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Touro Law Review

Volume 29
Number 4 *Annual New York State Constitutional
Issue*

Article 4

March 2014

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Recommended Citation

Hodgkinson, Brian (2014) "Don't Feed the Deer: Misapplications of Statutory Vagueness and the First Amendment Overbreadth Doctrine," *Touro Law Review*: Vol. 29: No. 4, Article 4.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol29/iss4/4>

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Don't Feed the Deer: Misapplications of Statutory Vagueness and the First Amendment Overbreadth Doctrine

Cover Page Footnote

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**DON'T FEED THE DEER: MISAPPLICATIONS OF
STATUTORY VAGUENESS AND THE FIRST AMENDMENT
OVERBREADTH DOCTRINE**

**COUNTY COURT, SULLIVAN COUNTY
NEW YORK**

People v. Gabriel¹
(decided September 5, 2012)

Appellant Robert Gabriel was convicted in the Town of Highland Justice Court for violating a provision of the New York State Environmental Conservation Law prohibiting feeding wild white-tailed deer or wild moose save for five enumerated exceptions.² On appeal, the County Court addressed three issues: first, whether sufficient evidence existed to convict the appellant of feeding white-tailed deer in violation of the statute; second, whether the statute was unconstitutionally vague, both facially and as applied; and third, whether the statutory limitation upon First Amendment rights was unconstitutionally overbroad.³ The first issue was summarily resolved by the appellant's admission of placing food in his backyard that attracted deer, which under the statutory language constituted "feeding."⁴ Applying a two-part test to the second issue, statutory vagueness, the court concluded the statutory language neither provided adequate notice for a "person of ordinary intelligence" nor "clear standards of enforcement" for officials.⁵ Consequently, the court held the statute both facially vague and vague as applied, and therefore violative of

¹ 950 N.Y.S.2d 874 (Co. Ct. 2012).

² *Id.* at 877-78; N.Y. COMP. CODES R. & REGS. tit. 6, § 189.3 (2010).

³ *Gabriel*, 950 N.Y.S.2d at 879-81.

⁴ *Id.* at 880 (" 'Feed' or 'feeding' is defined as 'the act of using, placing, giving, exposing, depositing, distributing or scattering any material, or any act to maintain the availability of such material, that attracts wild white-tailed deer to feed on such material including the distribution of such material in deer wintering areas.' " (quoting N.Y. COMP. CODES R. & REGS. tit. 6, § 189.2(f))).

⁵ *Id.* at 881-83.

Gabriel's constitutional right to due process.⁶ Finally, the court examined the statute under the First Amendment's "overbreadth doctrine."⁷ It forged a link between feeding wild animals and First Amendment speech protections by claiming that the former could be expressive conduct in support of conservation.⁸ Under this rubric it held the statute's prohibition of actions and materials that could "attract" or "feed" white-tailed deer was unconstitutionally broad.⁹

This Note surveys the New York and federal approaches to statutory vagueness and First Amendment overbreadth challenges. Part I.A discusses the facts of *People v. Gabriel*, which is the subject of this article's critique in Part IV. Parts I.B and I.C examine the decision's resolution of statutory vagueness and overbreadth claims respectively. Part II.A analyzes the federal method applied to resolving statutory vagueness challenges. Part II.B explores federal First Amendment overbreadth jurisprudence. Part III.A reviews New York's approach to statutory vagueness claims, illustrating doctrinal dissension where the challenge is facial rather than as applied. Part III.B examines the overbreadth doctrine in New York case law, which mirrors its federal counterpart. Part IV evaluates the court's decision in *People v. Gabriel*, proffering that it incorrectly resolved statutory vagueness and overbreadth challenges in a manner perverse to both federal and New York jurisprudence.

I. THE OPINION

A. Facts

On October 13, 2009, Department of Environmental Conservation ("DEC") officer Michael Bello received an anonymous call about a pile of apples and a deer stand located in the woods behind the appellant's property.¹⁰ Suspicious of possible DEC violations in the wake of the approaching hunting season, officer Bello proceeded

⁶ *Id.* at 884.

⁷ *Id.* ("The First Amendment overbreadth doctrine provides that 'a statute that attempts to proscribe constitutionally protected speech will not be enforced unless a limiting construction effectively removes the apparent threat to constitutionally protected expression.' " (quoting *People v. Foley*, 731 N.E.2d 123, 128 (N.Y. 2000))).

⁸ *Gabriel*, 950 N.Y.S.2d at 884.

⁹ *Id.* at 886.

