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Wyoming Hunt Interference Law - Anarchy in the Woods: How Far Afield Does the Right of Free Speech Extend

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COMMENT

WYOMING'S HUNT INTERFERENCE LAW—ANARCHY IN THE WOODS: HOW FAR AFIELD DOES THE RIGHT OF FREE SPEECH EXTEND?

Each year thousands of Americans enjoy the natural beauty of our national forests and wild lands and at the same time help control populations of wildlife by hunting. What began as a few isolated incidents of hunt interference in the eastern states has spread across the country. Hunters are being followed into the fields and forests by animal rights activists.[1] These anti-hunting advocates use air horns, loud music, and other abusive tactics to interfere with legal hunting and fishing activities.[2] Even more alarming is that vandalism and physical violence are becoming more common.[3]

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1. Extremist animal rights groups condemn all use of animals by humans. They call it animal exploitation. Tom Regan, a recognized and published advocate of total animal rights has stated the following goals of the movement:

* the total abolition of the use of animals in science;
* the total dissolution of commercial animal agriculture;
* the total elimination of commercial and sport hunting and trapping.

TOM REGAN, THE STRUGGLE FOR ANIMAL RIGHTS 46-47 (1987) [hereinafter REGAN, THE STRUGGLE].

2. Pheasant hunters in Duvall, Washington were joined in the field by animal rights activists who "ran shouting, clapping and making as much noise and commotion as possible across the wet ground in front of the hunters." Dee Norton, *Fussing Over Pheasants*, SEATTLE TIMES, Sept. 30, 1990, at B1.

Hunt interference tactics have not escaped even the President of the United States. Demonstrators from the Fund for Animals protested President Bush as he participated in his annual quail hunt during his Christmas vacation. Luckily, the President has secret service personnel to keep the protestors at a distance. *Animal Lovers to Protest Bush Hunting Vacation*, ARIZ. REPUBLIC, Dec. 25, 1991, at A6. Even though the animal activists had no success in dissuading President Bush from his hunt, they did, however, succeed in propagandizing their efforts by attracting media coverage.

3. In West Yellowstone, an activist protesting a buffalo hunt dipped her hands in the blood of a downed bison, smeared the blood on a hunter's face, and followed up her deed with a verbal assault. *On the Grapevine*, WYO. WILDLIFE, June 1990, at 39. Eleven protestors representing the Fund for Animals used snowmobiles and cross country skis to position themselves between hunters and their game. *Id.* Another Montana sportsman was struck twice by a protestor with a ski pole and then struck a third blow to the kidney as he turned to ignore his assailant. *Id.* The State of Montana had approved the bison hunt because these buffalo that had migrated from the Yellowstone Park carried brucellosis, a disease transmittable to domestic cattle that causes the cattle to abort their young. *Id. See also Activists Try to Block Hunt Near Park*, CASPER STAR TRIBUNE, Mar. 14, 1990, at 1. In Connecticut, a hunter fractured his neck after an animal rights activist sawed through the struts of his tree stand. 137 CONG. REC. S7464-03 (daily ed. June 11, 1991) (statement of Sen. Stanford for himself, Sen. Breaux, Sen. Cochran, and Sen. Hatch). Members of a New Jersey wing shooting club found that the tires on eight of their vehicles had been destroyed by spikes and roofing nails planted by anti-hunting activists. *Id.* Their dogs were caught in a number of leg crippling traps set in protest of the hunt. *Id.*

Extremist animal rights organizations also distribute pamphlets on other equally provocative ways to disrupt a hunt. Tactics suggested include the following: apply for

State legislatures are concerned that as animal rights extremists and anti-hunting groups grow and become better organized their tactics will become more extreme and confrontations between activists and hunters will occur with increased violence and frequency.[4] To address the problem of hunt interference, forty-five states,[5] including Wyoming, have passed hunt interference legislation.[6] These laws have been dubbed as

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permits, thus denying them to hunters; harass and disturb wildlife by using dogs, loud noises, etc.; tear down blinds and tree stands or desecrate them with rotten eggs, cow dung, human urine or fecal matter; organize groups to go into the woods during hunting season to disrupt the hunt. *On the Grapevine*, WYO. WILDLIFE, Mar. 1991, at 39. *See also* FRIENDS OF ANIMALS, INC., TIPS FOR HUNT SABOTEURS; INGRID NEWKIRK, SAVE THE ANIMALS — 101 EASY THINGS YOU CAN DO (1990); FRIENDS OF ANIMALS, INC., SABOTAGING THE HUNTING CROWD, ACTIONLINE (1988); STEVE RUGGERI, FRIENDS OF ANIMALS, INC., RHODE ISLAND HUNTER HARASSMENT CHALLENGE, NEW ENGLAND NEWSLETTER, Nov.-Dec., 1985, at 1-2. Luke A. Dommer, *The Anatomy of Hunt Sabotage*, THE ANIMALS' VOICE MAG., Aug. 1990, at 70.

4. Such fears are not unfounded. Civil disobedience, albeit criminal activity, is common and even encouraged in order to deliver the animal rights message. REGAN, THE STRUGGLE, *supra* note 1, at 174-83. For activists who participate in such activities, the ends justify all means. Tom Regan, an animal rights activist, declared that the animal rights movement is a war and disregard for the law by civil disobedience is their main and most powerful weapon. *Id.* at 175-76.

5. ALASKA STAT. § 16.05.790 (1991); ARIZ. REV. STAT. ANN. § 17-316 (1984); ARK. CODE ANN. § 5-71-228 (Michie Supp. 1991); CAL. FISH & GAME CODE § 2009 (West Supp. 1991); COLO. REV. STAT. ANN. § 33-6-115.5 (West 1990); CONN. GEN. STAT. ANN. § 53a-183a (West Supp. 1991); DEL. CODE ANN. tit. 7, § 731 (Supp. 1990); FLORIDA § 372.705 (West Supp. 1991); GA. CODE ANN. § 27-3-151 (Michie 1986); IDAHO CODE § 36-1510 (Supp. 1991); ILL. ANN. STAT. ch. 61, ¶ 302 (Smith-Hurd 1989); IND. CODE ANN. § 14-2-11-2 (Burns 1990); Act of June 4, 1991, H.F. 109, 1991 Iowa Legis. Serv., *available in* WESTLAW (to be codified at IOWA CODE ANN. § 109.125); KAN. STAT. ANN. § 32-1014 (Supp. 1990); KY. REV. STAT. ANN. § 150.710 (Michie Supp. 1990); LA. REV. STAT. ANN. § 56:648.1 (West 1987); Act of Dec. 19, 1991, Ch. 364, 1991 Mass. Legis. Serv., *available in* WESTLAW; ME. REV. STAT. ANN. tit. 12, § 7541 (West Supp. 1990); MD. NAT. RES. CODE ANN. § 10-422 (1990); MICH. COMP. LAWS ANN. § 300.262a (West Supp. 1991); MINN. STAT. ANN. § 97A.037 (West Supp. 1991); MISS. CODE ANN. § 49-7-147 (Supp. 1991); MO. ANN. STAT. § 578.151 (Vernon Supp. 1991); MONT. CODE ANN. § 87-3-141 to 144 (1991); NEV. REV. STAT. ANN. § 503.015 (Michie 1986); N.H. REV. STAT. ANN. § 207:57 (Supp. 1990); N.Y. ENVTL. CONSERV. LAW § 11-0110 (McKinney Supp. 1991); N.C. GEN. STAT. § 113-295 (1990); N.D. CENT. CODE § 20.1-01-31 (1991); Act of Oct. 23, 1991, File 60, Ohio Legis. Serv., *available in* WESTLAW (to be codified at OHIO REV. CODE ANN. § 1533.03); OKLA. STAT. ANN. tit. 29, § 5-212 (West 1991); OR. REV. STAT. § 496.994 (Supp. 1990); PA. CONS. STAT. ANN. tit 34, § 2302 (1991); R.I. GEN. LAWS § 20-13-16 (1989); S.C. CODE ANN. § 50-1-137 (Law. Co-op. Supp. 1990); S.D. CODIFIED LAWS ANN. § 41-1-8 (1991); TENN. CODE ANN. § 70-4-302 (1987); TEX. PARKS & WILD. CODE ANN. § 62.0125 (West 1991); UTAH CODE ANN. § 23-20-29 (Supp. 1991); VT. STAT. ANN. tit. 10, § 4708 (1984); VA. CODE ANN. § 29.1-521.1 (Michie Supp. 1991); WASH. REV. CODE ANN. § 77.16.340 (West Supp. 1991); W. VA. CODE § 20-2-2a (1989); WIS. STAT. ANN. § 29.223 (West Supp. 1990); WYO. STAT. § 23-3-405 (1991).

6. Senator Wyche Fowler, Jr., D-Georgia, has introduced federal legislation in the Senate that would also prohibit interference with a lawful hunt in the national forests. S. 1294, 102d Cong., 1st Sess. § 4 (1991). Representative Ron Marlenee, R-Montana, introduced the equivalent in the House of Representatives. 137 CONG. REC. E79-01 (daily ed. Jan. 3, 1991). This federal proposal is currently in committee and is pending. The Congressional Research Service performed a constitutional analysis of the federal proposal and found it to be constitutional on its face. CONGRESSIONAL RESEARCH SERVICE, THE SPORT HUNTING SAFETY AND PRESERVATION ACT OF 1991: CONSTITUTIONALITY OF H.R. 371, 102D CONGRESS (1991 predistribution copy).

"hunter harassment" or "hunter protection" laws.[7] Such legislation commonly prohibits the obstruction, impediment, or interference of a lawful hunt, whether such interference is perpetrated by animal rights activists or other hunters.

However, certain animal rights groups that oppose hunting have been especially unreceptive to these laws. They claim that hunt interference laws restrict the activities they employ to fight for animal rights, thus violating their right to free speech. In some instances, such activists intentionally break hunt interference laws in order to get arrested and subsequently challenge the constitutionality of such laws in court.[8] In *Dorman v. Satti*,[9] a federal court found that Connecticut's hunt interference statute, as written, was vague and overbroad, and thus unconstitutional.

This comment discusses the constitutionality of hunt interference laws.[10] Specifically, it will examine the Wyoming hunt interference law, and concludes that the Wyoming statute does not infringe upon the First Amendment right of free speech by illustrating first, that the Wyoming statute is neither vague nor overbroad, and second, by conducting a First Amendment analysis, that the Wyoming hunt interference statute complies with free speech safeguards.

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7. These terms are misnomers. These statutes protect hunters and activists alike by ensuring their safety. They also protect states' interests, including wildlife management. For convenience in referring to these laws, the term "hunt interference" laws/statutes will be used.

