Where Do We Draw the Line Between Harassment and Free Speech?

by

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WHERE DO WE DRAW THE LINE BETWEEN HARASSMENT AND FREE SPEECH?: AN ANALYSIS OF HUNTER HARASSMENT LAW

By
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I. Introduction

This article examines the constitutionality of the Recreational Hunting Safety and Preservation Act of 1994,[1] referred to as a "hunter harassment law," and offers conclusions about the future direction of constitutional analysis of laws regulating protests against hunting. At its core, the article addresses the right to protest embodied in the First Amendment, and specifically, the protection of symbolic speech as a method of protest.

The article considers the new "hunter harassment law" as a response to protests by the "animal protection movement."[2] The uniqueness of hunt protests presents new legal questions which make traditional constitutional analysis incomplete and unsatisfactory. Hunt Protests combine traditional and creative modes of speech with expressive conduct. This combination presents analytical difficulties in establishing the line between "permissible speech" and "impermissible conduct." In hunt protest cases, the mere presence of a protester may inhibit the success of a hunter, which achieves one of the protester's goals. This rare circumstance, where the means of the protest may secure the desired ends, makes determining which conduct is protected free speech, and which is not, a difficult constitutional question.

In other instances such as lunch counter sit-ins, where a combination of traditional and creative methods of protest were tested, the actions of protesters were not protected by the First Amendment.[3] However, this article suggests that courts should accord such protection to those who protest hunting. The fundamental question here is: How Highly does soci-

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[1] Pub. L. No. 103-322, 108 Stat. 2121 (codified as amended at 16 U.S.C. §§ 5201-5207 (1994)).

[2] There are significant distinctions between those who advocate for animal rights and those who advocate for animal welfare. The term "animal protection movement" is intended to describe both of these efforts.

[3] *See* Garner v. Louisiana, 368 U.S. 157 (1961); *but see* Brown v. Louisiana, 383 U.S. 131 (1966).

ety value the protection of the First Amendment rights as compared to its desire for uncomplicated recreational hunting?

In order to understand the constitutional questions raised by hunt protests, it is important to be familiar with their nature. The following narrative is a composite description of a typical hunt protest. Following the narrative are hypothetical examples, derived from the narrative, which will be used in the constitutional analysis that follows.

II. A TYPICAL HUNT PROTEST[4]

It is 5:15 a.m. on a cold and crisp October morning. Cars and trucks are converging on a five square mile area in Maryland, forty minutes away from the heart of Washington D.C. The destination for protesters and hunters is Roosevelt Wildlife Management Area,[5] a publicly owned wildlife refuge.[6] Hunters spread throughout the area. Some gather in a parking lot where coffee is available under a large tent. Hunters and officers from the Department of Natural Resources (DNR) mingle as they drink coffee and pass anecdotes. They talk of last year's hunting season and of their successes. They also talk, in tones meant to be overheard, about the protesters across the street.[7] Some hunters are already in the woods to stake out the best areas so they will be ready when legal hunting begins at dawn's first light.

Accompanying the hunters and the DNR officers are supporters who will be demonstrating against the hunt protesters. Their attire ranges from business suits, to jeans, to camouflage. Today, it is only men who are going hunting.[8] The hunters and their supporters prepare their signs and banners and ready their slogans for the news media which will arrive soon. Some hunters will stay by the road and ready themselves to compete with hunt protesters for media attention.

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[4] Composite description from personal experiences of author.

[5] A fictional name, recognizing the founder of the federal park system, based on a state park in Maryland (McKee Beschers).

[6] This article presumes that the hunting takes place on state or national park land which is open to the public during the times of the hunt. It further assumes the absence of planned physical contact with hunters (as may occur in other forms of protest, such as in the case of abortion protests). Reasons articulated in support of hunting vary. Some hunters say they hunt for food. Others say they hunt for sport or for population control. The hunters' rationale are not implicated in a constitutional analysis. This article assumes the hunters act within the scope of the law.

[7] The officers talk with the hunters as if they are acquaintances or friends; they may simply be comrades-in-arms. The impression left upon protesters by these actions is that the DNR officers support the hunters. They appear to understand hunting, but not the reasons to protest. In fact, the DNR officers have come from many areas other than this particular park and complain of the waste of resources the protest necessitates. The officers tell the protesters that they should enable the officers to check for poachers at other locations by not protesting.

[8] The NRA claims that hunting is one of the fastest growing sports among women, pointing out that by 1993, 1.5 million females had taken the NRA Hunter Safety courses. However, women still represented only 12% of the sports shooting market at this time according to the National Shooting Sports Foundation. *Consumer Products: Arms and the Woman*, MARKETING TO WOMEN 6 (1993), *available in* 1993 WL 2462004.

Those who have come to protest hunting line their cars up, as they have in the past, opposite the tent area on the side of the road. The law enforcement officers park with the hunters close to the tent.[9] Some DNR officers make a show of writing down the license plate numbers of the protesters. Protesters gather to plan strategy and make final preparations. Some don "blaze orange" vests with protest slogans on them which serve the dual purpose of safety and protest. This is shotgun season and the "game" is deer, so the hunters also wear orange vests rather than the camouflage of bow season.[10]

No recreational use of the park area is excluded even while the hunt is in progress. Other individuals are present, photographing the ducks and other wildlife, or strolling through the trails. They are purely recreational users of the park.[11]

The hunt protesters divide into groups, each with experienced leaders, and determine which areas they will cover. Some group leaders have walkie-talkies in case of an emergency.[12] Protesters review instructions and gather flashlights and equipment. They often carry cameras and video recorders to capture wildlife in their own way, or to film arrest situations or other information they might later need.[13] All the protesters have had basic instruction on how to respond to confrontations with hunters or law enforcement officers, how to contact the wildlife rehabilitator[14] in case of animal injury not resulting in death, and how to prepare for and respond to safety issues.

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[9] On this particular day, the protesters return to their cars at the end of the day to find that roofing nails have been spread throughout the area in which they parked. Many have flat tires, most have nails in their tires. The DNR officers do nothing; the hunters laugh—there is no damage to their cars.

[10] Hunters are allowed to wear camouflage during bow season in some parks because it is deemed less dangerous. It is not unusual for seasons to overlap and one may see hunters in the woods wearing the different colors appropriate to their weapons—calling into question the reason for the distinction.

[11] Whether recreational users of parks are warned about hunting depends on each park and whether the users contact the park before arriving. For example, Ohio state parks issue this generic warning to hunters, "Ohio State Parks are open to the public year-round for a variety of uses and activities. Therefore, hunters should exercise special caution and be aware that other park visitors may be present in or near hunting areas." Ohio Department of Natural Resources, Division of Parks and Recreation Public Information Section. Whether hunters will be in the parks every day during hunting also depends on the particular park. Some parks issue general permits which result in heavy use early in the season until each eligible hunter has killed his allowed number of animals. Other parks issue permits for a specific day and that is the only day hunters are allowed to hunt, spreading out the hunting more evenly throughout the season.

[12] There have been no emergencies, or violent altercations to date in the Roosevelt Wildlife Management Area or other locations. There was, however, an incident in Montana when a protester hit a hunter with a ski pole. *On the Grapevine*, WYO. WILDLIFE, June 1990, at 39.

[13] Protesters may film wounded animals left in the woods to die. Such footage might be disseminated to the public to encourage support for the protesters' cause.

[14] A wildlife rehabilitator is a veterinarian specially trained to work with wildlife, with the goal of reintroducing wild animals to their native habitats after medical care.

Throughout the morning, some protesters will remain by the road to speak with the press. Some prefer not to see what occurs in the woods and find other ways to be helpful.

Hunters check their guns, ammunition, and food. They also check their drinking supplies.[15] Protesters review last minute safety information. Both sides are prepared for encounters with the media. Hunters and protesters review advice on how to respond to one another, when to summon a law enforcement officer, and other tips for a successful day.

All understand that potential confrontation with one another is likely. Some look forward to such opportunities while others assiduously avoid them. Members of the media will be in the woods as well and may designate an individual as a de facto representative of hunters or protesters. No one can completely enjoy the woods, the glorious sunrise, the thrill of the hunt, as s/he would were the others not present.

Hunters and protesters enter the woods while those who remain to speak for and against hunting form lines on opposite sides of the country road as it grows light. From across the road they engage with the media, the law enforcement officers in between, and with each other.

Hunters break into small groups or go alone into the woods. Some prime their weapons as hunt protesters pass them unseeing in the darkness. Some hunters go directly to favorite spots where they wait for the light. Others, trying to avoid protesters, look for a good spot away from the noise of the protest on the road.

Small groups of protesters walk into the woods. Some try to find hunters immediately. Others try to find locations where deer might likely be. Still others walk quietly in the woods, hoping that mere human presence may deter deer from coming into view.

As dawn breaks, the hunting and the protesting begin in earnest. Tactics vary as much as personalities. Shots ring out occasionally. Protesters hurry toward the sound, thinking they may be needed, or in the opposite direction, thinking there may be little they can do. Hunters and protesters may share information, comments, insults, or conversation with each other when they meet.

Protesters often spot hunters in tree stands[16] or walking through the woods. Some protesters try to initiate a conversation with the hunters, examining the purpose or morality of their activity. Some say nothing. Occasionally, both hunter and protester recognize they are there for conflicting purposes, but that there is no need for shouting or name-calling. At other times, hunters point loaded weapons at protesters and explain what may happen accidentally or on purpose if the protester continues to follow or remain near the hunter. Likewise, some protesters react emotionally to a killed or wounded animal. They engage in angry name-calling

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[15] At Roosevelt Park, like in many real parks, hunters are allowed to drink alcohol while they hunt. However, intoxication in the park is a violation of park regulations.

[16] A tree stand is a device which allows hunters a relatively comfortable perch in a tree, giving them a vantage point from which to shoot.

or attempt to persuade hunters they are wrong. Opportunity abounds for frustration and emotion on both sides.

Tension in the woods is high. Encounters can continue for minutes or hours. These encounters are often concluded with the arrival of DNR officers. The officers sometimes arrive in groups and with video cameras to film the protesters as they talk with the officers or as they are arrested.

Most protesters decide whether or not to risk arrest before they go into the woods. Often an arrest is thought to enhance the group's political agenda. Protesters may, therefore, place themselves in situations in which arrest is likely. Others assiduously avoid arrest situations, either hoping to stay in the woods as long as possible, or simply wishing to avoid the legal, social, and economic consequences.

Hunters, likewise, must decide whether to call upon the law enforcement officers if they are being followed or feel harassed. It may require using the best hunting hours if they are asked to provide the officers with a factual basis upon which to file charges. Or, the result of an arrest may be a quick escape from protesters.

The morning wears on until many of the hunters and protesters are tired. Some protesters go to the weigh station to report back the number of animals killed.[17] Some hunters gather there, sharing stories of the day. Protesters feel successful if fewer animals have been killed than in previous years. Hunters feel successful if they or their friends have killed animals.

