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COMMENTS

Section 372.705, Florida Statutes: The Constitutionality of the State’s Hunter Harassment Law in a Multi-State Context

I. INTRODUCTION

“If all mankind minus one were of one opinion and only one person were of the contrary opinion, mankind would be no more justified in silencing that person then [sic] he, if he had the power, would be justified in silencing mankind.”

Society in the new millennium has seen many examples of polarity: rich and poor; powerful and weak; resourceful and incompetent; satisfied and hungry. This divergence, however, is not a concept unique to the present day. It has existed since the beginning of time. The new millennium has merely resulted in an escalation of the problems. One such problem involves the clash between activists and the parties who oppose them. At one time, the clash would have been settled physically. In the modern era, however, two new methods have come to replace the “pistols at dawn” solution: legislation and litigation.

In 1990, Florida enacted a law entitled “Harassment of hunters, trappers, or fishermen.” The law, in effect, criminalizes the act of interfering with someone while she is in the process of hunting or fishing. Interference can render the perpetrator guilty of a second-degree misdemeanor. Florida is not alone in this field. To date, almost all fifty states have enacted similar “hunter harassment” statutes. Some of the statutes are more detailed than others. Some statutes leave readers wondering what type of activity is actually prohibited. Some are so explicitly detailed that each violation is specifically enumerated in its own separate subsection. But they all seem to have one common theme: the

1. State v. Ball, 627 A.2d 892, 901 (Conn. 1993) (Berdon, J., dissenting) (quoting JOHN STUART MILL, ON LIBERTY (1859)).
3. See id. § 372.705(2).
proliferation of the dispute between activists and the hunters, fishers, and trappers who oppose them. In Florida, as in some of the other states where hunter harassment legislation has been enacted, the courts have not had an opportunity to interpret their respective statutes, either because no individual has been charged with violating the provisions, or because cases have yet to reach the appellate level. It is interesting to note that some of the statutes have been on the books for quite some time. For example, Arizona enacted its hunter harassment law in 1981, while both Kansas and Oregon have had their statutes since 1987. Yet these states, and many others, currently have no judicial decisions expressing an opinion as to the constitutionality of the laws.

Part II of this Comment first takes a look at some of the reasons why hunter harassment legislation has been passed, and some of the common constitutional arguments that seem to permeate the decisions in the states where courts have ruled on hunter harassment statutes. To date, the courts of only the following states have passed judgment on their hunter harassment laws: Connecticut, Idaho, Illinois, Minnesota, Montana, New Hampshire, New Jersey, Ohio, Texas, and Wisconsin. Part III takes a look at the decisions reached in these states, and develops a set of principles that characterize the ways in which the different jurisdictions view the subject of hunter harassment. Part IV contains the current version of Florida’s hunter harassment statute. Part V provides a detailed analysis of Florida’s hunter harassment law using the principles developed from the ten states in Part III as a framework. Part V also develops and analyzes proposals for both activists and the Florida legislature. Part VI concludes the Comment and suggests that the current version of Florida’s hunter harassment statute is in fact unconstitutional, but may be saved by incorporating an additional specific intent element and limiting its scope to acts that are purely physical.


II. BACKGROUND INFORMATION

A. Justifications for Hunter Harassment Legislation

One of the major concerns of state legislatures has been the level of violence that erupts when activists and their opponents meet face to face. This concern is evident in some of the legislative history surrounding the passage of hunter harassment laws. For example, Senator Benson of Connecticut, a supporter of Connecticut's hunter harassment bill, stated that "we need to have some sort of deterrent. . . . There have been some instances where hunters' lives have been threatened by individuals clearly because of the emotional type of objection that there is to . . . [the] taking of animals' lives."7 Senator Eaton added: "[H]unters are picked on often. . . . [T]hey should have the right to hunt in lands that are made available to them."8 Senator Gunther concluded: "[T]he people who are involved in this business of harassment are very apparent in their harassment . . . and they do it [purposely and] habitually and repeatedly."9 Some argue that state legislatures that have enacted hunter harassment laws have done so only as a result of successful lobbying on the part of hunters and their allies. For example, between 1981 and 1996, largely through the efforts of groups like the Sportsman's Caucus and the Wildlife Legislative Fund of America, hunter harassment legislation was rampant.10 In fact, most of the state statutes are based on model legislation prepared by the Wildlife Legislative Fund.11 Also, the National Rifle Association has vehemently supported the enactment of hunter harassment laws on numerous occasions.12 As one advocate of hunter harassment legislation has put it: "[I]t 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."13

B. First Amendment Constitutional Arguments

The majority of cases discussing the constitutionality of hunter harassment legislation focus on three major issues: (1) content neutrality; (2) overbreadth; and (3) vagueness. Those seeking to challenge a statute's constitutionality usually concentrate their arguments on the latter

8. Id.
9. Id.
10. Sanders, 696 N.E.2d at 1150.
11. Id. (quoting Ugalde, supra note 5, at 1111 n.14).
12. Id.
two, whereas the state most often structures its defense of the statute around the issue of content-neutrality, in addition to arguing that the terms of the statute are not unconstitutionally vague or overbroad.

1. THE "CONTENT-NEUTRAL VS. CONTENT-BASED" DISTINCTION

A threshold inquiry that must be met when dealing with First Amendment challenges to statutes is whether the statute at issue is content-neutral or content-based. A content-neutral statute is one that does not target a particular type of speech or point of view, but instead treats all expression alike. A content-based statute, on the contrary, singles out a specific kind of speech because of the message it seeks to convey. If the statute is content-based, the level of judicial scrutiny is often strict, and the statute is saved only if it is supported by a compelling state interest and is narrowly tailored to achieve that interest. If the statute is content-neutral, courts apply an intermediate level of judicial scrutiny, and the state need only advance a substantial interest in passing the legislation, provide evidence that the statute is narrowly tailored to achieve that interest, and demonstrate that alternative channels of communication are left open.

A second inquiry generally deals with the type of forum where the regulated activity takes place. A traditional public forum is one which the state has traditionally set aside for purposes of assembly and free expression, such as a public park or sidewalk. If the statute is content-based and proscribes conduct in a traditional public forum, courts apply strict judicial scrutiny, and the state must advance a compelling interest for passing the statute and provide evidence that the statute is narrowly tailored to achieve that interest. If the statute is content-neutral, only mid-level scrutiny is applied, and time, place, and manner (circumstance) restrictions must be narrowly tailored to serve a substantial state interest and alternative channels of communication must be left open. A nontraditional public forum is one which has not been set aside for

15. Grafton, supra note 13, at 204.
17. Durrant, supra note 14, at 513.
19. Durrant, supra note 14, at 516.
20. Id. at 516.
21. Id.
22. Id. at 516-17.
purposes of public debate or exchange of ideas. If the statute is content-based and regulates activity in a nontraditional forum, strict scrutiny still applies, and the state must demonstrate a compelling interest and provide evidence that the statute is narrowly tailored to achieve that interest. If the statute is content-neutral, however, the court utilizes a rational relation analysis and sustains the legislation if it is rationally related to a legitimate governmental interest.

2. OVERBREADTH

A statute is constitutionally overbroad if it does not limit its scope to areas justifiably within the state’s control, but instead encompasses other activities that are protected by the Constitution. One commentator has compared the overbreadth analysis to firing pellets at a small target. The shooter may hit the target (i.e., the desired conduct that the statute seeks to regulate), but may also strike the surrounding areas (i.e., forms of protected speech). A party asserting an overbreadth challenge, even though his own conduct may not be protected by the Constitution, may nevertheless succeed, if he can show that the law is so broad that it can be applied to other parties who engage in activities that are constitutionally protected.

3. VAGUENESS

Vagueness issues come into play in two primary areas: (1) when a person of ordinary intelligence cannot look at a statute and reasonably understand what type of conduct it actually prohibits; and (2) when the statute fails to define enforcement standards and guidelines for police and other officials to observe. Simply stated, laws which leave ordinary persons without notice as to what form of activity is criminal, or laws which leave an individual guessing as to their meaning, will be considered unconstitutionally vague, and possibly void. Content-neutrality, overbreadth, and vagueness are not unique to the hunter harassment field. Rather, these issues surface in the context of statutory law in general. Nevertheless, they constitute an important part of challenges to hunter harassment legislation, as Part III of this Comment demonstrates.

23. Id. at 517.
24. Id. at 521.
25. Id. at 517.
26. See Ugalde, supra note 5, at 1132.
27. See Grafton, supra note 13, at 200.
28. Id.
29. Schuster, supra note 18, at 479.
30. Grafton, supra note 13, at 200.
31. Schuster, supra note 18, at 481.
III. STATE AND FEDERAL CASE LAW

Courts in the ten states that have addressed the constitutionality of hunter harassment statutes have not reached the same decision. This split among the jurisdictions has prompted at least one commentator to urge the United States Supreme Court to decide the issue once and for all at its next opportunity. This part of the Comment will provide a detailed description of the decisions from the ten states. The decisions will be presented chronologically, as some of the more recent cases often make reference to the earlier court opinions. In addition, the relevant parts of the various hunter harassment statutes will be discussed in light of their treatment by the courts.

The decisions from the ten states can be grouped together into six primary categories: [1] unconstitutional in toto (Opinion of the Justices and Dorman) (i.e., invalidating an entire hunter harassment statute); [2] partially unconstitutional (Casey) (i.e., holding unconstitutional only certain provisions of a statute); [3] non-constitutional (Henry, Mueller, and Richardson) (i.e., finding parties guilty or innocent of violating a hunter harassment statute through statutory interpretation, but allowing the court to avoid addressing the statute's constitutionality) [4] constitutional non-implication of speech (Bagley and Wicklund) (i.e., interpreting terms of a statute to address only physical conduct, as opposed to speech, and thus preserving the statute's constitutionality); [5] constitutional enumeration (Ball and Binkowski) (i.e., deferring to the legislature's inclusion of several enumerated acts that characterize physical conduct); and [6] constitutional analysis of “dissuasion” provisions (Lilburn, Miner, Woodstock Hunt Club, and Sanders) (i.e., analyzing the constitutionality of a “dissuasion” element contained in a statute).

A. New Hampshire

New Hampshire was the first state to deal with the constitutionality of hunter harassment legislation. In 1986, the legislature asked the state supreme court to consider the proposed hunter harassment law, which the state planned to enact. In a per curiam decision, the New Hampshire Supreme Court advised the legislature that the statute, as written, would violate the state constitution. The statute in question prohibited

32. See Ugalde, supra note 5, at 1135.
34. Id. at 753. It should be noted that although the New Hampshire Supreme Court considered the statute under the state constitution, it nevertheless used federal cases in its analysis, such as Brandenburg v. Ohio, 395 U.S. 444 (1969), and Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), both of which addressed First Amendment principles under the United States Constitution. See Opinion of the Justices, 509 A.2d at 752.
a person from interfering with the taking of wild animals if the person acted with intent to prevent the taking. It further prohibited the person from disturbing wild animals in order to "prevent or hinder" their taking. Its remaining sections outlawed: (1) physical or verbal conduct that aimed to provoke a hunter engaged in the lawful taking of wildlife, if such conduct was intended to dissuade or otherwise prevent the taking; (2) preventing a hunter's enjoyment of the outdoors by verbal harassment or physical action when the hunter was lawfully engaged in hunting activity; and (3) remaining on public land or trespassing on private land with an intent to violate the hunter harassment law in any way.

In its analysis, the court first observed that the statute's language was too broad, constituting an infringement on free speech in violation of the New Hampshire constitution. The statute would have regulated speech that dangerously interfered with lawful activity or that resulted in a breach of the peace, but would also have regulated speech that served merely as an expression of an opinion without such similar risks. The court stated, however, that the protections of free speech under the state constitution were not limitless. Rather, free speech may be regulated by time, place, and manner restrictions that further the state's interest, but may not be connected to the content and subject matter of the speech itself.