¹⁰ *Id.* at 878.

to stake out the location, during which he viewed no activity at the deer stand.¹¹ During the following several days, he received two more calls and proceeded to further investigate the area.¹² These subsequent investigations indicated that deer had been feeding on the trail near the stand.¹³ In light of these indications, officer Bello knocked on the door of the property and inquired into the circumstances.¹⁴ Gabriel told officer Bello that he was unaware of the deer stand and that he occasionally fed animals that came into his backyard.¹⁵ Gabriel conceded that he placed apples in the backyard to feed wildlife, though he denied feeding deer.¹⁶ At the bench trial, Gabriel inquired into whether it was an offense to merely throw apples into his backyard and the judge responded, “You are not allowed to throw those apples out there. You are not permitted to do it I understand that if you have a bird feeder in your yard that attracts the deer, *we can get in trouble for that.*”¹⁷ Although Gabriel failed to preserve certain issues at trial, the County Court exercised its discretion to review them as a matter of justice and because they raised constitutional concerns.¹⁸ Specifically, Gabriel challenged the constitutionality of the statute’s vagueness and overbreadth.¹⁹

B. Constitutional Claims: Vagueness

The Due Process Clause of the Fourteenth Amendment prohibits conviction under a law that “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”²⁰ Effectuating this doctrine, the court laid out a two-part test to determine whether the statute was unconstitutionally vague under the Due Process Clause.²¹ The first part requires a de-

¹¹ *Id.*

¹² *Id.*

¹³ *Gabriel*, 950 N.Y.S.2d at 878 (Officer Bello noted deer droppings and a photograph from a “trail cam” as evidence that deer had been feeding in the area).

¹⁴ *Id.*

¹⁵ *Id.* at 878-79.

¹⁶ *Id.* at 879.

¹⁷ *Id.* (emphasis in original).

¹⁸ *Gabriel*, 950 N.Y.S.2d at 879.

¹⁹ *Id.* at 881.

²⁰ *Id.* (quoting *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010)).

²¹ *Id.* at 881.

termination that the law provides a person of ordinary intelligence with fair notice of the prohibited action.²² The second part necessitates clear standards of enforcement for officials tasked with executing the law.²³ Gabriel asserted that the statute was both facially vague and vague as applied to his particular case.²⁴ The court addressed the facial challenge first.²⁵

The ambiguity at issue stemmed from the meaning of the words “material” and “feeding” in NYCRR title 6, section 189. Applying the test’s first prong, the court determined that because the statute failed to expand on what constituted “material,” and also what actions would be considered “feeding,” the statute gave inadequate notice of the prohibited actions.²⁶ It determined that “a person of ordinary intelligence” would be unable to ascertain whether his or her actions were illegal.²⁷ Similarly, officials charged with implementing the law lacked sufficient guidance regarding what activities were prohibited.²⁸ The resultant opacity, the court reasoned, enhanced the potential for discriminatory and arbitrary enforcement.²⁹ Resolving the statute’s facial ambiguity, the court held that because it was facially vague, its application to Gabriel was unconstitutional.³⁰

C. Constitutional Claims: Overbreadth

Before evaluating the statute’s alleged overbreadth, the court affirmed Gabriel’s standing to bring the issue.³¹ It reasoned that although his conduct was unprotected by the First Amendment, his challenge was nonetheless proper under its overbreadth doctrine.³²

²² *Id.*

²³ *Gabriel*, 950 N.Y.S.2d at 881.

²⁴ *Id.* at 882.

²⁵ *Id.*

²⁶ *Id.* at 882.

²⁷ *Id.* The court gave as examples seemingly harmless and ordinary actions that could be held illegal under the statute if they attracted deer, such as planting a fruit tree or putting out garbage that may contain “material.” *Gabriel*, 950 N.Y.S.2d at 882.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 883. Subsequent to this determination, the court also held that had the statute not been facially vague, its application to Gabriel would have been unconstitutionally vague as applied. *Id.* at 884.

³¹ *Gabriel*, 950 N.Y.S.2d at 884.

³² *Id.* at 884 (“The First Amendment overbreadth doctrine provides that ‘a statute that attempts to proscribe constitutionally protected speech will not be enforced unless a limiting construction effectively removes the apparent threat to constitutionally protected expres-

Effectively, due to the statute's potential to limit protected speech and its lack of any limiting construction, the court allowed Gabriel to raise the First Amendment challenge.³³

In a manner similar to its Due Process analysis, the court enunciated several factors to determine whether a statute was overbroad. It began with the notion that if the statute "on its face," that is to say in its aggregate rather than in single conceived applications, prohibits a substantial amount of protected conduct, then it is overbroad.³⁴ Additionally, the court warned that regulations of protected speech "must be narrowly tailored to serve the government's legitimate interest."³⁵ This requirement demands that prohibitions not be substantially broader than necessary to achieve that legitimate governmental interest.³⁶ Proceeding to implement these analyses, the court determined the conduct prohibited by the statute could be an expression of support for conservation.³⁷ Thus, the conduct could be evaluated as a First Amendment protection, triggering the foregoing restraints on overbreadth.