8. In a recent Montana case, a federal court of appeals dismissed a challenge to Montana's hunt interference law. Lilburn v. Racicot, 8 Mont. Fed. Rep. 463 (D. Mont. Jan. 22, 1991). Plaintiff, Lilburn, an animal rights activist, was charged under Montana's hunt interference law for interfering with an individual engaged in the lawful taking of a game animal. *Id.* The complaint stated that the activist intended to interfere or stop a lawful activity by placing himself between a buffalo and a hunter, who was aiming a loaded rifle at the buffalo. *Id.* at 464, 468. Plaintiff sued to have the hunt interference law declared unconstitutional on the grounds that it was vague and that the law violated his First Amendment right of free speech. *Id.* Because of the constitutional nature of the issues, plaintiff sought his remedies in the federal district court. The court dismissed the suit by stating that the state courts would adequately protect his constitutional rights and that he must first exhaust his remedies there. *Id.* at 468.

In dismissing the suit, Federal Judge Charles C. Lovell issued an opinion that the Montana hunt interference statute was constitutional. *Id.* at 468-70. The court held that hunting is a lawful and legitimate activity "which the state may protect in any reasonable and constitutionally permissible manner." *Id.* at 468. The court noted that the law protected both activist and hunters alike from the very harm that occurred or that may have resulted in this instance. *Id.* Judge Lovell held that the Montana statute was not vague because it proscribed behavior "which interferes with an individual actually engaged in the lawful taking of a wild animal." *Id.* at 469-70. The court further disagreed that the hunt interference law infringed upon the activist's right of free speech by stating that the limitation on speech was incidental to the state's regulation of a subject within its power to regulate. *Id.* at 468-69.

9. 862 F.2d 432 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989).

10. The term "hunting" is used throughout this comment. However, this is not meant to exclude other types of lawful taking processes, such as fishing. Many state hunt interference statutes prohibit interference with the lawful taking (hunting, fishing, or trapping) of wildlife. Because fishing is the taking of wildlife, this means that intentional interference with the taking of a game fish is also prohibited under such statutes. Wyoming's statute specifically includes such a prohibition. WYO. STAT. § 23-3-405(a) (1991).

BACKGROUND

Because hunt interference laws may outlaw the extreme interference tactics utilized by certain animal rights groups, statutes such as Wyoming's hunt interference law may be challenged in court. The only successful challenge to a hunt interference statute to date occurred in *Dorman v. Satti*,[11] where a federal court found a Connecticut statute unconstitutionally vague and overbroad. Further, animal rights activists assert that protests that interfere with the lawful taking of wildlife are protected under the First Amendment and that hunt interference laws inhibit the exercise of free speech and are therefore unconstitutional.[12]

In order to assess the relative merits of such claims, some background on vagueness, overbreadth, and basic free speech analysis is necessary. First, this section discusses the vagueness and overbreadth doctrines and examines how these doctrines were applied in *Dorman* to find the Connecticut hunt interference statute unconstitutional. Second, this section reviews United States Supreme Court holdings regarding First Amendment analysis.

The Vagueness and Overbreadth Doctrines

When the federal or state governments implement laws to regulate speech, the government must be concerned with vagueness and overbreadth. The principles of vagueness in statutes regulating speech activities are based upon the same rationale as the overbreadth doctrine and the Supreme Court often speaks of them interchangeably.[13] The vagueness and overbreadth doctrines are important because legislative failure to consider these doctrines often results in unconstitutional statutes.

Briefly stated, the vagueness doctrine requires a law to place the ordinary person on notice that certain activity is prohibited. An overbroad statute is one that is designed to prohibit activities which are not constitutionally protected, but which is not sufficiently tailored to exclude from its scope activities which are constitutionally protected.[14] Concerns about imaginative minds construing practically any regulation in a manner reflecting some minute degree of overbreadth motivated the United States Supreme Court to limit the overbreadth doctrine by requiring that overbreadth of a statute be substantial

11. 862 F.2d 432 (2d Cir. 1988).
12. *Id.* at 434.
13. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 950 (4th ed. 1991).
14. Hill v. City of Houston, 764 F.2d 1156, 1161 (5th Cir. 1985).

before it can be invalidated.[15] The principles of vagueness and overbreadth become evident in *Grayned v. City of Rockford*.[16]

The Appellant in *Grayned* was convicted for violating an antinoise ordinance by his participation in a 200 person demonstration in front of an Illinois high school.[17] The demonstrators repeatedly cheered, chanted, baited policemen, and otherwise disrupted school activities.[18] Appellant claimed that the ordinance was unconstitutional because the ordinance was vague and overbroad.

The *Grayned* Court addressed the vagueness issue first. The Court noted that vagueness is a basic principle of due process and that a law is void for vagueness if a statute does not meet certain requisites.[19] First, laws must give a person of ordinary intelligence a reasonable warning that a certain activity is prohibited. Vague laws may trap the innocent by not providing fair warning.[20] The Court held that the Rockford ordinance gave reasonable notice as to what conduct was prohibited and that Grayned knew that his disruptive conduct violated the ordinance. Second, in order to avoid arbitrary and discriminatory enforcement, laws must provide explicit standards for those who enforce them.[21] In this instance, the behavior of the defendant disrupted school activities, which is what the Rockford ordinance was designed to prevent. Conduct that disrupts school activities is an explicit standard easily identified by law enforcement officers. Third, terms of a statute should be of common understanding or clearly defined.[22] Laws that do not meet these requisites are vague and impose a chilling effect upon protected behavior.[23] The Court held that the terms of the statute were terms of common understanding.[24] Applying these standards, the *Grayned* majority held that the antinoise ordi-

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15. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court ruled that the overbreadth of a statute must be real and substantial in order to invoke the doctrine, especially where speech is joined with conduct. The Oklahoma statute being considered was not overbroad based upon an unlikely interpretation and application or because the challenger has thought of a remote instance of overbreadth. *Id.* at 615. Thus the doctrine of "substantial overbreadth" was born. The standard envisioned by the Court is rigorous, especially where conduct and speech are involved. *Id.* The specific test that the Court offered is that it would invalidate statutes for overbreadth "only when the flaw is a substantial concern in the context of the statute as a whole." *Id.* at 616 n.14.

16. 408 U.S. 104 (1972).

17. *Id.* at 105. Appellant was convicted of violating an antinoise ordinance that read, in pertinent part, as follows:

> [N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . .

Id. at 107-08 (citing CODE OF ORDINANCES, ch. 28, § 19, 2(a)).

18. *Id.* at 105.

19. *Id.* at 108.

20. *Id.*

21. *Id.*

22. *Id.* at 109.

23. *Id.*

24. *Id.* at 112.

nance was not unconstitutionally vague.[25]

The *Grayned* Court next addressed overbreadth. Under the overbreadth analysis, the issue is whether the ordinance sweeps within its prohibitions activity that is constitutionally protected.[26] To be a constitutional regulation of speech, statutes must be narrowly tailored to achieve a specified governmental interest.[27] In *Grayned,* the ordinance's purpose was clear, to ensure uninterrupted school activity. The Court noted that expressive activity may be prohibited by law where such expression disrupts normal school activities. In so doing, the regulation may not punish the content of the speech, but only expression disruptive to the forum.[28] Noting the regulation did not restrict expression which did not disrupt school activities and that the ordinance was narrowly tailored to further the City's interest in having uninterrupted school sessions, the Court held that the ordinance did not unnecessarily interfere with First Amendment rights.[29] While some noisy demonstrations were prohibited under the ordinance (that might otherwise be constitutionally protected at another time and place), Rockford's modest restriction on some expression represented a "considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place. . . ."[30]

Hunt Interference Statutes and Vagueness and Overbreadth

In *Dorman v. Satti,*[31] a federal court of appeals struck down Connecticut's hunt interference law as a violation of the vagueness and overbreadth doctrines.[32] The plaintiff, Francelle Dorman, attempted to dissuade sportsmen from their plans to hunt waterfowl on state

25. *Id.* Regarding the exactness of words in a statute, the *Grayned* majority said that we should never expect mathematical certainty from language and asserted that the words of the Rockford statute are "marked by flexibility and reasonable breadth, rather than meticulous specificity." *Id.* at 110 (citing Esteban v. Central Mo. State College, 415 F.2d 1077, 1088 (8th Cir. 1969)).

26. *Id.* at 114.

27. *Id.* at 116-17. If the legislative purpose is a legitimate one of substantial governmental interest, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960).

28. *Grayned,* 408 U.S. at 119.

29. *Id.*

30. *Id.* at 121.

31. 862 F.2d 432 (2d Cir. 1988).

32. This statute provided:

> No person shall: (1) *Interfere* with the lawful taking of wildlife by another person, or *acts in preparation* for such taking, with intent to prevent such taking; or (2) *harass* another person who is engaged in the lawful taking of wildlife or *acts in preparation* for such taking.

Id. at 433 (quoting CONN. GEN. STAT. § 53a-183a (1985)). The terms found overbroad were italicized by the court. *Id.* at 433.

forest property near her home.[33] Dorman's attempt to discourage the hunters was consistent with her beliefs that animals have rights and that hunting is wrong.[34] After listening to Dorman's lecture, the hunters asked her to leave. When she refused, they summoned a law enforcement officer who arrested her for violating the hunt interference law.[35]

Though the charges were later dropped, Dorman sued to prohibit enforcement of the statute on the basis that the statute violated the doctrines of vagueness and overbreadth.[36] The State of Connecticut argued that the statute should have been construed to proscribe physical interference and "fighting" words, which are a form of speech directed to producing imminent violence and, therefore, not protected by the First Amendment.[37]

The court was not persuaded. It found that the statutory phrase "acts in preparation" was not a reasonable time or place restriction because "acts in preparation" could take place anywhere, not at some specific time and place. The court's holding stemmed from the fact that the phrase "acts in preparation" was not defined in the statute. Thus the statute prohibited interference with a wide range of activities, such as purchasing supplies.[38] The court also noted that the term "harassment" was not defined as to the nature of interference proscribed by the statute. The court therefore struck down the statute because the standards for enforcement were vague and the warning that certain behavior would be criminal was substantially overbroad.[39]

As a result of *Dorman*, the Connecticut legislature passed new hunt interference legislation using clear and concise terms in order to avoid problems of vagueness and overbreadth.[40] It is no longer classi-

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33. *Id.* at 434.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 435 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
38. *Id.* at 437.
39. *Id.*
40. CON. GEN. STAT. ANN. § 53a-183a (West Supp. 1991). The current statute reads as follows:

> § 53a-183a. Obstructing or interfering with the lawful taking of wildlife: Class C misdemeanor.
>
> (a) No person shall obstruct or interfere with the lawful taking of wildlife by another person at the location where the activity is taking place with intent to prevent such taking.
>
> (b) A person violates this section when he intentionally or knowingly: (1) Drives or disturbs wildlife for the purpose of disrupting the lawful taking of wildlife where another person is engaged in the process of lawfully taking wildlife; (2) blocks, impedes or otherwise harasses another person who is engaged in the process of lawfully taking wildlife; (3) uses natural or artificial visual, aural, olfactory or physical stimuli to affect wildlife behavior in order to hinder or prevent the lawful taking of wildlife; (4) erects barriers with the intent to deny ingress or egress to areas where the lawful taking of wildlife may occur; (5) interjects himself into the line of fire; (6) affects the condition or placement of personal or public property intended

fied as a hunter protection law because the statute now focuses on protecting the legal activity. The heading was changed from "harassment of hunters, trappers and fishermen" to "obstructing or interfering with the lawful taking of wildlife."[41] The Connecticut legislature deleted the term "acts in preparation" from the current statute. The terms "harass" and "interfere" are now defined by examples and association with certain prohibited kinds of behavior.[42]

First Amendment Background

The First Amendment appears to speak in absolute terms: "Congress shall make no law . . . abridging the freedom of speech . . . ." However, "the First Amendment is not the guardian of unregulated talkativeness."[43] In *Konigsberg v. State Bar of California*,[44] the United States Supreme Court developed a balancing test of the governmental interest and the restriction of speech involved. Justice Harlan, in his now famous opinion for the majority, rejected the idea that freedom of speech is absolute.[45] Harlan said that the Court had consistently recognized at least two ways in which the freedom of speech is narrower than an unlimited license of expression.[46] First, certain forms of expression, such as obscenity and fighting words, are considered outside the scope of constitutional protection.[47] Second, a weighing of the governmental interests involved may allow content neutral regulation of speech and thereby limit unfettered exercise of speech.[48] The weighing of

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for use in the lawful taking of wildlife in order to impair its usefulness or prevent its use; or (7) enters or remains upon private lands without the permission of the owner or his agent, with intent to violate this section.

(c) For the purposes of this section, "taking" and "wildlife" shall be defined as in section 26-1.

(d) Any person who violates any provision of this section shall be guilty of a class C misdemeanor.

41. *Id.*

42. *Id.*

43. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 25 (1948).

44. 366 U.S. 36 (1961).

45. *Id.* at 49-51.

46. *Id.* at 49-50. Subsequent Supreme Court cases have expanded these two ways to include additional levels of scrutiny and analyses of the forum where speech occurs.

47. *Id.* at 50. Some speech is not protected at all under the First Amendment. Fighting words, obscenity, and speech that falls under the "clear and present danger doctrine" are examples of speech that have not been protected under Supreme Court free speech analysis. *See* Cohen v. California, 403 U.S. 15 (1971); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940) (for cases involving fighting words). *See* New York v. Ferber, 458 U.S. 747 (1982); Jenkins v. Georgia, 418 U.S. 153 (1974); Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); (for cases involving restrictions of obscene speech). *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957); Whitney V. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); (for cases concerning the regulation of speech based upon the "clear and present danger" doctrine).

48. *Konigsberg*, 366 U.S. at 50-51.

the governmental interest analysis referred to by Justice Harlan takes the form of time, manner, and place restrictions on speech. The following section will address the background of reasonable time, manner, and place restrictions of speech.

Time, Manner, and Place Restrictions on Speech

Generally, the Supreme Court has used two analyses to determine whether a government regulation is a reasonable time, manner, or place restriction of speech. First, the Court has looked to see whether the regulation is based upon the content of the speech or whether the regulation is content-neutral. The level of judicial scrutiny applied depends upon this threshold inquiry. If the regulation restricts speech because of its content, the level of scrutiny is almost always strict. A law that regulates speech because of content, regardless of time, manner, and place restrictions, must be supported by a compelling governmental interest and be narrowly tailored to achieve that interest. On the other hand, if the regulation restricts speech on a content-neutral basis, the level of scrutiny is lowered. A content-neutral-based regulation of speech must be supported by a substantial governmental interest, be narrowly tailored, and leave open alternative channels of communication.

Second, where the regulation places a restriction on speech that occurs on public property, the Supreme Court has determined that an analysis of the type of forum is an important consideration in deciding the level of scrutiny to apply to the regulation. Thus, the place where First Amendment rights are exercised is important. Beginning with *Perry Education Association v. Perry Local Educators' Association*,[49] the Supreme Court modified the content-based/content-neutral analysis to include a study of the type of forum where speech is regulated. Under the *Perry* forum analysis there are different types of forums for First Amendment purposes. The government's right to regulate expression varies, depending on the distinction. In *Perry*, the Court looked at the forum where the speech occurred and then at the statute in question to determine whether it was content-based or content-neutral. This analysis dictated the level of scrutiny to apply to determine whether the statute's time, place, and manner restrictions of speech were reasonable.[50]

The following section first takes a brief look at the Court's analysis of content-based and content-neutral regulations of speech, prior to the *Perry* decision. For convenience purposes, this comment will refer to such analysis as "pre-*Perry* analysis." Second, this section will review the background of *Perry* and the "post-*Perry*" line of cases to see how the forum, where speech occurs or is regulated, fits into free

49. 460 U.S. 37 (1983).

50. *Id.* at 45-47; *see also* United States v. Grace, 461 U.S. 171 (1983); United States v. Kokinda, 110 S. Ct. 3115 (1990).

speech analysis.

Pre-Perry Background on Free Speech Regulation Analysis

Content-Based Regulations of Speech

Widmar v. Vincent[51] is an example of strict scrutiny analysis. In this case the University of Missouri at Kansas City passed a University regulation that banned the use of school facilities "for purposes of religious worship or religious teaching."[52] The purpose underlying the prohibition was the University's desire to maintain a strict separation of church and state.[53] The suit was brought by a religious group claiming that the regulation breached their First Amendment rights of free speech and free exercise of religion.[54]

The Court held that the regulation was based on the content of speech and discriminated against students who wanted to engage in such speech.[55] The *Widmar* majority further held that for the restriction to be valid, the regulation must pass the Court's most "exacting scrutiny."[56] To pass strict scrutiny muster, the Court said that the University's regulation must serve a compelling governmental interest and be narrowly drawn to achieve that end.[57] The Court held that the University's interest in maintaining a separation of church and state was not a sufficient compelling governmental interest to allow the content-based regulation of speech.[58]

Content-Neutral Regulations of Speech

United States v. O'Brien[59] is an example of pre-*Perry* content-neutral analysis[60] of speech regulation. In *O'Brien*, the defendant burned his draft card on the steps of the South Boston Courthouse[61] in violation of a federal statute that made it a crime for any person to forge, alter, knowingly destroy, knowingly mutilate, or otherwise change a draft card.[62] O'Brien defended his actions by telling the jury that he burned the draft card publicly to influence others to adopt his

51. 454 U.S. 263 (1981). This scrutiny is the "most exacting scrutiny." *Id.* at 276; *see also* Carey v. Brown, 447 U.S. 455 (1980); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

52. *Widmar*, 454 U.S. at 265.

53. *Id.* at 270. The University claimed it derived this interest from the establishment clauses of the Federal and Missouri Constitutions. *Id.*

54. *Id.* at 265-66.

55. *Id.* at 269-70.

56. *Id.* at 270, 276.

57. *Id.* at 270.

58. *Id.* at 276.

59. 391 U.S. 367 (1968).

60. Known as mid-level scrutiny under the *Perry* forum analysis. *See Perry*, 460 U.S. at 45.

61. *O'Brien*, 391 U.S. at 369.

62. *Id.*

antiwar beliefs.[63] O'Brien argued that the statute was unconstitutional as applied because it restricted his freedom of expression.[64] The Court rejected this contention: "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[65] The Court stated that the statute prohibited conduct, not free expression.[66] The majority further stated that a law prohibiting the destruction of draft cards no more abridges free speech on its face, or in application, than does a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books or records.[67]

The *O'Brien* Court held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on protected speech.[68] The Court set forth the appropriate framework for such regulation by stating that: (1) a government regulation is justified if the regulation is within the constitutional power of the government; (2) if the regulation furthers an important or substantial governmental interest; (3) if the government's interests are unrelated to the suppression of free expression; and (4) if the incidental suppression of alleged First Amendment freedoms is no greater than necessary in the furtherance of that interest.[69]

The Court found that the statute in *O'Brien* met the above criteria and thus held the regulation and O'Brien's conviction to be constitutional.[70] Consistent with the four criteria, the Court held that the power of Congress to establish a system of registration to enlist manpower for military service is beyond debate.[71] Government has the authority to require that individuals comply with the registration system. This includes the promulgation of laws that prevent the destruction of draft cards.[72] The Court went on to hold that the preservation of draft cards served important governmental interests that would otherwise be thwarted by the card's destruction and that the statute protected those interests.[73] The Court then found that the

63. *Id.* at 370.
64. *Id.* at 376.
65. *Id.* Many protestors attempt to justify so called "expressive" illegal conduct as action allowed in the First Amendment. Such alleged First Amendment expression is, at times, classified as an after-the-thought justification for illegal conduct, especially after those charged have spoken with their creative and imaginative lawyer.
66. *Id.* at 375.
67. *Id.*
68. *Id.* at 376.
69. *Id.* at 377.
70. *Id.*
71. *Id.* (citing Lichter v. United States, 334 U.S. 742, 755-58 (1948); Selective Draft Law Cases, 245 U.S. 366 (1918)).
72. *Id.* at 377-78.
73. *Id.* at 378-81. Some of the governmental interests cited by the Court were: (1) the draft card served as proof that the person whose name appeared on the card had registered for the draft; (2) the information on the draft card facilitated communica-

statute, as applied, condemned only the independent noncommunicative act of O'Brien's burning of the draft card and thus was not, as O'Brien asserted, a suppression of free speech.[74] Finally, the Court held that there were "no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction."[75]

The Importance of the Forum Where Speech Occurs or is Regulated

The 1983 Supreme Court decision of *Perry Education Association v. Perry Local Educators' Association*[76] focused on the type of forum in which the speech was sought to be restricted. For the first time, the Supreme Court made an effort to classify the types of forums on public property. This is significant because after *Perry* the level of scrutiny depends not only upon whether the regulation is content-based or content-neutral, but also upon the type of forum which is regulated.[77]

In *Perry*, a teacher's union, the Perry Education Association (PEA), was the duly elected exclusive bargaining representative of the teachers in the school district.[78] The collective bargaining agreement gave the PEA exclusive access to the interschool mail system and the teachers' mailboxes.[79] The rival union, the Perry Local Educators' Association (PLEA), was denied similar access. The Supreme Court held that the school district's denial of mailbox access to the PLEA did not violate the PLEA's right of free speech.[80]

The *Perry* Court recognized three distinct classifications of forums on public property and attached levels of First Amendment scrutiny to each.[81] First, there are forums that have traditionally been used for assembly and free expression, such as public parks and sidewalks. In such forums, the Court will apply strict scrutiny to test the constitutionality of a statute that regulates speech based upon its content. Strict scrutiny requires a compelling governmental interest in support of a content based regulation of speech. If the regulation is content neutral, however, the standard is lessened to a mid-level scru-

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tion between registrants and the draft board; (3) the draft card included reminders that served to inform the registrant to notify the draft board of changes in address and status; and (4) the draft card included warnings of unlawful conduct regarding the draft card. *Id.* at 378-80.

