

# HUNTING AND POSTING ON PRIVATE LAND IN AMERICA

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## INTRODUCTION

Rod Froelich, owner of seventy-five hundred acres in Sioux County, North Dakota, was tired of having hunters enter his land to hunt without his permission. Froelich had not posted “no hunting” signs on his land, which under the common reading of the state’s posting statute meant that hunters were not obligated to seek his permission to hunt.<sup>1</sup> As a member of the North Dakota House of Representatives, he sponsored legislation that would have required hunters to get permission from landowners before hunting on private land.<sup>2</sup> When the legislation failed, Froelich, with the support of the North Dakota Stockmen’s Association<sup>3</sup> and the North Dakota Farm Bureau,<sup>4</sup> sued the governor and the director of the Game and Fish Department of North Dakota, seeking a declaratory judgment that hunters must have landowner permission before hunting on private land.<sup>5</sup> In moving for summary judgment, Froelich argued that the posting statute, which provided for a criminal penalty if a hunter entered posted land, did not abrogate his common law right to exclude and his civil trespass remedy to enforce that right on unposted land.<sup>6</sup> He further argued that if the statute was interpreted to effect such an abrogation—which was the common reading—it

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1. N.D. CENT. CODE § 20.1-01-18 (2002); *see also infra* note 58 (detailing other state posting statutes).

2. H.R. 1278, 57th Leg. Assem., Reg. Sess. (N.D. 2001); Dale Wetzel, *Suit Seeks to Bar Hunters from Unposted Private Land*, BISMARCK TRIB. (North Dakota), May 28, 2003, at C6.

3. Press Release, North Dakota Stockmen’s Association, Stockmen’s Association Supports Trespass Lawsuit (July 15, 2003), *available at* <http://www.ndstockmen.org/images/Trespasslawsuit.htm>.

4. Press Release, North Dakota Farm Bureau, NDFB 2004 Priority Issues (Jan. 29, 2004) (on file with the *Duke Law Journal*).

5. Complaint for Declaratory and Injunctive Relief at 4–5, *Froelich v. Hoeven*, No. 03-C-0709 (Sioux County, N.D. filed May 21, 2003).

6. Plaintiffs’ Opening Brief in Support of Their Motion for Summary Judgment at 1–3, *Froelich* (No. 03-C-0709) [hereinafter *Froelich Brief*].

would amount to an unconstitutional taking.<sup>7</sup> In reply, the defendants simply relied on the existence and history of the posting statute to support their position that the public could hunt on unposted land without permission, free from any civil or criminal sanction.<sup>8</sup> They further stated in a newspaper article that, “The assumption that unposted land is open for hunting has been the case for decades, if not since statehood.”<sup>9</sup> The court deemed Froelich’s complaint a request for an improper advisory opinion and granted summary judgment for the defendants, declining to reach the merits of the case.<sup>10</sup>

The year before Froelich filed his suit, an Arizona landowner mounted a similar protest before an Arizona House of Representatives committee,<sup>11</sup> lobbying in support of a bill to repeal Arizona’s recently enacted posting statute.<sup>12</sup> Although agreeing that the statute clearly abrogated a landowner’s civil trespass remedy against people hunting on unposted land, she argued that it unfairly undermined private property rights.<sup>13</sup> In hearings before the committee, she stated that proper posting under the statute was difficult if not impossible, that some hunters knock down “no hunting” posts, that hunters were often dangerous, and that, in the end, the state’s posting law was simply inimical to private property rights.<sup>14</sup> Three other landowners testified similarly.<sup>15</sup> Members of the Arizona Game and Fish Commission, the Arizona Wildlife Federation, and the National Rifle Association argued in response that the posting law was a reasonable “compromise” between the

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7. *Id.*

8. Defendant’s Brief in Support of Motion for Judgment on the Pleadings or Alternative Motion for Summary Judgment at 5–7, *Froelich* (No. 03-C-0709) [hereinafter North Dakota Brief]; *see id.* at 15–16, 18–19 (arguing that the legislative adoption of the posting statutes at issue excludes the operation of any common law principles and that the courts have no authority to rewrite the statutes).

9. Wetzel, *supra* note 2.

10. *Froelich*, No. 03-C-0709, slip op. at 4 (Sioux County, N.D. May 3, 2004).

11. *Hunters Trespassing: Hearing on H.B. 2592 Before the House Comm. on Military, Veterans Affairs, and Aviation*, 45th Leg., 2d Sess. (Ariz. 2002) [hereinafter *Hearing*], available at [http://www.azleg.state.az.us/legtext/45leg/2r/comm\\_min/house/0321mvaa.doc.htm](http://www.azleg.state.az.us/legtext/45leg/2r/comm_min/house/0321mvaa.doc.htm).

12. ARIZ. REV. STAT. ANN. § 17-304 (West Supp. 2004).

13. *Hearing*, *supra* note 11 (statement of Anna Marsob).

14. *Id.* (statement of Anna Marsob).

15. *Id.* (statements of Nancy Laizure, Paul Oiefenderfer, and Judith Heuser).

rights of hunters and landowners.<sup>16</sup> After a lively debate, the bill failed.<sup>17</sup>

These two conflicts revolve around state posting statutes—statutes that require private landowners desiring to exclude hunters from their land to post “no hunting” signs. As an initial matter, as this Note later shows, Froelich’s argument that the statutes are only criminal and therefore do not affect landowners’ civil remedies is unavailing—the posting statutes actually make hunting on unposted land perfectly “legal.” In this way, the statutes sacrifice the rights of landowners for the sake of hunting, a sacrifice that seems increasingly unreasonable as society changes. For this reason, states or municipalities should eliminate or significantly change these statutes. Part I of this Note analyzes the history behind the statutes, from medieval English hunting laws to the rise of American statutes designed to ensure that everyone, not just the rich and landed, could hunt. Part II catalogues the current statutes, discussing the variations among them and how secondary sources characterize the balance of rights between hunters and landowners. Part III notes several problems with the current statutes; specifically, it recognizes the inherent conflict that the statutes create between the rights of hunters and landowners and analyzes landowners’ compelling, but likely unsuccessful, legal arguments against the statutes. Part III then describes certain changes in society since the posting statutes were first conceived and explains how those changes may undermine both the statutes’ rationale and their intended effects. Part IV suggests that, because judicial remedies seem unlikely, state legislatures or municipalities in the twenty-nine states with posting requirements should change their statutes (or common law requirements<sup>18</sup>) to require explicit landowner permission to hunt on private land, as twenty-one states already do. Failing the adoption of such a requirement, Part IV suggests several alternative improvements to the posting statutes.

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16. *Id.* (statements of Hays Gilstrop, Ariz. Game & Fish Comm’n; Joe Carter, Ariz. Game & Fish Comm’n; Darren LaSorte, Nat’l Rifle Ass’n; and Jack Simon, Ariz. Wildlife Fed’n).

17. *See id.* (noting that the bill failed by a roll-call vote of 0-8-0-2).

18. *See infra* note 67 and accompanying text (explaining that the common law posting requirements of Maine and Louisiana are similar to the statutory posting requirements of twenty-seven other states).

## I. THE HISTORY OF THE RIGHT TO HUNT ON PRIVATE LAND IN AMERICA

### A. *The English Law as It Arrived in Colonial America*

In England, before and during the era of the American colonies, hunting and trapping<sup>19</sup> were rights reserved for members of the wealthy, and usually landed, class.<sup>20</sup> In 1389, hunting was characterized as a “gentleman’s game,”<sup>21</sup> and eventually a scheme of qualification statutes arose to grant only leading citizens the right to hunt.<sup>22</sup> These qualification statutes were not justified on the theory that only landowners were entitled to the game on their land, for some statutes qualified prominent citizens regardless of whether they owned any land.<sup>23</sup> Rather, the statutes were explicitly justified—at least in part—on the rationale that hunting was an “amusing diversion” that kept members of the lower class from pursuing more important work.<sup>24</sup> Parliament was “[d]eaf to the plea that game might nourish the poor,” and the English game laws “ensured that the poor

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19. Unless this Note states explicitly that it is dealing with only hunting or trapping, it will discuss both under the general term “hunting.” American law generally treats hunting and trapping similarly, whereas fishing laws are often of a different nature. See RUTH S. MUSGRAVE & MARY ANNE STEIN, *STATE WILDLIFE LAWS HANDBOOK* 47–720 (1993) (describing the hunting, trapping, and fishing laws of all fifty states). *But see infra* notes 75–76 and accompanying text (discussing statutes that treat hunting and trapping differently). This Note does not treat the vast, complex array of fishing laws.

20. See THOMAS A. LUND, *AMERICAN WILDLIFE LAW* 8–10, 19 (1980) (noting that a goal of early English wildlife regulation was to secure “unequal distribution of the right to utilize wildlife,” that early English game law aimed “to beggar the powerless,” and that “landed wealth and high social standing” were requirements for hunters). Professor Lund’s book—based in part on his articles *British Wildlife Law Before the American Revolution: Lessons from the Past*, 74 MICH. L. REV. 49 (1975), and *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703 (1976)—provides a detailed history of American game law and is the source upon which Part I draws heavily.

21. 13 Rich. 2, c. 13, § 1 (1389) (Eng.); LUND, *supra* note 20, at 8.

22. See LUND, *supra* note 20, at 8 (“[Q]ualification statutes allowed only prominent citizens to take game, to possess certain weapons and, ultimately, to eat certain animals.”). The statutes often required hunters to have a certain level of wealth or a hereditary title to hunt. *Id.* Eventually, in 1831, the qualification statutes were abandoned in favor of a new statute permitting all people who purchased licenses to hunt on their own land or on the land of others with permission from the owners. Game Act, 1 & 2 Will. 4, c. 32, §§ 1, 6 (1831) (Eng.).

23. LUND, *supra* note 20, at 10 & n.58 (citing 1 Jam., c. 27, § 2 (1604) (Eng.), which allowed hunting by persons of “higher degree”). In addition, some “owners of properties worth less than the statutory amount who were equally subject to wildlife deprecations were not qualified to kill the damaging animals.” *Id.* at 10.

24. *Id.*

could neither consume game, nor interfere with the beasts that ravaged their crops.”<sup>25</sup>

Although the qualification statutes were not based on the theory that solely landowners were entitled to game on their private land, in eighteenth-century England an academic debate raged regarding whether, nonetheless, there was truth to this theory. Railing against this view, Blackstone argued that the landed had no inherent right to the game on their land; he argued that whatever right the landed had to take game on their own land was based on royal grants and that the “right of taking and destroying game belongs exclusively to the king.”<sup>26</sup> As such, Blackstone believed that the sovereign could confer upon (or deny to) anyone, rich or poor, the right to take game<sup>27</sup>—a theory that came to be called “free taking.”<sup>28</sup> This is not to say that Blackstone denied that landowners could exclude hunters as trespassers;<sup>29</sup> Blackstone simply believed that title to *ferae naturae* was vested in the sovereign, not the landowner, and thus that the sovereign had discretion to restrict or control hunting.<sup>30</sup> On the other side of the debate was Professor Edward Christian, an editor of Blackstone’s *Commentaries*.<sup>31</sup> Christian argued that, although the king could travel wherever he wished, he had no more right to the game on a citizen’s land than to the crops on that land.<sup>32</sup> Professor Christian, then, believed that landowners had the exclusive right to the game on their land.

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25. *Id.* at 19.

26. 2 WILLIAM BLACKSTONE, COMMENTARIES \*417; LUND, *supra* note 20, at 21.

27. 2 BLACKSTONE, *supra* note 26, at \*417–18.

28. LUND, *supra* note 20, at 20–21.

29. See 2 BLACKSTONE, *supra* note 26, at \*411 (noting that English law allowed restraints on hunting, one common restraint being a general prohibition against “entering on another man’s grounds, for any cause, without the owner’s leave”); see also 3 *id.* at \*209–10:

Every unwarrantable entry on another’s soil the law entitles a trespass by *breaking his close* . . . For every man’s land is in the eye of the law enclosed and set apart from his neighbor’s: and that either by a visible and material fence . . . or, by an ideal invisible boundary, existing only in the contemplation of the law . . .