After four or five hours, the protesters, hunters, media, and law enforcement officers begin to leave. Many will drive more than an hour to get home. They may return home to wash and rest. But, when they reemerge, they could be together in any part of society next to one another. They might pass pleasantries or debate these very issues.

III. HYPOTHETICALS

For ease of constitutional analysis, hypotheticals based upon the narrative will be considered. In order to make the case that the hunter harassment statutes are unconstitutional, it is appropriate to test the most common and the most difficult cases. This article will focus on the following hypotheticals.

A. Traditional Protest

The first hypothetical is known as the "Traditional Protest." Protesters, both pro and anti-hunting, stand outside Roosevelt park with signs and banners, engaging one another in debate of the hunting issue.[18]

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[17] The agencies that issue hunting licenses require hunters to report statistical information on every animal killed. *See, e.g.*, WASH. ADMIN. CODE § 232-28-240 (1996). This way state and federal agencies can determine if the hunters are killing animals in the appropriate number, and of the appropriate age and gender. Weigh stations are either temporarily or permanently established close to hunting sites in order to accomplish these goals.

[18] Protests by those in support of hunting are worth mentioning as they set up competing interests between groups of protesters. If protesters in support of hunting are not violating

B. *Typical Park Protest* [19]

The second hypothetical is the "Typical Park Protest." In these situations there are some protesters inside the woods who are wearing blaze orange vests which have anti-hunting slogans written on them. A few of the protesters are photographing the wildlife, both dead and alive.

Hunters ask the DNR officers to arrest the individuals who are not hunting or otherwise engaged in recreational activity, as they perceive these individuals to be intentionally disrupting the hunt. The protesters respond by arguing that they are opposed to hunting and have as much right to be in the woods to protect animals and to protest hunting as the hunters have to hunt. The protesters believe that attempts by the government to restrict the protest are in violation of their First Amendment rights.

C. *Silent Vigil in the Park*

The "Silent Vigil in the Park" is the third hypothetical. The protesters wear no slogans and carry no signs. They simply stand or walk quietly through the woods.[20] One of the protesters stands between a deer and a hunter. The hunter then asks the DNR officers to arrest that individual as well as those who merely stood quietly nearby or followed the hunters through the woods.

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the statutes because they do not intend interference with the hunt (though this may, in fact, be a result), then to limit the protest of those who oppose hunting would be to differentiate based on viewpoint or content of speech. This invalid distinction will be discussed later in the paper.

[19] "Typical Park Protest" can cover a wide range of behavior. The activity can consist of following hunters; speaking or playing music to scare away prey; depositing odors which would make animals more aware of human presence and thus more cautious; or any number of other non-traditional protest behaviors. The list is as long as the creativity of the protesters.

[20] For example, ducks sense motion at quite a distance. Therefore, if protesters simply walk around an area, they never need to speak to, follow, come in contact with, or in any way "harass" (in the traditional sense of the word) any hunters. Still they can be successful in reducing the number of ducks killed.

This is the nature of many hunt protests. Mere physical human presence decreases the likelihood hunters will be successful in their hunting. The protesters attempt to bring their protest to the hunters (a traditional tactic), but at the same time, utilize tactics that make this effort itself likely to achieve their short-term goal (a non-traditional tactic).

Hunters also recognize and attempt to minimize the effect of their own presence in a number of ways. Most sportsman's magazines include articles with tips on how to increase success in the woods focusing on ways to offset the effects of human presence. These magazines advertise products available at sporting goods stores which cloak the aspects of human presence noticed by the animals. One such item sold for deer hunters is deer urine. The instructions on the package explain that it is to be put on one's person a certain length of time prior to going into the woods. *See* Paul Clinton, *Many New Items Offered For Archery Season*, READING TIMES AND EAGLE (Reading Pa.), Aug. 25, 1996, at D11, *available in* 1996 WL 2211219. It should be noted, however, that not all hunters go to these lengths, just as not all protesters engage in the most extreme behavior.

D. *Active Vocal Protest in the Park*

The final hypothetical is the "Active Vocal Protest in the Park." Here the protesters enter the woods wearing vests emblazoned with slogans. They make significant noise by talking loudly to one another and by carrying loud portable radios. They do not approach or attempt to contact the hunters. The hunters ask that the protesters be arrested for interfering with their hunt based on the noise they make and the assumed adverse impact it may have on the hunting.

IV. LEGAL CONTEXT

A. *Legislative Action*[21]

In September 1994, Congress passed the Recreational Safety and Preservation Act,[22] a hunter harassment law which is also known as the

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[21] Significant state legislation preceded the enactment of the federal statute. In 1981, Arizona, Georgia and Vermont became the first states to pass hunter harassment statutes. *See* ARIZ. REV. STAT. ANN. § 17-316 (West 1996); GA. CODE ANN. §§ 27-3-150 to 27-3-152 (1993); VT. STAT. ANN. tit. 10, § 4708 (1997). In less than 15 years, due to diligent work on the part of the Sportsmans' Caucus and the Wildlife Legislative Fund, every state in the nation, culminating with Hawaii in July, 1995, had adopted a hunter harassment statute.

"Most of the hunter harassment laws are based on model legislation drafted by the Wildlife Legislative Fund of America, a pro-hunting lobby based in Washington, D.C." Aileen M. Ugalde, *The Right to Arm Bears: Activists' Protests Against Hunting*, 45 U. MIAMI L. REV. 1109, 1111 n.14 (1991) (citing Jim Glass, *Protect Hunters from Harassment*, USA TODAY, Aug. 6, 1990, at A8). Jim Glass, president of a pro-hunting group, wrote: "Hunting is perfectly legal in the U.S.A. Harassing hunters is not. It's pretty simple. . . . There's a time and place for animal rightists to attempt to effect societal change. The woods, during hunting season, is neither." *Id.*

The speed with which these statutes were passed, and that their timing corresponded to the growth of the animal protection movement, indicates a response to the increase in protests against hunting and not a sincere effort to protect hunters from simple harassment (already unlawful in each of the state and federal parks system).

Protesters consider these statutes impermissible restrictions of free speech; hunters believe these statutes protect their right to pursue state-sanctioned activity without disturbance. These statutes authorize civil and criminal penalties, as well as injunctive relief for activities which are perceived to harass hunters with the intention of interfering with lawful hunts.

[22] Pub. L. No. 103-332, 108 Stat. 2121 (codified at 16 U.S.C. §§ 5201-5207 (1994)). This act is also called the Hunters' Rights Amendment. The Act as codified provides:

§ 5201 Obstruction of a lawful hunt

It is a violation of this section intentionally to engage in any physical conduct that significantly hinders a lawful hunt.

§ 5202 Civil penalties

(a) In general

A person who violates section 5201 of this title shall be assessed a civil penalty in an amount computed under subsection (b) of this section.

(b) Computation of penalty

The penalty shall be -

(1) not more than $10,000, if the violation involved the use of force or violence, or the threatened use of force or violence, against the person or property of another person; and

Hunter's Rights Amendment. Similar efforts to pass a hunter harassment law were attempted starting in 1991, but these attempts failed. However, in the summer of 1994, without a hearing in committee or debate on the floor, the hunter harassment bill amended the Violent Crime Control and Law Enforcement Act of 1994, (Crime Bill).[23] The Crime Bill, including the hunter harassment provision, was passed and became law on September 13, 1994.[24]

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(2) not more than $5,000 for any other violation.

(c) Relationship to other penalties

The penalties established by this section shall be in addition to other criminal or civil penalties that may be levied against a person as a result of an activity in violation of section 5201 of this title. . . .

§ 5203 Other relief

Injunctive relief against a violation of section 5201 of this title may be sought by -

(1) the head of a State agency with jurisdiction over fish or wildlife management;

(2) the Attorney General of the United States; or

(3) any person who is or would be adversely affected by the violation.

§ 5204 Relationship to State and local law and civil actions

This chapter does not preempt a State law or local ordinance that provides for civil or criminal penalties for conduct that violates this chapter.

§ 5205 Regulations

The Secretary may issue such regulations as are necessary to carry out this chapter.

§ 5206 Rule of Construction

Nothing in this chapter shall be construed to impair a right guaranteed to a person under the first article of amendment to the Constitution or limit any legal remedy for forceful interference with a person's lawful participation in speech or peaceful assembly.

§ 5207 Definitions . . .

[23] Pub. L. No. 193-322, 108 Stat. 1923 (codified at 42 U.S.C. § 13701 (1994)). The Violent Crime Control and Law Enforcement Act amended the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. No. 90-351, 82 Stat. 197 (1968). One of the striking ironies of the inclusion of the Recreational Hunting Safety and Preservation Act of 1994 in the Violent Crime Control and Law Enforcement Act of 1994 is that the protest of hunting is a nonviolent activity. The groups and individuals who protest hunting and risk violating this statute, are part of the animal protection movement. One of the primary goals of this movement is to educate people about the plight of animals and to end what is considered oppressive and violent behavior. Although not every member of the animal protection movement has adopted nonviolence as a personal philosophy, all of the organized hunt protests have been based on that principle. It is ironic therefore that the work of those who consider themselves nonviolent is restricted under the Violent Crime Control and Law Enforcement Act.

[24] Many of the Congressional Representatives who co-sponsored predecessors to the bill that passed are members of the Congressional Sportsmen's Caucus. The Wildlife Legislative Fund of America solicited their support by sending them a letter. They were reminded in this letter that three-fourths of the money America spends a year on wildlife conservation. "$1.9 billion, is contributed directly by the nation's hunters, anglers, and trappers. By eliminating sportsmen from the conservation equation, America runs the risk of killing the goose that lays the golden egg." Letter from William Horn, Director of National and International Affairs, and Washington Counsel of The Wildlife Legislative Fund of America, to the Congressional Sportsmen's Caucus (May 1993) (on file with author) (the Wildlife Legislative Fund's letterhead states that their goal is: "To protect the Heritage of the American Sportsman to hunt, to fish and to trap". *Id.*

B. Constitutional Analysis of Federal Legislation

Due to the recent passage of the federal statute, or perhaps due to the federal penalties imposed, no cases concerning this statute have been brought or decided yet. Therefore, some state cases may be helpful in discerning what the federal courts will do with the federal statute. This article will first examine the constitutionality of the statute based on what the Supreme Court has already said about expressive conduct and permissible restrictions thereon.

First, the proper test must be determined. This article asserts that: (1) the test articulated by the Court in *Texas v. Johnson*[25] and followed in *United States v. Eichman*,[26] is the proper test, and not the test articulated in *United States v. O'Brien*;[27] and (2) even if the *O'Brien* test applies, the federal hunter harassment statute is unconstitutional because it is content-based.[28] Finally, this article addresses the question of public forum which was not addressed in *Johnson*, *Eichman* or *O'Brien*.