The court refrained from an extensive examination of the statute's substantive legitimacy, although it indicated doubts about it, and instead focused on its scope.³⁸ Excoriating the statute's overbreadth came as a corollary to the court's treatment of the statutory vagueness issue. The broad language that clouded the statute's meaning also expanded the breadth of conduct which could reasonably be interpreted as impermissible.³⁹ Recognizing this, the court held the statute's language rendered it substantially overbroad, and "not narrowly tailored to serve significant governmental interests."⁴⁰ The statute's overbreadth and vagueness implicated one another, as

sion.'") (quoting *Foley*, 731 N.E.2d at 128)).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 885.

³⁶ *Gabriel*, 950 N.Y.S.2d at 885.

³⁷ *Id.* at 884.

³⁸ *See id.* ("There is a genuine dispute as to whether this regulation serves a significant governmental interest in preventing the spread of CWD. Without addressing the merits of CWD regulations as applicable in New York, the Court must ask if the gathering of deer around a legal food plot as opposed to the proverbial apple tree is not also a concern for CWD transmission?").

³⁹ *See id.* at 885 ("Not only does this statute criminalize any type of feeding of deer, but broad language like 'placing,' 'exposing,' or 'depositing' creates myriad situations in which one could violate the statute without any intention of feeding deer or moose.").

⁴⁰ *Id.* at 885.

the court concluded “[t]he broad sweeping language of the regulation chills constitutionally protected conduct and leaves law enforcement in a position to arbitrarily enforce the law. The literal meaning of words like ‘material,’ ‘deposit’ and ‘maintain’ leave open an application of the regulation far beyond what the legislature plausibly intended.”⁴¹

II. FEDERAL APPROACH

A. Vagueness

Federal jurisprudence is replete with challenges arising from purported statutory vagueness and their resolution by its “void-for-vagueness” doctrine rests on settled principles.⁴² Throughout the greater part of the Supreme Court’s history, these challenges have been mechanisms for social, political, and economic action.⁴³ Primarily at issue are notions of due process arising under the Fifth and Fourteenth Amendments.⁴⁴ However, the interpretive breadth resulting from statutory vagueness may also implicate constitutionally protected speech, raising First Amendment concerns.⁴⁵ The Supreme Court has developed a two-part analysis for resolving these challenges, which is modified when protected speech is affected,⁴⁶ known as the void-for-vagueness doctrine.⁴⁷

The first part examines whether the statute provides proper notice or fair warning of the prohibited conduct.⁴⁸ Courts have hinged proper notice on whether “a person of ordinary intelligence

⁴¹ *Gabriel*, 950 N.Y.S.2d at 886.

⁴² See Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003) (discussing the long history of constitutional challenges to statutory vagueness); *Smith v. Goguen*, 415 U.S. 566, 572 n.7 (1974) (“The elements of the void-for-vagueness doctrine have been developed in a large body of precedent from this Court.”).

⁴³ Goldsmith, *supra* note 42.

⁴⁴ The Fifth Amendment guarantees due process against federal action whereas the Fourteenth Amendment does so against state action. See *Malloy v. Hogan*, 378 U.S. 1 (1964) (discussing various protections provided by the Fourteenth Amendment against state action).

⁴⁵ *Goguen*, 415 U.S. at 573.

⁴⁶ *Id.* at n.10.

⁴⁷ While the analysis has two “prongs,” both are not required to invalidate a statute for vagueness. See *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (invalidating ordinance solely on its failure to limit discretionary enforcement by police).

⁴⁸ *Holder*, 130 S. Ct. at 2718.