LUND, *supra* note 20, at 23 (explaining that, according to Blackstone, “the civil law denied the landowner’s property interest in wildlife” and, as such, “trespassers acquired good title to the animals they poached” (emphasis added)).

30. See LUND, *supra* note 20, at 22 (“The power to make [grants to take game] . . . established the king’s right as exclusive; had it been otherwise, . . . the landowner grantees would have antecedently enjoyed the rights the king appeared to bestow.”).

31. See *id.* at 21 (stating that Blackstone’s support for “free taking” and Professor Christian’s support for the “landed’s authority” placed them at opposite ends of the spectrum in the English debate about the “landed’s claim to wildlife”).

32. *Id.* at 22.

### B. *The American Reaction*

Had Professor Christian's theory prevailed in America, landowners could have excluded hunters from their land simply by claiming a property right in the animals themselves. But it was Blackstone's theory that prevailed in the new colonies, where geography made "free taking" the "logical policy."<sup>33</sup> Unlike in England, there was little danger that wildlife would be overharvested. In addition, game was arguably more necessary for early Americans than it was for their English counterparts because rural America, with its frontier, required more of a subsistence lifestyle. To the extent that wild animals impeded farming, which occupied a greater portion of land in the colonies than in England, it was more necessary to control the population of certain animals.<sup>34</sup> Thus, free taking—encompassing the idea that landowners did not own the game on their land, but not the idea that landowners were powerless to exclude trespassers—took hold.

To exclude hunters from their private land, landowners initially offered two arguments consistent with the theory of free taking. The first argument was that their right to wildlife was based not merely on their titles to land, but on royal grants of exclusive hunting rights.<sup>35</sup> Early American courts countered this argument by distinguishing sovereign rights from property rights, reasoning that sovereign rights "inhered indefeasibly in the powers of government."<sup>36</sup> The courts further characterized the conveyance of such rights over game to give landowners only the powers of a trustee, with the benefit of wildlife accruing to all citizens. Such powers were inalienable, so the authority over wildlife remained vested in the government.<sup>37</sup> The second

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33. *Id.* at 20.

34. *See id.* at 19 (stating that colonial policies controlling the hunting of wildlife sought to produce "a sustained yield of game" and "to serve agriculture by exterminating vermin").

35. *Id.* at 25; *see, e.g.*, First Grant to the Duke of York (1664), *reprinted in* 1 COLONIAL LAWS OF NEW YORK 1 (Albany, N.Y., James Lyon 1896) (providing an example of such a grant); *Arnold v. Mundy*, 6 N.J.L. 1, 4–8 (1821) (summarizing, then rejecting, plaintiff's argument that state regulation of hunting and fishing in a tidal area was improper in light of a royal grant of hunting rights to the plaintiff).

36. LUND, *supra* note 20, at 26.

37. *Id.*; *Mundy*, 6 N.J.L. at 71–73, 77 (explaining that the title to "common property [wild beasts]" is "still, though this title, strictly speaking . . . in the sovereign, yet the use is common to all the people"). This theory later became known as the "state ownership doctrine." *See Hughes v. Oklahoma*, 441 U.S. 322, 336–39 (1979) (reaffirming the states' power over wildlife on grounds other than the state ownership doctrine and noting that the state ownership doctrine had been "eroded to the point of virtual extinction"); *Geer v. Connecticut*, 161 U.S. 519, 527–28

argument, aimed at excluding nonlandowning hunters, was that landowners possessed status privileges similar to those exemplified by the English qualification laws.<sup>38</sup> This argument was easier to overcome: early American courts simply rejected the idea as being un-American.<sup>39</sup>

Notwithstanding the two developments described above, private landowners could still have excluded hunters simply by claiming that hunters were trespassers. Because the theory of free taking did not encompass the idea that hunters had the right to enter private land,<sup>40</sup> American lawmakers, to ensure that hunting was available to everyone, set about creating this new American right. It had its beginnings in seventeenth-century laws that allowed New Englanders to cross undeveloped private land<sup>41</sup> to fish or hunt fowl on public lakes.<sup>42</sup> Such laws, however, only ensured that hunters could enter undeveloped private land, not that hunters could actually take game on such land. Early American lawmakers then turned their attention to ensuring that hunters could do the latter.<sup>43</sup> Through the use of

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(1896) (giving a general description of the state ownership doctrine and the wide latitude of the states to regulate hunting). *But see* John D. Echeverria & Julie Lurman, “*Perfectly Astounding*” *Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L.J. 331, 365–68 (2003) (reconciling *Geer* with *Hughes*, and concluding that the state ownership doctrine is still alive and well).

38. *See* LUND, *supra* note 20, at 26 (“Had the English qualification tests been considered appropriate to American law, a hunting monopoly for the landed might have been established.” (footnote omitted)).

39. *Id.*; *see* Johnson v. Patterson, 14 Conn. 1, 5 (1840) (holding that such English privileges were inconsistent with the spirit of this country’s institutions); Hallock v. Dominy, 14 N.Y. Sup. Ct. 52, 55 (1876) (same). Despite this ideal, some American states did enact variations on the English qualification laws. *See* LUND, *supra* note 20, at 26 (mentioning Virginia and Pennsylvania laws that required a certain level of slave ownership or land ownership, respectively, for particular hunting rights).

40. *See supra* note 29 and accompanying text (explaining that Blackstone’s “free taking” theory did not always insulate hunters from the offense of trespassing).

41. In early America, the law preferred agriculture over hunting. LUND, *supra* note 20, at 24. As a result, “[d]eveloped lands were spared [the incursions of hunters].” *Id.* Thus, the right of hunters to cross private land to access public land was often limited to unenclosed or undeveloped private land. *See also infra* note 60 and accompanying text (explaining that nine of the current state posting statutes require posting only for undeveloped or unenclosed land). The posting statutes and this Note use the terms “undeveloped” and “unenclosed” interchangeably.

42. Book of the General Lawes and Libertyes (1660), *reprinted in* COLONIAL LAWS OF MASSACHUSETTS 170 (William H. Whitmore ed., Boston, Rockwell & Churchill 1889); LUND, *supra* note 20, at 24.

43. *See* LUND, *supra* note 20, at 25 (stating that early legislation “affirmed only the right to enter unenclosed private lands, not to hunt on them,” and that “[t]he next step would be to seek the right to take the game as well”).

constitutional conventions, court decisions, and legislation, such a right was born.

Strong advocates of hunting actually argued that the United States Constitution should protect the right of citizens to enter onto unenclosed land to hunt.<sup>44</sup> Although that effort was clearly unsuccessful, the citizens of two states—Pennsylvania and Vermont—ratified constitutions recognizing and protecting such a right.<sup>45</sup> Indeed, in Pennsylvania, an earlier document from 1696 recognized the right.<sup>46</sup> The Vermont constitutional provision still exists, providing: “The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations . . . .”<sup>47</sup> The Supreme Court of Vermont has recognized that Vermont’s constitutional provision changed the English law by “extend[ing] rights to citizens which the common law had not recognized” and by “recogniz[ing] rights to hunt and fish . . . in what had previously been the landowner’s private domain.”<sup>48</sup>

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44. *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PA. PACKET & DAILY ADVERTISER, Dec. 18, 1787, reprinted in 3 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 145, 151 (1981); LUND, *supra* note 20, at 25.

45. See PA. CONST. of 1776, § 43 (“The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed; and in like manner to fish in all boatable waters, and others not private property.”); VT. CONST. of 1777, § 39 (“That the inhabitants of this State, shall have liberty to hunt and fowl, in seasonable times, on the lands they hold, and on other lands (not enclosed:) [*sic*] and, in like manner, to fish in all boatable and other waters, not private property . . . .”). Pennsylvania ratified a new constitution in 1790 that did not include any such provision; Vermont’s provision still exists, located at Section 67 of the Vermont Constitution. Note that both Pennsylvania and Vermont are currently states in which landowners must post to exclude hunters from their land. See discussion *infra* notes 58, 62–63 and accompanying text.

46. See FRAME OF GOVERNMENT OF PENNSYLVANIA (1696), reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, OR COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3070, 3075 (Francis Newton Thorpe ed., 1909):

That the inhabitants of this province and territories thereof, shall have liberty to fish and hunt, upon the lands they hold, or all other lands therein, not inclosed, and to fish in all waters in the said lands . . . in and belonging to this province and territories thereof, with liberty to draw his, or their fish upon any man’s land, so as it be not to the detriment or annoyance of the owner thereof . . . .

47. VT. CONST. § 67; see *Cabot v. Thomas*, 514 A.2d 1034, 1037–38 (Vt. 1986) (describing and applying the constitutional provision); *New England Trout & Salmon Club v. Mather*, 35 A. 323, 328 (Vt. 1896) (Thompson, J., dissenting) (describing the history of the provision).

48. *Cabot*, 514 A.2d at 1037–38.

Even in states without constitutional provisions protecting the right to hunt on unenclosed land, early state courts recognized this right. In an early South Carolina case,<sup>49</sup> the court held that “[t]he hunting of wild animals in the forests, and unenclosed lands of this country, is as ancient as its settlement, [and] the right to do so coeval therewith; [and] the owner of the soil, while his lands are unenclosed, can not prohibit the exercise of it to others.”<sup>50</sup> Contrary to the law as it exists generally today,<sup>51</sup> this South Carolina court held not only that there was a presumption that unenclosed land was open to hunters but further that landowners could not even exclude hunters once they discovered their presence.<sup>52</sup> The Supreme Court of the United States, in *McKee v. Gratz*,<sup>53</sup> also recognized a presumption in American law that unenclosed land was open to hunters:

The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country.<sup>54</sup>

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49. *M’Conico v. Singleton*, 9 S.C.L. (2 Mill) 244, 244 (1818).

50. *Id.* Although “the decision was subsequently explained as either an imprecise treatment of trespass without injury, or as a judicial effort to steer clear of a ‘sea of petty litigation,’ the court did not shrink from the view that an owner had to enclose his property to exclude hunters.” LUND, *supra* note 20, at 25 (footnotes omitted).

51. See *infra* Part II.A (describing the posting statutes).

52. *M’Conico*, 9 S.C.L. at 246:

Having come to the conclusion, that it is the right of the inhabitants to hunt on unenclosed lands, I need not attempt to prove that the dissent or disapprobation of the owner cannot deprive him of it; for I am sure it never yet entered the mind of any man, that a right which the law gives, can be defeated at the mere will and caprice of an individual.

53. 260 U.S. 127 (1922).

54. *Id.* at 136. Justice Thurgood Marshall reaffirmed this view more than sixty years later in a portion of his dissent agreeing with the majority in *Oliver v. United States*, 466 U.S. 170 (1984):

Still other spaces are, by positive law and social convention, presumed accessible to members of the public *unless* the owner manifests his intention to exclude them.

Undeveloped land falls into the last-mentioned category. If a person has not marked the boundaries of his fields or woods in a way that informs passersby that they are not welcome, he cannot object if members of the public enter onto the property.

*Id.* at 193–94 (Marshall, J., dissenting). In *Oliver*, the Supreme Court reaffirmed the “open fields” doctrine of its Fourth Amendment jurisprudence, a doctrine whereby governmental investigation of certain undeveloped land is generally not considered a “search” for Fourth Amendment purposes. *Id.* at 184.

*McKee* is an instructive case because in it the Court recognized that American law had changed from the English common law. The Court held that, because of the differences between the two nations, a different presumption had taken hold in America—that unenclosed land was presumed open to hunters.

In addition to these constitutional and judicial approaches, a third method used to ensure hunters' access to private land was the enactment of posting statutes forcing landowners to post signs that hunting was not permitted.<sup>55</sup> These statutes fostered the presumption that private land was open to hunters and required affirmative acts on the part of landowners to exclude hunters. Such statutes are currently the primary source of hunters' right to hunt on private land in almost every state that recognizes such a right. The following Part examines these statutes in detail.