74. *Id.* at 382.

75. *Id.* at 381.

76. 460 U.S. 37 (1983).

77. *Id.* at 45.

78. *Id.* at 40.

79. *Id.* Rather than a statute placing a burden upon speech, in *Perry* it was the collective bargaining agreement that was challenged as an unreasonable time, manner, and place burden on speech.

80. *Id.* at 44-55.

81. *Id.* at 45-46.

tiny. Under mid-level analysis, time, manner, and place restrictions of speech must be narrowly tailored to serve a substantial governmental interest and leave open alternative channels of communication.[82]

Second, where public property is not a traditional public forum, but has been opened or specifically dedicated for use by the public as a place for expressive activity, the level of scrutiny applied is the same as that applied to the traditional public forum. If the regulation is content-based, then strict scrutiny applies. But, if the restriction is content-neutral, then mid-level scrutiny applies. The Court further noted that once a nontraditional public forum has been opened for free speech purposes, it is not required that the forum remain open to subsequent expressive activity.[83]

Third, regulations of speech which apply to public property which is not by tradition or dedication a forum for public debate are scrutinized by lower standards.[84] The *Perry* Court classified the teachers' mailboxes as a nontraditional/nondedicated forum and applied the rational relations standard to the collective bargaining restriction. *Perry* thus set the precedent that speech regulation in a nontraditional/nondedicated public forum must only meet the rational relations test, the Court's lowest standard. Under rational relations scrutiny, the government may regulate speech on a content-neutral basis if the regulation is supported by a reasonable governmental interest and the regulation is rationally related to the attainment of that interest.[85]

The *Perry* Court recognized that the First Amendment does not guarantee access to public or government property by holding that the teachers' mailboxes fell into the nontraditional/nondedicated public forum category and that the collective bargaining restriction was valid.[86] In the nontraditional/nondedicated public forum, the purposes of the forum are important. The *Perry* Court looked at the school district's purposes for the regulation and found that the limited access policy was reasonable because it was in line with the school district's legitimate interest in "preserving the property . . . for the use to which it is lawfully dedicated."[87] The Court noted that restrictions of speech in the nontraditional/nondedicated public forum are more liberal and

82. *Id.* at 45.

83. *Id.* at 45-46.

84. In describing the nontraditional public forum not dedicated or opened for free speech purposes, the *Perry* Court used the term "nonpublic." The use of the word "nonpublic" does not imply that such a forum is on private property. A nonpublic forum, consistent with the *Perry* decision, is public property which is not dedicated or opened to public debate purposes. *Id.* To eliminate confusion, this comment will utilize the term "nontraditional/nondedicated" to describe the third classification of public forum.

85. *Id.* at 46-55.

86. *Id.*

87. *Id.* at 50-51 (citing United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129-30 (1981)). This policy also furthered the school's interest in not "becoming a battlefield for inter-union squabbles." *Id.* at 53.

allow distinctions:

> Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.[88]

Thus, in addition to time, manner, and place regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. The Court noted that government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[89]

In sum, the Court held that when government property is not dedicated specifically for public debate purposes, nor traditionally used for such, the government may, without further justification, restrict its use.[90] After *Perry*, it is important to categorize the type of forum in which the restriction operates. This is because the level of scrutiny depends not only upon whether the regulation is content-based or content-neutral, but also upon the type of forum which is regulated.[91] This analysis, exemplified by *Perry* and used in subsequent cases, is the standard by which regulations of speech on public property are scrutinized.

In *United States v. Grace*,[92] decided one month after *Perry*, the Court utilized the *Perry* forum analysis to scrutinize a federal statute.[93] Appellees, who were banned from the sidewalk outside the United States Supreme Court building for picketing and leafletting,[94]

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88. *Id.* at 49.

89. *Id.* at 46.

90. *Id.* at 53. The decision in City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), also illustrates this third category of public forum distinction. The Supreme Court upheld a city ordinance that prohibited the posting of signs on public property and upheld the application of that ordinance to prohibit the placing of campaign signs on street light posts. The majority opinion by Justice Stevens noted that light posts are not traditionally dedicated to public communication and did not constitute a public forum. The prohibition of speech was permissible because it promoted important governmental interests in aesthetic values and the environment which were unrelated to the suppression of the particular viewpoint.

91. *See Perry*, 460 U.S. at 45-46.

92. 461 U.S. 171 (1983).

93. *Id.* at 176-77.

94. The Court held that the activities engaged in by appellees were protected forms of speech. "There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." *Id.*

challenged the statute. The statute prohibited, in part, the "display [of] any flag, banner, or device designed or adapted to bring into public notice any party organization, or movement"[95] in the Supreme Court building or on its grounds. The Court invalidated that portion of the statute as far as it related to public sidewalks. In so doing, the Court focused its attention on the forum, the sidewalks surrounding the Supreme Court building, where the speech sought to be regulated took place.[96] The Court conducted a *Perry* forum analysis to decide that the sidewalks were public sidewalks and therefore, a traditional public forum.[97] The majority then determined that the statute was content-neutral and, therefore, the statute had to withstand mid-level scrutiny.[98] Under the *Grace* standard of mid-level scrutiny, a mild revision of the *O'Brien* standard, a statute is valid if the time, manner, and place restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) if the statute leaves open ample alternative channels of communication.[99]

The Court found that the federal statute failed part two of the test. The stated purposes of the statute were to provide for the protection of the Supreme Court building and grounds and of the people and property therein, as well as preserving the decorum of the Court.[100] The *Grace* Court held that a ban on carrying a flag, banner, or device on public sidewalks surrounding the building did not serve those purposes, especially where no evidence was presented that the picketing had barred access to the Supreme Court building.[101] Thus, the statute did not serve a significant governmental interest and failed mid-level scrutiny.[102]

The *Perry* Court's tripartite framework for First Amendment analysis in the different forums was further re-enforced by the 1990 decision of *United States v. Kokinda*.[103] In this case, defendants were convicted under a federal statute that prohibited soliciting contributions on the sidewalk in front of a post office entrance.[104] Because solicitation is a protected form of speech under the First Amendment,[105] the Court had to determine the applicable level of scrutiny.[106] To de-

95. *Id.* at 172-73.
96. *Id.* at 178-79.
97. *Id.* at 178-80.
98. *Id.* at 177.
99. *Id.*
100. *Id.* at 182.
101. *Id.*
102. *Id.* at 183-84.
103. 110 S. Ct. 3115 (1990).
104. *Id.* at 3118. The statute that defendants violated was 39 C.F.R. § 232.1(h)(1) (1989), which provides in relevant part: "Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited." *Id.*
105. *Id.* (citing Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 629 (1980)).
106. *Id.*

termine what level of scrutiny applied, the Court used the *Perry* forum analysis.[107]

By applying the *Perry* analysis, the *Kokinda* Court found that the post office was not traditionally a place used for public assembly and expression[108] and neither Congress nor the Postal Service had expressly dedicated or opened the post office property[109] to any expressive activity, including solicitation.[110] Based upon its finding that the post office sidewalks were a nontraditional/nondedicated forum, and a finding that the regulation was content-neutral, the Court applied the rational relations test and found the regulation constitutional.[111] Specifically, the Court found the federal statute reasonable in light of the congressionally stated purpose of the forum: "to accomplish the most efficient postal delivery system."[112] Solicitation, the Court held, was disruptive to the postal service's purposes and thus could be reasonably regulated.[113]

The *Kokinda* Court held that the government may reserve the nontraditional/nondedicated forum for its intended purposes as long as the regulation of speech is reasonable and not content-based.[114] The Court noted that it is a long settled principle of law that governmental actions are subject to a lower level of scrutiny when "the governmental function operating . . . is not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage its internal operations. . . ."[115]

The government, therefore, may place reasonable time, place, and manner restrictions on speech. Prior to *Perry*, the Court typically determined whether the statute was content-based or content-neutral to set the scrutiny level. Under post-*Perry* analysis, the forum of the speech also plays an important role. The Court retained the strict scrutiny analysis because it applies to all public forums where a statute regulates the content of speech. The Court also retained the *O'Brien* standard, although somewhat refined by the *Grace* decision, for application of mid-level scrutiny. The post-*Perry* line of cases are significant for the fact that they recognized a lower level of scrutiny,

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107. *Id.* at 3119 (citing Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 650-51 (1981), for the proposition that the "[c]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.").

108. *Id.* at 3121. *See supra* notes 76-92 and accompanying text for *Perry* forum classifications.

109. A requirement under category two of the *Perry* framework. *See Perry*, 460 U.S. at 45-46.

110. *Kokinda*, 110 S. Ct. at 3121.

111. *Id.* at 3124-25.

112. *Id.* at 3122 (citing 39 U.S.C. § 403(a), 403(b)(1) (1970)).

113. *Id.* at 3123.

114. *Id.* at 3124; *see also Perry*, 460 U.S. at 46.

115. *Kokinda*, 110 S. Ct. at 3119 (citing Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896 (1961)).

the least demanding of all, called rational relations.

Under post-*Perry* analysis, restrictions of speech are subjected to one of three levels of scrutiny: strict, mid-level, or rational relations. Under strict scrutiny analysis, if a statute regulates speech based upon content, the court will look to see if there is a compelling governmental interest in support of the statute and if the restriction on speech is narrowly tailored to achieve that interest.[116] Under mid-level scrutiny, the government may regulate speech in the public forum if the restrictions are content-neutral, if such restrictions are narrowly tailored to serve a significant governmental interest, and if the law leaves open ample alternative means of communication.[117] Under rational relations analysis the courts will look to see if the government has a rational basis to restrict speech and whether such restriction is content-neutral and reasonable in light of the forum and governmental interests involved.[118] The courts use these levels of scrutiny to either uphold or invalidate statutes allegedly restrictive of free speech.

Thus, *Perry* teaches that if a statute regulates the content of speech on public property, whether the forum is traditional, nontraditional but opened for public opinion purposes, or nontraditional/nondedicated, a strict scrutiny analysis will apply. If a statute is a content-neutral regulation of speech, and the forum is a traditional or dedicated forum for public opinion purposes, the statute will be subjected to mid-level scrutiny. Finally, if a statute is content-neutral and regulates speech on public property which is not a traditional forum, nor has it been so opened or dedicated, it is only subject to rational relations scrutiny.[119]

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116. *See* Widmar v. Vincent, 454 U.S. 263 (1981).

117. *Grace*, 461 U.S. at 177; *Perry*, 460 U.S. at 45; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

118. *Perry*, 460 U.S. at 49; *Kokinda*, 110 S. Ct. at 3121-22.