[would have] fair notice of what is prohibited.”⁴⁹ Indeed, the principle is an axiom of laws that comport with due process.⁵⁰ However, like the statutes to which it is applied, the language is often ambiguous regarding what its interpretation entails.⁵¹ Whether a statute provides proper notice is an inherently flexible and often unclear determination.⁵² Consequently, as Justice Holmes ominously observed, “[T]he law is full of instances where a man’s fate depends on his estimating rightly If his judgment is wrong, not only may he incur a fine or a short imprisonment . . . [but] he may incur the penalty of death.”⁵³ Incident to the first part, the second requires that the statute provide clear standards of enforcement for officials tasked with its implementation.⁵⁴ This second requirement ensures protection against “arbitrary and discriminatory enforcement.”⁵⁵ Additionally, where the degree of statutory vagueness encroaches on protected speech by dissuading people from engaging in such speech, courts have required a heightened degree of specificity.⁵⁶ The foregoing analysis was on display in *Smith v. Goguen*.⁵⁷

In *Goguen*, the defendant was convicted of violating a Massachusetts flag misuse statute, which prohibited mutilating, trampling upon, defacing, or treating contemptuously the flag of the United States.⁵⁸ He had worn a small patch of the flag sewn onto the seat of his trousers and was charged with “contemptuously [treating] the flag of the United States” and sentenced to six months in jail.⁵⁹ Applying

⁴⁹ *Id.*

⁵⁰ *See Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”).

⁵¹ Goldsmith, *supra* note 42, at 280-81 (claiming the Supreme Court has issued sweeping and contradictory statements on the vagueness doctrine).

⁵² *Grayned*, 408 U.S. at 110 (“Condemned to the use of words, we can never expect mathematical certainty from our language.”).

⁵³ *Nash v. United States*, 229 U.S. 373, 377 (1913).

⁵⁴ *Goguen*, 415 U.S. at 573.

⁵⁵ *Id.*; *Grayned*, 408 U.S. at 108-09 (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”).

⁵⁶ *Goguen*, 415 U.S. at 573.

⁵⁷ *Id.*

⁵⁸ *Id.* at 568-69.

⁵⁹ *Id.* at 568, 570.

the void-for-vagueness doctrine, the Court characterized the statutory language at issue as “vague ‘not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.’”⁶⁰ Such deficiencies preclude cognizant inclusion in and exclusion from prohibited conduct, wherein lies the Due Process offense.⁶¹

Addressing the standards provided for enforcement, the Court lambasted the language as “allow[ing] policemen, prosecutors, and juries to pursue their personal predilections.”⁶² Further, deeming the language that the defendant was convicted under as “capable of reaching expression sheltered by the First Amendment,” the Court held a greater degree of specificity was required to save the statute.⁶³ The *Goguen* decision illustrates that while federal courts are concerned with proper notice being provided to citizens, of greater concern is the potential for unchecked and possibly discriminatory enforcement granted by vague statutes.⁶⁴

B. Overbreadth

Generally, a person to whom a statute may be constitutionally applied lacks the standing to challenge that statute’s constitutionality as applied to other litigants.⁶⁵ The First Amendment Overbreadth Doctrine is an exception to this generality.⁶⁶ Federal courts have recognized that elastic boundaries circumscribe the First Amendment and thus its treatment should allow it to pulsate.⁶⁷ Bearing that in mind, the Supreme Court has permitted litigants to challenge a statute’s validity, notwithstanding its applicability to their situation,

⁶⁰ *Id.* at 578 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

⁶¹ *Goguen*, 415 U.S. at 578.

⁶² *Id.* at 575.

⁶³ *Id.* at 573. The Court also made a comparison to the less exacting degree of specificity required for statutes “regulating purely economic activity,” whose scope does raise the same First Amendment concerns. *Id.* at n.10.

⁶⁴ *See id.* at 575 (“Mr. Justice Black, in a concurring opinion, voiced a concern, which we share, against entrusting lawmaking ‘to the moment-to-moment judgment of the policeman on his beat.’”); *Goguen*, 415 U.S. at 578 (“The deficiency is *particularly objectionable* in view of the unfettered latitude thereby accorded law enforcement officials and triers of fact.”) (emphasis added).

⁶⁵ *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

⁶⁶ *Id.* at 612-13.

⁶⁷ *Id.* at 611.

when it is substantially overbroad.⁶⁸ The Court has, however, recognized the severe implications of such action,⁶⁹ and accordingly has applied it “sparingly and only as a last resort . . . [and not] when a limiting construction has been or could be placed on the challenged statute.”⁷⁰ Further, it has qualified the doctrine’s application depending on whether speech or conduct was being regulated.⁷¹ Particular attention has been given to the latter, where the Court has required that the overbreadth be “real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”⁷² In *Virginia v. Hicks*⁷³ the Court illustrated the doctrine’s stringency when applied to conduct.⁷⁴