## II. THE CURRENT LAW OF HUNTING ON PRIVATE LAND IN AMERICA

### A. *The Posting Statutes*

The current state of American hunting law reflects the history of the right to hunt in this nation. Most states now have statutes requiring landowners to post their land to exclude hunters; the other states have statutes requiring hunters to get explicit permission from landowners before they hunt.<sup>56</sup> Even Vermont, which has a constitutional provision granting hunters the right to hunt on unenclosed private land, has a posting statute.<sup>57</sup>

As of this Note's publication, twenty-nine states require posting to exclude hunters. Twenty-four of these states require posting by statutes that pertain explicitly to hunting,<sup>58</sup> although there are many

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55. See LUND, *supra* note 20, at 70–72 (“In early American law, rules that required the landowner to post his property with notices prohibiting entry generally secured the goal of free access of takers to wilderness.”).

56. For a general discussion of state laws as of 1993, including state-by-state wildlife law summaries, see MUSGRAVE & STEIN, *supra* note 19.

57. VT. STAT. ANN. tit. 10, § 5201 (1997); see *Cabot v. Thomas*, 514 A.2d 1034, 1036–38 (Vt. 1986) (recognizing the coexistence of the constitutional provision and the statute and implicitly finding no contradiction); see also *supra* note 47 and accompanying text.

58. ALASKA STAT. § 11.46.350 (Michie 2002); ARIZ. REV. STAT. ANN. § 17-304 (West Supp. 2004); ARK. CODE ANN. § 18-11-403 (Michie 2003); CAL. FISH & GAME CODE § 2016 (West 1998); FLA. STAT. ANN. § 810.09 (West Supp. 2004); IDAHO CODE § 36-1602 (Michie 2002); KAN. STAT. ANN. § 32-1013 (2000); MASS. ANN. LAWS ch. 131, § 36 (Law. Co-op. 2001);

variations among the statutes.<sup>59</sup> Of these twenty-four states, nine require posting only for unenclosed/uncultivated land;<sup>60</sup> the theory in these states is that enclosed/cultivated land is already “posted” and that agriculture should be spared the depredations of hunters.<sup>61</sup> Three states, while lacking statutes specifically requiring that landowners post to exclude hunters, have general trespass statutes requiring that landowners post to exclude people from private land for any reason,<sup>62</sup> including to exclude hunters.<sup>63</sup> Thus, twenty-seven of the twenty-nine

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MICH. COMP. LAWS ANN. § 324.73102 (West 1999); MINN. STAT. ANN. § 97B.001 (West Supp. 2004); MISS. CODE ANN. § 49-7-79 (2003); NEV. REV. STAT. ANN. 503.240 (Michie 1995); N.H. REV. STAT. ANN. § 635:4 (1996); N.J. STAT. ANN. § 23:7-1 (West 1997); N.M. STAT. ANN. § 17-4-6 (Michie 1995); N.Y. ENVTL. CONSERV. LAW § 11-2113 (McKinney 1997); N.C. GEN. STAT. § 14-159.6 (2003); N.D. CENT. CODE § 20.1-01-18 (2002); OKLA. STAT. ANN. tit. 29, § 5-202 (West Supp. 2005); OR. REV. STAT. § 498.120 (2003); R.I. GEN. LAWS § 11-44-4 (2002); UTAH CODE ANN. § 23-20-14 (2003); VT. STAT. ANN. tit. 10, § 5201 (1997); W. VA. CODE ANN. § 20-2-7 (Michie 2002). Alaska’s posting statute, ALASKA STAT. § 11.46.350, although general in nature, specifically permits landowners to post “no hunting” signs, so this Note includes it among the twenty-four states with posting statutes specific to hunting. The same is true for New Hampshire’s statute, N.H. REV. STAT. ANN. § 635:4. Under Oklahoma’s posting statute, posting is not required for land “occupied” by the resident. OKLA. STAT. ANN. tit. 29, § 5-202. Oregon’s statute seemingly goes further and does not even mention posting as a means to delineate a landowner’s property—it requires, for example, a wire or hedge. OR. REV. STAT. § 498.120. Notwithstanding this language, however, it is almost certain that posting would count as such a means. *See O’Brien v. Eugene Chem. Exps., Inc.*, 664 P.2d 1106, 288–90 (Or. App. 1983) (holding that posting is a means to mark one’s property boundaries). This Note does not address the laws of the District of Columbia because the District is quite small and presumably has little land available for hunting.

59. *See infra* notes 68–87 and accompanying text.

60. *See supra* note 58 (citing the statutes of Alaska, California, Florida, Idaho, Michigan, Minnesota, North Dakota, Oregon, and Utah). North Dakota does not require posting for land on which cereal crops are grown. N.D. CENT. CODE § 20.1-01-22.

61. *See supra* note 41 (discussing the favored status of agriculture).

62. Pennsylvania’s statute, 18 PA. CONS. STAT. ANN. § 3503 (West 2000), is based on the Model Penal Code’s trespass provision, which does not specifically mention hunting but requires posting (or fencing or enclosing) to exclude all trespassers from land (posting is not required for buildings and occupied structures). *See also infra* notes 88–89 and accompanying text (discussing the Model Penal Code). Washington’s statute, WASH. REV. CODE ANN. § 9A.52.010 (West 2000), also requires posting to exclude all trespassers unless the land is fenced or otherwise enclosed “in a manner designed to exclude intruders . . .” Wisconsin’s statute, WIS. STAT. ANN. § 943.13 (West Supp. 2004), requires posting (or oral or written notice) to exclude all trespassers.

63. Pennsylvania courts generally hold that posting is required to exclude hunters. *See, e.g., Commonwealth v. Sweeley*, 29 Pa. D. & C.4th 426, 433 (C.P. 1995) (“Open lands that are not posted or fenced off are presumed open for recreational use by the public, especially in rural counties where hunting and outdoor activities are common.”). A Washington statute describing unlawful posting specifically mentions “signs preventing hunting,” WASH. REV. CODE ANN. § 77.15.220 (West 2001), and the Supreme Court of Washington has assumed that posting is required to exclude hunters, *Hickle v. Whitney Farms, Inc.*, 64 P.3d 1244, 1245 (Wash. 2003).

states that require posting do so by statute. Although the other states that require posting, Maine and Louisiana, lack statutes that apply to posting, in both states courts nevertheless presume that unposted land is open to hunters.<sup>64</sup> The remaining twenty-one states, which do not require posting, all have statutes requiring hunters to obtain landowner permission before hunting on private land.<sup>65</sup> Three of these states require that permission be written.<sup>66</sup> All twenty-one of these states require permission for entry onto any kind of private land, enclosed or unenclosed, developed or undeveloped.

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Likewise, the Supreme Court of Wisconsin has assumed that posting is required to exclude hunters. *Verdoljak v. Mosinee Paper Corp.*, 547 N.W.2d 602, 604 (Wis. 1996).

64. See *Lyons v. Baptist Sch. of Christian Training*, 804 A.2d 364, 372 (Me. 2002) (“The presumption that public recreational uses of open, unposted land are permissive applies equally to . . . hunters and snowmobilers crossing a cultivated field after the harvest . . .”). Additionally, Maine does have a specific posting statute for its saltwater islands. ME. REV. STAT. ANN. tit. 14, §§ 7556–7557 (West 2003). Until very recently Louisiana had an explicit statute that required posting for all land, but it was repealed by 2003 LA. ACTS 802 in an effort to simplify the state’s trespass laws. The new, general trespass statute is LA. REV. STAT. ANN. § 14:63 (West 2004), which allows landowner permission to be “implied.” It is highly likely that the statutory change was meant not to alter the posting requirement that existed previously.

65. ALA. CODE § 9-11-241 (2001); COLO. REV. STAT. § 33-6-116 (2003); CONN. GEN. STAT. ANN. § 53a-109 (West 2001); DEL. CODE ANN. tit. 7, § 714 (2001); GA. CODE ANN. § 27-3-1 (2003); HAW. REV. STAT. § 183D-26 (2001); 520 ILL. COMP. STAT. ANN. 5/2.33(t) (West 2004); IND. CODE ANN. § 14-22-10-1 (Michie 2003); IOWA CODE ANN. § 716.7(2)(a) (West 2003); KY. REV. STAT. ANN. § 150.092 (Banks-Baldwin 2002); MD. CODE ANN., NAT. RES. II § 10-411 (Supp. 2004); MO. ANN. STAT. § 569.150 (West 1999); MONT. CODE ANN. § 87-3-304 (2003); NEB. REV. STAT. § 37-722 (2000); OHIO REV. CODE ANN. § 1533.17 (West Supp. 2004); S.C. CODE ANN. § 16-11-610 (Law. Co-op. 2003); S.D. CODIFIED LAWS § 41-9-1 (Michie 2002); TENN. CODE ANN. § 70-4-106 (1995); TEX. PARKS & WILD. CODE ANN. § 61.022 (Vernon 2002); VA. CODE ANN. § 18.2-132 (Michie 2004); WYO. STAT. ANN. § 23-3-305 (Michie 2003). Connecticut requires posting to exclude nonhunting trespassers, CONN. GEN. STAT. ANN. § 53a-109, but posting is not required to exclude hunters, *id.* § 26-65. In Georgia, the default rule is that hunters must get permission from landowners, and landowners can also post their land so that hunters must obtain and carry written permission to hunt. GA. CODE ANN. § 27-3-1. Tennessee has a similar statute, requiring permission but also giving landowners the option of posting “hunting by written permission only” signs. TENN. CODE ANN. § 70-4-106. Missouri has a “classic” strict liability general trespass statute, MO. ANN. STAT. § 569.150, but the comment to the 1973 proposed code mentions hunting specifically: “[The statute] is directed at persons who do not bother to determine whether they are hunting . . . on the property of another.” A hunter who enters onto unposted land without permission is guilty of second-degree trespass, an infraction. If, however, the land is posted, the hunter is guilty of first-degree trespass, a misdemeanor. *Id.* § 569.140.

66. See *supra* note 65 (citing the statutes of Alabama, Maryland, and Ohio).

The twenty-seven<sup>67</sup> posting statutes have several characteristics and variations worth mentioning. Of primary interest is the great specificity with which most statutes define legally sufficient posting. Most states set an exact number of signs that must be posted, their size, what they must say, and even their height off of the ground and their color. A typical requirement for posting is Arizona's statute, which requires that "notices or signboards" be "not less than eight [inches] by eleven inches with plainly legible wording in capital and bold-faced lettering at least one inch high," and that such notices

[b]e conspicuously placed on a structure or post at least four feet above ground at all points of vehicular access, at all property or fence corners and at intervals of not more than one-quarter mile along the property boundary, except that a post with one hundred square inches or more of orange paint may serve as the interval notices between property or fence corners and points of vehicular access. The orange paint shall be clearly visible and shall cover the entire aboveground surface of the post facing outward and on both lateral sides from the closed area.<sup>68</sup>

New Mexico has an odd requirement that makes excluding hunters even more difficult: not only must signs be posted in Spanish as well as English, but notice must be published "for three consecutive weeks in a newspaper of general circulation in the county where the premises are situated."<sup>69</sup> The posting requirements, then, are not easy for landowners to fulfill but are specific and exacting.

Although all of the posting statutes allow landowners to prohibit hunting, many of them also allow landowners to prohibit other

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67. Although the ensuing discussion is phrased in terms of the posting "statutes," the nonstatutory posting requirements of Maine and Louisiana are similar to requirements of the twenty-seven statutes. Thus, this Note's discussion of the statutes also applies to these two states.