According to William Horn, a concerted lobbying effort was made to encourage every state to adopt some version of their model legislation. *Id.*

Mr. Horn indicated that it was as much a political statement of governmental and societal support for hunting and fishing, as it was an attempt to protect hunters from interference with hunting. *Id.* He admitted that current criminal law could respond adequately to any perceived concern of behavior which might properly be considered assaultive or harassing. *Id.*

See also, Ugalde, *supra* note 21, at 1123 n.104.

The Congressional Research Service of the Library of Congress (CRS) provided an analysis of the constitutionality of House Resolution 371 from the 101st Congress. No CRS report has been conducted on the more recent versions of this bill. However, the text of Resolution 371 is very similar to the language of the bill that was enacted into law. The CRS report concludes "that H.R. 371, if enacted would be constitutional on its face, but would be unconstitutional to the extent that it was applied so as to abridge freedom of speech that is protected by the First Amendment." HENRY COHEN, CONGRESSIONAL RESEARCH SERVICE, THE SPORT HUNTING SAFETY AND PRESERVATION ACT OF 1991: CONSTITUTIONALITY OF H.R. 371, 102D CONGRESS, 1 (1991). The report states that the bill is "[l]ike similar bills that have been enacted by state legislatures, it is *aimed at advocates of animal rights . . .* " *Id.* (emphasis added).

The report also opines that without this bill, "animal rights supporters might have as much right to make noise to protect animals in national forests as hunters would have to shoot such animals." *Id.* at 2. The nature of the problem, as this statement makes clear, is one of competing interests.

The report recognizes that "[o]f course, it would be unconstitutional if the government were to enforce the bill on the basis of the content of a violator's speech, as by prosecuting only persons who interfered with hunting by means of expressing anti-hunting views." *Id.* at 3.

[25] 491 U.S. 397 (1989).

[26] 496 U.S. 310 (1990).

[27] 391 U.S. 367 (1968).

[28] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24 (2d ed. 1988) (distinguishing among restrictions focused on communication or communicative impact). Content-based restrictions discriminate against message content, permitting expression of some messages while prohibiting expression of others. Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 81 (1978). The Court employs heightened judicial review when examining content-based restrictions. Widmar v. Vincent, 454 U.S. 263, 276 (1981). Thus, content-based restrictions

When considering the constitutionality of the hunter harassment statutes, the Court must determine which is the appropriate test to apply. Three relevant cases, *O'Brien*, *Johnson*, and *Eichman*, involve protest situations and expressive conduct. The first question before the Court in each case was whether state and federal regulations applied to the protesters' expressive conduct restricted that expression based on content. When a court finds a statute is content-based, strict scrutiny analysis is required.[29] If a statute is deemed content-neutral[30] then a time, place and manner analysis is appropriate.[31]

In each of the hypotheticals above, the protesters will allege that their behavior is expressive conduct and that the hunter harassment statute seeks to regulate this behavior because of its expressive quality. In order to determine the threshold question of whether the statute is content-based the principles from *Johnson* and *Eichman* are utilized. Only if the hunter harassment statutes are deemed to be content-neutral, as the Court reminds us in *Johnson*[32] and *Eichman*,[33] need we consider *O'Brien*. In order to determine the appropriateness of these tests, it is important to first know more about the relevant cases.

1. Johnson *and* Eichman

In two successive terms, the Supreme Court upheld First Amendment protection for expressive conduct. The Court required "the most exacting scrutiny"[34] for "restriction[s] on expression [which] cannot be 'justified without reference to the content of the regulated speech.'"[35] The facts in both *Johnson* and *Eichman* are analogous to those in our hypotheticals because each involves protest and expressive conduct. In *Johnson* and *Eichman*, protesters burned flags as a symbolic part of their protest.

In 1984, at the Republican National Convention, Gregory Lee Johnson burned an American flag as part of a protest against the policies of the

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will be upheld only where they serve a compelling state interest and are narrowly drawn to achieve that end. *Id.* at 270 (citing Carey v. Brown, 447 U.S. 455, 461, 464-65 (1980)). For example, certain state interests may be so compelling that, where no adequate alternative exists, a content-based distinction, if narrowly drawn, would be a permissible way of furthering those objectives. *Widmar*, 454 U.S. at 270. *See* Stephen K. Schutte, *International Society For Krishna Consciousness, Inc. v. Lee: The Public Forum Doctrine Falls to Government Intent Standard*, 23 GOLDEN GATE U. L. REV. 563, 564-565 n.8 (1993).

[29] *Johnson*, 491 U.S. at 412; *Eichman*, 496 U.S. at 318.

[30] Content-neutral regulations generally receive a lower standard of review than content-based regulations. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980). "A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully . . . ." *Id.* at 536. A content-neutral regulation may limit expression irrespective of message content and focus on the time, place, or manner of the expression. TRIBE, *supra* note 28, at 992-93.

[31] *See O'Brien*, 391 U.S. 367.

[32] 491 U.S. at 407.

[33] 496 U.S. at 318.

[34] *Johnson*, 491 U.S. at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

[35] *Eichman*, 496 U.S. at 318 (citing *Boos*, 485 U.S. at 320) (quoting Virginia Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

Reagan administration and some Dallas-based corporations.[36] Protesters chanted while Johnson burned the flag.[37] "No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning."[38] The Court determined that Johnson's conduct was "expressive"[39] and that the State could not justify prosecution of the defendant based on an interest in preventing breaches of the peace[40] or to preserve the flag as a symbol of nationhood and national unity.[41]

After the Court decided *Johnson*, Congress passed the Flag Protection Act of 1989.[42] This law was held to be unconstitutional, as applied by the state in *Eichman*.[43] Two protests were involved in *Eichman*. The first protest involved individuals burning several flags in order to protest various aspects of the government's policies. The second protest involved burning several flags in order to protest the passage of the Flag Protection Act.[44] In both these instances the government conceded that the act of burning flags was expressive conduct.[45] The Court found that even though there was "no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the government's asserted interest is 'related to the suppression of free expression, and concerned with the content of free expression.'"[46]

In both cases, the protesters were criminally sanctioned for their conduct. Texas[47] and the District of Columbia[48] argued repeatedly that the Government had the right to protect the symbol of the nation and to encourage respect for that symbol.[49]

The Supreme Court found that in both of these cases the disparate treatment of similar acts, based upon whether the acts foster or reduce respect for the flag, is improper.[50] If the Government allows an individual to burn the flag as a show of respect (such as burning an old flag to properly dispose of it) but does not allow an individual to burn the flag if s/he intends to call into question "the flag's representation of nationhood and national unity,"[51] then the Government would be determining what behavior deserved sanction based on the ideas expressed by the behavior. The

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[36] *Johnson*, 491 U.S. at 399.

[37] *Id.* at 406.

[38] *Id.* at 399.

[39] *Id.* at 406.

[40] *Id.* at 409-10.

[41] *Id.* at 420.

[42] 103 Stat. § 777 (current version at 18 U.S.C. § 700 (1988 & Supp. I)).

[43] United States v. Eichman, 496 U.S. 310 (1990) (statute found to be unconstitutional as applied to this petitioner).

[44] *Id.* at 312.

[45] *Id.*

[46] *Id.* at 315 (quoting Texas v. Johnson, 491 U.S. 397, 410 (1989)).

[47] Texas v. Johnson, 491 U.S. 397, 400 (1989).

[48] *Eichman*, 496 U.S. at 316.

[49] The state government in Johnson, also argued that it appropriately sought to protect the public from breaches of the peace with the regulation. *Johnson*, 491 U.S. at 400.

[50] *Johnson*, 491 U.S. at 416-17; *Eichman*, 496 U.S. at 317.

[51] *Johnson*, 491 U.S. at 417.

Government in these cases, attempted to sanction the behavior which evidenced a viewpoint with which it disagreed. The Court, twice, struck down the Government's efforts to do so.

The test articulated in *Johnson*, and followed in *Eichman*, is derived from *Spence v. Washington*[52] which requires that a court resolve a number of questions. First, a court must ask whether the conduct involved was sufficiently expressive to invoke the protection of the First Amendment.[53] In order to answer this, a court must decide whether there was an intent to convey a particularized message and whether the likelihood is great that the message will be understood by those who viewed it.[54]

If a court determines that the conduct in question is expressive, the next question it must address is "whether the State's regulation is related to the suppression of free expression."[55] *Johnson* reaffirmed the proposition that if the regulation is not related to expression, the less stringent *O'Brien* standard applies.[56] It further reaffirmed "the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien's* less demanding rule."[57] Only if the regulation of hunt protests could be deemed unconnected to expression, would the Court ask whether the government's interest is sufficiently important to justify incidental restrictions on First Amendment freedoms.[58]

It is more likely that hunter harassment regulations, under the second prong of the *O'Brien* test, will be considered content-based, and thus a more demanding test applies. In that case, the Court must examine the State's interest with the most exacting scrutiny,[59] to determine whether the governmental interest justifies the statute or convictions.[60]

2. Expressive Conduct

In a recent law review article, Justice John Paul Stevens wrote that "[t]he category of expression embraced by the term 'the freedom of speech' has undergone parallel change and expansion as it has been tested

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[52] 418 U.S. 405 (1974).

[53] *Johnson*, 491 U.S. at 403 (citing *Spence*, 418 U.S. at 409-11).

[54] *Id.* at 404 (citing *Spence*, 418 U.S. at 410-11).

[55] *Id.* at 403 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968), and *Spence*, 418 U.S. at 414 n.8).

[56] *Id.*

[57] *Id.* at 407 (referring to Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984)).

[58] *Id.* at 407 (quoting *Clark*, 468 U.S. at 298) (The proper analysis is the rule established in *O'Brien*, which "is little, if any, different from the standard applied to time, place, or manner restrictions.").

[59] *Id.* 403 (citing *Spence*, 418 U.S. at 411); Boos v. Barry, 485 U.S. 312 (1988).

[60] *Johnson*, 491 U.S. at 406 (citing Community for Creative Non-Violence v. Watt, 703 F.3d 586 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288). The analysis depends upon whether the case involves an application of a statute or a facial challenge. *Id.*

in the crucible of litigation (emphasis omitted)."[61] He listed some of the forms of communication which would not originally have received protection, but do now, including parades,[62] dances,[63] artistic expression,[64] picketing,[65] wearing arm bands,[66] burning flags[67] and burning crosses,[68] commercial advertising,[69] charitable solicitation,[70] rock music,[71] some libelous false statements,[72] and perhaps even sleeping in a public park.[73] Justice Stevens explained that "what began as a categorical black-letter prohibition gives way to a more context-specific balancing of competing interests."[74]

Some commentators argue that the focus for determining whether speech or conduct is expressive should be on the speaker and not on the listener.[75] These commentators also argue that the expression versus conduct distinction is inappropriate.[76] Other commentators go further and state that "no distinction should be made between the value of the written or spoken word or expressive conduct."[77] Still others suggest that the government must, and does, make content-based choices all the time, and therefore a new approach must be pursued.[78] Although these ideas are very attractive,[79] this article asserts that even under the traditional *Spence* test, as used by the Court in recent cases, hunt protesters' conduct is ex-

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61 The Honorable John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1298 (1993).