The court concluded that the proposed statute was not content-neutral, as it "discriminate[d] among points of view." As an illustration, the court noted that the provision preventing the provocation of hunters with intent to dissuade them from hunting could be applied both to anti-hunting advocates as well as to conservationists who direct pro-conservation statements at the hunters. As a result, the proposed bill acted as

35. Id. at 751.
36. Id.
37. Id. There were three additional provisions in the proposed law. These included: (1) the prohibition of disobeying an official's order to disburse; (2) the provision for injunctive relief and damages which encompassed punitive damages and any economic loss sustained on the part of the hunter; and (3) the labeling of a violation of any prohibition in the statute as a violation of the statute in general. Id. These provisions appear in several states' hunter harassment statutes, but this Comment would prefer to treat them as collateral issues and instead concentrate on the "disturbance," "interference," and "dissuasion" provisions.
38. Id. at 752.
39. Id.
40. Id. (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).
41. Id. at 752.
42. Id. Although this illustration may not adequately define what the court earlier termed a "discrimination among points of view," it would be safe to assume that the court would agree that anti-hunting ideology would be singled out as the target of the statute, whereas pro-hunting commentary would most likely not subject an individual to prosecution.
an unconstitutional content-based restriction. Additionally, the court found the law to be too vague, as it gave an ordinary individual little or no notice as to what activity would actually fall within its scope.\footnote{43. Id.}

Furthermore, because the bill neglected to define critical terms and could therefore be interpreted to encompass several categories of \textit{protected} speech, the court also found the bill to be overbroad.\footnote{44. Id.} The court noted, for example, that the section of the bill that prohibited a person from engaging in an activity that would affect the behavior of an animal with intent to prevent its taking could be read to prohibit a landowner from posting signs or putting out food on his own property to attract wild animals and save them from the hunt.\footnote{45. Id.}

\section*{B. \textit{United States Court of Appeals for the Second Circuit}}

Two years after the decision in New Hampshire, the Second Circuit became the next court to pass judgment on a state hunter harassment statute.\footnote{46. Dorman v. Satti, 862 F.2d 432 (2d Cir. 1988).} The Connecticut legislature enacted its Hunter Harassment Act in 1985.\footnote{47. Id. at 433 (referring to CONN. GEN. STAT. § 53a-183a (1985)).} The Act made it criminal for a person to "(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."\footnote{48. Id. (quoting CONN. GEN. STAT. § 53a-183a (1985)) (emphasis omitted).}

On January 30, 1986, Francelle Dorman approached several hunters on state-owned forest property and attempted to dissuade them from hunting waterfowl by walking along with them and speaking about the cruelty of hunting and the beauty of the animals.\footnote{49. Id. at 434.} After refusing to leave the area, a law enforcement officer placed Ms. Dorman under arrest, but the prosecutor decided to dismiss the case on grounds that the arrest had been premature.\footnote{50. Id. Apparently, Ms. Dorman had only been discussing what she planned to do to interfere with the hunting of the geese, rather than actually engaging in the act of interference itself.} Four months later, Ms. Dorman brought an action in federal district court under 42 U.S.C. § 1983 against the prosecutor and state public safety commissioner, seeking a declaratory judgment that the Hunter Harassment Act violated the First and Fourteenth Amendments of the United States Constitution.\footnote{51. Id.} Ms. Dorman argued that the Act facially regulated protected free speech, as it failed to define
what constituted "interference" or "harassment," and as the phrase "acts in preparation" was not confined to any specific time, place, or circumstance limitation.\footnote{52} The district court found the Act unconstitutionally vague and overbroad.\footnote{53} On appeal the Second Circuit first observed that language in a statute prohibiting activity that involves interference or harassment applies equally to verbal as well as to physical conduct.\footnote{54} The court then drew a distinction between a content-based and a content-neutral regulation.\footnote{55} It held that the former required a compelling state interest and that it be narrowly drawn to achieve that end, while the latter could encompass a time, place, and manner restriction, provided that it was necessary to serve a significant government interest and that it left open alternative channels of communication.\footnote{56} Applying these rules to the Hunter Harassment Act, the court of appeals noted that although the Act first appeared to be a content-neutral regulation, in reality it intended to insulate hunters from verbal as well as physical activity perpetrated by those, like Ms. Dorman, who were opposed to hunting.\footnote{57} To the extent that the Act could be viewed as content-based, it would be unconstitutional, as Connecticut did not have, or at least the defendants had not shown that the state had, a compelling interest in protecting hunters from harassment.\footnote{58}

The court concluded by stating that the terms "interfere," "harass," and "acts in preparation" were not specifically defined and could not therefore be justified as reasonable time, place, or circumstance regulations of speech.\footnote{59} Quoting the district court, the Second Circuit expressed its dismay as to the wide range of activities that could be included under the "acts in preparation" provision: "buying supplies long before the actual hunt takes place; ... consulting a road map; ... making plans during a workplace coffee break; or even getting a good night’s sleep before embarking on a hunting trip."\footnote{60}

In dissent, Judge Miner argued that the court should have certified

\footnote{52. \textit{Id.} at 436. As part of their appeal, the prosecutor and commissioner sought a certification to the Connecticut Supreme Court of the terms "interfere," "harass," and "acts in preparation," but the Second Circuit denied their motion. \textit{Id.} This Comment will not address the certification issue.}


55. \textit{Id.} at 437.


57. \textit{Id.}

58. \textit{Id.}

59. \textit{Id.}

the ambiguous terms to the Connecticut Supreme Court because there had been several earlier cases, dealing with non-hunter harassment issues, wherein the same terms had been defined. Judge Miner opined that the certification could assist in affixing a limiting construction on the terms of the statute, and provide the Connecticut Supreme Court with an opportunity to excise troublesome portions of the statute on state grounds.

C. Texas

In Henry v. State, Texas became the third state to address hunter harassment legislation. There, a Texas jury found Rex Henry guilty of violating the Sportsman’s Rights Act, which provides: “No person may intentionally interfere with another person lawfully engaged in the process of hunting or catching wildlife.” Eyewitnesses identified Henry as the individual who drove a pickup truck alongside the perimeter of a deer lease, repeatedly slamming the doors and making other kinds of noise to interfere with a deer hunt. These same witnesses testified that Henry engaged in this conduct only during deer season and that he had admitted in the past that he had raised the deer as pets and did not want to see them hunted on the adjacent property. Henry argued on appeal that the evidence failed to show that he was on the same land on which the hunting was taking place when he engaged in the interference activity. The court rejected this argument and upheld his conviction, finding that the Sportsman’s Rights Act did not require the perpetrator to be on the same property as the hunter.

D. Wisconsin

One year later, in 1991, Wisconsin became the fourth state to adjudicate the merits of a constitutional challenge to its hunter harassment statute. James Bagley and two other individuals prevented a group of

61. Id. at 438.
62. Id. at 439. Ball partially answered Judge Miner’s certification concerns, wherein the Connecticut Supreme Court had an opportunity to analyze a revised version of the state’s hunter harassment statute in 1993. See infra Part III.E and accompanying notes 83-107.
63. 797 S.W.2d 281 (Tex. App. 1990).
64. TEX. PARKS & WILD. CODE ANN. § 62.0125(c) (Vernon 1990). The statute defines “process of hunting or catching” as “any act directed at the lawful hunting or catching of wildlife, including camping or other acts preparatory to hunting or catching of wildlife that occur on land or water on which the affected person has the right or privilege of hunting or catching that wildlife.” Id. § 62.0125(b)(2).
65. Henry, 797 S.W.2d at 282.
66. Id.
67. Id.
68. Id.
Native American spearfishers from launching a boat by using their own boat to block the boat landing. They were charged in violation of the state hunter harassment law, which makes it a crime to interfere with the lawful taking of wildlife with intent to prevent the taking by “impeding or obstructing a person who is engaged in an activity associated with lawful hunting, fishing, or trapping.” The phrase “activity associated with lawful hunting, fishing or trapping” is defined as “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.” The trial court dismissed the charges, finding that the hunter harassment law was unconstitutionally vague and overbroad. The appellate court reversed on both issues.

First, the appellate court held that the statute, by using such phrases as “interfere,” “impede,” or “obstruct,” only prevented demonstrators from physically interfering with hunters or fishermen, but did not prohibit them from verbally interfering. Thus, the statute did not contravene First Amendment principles of overbreadth and did not serve as a content-based restriction. The court distinguished the Connecticut statute invalidated in Dorman on grounds that it only used the term “interfere” without any further limiting construction, while the Wisconsin statute made reference to “impede” and “obstruct,” which served to refine and limit the notion of “interference.” The court relied on the dictionary definitions of impede: “to interfere with or get in the way of the progress of;” and obstruct: “to block up; place an obstacle in or fill with obstacles or impediments to passing,” to conclude that the everyday usage of these terms describes physical, not verbal, activity. The court held that inclusion of the affirmative defense provision in the statute evidenced the legislature’s intent to exclude protected speech from the scope of the statute and distinguish it from conduct that was purely physical.

70. Id. at 762.
71. Id. at 763 (quoting Wis. Stat. § 29.223(2)(a)(3) (1990)). Bagley and the others also failed to obey an order from a Wisconsin Department of Natural Resources warden to desist from their activity in violation of section 29.223(2)(b). Bagley, 474 N.W.2d at 762-63. The statute also provides an affirmative defense if an individual’s conduct is protected by the right to freedom of speech under either the state or federal Constitution. Wis. Stat. § 29.223(3m) (1991) renumbered in 1997 to Wis. Stat. § 29.083(1).
72. Id. at 763 (quoting Wis. Stat. 29.223(1) (1991) renumbered in 1997 to Wis. Stat. § 29.083(1)).
73. Bagley, 474 N.W.2d at 762.
74. Id.
75. Id. at 763.
76. Id.
77. Id. at 764.
78. Id.
79. Id. The court advised that had Bagley and the other defendants demonstrated by the
The court also addressed the issue of vagueness. The court followed the general rule that a person has no standing to argue a statute is void for vagueness if that person's activity clearly falls within the core of conduct prohibited by the statute. The trial court found that no such core violation existed because the Native Americans had not yet engaged in the act of fishing. The appellate court disagreed, however, finding that the statute applied to preparatory acts as well as to actual acts, and launching a boat amounted to an act of preparation. The defendants were therefore without standing to assert a vagueness challenge.

E. Connecticut

In 1993, Connecticut faced a second challenge to the validity of its hunter harassment statute. In State v. Ball, the Connecticut Supreme Court upheld the constitutionality of a revised version of the statute. The earlier version prohibited “interfer[ing] with the lawful taking of wildlife by another person, or acts in preparation for such taking, with intent to prevent such taking” and “harass[ing] another person who is engaged in the lawful taking of wildlife or acts in preparation for such taking.” The current law reads: “(a) No person shall obstruct or interfere with the lawful taking of wildlife by another person at the location where the activity is taking place with intent to prevent such taking.” In subsection (b), the new law goes on to enumerate a series of acts that constitute violations of the statute when perpetrated intentionally or knowingly: (1) driving or disturbing wildlife for the purpose of disrupting its lawful taking while another person is lawfully engaged in the process of taking the wildlife; (2) blocking, impeding or otherwise harassing that person; (3) using natural or artificial stimuli to affect the behavior of the wildlife in order to prevent its taking; (4) building barriers to prevent a person from accessing the area where wildlife may be lawfully taken; (5) interjecting oneself into the line of fire; (6) affecting the condition of public or private property used as a hunting area in order to impair its usefulness as such an area; or (7) entering or remain-

evidence that their activities constituted pure speech or expressive conduct, as opposed to normal conduct, a different result might have been reached. Id. at 765. The defendants, however, failed to show how their conduct (i.e., blocking the launching of boats with their own boats) merited First Amendment protection.

80. Id.
81. Id.
82. Id.
83. 627 A.2d 892 (Conn. 1993).
84. See Dorman v. Satti, 862 F.2d 432, 433 (2d. Cir. 1988) (quoting CONN. GEN. STAT. § 53a-183a (1985)).
85. CONN. GEN. STAT. ANN. § 53a-183a (West 1993) (emphasis added).
ing on private lands without the owner's permission with the intent to engage in any of these prohibited activities.\textsuperscript{86}

On the morning of October 19, 1991, Robert Dubois, a duly licensed bow hunter, waited at the entrance to a state park forest. As Dubois waited, the defendants approached him and identified themselves as anti-hunting activists and indicated that they would follow Dubois into the forest.\textsuperscript{87} After Dubois entered the park, the defendants formed a semicircle around him directly within his line of fire and attempted to dissuade him from hunting.\textsuperscript{88} A conservation officer placed the defendants under arrest after they refused to leave the park.\textsuperscript{89} The defendants moved to dismiss the charges on grounds that the Connecticut hunter harassment statute was unconstitutional, both facially and as applied to the facts of their case, under the First and Fourteenth Amendments of the United States Constitution.\textsuperscript{90} The trial court denied the motion.\textsuperscript{91}

The Connecticut Supreme Court addressed three primary issues: (1) whether the statute was directed only at conduct or whether it implicated speech; (2) whether, even if it encompassed conduct bordering on expression, the statute was content-neutral, and the state had an important interest to protect; and (3) whether any unresolved question as to the state's interest in regulating the interference with hunting necessitated a remand to the trial court.\textsuperscript{92} The court first concluded that the statute governed communicative as well as non-communicative conduct.\textsuperscript{93} The state argued that the statute did not implicate the First Amendment at all. The court disagreed, citing cases holding that activities such as parades, dances, picketing, wearing arm bands, rock music, and sleeping in a public park, though conduct, also involve communication.\textsuperscript{94} The court bolstered its position by pointing out that section 53a-183a(b)(1) of the statute.