68. ARIZ. REV. STAT. ANN. § 17-304 (West Supp. 2004). As exemplified by the Arizona statute, many of the posting statutes are concerned particularly with posts where roads enter a parcel of land. *See, e.g.*, N.M. STAT. ANN. § 17-4-6 (Michie 1995) ("In the event a public road enters or crosses the enclosure or pasture, an additional notice shall be posted conspicuously within three hundred yards of the point where each public road enters the posted property."). Some states require that the landowner's address be on the sign. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 11-2111(2) (McKinney 1997) ("Signs shall bear the name and address of the owner, lawful occupant, or other person or organization authorized to post the protected area."). California, although specifying the number of signs that must be posted (three to a mile along all boundaries), is less stringent regarding what the signs must look like. *See* CAL. FISH & GAME CODE § 2016 (West 1998) ("Such signs may be of any size and wording . . .").

69. N.M. STAT. ANN. § 17-4-6.

activities. Some of the statutes permit landowners to post “no trespassing” signs instead of “no hunting” signs, meaning that landowners may prohibit trespass for any reason.<sup>70</sup> Other statutes allow landowners to post prohibitions on other specific activities, such as “no digging.”<sup>71</sup> Michigan’s statute defines the act of posting as prohibiting all “recreational activity,” which includes hunting and apparently other outdoor activities as well.<sup>72</sup> Minnesota’s statute similarly defines the act of posting as prohibiting “[o]utdoor recreation,” which it defines as “any voluntary activity, including hunting, fishing, trapping, boating, hiking, camping, and engaging in winter sports, which is conducted primarily for the purposes of pleasure, rest, or relaxation and is dependent upon or derives its principal benefit from natural surroundings.”<sup>73</sup> Conversely, some state courts have construed their posting statutes such that “no hunting” signs prohibit only hunting and not other activities.<sup>74</sup>

Although most posting statutes apply to trapping as well as hunting, some differentiate trapping and subject it to harsher rules; presumably this is because trapping can be especially dangerous for landowners, who do not know the presence and location of traps, and because the act of placing and leaving traps on land is somewhat more invasive than a hunter’s temporary presence on land. Mississippi<sup>75</sup> and North Dakota,<sup>76</sup> for instance, although requiring posting to exclude hunters, mandate that trappers get explicit permission from landowners, notwithstanding the absence of postings.

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70. *E.g.*, N.H. REV. STAT. ANN. § 635:4 (1996).

71. *E.g.*, ALASKA STAT. § 11.46.350(b)(6) (Michie 2002). Some of the twenty-one state statutes that require explicit permission to hunt also require explicit permission for other activities. *See, e.g.*, S.C. CODE ANN. § 16-11-610 (Law. Co-op. 2003) (requiring explicit landowner permission for entry onto land to gather fruit, flowers, shrubbery, etc., or to cut timber).

72. MICH. COMP. LAWS ANN. § 324.73102 (West 1999).

73. MINN. STAT. ANN. § 97B.001(1a) (West Supp. 2004).

74. *E.g.*, *State v. Dixon*, 766 P.2d 1015, 1024 (Or. 1988) (“In the present case, the defendants . . . had blocked access to their property with cables and posted ‘No Hunting’ signs. However, on this record there was no objective reason for the [“trespassers”] to believe that, in addition to the restriction on hunting, other uses such as hiking were forbidden.”).

75. MISS. CODE ANN. § 49-7-13 (2003). This is a separate statute from Mississippi’s general posting statute, *supra* note 58.

76. N.D. CENT. CODE § 20.1-01-18 (2002). This statute requires that permission be written. *Id.* A special concern for the dangers of trapping is also manifest in the statutes of the twenty-one “nonposting” states, which require landowner permission prior to hunting: Montana, for instance, requires that permission to trap be written, whereas permission to hunt need not be written. MONT. CODE ANN. § 87-2-604 (2003).

Generally, the posting statutes do not preclude landowners' right to exclude personally hunters whom they happen to encounter on their land. That is, even on unposted land in states with posting statutes, if landowners see hunters and tell them to leave, the hunters must leave.<sup>77</sup> On the other hand, the posting statutes generally allow landowners to give specific hunters permission to hunt while still excluding the general population of hunters with postings.<sup>78</sup> The statutes do not address situations in which, for whatever reason, hunters see no postings at a given point in time but nevertheless know that landowners do not want hunting on their land.

The majority of the posting statutes are criminal statutes that penalize trespassers who hunt on posted land, although a few are unclear about whether they provide a criminal penalty or create a civil remedy.<sup>79</sup> At least one seems to do the latter.<sup>80</sup> Virginia has an odd criminal statute: it provides that, although a hunter must get explicit permission to hunt on private land (and thus, for analytical purposes, this Note classified it above as one of the twenty-one "nonposting" state statutes), a hunter who trespasses on unposted land is guilty of a Class 1 misdemeanor whereas a hunter who trespasses on posted land is guilty of a more serious Class 3

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77. *See, e.g.*, ALASKA STAT. § 11.46.350(b) (Michie 2002) (stating that landowners can give notice against trespass directly or by posting); MISS. CODE ANN. § 49-7-79 (2003) (same). However, the posting statute of at least one state, Arizona, seems to indicate the contrary: "The entry of any person for the taking of wildlife shall not be grounds for an action for trespassing unless the land has been posted pursuant to this section." ARIZ. REV. STAT. ANN. § 17-304(D) (West Supp. 2004). The statutes of a few states are unclear in that they do not explicitly state that a landowner can or cannot personally exclude a hunter. *See, e.g.*, MASS. ANN. LAWS ch. 131, § 36 (Law. Co-op. 2001) (stating that a person cannot hunt on private land without permission if the land is posted, but not stating whether a landowner can give personal notice against trespass).

78. *See, e.g.*, ARIZ. REV. STAT. ANN. § 17-304 (requiring hunters to get written permission if land is posted); CAL. FISH & GAME CODE § 2016 (West 1998) (same); IDAHO CODE § 36-1602 (Michie 2002) (requiring hunters to get permission if land is posted); MASS. ANN. LAWS ch. 131, § 36 (same).

79. *See e.g.*, KAN. STAT. ANN. § 32-1013 (2000) (stating that the act of hunting on posted land is "unlawful"). Some of the statutes are unclear because they are not in distinctly criminal or civil codes but rather in fish and wildlife codes. *See, e.g.*, CAL. FISH & GAME CODE § 2016 (imposing the same requirement as the Kansas statute, but in a provision originally derived from the California penal code). New Jersey's statute is unclear because it provides for "a civil penalty of not less than \$100.00 nor more than \$200.00 for the first offense" but does not indicate whether it is the state or private citizens who may bring suit under the provision. N.J. STAT. ANN. § 23:7-1 (West 1997).

80. *See* ARIZ. REV. STAT. ANN. § 17-304(D) ("The entry of any person for the taking of wildlife shall not be grounds for an action for trespassing unless the land has been posted pursuant to this section.").

misdemeanor.<sup>81</sup> In addition to providing a criminal penalty or creating a civil remedy, many posting statutes penalize trespassing hunters by revoking their hunting licenses.<sup>82</sup> Finally, a few of the criminal posting statutes require that landowners themselves complain before the state will commence prosecution.<sup>83</sup>

Some of the posting statutes also have exceptions for hunters who pursue wounded animals onto posted land. Kansas, for instance, allows the pursuit of wounded game onto posted land, unless and until landowners instruct hunters to leave.<sup>84</sup> Even some of the nonposting state statutes that require explicit permission from the landowner provide for such an exception.<sup>85</sup> Similarly, a few posting statutes have exceptions for hunters who retrieve hunting dogs from posted land.<sup>86</sup>

Finally, some of the posting statutes have stricter requirements for hunters in close proximity to buildings, animals, or other sensitive areas; in most cases, hunting in such areas requires affirmative landowner permission. Minnesota, for instance, although mandating posting to exclude hunters from undeveloped land, requires hunters to obtain written permission to hunt with a firearm within five hundred feet of any building occupied by a human or animal, including corrals or stockades.<sup>87</sup>

### *B. Other Authorities and State Laws*

Various secondary sources provide general insight about whether and when landowners must post to exclude hunters. The Model Penal Code's criminal trespass provision, on which Pennsylvania's trespass statute is based,<sup>88</sup> requires landowners to post nonfenced land

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81. VA. CODE ANN. § 18.2-132 (Michie 2004).

82. *E.g.*, N.J. STAT. ANN. § 23:7-1; UTAH CODE ANN. § 23-20-14(3) (2003).

83. *E.g.*, OKLA. STAT. ANN. tit. 29, § 5-202 (West Supp. 2005); OR. REV. STAT. § 498.120 (2003); *see, e.g.*, N.C. GEN. STAT. § 14-159.6 (2003) (applying only in two counties).

84. KAN. STAT. ANN. § 32-1013(c); *see also* MINN. STAT. ANN. § 97B.001 (West Supp. 2004) (requiring hunters to leave immediately after retrieving wounded animals); N.D. CENT. CODE § 20.1-01-19 (2002) (creating an absolute right for a hunter to enter posted land to retrieve game "shot or killed on land where the person had a lawful right to hunt").

85. *See, e.g.*, IOWA CODE ANN. § 716.7(2)(a) (West 2003) (requiring, however, that the hunters be unarmed).

86. *See, e.g.*, MICH. COMP. LAWS ANN. § 324.73102 (West 1999) (stating that hunters cannot possess firearms when retrieving dogs); MINN. STAT. ANN. § 97B.001 (stating that hunters must leave immediately after retrieving dogs).

87. MINN. STAT. ANN. § 97B.001(7).

88. *See supra* note 62.

(excluding buildings and occupied structures) to exclude any would-be trespassers, including hunters.<sup>89</sup> The *Restatement (Second) of Torts* states that,

[I]f . . . it is the custom in wooded or rural areas to permit the public to go hunting on private land . . . , anyone who goes hunting . . . may reasonably assume, in the absence of posted notice or other manifestation to the contrary, that there is the customary consent to his entry upon private land to hunt or fish.”<sup>90</sup>

*Corpus Juris Secundum* notes that landowners generally have the sole right to game on their land,<sup>91</sup> but it also recognizes that many states have criminal posting statutes<sup>92</sup> and that custom sometimes allows hunters to enter unenclosed land.<sup>93</sup> *American Jurisprudence*, on the other hand, states that a hunter in “pursuit” of game “may” be deemed a trespasser regardless of posting but notes that states can require landowners to post “no trespassing” signs for hunters “retrieving wounded game.”<sup>94</sup> Thus, these secondary sources seem split about whether posting is required to exclude hunters.

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89. MODEL PENAL CODE AND COMMENTARIES § 221.2 (Official Draft and Revised Comments 1985). Comment 1 states that:

one or more of the following factors had to be shown in order to prove the offense: notice . . . whether by personal communication or posting of signs; intention . . . to hunt or shoot; entry by force . . . ; the fact that the land was of particular ownership or use . . . ; the fact that the trespass was in a building or structure rather than on open land.

*Id.* § 221.2 cmt. 1 (footnotes omitted). Despite the “one or more” language of the comment, the text of the rule does not reflect the view that the intention to hunt or shoot is sufficient to state a claim for trespass. In addition, the three states whose laws the comment cites to support the “intention . . . to hunt or shoot” factor all require a landowner to post to exclude hunters. *Id.* § 221.2 cmt. 1 n.2.

90. RESTATEMENT (SECOND) OF TORTS § 892 cmt. d (1979). Various other *Restatement* provisions also address posting. For example, a failure to post is not considered landowner consent in the context of landowner liability to trespassers who habitually and notoriously disregard such posts. *Id.* § 330 cmt. c.

91. 38 C.J.S. *Game* § 5 (2003).

92. *Id.* § 59.

93. *See id.* § 52 (“A license to hunt does not confer any right on the holder to go upon lands owned by another, or to enter the enclosure of another, without his permission. In the case of unenclosed land, however, the right has sometimes been conferred by immemorial usage or by constitutional provision.” (footnotes omitted)).

94. 35A AM. JUR. 2D *Fish, Game, and Wildlife Conservation* § 22 (2001). “Pursuit” is not specifically defined; however, if hunters can be deemed trespassers merely for chasing game, surely they can be deemed trespassers for entering private land to hunt when not in the midst of a chase.