62 *Id.* at 1298 n.32 (citing Gregory v. City of Chicago, 394 U.S. 111 (1969)).

63 *Id.* at 1298 n.33 (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)).

64 *Id.* at 1298 n.34 (citing Miller v. California, 413 U.S. 15, 24 (1973) (exempting works with "artistic value" from definition of obscenity)).

65 *Id.* at 1298 n.35 (citing Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968)).

66 *Id.* at 1298 n.36 (citing Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)).

67 *Id.* at 1298 n.37 (citing Texas v. Johnson, 491 U.S. 397 (1989)).

68 Id. at 1298 n.38 (citing R.A.V. v. City of St. Paul, 505 U.S. 375 (1992)).

69 *Id.* at 1298 n.39 (citing Virginia State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976)).

70 *Id.* at 1298 n.40. (citing Village of Schaumburg v. Citizens for Better Env't., 444 U.S. 620 (1980)).

71 *Id.* at 1298 n.41 (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989)).

72 *Id.* at 1298 n.42 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

73 *Id.* at 1298 n.43 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)).

74 *Id.* at 1300.

75 Eliot F. Krieger, *Protected Expression: Toward a Speaker-Oriented Theory*, 73 DENV. U. L. REV. 69, 88 (1995).

76 "To call [them] non-expression and mere physical expression is at best incoherent and at worst cynically disingenuous." *Id.* at 88.

77 Nina Kraut, *Speech: A Freedom in Search of One Rule*, 12 T.M. COOLEY L. REV. 177, 196 (1995).

78 Ewrin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199 (1994).

79 I believe that many cases have been wrongly decided on this basis. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). *See* Susan H. Hickes, *Constitutional Law—First Amendment—Regulation Prohibiting Sleeping in National Parks Upheld as a Valid Time, Place, and Manner Regu-*

pressive and therefore eligible for constitutional protection. Spence serves as adequate protection for the expression implicated by anti-hunting protests and, therefore, no new test or analysis is required.

In determining whether the conduct in the hypotheticals is expressive under the *Spence* test a court will first ask if the conduct is intended to convey a particular message, and then ask if there was a great likelihood that the hunters understood the message.[80]

a. Intent to Convey a Particular Message

It is evident that the protesters in the "Traditional Protest" hypothetical are engaging in expressive conduct and, therefore, deserve First Amendment protection. The Congressional Research Service report,[81] as well as those courts which have already heard these matters, indicate that such traditional protests are protected.[82]

Confusion may arise, however, when analyzing the non-traditional forms of anti-hunting protest. For constitutional purposes, the behavior of the protesters is viewed in light of whether it indicates an intent to convey a message. Even without traditional protesters, media presence, or other traditional indicia of a protest outside the park, the behavior of the individuals in both the "Typical Park Protest" and the "Active Vocal Protest" hypotheticals show that the protesters intend to spread a message. This intent, and the fact that the message is anti-hunting, are both clearly demonstrated by the slogans on the protesters' vests and their conversations with the hunters.[83] Slogans written on clothing or posters have been considered symbolic speech for some time. In fact, certain types of clothing or adornments without any written words, may also be considered speech.[84]

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lation Regardless of Whether Sleeping is Speech, Clark v. Community for Creative Non-Violence, 15 U. BALT. L. REV. 181 (1985).

[80] Spence v. Washington, 418 U.S. 405, 410-11 (1974).

[81] COHEN, *supra* note 24, at 1.

[82] Opinion Of the Justices, 509 A.2d 749 (N.H. 1986); Idaho v. Casey, 876 P.2d 138 (Idaho 1994); Henry v. Texas, 797 S.W.2d 281 (Tex. Ct. App. 1990); Lilburn v. Racicot, 967 F.2d 587 (D. Mont. 1992) (unpublished); Wisconsin v. Bagley, 474 N.W.2d 761 (Wis. Ct. App. 1991); Dorman v. Satti, 678 F.Supp. 375 (D. Conn. 1988), *aff'd*, 862 F.2d 432 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989); Connecticut v. Ball, 627 A.2d 892 (Conn. 1993).

[83] The fact that most hunter harassment statutes divide individuals in the woods into three categories is evidence supporting this statement. Statutes generally recognize: hunters, other recreational users, and individuals who are subject to the statutes. *See, e.g.*, VT. STAT. ANN. tit. 10, § 4708 (1997). The individuals who are subject to the statute may not be identified as protesters *in the statutes*, but they are in case law. The statutes, by inclusion of language such as "knowing" and "intentional," make it clear that they apply only when there is purpose to the conduct of the protesters.

[84] Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503 (1969) (black arm bands in school to protest American military involvement in Vietnam); Schacht v. United States, 398 U.S. 58 (1970) (wearing United States military uniforms to protest American military involvement in Vietnam); Spence v. Washington, 418 U.S. 405 (1974) (attaching a peace sign to a flag); Stromberg v. California, 283 U.S. 359 (1931) (displaying a red flag); Smith v. Goguen, 415 U.S. 566 (1974) (wearing an American flag "contemptuously" on seat of pants).

A more difficult question regarding proof of intent is the "Silent Vigil" hypothetical. In this setting, the protesters outside the park reflect the intent of those silently walking in the woods. Courts can imply the intent if the hunters notice the connection between the two groups or if the connection is otherwise established. If the connection is not established, other indicators must determine the intent of the individuals involved. When one of the individuals stands between a deer and a hunter, we can say with certainty that the individual is trying to save the deer from the hunter by sheltering it with her own body. Though some might say that this act does not necessarily indicate an intent to protest, the act clearly conveys the message that the individual does not wish the deer to be shot by the hunter. This is communication, and is inherently a political message, especially in the context of the hunt. It is difficult to envision an individual participating in this behavior *without* intending to convey a message to the hunter.

Communicative conduct does not require speech or slogans.[85] The activity of the hunt protesters is almost uniformly annoying to the hunters. However, we need to determine whether the purpose of the protesters is to annoy hunters, to make a statement, to protect animals, or any combination of these and other purposes. It is hard to distinguish if a protester is intending to make a statement or attempting to protect an animal. Is attempting to protect the lives of animals during a hunt the equivalent of intending to convey a message? The act clearly implies that the actor disagrees with the hunting. Courts should find that this is enough to meet the first prong of the test articulated in *Johnson* and reaffirmed in *Eichman*. When individuals[86] attempt to prevent harm to animals during a lawful hunt, they are implicitly criticizing the hunting activity. Someone who wishes to save animals without seeking to convey a message about hunting does not need to be at the hunt protest. They could be working at animal shelters, rescuing animals, paying for veterinarians' services, etc. Therefore, it is safe to say that those who choose to engage in this behavior, in the woods, intend to convey a message to the hunters and therefore their behavior is expressive.

Thus, the actors in all of the hypotheticals intend to convey an anti-hunting message to the hunters. Whether individuals choose to protest hunting by standing quietly by hunters, or more traditionally, by wearing slogans or by carrying signs, the courts should recognize that this behavior is protest. These actions are "communicative conduct" and are intended to convey a particularized message against hunting. Some state courts

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[85] Brown v. Louisiana, 383 U.S. 131 (1966) (sit-in by blacks in a "whites only" area to protest segregation); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (refusing to salute the flag); United States v. O'Brien, 391 U.S. 367 (1968) (burning draft cards to protest American military involvement in Vietnam); Boos v. Barry, 485 U.S. 312 (1988) (proximity to an embassy).

[86] Here I refer to individuals who are not paid to protect animals (e.g., Department of Natural Resources employees or animal rehabilitators) in order to clarify the intent of the actors.

have already recognized hunt protests as "communicative conduct."[87] Federal courts should follow this lead when the question arises before them.

A more difficult question is whether an individual's silent following of hunters through the woods, with a clear purpose to prevent the killing of animals, but without slogans or other protesters present can be considered symbolic speech. Except for the lack of a slogan, the goals and behaviors of this protester are identical to those which meet the test of symbolic speech. Because courts should focus on whether a message is intended to be conveyed, the absence of slogans, clothing and other factors should not be dispositive, but rather only one factor to be considered. Moreover, as noted above, the protester's decision to save animals during a hunt, rather than at other times, militates for concluding that the protester intends to convey a message.

The intent of the hunt protesters in the hypotheticals to convey a particular message can be demonstrated by a further examination of their goals. This article focuses on actions deliberately taken by hunt protesters for the purpose of disrupting and stopping hunts and for protesting hunting in general.[88] Hunt protests are organized by people who disagree with the concept of hunting in general and who choose to protest both the activity itself and the Government's involvement at taxpayer expense. Another goal is educating hunters, law enforcement officers, and others, through media exposure, about the high cost of hunting to both humans and animals.

Hunt protests focus public attention on the Government's participation in sponsoring and sanctioning the killing of animals for sport, recreation, or revenue. Often, the protests are aimed at the Government's attempt to limit or restrict the right to protest hunting. One unique aspect of hunt protests is that the hunt protesters, by their choice of tactic, may effectuate their goal: the reduction of successful hunting.

Hunt protesters, like civil rights protesters before them, prevent "law-abiding" citizens from engaging in behavior that was state-sanctioned and considered a protected right.[89] The right to segregate, once protected under law, was after time, neither afforded protection nor the same degree of moral support it once enjoyed. Whether the ability to hunt[90] will sup-

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[87] Dorman v. Satti, 678 F.Supp. 375 (D. Conn. 1988), *aff'd*, 862 F.2d 432 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989).

[88] Protesters in the field rarely admit this first goal; admitting their purpose in light of the hunter harassment statutes could result in removal from the hunting area and/or the risk of criminal and/or civil sanctions.

During hunts, some protesters photograph wildlife or fauna, claiming that photos are their only goal. This article does not address this approach though some state statutes are overbroad and would restrict even this type of behavior from "non-protesters." *See, e.g.*, KAN. STAT. ANN. § 32-1014 (1993). The focus of this article is on the restriction of the right to protest. Therefore, the hypotheticals outline protest situations.

[89] Included in these once state-sanctioned behaviors is the "right" to segregate and the "right" to draft young men to serve in the Vietnam War.

