

SUBVERTING JUSTICE: AN INDICTMENT OF THE ANIMAL ENTERPRISE TERRORISM ACT

BY

KIMBERLY E. MCCOY*

*First they came for the terrorists, and I didn't speak up,
because I wasn't a terrorist.
Or so I thought . . .¹*

The Animal Enterprise Terrorism Act (AETA) creates yet another obstacle for the animal advocacy movement. This article explores the reasons behind the AETA's enactment and its implications for those who advocate on behalf of animals. The author notes the AETA targets individuals based solely on their political ideology and can deter these individuals from exercising their right to free speech due to the threat of being permanently branded as a terrorist. It is this infringement on First Amendment rights, coupled with the AETA's overbreadth and vagueness, that lead the author to conclude the AETA is unconstitutional. The author also notes the many social policy flaws within the

* © Kimberly E. McCoy 2007. Kim McCoy is the Executive Director of Sea Shepherd Conservation Society, an international nonprofit organization whose mission is to defend, conserve, and protect marine wildlife and habitat worldwide. She is also proud to serve on the National Advisory Council of the National Center for Animal Law. McCoy earned her J.D. from Lewis & Clark Law School in 2007, where she specialized in animal and environmental law. She would like to extend her heartfelt gratitude to Laura Ireland Moore and Will Potter for their invaluable comments and input on this paper. She would also like to thank Kristen Monsell, Misty Diana Fedoroff, and the staff of *Animal Law* for their dedication and countless hours of hard work spent verifying, polishing, improving, and shaping this information into a valid resource for others.

¹ The opening statement is the Author's adaptation of a poem attributed to Pastor Martin Niemöller.

They came first for the Communists, and I didn't speak up, because I wasn't a Communist.
Then they came for the Jews, and I didn't speak up, because I wasn't a Jew.
Then they came for the Catholics, and I didn't speak up, because I was a Protestant.
Then they came for me, and by that time there was no one left to speak up.

Peggy T. Berman & Brigid O'Hara-Forster, *Part 2*, Time Mag. (Aug. 28, 1989) (available at <http://www.time.com/time/printout/0,8816,958452,00.html>). A modified version of this poem is inscribed at the New England Holocaust Memorial. The New Eng. Holocaust Meml., *Martin Niemöller*; <http://www.nehm.org/contents/niemoller.html> (accessed Nov. 26, 2007).

AETA and finds that the AETA is unnecessary, as existing laws cover every crime encompassed in its language. These defects lead the author to call for the AETA's repeal and to suggest that individuals look to the judiciary for change.

| | |
|--|----|
| I.INTRODUCTION | 2 |
| II.BACKGROUND INFORMATION..... | 3 |
| A. Terrorism Defined | 3 |
| B. Animal Enterprise Protection Act..... | 4 |
| C. Animal Enterprise Terrorism Act | 6 |
| III.UNCONSTITUTIONALITY | 8 |
| A. Vagueness Doctrine | 8 |
| B. Overbreadth Doctrine | 10 |
| C. Content and Viewpoint Basis | 11 |
| IV.OTHER FLAWS | 13 |
| A. Existing Crimes..... | 13 |
| B. True Terrorism..... | 14 |
| C. Scaremongering | 16 |
| D. Obstruction of Justice | 17 |
| V.CONCLUSION..... | 18 |

I. INTRODUCTION

Despite its own admissions that animal rights activists have taken no lives,² the United States Federal Bureau of Investigation (FBI) categorizes animal advocates as “[o]ne of today’s most serious domestic terrorism threats.”³ This self-contradiction denigrates the experience of those who suffer actual physical violence and threats of lethal terrorism from a multiplicity of other sources. Going one step further, the Departments of Justice (DOJ) and Homeland Security have cited the Animal Liberation Front (ALF) as “the most serious domestic terrorist threat.”⁴ The classification of animal advocates as terrorists has encouraged a