119. *Perry* was not the first case to incorporate the forum into First Amendment analysis. *See, e.g.*, Heffron v. International Soc. for Krishna Consciousness, 452 U.S. 640, 650-51 (1981); Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972); Adderly v. Florida 385 U.S. 39, 47-48 (1966); Schneider v. New Jersey, 308 U.S. 147, 163 (1939); Hague v. CIO, 307 U.S. 496, 515-16 (1939). *Perry* was, however, the first case to classify public property into three distinct forums. The Court united the forum classification with an analysis of whether the regulation of speech is content-based or content-neutral in order to determine the appropriate level of scrutiny. As a result of *Perry*, the following outline is helpful to determine the appropriate level of scrutiny for regulations that restrict speech on public property:

I. **traditional public forum -**
   - content-based (strict scrutiny)
   - content-neutral (mid-level scrutiny)

II. **non-traditional public forum opened or dedicated for First Amendment activity -**
   - content-based (strict scrutiny)
   - content-neutral (mid-level scrutiny)

III. **non-traditional public forum** *not* opened or dedicated for First Amendment activity -
   - content-based (strict scrutiny)
   - content-neutral (rational relations scrutiny)

The strict scrutiny standard remains constant for each level of the public forums.

ANALYSIS

All statutes must be tailored to overcome vagueness and overbreadth concerns. This analysis section will first address whether the Wyoming statute passes constitutional muster under these doctrines. Then this section will subject the Wyoming hunt interference statute to a *Perry* forum analysis.

The Wyoming Hunt Interference Statute

The Wyoming hunt interference statute went into effect on July 1, 1991.[120] The Wyoming statute, in pertinent part, provides:

> § 23-3-405. Interference with lawful taking of game animals, game birds and game fish prohibited; penalties; damages; injunction.
>
> (a) No person shall with the intent to prevent or hinder the lawful taking of any game animal, game bird or game fish:
>
> (i) Interfere with the lawful taking of or the process of lawfully taking any game animal, game bird or game fish;
>
> (ii) Engage in any activity intended to threaten or otherwise affect the behavior of any game animal, game bird or game fish.[121]

Overcoming Vagueness and Overbreadth: Does Wyoming's Hunt Interference Statute Meet Grayned's Standard for Avoiding Vagueness and Overbreadth?

If Wyoming's hunt interference statute is to withstand a constitutional challenge based on vagueness and overbreadth, it must avoid the fatal flaws contained in Connecticut's invalidated statute. In its framing of the hunt interference law, the Wyoming legislature took care to avoid vagueness and overbreadth problems.

The Wyoming hunt interference statute must meet the requisites outlined in *Grayned* in order to survive vagueness scrutiny.[122] First, laws must give a person of ordinary intelligence a reasonable opportunity to know what action is prohibited. The Wyoming hunt interference statute, by utilizing the words "interfere," "hinder," or "prevent," uses terms of common understanding and limits them to a particular context, "interference with the lawful taking of or the pro-

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Strict scrutiny analysis did not change from pre-*Perry* standards to post-*Perry* analysis. If a regulation is content-based, strict scrutiny applies.

120. Act of Feb. 15, 1991, Ch. 41, §2, 1991 WYO. SESS. LAWS 124, 126.

121. WYO. STAT. § 23-3-405 (1991).

122. *Grayned*, 408 U.S. at 108-09.

cess of lawfully taking" game.[123] Accidental violations are avoided because the statute mandates an "intent" to "interfere," "hinder," or "prevent." Thus, reasonable notice is given as to the type of conduct prohibited.

In *Dorman*, the invalidated hunt interference regulation used the phrase "acts in preparation," a phrase not defined nor limited to time and place within the Connecticut statute. The Wyoming statute, on the other hand, uses "process of lawfully taking." This phrase is defined within the statute to mean "travel, camping and other acts preparatory to taking game animals . . . *if occurring on lands or water upon which the affected person may legally take the game* . . . ."[124] Thus, while the Wyoming statute also uses an "acts in preparation" clause, the Wyoming statute avoids vagueness and overbreadth by limiting its restriction to time and place by definition.[125] Definitions of additional terms used within the statute may be found in the same Game and Fish section of the Wyoming Statutes.[126] For example, the terms "game animal," "game bird," and "game fish" are defined under the "definitions of wildlife" section.[127] The term "take" is defined by the Wyoming statutes to mean "hunt, pursue, catch, capture, shoot, fish, seine, trap, kill, or possess, or attempt to hunt, pursue, catch, capture, shoot, fish, seine, trap, kill, or possess."[128] The term "person," as used in the Wyoming statutes is defined to mean an "individual, partnership, corporation, company, or any other type of association, and any agent or officer of any partnership, corporation, company, or other type of association."[129] The *Grayned* Court noted that it is a basic principle of due process that an enactment is void for vagueness if its regulations are not clearly defined.[130] Terms used in the Wyoming hunt interference statute that may not be of common understanding are reasonably defined. Given the clarity and definition of the terms, the Wyoming hunt interference statute gives fair notice in words of common understanding to those who might violate it.

Second, if arbitrary and discriminatory enforcement is to be prevented, the laws must provide explicit standards for those who apply them.[131] The Wyoming hunt interference statute prohibits conduct that is intended to interfere with the lawful taking of wildlife. Such conduct can easily be measured by the conduct's impact on the nor-

123. WYO. STAT. § 23-3-405 (1991).
124. WYO. STAT. § 23-3-405(h) (1991) (emphasis added).
125. *Id.* Thus the vagueness and overbreadth concerns (time and place) of the *Dorman* court, that protests at the local sporting goods store would also be prohibited, are alleviated by the Wyoming statute's restriction of the acts in preparation clause to a specific time and place (where game can lawfully be taken).
126. WYO. STAT. §§ 23-1-101, 102 (1991).
127. WYO. STAT. § 23-1-101(a)(i), (iv), (v), (xi) (1991).
128. WYO. STAT. § 23-1-102(a)(vii) (1991).
129. WYO. STAT. § 23-1-102(a)(viii) (1991).
130. *Grayned*, 408 U.S. at 108.
131. *Id.*

mal activity of the forum.[132] Like the Rockford statute in *Grayned* which prohibited conduct disruptive to a forum whose purposes were school activities, Wyoming's hunt interference statute prohibits conduct disruptive to a forum whose purposes include hunting and fishing.

Terms relating to the prohibited conduct that may elude common understanding, such as "taking," "person," or "game animals, fish or birds" are defined by the Wyoming statutes.[133] The Wyoming hunt interference statute describes what type of interference is prohibited (i.e., interference that prevents or hinders the lawful taking of any game animal). By using words of common understanding such as "interfere,"[134] and defining other terms, the Wyoming statute provides easily ascertainable standards for enforcement.[135] Woodcutting, trail riding, hiking, and even talking are just some of the activities that take place in hunt areas that are lawful. But, *if* such activities are done with the *intent* to prevent, hinder, or otherwise interfere with the lawful taking of wildlife, these activities become unlawful. The key phrase in the Wyoming statute, therefore, is "with the intent to prevent or hinder the taking . . . ."[136] By requiring a threshold determination of intent, the Wyoming hunt interference statute is clear as to the disruptive conduct prohibited, leaving little room for error through arbitrary enforcement.

Third, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms."[137] Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[138] The Wyoming hunt interference statute clearly provides that conduct not intended to interfere with the lawful taking of wildlife is not regulated. It is only disruptive conduct which intentionally interferes, impedes, or hinders the lawful

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132. *Id.* at 116.

133. *See supra* notes 123-29 and accompanying text.

134. A WESTLAW search of the Wyoming statutes revealed that the term "interfere," or its roots, appears 136 times in the collective Wyoming statutes. Wyoming would have substantial revisions to its statutes if the term "interfere" was declared vague. This is a good argument that the term "interfere" is a term of common understanding and therefore not vague or overbroad.

135. The Congressional Research Service noted that a statute or court could avoid any problems of constitutional overbreadth or vagueness by defining or construing the word "interfere" to refer only to physical interference, whether accomplished by speech or otherwise. CONGRESSIONAL RESEARCH SERVICE, THE SPORT HUNTING SAFETY AND PRESERVATION ACT OF 1991: CONSTITUTIONALITY OF H.R. 371, 102D CONGRESS, at CRS-3 n.8, CRS-5 (1991 predistribution copy). Accordingly, the term "interfere" would be understood not to imply that pure speech is prohibited. It appears that the association of terms like "interfere" with certain types of prohibited conduct is also an adequate way to avoid problems of vagueness or overbreadth. The Congressional Research Service of the Library of Congress is an independent research service which does analysis of proposed bills to determine constitutionality.

136. WYO. STAT. § 23-3-405(a) (1991).

137. *Grayned*, 408 U.S. at 109.

138. *Id.* (citing Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

hunt that is prohibited.[139] The viewpoint of the interferer is unimportant. The focus of the statute is upon the intent of his or her interference.

Thus, the Wyoming hunt interference statute is narrowly tailored to prohibit only disruptive conduct and does not, therefore, unnecessarily intrude upon basic First Amendment freedoms. By using terms of common understanding and by defining others, the Wyoming legislature has taken precautions to avoid vagueness of terms that could invalidate any statute.[140]

Regarding overbreadth, a comparison of the Wyoming hunt interference statute and the ordinance at issue in *Grayned v. City of Rockford*[141] is enlightening. The Rockford statute was designed for the protection of school activities. Wyoming's hunt interference statute also protects a legal activity: the lawful taking of wildlife.[142] The Rockford ordinance placed a time, place, and manner restriction on disruptive speech to protect school activities. The ordinance was limited in time to the hours while school was in session, restricted in place to the property surrounding the school, and limited in scope to disruptive activities. The Wyoming hunt interference statute advances the State's interests of protecting its citizens from armed or physical confrontation, preserving a legal activity, and furthering wildlife management goals.[143] It does this much like the statute in *Grayned* by placing a reasonable time, manner, and place restriction on speech. The hunt interference statute forbids disruptive activity at a specific time (during the taking process), at a sufficiently fixed place (in the area of the lawful taking),[144] and in a specific manner (the statute limits the scope of its restriction to conduct that intentionally hinders or prevents the lawful taking of wildlife).

The reasons for implementing the Rockford school ordinance are similar to those for enacting the hunt interference statutes. In both cases there exists a need to protect a legal activity in progress. Disrup-

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139. Intentional interference with a hunter or fisherman is not the only conduct prohibited by the Wyoming statute. Any activity intended to threaten or otherwise affect the behavior of wildlife is also violative. A hunter or an anti-hunt activists who intentionally affects a game animal's behavior, in order to interfere with the lawful taking process by another, is also violating the statute. WYO. STAT. § 23-3-405(a)(ii) (1991). The Wyoming hunt interference law excuses from its reaches private land owners while on their own property. WYO. STAT. § 23-3-405(g)(ii) (1991).

140. For an example of terms used and terms defined, see *supra* notes 123-29 and accompanying text.

141. 408 U.S. 104 (1972).