[90] Hunting is a regulated and lawful recreational activity, and in November 1996, Alabama became the first to make hunting and fishing constitutional rights. *Official Election*

port a limitation of the right to protest remains to be seen. Further, whether hunting will continue to be seen as morally neutral will also be judged with time. Fewer and fewer people in this country participate in hunting.[91] It is possible that in the not-too-distant future, popular sentiment will look upon hunting in the same way as it now regards slavery.[92]

Protesters intend to communicate their displeasure with hunting, to reduce its effectiveness, and to communicate to the hunters and others, that hunting should end. Thus, their actions meet the first prong of the test articulated by the Court in *Johnson*:[93] their actions intend to convey a particularized message.

b. Likelihood that the Audience Understood the Message

The second question that courts must ask to determine whether the conduct in the hypotheticals is expressive, and thereby protected, is if the hunters understood the message. The focus here is on the person who hears the message.[94] In *Barnes v. Glen Theatre, Inc.*[95] the Court focused on the expression versus conduct distinction and the impact on the person hearing the message. Using the *O'Brien*[96] test in that case, Justice Rehnquist found that the conduct was expressive, but that incidental limitations on the activity were justified given the substantial interest of the government which was unrelated to the suppression of free expression.[97]

It is difficult to imagine an example where conduct and expression are more intertwined than in dance. How can we conceive of dance without movement and expression?[98] The plurality in *Barnes* describes the State's goal as an attempt to protect viewers from the "harmful message that nude dancing communicates."[99] Thus the Court, only one year after

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Results, THE MONTGOMERY ADVERTISER, Nov. 30, 1996, at 3F. A similar attempt in Minnesota failed. THE FUND FOR ANIMALS NEWSLETTER, Summer 1996, at 7.

91 "Several recent studies indicate that 51 to 73% of Americans oppose sport hunting." Mike Markarian, *Sport Hunting: The Mayhem in Our Woods*, ANIMALS' AGENDA, July-Aug. 1996, at 14-15. "Every year the number of sport hunters decreases. According to the U.S. Fish and Wildlife Service (USFWS), 10% of Americans purchased hunting licenses in 1975, 7% in 1991, and fewer than 6% in 1994. Leading researchers in hunting demographics indicate that if current social trends continue, sport hunting itself could be extinct by the year 2050." *Id.*

92 MARJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY (1988). *See also* Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 444 n.157 (1996); Peter Singer, *The Great Ape Project*, THE ANIMAL'S AGENDA, July-Aug. 1996, at 12, 13.

93 Texas v. Johnson, 491 U.S. 397, 402-04 (1989).

94 *See* TRIBE, *supra* note 28, § 12-7; Melville Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 38-57 (1973).

95 501 U.S. 560 (1991) (holding that nude dancing was a form of expression).

96 United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

97 *Barnes*, 501 U.S. at 560-61.

98 "This is no more than recognizing, as the Seventh Circuit observed, that dancing is an ancient art form and 'inherently embodies the expression and communication of ideas and emotions.'" *Id.* at 587 (White, J., dissenting) (citing Miller v. Civil City of South Bend, 904 F.2d 1081, 1087 (7th Cir. 1990) (en banc)).

99 *Barnes*, 501 U.S. at 591.

Eichman,[100] reverts back to the *O'Brien* test and continues to make the same mistakes the Court made in *O'Brien* and cases that follow.[101] The Court recognizes expression but then finds a reason not to protect that freedom.

In the hunt protest context, like the dance in *Barnes*, it can also be difficult to distinguish the conduct from expression. However, both the federal and state statutes, attempt to distinguish between activities which may disrupt the hunt based on intent of the individuals engaging in the disruptive behavior. These statutes allow activities which are disruptive, as long as there is no intent to be disruptive. Enforcing these statutes presupposes that officers in the woods will be able to distinguish between the intent of individuals based on their conduct, even those engaged in identical behavior. In practice, this supposition is not without support, as the hunters do not seek, or have not sought thus far, to have the wildlife photographers, hikers, picnickers or even other hunters arrested. This is true even though the presence of these individuals may interfere with hunting and their conduct may be identical to that of the protesters.

Rather, only those individuals who are opposed to hunting, and whose protests interfere with hunting, are the targets of hunters and only those actions are cognizable under the statute.[102] It is only the intent, or the messages, which distinguish between the actors. This very distinction itself indicates that the hunters, and the statute, recognize: (a) that there is a message intended to be conveyed by the protesters; and (b) that the message is anti-hunting because it intends to interfere with the hunting. It is this very message, and only this message, which the statute and the hunters seek to regulate. Other users of the woods and parks may disturb the hunters, but the statutes restrict (and the hunters are vehemently opposed to) only those who are there to protest the hunting. This indicates that both prongs of the test are met. First, the hunt protesters are conveying a message about hunting and second, the hunters and legislators are responding to that message.

This is true for the "Traditional Protesters," the "Typical Park Protesters," and the "Active Vocal Protesters." Courts can tell what these individuals mean to convey from their signs, chants, and conversations with hunters (which attempt to dissuade them from the hunt). Again, the harder hypothetical is the "Silent Vigil."

Because of the lack of traditional indicia of protest, room for confusion exists as to the message of the protesters in the absence of their own clearly articulated message. Courts can certainly assume that the hunters understand the message intended to be conveyed by these protesters. In-

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[100] United States v. Eichman, 496 U.S. 310 (1990).

[101] *See also* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); United States v. O'Brien, 391 U.S. 367 (1968); United States v. Albertini, 472 U.S. 675 (1985) (rule barring respondent from military base upheld in application against entrance on base to protest war).

[102] Some state statutes regulate activity of individuals which interferes with hunters whether or not there was intent to interfere. *See, e.g.*, KAN. STAT. ANN. § 32-1014 (1993). These statutes are too broad to receive constitutional protection.

dications of the protesters' intent may be gleaned from their dress, the way they carry themselves, who they associate with, and again, the mere fact that they are in the woods with no other ostensible goal.

Ironically, if prosecutors cannot prove that the "Silent Vigil" protesters intend to interfere with the hunt, they cannot prove that the protesters violate the statute. The prosecutors will likely attempt to prove a violation of the statute by proving that the protesters are opposed to hunting and intended to interfere with the hunting. Prosecutors may accomplish this by showing evidence that a defendant is associated with an animal rights group. The only question remaining is whether the hunters may discern this information during the hunt. Again, it is likely, though not certain, that the hunters will be able to understand the protesters' message. If the "Silent Vigil" protesters wish to be assured of constitutional protection, they may need to include some clear indication of the message they wish to communicate.

The message of the protesters in the other three hypotheticals are likely to be understood by the hunters, and therefore, these protesters meet both the first and second prongs of the test articulated in *Johnson.*[103] Courts should find that this conduct is expressive and therefore may be protected by the First Amendment.

With regard to the "Silent Vigil" protesters, the more traditional indicia of a protest message included in their silent vigil, the more likely their conduct will be considered expressive and therefore receive protection. Determining whether the conduct is expressive requires a close examination of each factual situation, keeping in mind that it is unlikely individuals will place themselves in these circumstances without a motive to communicate. The question remains, whether very subtle communication will be protected, or whether the protesters will be required by the courts to more clearly convey their anti-hunting message. In order to claim constitutional protection, is it enough to say that because the hunters felt individuals intended to interfere with the hunt, an anti-hunting message was clearly expressed and communicated?

3. Content-Neutrality

Once courts determine that the conduct is expressive and therefore potentially entitled to constitutional protection, the next question is whether the statute seeks to restrict this expressive conduct based on the *content* of the communication. If the statute is content-based, strict scrutiny applies. If the regulation is unrelated to the suppression of free expression, the less strict standard of the *O'Brien*[104] test applies.[105] State courts are split on this issue,[106] and no federal court has yet to address

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[103] Texas v. Johnson, 491 U.S. 396, 402-04 (1989).

[104] 391 U.S. 366, 376-377 (1968).

[105] Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

[106] A number of state courts have already considered the constitutionality of these laws. Connecticut's courts, most notably, have been considering the matter for a number of years. The states which have considered the question, have not uniformly answered it.

this issue. When the federal courts do face this question they should find that the federal hunter harassment statute is in violation of First Amendment rights.

The federal hunter harassment statute makes it a violation "intentionally to engage in any physical conduct that significantly hinders a lawful hunt."[107] Thus, the Act itself contains no explicit content-based limitation. On its face it prohibits conduct which hinders hunting, whether the protesters advocate more hunting, less hunting, or a completely different

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The New Hampshire House of Representatives asked its Supreme Court to determine the constitutionality of its statute. The Justices of the Court found that New Hampshire's statute was not constitutional, for two reasons. First, its language was overbroad, "it would prohibit not only speech likely to interfere with lawful activity of hunters or fisherman" or that which would provoke breaches of peace, "but also mere expressions of particular point of view raising no such risks." Opinion of the Justices, 509 A.2d 749, 752 (N.H. 1986). Second, it "was so vague as to provide little or no notice to individuals of ordinary intelligence as to what activity would come within its proscriptions." *Id.*

In Idaho, a defendant convicted in the Fifth Judicial District Court appealed the decision and challenged the constitutionality of the statute. The Idaho Supreme Court held that the statute was unconstitutionally overbroad. Idaho v. Casey, 876 P.2d 138, 139 (Idaho 1994).

However, Texas upheld a conviction under its hunter harassment law even though the defendant did not enter onto the property where the hunting occurred. (There was no constitutional challenge.) Henry v. Texas, 797 S.W.2d 281 (Tex. Ct. App. 1990).

Montana's hunter harassment statute was held facially unconstitutional in its entirety by the Eighteenth Judicial District Court. The State appealed and the Supreme Court of Montana determined that the specific provision which prohibited "disturbing individuals engaged in the lawful taking of wild animals" was not unconstitutionally overbroad. Montana v. Lilburn, 875 P.2d 1036, 1044 (Mont. 1994). The Court further held that the statute, in its entirety, was constitutional. *Id.* The defendant, John Lilburn, appealed to the Supreme Court; the Justices denied his petition for a writ of certiorari on January 9, 1995. Lilburn v. Montana, 513 U.S. 1078 (1995).

Wisconsin, like Montana, determined that its statute was not unconstitutionally overbroad or vague. Wisconsin v. Bagley, 474 N.W.2d 761, 763 (Wis. Ct. App. 1991).

Connecticut is the jurisdiction most rich in judicial action. Its courts found the state's first hunter harassment statute to be unconstitutionally vague and overbroad. Dorman v. Satti, 678 F.Supp. 375 (D. Conn. 1988), *aff'd*, 862 F.2d 432 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989). The state then passed a second version of the hunter harassment statute, which was also challenged. It was upheld, then remanded on appeal for more evidentiary findings. Connecticut v. Ball, 627 A.2d 892 (Conn. 1993).

No clear picture emerges from a review of the states' response to the question of whether the hunter harassment statutes are constitutional. Each state has its own version of the law, further complicating a uniform view of the hunter harassment statutes.

[107] 16 U.S.C.A. § 5201 (1988). Some state statutes, however, fail to express what harassment or interference is—which activities, words, actions, odors, noises, and so forth, constitute a violation and which do not. Few delineate what is considered ordinary, normal or recreational activity which is not deemed interference. Other statutes do not distinguish between identical uses of protesters and recreational users (walking, taking hikes, listening to music, taking photos, etc.) which may be permissible and which may not. These problems lead to challenges of vagueness and overbreadth. Those statutes which do distinguish between identical behaviors, usually do so on the basis of "intentional" or "knowing" behavior which "disrupts" or "interferes" with the lawful hunt. These statutes, like those in Texas v. Johnson, 491 U.S. 397 (1989), and United States v. Eichman, 496 U.S. 310 (1990), may be deemed content-based due to this distinction.

message. However, the lack of any explicit content discrimination does not end the inquiry.

