content-based restrictions on expressive conduct.

174 Trophy hunters are those who hunt strictly for the sport of killing.

175 Kniaz, *supra* n. 139, at 779.

been no reports of hunters being physically injured from the activities by anti-hunting protesters anywhere in the United States.[176] Anti-hunting protests are inherently peaceful, while hunters successfully kill millions of animals every year. In one case where an anti-hunting protester twice positioned himself between a hunter, his gun, and a bison, the hunter was still able to kill and bag his game.[177] As such, the government is in a weak position to argue that part-time waitresses and protectors of hand-fed birds pose a serious threat to the interest the government seeks to protect.

There is no doubt that states have a compelling interest in preventing violence and vandalism directed toward hunters on public grounds—but violence and vandalism are already illegal. The government's attempt to further regulate violence and vandalism through content-based restrictions on anti-hunters is not the tight fit between the means and the ends required under the strict scrutiny standard of review.

There are substantially less restrictive means available to satisfy a state's interest in protecting hunters from threats or harm. For example, statutes that restrict physical conduct, such as throwing lit firecrackers under a hunter's feet or throwing water balloons at a hunter's head as she raises her rifle to shoot, are a tight fit with the goal of protection. A state has no compelling interest in ensuring that a hunter is not asked to reconsider the morality and ethics of hunting. Even if anti-hunting protesters changed ten dozen hunters' sensibilities about hunting, the other 15,999,880 American hunters would make sure that the country was still able to meet its wildlife management population goals.

Hunter harassment statutes are content-based and the conduct they proscribe occurs in a public forum. As such, the statutes must be reviewed under the standard of strict scrutiny. Since the statutes fail to achieve a tight fit between the means and the ends they seek to achieve, and because less restrictive alternatives are available, the statutes fail strict scrutiny and violate an anti-hunter's right to free expression.

176 *State v. Lilburn*, 875 P.2d 1036, 1038 (Mont. 1994).

177 Roegge, *supra* n. 24, at 467.