\textsuperscript{86} Id. § 53a-183a(b). It is important to emphasize a few things about the revised version of the statute. Note that "obstruct" has replaced "harass" in subsection (a); that "otherwise harasses" in subsection (b)(2) is further defined by inclusion of the physical conduct terms "block" and "impede;" and that the Connecticut legislature added the phrase "at the location where the activity is taking place" and deleted altogether the phrase "acts in preparation." See id. § 53a-183a and accompanying legislative history and notes.
\textsuperscript{87} Ball, 627 A.2d at 895.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 894.
\textsuperscript{91} Id. The defendants entered pleas of nolo contendere, and were found guilty and fined $100. See id. The trial court ruled only on the contention that the statute was facially invalid, but did not consider the allegation that the statute was unconstitutional as applied. As the defendants had already entered their nolo contendere pleas, the Connecticut Supreme Court was unable to consider the merits of their "as applied" contention.
\textsuperscript{92} Id. at 896.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 896-97.
statute ("driving or disturbing wildlife for the purpose of disrupting the lawful taking of wildlife where another person is engaged in the process of lawfully taking wildlife") would itself be sufficient to implicate the First Amendment, as the disruption or driving away may be accomplished by either physical or verbal acts.95

Next, the court decided that the statute as written was content-neutral and not content-based.96 The defendants had argued that the statute would be enforced only against those who, by words or actions, sought to convey the message that hunting was wrong.97 The court stated that simply because an otherwise content-neutral statute permits excessive prosecutorial discretion does not automatically render it content-based.98 The defendants also argued that the statute's legislative history was evidence that it was enacted for the sole purpose of insulating hunters from the views of activists. The court disagreed and held that an otherwise constitutional statute does not become unconstitutional because the legislature was motivated by ill-will.99 The court held that the Hunter Harassment Act was content-neutral since it restricted all expressive conduct in contravention of its terms, and did not facially single out a particular point of view.100 Quoting the trial court, the Connecticut Supreme Court observed that any noise or disruptive activity, whether perpetrated by an animal activist, or by another individual who was simply dismayed at the hunter's choice of weapon, or who felt the need to pray out loud, would amount to a violation of the statute, as long as it was effected with an intent to disrupt the hunt.101

Finally, the court had to consider Connecticut's interest in passing the hunter harassment law. The resolution of this issue ultimately turned on whether the state park in this case was a traditional public forum or a nonpublic forum.102 If the park were a traditional public forum, the state would have to advance a significant interest in order for the statute to survive a constitutional challenge, but if the park were a nonpublic forum, the state needed only to demonstrate a reasonable state interest.103 The court decided to remand the case for a determination of the

95. Id. at 897.
96. Id. See supra Part II.B and accompanying notes for a more detailed discussion of the distinction between statutes that are content-neutral and those that are content-based.
97. Ball, 627 A.2d at 897.
98. Id. at 897-98.
99. Id. at 898.
100. Id.
101. Id. at 897.
102. Id. at 899.
103. Id. Obviously, the defendants would argue for the former because the burden of proof on the part of the state would be much higher. Note that the traditional public versus nonpublic distinction only comes into play when the court has already determined that the regulation at issue
In dissent, Justice Berdon argued that the “blocks, impedes or otherwise harasses” provision in the statute was troublesome. He believed that the legislative history indicated that Connecticut intended to insulate hunters from expressive speech by anti-hunting activists. As a result, he argued that the statute was a content-based restriction, and that on remand, the state should have to prove a compelling interest in order to survive the defendants’ constitutional challenges.

F. Montana

State v. Lilburn presented the Montana Supreme Court in 1994 with an opportunity to review Montana’s hunter harassment law. The state had apparently granted three individuals special licenses to hunt bison that had migrated off the grounds of Yellowstone National Park. On the day of the hunt, Lilburn and several others were seen on snowmobiles and cross-country skis trying to herd the bison back on to

is content-neutral. If the court determines the statute to be content-based, the distinction does not figure into the equation, and the state must advance a compelling state interest, regardless of where the activity is taking place. See supra Part II.B.

104. Ball, 627 A.2d at 899. On remand, the trial court held an evidentiary hearing and determined that a state park is a nonpublic forum. State v. Ball, Nos. CR1874479, CR1874480, CR1874481, CR1874482, 2000, Conn. Super. LEXIS 3003 (Conn. Super. Ct. Nov. 8, 2000). The court stated: “The state forests and parks have not been opened for the use by the public as a place for expressive activity. The state forests and parks have historically been utilized for recreation and preservation of natural habitat.” Id. at *20. The court also found that Connecticut had a significant state interest in seeking to regulate activity in the state parks. Id. at *28. The court adopted the state’s argument that citizens’ enjoyment of parks and killing wildlife in general constitute a significant state interest and amount to an accepted public policy. Id. at *27-28. The court, however, may have analyzed the state interest issue more intensely than the Connecticut Supreme Court instructed. The supreme court required the trial court on remand to find only a reasonable state interest if it preliminarily determined that a state park is a nonpublic forum. State v. Ball, 627 A.2d 892, 899 (Conn. 1993). The trial court incorrectly analyzed the state interest issue under the significant interest standard. One may observe that the trial court in reality committed no error, as it applied the standard more stringently than was required. The long-term effect of the error, however, could perhaps be anything but harmless. Enjoyment of parks and of killing wildlife in general may be accepted as “reasonable” interests under the lower threshold required by the Connecticut Supreme Court, but it is certainly debatable whether such interests suffice under the more stringent “significant” standard. Critics of the trial court’s error may point out that the court, in effect, lessened the burden of proof required under an analysis of the content-neutral standard, and created a precedent for future courts in other states faced with the same task of resolving the forum issue. These courts may now find it easier to uphold hunter harassment statutes without having to scrutinize as strictly as the Connecticut Supreme Court required in remanding the case in Ball.

105. Ball, 627 A.2d at 900 (emphasis in original).
106. Id. at 901.
107. Id.
108. 875 P.2d 1036 (Mont. 1994).
109. Id. at 1038.
the park grounds. Lilburn then approached one of the hunters, placing himself directly in the line of fire on two occasions. He was charged and convicted of violating section 87-3-142(3) of the Montana Hunter Harassment Law, which provided: “No person may disturb an individual engaged in the lawful taking of a wild animal with intent to dissuade the individual or otherwise prevent the taking of the animal.”

The issue on appeal concerned the scope of section 87-3-142(3); specifically, whether it encompassed speech along with conduct. Lilburn argued that the provision was both overbroad and content-based in that it criminalized both speech and conduct based solely on the content involved (an anti-hunting message), while it permitted other types of conduct and speech that conveyed a different message. The trial court agreed that the provision was overbroad and found that protected “[c]onduct such as prayer vigils at trailheads, the singing of protest songs or the burning of hunting maps, if done with the intent to dissuade a hunter, would be violations of the statute.” The trial court also concluded that the statute prohibited communication that would dissuade a hunter from hunting, yet permitted communication that served to encourage hunting, even if this latter communication resulted in distracting the hunter. The Montana Supreme Court disagreed.

The supreme court argued that provisions in a statute cannot be read in isolation and should be considered in light of the context in which they are used by the legislature. As a result, even though the statute may encompass verbal utterances as well as physical acts, the content of those utterances is irrelevant; the prohibition does not depend on whether an anti-hunting message is being conveyed. The court downplayed the importance Liburn placed on the word “dissuade,” and explained the statute in terms of the content-neutral versus content-based distinction. Although a statute may have a discriminatory impact, as Liburn contended, it nevertheless would be content-neutral if the objective behind it is aimed neither at advancing nor inhibiting a specific

110. Id.
111. Id.
112. Id. at 1039 (quoting Mont. Code Ann. § 87-3-142(3) (1994)). The statute was amended in 1997. For a discussion of the amendments, see infra Part V.F.
113. Lilburn, 875 P.2d at 1040. Lilburn failed to argue that his own conduct (stepping into the line of fire) was constitutionally protected, nor did he contend that the statute, as applied to him, infringed on his First Amendment right to freedom of speech. Id.
114. Id.
115. Id. at 1041.
116. Id.
117. Id.
118. Id. at 1041-42.
119. Id. at 1042.
HUNTER HARASSMENT

point of view.\textsuperscript{120} The court considered the legislative history and found that Montana was not acting to suppress speech based upon content, but simply to protect both hunters and activists from accidents and violent confrontations that could occur should emotions run high.\textsuperscript{121} Furthermore, by reading “dissuade” in the context of the entire statute, the court found it apparent that the term was intended to refer only to the act of disturbing the hunter while he or she was engaged in a lawful hunt.\textsuperscript{122} The fact that speech or some form of conduct would result in disturbing a hunter was not dependent at all on the content of what was expressed, for “a person could blurt out anything at the moment a hunter is trying to shoot, and this could ‘disturb’ the hunter by distracting him or her, or by scaring the animal away.”\textsuperscript{123} The court concluded its overbreadth analysis by distinguishing Dorman on the basis that the Montana statute did not reach “acts of preparation” but was confined only to the actual moment of hunting itself.\textsuperscript{124}

The second part of the opinion addressed the void-for-vagueness challenge. As in Bagley, the Montana Supreme Court found that a person who had clearly engaged in conduct that a statute, by its terms, proscribes was without standing to assert a claim for void-for-vagueness.\textsuperscript{125} When Lilburn stood in the hunter’s line of fire, the court noted, he clearly disturbed the hunter, and his intent was indisputably to prevent the taking of the animal.\textsuperscript{126}

G. \textit{Idaho}

The Idaho Supreme Court also decided the constitutionality of its hunter harassment law in 1994, in \textit{State v. Casey}.\textsuperscript{127} Claire Casey walked onto state land adjacent to the ranch on which she was working to speak with some hunters who were hunting chukars.\textsuperscript{128} Ms. Casey was concerned about the chukars, but the hunters paid her no attention.\textsuperscript{129} She then waved her arms and began to scream in an effort to scare the chukars away, cursed at the hunters, and stood in front of them so that they were unable to shoot.\textsuperscript{130} She was subsequently charged with violating the provision in the Idaho hunter harassment statute that pro-

\begin{flushleft}
\textsuperscript{120.} \textit{Id.} \\
\textsuperscript{121.} \textit{Id.} \\
\textsuperscript{122.} \textit{Id.} at 1043. \\
\textsuperscript{123.} \textit{Id.} at 1042-43. \\
\textsuperscript{124.} \textit{Id.} at 1043. \\
\textsuperscript{125.} \textit{Id.} at 1044. \\
\textsuperscript{126.} \textit{Id.} \\
\textsuperscript{127.} 876 P.2d 138 (Idaho 1994). \\
\textsuperscript{128.} \textit{Id.} at 139. \\
\textsuperscript{129.} \textit{Id.} \\
\textsuperscript{130.} \textit{Id.}
\end{flushleft}
hibited a person from "enter[ing] or remain[ing] in any area where any animal may be taken with the intent to interfere with the lawful taking or pursuit of wildlife." She appealed to the Idaho Supreme Court, which overturned her conviction.

The supreme court initially concluded that the provision at issue was not a regulation of protected speech, as Casey had argued, because facially, the provision implicated only conduct that served as an interference with the taking of wildlife without in any way singling out conduct that was necessarily expressive. The court, however, did agree with Casey that the provision was unconstitutionally overbroad because it did not specifically limit its reach to physical interference, nor did it exclude protected forms of speech and include only unprotected speech such as fighting words or obscenity. The court noted that the potential "chilling effect" on free speech would be great: "[S]omeone might enter an area where wildlife could be legally hunted and do nothing more than announce his opposition to hunting and his intention to interfere with such taking. Such a person would be in violation of subsection (1)(c) and yet his actions constitute protected free speech." The court, therefore, held that section 36-1510(1)(c) was unconstitutional.