Many states also have other, ancillary statutes relating to this issue. Because most states have a stated policy of encouraging hunting,<sup>95</sup> and thus encouraging private landowners to allow hunting on their land, some states have provided incentives for landowners not to post their land (and in states where posting is not required, for landowners to give permission to hunters).<sup>96</sup> The incentives generally take two forms: protecting landowners from damage done by hunters and from liability for injuries suffered by hunters, and directly rewarding landowners for allowing hunting on their land.<sup>97</sup>

To protect landowners from damage caused by hunters, some states provide for the revocation of hunting licenses if hunters damage property.<sup>98</sup> Some statutes state that a hunter is liable to landowners for any damage done to their land.<sup>99</sup> Other statutes simply state, without specifying a penalty, that hunters shall not do any damage to land.<sup>100</sup> Still other states have general laws prohibiting certain common trespass offenses that hunters commonly commit, such as leaving a gate open.<sup>101</sup> A few states have especially stringent punishments for hunters who accidentally kill livestock;<sup>102</sup> New Hampshire actually requires the state to pay for livestock accidentally killed during deer hunting season.<sup>103</sup> Finally, although state law regarding landowners' liability for injuries to people on their land is a separate, complex area of law that is generally protective of

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95. See Patrick J. Cottriel, Comment, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235, 1258-60 (1996) (describing the many state and federal statutes prohibiting harassment of hunters and the states' interest in preserving the right to hunt).

96. LUND, *supra* note 20, at 71.

97. *Id.*

98. *E.g.*, ARIZ. REV. STAT. ANN. § 17-340 (West Supp. 2004); NEV. REV. STAT. ANN. 503.185 (Michie Supp. 2003).

99. IDAHO CODE § 36-1602 (Michie 2002); MASS. ANN. LAWS ch. 131, § 61 (Law. Co-op. 2001).

100. *E.g.*, KY. REV. STAT. ANN. § 150.092 (Banks-Baldwin 2002). This statute is from a nonposting state, but it is instructive nonetheless.

101. *See, e.g.*, MONT. CODE ANN. § 45-6-101 (2002) (defining the failure to close a previously unopened gate as criminal mischief, a misdemeanor). This is a statute from a nonposting state, but it is instructive nonetheless.

102. *See, e.g.*, IDAHO CODE § 36-1602 (making such an act a misdemeanor).

103. N.H. REV. STAT. ANN. § 425:10 (2002).

landowners who do not invite people onto their land,<sup>104</sup> some states have created special statutes limiting landowner liability to hunters.<sup>105</sup>

States also directly reward landowners for not posting their land. Some states provide owners of unposted land with wildlife for stocking,<sup>106</sup> and others provide such landowners with labor, materials, and even plants for improving their land.<sup>107</sup> Some states give aid in the form of payments to owners of unposted land for damage done by game animals.<sup>108</sup> Wyoming provides a more direct form of incentive, requiring hunters who kill deer, antelope, or elk on private land to give landowners a coupon redeemable for thirteen dollars.<sup>109</sup> California simply pays private landowners to open their land for hunting.<sup>110</sup> Even the United States Congress has considered such an incentive: some Senators have proposed a bill that would provide modest, per-acre payments from a \$50 million federal fund to landowners who voluntarily open their land to hunting.<sup>111</sup>

Finally, it bears repetition that state laws dealing with posting, hunting, and related issues are varied and complex. As a result, each state's mix of laws is unique. Nonetheless, the overarching

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104. See RESTATEMENT (SECOND) OF TORTS §§ 333–339 (1979) (stating that landowners are generally not liable to uninvited guests on their land).

105. See, e.g., N.H. REV. STAT. ANN. § 212:34 (Supp. 2003) (stating that a landowner owes “no duty of care to keep such premises safe for entry or use by others for hunting, fishing, trapping,” or other recreational uses).

106. E.g., N.J. STAT. ANN. § 23:2-3 (West 1997).

107. E.g., N.Y. ENVTL. CONSERV. LAW §§ 11-0305(1), 11-0501(10)(a)–(c) (McKinney Supp. 2004).

108. E.g., IDAHO CODE § 36-1108 (Michie Supp. 2004); WIS. STAT. ANN. § 29.889 (West 2004); see, e.g., N.H. REV. STAT. ANN. § 207:22-a (2001) (allowing landowners to participate in the wildlife damage control program only if their land is unposted or if their land is posted “Hunting by Permission Only” and permission is reasonably granted).

109. WYO. STAT. ANN. § 23-3-105 (Michie 2003). Wyoming is a nonposting state; thus, the incentive is actually directed at convincing landowners to give explicit permission to hunters. The statute is instructive nonetheless.

110. CAL. FISH & GAME CODE § 1573 (West 1998); see also Sportsman's Guide to Access Yes, at <http://fishandgame.idaho.gov/hunt/access/2004accessyes.asp> (describing Idaho's “Access Yes!” program, which pays landowners to open their land to hunting) (last visited Nov. 4, 2004) (on file with the *Duke Law Journal*).

111. Voluntary Public Access and Wildlife Habitat Incentive Program Act of 2003, S. 1840, 108th Cong. § 3 (2003); see also Voluntary Public Access and Wildlife Habitat Incentive Program Act of 2003, H.R. 3482, 108th Cong. (2003) (providing the House's version of this legislation); Press Release, Senator Kent Conrad, “Open Fields Incentives” Legislation Offered by Conrad (Oct. 9, 2003) (summarizing the legislation), available at <http://conrad.senate.gov/~conrad/releases/03/10/2003A12901.html>.

presumption that landowners who do not post their land have opened their property to hunters clearly exists in more than half of the states.

### III. A CRITIQUE OF THE POSTING STATUTES

#### A. *Legal Arguments Against the Statutes*

The posting statutes create an obvious problem: they pit the rights of one group, hunters, against the rights of another group, landowners. The rights of both groups are powerful. For hunters, the right to hunt and trap on all land has its source in the early national egalitarian desire to allow everyone to hunt.<sup>112</sup> But landowners' right to exclude is a pillar of the common law; as the Supreme Court has stated, this right is "one of the most essential sticks in the bundle of rights that are commonly characterized as property . . ." <sup>113</sup> Landowners wishing to argue that posting statutes unduly infringe upon their property rights have two legal arguments: (1) that the common law right to exclude is paramount, and that the posting statutes do not interfere with that right or its civil enforcement; and (2) that, if the posting statutes do interfere, they have created an unconstitutional taking of property without just compensation.<sup>114</sup> Both of these arguments, however, are weak.

Landowners could argue that there is no inconsistency between the common law and the posting statutes because the statutes simply impose a criminal penalty against people trespassing on posted land; they do not abrogate landowners' civil remedy for trespass on unposted land, at least in the majority of states where the posting statutes are criminal.<sup>115</sup> As Rod Froelich argued in North Dakota state court, the common law protects landowners against intrusion by providing both criminal penalties against trespassers and civil causes of action for landowners.<sup>116</sup> The United States Supreme Court has stated that "the law of *civil* trespass . . . has always been recognized[] by the common law in general . . . as a field quite distinct and separate

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112. See *supra* Part I.B.

113. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

114. See U.S. CONST. amend. V (stating that "private property [shall not] be taken for public use, without just compensation"). Various states also have constitutional provisions mirroring the Fifth Amendment. *E.g.*, ILL. CONST. art. I, § 15.

115. See *supra* notes 79–83 and accompanying text.

116. Froelich Brief, *supra* note 6, at 1–3.

from criminal trespass,”<sup>117</sup> and that civil and criminal sanctions for injuries to property rights often coexist:

Petitioners make much of the fact that the 1793 Act contained criminal penalties in arguing that the Act pre-empted common-law actions. In property law, however, it is common to have criminal and civil sanctions available for infringement of property rights, and for government officials to use the police power to remove trespassers from privately owned land.<sup>118</sup>

This argument is buttressed further by the fact that criminal trespass provisions, such as the one in the Model Penal Code, have traditionally required that trespassers knowingly trespass,<sup>119</sup> and posting statutes are aimed at ensuring that hunters know when they are trespassing. Finally, it can be said that “[c]riminal trespass statutes do not afford a substitute for adequate civil remedies for trespass.”<sup>120</sup>

This argument, however, suffers from two problems. First, the common law is not entirely clear about the specific issue of whether landowners possess a civil remedy against hunters who enter unposted land to hunt. Admittedly, the position of Blackstone,<sup>121</sup> and of the Supreme Court in cases such as *Kaiser Aetna v. United States*,<sup>122</sup> is that a civil remedy does exist when it comes to trespass *in general*. By contrast, however, sources such as the *Restatement (Second) of Torts*<sup>123</sup> and *Corpus Juris Secundum*<sup>124</sup> indicate that under common law hunters had the right to enter unposted land without explicit landowner permission—thus precluding a civil remedy. The Supreme

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117. *Bouie v. City of Columbia*, 378 U.S. 347, 357 (1964); see Froelich Brief, *supra* note 6, at 10 (citing *Bouie* and noting the distinction between civil and criminal trespass).

118. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 239 (1985); see Froelich Brief, *supra* note 6, at 10 (citing *Oneida County* and noting that “[t]he posting statute simply adds a layer of criminal sanctions . . . without abrogating . . . preexisting civil sanctions”).

119. MODEL PENAL CODE AND COMMENTARIES § 221.2 (Official Draft and Revised Comments 1985); see also 75 AM. JUR. 2D *Trespass* § 177 (2003) (“Many criminal trespass statutes require that notice or warning be given to a person that his presence on the premises is prohibited, since many criminal statutes require that the trespass be knowingly committed.” (footnotes omitted)).

120. 75 AM. JUR. 2D *Trespass* § 166; see Froelich Brief, *supra* note 6, at 12–13 (citing *American Jurisprudence 2d* and arguing that criminal statutes are inadequate because landowners cannot compel prosecutions for trespass).

121. See *supra* note 29 and accompanying text.

122. 444 U.S. 164, 176 (1979).

123. RESTATEMENT (SECOND) OF TORTS § 892 cmt. d (1979); *supra* note 90 and accompanying text.

124. 38 C.J.S. *Game* § 5, 52, 59 (2003); *supra* notes 91–93 and accompanying text.

Court in *McKee v. Gratz*<sup>125</sup> and *Oliver v. United States*,<sup>126</sup> purporting to describe the common law of the United States in general,<sup>127</sup> apparently took this latter view. The question may well be one of what exactly *is* the common law: did the common law that existed in England at the time of the American Revolution survive in this nation, or did American common law take a different path? Because of this ambiguity, whether the common law provides a civil remedy for trespass on unposted land is, at the very least, unclear.

Still more problematic is that, even if American common law provides a civil remedy for trespass on unposted land, it seems clear that state posting statutes aim to abrogate this remedy. As an initial matter, legislatures certainly have the right to alter the common law by statute.<sup>128</sup> The general rule is that courts should construe statutes to avoid any potential constitutional problem;<sup>129</sup> however, when a statute and its legislative history are clear, a court is unlikely to construe a statute awkwardly simply to avoid such a problem.<sup>130</sup> In the posting context, although a construction of the posting statutes abrogating any civil remedy might appear to cause a takings problem,<sup>131</sup> any construction that would allow a civil trespass remedy seems tortured and would conflict with the history of the posting statutes. Although the text of the statutes standing alone may be unclear about whether a common law civil remedy survives the statutes' enactment, the history of the statutes is not: they were enacted to ensure that all citizens had the right to hunt, even on the land of others, so long as the land was unposted.<sup>132</sup> In the *Froelich* case, for example, when Froelich argued that the statutes were not designed to abrogate the common law right of civil redress,<sup>133</sup> the defendants flatly stated that

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125. 260 U.S. 127, 136 (1922); *see supra* note 53 and accompanying text.

126. 466 U.S. 170, 193–94 (1986) (Marshall, J., dissenting); *see supra* note 54 and accompanying text. Although this proposition was clearest in Justice Marshall's dissent in this case, this portion of the dissent agreed with the Court majority.