In *Eichman* the Court recognized that the Flag Protection Act of 1989 "contain[ed] no explicit content-based limitation on the scope of prohibited conduct."[108] Yet the Court found that it was "nevertheless clear that the Government's asserted interest is 'related to the suppression of free expression'"[109] and therefore strict scrutiny is the appropriate analysis. This was true in *Eichman* because "[t]he Government's interest is implicated only when a person's treatment of the flag communicates a message to others that is inconsistent with the identified ideals."[110] Specifically, the Act exempts from prosecution, disposal of flags which is consistent with respect for the flag.[111]

Thus, two individuals could burn flags, one for reasons of protest and one to properly dispose of a worn flag. The former is subject to prosecution, the latter is not. Under the Flag Protection Act, identical behavior is treated differently. The reason for the disparate treatment is linked to the expressive nature of the conduct of the actors.

Likewise, in the hunter harassment context, the federal statute regulates only conduct which "intentionally" interferes with hunting. Two individuals could walk through the woods taking photographs, one for love of animals and nature, the other for love of animals, to protect them from hunters, and to protest hunting. Under the hunter harassment statute, the conduct of the latter individual would be regulated and the behavior of the former individual would not. The reason for the distinction in treatment would be the expressive nature of the behavior which evidenced the intent of the individuals. Therefore, as in *Eichman*, even though a statute may not appear on its face content-based, it may still fail constitutional scrutiny. As the Flag Protection Act in *Eichman* failed, so should the federal hunter harassment statute because it impermissibly regulates conduct based on its expressive nature.

In addition to the argument that the statute should fail as facially invalid, it should fail if applied unconstitutionally to suppress the activities of protesters. The cases that have been brought under state statutes indicate that the enforcement of the statutes are targeted at anti-hunting protesters.[112] This is not surprising, given that the goal of the statutes, as

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[108] *Eichman*, 496 U.S. at 315.

[109] *Id.* at 315, (citing Texas v. Johnson, 491 U.S. at 410).

[110] *Eichman*, 496 U.S. at 310.

[111] *Id.* at 311.

[112] All of the defendants in the state cases have been anti-hunting protesters, with one exception. The defendants in the Wisconsin case appear to have been protesting the exercise of treaty rights by Native Americans. Protecting the ability to hunt, to the exclusion of the interests of others, has been the norm in this country. *See* Op. Atty. Gen. 244 (Va. 1978) ("[N]o permit may be issued for an activity which would interfere with the public right to fish, fowl or hunt in the Eastern Shore marsh or meadowlands . . . . ").

The primary instances of restrictions on hunting are really restrictions on Native American treaty rights, and protection of the ability of Anglo-Americans to hunt and fish. *See* H. Barry Holt, *Can Indians Hunt In National Parks? Determinable Indian Treaty Rights and United States v. Hicks*, 16 ENVTL. L. 207 (1986).

mentioned in a Congressional Research Service report,[113] and in pro-hunting magazines,[114] was to curb anti-hunting, animal rights activity.

No cases have been brought under the federal statute to date, so state jurisprudence may serve as an illustration. The forces behind the enactment of the state statutes are the same as the ones behind the enactment of the federal legislation. The same motives may be imputed and it is reasonable to conclude that the enforcement patterns of the state statutes would be repeated in the enforcement of the federal statute.[115]

The state and federal hunter harassment statutes, though different in important respects, are at their base, very similar. The goal is to allow hunters to hunt without distraction from protesters. Other distractions, such as those caused by recreational users, are to be tolerated by the hunters as they have been in the past.

Merely accepting the notion that the statute is impermissibly targeted at anti-hunting protesters does not guarantee that it will be deemed unconstitutional. The Justices in *Clark* recognized that a statute may survive constitutional challenge even if its application is targeted only at protesters.[116] However the court in *Clark* did not find that the statute was content-based, and found instead that the statute would apply to any protesters engaging in the same behavior. That is not the case here. Protesters who support hunting have not been subject to state prosecution under the various state hunter harassment statutes. There is no indication that a different result will occur under the federal statute, as the protesters who support hunting are not "intending to interfere with the hunting." Therefore, the statute, at least in its application, if not on its face, should fail constitutional muster because it impermissibly distinguishes between identical behavior based on its expressive nature.

The federal statute specifically exempts First Amendment activity from regulation. This raises the question of whether the constitutional activity exemption of the federal statute serves to render the statute both facially constitutional and content-neutral. Either the statute protects the hunting activity from intentional interference as section 5201 purports to do,[117] or it protects First Amendment interests as section 5206 purports to

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Thus, the Wisconsin case involved protest, therefore the behavior was potentially due protection, even though it was not anti-hunting protest.

113 COHEN, *supra* note 24, at 1.

114 Tom Gresham, *Handling Hunter Harassment*, SPORTS AFIELD, Sept. 1992, at 60; Satchell, *The American Hunter Under Fire*, U.S. NEWS & WORLD REP., Feb. 5, 1990, at 30; Ugalde, *supra* note 21, at 1111 n. 14.

115 *See* Connecticut v. Ball, 627 A.2d 892, 900-01 (Conn. 1993) (Berdon, J., dissenting) (quoting TRIBE *supra* note 28, § 12-6). Tribe discusses the relevance of legislative history with regard to the determination of the constitutionality of a statute. *Id.* The legislative history coupled with recreational immunity for identical behaviors indicates that these statutes are indeed content-based. *Id.*

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

117 16 U.S.C. § 5201 (1994) (it is a violation of this section intentionally to engage in any physical conduct that significantly hinders a lawful hunt).

do.[118] It cannot do both at the same time, so long as protest activity interferes with the hunt and is considered harassment by the hunters. This attempt to steer clear of constitutional problems is an ineffective cure for the constitutional problem. It does not render the statute content-neutral. Rather, it indicates the statute is content-based.

4. The Government's Interest

Because the hunter harassment statute is content-based, the Government must show a compelling interest to support the restriction on expressive conduct.[119] There are no federal cases in which the government has been asked to support the hunter harassment statute by indicating the significant government interest at stake. Therefore, the stated government interests discussed below are those which have been advanced on behalf of state hunter harassment statutes.

One assertion implicit in the restriction of anti-hunting protests is that they are to some degree successful in disrupting the hunting. However, no data indicates that the protests have had an adverse impact on the hunts, much less that any alleged impact is significant. Therefore, it is hard to argue that the alleged government interest protected is: (1) in need of protection, or (2) a sufficient basis upon which to sustain a content-based statute from constitutional challenge. Despite this difficulty, this article addresses the government interests which may be identified as needing the protection the statute allegedly offers.

a. Hunting as a wildlife management tool

The basis most often asserted for a hunter harassment statute is the importance of protecting hunting as a wildlife management tool.[120] Hunters have been part of the wildlife "management" techniques in this country since the formation of the parks.[121] Conservation was a principle motivation behind President Theodore Roosevelt's development of the National Park System. Roosevelt recognized that the encroachment of humans into animal habitat, natural and other destruction of animal habitat, widespread hunting, and other factors were leading to the dra-

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[118] 16 U.S.C. § 5206 (1994). "Nothing in this chapter shall be construed to impair a right guaranteed to a person under the first article of amendment to the Constitution or limit any legal remedy for forceful interference with a person's lawful participation in speech or peaceful assembly." *Id.*

[119] This is true based on *Texas v. Johnson*, 491 U.S. 396 (1989), and *United States v. Eichman*, 496 U.S. 310 (1989), and even if *United States v. O'Brien*, 391 U.S. 367 (1968), were applied (as long as other factors were met, such as public fora, to be discussed later.)

[120] *See*, RON BAKER, THE AMERICAN HUNTING MYTH (1985); INGRID NEWKIRK, SAVE THE ANIMALS! 94 (1990); PETER SINGER, ANIMAL LIBERATION 234 (1990).

[121] This is one of those rare situations where the government allows, authorizes, or encourages armed citizens (who are not necessarily trained in firearm use much less wildlife management) to do the work of the government.

matic decline in animal populations.[122] He understood that these factors, if unchecked, would result in a reduced number of animals to hunt.

This was an undesired outcome and the parks became part of the government's policy to preserve enough animals to sustain hunting for the pleasure of humans, not for the sake of the species. It was also recognized, at that time, that humans found animals pleasing in and of themselves, and necessary for an understanding of nature and humans' place within it. Conservation has thus become the principle by which a "thing," be it nature or animals, is preserved in large enough quantities to be sustained for human use and enjoyment. This principle is responsible both for developing parks and opening these areas to hunting.

Hunting plays a large part in the conservation efforts for state and federal parks. Hunting license fees create part of the revenue that maintains animal populations and habitat to meet the demands of hunters.[123] It is unclear whether the hunting fees also provide enough revenue to benefit other users of the parks, or simply fund hunting activities. Many hunters and park managers claim that without the annual hunts animal populations would overwhelm humans, providing more animals than are needed for human use.[124]

This article does not concentrate on these myths, as much has been written on both sides of this topic. However, park management principles and hunting regulations themselves clearly indicate that their goal is to increase the animal population so that there are plenty of animals to hunt. For instance, deer hunters are encouraged to kill male animals, thus *increasing* the carrying capacity of a herd.[125] A hunting policy focused on decreasing the number of animals, would encourage the killing of young and female deer. Also, food is planted, or protected, for deer in the spring and summer resulting in large populations of healthy animals ready for hunting in the fall. This practice undermines the argument that hunting is necessary to control overpopulation, or to prevent animals from starving due to lack of food sources. While these arguments are mainly applied to deer, the same arguments and tragic results apply to many other species.

The point is not whether or not one accepts the validity of the claims that hunting is an efficient tool of conservation or that conservation is an important governmental interest. The real question is, assuming that these asserted governmental interests are valid and important, do they support the statute's regulation of expressive conduct? This article asserts that they cannot. If the protection of the national symbol, our flag, is not a

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[122] This is still a concern, even with "wildlife management." "In the 19th and 20th centuries, hunters have helped wipe out dozens of species . . . . In its report on the Endangered Species Act of 1973, the U.S. Senate's Commerce Committee stated, '[H]unting and habitat destruction are the two major causes of extinction.'" Markarian, *supra* note 91, at 14.

[123] Ugalde, *supra* note 21, at 116 n.45.

[124] *Id.* at n.46. "By reducing natural populations artificially every year, hunters actually stimulate breeding." Baker, *Of Cowards and Conservation*, ANIMAL'S VOICE MAG., Feb.-Mar. 1991, at 30, 35, *cited in* Ugalde, *supra* note 21 at 1116 n.46.

[125] Carrying capacity represents the number of animals which are naturally sustained by the available habitat while maintaining maximum reproduction.

sufficient government interest to sustain a challenge to content-based statutes,[126] how can the interest of conservation rise to such a level?