In dissent, Justice Silak argued that the Supreme Court of the United States has advised that the overbreadth doctrine is "strong medicine" and should be used sparingly. He would have affixed a limiting construction to the subsection by adding the word "physically" so the statute would read: "enter[ing] or remain[ing] in any area where any animal may be taken with the intent to [physically] interfere with the lawful taking or pursuit of wildlife." He concluded that Casey's conviction should have been upheld under the limiting construction because she was not engaged in any form of constitutionally protected expression when she waved her arms around and screamed at the chukars.

131. Id. (quoting Idaho Code § 36-1510(1)(c) (Michie 1994)).
132. Id. at 139, 141.
133. Id. at 140.
134. Id. The court cited to City of Houston v. Hill, 482 U.S. 451 (1987), for the proposition that "acts such as interference and harassment encompass verbal as well as physical conduct unless otherwise defined." Id.
135. Casey, 876 P.2d at 140-41.
136. The court was careful to point out that its decision invalidated only that particular subsection and was not intended to apply to the remaining provisions of the statute. Id. at 141. The court also stated that because it had already invalidated the provision on overbreadth grounds, it would not consider the void-for-vagueness argument that the defendant had raised.
137. Id. (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).
138. Id. at 142.
139. Id.
HUNTER HARASSMENT

H. Ohio

The next state to consider a hunter harassment law was Ohio in 1996. In *State v. Mueller*, 140 two property owners gave several hunters permission to hunt deer on their private property. 141 Arthella Mueller, to whom the adjoining property owner had given permission to patrol his own land and keep the hunters away, began to wave her arms and yell at the deer when they crossed on to the land she was patrolling, in an effort to prevent them from going back to the adjoining property. 142 Neither the hunters nor Ms. Mueller actually crossed the property line. 143 Nevertheless, Ms. Mueller was convicted of violating the provision of the Ohio hunter harassment statute which provided, in pertinent part: “No person shall purposely prevent or attempt to prevent any person from hunting . . . a wild animal as authorized by this chapter by any of the following means: . . . (2) Creating a visual, aural, olfactory, or physical stimulus intended to affect the behavior of the wild animal being hunted . . . ” 144 Mueller argued that section 1533.03(C) of the statute was dispositive of the case and would not render her liable under section 1533.03(A)(2). 145 Section 1533.03(C) stated: “This section applies only to acts committed on lands or waters upon which hunting, trapping, or fishing activity may lawfully occur.” 146

The trial court disagreed and found that her actions carried over to the adjacent property and brought her within the scope of section 1533.03(A)(2) much like a noisy stereo would subject its owner to a disorderly conduct or nuisance charge if brought by a neighbor. 147 The appellate court, however, reversed and stated that to ignore the express language of section 1533.03(C) would be to defy the legislature’s intent. 148 Moreover, the owner of the land on which Mueller was present expressly forbade any hunting activity to take place thereon. As a result, hunting could therefore not “lawfully occur” on that land within the meaning of section 1533.03(C). 149 As Mueller’s actions were committed on land where hunting could not take place, the hunter harassment statute had not been violated, and the conviction was therefore overturned. 150

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141. *Id.* at 984.
142. *Id.*
143. *Id.*
144. *Id.* at 984-85 (quoting *Ohio Rev. Code § 1533.03(A)(2)* (1996)).
145. *Id.* at 984.
146. *Id.* at 985 (quoting *Ohio Rev. Code § 1533.03(C)* (1996)).
148. *Id.*
149. *Id.*
150. *Id.* One year after *Mueller*, the Ohio legislature enacted an additional statute to
I. Minnesota

In State v. Miner,\textsuperscript{151} Minnesota became the next state to adjudicate a constitutional challenge to a hunter harassment statute. The defendants were part of a group of protesters who visited a state park hosting a bow hunt to control the deer population.\textsuperscript{152} The group, several members of which were dressed in bright orange colors, approached a few of the hunters and tried to convince them not to kill the deer.\textsuperscript{153} Some of them succeeded in scaring the deer away and others were able to steal some of the scent bombs set by the hunters to attract the deer.\textsuperscript{154} The defendants were arrested for refusing to leave the park and later charged with violating Minnesota’s hunter harassment statute.\textsuperscript{155} Section 97A.037(1) provides: “A person who has the intent to prevent, disrupt, or dissuade the taking of a wild animal or enjoyment of the out-of-doors may not disturb or interfere with another person who is lawfully taking a wild animal or preparing to take a wild animal.”\textsuperscript{156}

The court first observed that the use of the word “dissuade” in section 97A.037(1) rendered that section content-based and therefore presumptively invalid.\textsuperscript{157} The court considered “dissuade” in light of its dictionary definition and concluded that the word involved some form of argument, advice, appeal, or reasoning designed to deter a hunter from taking a wild animal.\textsuperscript{158} In other words, an intent to dissuade a hunter was akin to an intent to convey a specific message, and was therefore an impermissible content-based regulation.\textsuperscript{159}

Although Minnesota argued that it had an interest in protecting a hunter’s right to lawfully take wild animals, it was unable to show why a provision that prohibits only speech delivered with intent to dissuade the taking of the wild animal was necessary to serve that interest.\textsuperscript{160} The court therefore excised the “dissuade” element from section 97A.037(1) to supplement the preexisting hunter harassment law. The new statute addressed the same facts as in Mueller, but proclaimed a much different result. It is now illegal in Ohio to create noise or loud sounds that are aimed to distract wildlife, even if the perpetrator is not making the noise or disruptive sounds on the same property where the hunt is taking place. \textit{See} \textbf{Ohio Rev. Code Ann. § 1533.03.1} (Anderson Supp. 2001).

\textsuperscript{151} 556 N.W.2d 578 (Minn. Ct. App. 1996).
\textsuperscript{152} Id. at 580.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 580-81.
\textsuperscript{155} Id. at 581 (referring to \textbf{Minn. Stat. § 97A.037} (1994)).
\textsuperscript{156} Id. (quoting \textbf{Minn. Stat. 97A.037(1)} (1994)). This section defines “preparing to take a wild animal” as including “travel, camping, and other acts that occur on land or water where the affected person has the right or privilege to take lawfully a wild animal.” Id.
\textsuperscript{157} Miner, 556 N.W.2d at 582.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 583.
but left the remaining provisions intact.\textsuperscript{161} The court justified the new version of the statute, in response to the defendants’ second argument that the section was not a valid time, place, or circumstance regulation, by stating that the modified version applied only to conduct without any connection to speech.\textsuperscript{162}

The court then distinguished \textit{Dorman} by arguing that the “acts in preparation” provision found there to be unconstitutional was virtually limitless, whereas the similar provision in the Minnesota statute not only defines “acts” as, inter alia, travel and camping, but also confines those acts to land or water areas where a person has the lawful right to hunt.\textsuperscript{163} The court rejected the defendants’ argument that the term “disturb” was too vague, as the term was easily understood and was further limited and applied only when the specific intent of “prevent[ing] or disrupt[ing] the taking of a wild animal” was first met.\textsuperscript{164}

Finally, the appellate court addressed the defendants’ contention that section 97A.037(1) was unconstitutional as applied to the facts of the case because the defendants were engaging in protected speech when they approached the hunters and asked them not to kill the deer.\textsuperscript{165} The court responded by saying that their right “to express their opposition to the taking of wild animals does not include the right to do so in a manner that disturbs or interferes with another’s right to lawfully take wild animals.”\textsuperscript{166} As a result, the convictions were upheld.\textsuperscript{167}

In the companion case of \textit{State v. Wicklund},\textsuperscript{168} Minnesota again upheld the constitutionality of its hunter harassment law.\textsuperscript{169} The facts in this case were identical to those in \textit{Miner}.\textsuperscript{170} The defendant was among a group of protestors in a state park who conversed with a hunter and remained camped out beneath his deer stand.\textsuperscript{171} Following his failure to obey an order to disperse, the defendant was arrested.\textsuperscript{172} The court upheld his conviction, finding that he acted with intent to prevent or disrupt the taking of a wild animal or the hunter’s enjoyment of the outdoors, and that as a result, he disturbed a hunter who was lawfully

\textsuperscript{161.} Id.
\textsuperscript{162.} Id. at 584.
\textsuperscript{163.} Id.
\textsuperscript{164.} Id. at 584-85.
\textsuperscript{165.} Id. at 585.
\textsuperscript{166.} Id. at 586.
\textsuperscript{167.} Id.
\textsuperscript{169.} Id. at *5.
\textsuperscript{170.} Id. at *4.
\textsuperscript{171.} Id. at *2-3.
\textsuperscript{172.} Id. at *3.
taking a wild animal.\textsuperscript{173}

J. Illinois

In 1997, and again in 1998, Illinois had an opportunity to decide the fate of its hunter harassment statute. The appellate court's decision in \textit{Woodstock Hunt Club v. Hindi}\textsuperscript{174} and the Illinois Supreme Court's decision in \textit{State v. Sanders},\textsuperscript{175} however, produced different results. In \textit{Hindi}, the defendants used sirens, bullhorns, megaphones, and an engine-powered glider to scare geese away from the lands of the plaintiffs' hunting club.\textsuperscript{176} They were charged with violating section 125/2 of the hunter interference law which prohibits a person from: (a) interfering with the "lawful taking of a wild animal" if the person acted with intent to prevent the taking; and from (b) disturbing or engaging in any activity that disturbs a wild animal if done with intent to prevent the taking of the animal.\textsuperscript{177} Section 125/2(c) also prohibited an individual from disturbing another who was taking or who was in the process of taking a wild animal "with intent to dissuade or otherwise prevent the taking."\textsuperscript{178}

The appellate court first determined that subsections (a), (b), and (c) involved both communicative and noncommunicative activity, as they failed to distinguish between verbal and physical conduct.\textsuperscript{179} The court then held that the three provisions were a content-neutral, not a content-based, regulation.\textsuperscript{180} The court stated that "[a] person may violate the Act by shouting 'Fire!,' by waving a placard proclaiming 'Hunting is good!' in front of a hunter, or by playing the 1812 Overture on a stereo system" if done with an intent to dissuade or prevent a hunter from taking the wild animals.\textsuperscript{181} The court observed that the statute did not single out any particular point of view or opinion, and thus was not concerned with the content of the message.\textsuperscript{182} The court rejected the

\begin{itemize}
\item \textsuperscript{173} \textit{Id.} at *5. The court acknowledged that \textit{Miner} was dispositive of this case, as both cases involved the same constitutional issues. \textit{Id.} at *4. The court noted that although \textit{Miner} eliminated the "dissuade" element from the specific intent portion of the statute, the defendant here was nevertheless liable, as he had actually "prevented" or "disrupted" the taking of an animal, which were the two specific intent terms that \textit{Miner} left intact. See \textit{Id.} at *5. Minnesota subsequently amended section 97A.037 in 1998. See \textit{MINN. STAT. ANN.} § 97A.037 (West 1997 & Supp. 2001). Section 97A.037(1) is for all intents and purposes identical to the version analyzed in \textit{Miner} and \textit{Wicklund} except for the fact that the "dissuade" element has been removed.
\item \textsuperscript{174} 684 N.E.2d 1089 (Ill. App. Ct, 1997).
\item \textsuperscript{175} 696 N.E.2d 1144 (III. 1998).
\item \textsuperscript{176} \textit{Hindi}, 684 N.E.2d at 1091-92.
\item \textsuperscript{177} 720 I11. COMP. STAT. ANN. 125/2(a)(b) (West 1996).
\item \textsuperscript{178} \textit{Id.} 125/2(c).
\item \textsuperscript{179} \textit{Hindi}, 684 N.E.2d at 1093.
\item \textsuperscript{180} \textit{Id.}
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} \textit{Id.}
\end{itemize}
contention that the “dissuade” element of the specific intent portion of the section brought the statute into a more communicative realm and found instead that “[a]ny expression suppressed by the Act is out of concern for its intentionally disruptive nature, not for its likely communicative impact.”