127. Although the Court does not have the final word on the content of the common law of any individual state, it is telling that the Supreme Court considers American common law to allow hunting on unposted land.

128. 15A AM. JUR. 2D *Common Law* § 15 (2004).

129. *E.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

130. *See, e.g.*, *U.S. v. Locke*, 471 U.S. 84, 96 (1985) (“We cannot press statutory construction ‘to the point of disingenuous evasion’ even to avoid a constitutional question.” (citations omitted)).

131. *See infra* notes 137–53 and accompanying text.

132. *See supra* Part II.B.

133. *Froelich* Brief, *supra* note 6, at 13.

“[t]he law of trespass and [the] ‘posting’ requirements are plainly set out”<sup>134</sup> to allow hunters to enter unposted, private land, and that “[t]he assumption that unposted land is open for hunting has been the case for decades, if not since statehood.”<sup>135</sup> Owners of unposted land could sue hunters if courts were willing to construe posting statutes to provide only criminal sanctions for trespass on posted land. But this is unlikely because such a statutory construction would directly conflict with the posting statutes’ legislative history and with most states’ strongly professed policy of promoting hunting.<sup>136</sup>

Construing the posting statutes as they must be construed, however, creates at least one<sup>137</sup> possible constitutional problem: takings. This is the second possible argument for a landowner wishing to challenge the statutes. The Takings Clause of the U.S. Constitution<sup>138</sup> and many similar clauses of state

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134. North Dakota Brief, *supra* note 8, at 5.

135. Wetzel, *supra* note 2.

136. See, for example, the pro-hunting stance of most state wildlife agencies, Eric Biber, *Exploring Regulatory Options for Controlling the Introduction of Non-Indigenous Species to the United States*, 18 VA. ENVTL. L.J. 375, 406 n.184 (1999), state constitutional provisions safeguarding the right to hunt, N.D. CONST. art. XI, § 27; WIS. CONST. art. I, § 26, and recent statutes that prohibit hunter harassment, Jeffrey S. Thiede, Comment, *Aiming for Constitutionality in the First Amendment Forest: An Analysis of Hunter Harassment Statutes*, 48 EMORY L.J. 1023, 1023–26 (1999).

137. Another possible constitutional argument is that substantive due process may require a form of intermediate scrutiny when the government abolishes certain “core” common law rights. See Froelich Brief, *supra* note 6, at 14–15 (making this argument). As Justice Marshall stated,

I do not understand the Court to suggest . . . that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. . . . Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that *there are limits on governmental authority to abolish “core” common-law rights, including rights against trespass*, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

*Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring) (emphasis added) (footnote omitted). It is certainly arguable that allowing hunters unfettered access to private land is not a compelling need. See *infra* Part III.B. However, the Court has avoided delving into such a confused issue as when the abrogation of the common law right against trespass, or the abrogation of any other common law right, has violated substantive due process. In light of this confusion, and in light of the possible nonexistence of a common law right against trespassing hunters, see *supra* text accompanying notes 121–27, the argument seems unlikely to persuade a state court. In addition, the argument, to a large extent, is coextensive with the takings argument: if a taking is found to exist, the posting statute will be unconstitutional; if not, the posting statute will be constitutional.

138. U.S. CONST. amend. V. The Takings Clause has applied to the states since the Supreme Court incorporated it into the Fourteenth Amendment and applied it to a state statute. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

constitutions<sup>139</sup> forbid the taking of private property without just compensation. The Supreme Court has analyzed takings claims as either regulatory or physical:<sup>140</sup> physical takings can be either per se physical takings or compensable physical invasions.<sup>141</sup> In *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>142</sup> the Court defined a per se physical taking as one that destroys all of a landowner's property rights, including the rights to possess, use, and exclude.<sup>143</sup> Despite this language, which seems to suggest that a landowner must lose all of these property rights to show a per se physical taking, the Court in *Nollan v. California Coastal Commission*<sup>144</sup> firmly stated that simply requiring a landowner to cede a permanent public easement constitutes such a taking:

We think a "permanent physical occupation" has occurred, for purposes of [the *Loretto*] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.<sup>145</sup>

Consistent with *Nollan*, the Court has elsewhere stated that a physical invasion of "only" an easement requires compensation<sup>146</sup> and that governmental authorization of others' physical invasion is sufficient for a takings claim.<sup>147</sup> The posting statutes force landowners to grant

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139. *E.g.*, ILL. CONST. art. I, § 15; UTAH CONST. art. I, § 22.

140. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); see Rebecca E. Harrison, Comment, *When Animals Invade and Occupy: Physical Takings and the Endangered Species Act*, 78 WASH. L. REV. 867, 875–76 (2003) (summarizing Supreme Court takings jurisprudence as dividing takings law into regulatory takings, per se physical takings, and compensable physical invasions).

141. *Loretto*, 458 U.S. at 434–35.

142. 458 U.S. 419 (1982).

143. *Id.* at 435–36.

144. 483 U.S. 825 (1987).

145. *Id.* at 832. The Court's analysis of whether this particular easement constituted a taking was more complex because the plaintiff was required to grant the easement only as a condition for receiving a building permit. *Id.* at 834–37. The Court here, however, was simply stating that requiring an owner to grant an easement in the absence of such conditions would certainly be a taking. See also Froelich Brief, *supra* note 6, at 18–19 (making this argument).

146. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979).

147. *Loretto*, 458 U.S. at 432 n.9.

easements to the public,<sup>148</sup> so they would seem to constitute takings under *Nollan*.

Nevertheless, the Court in *Lucas v. South Carolina Coastal Council*<sup>149</sup> held that even severe limitations on property rights are not takings so long as they are not “newly legislated or decreed” but rather “inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”<sup>150</sup> The Court even specifically stated that “we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner’s title.”<sup>151</sup>

Thus, the holding in *Lucas* would focus the inquiry on the extent to which a hunting easement was a preexisting limitation upon a landowner’s title. This is another form of the same question, stated above,<sup>152</sup> of whether the common law provides landowners with a civil trespass remedy against people hunting on their unposted land. That is, if the common law does not provide such a remedy, the hunting easement is a “background principle” of state property law, and if the common law does provide a remedy, the hunting easement is not a “background principle.” As noted above, this is an open question. But given that a court would likely seek a reason to uphold a posting statute, and given that many of the state posting statutes are nearly as old as the states themselves, such a court would likely conclude that

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148. Easements for hunters which stretch over landowners’ entire property are larger than that in *Nollan*, which was only, at most, ten feet wide. *Nollan*, 483 U.S. at 853–54 (Brennan, J., dissenting). Although landowners can temporarily “remove” the easements by posting, posting can be difficult and expensive, and signs can fall off or be removed. *See Hearing, supra* note 11 (statements of Anna Marsob and Nancy Laizure) (describing how difficult posting can be); *supra* Part II.A (noting the exacting requirements of many posting statutes). In addition, the actual physical space occupied by the required signs could itself be thought of as an easement, so that the easement is actually permanent. *See Froelich Brief, supra* note 6, at 20 (making this argument). If a court were to consider the easement merely temporary, however, it is even more likely that the court would uphold the posting statute authorizing the easement given that temporary physical invasions are considered less egregious than permanent ones. *See Loretto*, 458 U.S. at 435 n.12 (“[T]emporary limitations [on the right to exclude] are subject to a more complex balancing process to determine whether they are a taking.”).

149. 505 U.S. 1003 (1992).

150. *Id.* at 1029.

151. *Id.* at 1028–29. For this proposition, the Court cited *Scranton v. Wheeler*, 179 U.S. 141 (1900), which held that the government’s navigational servitude on a private landowner’s interest in submerged land was not a taking, partly because that servitude was preexisting. *Id.* at 143.

152. *See supra* notes 121–27 and accompanying text.

the public's right to hunt on private land, absent posting, was a preexisting easement on a landowner's title.<sup>153</sup>

Therefore, the two legal arguments that landowners can assert against the posting statutes likely would be unsuccessful under current legal doctrine. Despite this result, as the next Section shows, social changes since the founding of this country have only increased the prejudice to landowners' rights, to the extent that the posting statutes should be repealed or modified.

### *B. The Posting Statutes in Light of Changes in Society*

The posting statutes were designed to balance the rights of two different groups: hunters and landowners. For many Americans, hunting is an almost sacred activity, one enshrined in the national culture. For these people, the posting statutes surely seem a reasonable compromise. For others, the posting statutes unfairly eviscerate the rights of landowners for an insufficiently important purpose. Although the posting statutes, when originally conceived, may indeed have struck a reasonable compromise, social changes over the last several hundred years have altered the balance to an unfortunate degree, unfairly increasing the burden on landowners. Specifically, the need to hunt has been eliminated, and the impact on certain landowners—especially those who dislike hunting—has greatly increased. As the Supreme Court has recently underscored, when the reason for a rule no longer exists, the rule may (or should) no longer apply.<sup>154</sup>

One of the most dramatic social changes from the early days of America is that today almost no Americans rely on subsistence hunting. In the post-Industrial Revolution era of twenty-four-hour grocery stores, it is a rare sight indeed to see someone hunting for survival. In addition, hunting has become a middle- and upper-class

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153. This conclusion is equally damning to the additional argument that the requirement of posting signs itself is a taking, no matter how small or unobtrusive the signs may be. *See supra* note 148.

154. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (“*Cessante ratione legis cessat ipse lex.*” (quoting 1 SIR EDWARD COKE, *FIRST INSTITUTE OF THE LAWS OF ENGLAND* \*70b)); *see also* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897):

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

pastime.<sup>155</sup> The number of hunters per capita has also substantially decreased: even since 1955—a good seventy-five years after the Industrial Revolution and well into the era of specialized labor and the decline of family-owned farms—the number of hunters in America has increased by only 31 percent, whereas the population has increased by 71 percent.<sup>156</sup> In fact, from 1996 to 2001 the number of hunters actually decreased by nearly 7 percent to around 13 million, about 6 percent of the total U.S. population.<sup>157</sup> Hunting arguably remains a wildlife management tool,<sup>158</sup> but it is clear that hunting today is not a necessity so much as a recreation. Although contemporary hunters may at times evoke (and invoke) early American imagery of populist hunting, early America has long since vanished.

Societal attitudes toward animals in general have undergone a major transformation. At the founding of the country, there were almost no animal-rights activists, or even vegetarians.<sup>159</sup> This is not to say that early Americans cared nothing about animal welfare; indeed,

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155. U.S. FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR & U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2001 NAT'L SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION 30 (2002) [hereinafter U.S. SURVEY] (finding that more than half of all hunters come from households earning over forty thousand dollars per year), available at <http://www.census.gov/prod/2003pubs/fhw01-us.pdf>.

156. *Id.* at 6. The number of anglers, however, increased faster than the rate of population growth. *Id.*

157. *Id.* app. B at B-5.

158. The extent to which hunting is necessary in this regard is a topic of lively debate. See Andrew Daire, *The Right to Pursue Game vs. The Government's Right to the Conservation of Wildlife*, 10 U. BALT. J. ENVTL. L. 115, 117–19 (2003) (detailing the disagreement). Compare M. Nils Peterson, *An Approach for Demonstrating the Social Legitimacy of Hunting*, 32 WILDLIFE SOC'Y BULL. 310, 310 (2004) (arguing that hunting is a vital wildlife management tool), with Jacqueline Tresl, *Shoot First, Talk Later: Blowing Holes in Freedom of Speech*, 8 ANIMAL L. 177, 179 (2002) (expressing doubt about the wildlife management rationale), and THE FUND FOR ANIMALS, HUNTING FACT SHEET #1, at 1 (Sept. 14, 2002) (arguing that “wildlife management” is an invalid justification for hunting and pointing out statements of the New Jersey Division of Fish, Game, and Wildlife to the effect that state wildlife management is solely geared toward providing animals for recreational hunting), available at [http://fund.org/uploads/fs\\_hunt1.pdf](http://fund.org/uploads/fs_hunt1.pdf).