² Federal Bureau of Investigations (FBI), *When Talk Turns to Terror: Homegrown Extremism in the U.S.*, <http://www.fbi.gov/page2/may05/jlewis052305.htm> (May 23, 2005); Terry Frieden, *FBI, ATF Address Domestic Terrorism: Officials: Extremists Pose Serious Threat*, <http://www.cnn.com/2005/US/05/19/domestic.terrorism/index.html> (May 19, 2005) (“No deaths have been blamed on attacks by [animal rights groups].”); FBI, *Congressional Testimony: Statement of John E. Lewis, Deputy Assistant Director: Counterterrorism Division: Federal Bureau of Investigation: Before the Senate Committee on Environment and Public Works*, <http://www.fbi.gov/congress/congress05/lewis051805.htm> (May 18, 2005) (“[M]ost animal rights . . . extremists have refrained from violence targeting human life. . .”) [hereinafter *Lewis Testimony*]; U.S. Sen. Comm. Env. & Pub. Works, *U.S. Senate Committee on Environment and Public Works Hearing Statements: Statement of Senator James M. Inhofe: Oversight on Eco-terrorism Specifically Examining the Earth Liberation Front (ELF) and the Animal Liberation Front (ALF)*, http://epw.senate.gov/hearing_statements.cfm?id=247266 (May 18, 2005) (“Experts agree that [animal rights groups] have not killed anyone to date . . .”).

³ FBI, *Lewis Testimony*, *supra* n. 2.

⁴ U.S. Sen. Comm. Env. & Pub. Works, *supra* n. 2.

disproportionate and largely unfounded element of fear in the American public. This fear has contributed to the enactment of federal legislation that targets individuals based solely upon their political ideology—namely, the Animal Enterprise Terrorism Act (AETA).⁵

Robert Mueller, Director of the FBI, recently stated that the FBI would continue to “investigate and bring to justice the animal rights . . . extremist movements whose criminal acts threaten the American *economy* and American lives.”⁶ When financial interests are mentioned ahead of human lives, one must wonder, exactly whose interests are being protected by this legislation, and at what price to American civil liberties?

This paper offers an in-depth analysis of the AETA, providing relevant background information and noting the absence of a universally accepted definition of terrorism. It explains that the AETA is unconstitutional because it is vague, overbroad, and impermissibly content- and viewpoint-based. The paper also discusses numerous social policy flaws inherent in the AETA, and concludes that, for the reasons outlined herein, the AETA should be repealed.

II. BACKGROUND INFORMATION

A. *Terrorism Defined*

In a nation obsessed with waging “war on terror,”⁷ it is important to know exactly what constitutes terrorism. However, there exists no one universally accepted definition of this powerful and provocative word.⁸ For some people, the word terrorism may conjure up images of commercial airplanes being flown into buildings, killing thousands. Others may picture secret compounds in the wilderness, full of homemade bombs and chemical weapons. Apparently, some people would also include ALF-type actions, such as the rescue of innocent animals from laboratories and factory farms, in their definition of terrorism. Such a notion is absurd, given that the ALF

⁵ Animal Enterprise Terrorism Act, 18 U.S.C.A. § 43 (West 2007) (formerly known as the Animal Enterprise Protection Act; amended by Pub. L. No. 109-374 (Nov. 27, 2006)). The Animal Enterprise Terrorism Act has been officially renamed under § 43 as Force, violence, and threats involving animal enterprises. For practical purposes, the author uses “AETA” when referring to the Act in this article.

⁶ FBI, *Major Executive Speeches: Prepared Remarks of Robert S. Mueller, III: Director, Federal Bureau of Investigation: Operation Backfire Press Conference*, <http://www.fbi.gov/pressrel/speeches/mueller012006.htm> (Jan. 20, 2006) (emphasis added) (accessed Nov. 26, 2007).