In Sanders, the defendant yelled at a hunter and took her photograph as the hunter was about to shoot a deer on the grounds of a deer relocation center. The court first determined that the “dissuade” element in section 125/2(c) was impermissibly content-based, not content-neutral. In so doing, the court looked to the decision reached in Miner and the etymological underpinnings of the term “dissuade,” as well as to Lilburn and Hindi where the courts read the term in light of the larger scheme imposed by the statute, and found that the term was intended to prohibit the act of interfering, without any reference to the content of the particular message. The Illinois Supreme Court found that had the state intended to apply the “dissuade” element without regard to the message evoked by the conduct, it could have limited the specific intent portion of the subsection to read “intent to prevent,” as section 125/2(a) did. The court entertained the argument that a content-based provision, such as section 125/2(c), could still avoid unconstitutionality if the state offered a compelling interest in passing it. The court, however, was not convinced that such an interest existed, finding, as did the court in Miner, that the legislature’s decision to protect hunting by focusing on the expression of a point of view, as opposed to a general prohibition on intentional and disruptive behavior, was difficult to justify. In conclusion, the court found section 125/2(c) unconstitutional, and therefore excised it from the Hunter Inference Act, thereby rendering moot a discussion of vagueness and overbreadth.

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183. Id.
185. Sanders, 696 N.E.2d at 1148.
186. Id. at 1147-48.
187. Id. at 1148.
188. Id. at 1148-49.
189. Id. at 1149. The court acknowledged that Illinois had a legitimate and reasonable interest in wanting to permit hunting within its borders, but noted that penalizing the expression of ideas, even those that were contrary to hunting, did not amount to a compelling state interest. See id. The court did not go into detail, however, as to why no compelling interest existed.
190. Id. In 1997, Illinois amended the Hunter Interference Act. Subsection (a) now reads: “Willfully obstructs or interferes with the lawful taking of wild animals by another person with the specific intent to prevent that lawful taking.” See 720 I.L.L. COMP. STAT. ANN. 125/2 (West Supp. 2000) in its current version. The amended statute also deleted subsections (b) and (c) in their entirety. As a new element, the statute now includes a series of acts that constitute specific violations of subsection (a). These directly parallel the specific acts enumerated in the revised version of section 53a-183a, Connecticut General Statutes, as amended after Dorman and upheld in Ball.
In dissent, Justice Harrison argued that the majority should have applied the communicative analysis to each provision of the statute, and, in so doing, would thereby have found that the entire statute should have been declared unconstitutional.\(^\text{191}\) On the other hand, Justice Bilandic, also in dissent, argued that section 125/2(c) did not implicate the content of the message being conveyed; rather, it merely prohibited the act of disrupting or disturbing a hunter while he or she is engaged in hunting.\(^\text{192}\)

K. Texas Revisited

A year after Sanders, Texas had another opportunity to consider its own hunter harassment statute, in Richardson v. State.\(^\text{193}\) The defendant apparently rode up and down the perimeter of his land adjoining a ranch that operated a deer lease and fired his gun into the air in an effort to scare away deer from some hunters.\(^\text{194}\) He was charged with violating section 62.0125(c) of the Sportsman’s Rights Act, which provided: “No person may intentionally interfere with another person lawfully engaged in the process of hunting or catching wildlife.”\(^\text{195}\) The defendant argued that the state was required to prove not only the elements of section 62.0125(c), but also those of section 62.0125(d), which provided: “No person may intentionally harass, drive, or disturb any wildlife for the purpose of disrupting a person lawfully engaged in the process of hunting or catching wildlife.”\(^\text{196}\) The court, however, rejected this argument, finding that the state charged the defendant with a violation of section 62.0125(c) and that the jury was properly instructed as to the elements of that subsection.\(^\text{197}\)

L. New Jersey

The most recent hunter harassment decision was that reached by an appellate court in New Jersey in the 1999 case of Binkowski v. State.\(^\text{198}\) The plaintiffs were a group of individuals who alleged that they were interested in the protection of animals.\(^\text{199}\) They brought an action seeking a declaratory judgment that the New Jersey hunter harassment statute was unconstitutional, and an injunction preventing state officials

\(^{191}\) Sanders, 696 N.E.2d at 1153.
\(^{192}\) Id.
\(^{194}\) Id. at *2-3.
\(^{195}\) Id. at *4 (referring to TEX. PARKS & WILD. CODE ANN. § 62.0125(c) (Vernon 1991)).
\(^{196}\) Id. at *5 (referring to TEX. PARKS & WILD. CODE ANN. § 62.0125(d) (Vernon 1991)).
\(^{197}\) Id. at *6.
\(^{199}\) Id. at 67.
from enforcing its provisions. The complaint focused on two subsections of the statute: section 23:7A(2)(a), which provided: "No person may, for the purpose of hindering or preventing the lawful taking of wildlife, block, obstruct, or impede, or attempt to block, obstruct, or impede, a person lawfully taking wildlife;" and section 23:7A(2)(g), which prohibited, for purposes of hindering or preventing the taking of wildlife, a person from making or attempting to make "loud noises or gestures, set out or attempt to set out animal baits, scents, or lures or human scent, use any other natural or artificial visual, aural, olfactory, or physical stimuli . . . to disturb [or] alarm the behavior of wildlife, or annoy a person lawfully taking wildlife."201

The appellate court first observed that the statute, by its terms, clearly regulated conduct, not speech.202 Although the First Amendment protects conduct which is sufficiently mixed with elements of communication and which demonstrates an intent to convey a specific message (along with the likelihood that the message would be understood by those witnessing it), the court ruled that New Jersey's hunter harassment statute regulated conduct that was not sufficiently expressive to warrant constitutional protection.203 In other words, the statute prohibited conduct that was not "integral to or commonly associated with expression," such as picketing or handbilling.204 The court noted that virtually all of the United States Supreme Court cases that addressed issues of "expressive conduct" that implicated First Amendment challenges were "as applied" cases and not facial challenges to statutory terms.205

The court rejected the plaintiffs' overbreadth argument on grounds that it failed to allege a "real and substantial" threat to constitutional liberties, as the plaintiffs did not show how the statute might infringe on an individual's freedom of speech.206 Furthermore, the court construed the statute to apply only to harassment or interference that takes place in areas where wildlife may be found, or in the immediate proximity thereto, and only if effected with intent to interfere with the lawful taking of wildlife.207 Protestors would still be able to get their message across in the areas outside the immediate proximity of the hunting grounds.208

200. Id. at 67-68.
201. Id. at 68 (referring to N.J. Stat. Ann. §§ 23:7A(2) (West 1993)).
202. Id. at 69.
203. Id. at 70.
204. Id.
205. Id. at 71.
206. Id. at 73.
207. Id.
208. Id. at 74.
The court next concluded that sections 23:7A(2)(a) and (g) were not vague. The terms used in the sections were not so unusual or extraordinary that a person of average intelligence would need to consult a dictionary in order to understand them. The court therefore concluded that the statute was constitutional.

IV. SECTION 372.705, Florida Statutes

In its current form, Florida’s version of the hunter harassment statute is similar in certain respects to those of the other states outlined in Part III of this Comment. As is the apparent custom across the nation, violation of Florida’s statute also subjects the offender to a misdemeanor charge. Following is Florida’s current hunter harassment law:

372.705 Harassment of hunters, trappers, or fishers.
(1) A person may not intentionally, within a publicly or privately owned wildlife management or fish management area or on any state-owned water body:
(a) Interfere with or attempt to prevent the lawful taking of fish, game, or nongame animals by another.
(b) Attempt to disturb fish, game, or nongame animals or attempt to affect their behavior with the intent to prevent their lawful taking by another.

Section 372.705, Florida Statutes, provides for the protection of fishermen as well as hunters, whereas some states only make reference to the latter group. As can be seen, the terms of the statute are similar to the terms of some of the statutes mentioned throughout Part III of this Comment, but differ somewhat in form from some of the others.

V. ANALYSIS

As mentioned at the outset of this Comment, Florida’s hunter harassment statute has not been challenged in the appellate courts. As a result, unlike the states highlighted in Part III, Florida does not have the benefit of case law to interpret its statute. In anticipation of such a case eventually developing in Florida, this part of the Comment provides an

209. Id. at 76.
210. Id. at 77. The court did not consider the free exercise of religion claim that one of the plaintiffs had advanced, as she had failed to support it by competent evidence of her religious beliefs.
213. See id. As an example, compare Ohio Rev. Code Ann. § 1533.03 (entitling the statute “Harassment of hunters, trappers and fishermen,” thereby making apparent the fact that hunting as well as fishing is a protected activity), with Conn. Gen. Stat. Ann. § 53a-183a (making no separate provision in the title for fishing, but placing it under the general heading of “wildlife”).
analysis of section 372.705, *Florida Statutes*, and predicts how a court in the state might approach a constitutional challenge to the statute. Florida’s law will be analyzed herein under each of the principles developed in the precedent hunter harassment cases decided in the other ten states. It is important to emphasize, however, that this analysis is not intended as a protest instruction manual and readers are not encouraged to rely entirely on any of the suggestions mentioned herein. One must remember that a court of law in Florida is the ultimate interpreter of the state’s hunter harassment law, and it might maintain a different point of view from those reached in the other ten states.

A. *Section 372.705 Under the New Hampshire Rule*214

Upon first glance, the New Hampshire and Florida statutes seem to be quite similar. Both prohibit interference with lawfully taking wildlife, and make it a violation to disturb or scare away wildlife so that hunters are unable to shoot. There is, however, one interesting difference between the two statutes. In section 372.705(1)(a) of the Florida version, all that is outlawed is the interference or the attempt to prevent the taking of wildlife, while in the New Hampshire equivalent, one must not only interfere with the taking of wildlife, but must also act with intent to prevent the taking.215 Thus, a specific intent element is present in New Hampshire, but not in Florida. Note, however, that in section 372.705(1)(b) of the Florida statute, a person must disturb a wild animal with intent to prevent its taking, and thus the section involves a specific intent.216 In 1986, the New Hampshire Supreme Court struck down the state’s proposed version of the hunter harassment law, which contained a specific intent requirement.217 One might wonder whether Florida’s section 372.705(1)(a) would survive similar judicial scrutiny, given the fact that it does not even have a specific intent element.

The New Hampshire court was also displeased with the provision that outlawed the disturbance of an animal’s behavior, most notably because it contained no limiting construction or area confinements, and

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214. The analysis here will use the New Hampshire statute in the form in which it appeared before the justices of the state supreme court in 1986. It should be noted, however, that the state has since revised the statute. The new version prohibits a person from “purposely obstruct[ing] or impedi[ng] the participation of any individual in the lawful activity of hunting, fishing or trapping while that individual is in a designated hunting area on public lands.” N.H. REV. STAT. ANN. § 207:57(I) (2000). The statute also provides: “No person shall enter or remain in a designated hunting area on any state lands with the intent to purposely obstruct or impede the participation of any individual in the lawful activity of hunting, fishing or trapping.” *Id.*


could therefore have theoretically subjected to liability a landowner who posted "no hunting" signs or invited animals on to his own property. Florida's statute addresses this concern directly on point by requiring that the disruption or disturbance occur within the borders of a wildlife management area or state-owned body of water. Thus, this provision would most likely survive the New Hampshire rule's overbreadth and vagueness discussion.

The New Hampshire court also struck down the provision that made it a crime to interfere with a hunter with intent to dissuade her from hunting, as this prohibition effectively discriminated among viewpoints and criminalized only those ideas that were expressed with an anti-hunting sentiment. Florida's statute does not contain such a provision. The New Hampshire rule would permit an activist to try to dissuade a hunter, and thus an individual in Florida might consider limiting his protest tactics to those involving argumentation and persuasion, as they would be insulated under the New Hampshire rule.

The court in New Hampshire was also concerned that "interfere," as it was used within the meaning of the statute, was not necessarily limited to physical acts, but might encompass speech or expression. Florida's law does not distinguish between "speech" and "physical conduct" in its use of the term "interfere," and thus under the New Hampshire rule, section 372.705(1)(a) would probably be struck down since seemingly innocent speech is accorded the same treatment as both inflammatory comments and outward, physical activity.