159. Cf. HARVEY A. LEVENSTEIN, *REVOLUTION AT THE TABLE: THE TRANSFORMATION OF THE AMERICAN DIET* 4 (1988) (noting that during the first half of the nineteenth century “people on both sides of the British North Atlantic were carnivores of the first order”). See generally M. Varn Chandola, *Dissecting American Animal Protection Law: Healing the Wounds with Animal Rights and Eastern Enlightenment*, 8 WIS. ENVTL. L.J. 3, 12–21 (Winter 2002) (discussing the historical and philosophical views of animals in the West); Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1513–26 (2001) (reviewing STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000)).

many early Americans were quite concerned with the transportation and labor benefits that animals provided, and some were concerned with ecosystem management and the continued existence of animals as a source for subsistence hunting.<sup>160</sup> Rather, early American attitudes toward animals were simply what one would expect of a young, rural country at that moment in history: pragmatic and not concerned with high-minded idealism that considered the killing of animals in any way immoral.

Over the past two centuries, however, American attitudes toward animals have changed, undoubtedly in part by virtue of the elimination of the need to hunt—or even to eat meat, as some have argued.<sup>161</sup> Organizations such as the Humane Society of the United States or the more radical People for the Ethical Treatment of Animals (PETA) have arisen to safeguard animal rights. Some legal scholars have even argued for a fundamental alteration of the property status of animals.<sup>162</sup> Eminent twentieth-century figures, such as Mahatma Gandhi, have fervently advocated vegetarianism for moral reasons.<sup>163</sup> Bruce G. Friedrich, a PETA official, has argued, quoting Martin Luther King, Jr., that “the arc of history is long, but that it bends towards justice,” so that one day people will look back on meat-eaters as they now do on slave owners.<sup>164</sup> It is true that the majority of Americans are not vegetarians, and that sentiments such as those of Gandhi and, especially, of Friedrich are not widely shared.<sup>165</sup> The point, however, is that *some* people now have these views, and that for them the matter is quite clear, no matter how radical the majority of Americans may find their views.

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160. See LUND, *supra* note 20, at 28–31 (noting various wildlife statutes enacted to ensure the usefulness and continued existence of animals).

161. See Richard Corliss, *Should We All Be Vegetarians?*, TIME, July 15, 2002, at 48, 48–56 (summarizing the debate regarding whether eating meat is necessary and whether a vegetarian diet is healthy).

162. See, e.g., David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 476 (2000) (arguing that the legal and equitable components of living property can and should be severed, with the equitable component being vested in animals themselves); Nussbaum, *supra* note 159, at 1511–13 (advocating substantial change in the legal status of animals and providing a theoretical framework for such change).

163. Mahatma Gandhi, *The Moral Basis of Vegetarianism*, Address at a Social Meeting of the London Vegetarian Society (Nov. 20, 1931), available at <http://www.ivu.org/news/evu/other/gandhi2.html>.

164. Bruce G. Friedrich, *Preface* to VASU MURTI, *THEY SHALL NOT HURT OR DESTROY: ANIMAL RIGHTS AND VEGETARIANISM IN THE WESTERN RELIGIOUS TRADITION* v, vi (1999).

165. Corliss, *supra* note 161, at 51–52.

Moreover, even the average American's attitude toward animals has greatly changed. Many Americans are now members of the mainstream Humane Society and local pet rescue clubs. Vegetarianism, although not a majority practice, has been increasing in popularity and is no longer an "odd" or "radical" choice, with many vegetarians choosing not to eat meat out of concern for animal welfare.<sup>166</sup> Many people who do not hunt now enjoy simply watching wildlife, whether at a state park or outside of their own windows. Perhaps the best example of changing attitudes is overseas, in England, where at the turn of the millennium the centuries-old sport of foxhunting with dogs came under attack and was banned, after already having been banned in Scotland.<sup>167</sup> Although this Note deals with America, the example of English foxhunting demonstrates the plausibility that the majority of Americans will one day disfavor hunting.<sup>168</sup> In the end, however, it is sufficient to say that American attitudes toward animals have changed, and that a significant number of contemporary Americans would not want animals killed on their land. Some people, especially hunters, surely would disagree with these sentiments, but the sentiments exist nonetheless.

Another major social shift in the last several hundred years has been the shift to smaller land parcels and suburbanization. At America's founding, the country was predominantly rural, with plenty of large tracts and room for expansion.<sup>169</sup> Parcels of land were generally large. During the twentieth century, however—and especially during the latter half of that century—the American population became increasingly suburban and decreasingly rural.<sup>170</sup> In

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166. *Id.*

167. Christopher Adams, *PM Faces Long Court Battle as Hunting Ban Is Forced into Law*, FIN. TIMES (London), Nov. 19, 2004, at 4; Alison Hardie, *Boxing Day Hunt on Its Last Legs?*, THE SCOTSMAN, Dec. 27, 2003, at 3. Hunting foxes with the aid of dogs is the most popular method of fox hunting and has the deepest historical roots.

168. *National Geographic* wonders whether foxhunting—which some people might consider more harmful to animal rights than other forms of hunting, such as deer hunting, that at least yield food—might come under attack in the United States. Laura Howden, *Is U.S. Safe from Foxhunting Debate?*, NAT'L GEOGRAPHIC NEWS (May 31, 2002), at [http://news.nationalgeographic.com/news/2002/05/0530\\_020532\\_fox.html](http://news.nationalgeographic.com/news/2002/05/0530_020532_fox.html) (on file with the *Duke Law Journal*).

169. *Cf.* LUND, *supra* note 20, at 19–34 (describing the geography as it related to hunting in early America).

170. FRANK HOBBS & NICOLE STOOPS, U.S. DEP'T OF COMMERCE, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 32–33 (2002), available at <http://www.census.gov/prod/2002pubs/censr-4.pdf>.

1910, only 7.1 percent of the population lived in suburban areas<sup>171</sup> whereas 72 percent lived in rural areas.<sup>172</sup> By 2000, 50 percent of Americans resided in suburban areas,<sup>173</sup> and the rural population had dropped to 20 percent.<sup>174</sup> Unlike the early days of the nation, then, modern America is predominantly urban and suburban—with half of the country owning small- to medium-sized plots on the edge of a metropolis, adjacent to farm country.

Another change in America is the existence of modern, commercial hunting preserves. Whether a result of increased suburbanization, modern hunting's recreational nature, or the increasingly middle-class demographic of hunters (many of whom want an organized, vacation-like experience),<sup>175</sup> private land available for hunting now exists all over the nation.<sup>176</sup> And the majority of hunting in America takes place on private land—in 2001, 74 percent of hunting days were on private land,<sup>177</sup> and hunters spent \$371 million on trip-related private land-use fees and \$4 billion on private land leases/purchases for hunting.<sup>178</sup> As a result, the recreational activity of hunting can now be a source of income for landowners.<sup>179</sup>

It is within the context of these social changes that the posting statutes and the collision of rights they generate must be analyzed. The most significant social change is that hunting is no longer a necessity. This fact alone seems sufficient to justify the assertion that the posting statutes harm landowners' property rights in order to serve a relatively insignificant purpose—facilitating one small group's recreational pursuit.

Almost equally important is that the degree of harm to landowners' property rights has increased because of landowners'

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171. *Id.* at 33 fig.1-15.

172. *Id.* at 32 fig.1-14.

173. *Id.* at 33 fig.1-15.

174. *Id.* at 32 fig.1-14.

175. *See supra* notes 155, 169–74 and accompanying text.

176. EDWARD L. KOZICKY, HUNTING PRESERVES III-A 11, at <http://wildlife.tamu.edu/publications/a075.pdf> (last visited Oct. 3, 2004) (on file with the *Duke Law Journal*).

177. U.S. SURVEY, *supra* note 155, at 80 tbl.28.

178. *Id.* at 73 tbl.18.

179. *See, e.g.*, RURAL ENTERPRISE & ALTERNATIVE DEV. INITIATIVE, ILL. COUNCIL ON FOOD & AGRIC. RESEARCH & S. ILL. UNIV. CARBONDALE, REP. NO. 2, ALTERNATIVE AGRICULTURE: CAN FEE HUNTING INCREASE YOUR BOTTOM LINE? 1–4 (2001) (detailing how landowners can make money from charging hunters fees to hunt on their land), available at <http://www.siu.edu/~readi/grains/factsheets/hunting.pdf>.

changing attitudes toward animals; that is, especially for people who consider the killing of animals morally wrong, but also for people who would simply prefer to observe or enjoy the presence of wildlife, the diminution of their right to exclude has become more egregious than it was in early America. Regardless of whether people opposed to the killing of animals are in the mainstream, for many of them it is a significant insult to have animals killed on their land. Some people might even want to use their land as a sanctuary for animals, and the posting statutes make achieving that goal difficult, if not impossible. Put simply, people have the freedom of conscience to think what they will about animal rights and hunting, and for those whose consciences dictate that animals should not be killed, their right to exclude hunters from their land becomes paramount.

The degree of harm to landowners' property interests has also increased because the posting statutes make it more difficult for landowners who wish to allow hunting on their land for a fee—whether in the form of a lease or a one-time, informal payment—to do so. This is true for two reasons. First, to charge hunters a fee, landowners must post their land properly—otherwise hunters can simply enter without permission. As previously noted, proper posting can be difficult, if not impossible; or at the very least it requires a good deal of expense and effort.<sup>180</sup> Second, the existence of other unposted or improperly posted land, which hunters can enter without charge, makes it less likely that hunters will pay for the privilege of hunting on the land of a private landowner who wants to charge a fee. Landowners have made and will continue to make money from allowing hunters to hunt on their land, but laws requiring individual landowners to post make this endeavor substantially more difficult.

In addition, the increasing suburbanization of America means that one traditional problem with the now-recreational activity of hunting—accidental injuries—affects nonhunters more closely than before.<sup>181</sup> According to the International Hunter Education Association, in the United States between 1994 and 2001 there was an average of at least 993 hunting casualties per year, with an average of

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180. See *supra* notes 13–15, 68–69 and accompanying text.

181. See, e.g., Rick Barrett, *Neighbors Oppose Hunt Plan for Land: Safety Concerns Raised in Town of Delafield*, MILWAUKEE J. SENTINEL, June 1, 2002, at B1 (noting citizen concerns about a proposed hunting area near suburban developments). *But see* Bob Hodge, *Deer, Deer: A Wise-Acre Decision Turns Political*, KNOXVILLE NEWS-SENTINEL (Knoxville, TN), Feb. 13, 2000, at C8 (discussing the Tennessee Wildlife Resource Agency's argument that hunting near suburbs poses few risks to hunters).

at least 91 fatal casualties.<sup>182</sup> Most casualties affect hunters themselves, but accidental shootings of hikers, bird watchers, and even suburban residents at home are not uncommon.<sup>183</sup> As the suburbs expand, laws allowing hunters to enter smaller, private tracts will only increase the number of accidental injuries. Suburban landowners should be given the choice of whether to allow this danger.<sup>184</sup>

Thus, while it is arguable that the posting statutes have always required too great a sacrifice of landowners, that sacrifice has only grown more severe for some and now serves a significantly less important purpose than it did historically. The next Part suggests a change.

#### IV. SOLUTIONS AND SUGGESTIONS

This Note has shown that, given the social changes since the formulation of state posting statutes, the statutes tip the balance between hunters' rights and landowners' rights too far in favor of hunters. Despite the probable lack of any judicial remedy, legislatures

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182. These data are extrapolated from annual reports issued by the organization from 1994 to 2001. See Int'l Hunter Educ. Assoc., Annual Reports of Hunting and Hunting Related Incidents, at [http://www.ihea.com/docs/Incident\\_Reports1](http://www.ihea.com/docs/Incident_Reports1) (last visited Nov. 30, 2004) (on file with the *Duke Law Journal*). These numbers are certainly conservative because not every state reports, and presumably not every incident is reported. See, e.g., *id.* (noting the states for which data are unavailable at the top of each table of incident statistics). The statistics also include Canada, but in the few years for which the Canadian data is separable from the American data, Canada accounts for only a miniscule number of the total casualties. See, e.g., *id.* (documenting that casualties from Canadian incidents numbered only 39 of 1181 in 1994, 41 of 1242 in 1995, and 40 of 1019 in 1997).