⁷ This phrase is used to describe a campaign initiated by President George W. Bush following the September 11, 2001 attacks on the U.S. President Bush referred to the “war on terror” in his address to a joint session of Congress on September 20, 2001. Pres. George W. Bush, *Address to a Joint Session of Congress and the American People* (Wash. D.C., Sept. 20, 2001) (available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>).

⁸ Steven Best & Anthony J. Nocella, II, *Appendix 3: Defining Terrorism*, in *Terrorists or Freedom Fighters? Reflections on the Liberation of Animals* 361, 369–76 (Steven Best & Anthony J. Nocella, II eds., Lantern Bks. 2004).

adheres to “strict nonviolence guidelines” and specifically instructs its members not to harm any human or nonhuman animal.⁹

Individuals, corporations, and government departments have exploited the ambiguity of the word terrorism to the extent that it “is commonly used as a term of abuse, not accurate description.”¹⁰ Consistent with the prevalent with-us-or-against-us mentality,¹¹ the distinction “between good and bad varieties of terrorism . . . is determined by the agent of the crime, not its character.”¹² This line of thinking has created a political climate rich in McCarthyist propaganda and ripe for unconstitutional legislation such as the AETA.

B. *Animal Enterprise Protection Act*

To better understand the AETA, one must first consider its predecessor, the Animal Enterprise Protection Act (AEPA),¹³ and the legislative efforts leading to it. During the late 1980s and early 1990s, Representative Charles W. Stenholm (D-TX) tried repeatedly to enact federal legislation “to prevent, deter, and penalize crimes . . . against U.S. farmers, ranchers, food processors, and agricultural and biomedical researchers.”¹⁴ Representative Stenholm’s attempts include the Farm Animal and Research Facilities Protection Act of 1989 (House Bill 3270), the Farm Animal and Research Facilities Protection Act of 1991 (House Bill 2407 IH), and the Animal Rights Terrorism Act of 1992 (House Bill 2407 RH).¹⁵ These bills were designed to amend the Food Security Act of 1985.¹⁶ They offered steep penalties, required no element of interstate travel, and included provisions for a private right of action by animal facility owners.¹⁷ None were enacted into law.

Prior to the passage of the AEPA, a number of states already had laws

⁹ ALF, *Introducing the Animal Liberation Front*, in *Terrorists or Freedom Fighters?*, *supra* n. 8, at 7 (reprinted from the ALF Primer) (“[T]ake all necessary precautions against harming any animal, human and nonhuman.”); Animal Liberation Front.com, *The ALF Primer: Animal Liberation Guidelines*, <http://animalliberationfront.com/ALFront/ALFPrime.htm#ALF%20Guidelines> (accessed Nov. 26, 2007) (noting that “the ALF does not, in any way, condone violence against any animal, human or non-human. Any action involving violence is by its definition not an ALF action, and any person involved is not an ALF member. [The principle of nonviolence] must be strictly adhered to. In over 20 years, and thousands of actions, nobody has ever been injured or killed in an ALF action.”).

¹⁰ Interview by Sabahattin Atas with Noam Chomsky, Prof. Linguistics & Phil., Mass. Inst. Tech. (Sept. 2003) (available at <http://www.chomsky.info/interviews/200309-.htm>) (accessed Nov. 17, 2007).

¹¹ Pres. Bush, *supra* n. 7 (“Either you are with us, or you are with the terrorists.”).

¹² Interview with Noam Chomsky, *supra* n. 10.

¹³ Animal Enterprise Protection Act of 1992, 18 U.S.C. § 43 (2000) (enacted Aug. 26, 1992; amended by Pub. L. No. 109-374) [hereinafter AEPA].

¹⁴ 135 Cong. Rec. E3079 (daily ed. Sept. 19, 1989) (statement of Hon. Charles W. Stenholm).

¹⁵ H.R. 3270, 101st Cong., 1st Sess. (Sept. 13, 1989); H.R. 2407, 102nd Cong., 2nd Sess. (May 20, 1991).