The regulation at issue in *Hicks* was promulgated by The Richmond Redevelopment and Housing Authority (“RRHA”), a Virginia state agency, which authorized police to serve notice upon any individual whose presence on its property lacked “a legitimate business or social purpose;” and further, to subsequently arrest the person if the notice went unheeded.⁷⁵ Respondent Hicks, after violating the regulation several times, was convicted under Virginia’s repeat trespass statute.⁷⁶ Conceding his conduct was not constitutionally protected and that the trespass statute he was charged under was valid, Hicks challenged the constitutional validity of the RRHA policy as overbroad.⁷⁷ Addressing that contention, the Court re-affirmed principles enunciated in *Broadrick v. Oklahoma*.⁷⁸ It cautioned that facially invalidating a law may vitiate the benefits sought by narrowing its expansive scope.⁷⁹ Moreover, it counseled that “there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law[,] . . . especially to constitutionally unprotected

⁶⁸ *Id.* at 619. The Supreme Court’s rationale stemmed from “a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *Id.* at 612.

⁶⁹ See *Broadrick*, 413 U.S. at 613 (calling the doctrine’s application “strong medicine”).

⁷⁰ *Id.* at 613.

⁷¹ *Id.* at 615.

⁷² *Id.*

⁷³ 539 U.S. 113 (2003).

⁷⁴ *Id.*

⁷⁵ *Id.* at 116.

⁷⁶ *Id.* at 117.

⁷⁷ *Id.* at 118.

⁷⁸ *Broadrick*, 413 U.S. at 610.

⁷⁹ *Hicks*, 539 U.S. at 119.

conduct.”⁸⁰

In denying Hicks’s claim, the court held the RRHA policy did not prohibit a substantial amount of protected speech.⁸¹ Because the policy language “legitimate business or social purpose” applied to *all* forms of conduct, the Court reasoned, the degree of protected conduct which may possibly be prohibited was minimal compared with the valid prohibitions against non-constitutionally protected conduct.⁸² The Court reinforced its conclusion stating it was “not surprising, since the overbreadth doctrine’s concern with ‘chilling’ protected speech ‘attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from ‘pure speech’ toward conduct.’ ”⁸³ And additionally, “[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).”⁸⁴

III. NEW YORK APPROACH

A. Statutory Vagueness: As Applied and Facially

Similar to federal courts, New York employs the aforementioned void-for-vagueness doctrine to resolve statutory vagueness challenges.⁸⁵ The Court of Appeals has distinguished as applied challenges from facial challenges based on what they entail and how their resolutions affect each other.⁸⁶ A determination that a statute is vague as applied rests on finding its constitutional application to the challenger’s particular facts.⁸⁷ In contrast, a challenge to a statute’s facial validity requires the “heavy burden” of proving the statute is vague in all its applications.⁸⁸ Courts are reticent to hold a statute fa-

⁸⁰ *Id.*

⁸¹ *Id.* at 124.

⁸² *Id.* at 123.

⁸³ *Id.* at 124 (quoting *Broadrick*, 413 U.S. at 615).

⁸⁴ *Hicks*, 539 U.S. at 124.

⁸⁵ *People v. Stuart*, 797 N.E.2d 28, 34 (N.Y. 2003).

⁸⁶ *Id.* at 36.

⁸⁷ *Id.* at 35.

⁸⁸ *Id.* Courts are especially concerned with statutes that fail to specify standards of conduct, with the concern being arbitrary or discriminatory enforcement. *See Goguen*, 415 U.S. at 575. Similar to federal courts, the New York Court of Appeals has hinted that the second prong, standards of enforcement, may be the most important. *See People v. Nelson*, 506

cially vague because such a decision invalidates it entirely, as opposed to finding a statute is vague as applied, which only bars its application in the particular instance.⁸⁹ Consequently, the New York approach first examines the statutory validity as applied to the situation at issue.⁹⁰

If the court determines a statute is constitutionally permissible as applied, it will further reach the tacit conclusion that it is also facially constitutional.⁹¹ This rule, known as the “no valid applications rule,” is premised on the idea that if “there was at least one person as to whom the statute could be applied constitutionally, [it is] implicitly determined [to be] valid on its face.”⁹² While the principles of fairness underlying the void-for-vagueness doctrine stem from common notions of reason and natural law,⁹³ there has been discord within New York’s highest court over the validity of the “no valid applications rule.” This disagreement and New York’s approach to statutory vagueness challenges were displayed in *People v. Stuart*.⁹⁴

Stuart concerned as applied and facial vagueness challenges to a New York statute prohibiting stalking.⁹⁵ The statutory language at issue was “no legitimate purpose,” which the defendant claimed was insufficient to provide a person of ordinary intelligence proper

N.E.2d 907, 909 (N.Y. 1987) (“The Constitution abhors a law placing unfettered discretion in the hands of police, prosecutors and juries and allowing punishment of the poor or unpopular on a whim.”); *Stuart*, 797 N.E.2d at 35 (holding adequate guidelines for law enforcement may be the vagueness doctrine’s most important aspect).