142. Wyoming's hunt interference statute does not protect the illegal methods of taking wildlife, such as poaching. Poaching is the process of illegally taking game without a proper license and/or out of season. WYO. STAT. §§ 23-3-102, 103 (1991).

143. Although the interests involved in *Grayned* and the hunt interference statutes may be distinguished, these interests are common in that they protect a legal activity and the rights of participants of those activities.

144. The *place* the statute regulates is specifically designated within the statute. WYO. STAT. § 23-3-405(h) (1991). Thus, only where the taking of game is lawful is the statute in effect.

tion of legal hunting and fishing activities could result in serious consequences. Animal activists typically blow air horns, chant, bait hunters with verbal abuse, vandalize, and use other tactics to disrupt the lawful taking of game.[145] The result of hunt interference, absent the statute, is that the State's effort and responsibility[146] to ensure the peace and safety of its citizens and to manage the wildlife[147] can be frustrated.[148]

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145. *See supra* notes 2-3.

146. Wildlife belong to the state. WYO. STAT. § 23-1-103 (1991). Accordingly, the state has the responsibility of and an interest in managing wildlife. *Id.*

147. Without wildlife management, overpopulation for a certain feed area would result and wildlife would begin to look to other places for food. The deer and elk herds may wander onto farms and ranches and compete with livestock for available feed, causing great financial loss to the ranchers and the State through damage claims. Predators (mountain lions, coyotes, etc.) also wander in search for food, following game as a food source. They kill livestock, and again the loss is financial. An additional danger with predators is that they often wander into towns and cities in search of food, increasing the chance for predator/human confrontation. Cities in Colorado, including Denver, Colorado Springs, and Boulder, have experienced many mountain lion/human confrontations as the big cats have wandered into the cities. These instances have been documented in local newspapers. *See Cougar Caught, Released*, ROCKY MOUNTAIN NEWS, Jan. 28, 1992, at 10; Gary Gerhardt, *Instinct Likely Caused Lion to Kill Youth, Expert Says*, ROCKY MOUNTAIN NEWS, Jan. 25, 1991, at 16; Gary Gerhardt, *Springs Police Shoot Cougar With Spaniel In Its Mouth*, ROCKY MOUNTAIN NEWS, Jan. 26, 1991, at 10; John C. Ensslin, *Cougar's Action Forced His Death*, ROCKY MOUNTAIN NEWS, Sept. 9, 1991, at 6.

148. The wildlife biologists and professionals of the Wyoming Game & Fish Department have recognized that the tactics used by some animal rights groups to interfere with lawful hunting and fishing activities, pose a serious threat to scientifically proven methods that they employ to manage wildlife. WYOMING GAME & FISH DEPARTMENT, PLANNING REPORT #20, THE ANIMAL RIGHTS MOVEMENT AND WILDLIFE MANAGEMENT IN WYOMING (1989).

The Yellowstone elk and bison herds are good examples of how the animal rights movement has hurt otherwise effective wildlife management techniques. Scott Skinner, *Hunt on Hold*, WYO. WILDLIFE, Oct. 1991, at 12-15. Bison were originally confined to the Grand Teton National Park. *Id.* at 12. Because of overpopulation and failure of other population control techniques besides hunting, the bison found their way down to the National Elk Refuge outside of Jackson, which was designed only to winter elk. *Id.* Now the bison compete with elk in already overcrowded conditions for winter feed. *Id.* at 14. The bison have caused trouble on the feed grounds by shouldering the elk aside (one buffalo can consume as much forage as four or five elk) and occasionally goring and seriously wounding elk. *Id.* Because of legal action by an animal rights group, wildlife biologists are unable to control the population of the buffalo herd by issuing a certain number of hunting permits. *Id.* at 14, 15. Harry Harju, supervisor of Biological Services expressed his frustrations regarding the limited wildlife management techniques available:

> We want bison to be a part of the Jackson Hole system, but we must be able to control the herd. We feel that legal sport hunting is the best way to do that. Hunting generates money that can be used on behalf of wildlife. It provides recreation and it solves the problem. *Properly regulated hunting is an efficient game management tool.* Animals as big as bison need to be controlled. If they aren't, habitat destruction and conflicts with wildlife and man will result. If we're going to have bison, we're going to have to be able to control them. . . . Some people would prefer department employees to cull the herd, but we don't like that. We'd rather not have buffalo than have to manage them that way. It's expensive, time consuming, and it eliminates public participation. Nobody has come up with an alternative better than sport hunting.

Id. at 15 (emphasis added). But buffalo hunting is currently not allowed in Wyoming,

Like the Rockford ordinance, the Wyoming hunt interference statute does not seek to punish a person because of the content of his or her speech, but only for disruptive conduct inconsistent with the purposes of the particular forum.[149] Just as the Rockford ordinance was narrowly tailored to further the City's interest and did not unnecessarily interfere with First Amendment rights, the Wyoming hunt interference statute is narrowly tailored to prohibit only disruptive conduct intended to interfere with the lawful taking of wildlife. Thus, the Wyoming hunt interference statute, like the Rockford ordinance, "represents a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place" to accomplish the interests and goals of the government.[150]

First Amendment Analysis

In the First Amendment context, the first question that must be answered is whether Wyoming's hunt interference statute, and similar statutes adopted by forty-four other states, are indeed restrictions of free speech. An argument that they are not is backed by sound logic and case law.

First Amendment protections may apply to pure speech or speech and conduct combined. When laws are not directed at the views expressed, as here, any hindrance of speech that results from such a law is merely incidental, and no First Amendment issue arises.[151] Under the Wyoming statute, expression such as peaceful distribution of handbills and quiet speech that does not interfere with the purposes of the forum or the lawful activity in progress would not be prohibited. The hunt interference statute prohibits speech or conduct only where the primary intent and result is not to express an idea, but to interfere with the legal actions of others (here, the lawful taking of wildlife).

Considering some of the tactics employed by certain animal rights groups, i.e., air horns, vandalism, theft, and even violent physical confrontation,[152] the intent of such conduct is not to communicate. Rather, it is to interfere, impede, and stop the lawful activity in progress. Such activists groups attempt to cloak their conduct in the First

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presenting herd management problems for the Game & Fish Department.

149. *Grayned*, 408 U.S. at 116-18.

150. *Id.* at 121.

151. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 828 (1988). *See also Racicot*, 8 Mont. Fed. Rep. at 469 (citing Younger v. Harris, 401 U.S. 37 (1971) which held " . . . [w]here a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so.").

152. *See supra* notes 2-3.

Amendment.[153] However, it is basic First Amendment law that where conduct or speech has no communicative value, free speech protections do not apply.[154] For example, "[r]egulations of loud noises used not to communicate but instead to shatter glass, or pamphlets used not to express anything but to cover the ground with litter, need not trigger any [F]irst [A]mendment scrutiny at all."[155]

Likewise, if someone shouted the Lord's Prayer in order to drive away game or otherwise interfere with a hunt, that person, once charged, could not validly claim that his religious or First Amendment freedoms had been violated. This is because such speech was not intended as communication. Such speech is classified as conduct intended to drive away game or otherwise interfere with the lawful hunt. It is this type of conduct that the Wyoming hunt interference statute seeks to regulate. The *O'Brien* Court spoke to this issue: "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[156] The Court noted that the statute there in question, prohibited conduct, not expression. The Wyoming hunt interference statute likewise prohibits conduct, not speech. Thus, where the speech and conduct of the animal rights activists in public hunting and fishing areas is noncommunicative, and meant only to disrupt, no First Amendment issue exists.

Assuming that Wyoming's hunt interference statute places more

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153. In NOW v. Operation Rescue, 747 F. Supp. 760 (D.D.C. 1990), antiabortion activists claimed, similar to claims asserted by animal rights activists, that their First Amendment rights allowed them to engage in illegal and tortious acts of trespassing, impeding a legal activity, blockading and obstructing the entrance to an abortion clinic. *Id.* at 769. The United States District Court held that such conduct is not protected by the First Amendment and refused to extend free speech protections. *Id.*; *see also* New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989); Medlin v. Palmer, 874 F.2d 1085 (5th Cir. 1989); National Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989); Armes v. City of Philadelphia, 706 F. Supp. 1156 (E.D. Pa. 1989); Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989).

Some antiabortion groups, like some animal rights activists, claim that the common law doctrine of justification excuses their irrational conduct. This was the argument made by defendants in *NOW v. Operation Rescue*, *supra*. Since they believe that abortion kills human beings, defendants argued that they were acting to prevent a greater harm, therefore their lawless action was justified. This is the same argument made by animal rights activists, but in another context, of course. However, the United States District Court noted that the harm defendants sought to protect was a legally protected activity, therefore there was no injury to defendants. 747 F. Supp. at 769. Without injury, unlawful conduct cannot be justified. *Id.* at 769-70. Thus, the court held that the principle of justification was baseless in this context. Again, it is easy to draw an analogy to the animal rights issue regarding hunt interference statutes. Hunting and fishing are legally protected activities. Thus, no injury results to the activists and the justification theory is also baseless in the hunt interference context.

154. "Where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." *Grayned*, 408 U.S. at 116. Conduct, otherwise illegal, is not protected expression under the First Amendment.

155. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 831 (1988).

156. *O'Brien*, 391 U.S. at 376.

than an incidental restriction upon free speech, a First Amendment analysis would probably be conducted by a reviewing court. The following section will analyze the Wyoming statute under a *Perry* forum analysis according to established United States Supreme Court precedent.

Perry Analysis

This section will first determine whether the Wyoming hunt interference statute is content-based or content-neutral. Then the analysis will determine what type of forum the Wyoming statute seeks to regulate. The appropriate level of scrutiny will then be applied to see whether the hunt interference statute passes constitutional standards.

The Wyoming Hunt Interference Statute: Content-Based or Content-Neutral?

A content-based regulation of speech would be one that seeks to suppress particular ideas. For example, if the Wyoming statute banned antihunting or animal rights views, or left the forum open to all groups but antihunting or animal rights groups, such a statute would be content-based and must pass strict scrutiny. To support such a regulation, a state must show that its regulation is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end.[157] Considering the emotional nature of the issue and the confrontational tactics used by some anti-hunting groups, and given the fact that hunters (and in some cases, the activists) are armed, there may exist a compelling governmental interest to ensure the safety of citizens.[158]

The Wyoming hunt interference statute does not outlaw pro-animal or antihunting views from the forests. Rather it only bans interference with the lawful taking of wildlife, regardless of whether that interference originates from animal rights activists or other person. The content-neutrality of a statute is not lost simply because a law places an incidental burden on some speakers more than others.[159]

157. *Perry*, 460 U.S. at 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

158. In *Dorman*, 862 F.2d at 437, the court, in dicta, opined that the Connecticut hunt interference statute could not withstand strict scrutiny required of a content-based statute. But the court limited its observation to the fact that there was no showing of a compelling governmental interest. *Id.* It should be noted that the issues before the court were those of vagueness and overbreadth, and a showing of a compelling interest, therefore, was not required. Thus, the *Dorman* case does not stand for the proposition that hunt interference statutes cannot withstand a strict scrutiny analysis.

159. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (holding that the City's interest in zoning justified a time, manner, and place restriction on speech by an adult theater). *See also* Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986). In *Arcara* the Court upheld the closure of an adult bookstore where prostitution was taking place. The statute in question was aimed at the illegal conduct of prostitution, not at quashing free expression. The Court further held that sexual conduct, as a result of prostitution, "manifests absolutely no element of protected expression." *Id.* at 705.

Thus, it may be logically concluded that the Wyoming statute is a content-neutral law. The rest of this analysis will proceed on that basis.

Looking at the Forum that the Wyoming Hunt Interference Statute Seeks to Regulate

For analysis purposes, a quick review of the *Perry* holding is appropriate. A statute that regulates speech based upon its content in any public forum will be tested under strict scrutiny analysis.[160] If the regulation is content-neutral, and the forum is either a traditional public forum or has been dedicated or opened to public expression, the scrutiny is lessened to mid-level standards.[161] Public property which is not by designation or tradition a forum for free speech purposes is a nontraditional/nondedicated forum for speech purposes and is governed by lower standards. A content-neutral time, manner, and place regulation of speech in this setting must only meet the rational relations standard.[162] For analysis purposes, it is necessary to decide which category of public forum public hunting and fishing areas fall under.[163]

Traditional Public Forum. Under post-*Perry* analysis, hunting and fishing areas do not fit the criteria of the traditional public forum. There is no case law holding that such areas are traditional public forums used for the purpose of free exchange of ideas.[164] Indeed, places considered traditional public forums have been limited by Supreme Court decisions to include public streets, sidewalks and parks.[165] Even these forums are subject to limitations.[166] If a court classified hunting and fishing areas as traditional public forums, such a finding would not be fatal to the analysis. The Wyoming hunt interference statute, as a content-neutral regulation of speech, would be subjected to a mid-level analysis, and the issue logically becomes

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Correspondingly, Wyoming's hunt interference statute is aimed at illegal conduct, not at stifling the expression of ideas. The extreme acts of certain anti-hunting groups are aimed at hindering or stopping the lawful activity in progress, not at communication. Thus, such conduct, like the conduct banned in *Arcara*, bears absolutely no element of protected speech and may not be asserted as First Amendment activity.

160. *Perry*, 460 U.S. at 45-46.

161. *Id.*

162. *Id.* at 46.

163. For purposes of this comment, the issue of the impact of hunt interference regulations on private property will not be treated. This is because the statute's greatest impact is on public hunting and fishing areas.

164. The fact that property may be open to the public does not mean that such areas must be treated as a traditional public forum for First Amendment purposes. *Kokinda*, 110 S. Ct. at 3121. Indeed, it is a long settled principle of law that governmental actions are subject to a lower level of scrutiny when "the governmental function operating . . . is not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage its internal operations. . . ." *Id.* at 3119 (citing Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896 (1961)).

165. *Perry*, 460 U.S. at 45 (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

166. *Id.*

whether the Wyoming hunt interference statute is a reasonable time, manner, and place restriction of speech under the three-part test outlined in *Grace*.[167]

Under mid-level scrutiny, a governmental regulation of expression is justified if it is content-neutral, if it is narrowly tailored to serve a significant governmental interest, and if it leaves open alternative channels of communication.[168] As the above analysis has shown, the Wyoming hunt interference statute does not seek to regulate a particular viewpoint.[169] Therefore, as constructed, it is a content-neutral regulation of speech, which at the most merits mid-level scrutiny.

Wyoming's hunt interference statute must also further significant governmental purposes. The purposes of Wyoming's hunt interference statute are to ensure the safety of the state's citizens, to enable the Game and Fish Department to manage wildlife through a legal taking process, to maintain a constant and manageable population of certain species thereby maintaining the health of the herd and preserving habitat, to attain an equilibrium where man and wildlife can cohabitate without unreasonable interference from the other, to control disease spread from wildlife to humans and domestic animals, to ensure revenue to the federal government and the State of Wyoming, and to acquire new lands for all forms of outdoor recreation, including hunting and fishing areas.[170]

The most significant governmental interest supporting Wyoming's hunt interference statute is the safety of the citizens.[171] This governmental interest would fall under a state's police power to protect the lives and quiet of all persons, public property, legal activities, and those who participate in those activities.[172]

Who pays for wildlife and habitat management is another interest of the state and federal governments. The management of wildlife and habitat by game and fish agencies is a large responsibility, involving thousands of people working for the well-being of game and non-game species alike. The costs of managing our wildlife are extremely high, with hundreds of millions of dollars spent each year. Unlike other governmental agencies, game and fish departments receive little support from taxes paid by the general public. Through license fees and special excise taxes[173] on hunting and fishing equipment, government has

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167. *Grace*, 461 U.S. at 177.

168. *Id.*

169. *See supra* notes 157-59 and accompanying text.

170. These state interests were brought to light in an interview with Mark O. Harris, State Representative, State of Wyoming, in Cheyenne, Wyoming (Oct. 3, 1991). Mr. Harris is the impetus and original author of Wyoming's hunt interference law.

171. Where one or both parties have weapons because of the lawful hunting activity involved, even if not for the purpose of antagonism of the opposing party, the government interest of safety would be important and substantial (if not compelling) to support hunt interference statutes.

172. *See* Opinion of the Justices, 509 A.2d 749, 750-51 (N.H. 1986).

173. *See* PITTMAN-ROBERTSON WILDLIFE RESTORATION ACT, 16 U.S.C. § 669 (1988).

placed the burden of funding wildlife management on sportsmen and sportswomen. Without these funds, the wildlife conservation effort would be severely hindered and thousands of jobs in wildlife management and the sporting goods industry would be lost.[174]

Another significant interest is the state's responsibility to maintain and care for wildlife. This responsibility falls to the state and its game and fish agency.[175] Aldo Leopold, a preeminent conservationist, was the main force behind the American Game Policy, introduced in 1930 and later adopted, as policy, by the Pittman-Robertson Act.[176] This policy required that state game and fish agencies be staffed with highly trained wildlife biologists and wildlife management specialists.[177] These specialists have determined through practice and studies that, although hunting is not a wildlife management cure-all, a monitored hunt of some species is an effective wildlife management tool in maintaining proper population size for a given area of feed and habitat.[178] The interference of this management activity could be dev-

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In 1991, $354 million raised from excise taxes on sporting equipment were used to help fund state fish and wildlife restoration programs. *Interior Secretary Lujan Announces $354 Million for State Wildlife Projects*, Dep't of the Interior News Release, Mar. 19, 1991.

174. NATIONAL SHOOTING SPORTS FOUNDATION, THE HUNTER AND CONSERVATION 10 (1989) [hereinafter CONSERVATION]. License fees are the largest portion of funds raised for state game and fish departments, presently furnishing them with nearly $800 million a year. *Id.* at 12. Hunters have paid some $7 billion for conservation through excise taxes, licenses and permits. *Id.* at 22. Surveys by the U.S. government show that hunters and fishermen pour over $38 billion into the nation's economy each year. *Id.* The Wyoming Game and Fish Department's annual report showed that hunters, fishermen, and trappers spent more than $600 million in 1990 in the State of Wyoming. As a group, these sportsmen spent over $14 million on Wyoming licenses alone in 1990. Chris Madsen, *Without the Hunt*, WYO. WILDLIFE, Jan. 1991, at 22. A great deal of this money finds its way to conservation programs benefitting management techniques and studies of game and non-game animals.

175. WYO. STAT. §§ 23-1-103, 302 (1991).

176. UNITED STATES DEPARTMENT OF THE INTERIOR FISH AND WILDLIFE SERVICE, RESTORING AMERICA'S WILDLIFE 2 (1987). The Pittman-Robertson Act provides federal funds derived from excise taxes on hunting and fishing equipment to state game and fish agencies to help foster wildlife and habitat management. *Id.* at 4. One of the requirements that state game and fish agencies must follow in order to be eligible for these funds is that their personnel be trained and competent to perform their duties. *Id.* at 12.

177. *Id.*

178. The following are some examples of texts on wildlife management that regard hunting as a valuable population maintenance tool: ALDO LEOPOLD, GAME MANAGEMENT (1933); Steve W. Chadde & Charles E. Kay, *Tall-Willow Communities on Yellowstone's Northern Range: A Test of the "Natural Regulation" Paradigm, in* THE GREATER YELLOWSTONE ECOSYSTEM 231, 237-38, 255-58 (Robert B. Keiter & Mark S. Boyce eds., 1991); John J. Craighead, *Yellowstone in Transition, in* THE GREATER YELLOWSTONE ECOSYSTEM 27, 31-32 (Robert B. Keiter & Mark S. Boyce eds., 1991); MARK S. BOYCE, THE JACKSON ELK HERD: INTENSIVE WILDLIFE MANAGEMENT IN NORTH AMERICA (1989); GAME MANAGEMENT IN MONTANA (Thomas W. Mussehl & F.W. Howell eds., 1971); STANLEY H. ANDERSON, MANAGING OUR WILDLIFE RESOURCES (1985); GAME HARVEST MANAGEMENT (Samuel L. Beasom & Sheila F. Roberson eds., 1985); ELK OF NORTH AMERICA: ECOLOGY AND MANAGEMENT (Jack Ward Thomas & Dale E. Toweill eds., 1982).

astating to wildlife and domestic livestock.[179]

Wildlife is a resource that cannot be stockpiled, therefore unregulated population increase is not feasible. Nor is unregulated hunting feasible. By the turn of the century, unregulated hunting by those who hunted for profit had decimated many species, including elk, antelope, and buffalo. Through careful wildlife management practices these species, and many others, were replenished.[180] But new problems have surfaced.

Society's increasing needs have caused expansive urban development. Man's use of natural resources to support this urban explosion has decreased the availability of wildlife range and habitat, increasing the need for sound wildlife management techniques. Now, overpopulation of wildlife has created grave problems for man and for species. Too many animals on too small an area could destroy an entire population from simple lack of feed and disease.[181] This problem escalates in the winter. In a hard winter, when an overpopulated game herd depletes all of the available food, death by starvation is inevitable.

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179. Elk and bison in the Yellowstone area are carriers of a disease called brucellosis. Brucellosis can be transmitted from the bison and elk to domestic cattle, causing them to abort their young. Ranchers in the area are worried that their cattle will be infected with the disease. The issue mushroomed recently when Parker Land and Cattle Co. of Dubois, Wyoming, sued the State of Wyoming Game and Fish Department. The company subsequently sued the Forest Service, Park Service, U.S. Fish and Wildlife Service and the Bureau of Land Management. Parker Cattle Co. claimed that it had to destroy 620 head of its cattle after they contracted brucellosis in pastures contaminated by the feces, urine and afterbirth of elk. *See* Gary Gerhardt, *The Killing Fields*, ROCKY MOUNTAIN NEWS, Feb. 9, 1992, at 10.