Here, as in *Johnson*[127] and *Eichman*,[128] it is possible to protect the government's interest without suppressing the conduct protected by the First Amendment. Further, protection of First Amendment activity is also a government interest and one which supersedes many others. Finally, there is no factual evidence offered in any of the state cases or legislative history that the anti-hunting protests have affected the ability of hunters to kill sufficiently large numbers of animals for the alleged wildlife management needs. Therefore, wildlife management, stated as a government interest, is insufficient to support the suppression of free expression.

b. Hunting as an important part of American heritage

Recently, some states have passed resolutions indicating that hunting is an important part of American heritage and should be protected and promulgated.[129] One could debate the nature of the role hunting has played in our country's history and development, or whether it is a part of our heritage deserving protection and encouragement. Slavery, too, is part of the heritage of this country, yet it would be shocking in this day to hear calls for protection of the nostalgic memories of slavery and to encourage its practice now. Therefore, the mere statement that a practice was integral to the history or development of the country is not sufficient to warrant its protection or promulgation. Further, how can the undisturbed pursuit of pleasure of one group be sufficient reason to restrict the constitutional rights of another group?

Is the protection of hunting as a part of our national heritage a sufficient government interest to withstand the constitutional challenge to a content-based statute? As stated above, and as in *Johnson* and *Eichman*, there are ways to achieve this goal, without restricting First Amendment activity. Further, it is not clear that anti-hunting protests compromise the notion that hunting is a part of the American tradition. Like the efforts of the protesters in *Johnson* and *Eichman*, the hunt protestors' efforts may have the opposite reaction, stirring a protective response against the protest. Indeed, resolutions in support of hunting surfaced only after the protests began. This indicates that the proper response to speech is certainly

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126 *See generally* Texas v. Johnson, 491 U.S. 379 (1989); United States v. Eichman, 496 U.S. 310 (1990).

127 491 U.S. 397.

128 496 U.S. 310.

129 *See, e.g.*, ALA. CONST. AMEND. NO. 543 (1996); ALASKA STAT. § 41.21.170 (Michie 1996); CAL. FISH & GAME CODE § 712 (West 1996); COLO. REV. STAT. § 33-1-101 (1996); FLA. STAT. ANN. § 372.12 (West 1996); GA. CODE ANN. § 12-3-5 (1996); HAW. REV. STAT. § 171-26 (1996); KAN. STAT. ANN. § 32-924 (1993); LA. REV. STAT. ANN. § 56:266 (West 1994); ME. REV. STAT. ANN. tit. 12, § 7035 (West 1996); MASS. GEN. LAWS. ANN. ch. 21A, § 2 (West 1996); MONT. CODE ANN. § 1-1-226 (1991); N.M. STAT. ANN. § 17-1-5.1 (Michie 1996); N.D. CONST. ART. 1, § 1 (1994); OHIO REV. CODE ANN. § 1531.06 (Anderson 1995). Iowa, Massachusetts, Michigan, Oregon and Washington also sought to expand the rights of hunters in recent 1996 elections.

not the restriction of that speech. More speech as an alternative is generally desired over the restriction of speech.

Again, if the protection of our flag as a national symbol was an insufficient government interest to overcome a challenge to the statutes in *Johnson* and *Eichman*, an asserted interest to protect hunting as a national heritage is likewise insufficient to protect the content-based hunter harassment statutes from constitutional challenge.

c. Safety concerns

Another government interest asserted in support of the hunter harassment statutes is concern for the safety of the protesters. This assertion is patently absurd on its face. First, the implication is that the protesters are at risk. If this is true, it is an assumed risk on the part of the protesters. Further, implicit in the alleged risk is the notion that hunters are liable to injure the protesters. If any such action occurs, surely the hunters involved would be culpable under existing criminal laws. Is a statute needed to protect the hunters from annoyance so that they may not injure protesters? This is not an implication that would please the authors of the statute.

If the implication is not that intentional harm would befall the protesters, but rather that accidental harm would occur, this argument also lacks validity. Other hunters are not protected from each other by such statutes, and they are certainly more at risk. Many hunters die each year at the hands of one another or due to their own negligence.[130] Some regulations, such as the requirement of safety courses and the introduction of blaze orange, are a result of a high number of hunter fatalitites. However, no statutes have been enacted to allow hunters to banish one another from the woods or restrict other hunters' activities, due to safety concerns.

Another group harmed by the carelessness of hunters are individuals living near wooded areas, yet, this group remains unprotected.[131] Further, there are no restrictions on the use of the woods by recreational users during a hunt. If the government was concerned for the safety of its citizens, it might consider imposing a larger buffer zone around active hunters or excluding all others from the area during the hunt.

Either of these solutions, implies two potentially undesirable notions. First, it restricts the use of public property for the benefit of one group

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[130] In 1988, 177 people were killed and over 1,700 people were injured by hunters. Richard L. Worsnop, Hunting Controversy, Cong. Q. Researcher, Jan. 24, 1993, at 51-52. *See, e.g.*, *Man, 62, To Be Arraigned in Deer Hunter's Death*, THE COLUMBUS DISPATCH, Jan. 2, 1995, at 6B; *Man Pleads Guilty in Hunting Death*, STAR-TRIBUNE, Mar. 16, 1994, at 9B; *Shooting Death Hearing Delayed*, THE GRAND RAPIDS PRESS, Dec. 4, 1994, at C6; Terri P. Guess, *Hunter Sentenced in Slaying*, STAR-TRIBUNE, July 13, 1994, at 2B; *Hunter Named in Wrongful Death Suit*, THE STAR-LEDGER, May 29, 1996, at 23.

[131] One noted example is the death of a woman in Maine who was killed while standing in her backyard by a hunter who mistook her white mittens for a whitetail deer. *Death and Hunter's Trial Pose Tough Questions*, N.Y. TIMES, Oct. 22, 1990, at A12; *Man is Acquitted in Hunting Death*, N.Y. TIMES, Oct. 18, 1990, at A16.

over another. This might be very unpopular with the recreational users. Perhaps the managers of state and federal parks felt that the public would not tolerate a restriction of their use of a public facility for the benefit of a select few.[132] Secondly, it highlights the inherently dangerous nature of hunting, which is increasing with the decrease of wooded areas and the rise of development. The inevitable conclusion could be more restrictions on hunting, rather than on other activities which may interfere with hunting.

Asserting safety as a government interest sufficient to sustain a challenge to a content-based statute also fails for the same reason concerns for breaches of the peace failed in *Johnson*. No breaches of the peace or injuries to protesters have occurred, and no significant threats have occurred since the protests began.

If the safety concerns are directed at protecting the hunters, a dubious claim at best, the result is the same. Although no hunters have been injured by protesters, the possibility of assault on hunters by protesters may be posited as a motivating purpose for the introduction of the hunter harassment statutes.[133] However, it is unlikely that non-violent protesters would choose to assault hunters who are armed, and may have been drinking. Further, only one assault is alleged in the history of protest activity, and appropriate criminal statutes deal with this eventuality.[134] Hunter saftery does not appear to be a motivating factor for the introduction of these statutes. Thus, safety concerns fail as a sufficient government interest which might support the statute.

None of the asserted governmental interests support the regulation of free expression. None even rise to the level of the interest articulated in *Johnson*[135] and *Eichman*,[136] which failed to justify a content-based restriction of First Amendment rights.

5. *Public Forum*

Another important question to answer is whether the federal park is a "public forum" for First Amendment purposes. The hunt protests considered in this article are conducted on public park land, which is of course, open to the public. No persons, groups, or political statements are excluded, except those who wish to protest hunting by interfering with the hunt.

The park is public property, financed by taxpayers, but the question remains whether it meets the definition of a public forum in which expres-

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132 There are an estimated 300 hunters a year, maximum, and nearly half a million other visitors a year who came to the Park for other reasons. Telephone Interview with Steve Hiller, Park Manager, John Bryan State Park, Ohio (Oct. 31, 1995).

133 Telephone Interview with William Horn, Director of National and International Affairs and Washington Counsel of the Wildlife Legislative Fund of America (Oct. 12, 1993).

134 There was one assault for which Lyn Dessaux was convicted of striking a bison hunter with a ski pole. *Animal Rightists Guilty of Assault in Montana*, UPDATE: HUNTING - TRAPPING - FISHING, THE WILDLIFE LEGISLATIVE FUND OF AMERICA, Summer 1991, at 6.

135 491 U.S. at 407-11, 413-17 (1989).

136 496 U.S. at 318 (1990).

sive conduct is presumptively protected. The courts in *Johnson* and *Eichman* did not address this issue, as the activity in those cases was unquestionably conducted on public fora. However, this question does arise in the hunter protest context.

Historically, the Court has struggled with the public forum question in many cases,[137] and has recently tried to articulate a formula for deciding these cases.[138] In 1983, the Court decided *Perry Education Association v. Perry Local Educator's Association*[139] and set forth the current test for public forum cases.

a. Traditional definition

A public forum is defined as "public property which the state has opened for use by the public as a place for expressive activity."[140] The Court in *Perry* describes streets and parks as public fora in that they "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions."[141]

The question is whether the parks used for the protests and hunting are the type of parks referred to by *Perry*. These parks are publicly owned, "held in trust for the use of the public," and they have "been used for the purposes of assembly."[142] This much cannot be argued. However, the question arises whether the parks have been used for "communicative activity."

b. Modern definition suggested

The definition of communication changes over time and so may our view of whether these parks are traditionally used for communicative activity. Historically, the parks have been used for hunting. This govern-

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[137] *See, e.g.*, Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) (finding a local ordinance which requires a permit in order to distribute literature of any kind by any method is invalid on its face); Hague v. C.I.O., 307 U.S. 496, 518 (1939) (legislation requiring a permit before leasing any hall for a public meeting at which a speaker will advocate obstruction of, or change to, the state or federal government, is void); Cantwell v. Connecticut, 310 U.S. 296, 301 (1940) (declaring state ban of expression on public property too broad and therefore, invalid); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding a state statute requiring a special permit and fee to groups wanting to have a parade or procession on any public street).

[138] *See e.g.*, Brown v. Louisiana, 383 U.S. 131, 134 (1966) (restricting the government's ability to regulate free speech in public libraries); Grayned v. City of Rockford, 408 U.S. 104, 107 (1972) (finding that an ordinance which forbids noise or disruption on school grounds while school is in session is valid); S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (holding that a municipality denying use of a city auditorium to a particular performance was improper because it was a prior restraint on speech); Greer v. Spock, 424 U.S. 828, 839 (1976) (allowing restrictions of free speech and access to military base); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 652 (1981) (limiting government's ability to regulate expression on state fairgrounds).

[139] 460 U.S. 37 (1983).

[140] *Id.* at 45.

[141] *Id.* (quoting *Hauge*, 307 U.S. at 515).