⁸⁹ *Stuart*, 797 N.E.2d at 35-36.

⁹⁰ *Id.* at 36.

⁹¹ *Id.*

⁹² *Id.* at 37.

⁹³ *See id.* at 33 (“It is axiomatic that a proscriptive law must provide people with reasonable notice of the conduct it prohibits.”).

⁹⁴ *Stuart*, 797 N.E.2d at 37.

⁹⁵ *Id.* The stalking statute at issue, “Stalking in the fourth degree,” provided in relevant part:

[A] person is guilty of stalking in the fourth degree if he or she (1) intentionally and for no legitimate purpose (2) engages in a course of conduct directed at a specific person (3) when he knows or reasonably should know that his conduct will have either of two consequences: first, that it is likely to cause reasonable fear of material harm to the victim’s (or other specified third party’s) physical health, safety or property . . . or second, that the conduct causes material harm to the victim’s mental or emotional health and consists of following, telephoning or initiating communication with the victim (or other specified third party) after being clearly told to stop.

N.Y. PENAL LAW § 120.45 (McKinney 1999).

notice.⁹⁶ He further contested the statute's failure to qualify the type of intent that was prohibited.⁹⁷ Specifically, the statute proscribed a course of conduct, but not the ends intended to be reached by that conduct, which the defendant alleged compounded the vagueness.⁹⁸ In this regard, the defendant argued that the statute fell short of achieving sufficient clarity.⁹⁹

Addressing these challenges, the court held the statutory conduct was clearly delineated, thus a perpetrator's intent was irrelevant.¹⁰⁰ Here, the defendant continuously followed, stared at, and approached the complainant.¹⁰¹ Under the statutorily proscribed conduct, the defendant had ample notice that his actions were prohibited and any reasonable person could have understood as much.¹⁰² Further, the language "legitimate purpose,"¹⁰³ the court reasoned, should be read as its ordinary meaning, but within the statutory context.¹⁰⁴ Therefore, a person engaged in actions such as the defendant's would be on reasonable notice that he lacked a "legitimate purpose" under the statutory rubric, which bears a clear account of its proscribed conduct.¹⁰⁵ While the challenged statute's clarity was unanimous among the court, the concurrence exhibited doctrinal dissension with the majority's affirmation of the "no valid applications rule."¹⁰⁶

The concurrence took issue with the limitations that the "no valid applications rule" placed on prospective facial challenges.¹⁰⁷ As applied challenges to statutes may be unsuccessful even though the statute is facially vague.¹⁰⁸ This results from the manner in which

⁹⁶ *Stuart*, 797 N.E.2d at 39.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Stuart*, 797 N.E.2d at 30.

¹⁰² *Id.* at 39.

¹⁰³ The court defined the ordinary meaning of "no legitimate purpose" as "the absence of expression of ideas or thoughts other than threats and/or intimidating or coercive utterances" *Id.* at 41.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Stuart*, 797 N.E.2d at 41-42 (Kaye, J., concurring).

¹⁰⁷ *Id.* at 44.

¹⁰⁸ *See id.* (illustrating an instance where a facially vague statute nonetheless survives an as applied challenge because the conduct fits "squarely within the 'hard core' of the statute's proscriptions") (quoting *Broadrick*, 413 U.S. at 608).

vagueness shades particular circumstances, as the concurrence explained, “[A] facially vague statute fails to give *anyone* notice of its limits, even though *everyone* might understand its core, and even though it may not be unconstitutional as applied to this core.”¹⁰⁹ Emphasizing the primary importance of clear guidelines for law enforcement, the test’s second prong, the concurrence further stressed that although valid as applied, a statute may nonetheless lack the clear standards for enforcement.¹¹⁰ As the concurrence illustrated, “the second prong mandates that a statute not *permit or encourage* arbitrary or discriminatory enforcement by the police. The test is not whether an officer actually exercised discretion arbitrarily in a given case.”¹¹¹

This point echoes the language previously used, “though everyone might understand its core,” in that although an official’s response in a particular case may not be discriminatory as it related to a given set of facts, the relevant inquiry is whether the statute provides the official with sufficient guidelines.¹¹² Thus, the concurrence concluded “an analysis of the *second* prong ‘as applied’ to a defendant has no discernible meaning; the very nature of a second-prong analysis is inherently a facial one.”¹¹³ The foregoing illustrates the court’s disagreement over the appropriate analysis for vagueness challenges. Indeed, the opinions differ on the appropriate New York and federal precedent attached to the issue,¹¹⁴ which indicates greater opacity accompanies the initially clear two-pronged vagueness analysis.