B. Section 372.705 Under the Connecticut Rule

The Dorman rule interprets the term "interfere" as involving physical as well as verbal expression in the absence of any indication by the legislature to the contrary. The Florida statute does not draw a distinction between acts that would constitute an "interference," and some form of verbal communication that would serve the same function. As a result, the Dorman court would consider Florida's section 372.705(1)(a) as a regulation of pure speech, as "interference" would be directly linked not only to conduct, which would be a permissible regulation, but also to speech, which would be targeted only for its anti-hunting message. The only way for Florida to save this subsection from unconstitutionality, at least under the Dorman rule, would be to demon-

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219. Dorman also invalidated the Connecticut provision that prohibited the "harassment" of hunters with intent to prevent the taking of wildlife. Dorman v. Satti, 862 F.2d 432, 437 (2d Cir. 1998). As Florida's statute deals only with "interference," however, this Comment will not address the "harassment" subsection in the original Connecticut statute.
strate a compelling state interest in seeking to protect hunters, fishers, and trappers from verbal interference. It is important to emphasize that *Dorman* did not hold that use of a term like "interference," which can be interpreted not only to encompass speech, but also to regulate the content of that speech, automatically translates into the absence of a compelling state interest to justify the term's import. On the contrary, *Dorman* merely held that Connecticut did not advance such an interest at trial. Florida might consider the advice given by the Second Circuit and express a compelling interest should a trial on the merits of a constitutional challenge to section 372.705 surface in the future.220

Florida might also survive a challenge to section 372.705(1)(a) on an additional ground. The *Dorman* rule also takes into account the fact that the term "interfere" is not limited by any time, place, or circumstance requirement. As such, in Connecticut, an activist would have been subject to liability if he or she were involved in a scuffle with a hunter while standing in line at the supermarket. In Florida, however, a similar incident would not subject the activist to liability under section 372.705. The statute applies only to activity taking place on the grounds of a wildlife management or state-owned body of water.221 Thus, Florida directly anticipated the concern expressed by the Second Circuit (i.e., the potentially far-reaching and practically limitless geographical scope of the hunter harassment prohibition) and limited the locations in which conduct can be prohibited.

An argument may be raised that the Second Circuit developed the "controlled scope" rule in *Dorman* only for provisions in statutes that deal with "acts in preparation." Such an argument is not without merit. The vast majority of the *Dorman* opinion does, in fact, deal with the "acts in preparation" term in the statute. Nevertheless, the spirit of the opinion suggests that the Second Circuit would most likely have found the statute constitutional if it had been drafted in a manner similar to that of Florida's hunter harassment law. Under Florida law, interference can be prohibited by the state as long as it is narrowly tailored and confined to a legitimate location, provided that innocent speech is not the subject of regulation.

The *Ball* interpretation of the Connecticut statute may be something

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220. Specific interests tend to be tailored to each state and fit that particular state's needs. Certain interests, however, may exist across the board. For example, public safety is a major concern. See Roegge, supra note 16, at 460. The potential for accidental death or injury on the hunting field is great for both activists and hunters alike. Another interest that states generally seem to possess is conservation. Hunters, in effect, keep the population of various species of animals in check and help minimize the spread of disease and other ecological threats. Furthermore, fees and licenses collected from the hunters contribute to state revenue. *Id.*

for Florida to consider. The amended statute in Connecticut added such terms as “obstruct” and “at the location [where the hunt is taking place]” to cure the two major concerns stemming from the Dorman rule: (1) insufficient emphasis on physical acts; and (2) unlimited scope of enforcement. The new statute went so far as to enumerate seven specific events that would subject a perpetrator to liability. It may come as no surprise that these events are all physical acts: driving away wildlife; blocking a hunter; using artificial or natural stimuli to scare away game; constructing barriers; placing oneself in the line of fire; affecting the condition of property; and entering lands with intent to engage in any of these events. The Ball rule, however, does not treat these events as clear-cut in terms of “physicality” as Connecticut would have intended. Ball advises that certain types of physical acts, such as picketing, dancing, and wearing armbands, though traditionally viewed as acts in and of themselves, do, in fact, implicate communicative elements. Furthermore, “driving away wildlife” could always be accomplished verbally, as well as physically (perhaps by screaming at the animal). Thus, the curative intent of the enumerated events was not accomplished in the way in which the legislature envisioned.

The Ball rule, however, as it applied to its facts, found that the policy reasons behind the amended version of the statute were not meant to discriminate among the expressive content of the acts themselves. Rather, the policy indicated that it was not so much the underlying message being conveyed as it was the physical act of disruption itself that eventually ensued. The Ball rule would apply evenhandedly to an animal rights' activist sounding a siren or other noisemaker just as it would to a hunter setting scent bombs to lure game away from other hunters. Obviously, the message conveyed by the two individuals would be strikingly different, but for purposes of liability under the Connecticut statute, the underlying content of the message is irrelevant.

The activists in Ball followed the hunter on to the lands of the state park and formed a semi-circle around him. The court suggested that this type of activity was not what has traditionally been labeled as an “expressive activity” (i.e., picketing, certain kinds of dancing, etc.) meriting protection of free speech under the First Amendment. The Ball court hinted that had the activists engaged in an activity like picketing, the analysis would have stopped there, and the statute as applied to them would have been unconstitutional. The Ball rule, therefore, suggests a possible way in which animal rights' activists may escape liability under a hunter harassment law. The activists must engage in an activity that

has been traditionally imbued with elements of free speech and must not violate any other provision of a hunter harassment statute that is otherwise constitutional.

Under the Florida statute, as the Dorman rule would suggest, the term "interfere" might be problematic because it does not distinguish between verbal communication and physical acts. Thus, it might be constitutionally infirm. Activists might be able to rely on the Ball rule and engage in an activity like picketing, as the "interfere" prohibition is not otherwise constitutional in and of itself. The activist would still be violating the Florida statute but could not be constitutionally prosecuted under it if a court in Florida were to follow the rule established in Ball.

The Ball rule leaves one issue unresolved. A content-neutral regulation must still survive a "state interest" analysis. On remand in Ball, the issue turned on whether the land on which the hunting took place was a traditional public or nonpublic forum. The court there ultimately concluded that the state park at issue was a nonpublic forum. A court in Florida would likely arrive at the same conclusion. Most would consider hunting and fishing preserves to be nonpublic areas. They are not the type of setting that has been traditionally associated with the free exchange of ideas. As a result, the Ball rule would therefore require the Florida legislature to advance a reasonable, as opposed to significant, state interest in passing section 372.705.

C. Section 372.705 Under the Ohio & Texas Rules

The Ohio rule stems from the premise that when one is charged with violating a provision in a hunter harassment statute, the court will not necessarily ignore other provisions in the statute that may provide a defense. The Ohio rule essentially states that one cannot be charged with preventing the taking of wildlife by creating distractions on land A to scare wildlife away, pursuant to one subsection of a hunter harassment law, if another subsection of that same law requires that the act be performed on land B. The rule encompasses the policy that terms of a hunter harassment statute cannot be read in isolation from one another if doing so would effectively thwart the intention behind the statute. Thus,

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224. See supra note 96.
225. See supra note 104. Traditional public fora typically include public streets, sidewalks, and parks. See Durrant, supra note 14, at 530.
226. These states are grouped together for two important reasons. First, the courts in both states did not actually address the constitutionality of their hunter harassment laws per se, but analyzed the provisions and applied them to the facts of the case. See, e.g., State v. Mueller, 681 N.E.2d 983, 985 (Ohio Ct. App. 1996) (Shaw, J., concurring separately) (reserving judgment for another occasion as to whether the Ohio hunter harassment law is constitutional). Second, the courts in both states reached different outcomes on practically the same issue.
according to a literal reading of the Ohio rule, if an activist in Florida were to stand one inch off the property of a wildlife management or state-owned body of water and engage in disturbing and distracting wildlife in violation of section 372.705 (1)(b), such as by sounding an air horn or blowing off firecrackers, she cannot be charged in violation of the hunter harassment statute because she was not technically on the wildlife management or state-owned body of water when engaging in the conduct. While she may be liable for breaking community sound ordinances or other local nuisance laws, Florida could not impose liability under its hunter harassment law in light of the Ohio rule. An observer might wonder, though, whether this was the intent of the Ohio Court of Appeals in fashioning its rule. The plaintiff in Mueller was not engaging in publicly disruptive conduct by waving her arms and trying to prevent the deer from returning to the neighbor’s yard. Nor was she on public property when the incident occurred. Query whether the Ohio court would have been as lenient to the plaintiff had she blown off air horns or created other disturbances while standing at the entrance to a state park on the day of a hunt.

The Texas rule provides a somewhat different approach. The rule states that all an activist need do to incur liability under the hunter harassment statute is to “intentionally interfere with [a hunter] lawfully engaged in the process of hunting or catching wildlife,” while the hunter is on “land or water on which [she] has the right or privilege of hunting or catching that wildlife.” There is no requirement that the activist be on the same land as the hunter while engaging in protest. This suggests that the Texas rule’s interpretation of geographical restriction is more loosely defined than those of the other states. This does not appear to comport with the Dorman rule’s requirement that geographical restrictions be specifically defined.

In Henry, the court applied the Texas rule and left the plaintiff with no opportunity to raise a constitutional challenge. The appellate court decided that the interfering activity did not have to take place on the same land as the hunting itself. This rule would not apply in Florida, as section 372.705 specifically requires the harassing activity to occur on the wildlife management lands or state-owned bodies of water. One might use the Texas rule, however, to stand for the proposition that policy requires the state to step in and prevent harassment or interference of hunters engaged in the lawful act of taking wildlife, whether or

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228. Id. § 62.0125(b)(2).
not the annoyance actually takes place on the same land as the hunting. To counter this argument, an opponent need only raise the Ohio rule to show that such a broad reading of the Florida statute would thwart its basic purpose and stand for a bad policy decision for future cases. If a court in Florida were to follow the decisions from the other jurisdictions, it would view the basic purpose surrounding passage of section 372.705 as consistent with the purposes behind the other state hunter harassment statutes. Most hunter harassment laws are passed with the purpose and intention of reducing, or possibly eliminating, accidental shootings or other forms of violence that occur on hunting lands when protestors and hunters collide. Permitting activists to express their opinions off or near the hunting lands would promote safety and would still provide the activists with an opportunity to make their views known. Therefore, if activists and hunters alike would be protected if protests were to take place off or near hunting lands, the intent of the state legislatures in enacting hunter harassment statutes would be realized. As such, broadening the Texas rule, or following the Ohio rule as amended after Mueller, to encompass protests taking place adjacent to a hunting area would seriously undermine legislative intent. Furthermore, permitting a court to ignore provisions of statutes that serve to exculpate an individual from a crime would amount to a bad policy decision and would disrupt the criminal law system altogether. If statutory provisions are not followed, then it is hard to imagine why a future court could not use this reasoning as support for a decision to ignore an enumerated affirmative defense in a manslaughter statute and find an individual guilty of a crime even if she acted in self-defense.

The other part of the Texas rule, stemming from the Richardson case, applies only when an activist or some other party engages in activity to scare away or disrupt wildlife. The rule requires the state to show only that the person succeeded in interfering with the hunter, not necessarily that the person scared away the wildlife with the intent to prevent its taking, even if the person actually engaged in the latter activity. The burden of proof, particularly that of specific intent, is thereby lessened. Once again, the Ohio rule would command that the court not ignore other relevant portions of the statute and would require the state to prove that the person acted with the specific intent to disrupt the hunter, rather than merely to show a general interference. The second part of the Texas rule would be particularly appealing to a prosecutor in Florida who cannot find evidence that a perpetrator acted with the specific intent to prevent the taking of wildlife under section 372.705(1)(b). The Texas rule would allow the prosecutor to charge the activist with a violation of section 372.705(1)(a), which does not currently have a specific intent mens rea, even if the activist’s activity falls squarely within the conduct
prohibited by section 372.705(1)(b). By so doing, the prosecutor’s burden of proof is diminished, and a conviction is more likely. Of course, the Ohio rule would counsel against this.

D. Section 372.705 Under the Idaho Rule

The Idaho rule stems from a provision in the state’s hunter harassment law that prohibited an individual from “enter[ing] or remain[ing] in any area where any animal may be taken with intent to interfere with the lawful taking or pursuit of wildlife.” By contrast, Florida’s statute does not contain such a provision. Nevertheless, the Idaho provision is similar in form to section 372.705(1)(a) (interfering with or attempting to prevent the lawful taking of wildlife), with the notable exception that the Idaho version introduces a specific intent element. In terms of further similarity, “any area where any animal may be taken” as written in the Idaho statute may be compared to “wildlife management or state-owned water body” in the Florida statute, as the latter area undoubtedly envisions a region where wildlife and other game may be taken. The Idaho rule does not classify “interfere” as a regulation of speech. Instead it seems to concentrate its scope on specific acts and other forms of physical conduct. The rule, however, does consider such a term overbroad insofar as it does not specifically limit its coverage to physical conduct but actually may include some varieties of protected speech.