[142] *Id.* (quoting *Hauge*, 307 U.S. at 515).

mental subsidy to hunters went long-unquestioned. Hunters, in return, began to pay fees to defray the government's costs of maintaining the parks for the hunters' benefit. Therefore, the parks have traditionally been used to support pro-hunting activity. Through this support for hunting, the government communicates the message that hunting is appropriate, governmentally sanctioned behavior.

Today, hunting is a political issue. Opposition to hunting has grown in number and voice, especially in the last decade. One of the points of opposition, in addition to concern for the welfare of animals, is the financial support this activity receives from the government. As in the abortion debate, opponents of hunting decry the use of government funding to support an activity which they find abhorrent. As with slavery, opponents find their government's support, protection, and sanction of this activity a vice worthy of protest.

Hunting was once widespread in our country's history and part of the routine of life. Today it no longer maintains this standing in society. Two reasons account for this change. First, fewer people are hunting than ever before. The cost, time, and effort of hunting make it an inefficient and unpopular method of acquiring food in a modern society. Hunting has been reduced to a sport, or a hobby, and is no longer a necessity or way of life.[143] Modern day hunters may eat the animals they kill, but hunting is no longer a primary means of subsistence, it is now simply a form of pleasure or competition.

The second reason for the change in attitude toward hunting is the emergence of the animal protection movement. This new social movement urges society to look upon animals with different, more compassionate eyes. The individuals in this movement, like those who worked for the abolition of slavery, seek to introduce a new paradigm, a new way for society to consider and treat animals. As slaves were considered nonhuman pieces of property to be used and abused at the whim of "superior" humans, animals are now considered property, inferior and subject to use by humans. The animal protection movement attempts to change the way society looks at animals.

The animal protection movement works to achieve these goals by focusing attention on cruel and unnecessary forms of animal abuse. Hunting is "targeted" for attention by some animal protection groups. Because many Americans have no personal experience with hunting, and hunting is no longer necessary for survival, the practice of hunting can now more easily be discussed in both objective and moral terms. The tactic of protesting hunting is an attempt to further this dialogue and should take place where the hunters are in order to counter the acceptable image of hunting.

The dialogue regarding the morality of hunting is new to our society; it was not contemplated when the Court was defining public fora, nor when the parks were first opened. The decreased importance of hunting and the growth of the animal protection movement have potentially al-

[143] In some instances, hunting may still provide the primary source of nourishment for a person or family.

tered whether parks are to be defined as public fora. Because conversations about hunting are occurring in the parks, the next question the courts must decide is whether the conversation which occurs there should be protected.

c. Why the protesters must choose hunting grounds as their public forum

Other channels are available to the protesters to communicate their message. However, there is no place other than the woods to confront the hunters. This is the only place where they will be engaging in the hunt. There is no other way to directly challenge the government's protection and implicit support of hunting. There is no alternative method by which to send the anti-hunting message as directly. If the government supports hunting on public property, and forbids opposing viewpoints to be expressed there, the government takes sides in this political debate.

It is essential that the protest occur in the woods, as "the right to protest on public property should, at least in some circumstances, be determined in relation to the wrongs being protested."[144] In 1965, the infamous march from Selma to Montgomery, Alabama took place, but not without legal challenge.[145] It is partially infamous for the effort required to get past the police, and from the beatings visited upon the marchers. However, it is also important to note that

> [u]nder the existing analytical framework, a major highway would undoubtedly be classified as a 'nonpublic forum,' in which speech rights are severely limited. . . . Thus, if a court today were to confront a situation like the Selma march, it would almost certainly deny the plaintiffs the requested relief on the grounds that state restrictions on protest activities on public highways are reasonable.[146]

"The impact of this mode of analysis is significant. It is doubtful that the Selma march would be long remembered had it taken place on a single day on a side street, or seldom-used park in Selma."[147] Thus, we see the importance of context in the protest cases. A government that allows the "sport" of hunting to be conducted, without allowing the protesters to exhibit their disapproval, creates a special category of activity. The government is supporting hunting financially and protecting it from dissent.

The workers and patrons of abortion clinics wish that they could go about their business without protesters calling them names and without the fear of altercations, violence and nation-wide publicity. However, stat-

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144 Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1412 (1995).

145 *Id.* (citing Williams v. Wallace, 240 F.Supp. 100 (M.D. Ala. 1965)).

146 *See* New York County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F.Supp. 358 (S.D.N.Y. 1993); Irish-Am. Gay, Lesbian and Bisexual Group of Boston & Others v. City of Boston, 636 N.E.3d 1293 (Mass. 1994); and Irish Lesbian and Gay Org. v. Bratton, 882 F.Supp. 315 (S.D.N.Y. 1995).

147 Krotoszynski, *supra* note 144, at 1421-22.

utory protection is not allowed to these individuals[148] even though they are engaged in serious, medical, and personal activities, and not merely a recreational pursuit. Why should hunters be afforded more protection?

Abortion has been a political issue in this country for many years. Both personal choice and public policy are involved. With the advent and growth of the animal protection movement, hunting and other activities once considered personal choices are now cast into political debate as well. If hunting was not the subject of political controversy, there would be no need to create hunter harassment laws to protect the hunters from the interference such debate causes. States would not need to pass resolutions lauding hunting as part of our national heritage if they did not feel that this perception was under attack.

The protesters have two broad goals for their communication. First, educating the public and their government, thereby affecting public policy. Second, offering the hunters another perspective, affecting personal choice, and thereby directly achieving the goal to end hunting. The first goal can be communicated without being in the woods. However, access to the woods during hunting is critical in the documentation of truthful and accurate education. There is no other venue for communication of the second goal. Just as courts have decided that location is relevant to the protest in determining whether the location is a public forum, so must courts consider the necessary connection in hunt protests.

Informed public debate must consider opposing viewpoints. How can courts refuse animal protection activists the right to protest the hunting activity when they allow more intrusive and potentially dangerous protests in proximity to their targets? The hunters have no overriding interest to protect and the First Amendment therefore will not support such restrictions of the protesters right to expressive conduct.

d. The changing nature of parks

Another reason why parks may be considered public fora under *Perry*[149] is the changing nature of their use. Parks are managed by public officers for the benefit of the public. The management direction of the parks changes to meet public interest in and awareness of different issues. For instance, many parks which allow hunting, also conduct nature hikes, seminars on ecology, and the like. The park system is increasingly an educational forum for environmental concerns. Would a person who distributes a petition to stop a dove-shoot among bird watchers in the park be evicted on the basis that the park is not a public forum?

Parks that allow hunting were not created by the state for public communicative activity. They have been a traditional gathering place, though perhaps not in the political sense considered in *Perry*. Public uses of fora change over time. The use of the town square as a forum for communication has waned with access to other forums. The fact that courts have considered whether private or quasi-public fora, such as shopping malls,

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148 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

149 Perry Educ. Ass'n v. Perry Local Educator's Ass'n., 460 U.S. 37, 45 (1983).

have taken the place of community gathering centers, indicates the need to recognize changes in use over time.[150]

The question here is whether the government, by allowing some communicative activity, has designated these parks as limited public fora regarding the hunting debate, and not general public fora for the purposes of other, general, communicative activity. The evidence indicates that it has, and shows that there is no danger in making such a designation.

e. Determining the primary purpose of the fora

In deciding whether the parks should be deemed public fora, courts must determine the primary purposes of state and federal parks.[151] Can the government deem that the primary purpose of the parks is to serve the hunters, representing a mere ten percent of park use?[152] Can the government justify the hunters' preference that their use be restrictive of the uses of protesters and those who eschew the woods when hunters are there (for safety or personal considerations)? Or, instead, should the primary purpose of the parks be deemed to serve the greatest number of the public without restriction? While the primary purpose of the parks cannot be said to be communicative activity, this conclusion is not necessary to sustain the designation of the parks as limited public fora regarding the hunting debate.

Hunting is a political question. The continued government support of hunting, both financially and politically, indicates government approval. Furthermore, the government is actively protecting and enhancing hunting at the taxpayer's expense. By permitting, licensing, protecting, and encouraging hunting, the government has allowed the parks to be used for a particular type of communication. This amounts to the designation of hunting sites as limited public fora. Therefore, the government is obligated to allow similar genres of communication at the site.[153]

IV. CONCLUSION

Protests against hunting have increased with the growth of the animal protection movement. Perhaps the best recognition of this movement comes from the response of its opponents and detractors. The growing debate on both sides is appropriate and beneficial for society. Hunting is a political issue that must be discussed before society decides whether to protect or regulate this activity.

In the meantime, hunt protesters are engaging in expressive conduct which courts should recognize as protest activity (communication) and therefore protected under the First Amendment. Hunter harassment stat-

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150 *See generally* James Podgers, *Free Speech in the New Downtowns*, 81 A.B.A.J. 54 (1995).

151 *Perry*, 460 U.S. at 45.

152 Telephone Interview with Steve Hiller, *supra* note 132.

153 Travis v. Owego-Apalachin School Dist., 927 F.2d 688, 692 (2d Cir. 1991); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 385-86 (2d Cir. 1992).

utes are created to suppress these messages—the protest of hunting—and are therefore content-based.

The hunters' concerns—that the protests will harm hunting or endanger hunters—must be proven before the protests can be restricted on these grounds. The government's asserted interests are not implicated, as in alleged safety concerns, or they fail to sustain a challenge because there are other ways to achieve the desired goals without restricting expression.[154]

Thus, the parks where hunting and protesting occurs, though not originally designated for communicative activity, have become limited public fora as to the hunting debate. This is true because the government supports pro-hunting communication in these settings, through its regulations, resource allocations and other behavior. Therefore, the government must also allow anti-hunting communication, through speech and expressive activity, in the same setting.

Whenever the goal and tactic of social protest is to break laws considered wrong, immoral, or unconstitutional, the protest inevitably interferes with the right of law-abiding citizens to engage in legal activity.[155] The existing laws must be measured in light of the requested reform. In the hunt protest case, courts must compare rights. The right to hunt must be compared to the right to protest. The right to protest, if granted here, may or may not harm the right or ability to hunt. However, the right to speak on such topics is guaranteed under the Constitution and therefore may not be impaired even if it harms the ability to hunt.

Many important societal questions are implicated in the discussion. Consider that the hunter harassment laws intend to silence protest and quell debate. If we are so afraid of the questions raised by anti-hunting protests that we cannot bear to hear the issues, how can we move toward solutions allowing freedom for humans and eventually for animals? Those who urge restrictions on speech do so precisely because the protestor's message is something that many choose not to hear. What harm comes of allowing the protesters in the woods? Can that potential harm be worse than the alternative—silencing protest and First Amendment freedoms to stifle debate on a topic of growing importance to society?

As Justice Brandeis said: "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."[156]

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[154] Connecticut v. Ball, 627 A.2d 892, 896-97 (Conn. 1993); Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981).

[155] For example, the freedom rides, lunch counter sit-ins, abortion protests, and tax resistance protests.

[156] Whitney v. California, 274 U.S. 357, 376 (1927).