B. Overbreadth

New York’s overbreadth doctrine is taken from federal jurisprudence and is less contentious than its vagueness analysis. Similar to its federal counterpart, the doctrine is an exception to the general rule against third-party standing stemming from the concern that a law’s expansive scope may dissuade people from exercising their First Amendment rights.¹¹⁵ Its main inquiry focuses on “whether the

¹⁰⁹ *Id.* at 43 (emphasis in original).

¹¹⁰ *Id.*

¹¹¹ *Stuart*, 797 N.E.2d at 44 (emphasis in original).

¹¹² *Id.* at 43.

¹¹³ *Id.* at 44 (emphasis in original).

¹¹⁴ *Id.* at 38 n.10.

¹¹⁵ *Foley*, 731 N.E.2d at 128.

law on its face prohibits a real and *substantial* amount of constitutionally protected conduct.”¹¹⁶ If the prohibition stems from a content-neutral regulation of “time, place, and manner of expression,” it is enforceable as long as it is “narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication.”¹¹⁷ The prohibition is content-neutral if it does not stem from the government’s disagreement with that speech or conduct; in other words, the primary inquiry is into the government’s motive for enacting the restriction.¹¹⁸ Upon finding that a restriction is content-neutral, courts examine whether the “regulation promotes a substantial government interest” by means that are not broader than necessary to fulfill that interest.¹¹⁹ The means adopted do not have to be the least restrictive available, but rather the legislature is afforded flexibility in determining which methods are best suited to constitutionally achieving its valid aims.¹²⁰ In New York’s highest court, the doctrine has not seen the same contention as vagueness challenges have. However, the broad language attending overbreadth jurisprudence leaves lower courts with the leeway to use it in a more liberal fashion than it was perhaps intended for. The court in *Gabriel* exemplified this notion.

IV. MISAPPLICATIONS: OVERBREADTH AND VAGUENESS

Rather than providing a mechanism for judicial action,¹²¹ the overbreadth doctrine is intended to serve as additional protection for First Amendment rights.¹²² As *Gabriel* illustrates, however, broad language allows for expansion and contraction within that language,

¹¹⁶ *People v. Barton*, 861 N.E.2d 75, 79 (N.Y. 2006) (emphasis added).

¹¹⁷ *Id.* at 80 (quoting *Int’l Soc. for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494, 497 (5th Cir. 1989)).

¹¹⁸ *Barton*, 861 N.E.2d at 80.

¹¹⁹ *Id.* at 81 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

¹²⁰ *Id.*

¹²¹ One commentator aptly noted: “The overbreadth doctrine is quite clearly outside the pantheon of ‘passive virtues.’ Rather than serving to postpone and limit the scope of judicial review, it asks that review be hastened and broadened. It results often in the wholesale invalidation of the legislature’s handiwork, creating a judicial-legislative confrontation.” *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852 (1970).

¹²² See *Broadrick*, 413 U.S. 601 (outlining the aims and uses of the overbreadth doctrine); see also *Barton*, 861 N.E.2d at 81 (“The validity of [time, place, or manner] regulations does not turn on a judge’s agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.”).

leading to unduly active decisions. For instance, the court in *Gabriel* questioned the legislative rationale behind the statute, contemplating situations that spoke to the statute's substantive validity and efficacy.¹²³ Testing a statute's significant governmental interest in such a manner is contrary to the language in *Barton*, which *Gabriel* relied upon in its overbreadth analysis.¹²⁴ The court's apparent overzealousness in *Gabriel* in applying the overbreadth doctrine can be tied to its interpretation of broad precedential language. Considering the calls for reluctance associated with the doctrine, the court may have applied it too readily. Courts have cautioned that the doctrine is a drastic measure, or "strong medicine," reserved for laws that infringe upon a substantial amount of protected speech.¹²⁵ That the law here is a content-neutral restriction on conduct bolsters those caveats, as the doctrine's already limited applicability attenuates when the behavior at issue is conduct rather than pure speech.¹²⁶ The opinion in *Gabriel* failed to even mention, and thus presumably consider, these reservations. Rather, in invalidating the statute entirely the court opted for the most drastic measure. Alternatively, and to avoid frustrating legislative objectives and resultant delays, it could have crafted a less restrictive interpretation or demarcated a line of application from which subsequent decisions could act from.¹²⁷ Either would have been preferable here, where the conduct was not pure-speech and in its expressive form, conservation, there existed alternative avenues of communication. Similar to its application of the overbreadth doctrine, the court too readily invalidated the statute on vagueness grounds.