180. For example, in 1907 elk were common only in and around Yellowstone National Park. Because of careful management techniques, today there are more than 500,000 elk in the United States. CONSERVATION, *supra* note 174, at 21. In Yellowstone National Park, where the control effect of public hunting is prohibited, the elk have multiplied so fast they are destroying their habitat and that of other species. *See* Chadde & Kay, *supra* note 178, at 255-58; Craighead, *supra* note 178, at 31-32 (rejecting the natural regulation or "hands off" wildlife management theory, stating "[i]t has been based on the erroneous notion that biotic communities can regulate themselves within artificial boundaries and in areas where man is a massive intruder. The result has been a serious overpopulation of elk and bison, with corresponding decline in whitetail, mule deer, beaver, and other species.").

181. Some animal rights groups oppose wildlife management techniques that include the harvesting of animals to control wildlife populations. However, amidst charges of hypocrisy, People for the Ethical Treatment of Animals (PETA) tried their own brand of game management.

According to reports in the WASHINGTON POST and the MONTGOMERY JOURNAL, PETA had "rescued," from supposed inhumane conditions, some rabbits from a school and some roosters from a private residence. *Circus Blasts 'Animal Rights' Groups Killing 'Rescued' Rabbits and Roosters*, PR Newswire, Apr. 30, 1991, *available in* LEXIS, Nexis Library. The activists group kept the animals at their sanctuary facility until conditions became overcrowded. To solve the problem, PETA killed 18 rabbits and 14 roosters. *Id.* A PETA spokesperson said the mass killings were necessary because the conditions were overcrowded and that the "mercy killings" were consistent with animal rights philosophy. *Id.* Critics blasted the activist group by saying that PETA follows a double standard and that "[PETA] is an extremist cult that is seeking to impose its own radical philosophy on the public while following its own weird interpretation of what is ethical treatment of animals." *Id.*

Predators attack hunger-weakened stragglers. Disease and parasites add to the toll.[182] The end result is a weak, unhealthy herd containing far fewer animals than would be present had surplus animals been thinned out in the fall hunt.[183] Therefore, hunting, through its role as a wildlife management tool, rises to the level of a significant governmental interest, thus satisfying that part of mid-level scrutiny.

The Wyoming hunt interference statute must utilize appropriately narrow means to protect the governmental interests involved. The statute does so by prohibiting only the independent noncommunicative impact of interfering with a legal hunt. The Wyoming statute confines its limitations on speech to time, manner, and place. The time of the restriction is during the "process of lawfully taking wildlife."[184] This is defined within the statute to mean travel, camping, and other preparatory acts, if occurring on lands where game may be lawfully taken.[185] The activity regulated is conduct meant to interfere with the legal taking of wildlife. Only where speech is used as a tool and is intended to prevent, hinder, interfere, or threaten the legal taking of wildlife, does the statute impose its regulations.

The use of speech to intentionally interfere with a hunt is conduct. It is conduct because the speech is not intended to communicate, but rather to interfere. The United States Supreme Court held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on protected speech.[186] The harm which the hunt interference statute seeks to prevent does not flow from the content of the speaker's message, but from his conduct. The state has a valid interest in regulating that conduct.[187] Thus, the Wyoming statute is sufficiently tailored to narrowly regulate disruptive conduct. Any regulation of protected speech is merely incidental and insignificant when balanced against the governmental purposes involved.

Finally, the Wyoming hunt interference statute must leave open ample alternative channels of communication. The hunt interference statute only affects hunting and fishing areas.[188] The statute does not seek to regulate speech in traditional public forums. Those who wish to voice views in opposition of a hunt still have the traditional public

182. CONSERVATION, *supra* note 174, at 4, 5.
183. *Id.* at 5. *See also supra* note 178 for additional authority.
184. *See* WYO. STAT. § 23-3-405(h) (1991).
185. *Id.*
186. *O'Brien*, 391 U.S. at 376.
187. Otherwise, someone who is arrested for running a red light would be entitled to First Amendment protection if that person were a newscaster late for work or a professor late to a lecture. Book selling in an establishment used for prostitution does not confer First Amendment protections to defeat a valid statute aimed at penalizing and terminating illegal use of the premises. *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986).
188. WYO. STAT. § 23-3-405(h) (1991).

forums open to them as alternative channels of communication. These traditional public forums include public parks, streets, sidewalks, and those places specifically set aside for public debate.[189] Because the Wyoming statute limits its restrictions to areas where game can lawfully be taken, picketing on a *public* sidewalk in front of a sporting goods store is not prohibited.[190] Therefore, the Wyoming hunt interference statute leaves traditionally effective means of communication unregulated for animal rights activists to air their views.

Under mid-level analysis, the Wyoming hunt interference statute is constitutionally sound. The Wyoming statute is an example of reasonable time, place, and manner restrictions of speech or conduct. The Wyoming statute is not based on the content of speech, but rather is content-neutral. The type of speech sought to be restricted by the Wyoming statute has not been held by the courts to be protected speech. Rather, it is not speech at all, but intrusive conduct, meant to interfere. The State has numerous valid interests in regulating such conduct. Additionally, the Wyoming hunt interference statute is narrow in application to achieve specific substantial governmental interests and the statute leaves open all traditional channels for expressing antihunting viewpoints. Thus, the statute passes muster under mid-level analysis.

Nontraditional Public Forum: Opened or Dedicated for Public Debate Purposes. Public hunting and fishing areas do not fit the criteria of the nontraditional public forum dedicated or opened for First Amendment purposes. Neither Congress, nor the Forest Service, has expressly dedicated or opened the national forests to expressive activity,[191] particularly activity intended to interfere with the lawful taking of wildlife. In fact, Congress has dedicated the national forests for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.[192] Again, even if a court decided that hunting and fishing areas were dedicated by the appropriate governmental body for free speech purposes,[193] the Wyoming statute would only have to meet the *Grace* standard of mid-level scrutiny. As shown by above analysis, the Wyoming statute meets that burden.

Nontraditional/Nondedicated Public Forum. The *Perry* analysis,

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189. *See Perry*, 460 U.S. at 45; *Kokinda*, 110 S. Ct. at 3119.

190. *See supra* note 188 and accompanying text.

191. Outdoor recreation, one of the purposes to which the national forests are dedicated, may be imaginatively considered expressive activity. But clearly, tactics of anti-hunt protestors do not fall within the purposes for which the forests, or other public hunting and fishing areas, were dedicated.

192. 16 U.S.C. § 528 (1988).

193. Even though the national forests allow some form of expression through outdoor recreation, this does not add up to the dedication of national forests to First Amendment speech activities. Indeed, "the government does not create a public forum by . . . *permitting* limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Kokinda*, 110 S. Ct. at 3121 (citing Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 802 (1985)).

as used in *Kokinda*, supports the assertion that public hunting and fishing areas fall into the third level forum (nontraditional/nondedicated public forum), and thus time, manner, and place restrictions on speech need only meet the rational relations test of reasonableness.[194] Hunting and fishing areas (national forests and other public lands), like the school mailboxes in *Perry*, or the post office sidewalks in *Kokinda*, meet the nontraditional/nondedicated public forum criteria. This is because hunting and fishing areas are not traditional or dedicated public forums for public opinion purposes, nor have they been opened up to such. Therefore, restrictions on speech in the forum need only bear a rational relation to the State's purposes in enacting the law. As in *Kokinda*, the government may reserve a nontraditional/nondedicated public forum for its intended purposes (in the case of hunt interference statutes, hunting and fishing, which would seem to be intended "wildlife and fish purposes") as long as the regulation of speech is reasonable and not an effort to suppress speech because of its content.[195] Having shown that the hunt interference statute meets the higher burden of mid-level analysis, the above mentioned governmental interests (i.e., game management, public safety, public fiscal policy, etc.) easily meet the *Kokinda* burden of bearing a rational relation to reasonable governmental interests.

CONCLUSION

If the Wyoming hunt interference statute was challenged for vagueness and overbreadth, the outcome is predictable. As shown by above analysis, the Wyoming statute meets the standards set by *Grayned*. The hunt interference statute avoids vagueness problems by placing the ordinary person on notice that certain activity is prohibited. The activity prohibited by the Wyoming statute is intentional interference with the lawful taking of game. The statute avoids arbitrary and discriminatory enforcement of its provisions by using explicit terms which leave little room for error. Otherwise vague terms are either defined within the hunt interference statute or defined within the Game and Fish section. The Wyoming statute avoids problems of overbreadth because it does not outlaw otherwise constitutional activity. Such problems are avoided because the statute confines its limitations on disruptive expression to specific instances of time, manner, and place. The hunt interference statute limits its restrictions to a specific time defined in the statute, during the lawful taking process. It describes the manner of activity prohibited: conduct intended to interfere with, by preventing or hindering, the taking process. The place of the restriction is the place where game is lawfully taken, usually public hunting and fishing areas. The statute does not

194. *Compare Kokinda*, 110 S. Ct. at 3121, to textual assertion. If the *Kokinda* Court could classify post office sidewalks as a nontraditional public forum, it would certainly be reasonable to classify public hunting and fishing areas as such.

195. *Kokinda*, 110 S. Ct. at 3121-22; *see also Perry*, 460 U.S. at 46.

prohibit otherwise nondisruptive activities.

If the Wyoming hunt interference statute was challenged on a theory that it quashes free speech in a traditional or nontraditional (but opened or dedicated for public opinion purposes) forum, the conclusion is also predictable. The statute does not discriminate based upon a person's viewpoint or the content of speech. Thus, the conclusion that it is a content-neutral regulation is unavoidable. Applying the appropriate mid-level scrutiny, the hunt interference statute passes constitutional muster. It does so because its regulations are content-neutral, the regulation is narrowly tailored to serve substantial governmental interests, and it leaves open alternative channels of communication.

Even more probable is that the forum the Wyoming statute seeks to regulate is a nontraditional public forum not dedicated or specifically opened for public debate purposes. *Perry* holds that government regulations of speech that are content-neutral in this type of forum are subject to the lowest standard of scrutiny, rational relations. Analysis showed that the Wyoming statute's regulations bore a rational relation to governmental purposes and that the statute was reasonably tailored, in light of the forum's normal activity, to achieve those interests.

The Wyoming hunt interference statute is therefore constitutional. As Justice Harlan said in *Konigsberg*, the First Amendment does not allow the unfettered exercise of speech nor unregulated talkativeness. Nor does it give us the unlimited right to impose our personal beliefs and agendas on others to the extent that it interferes with their participation and enjoyment of a lawful activity. That is called anarchy. In the case of animal rights activists' interference with lawful hunting and fishing activities, it is "anarchy in the woods."

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