Applying the Idaho rule to a hypothetical scenario in Florida may serve to illuminate this distinction. Suppose an animal rights’ activist in Tampa visits a state park and begins to express her views that hunting is immoral. She uses such phrases as, “I believe that killing animals for sport is wrong,” and “My views are that you should not take the life of an innocent animal.” Under the Idaho rule, these statements constitute protected forms of free speech pursuant to the First Amendment. They are not inflammatory, nor do they appear to be motivated by malice or ill will. Notice also that the activist does nothing more than reiterate these statements during her stay in the park and does not engage in violence or other disruptive activities. Although she is making the statements “with the intent to interfere with the lawful taking or pursuit of wildlife,” under the Idaho statute, and “[to] interfere with or attempt to prevent the lawful taking of fish, game, or nongame animals by another,” under the Florida version, the Idaho rule nevertheless insulates her from liability. This is supported by the Casey court’s observation that “someone might

233. See id. § 372.705(1); see also Idaho Code § 36-1510(1)(c) (Michie 1994).
enter an area where wildlife could be legally hunted and do nothing more than announce his opposition to hunting and his intention to interfere with such taking. Such a person would be in violation of subsection (1)(c) and yet his actions constitute protected free speech. It is interesting to note that the actions of the hypothetical activist do not reach the level of physical conduct that the defendant in Casey exhibited. In fact, the actions would be far less “dangerous.”

The Casey dissent would have saved the subsection in question by adding a limiting construction (the term “physically”). The Florida legislature should consider amending section 372.705(1)(a) to clarify that the interference must be physical. This would avoid the danger that the current version of section 372.705(1)(a) may implicate protected forms of speech. Before undertaking such an initiative, however, it is important to remember that section 36-1510(1)(c) of the Idaho statute and section 372.705(1)(a) are not identical. Only a creative argument could lead a Florida court to conclude the contrary. The Casey court was quick to point out that it was not addressing the constitutionality of the remaining provisions of the hunter harassment law. One of these provisions currently reads: “No person shall (a) intentionally interfere with the lawful taking of wildlife or lawful predator control by another.” If this provision is constitutional, then it is difficult to imagine how section 372.705(1)(a) of Florida’s statute arguably could be unconstitutional. Notice how both subsections are without specific intent elements. However, section 36-1510(1)(c), the provision invalidated in Casey, did have a specific intent requirement (i.e., that the person enter the lands “with the intent to interfere with the lawful taking...”). The argument can therefore be made that the Idaho rule only accounts for protected free speech when the speaker possesses the necessary mens rea to “interfere” with the taking of wildlife. The Casey court was concerned that section 36-1510(1)(c) of the Idaho statute could be applied to penalize a person for entering wildlife lands merely to say, “I am against hunting.” The Idaho rule permits interference in the form of verbal communication provided that the activist’s intent is only to announce her opposition to hunting and to confine her protest to speech.

234. Casey, 876 P.2d at 140-41.
235. The dissenting judge in Casey found that both waving one’s arms around to scare off animals and standing in front of hunters as they are about to shoot are not constitutionally permissible activities. See id. at 142. One might wonder whether he would have changed his mind had Ms. Casey acted like the hypothetical activist in Florida, and limited her “interference” to nothing more than statements of opinion or points of view.
236. Id. at 142.
237. Id. at 141.
238. Id. at 139 (quoting Idaho Code § 36-1510(1)(a) (Michie 1994)).
The rule would not insulate an activist from physically acting on her own speech, and engaging in other activity that serves to physically disrupt a hunter while he is in the process of hunting. The Idaho rule would protect an activist in Florida if he were to enter the wildlife or fish management area with the intent only to verbally express his opposition to hunting, without acts of physical disruption, such as sounding a siren or standing in the line of fire.

E. Section 372.705 Under the Minnesota Rule

The Minnesota rule analyzes the provision of the hunter harassment statute at issue in the Miner case that read: “A person who has the intent to prevent, disrupt, or dissuade the taking of a wild animal or enjoyment of the out-of-doors may not disturb or interfere with another person who is lawfully taking a wild animal or preparing to take a wild animal.”\(^{240}\) The Miner court determined that the use of the word “dissuade” implied some form of argumentation or enlightened discourse, and was thus indisputably speech.\(^{241}\) The rule thus carves out an exception for “dissuasion” language. The court excised the term “dissuade,” leaving intact the remainder of the provision, including the other two specific intent terms that the state would have to prove: “prevent” or “disrupt.”\(^{242}\) The rule considered only the term “dissuade” as implicating speech. Thus the remaining two terms, “prevent” and “disrupt,” must not have dealt with speech, but only conduct or other physical activity. The Miner court also pointed out that the term “disturb” was not ambiguous, but clearly understood in everyday usage, and was only triggered when a person first possessed the specific intent of “preventing” or “disrupting” the lawful act of taking wildlife.\(^{243}\)

The Minnesota rule is applicable to a constitutional analysis of Florida’s hunter harassment statute for two reasons. First, as the term “dissuade” implicates speech and therefore falls within the ambit of protection of the First Amendment, an activist in Florida seeking to avoid application of section 372.705 (1)(a) may consider focusing the brunt of her protest in the form of philosophical arguments and Socratic questions geared at “dissuading,” not “preventing” or “disrupting,” a hunter from taking wildlife. If the Florida activist insists on using visual aids, such as stereos, firecrackers, or smoke bombs, to assist in getting her message across, the Minnesota rule would caution against use of any-

\(^{241}\) Id. at 582.
\(^{242}\) Id. at 583.
\(^{243}\) Id. at 584-85.
thing that is not, at its foundation, speech. For extra protection, the activist should combine both the Connecticut and Minnesota rules and carry picket signs displaying dissuasion messages or perform dances that have as their core a dissuasion theme.

The second way the Minnesota rule applies to section 372.705 deals with subsection (1)(a). Notice again that this subsection does not contain a specific intent requirement as did the statutory provision at issue in Miner. The Miner court pointed out that terms such as “disturb” and “interfere” are not ambiguous or void for vagueness because, as the Minnesota rule indicates, the terms apply only when a person first possesses the requisite specific intent. In Minnesota, such intent is in the form of “preventing” or “disrupting” the taking of a wild animal. As section 372.705(1)(a) of the Florida version does not have a specific intent requirement, the argument can be made that the Minnesota rule would not insulate the subsection from a void-for-vagueness challenge. Though a term like “interfere” may have an everyday understanding, it is not susceptible to a limiting construction, nor is it specifically modified in a way that a specific intent element would accomplish. The Florida legislature may consider amending the subsection accordingly.

F. Section 372.705 Under the Montana Rule

The Montana rule also deals, almost in its entirety, with another specific intent “dissuasion” provision. The 1994 version of the statute provided that “a person may not disturb an individual engaged in the lawful taking of a wild animal with intent to dissuade the individual or otherwise prevent the taking of the animal.” The Lilburn court reviewed the legislative history and found that the “dissuasion” provision did not penalize speech or other forms of verbal communication, but the court limited the statute’s reach to conduct and other tangible acts that served to disturb the hunter while he or she was in the process of hunting. Thus, the Montana rule seems to be in stark contrast to the Minnesota rule. It is debatable, however, how effective the Montana rule can actually be. If “dissuade” in fact means “disturb,” then the Montana hunter harassment statute would read: “a person may not disturb an individual engaged in the lawful taking of a wild animal with intent to disturb the individual or otherwise prevent the taking of the animal.” The actus reus and mens rea portions of the statute are, in

244. MONT. CODE ANN. § 87-3-142(3) (1994) (emphasis added).
245. State v. Lilburn, 875 P.2d 1036, 1042 (Mont. 1994).
246. Id. at 1043.
essence, fused together. This is problematic, most notably because the burden of proof that the state needs to meet is substantially lessened.

"Dissuasion," as defined under the Minnesota rule and under most commonsense standards, involves some form of discourse or argumentation. Skilled argumentation implies prior thought and reflection. Therefore, if "dissuade" is the specific intent element, the state would have to prove not only that the activist spoke with the hunter, but also that he planned the outline of his speech and pondered the details beforehand. Conversely, "disturb" implies an act that can occur spontaneously, and the state need only show that the activist succeeded in preventing the hunter from taking the shot or setting the trap. The "dissuade" element would require the state to prove substantially more than what would suffice if "disturb" were the standard. As the actus reus portion of the offense involves a "disturbance" as well, the state is half way toward meeting the burden of proof if "disturb" serves as the mens rea. To meld a specific intent requirement into an actus reus portion of a statutory provision blurs the distinction between a wrongful act and a culpable mental state, both of which have been required for conviction purposes for hundreds of years under the common law of England and the United States. It is fundamental in criminal law that the two elements be kept separate. Blending them would make the state’s job that much easier and would unfairly prejudice an activist charged with violating a hunter harassment statute. If the Montana rule were applied in Florida, a protestor still would be subject to prosecution under section 372.705 even if she engaged only in purely academic discourse in an attempt to dissuade a hunter from hunting.

It is interesting to note that the Montana legislature amended the subsection in question in 1997. The phrase "dissuade the individual or otherwise" was deleted from the statute. The legislature followed the example set in Minnesota, and left "prevent" as the only specific intent element that the state needs to prove.

G. Section 372.705 Under the Illinois Rule

The Hindi rule seems to parallel that of Montana. Hindi places greater emphasis on the disruptive nature of the activity and would thus consider megaphones, bullhorns, and sirens, even if used with intent to "dissuade" a hunter, to be a violation. The plaintiffs in Hindi engaged in these activities, but did not limit their protest to argumentation or discourse. It is unclear whether the Hindi court would have considered discourse or some other "verbal only" communication as grounds for

liability under the statute. One could argue that the decision would not have been different. The court stated that an individual could violate the provisions of the statute by "shouting 'Fire!,,' by waving a placard proclaiming 'Hunting is good!' in front of a hunter, or by playing the 1812 Overture on a stereo system." Shouting "Fire!" or playing a stereo might not be considered as possessing any redeeming social value. Waving the placard, however, is different. Even though it contains a pro-hunting message, it still would violate the statute if it were done to dissuade a hunter from hunting. This seems to directly contradict the Connecticut rule, as this type of activity could easily be considered a traditional form of conduct protected by the First Amendment, such as picketing and other similar events.

This apparent discrepancy, however, is corrected in the Sanders rule, which supplants the Hindi rule. The Sanders rule reflects the view that "dissuade" does in fact involve the elements of speech and communication. Had the Illinois legislature intended to classify "dissuade" more along the lines of "prevent," it would have drafted the subsection containing "dissuade" in the same way as it did section 125/2(a), which stated that interference with the taking of a wild animal is illegal if done "with intent to prevent the taking." The Sanders rule nevertheless permits a statute to regulate "dissuasion" in effect (as a content-based statute) if there is a compelling state interest to support it. In the Sanders case, however, the Illinois Supreme Court was not able to see how regulating the content of a "dissuasion"-type speech was necessary to protect hunters from interference.

Applying the Sanders rule in Florida, it would appear permissible for an activist to engage in activity that dissuades a hunter from taking wildlife. In response, however, the state would be able to argue, using the Hindi rule, that even dissuasion is prohibited, not because of the content or central idea behind the message, but rather, because of its tendency to incite disruptive and potentially dangerous behavior. Because the Florida statute does not specifically make reference to dissuasion, it stands a better chance of passing constitutional muster than the Illinois statute that effectively singled out dissuasive behavior for prosecution. Florida would need to prove that the term "interfere" in section 372.705(1)(a) includes dissuasive commentary. To avoid application of the First Amendment, however, Florida would have to argue that a compelling state interest is served by the inclusion of dissuasive

249. Id. at 1093.
250. See 720 ILL. COMP. STAT. 125/2(a) (West 1996) (emphasis added).
252. Id. at 1149.
speech within the meaning of section 372.705(1)(a). The Sanders court was unable to make the connection between state interest and regulation of discourse. The argument can be made, however, that the Illinois Supreme Court was heavily against the connection, as the statute specifically included the term “dissuade” as part of its terms over and above the “prevent” specific intent requirement in the other subsection. Perhaps the Illinois legislature acted intentionally to distinguish “prevent” from “dissuade,” reserving the former for conduct and the latter for speech. Because Florida’s statute could be interpreted to apply across the board, one might conclude that the Florida legislature was not in fact motivated by the content of the message, but instead by its potential repercussions.