183. See, e.g., Matt Crawford, *Charges 'Unlikely' in Freak Shooting*, BURLINGTON FREE PRESS (Burlington, VT), Nov. 24, 2003, at A1 (describing an incident in which a man was killed by a hunter while watching football in his home); Jingle Davis, *Hunters, Hikers Will Still Share Trail*, ATLANTA J.-CONST., Nov. 26, 2002, at 4A (describing an incident in which a hunter killed a hiker on the Appalachian Trail); *Widow Seeks Hunter-Education Rule*, SEATTLE TIMES, Sept. 22, 2003, at B4 (describing the efforts of a widow whose husband was mistaken for an elk and killed).

184. It is true that increasing suburbanization and the resulting small parcels mean fewer suburban landowners are able to hunt entirely on their own land. Furthermore, suburbanization makes requiring affirmative permission from landowners more onerous than it once would have been, because it means that more landowners must be contacted. But nothing prevents avid suburban hunters from purchasing or leasing nonsuburban land, or visiting free public tracts of nonsuburban land, on which to hunt. In any case, a somewhat increased burden on hunting does not change the facts mentioned above—most notably, that hunting is now a recreation, albeit an important one for certain people, that heavily burdens some landowners and infringes upon their property rights. Finally, even if suburban landowners are more fearful of hunters than the statistics justify, the irrational nature of their fear is no reason to destroy their property rights.

have the ability to change the law. It is on such change this Note now focuses.

*A. Remedies at the State Level*

To adequately protect landowners' rights, state legislatures in the twenty-seven states that have posting statutes<sup>185</sup> should take the simple step of repealing those statutes and enacting new statutes requiring affirmative landowner consent for hunters wishing to hunt on private land. These new statutes could take either the larger step of clearly criminalizing all trespass on private property and providing a civil remedy or the smaller step of retaining the posting requirement but making it clear that this requirement operates only to criminalize trespass, without destroying landowners' right to sue civilly for trespass on unposted land.<sup>186</sup>

Short of repealing the posting statutes, state legislatures could take other, lesser actions that would alleviate the injury done to landowners' property rights. For instance, states could retain their posting statutes for all forms of recreation except hunting, on the rationale that hunters are more prevalent and dangerous than participants in other recreational activities, and that they may inflict greater damage on property rights because certain landowners are morally opposed to hunting.<sup>187</sup> This strategy—which, in fact, Connecticut has adopted<sup>188</sup>—would allow states to provide protection for hikers, sightseers, and other people involved in recreational

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185. As previously noted, the nonstatutory posting requirements of Maine and Louisiana are similar to the statutory posting requirements of the twenty-seven states with posting statutes. *See supra* note 67. Thus, although Maine and Louisiana obviously cannot repeal any statute to remedy this problem, they can follow the other suggestions in this Part—for instance, they can enact statutes to explicitly require that hunters obtain landowner consent before hunting on private land.

186. *See supra* notes 116–20 and accompanying text (discussing Rod Froelich's argument that courts should construe the posting statute to apply only to criminal trespass, rather than to abrogate a landowner's common law civil remedy). Although this Note has argued that such an argument seems flawed, largely because of the clear history and legislative intent of the statutes, *see supra* notes 121–36 and accompanying text, it certainly would be feasible and reasonable for state legislatures to “override” this history and intent to make clear that the statutes apply only to criminal sanctions.

187. *See supra* notes 159–68 and accompanying text.

188. CONN. GEN. STAT. ANN. § 26-65(b) (West 1999) (requiring landowner consent to hunt on private land); *id.* § 53a-109 (West 1990) (establishing criminal trespass liability for entering any land, posted or unposted, for the purpose of hunting, but requiring posting or fencing to establish liability for entry for other purposes). Other states that require affirmative consent to hunt on private land may also have posting statutes for nonhunting trespassers.

activities. States could also make posting easier, for example, by allowing landowners to post a single notice at the county courthouse, online, or in some other database.<sup>189</sup> Doing so would eliminate the expense and effort of posting, as well as the problem of signs' falling down or being torn down; it would also make it simple for hunters to verify that land on which they intended to hunt was open to hunting.

Neither of these solutions would irreparably harm hunting. Twenty-one states already have statutes that require affirmative consent to hunt,<sup>190</sup> and there is no evidence that hunting is unreasonably difficult in any of those states. Those states are not geographically concentrated in any way: hunting requires affirmative landowner permission in Midwestern states such as South Dakota; in large, game-filled states such as Texas; in Southern states such as Tennessee; and in Mid-Atlantic states such as Delaware.<sup>191</sup> If states remained concerned about the availability of land for hunting, they could either create more incentives for private landowners to open their land to hunting—possibly with the help of the federal government<sup>192</sup>—or increase access to public land for hunting by purchasing more land or by easing restrictions on existing public land. Such a solution would preserve the integrity both of private land ownership and of hunting.

### *B. Remedies at the Municipal Level*

Municipalities, as entities distinct from states, could also take action to remedy the imbalance between hunters' and private landowners' rights. Specifically, municipalities could take the same measures mentioned above: requiring landowner permission to hunt on private land or modifying the posting statutes.<sup>193</sup>

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189. North Carolina, for instance, had an easier posting requirement dating back to colonial times and into the nineteenth century. *See* 2 WILLIAM T. DORTCH ET AL., THE CODE OF NORTH CAROLINA § 2831 (1883) (codifying a 1784 statute, 1784 N.C. Sess. Laws 33 § 5, that required posting only in “two or more public places” and amended an earlier colonial statute to require that posting be done “at the court house door of the county”). North Carolina's current posting statute, N.C. GEN. STAT. § 14-159.7 (2003), was added in 1949 and requires posting of land in a manner similar to the posting statutes of other states, 1949 N.C. Sess. Laws 887; *see supra* note 58 and accompanying text.

190. *See supra* Part II.A (discussing the relevant statutes of every state).

191. *See supra* note 65 (listing the statutes of states requiring affirmative landowner consent).

192. *See supra* notes 106–11 and accompanying text.

193. In addition, municipalities could take a further step, which some have already done: ban hunting within municipal limits, on the rationale that hunting is unacceptably dangerous in

Municipalities do face one impediment if they decide to take such action—preemption. The regulation of firearms (including ownership restrictions and licensing) is a field that states have traditionally occupied completely, thus preempting any municipal ordinances in conflict with state law.<sup>194</sup> The traditional regulation of firearms by states, however, does not necessarily mean that municipalities could not ban or further regulate firearm *discharges* within municipal limits; some states allow municipalities to do so.<sup>195</sup> Nor does the traditional regulation of firearms by states necessarily mean that municipalities could not ban hunting or regulate it more than states have done, regardless of any apparent limits on municipal regulation of firearms or firearm discharges—some states may only preempt their municipalities when it comes to regulations like ownership restrictions and licensing. The law on preemption is very unclear, principally because few states have statutes or clear judicial opinions on the issue; for the most part, the preemption issue is decided by state game departments or attorneys general after municipalities attempt to regulate hunting in some fashion. Thus, state law varies widely.<sup>196</sup>

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municipalities (states could also ban hunting in municipalities based on the same rationale). *See, e.g.*, WEST DES MOINES, IOWA, CITY CODE § 5-2-7-5 (2003) (banning hunting generally, but allowing hunting of certain birds under certain conditions), *available at* <http://www.sterlingcodifiers.com/IA/West%20Des%20Moines/index.htm>. The desirability of flatly banning hunting in such a manner, however, is outside the scope of this Note.

194. *E.g.*, COLO. REV. STAT. § 29-11.7-103 (2003). *See generally* Legal Cmty. Against Violence, Master List of Firearms Policies, *at* <http://www.firearmslawcenter.org> (last visited Nov. 5, 2004) (on file with the *Duke Law Journal*) (describing generally the preemption issue and describing each state's applicable law). This generally means that municipalities cannot ban firearms or create alternative licensing schemes. *Id.*

195. *E.g.*, MINN. STAT. ANN. § 471.633(a) (West 2001).

196. It appears that some states disallow ordinances relating to firearm discharges and hunting, whereas others allow them. The attorney general of Tennessee, for instance, has stated that, in the current absence of express state legislative authorization for municipalities to restrict firearm discharges within municipal limits, municipalities cannot enact ordinances restricting hunters from discharging firearms within city limits when such hunters are otherwise abiding by state hunting laws. Conflict Between State Authorized Hunting and Municipal Prohibition on Firearm Discharges, Op. Tenn. Att'y Gen. No. 98-038 (1998). Apparently, New Jersey forbids municipalities from passing ordinances that generally regulate hunting. *See* Aimee J. Frank, *Animal Trapping Ban on Hold*, DAILY FREEMAN (New York), Sept. 13, 2003, at A3 (describing how New Paltz's town attorney advised the town that a proposed ordinance banning certain types of traps likely conflicted with comprehensive state hunting laws). In Vermont, municipalities can ban firearm discharges within municipal limits but, pursuant to the state constitutional provision protecting the right to hunt, municipalities cannot ban other forms of hunting. Isaac Olson, *Town Forest to Be Posted*, CALEDONIAN-RECORD (Vermont), Nov. 13, 2003, at 1. Texas allows municipalities individually to decide whether hunting is allowed in city

The issue of whether and to what extent municipalities can ban or regulate hunting is, of course, a secondary issue; the main issue is whether and to what extent municipalities can create ordinances that require affirmative landowner consent for hunting on private land. In municipalities banning hunting generally, this is not an issue. In municipalities that could but have not yet banned hunting generally, it seems—although this is not certain—that they could enact this “lesser” restriction. In municipalities unable to ban hunting outright but able to regulate it, whether ordinances that further “regulate” hunting by requiring affirmative landowner consent would be considered reasonable remains an open question. Even in municipalities unable to ban hunting outright or in any way regulate it, this question remains open inasmuch as an ordinance requiring affirmative landowner permission to hunt could plausibly be called a regulation or enforcement regarding private property rights and trespass law, not a regulation regarding hunting.

It is clear that any municipal ordinance would be inferior to a state remedy because the ordinance would only apply to one municipality—generally a small area when compared to a state. It would be time-consuming and inefficient for each individual municipality to try to guarantee private landowner rights. In addition, with the preemption issue hanging in the background, a statewide solution would also be preferable given the unquestionable power of states to change their posting statutes. Nonetheless, if state legislatures prove unwilling or unable to change their laws, municipalities can and should act.

#### CONCLUSION

Twenty-nine states currently require private landowners to post their land to exclude hunters, twenty-seven of these states by statute. The posting statutes were an outgrowth of the American desire to ensure that hunting was available to everyone, not just the rich and landed. The statutes vary widely in their particulars, but the core idea behind them—that landowners must take often onerous steps to

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limits; San Antonio allows hunting, Houston and Dallas do not. Don Sapatkin, *Deer Hunters Quietly Active in City*, PHILA. INQUIRER, Jan. 13, 2003, at B1. The situation is similar in Iowa, where municipalities can ban all hunting, selectively ban certain types of hunting, and enact related ordinances. See, e.g., WEST DES MOINES, IOWA, CITY CODE § 5-2-7-5 (allowing hunting of specific birds under certain conditions but banning hunting generally and, consistent with Iowa state law, requiring affirmative landowner consent to hunt on private land).

ensure that hunters do not enter their land—exists in all twenty-seven statutes. Whatever the merits of these statutes when first formulated, as a result of social changes they now unfairly privilege hunters over landowners. Because judicial remedy of this problem seems unlikely, state legislatures should alter their statutes to require landowner permission to hunt on private land. Failing state legislation, municipalities could take action, although the reach of municipal ordinances would be limited and the potential for state law preemption presents a substantial danger. It is time for states and cities to recognize that American society has changed.