Facial invalidation requires the litigant to show that a statute

¹²³ *Gabriel*, 950 N.Y.S.2d at 884 ("There is a genuine dispute as to whether this regulation serves a significant governmental interest in preventing the spread of CWD. Without addressing the merits of CWD regulations as applicable in New York, the Court must ask if the gathering of deer around a legal food plot as opposed to the proverbial apple tree is not also a concern for CWD transmission?").

¹²⁴ See *Barton*, 861 N.E.2d at 81. Additionally, criticizing the apparent overbreadth and inconsistency of the statute, the court in *Gabriel* reasoned that "[i]t is also not disputed that planting food crops, fruit trees, or cutting brush for deer to eat does not 'concentrate the animals and create extensive face-to-face contact' with deer; this type of feeding is encouraged by the DEC to conserve the deer population." *Gabriel*, 950 N.Y.S.2d at 885. However, drawing on *Barton*, whether certain proscriptions against feeding deer appear inconsistent with other such lawful practices is outside the judicial purview.

¹²⁵ *Foley*, 731 N.E.2d at 128; *Broadrick*, 413 U.S. at 613.

¹²⁶ *Broadrick*, 413 U.S. at 615.

¹²⁷ *The First Amendment Overbreadth Doctrine*, *supra* note 121, at 862.

is invalid in all of its applications.¹²⁸ Accordingly, and as a prerequisite, litigants must first demonstrate the inapplicability of the statute as applied to their situation; the inability to do so means the statute is facially valid.¹²⁹ In *Gabriel*, however, the court addressed the statute's facial challenge prior to the as applied challenge, holding "[b]ecause the regulation [was] facially vague and therefore unconstitutional, its application to Appellant is also unconstitutional."¹³⁰ While that assertion is true, it is premised on the assumption that the statute is unconstitutionally vague as applied to Gabriel. Having established the statute's facial invalidity, the court had to show its invalidity as applied to Gabriel, otherwise its holding of facial invalidity would have been erroneous. The proper analytical cadence is important because it ensures a certain degree of measure before invalidating a statute *in toto*, which courts are rightly hesitant to do.¹³¹ Here, the court's proclivity to invalidate the statute was illustrated by its overbreadth and vagueness analyses. Upon determining the statute was facially invalid, the court gave a terse and conclusory statement as to why the statute was invalid as applied to Gabriel, which was essentially a repetition of its prior analysis on facial invalidity. This analysis is further undermined by the court's apparent admission of the statute's validity as applied to Gabriel: "While the statute as applied in this case does validly prohibit conduct not protected under the First Amendment"¹³² Further, by the court's admission and the statute's clear language, the law was intended to prohibit feeding deer, which Gabriel admitted to doing.¹³³ Any reasonable person would have been on notice that the statute proscribed feeding deer. Thus, as applied to Gabriel the statute appears constitutionally clear, and as a result facially valid.

Similar to its overbreadth treatment, the court's resolution of Gabriel's vagueness challenge was drastic and failed to give suffi-

¹²⁸ *Stuart*, 797 N.E.2d at 37; *see also Morales*, 527 U.S. at 77 (Scalia, J., dissenting) (characterizing facial challenges as "go-for-broke" propositions requiring the litigant to show no valid application exists).

¹²⁹ *Stuart*, 797 N.E.2d at 37.

¹³⁰ *Gabriel*, 950 N.Y.S.2d at 883.

¹³¹ *See Stuart*, 797 N.E.2d at 36 ("[F]acial challenges to statutes are generally disfavored and legislative enactments carry a strong presumption of constitutionality."); *see also Morales*, 527 U.S. at 77 (Scalia, J., dissenting) (urging restraint from facial invalidation).

¹³² *Gabriel*, 950 N.Y.S.2d at 885. *But see id.* at 884 ("The regulation is therefore also unconstitutional as applied to Appellant.").

¹³³ *Id.* at 883, 885; N.Y. COMP. CODES R. & REGS. tit. 6, § 189.3.

cient consideration to alternative solutions, such as applying a narrowing construction.¹³⁴ “Restraint is a counsel of prudence,”¹³⁵ and in the instant case the court would have exercised such had it given more thought to why facial invalidity and the overbreadth doctrine are approached cautiously and applied sparingly.

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¹³⁴ *The First Amendment Overbreadth Doctrine*, *supra* note 121, at 862.

¹³⁵ *Id.* at 849.

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