The Sanders rule is also important for activists in Florida for another reason. The plaintiff in Sanders apparently yelled at a hunter and took her photograph. The court nevertheless accorded these acts constitutional protection, as they were intended to “dissuade” the hunter, which in essence rendered them forms of “speech.” This new scenario changes the hypothetical case of the Florida activist developed under the Idaho rule. It would permit the activist to engage in a slightly more “heated” protest than silently displaying argumentative discourse on a picket sign or subjecting the hunter to the Socratic method. Of course, the activist must take heed that she is engaging in the conduct with the intent to “dissuade” and not to “prevent” the hunter from taking wildlife.

H. Section 372.705 Under the Wisconsin Rule

The Wisconsin rule would prove extremely useful to the Florida legislature should it decide to amend section 372.705(1)(a). The Wisconsin rule considers the terms “obstruct” and “impede” to be more refined than the general term “interfere,” and the rule treats them both as limiting constructions for “interfere.” The Wisconsin statute makes it an offense to “interfere” with lawful hunting “with the intent to prevent the taking” of wildlife by “impeding or obstructing” a hunter. The Wisconsin statute incorporates not only the Connecticut rule’s concern with the verbal-nonverbal distinction, but also the Minnesota rule’s requirement that the specific intent term trigger the necessary actus reus element before liability can come into play. The Bagley court concluded that the terms “impede” and “obstruct” did not implicate verbal communication, as the statute listed them apart from the term “interfere,” and as it contained a provision for protection of free speech as an affirmative

253. Id. at 1146.
Moreover, the defendants could not reasonably allege that the activity in which they engaged (i.e., blocking a boat dock with their own boat) that triggered the "impede" and "obstruct" provisions, amounted to constitutionally protected speech. Perhaps, if the defendants engaged merely in chants or carried picket signs, they would have had more success in a constitutional challenge. They could have argued that imposing liability on their actions, under violations of "impede" and "obstruct" terminology, is an impermissible regulation of speech.

Florida should consider whether to further classify violations within the meaning of section 372.705(1)(a). "Interfere," standing alone, will result in a somewhat troublesome outcome under practically any of the aforementioned rules. By following the Wisconsin rule and incorporating physical acts that serve to describe how "interference" may be effected within the meaning of section 372.705(1)(a), the Florida legislature would lead one to rationally conclude that speech and other forms of verbal communication are not the target of the subsection, and that these forms of verbal communication still enjoy constitutional protection. A problem arises, however, even with concrete terms like "impede" and "obstruct." Had the plaintiffs in Bagley actually engaged purely in innocent speech, or in an activity that has been traditionally imbued with elements of speech, a question arises as to whether this would have resulted in an "impediment" or an "obstruction" within the meaning of the Wisconsin statute. According to the Wisconsin rule, the answer is no. Nevertheless, liability would probably still attach, as the speech would "pass through" the concrete terms, and revert back to the abstract term "interfere." Under the Minnesota rule, the Wisconsin statute would still be constitutional, as it contains the specific intent term "prevent." Thus, liability would be imposed on the activist who possesses the "prevent" mens rea. Admittedly, it is speech that is being implicated in the preceding analysis, but the message or content of that speech is not necessarily the target. For example, in Bagley, the state could also have imposed liability on a rival fisherman who verbally confronted the Native American spearfishers in an attempt to prevent them from fishing in what he considered to be "his" area. As it is speech in general that is being implicated, however, the state interest analysis would then come into play. The important concept to bear in mind is that the specific intent portion of the statute is in play throughout the process. Florida's section 372.705(1)(a) is without such a specific intent element, and thus it might be beneficial for one to be added.

256. Id.
The Wisconsin rule may also be analyzed under a void-for-vagueness challenge. The rule does not permit an individual to make this claim if the terms of the statute clearly prohibit the conduct in which he engaged. Thus, an activist in Florida should pay close attention to the terms of section 372.705. The activist would notice that section 372.705(1)(b) only imposes liability for attempting to disturb or affect the behavior of wildlife. Thus, under the Wisconsin rule, if he actually succeeds in disturbing or affecting the behavior of the wildlife, his conduct would not be proscribed, and he would have standing to raise a void-for-vagueness challenge. Similarly, the Florida statute only prohibits interference activity on the grounds of a wildlife management or state-owned water body. If the activist conducts his protest outside the boundaries of the prohibited area, and if a court were to follow the Texas rule and impose liability, the activist may also raise a void-for-vagueness challenge.

I. Section 372.705 Under the New Jersey Rule

The New Jersey rule prohibits a person from blocking or impeding a hunter from taking wildlife, and also from causing distractions that serve to scare the wildlife away. The rule incorporates a specific intent requirement: that the person act with intent to prevent the taking. The rule provides that "blocking," "impeding," and "distracting" all imply some form of pure conduct without any particular reference to expressive-type conduct. It is important to remember that the plaintiffs in the Binkowski case had not been arrested under the statute, nor had they actually engaged in any of the prohibited activities. They were only seeking a declaratory judgment that the statute was unconstitutional.257 The New Jersey rule therefore counsels against declaratory judgment actions when the plaintiff-activists fail to indicate the specific conduct in which they plan to engage and that they consider to be constitutionally permissible. To succeed on a constitutional challenge to Florida's hunter harassment statute under the New Jersey rule, a plaintiff would have to have already engaged in some form of conduct, been arrested or subjected to some negative treatment under the statute, or demonstrated with particularity the type of conduct and activity that she would have liked to pursue. The rule appears to infer that activists may succeed on a claim if they have engaged in the type of conduct typically protected under the auspices of free speech, like picketing.

The New Jersey rule is also unique insofar as it limits its scope of enforcement to the areas in which the hunting activity takes place, or in

the immediate vicinity thereto. This notion is unique because the New Jersey statute, by its terms, does not list a geographical area to be included in its coverage. The *Binkowski* court did not further define what it meant by the term “immediate vicinity.” The court, however, did admit that an activist would be permitted to engage in protest in the region outside that area. An activist in Florida, acting under the New Jersey rule, should be careful in selecting an area for protest. Standing outside the wildlife management area would not appear to violate the Florida statute, but the New Jersey rule might include such an area within the meaning of the statute, as it could be considered the “immediate vicinity” of a hunting region. The argument can be made, however, that the rule’s geographical scope only comes into play when a statute, like the New Jersey one at issue in *Binkowski*, does not make reference to a specific area.

Lastly, the rule fashioned in New Jersey contains one interesting caveat. The court in the *Binkowski* case did not consider the plaintiff’s free exercise of religion claim because she had failed to support it with proper evidence. This leads to the argument that had the plaintiff been able to bring forth sufficient evidence, the claim may have succeeded. A Florida activist seeking to challenge section 372.705 and its seeming prohibition of both conduct and speech might seek to use the religious exception contained in the New Jersey rule. Of course, the activist would need to show that the type of conduct in which she engaged, or the speech and the message she advanced, were in furtherance of her sincere religious beliefs and were infringed upon by the imposition of liability under section 372.705.

VI. CONCLUSION

Section 372.705, *Florida Statutes*, as analyzed under the various rules developed throughout the course of this Comment, would be subjected to differing outcomes depending upon the specific circumstances at stake. As a general rule, however, it would appear that a hunter harassment statute that fails to distinguish among acts that are purely indicative of conduct, acts that involve behavior traditionally imbued with elements of speech, and activity characterized by communicative speech and other verbal pronouncements, will be subject to the strictest scrutiny. Absent a compelling state interest (i.e., one that involves a very high threshold of proof) to support passage of the statute, a court may have no choice but to declare the statute unconstitutional. Provisions in

258. *Id.* at 77.
a statute that target "dissuasion" as opposed to merely "preventive conduct" will usually not survive a compelling state interest analysis.

Specific intent elements are very important and will usually save a hunter harassment statute from unconstitutionality, except in the rare circumstance when they are perhaps inadvertently fused with the actus reus portion of the violations enumerated within the terms of the statute. These elements imply a "beforehand" thought process, which normally remove them from the realm of spontaneity and uncontrolled disruption. As it now stands, section 372.705, Florida Statutes, only contains one subsection with a specific intent requirement. It would be in the legislature's interest to correct the other subsection through curative terminology and other limiting constructions, including the use of specific intent elements, to avoid future constitutional problems.

Florida should also consider the approach used by Justice Silak in the Casey case and insert the term "physically" into section 372.705(1)(a), thereby clearing up any confusion that the subsection applies both to speech and to conduct. Activists in Florida would still be able to engage in protests as long as (1) their protests are entirely based on verbal communication with a focus on dissuasion, and (2) any activity in which they engage is limited to the type of activity which has been traditionally protected as "expressive" conduct (i.e., picketing, dances, etc.). Florida may also want to follow the lead of states like Connecticut, and include, as part of section 372.705, a list of enumerated, physical acts that amount to violations of the statute, so as to avoid the argument that the section is overbroad and void for vagueness.

As a final thought, consider one of the comments made in the Miner case. The court there stated, referring to activists: "[E]xpress[ing] their opposition to the taking of wild animals does not include the right to do so in a manner that disturbs or interferes with another's right to lawfully take wild animals." One may wonder, however, what makes

259. This Comment was not intended to address the issue of the specific adverbs used as part of the mens rea in each of the statutes. For example, if the statute uses the adverb "knowingly," in the absence of any legislative intent, the question then arises as to whether "knowingly" applies to the term it directly modifies, or to the remainder of the terms as well. For a discussion of this subject directly, please see section 2.01 and section 2.03 of the Model Penal Code.

260. It is interesting to note that in 1994, the federal government passed the Recreational Hunting Safety and Preservation Act, which essentially operates as a hunter harassment statute at the federal level. See 16 U.S.C. §§ 5201 - 5207 (1994). The statute explicitly states: "It is a violation of this section intentionally to engage in any physical conduct that significantly hinders a lawful hunt." Id. § 5201 (emphasis added). The federal government clearly indicated that the intent of the statute is to regulate only physical conduct. The argument can be made that Congress recognized the wide array of potential problems inherent in a decision to apply the terms of the statute to speech, and thus limited the reach of the statute to activity ostensibly recognized as pure conduct.

the rights of hunters paramount to the rights of activists. The two rights at issue are the right to hunt and the right to freely express a set of ideas. Who has the right to say which of the two is more important or deserves greater protection? If activists and hunters could both express their views without infringing on one another’s freedoms, litigation would be drastically reduced. For example, in the *Lilburn* case, the hunters were issued licenses to shoot the bison with the ultimate goal of preventing the bison’s escape to other areas. Had the activists been allowed to herd the bison back into Yellowstone Park, both they and the state would have accomplished their respective goals. The hunters, however, would have argued that it was nevertheless their right to shoot the bison. They are probably right. The question then becomes: should they be right? Of course, the answer to that question is beyond the scope of this Comment.

**PATRICK REINHOLD COSTELLO***

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262. One commentator does not think this coexistence is possible. See William J. Thurston, Casenote, “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 (1999). Thurston states: “[W]hen . . . opposing views meet in the woods, if the rights of one group are to be exercised, the rights of the other must be infringed. The respective natures of hunting and anti-hunting protests are such that they cannot co-exist, even on a limited or restricted basis.” Id. at 181.

* J.D. 2002, University of Miami School of Law. Although the preceding Comment is the product of many weeks of research and intense thought and commentary on my part, the substance of the piece would not have been possible without the guidance and support of four very special people. I would like to thank my parents for instilling in me at a very early age the importance of following through on a task to its very end, and the courage to treat each obstacle along the way as part and parcel of the learning process in general. I would also like to extend a note of gratitude to my brother who has inspired me in ways he may never know, and who has taught me what the meaning of friendship is all about. Finally, I would like to thank Professor Wes Daniels for bringing the subject of hunter harassment legislation to my attention, and for having patience with me on a daily basis during the long revision and finalization process. To the reader, I hope you have enjoyed examining this Comment as much as I enjoyed writing it.