¹⁶ 135 Cong. Rec. at E3079; Food Security Act of 1985, 7 U.S.C. § 1281 (2006) (1985 amendment to the Agricultural Adjustment Act of 1938).

¹⁷ 135 Cong. Rec. at E3080.

in place that “specifically criminalized economic sabotage by animal liberators.”¹⁸ In fact, Paul L. Maloney, the Deputy Assistant Attorney General for the DOJ’s Criminal Division, testified in 1990 that the DOJ “[could] not endorse the creation of new federal legislation which, in [the DOJ’s] view, would add nothing to the prosecution of [animal rights motivated] offenses.”¹⁹ Nevertheless, on March 5, 1991, Senator Howell Heflin (D-AL) introduced Senate Bill 544, which ultimately passed in lieu of related House Bill 2407 and was signed into law on August 26, 1992 as the AEPA.²⁰ Congress amended the AEPA’s restitution provisions in 1996²¹ and increased its maximum penalties in 2002.²²

The AEPA created a special offense—beyond existing criminal provisions—for any person traveling or using the mail in “interstate or foreign commerce . . . for the purpose of causing a *physical* disruption to the functioning of an animal enterprise.”²³ Penalties included fines and the possibility of imprisonment, ranging from a maximum of one year to life.²⁴ However, it soon became clear that these provisions were not enough to satisfy certain special interest groups.

In 2003, the American Legislative Exchange Council (ALEC)—supported by tobacco, petroleum, pharmaceutical, and transportation companies—proposed new model legislation targeting animal advocates.²⁵ This legislation, known as the Animal and Ecological Terrorism Act, was flawed in many of the same ways as the AETA is flawed. In 2004, the FBI testified before the Senate Judiciary Committee, claiming the need for stronger legislation to protect against secondary and tertiary targeting of

¹⁸ Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 Buff. L. Rev. 765, 818, n. 296 (Winter 1995).

¹⁹ *Id.* at 819 (quoting testimony from *Animal Research Facility Protection: Joint Hearing Before the Subcomm. on Dept. Operations, Research, & For. Agric., and the Subcomm. on Livestock, Dairy, & Poultry of the House Comm. on Agric.*, 101st Cong., 2d Sess. 2 (Feb. 28, 1990)).

²⁰ Sen. 544, 102nd Cong., 1st Sess. (Mar. 5, 1991).

²¹ AEPA, 18 U.S.C. § 43 (as amended by Pub. L. No. 104-294 (1996)); Will Potter, *Animal Enterprise Protection Act*, <http://www.greenisthenewred.com/blog/aepa/> (July 29, 2006).

²² AEPA, 18 U.S.C.A. § 43 (West Supp. IV 2006) (as amended by Pub. L. No. 107-188, Title III, § 336).

²³ *Id.* at § 43(a)(1) (emphasis added).

²⁴ *Id.* at §§ 43(a)–(c).

²⁵ For a comprehensive analysis of the American Legislative Exchange Council’s (ALEC) failed legislation, see Andrew N. Ireland Moore, *Caging Animal Advocates’ Political Freedoms: The Unconstitutionality of the Animal and Ecological Terrorism Act*, 11 Animal L. 255 (2005); ALEC, *Animal Rights and Ecological Terrorism Act*, Fact Sheet, <http://www.alec.org/2/criminal-justice/animal-rights-and-ecological-terrorism-act.html> (accessed Nov. 26, 2007) (proposing that the bill addresses “forms of terror” committed in the name of animal rights and does not inhibit one’s right to speak or protest); see also Press Release, ALEC, *ALEC Offers Legislation to Fight Domestic Terror by Animal and Eco-Extremist Groups: “Let’s Call a Terrorist, a Terrorist,” Says ALEC* (Sept. 13, 2003) (offering ALEC’s position that legislation will assist in fighting acts of domestic terror by animal rights groups) (available at <http://www.alec.org/news/press-releases/press-releases-2003/september/alec-offers-legislation-to-fight-domestic-terror-by-animal-rights-and-eco-extremist-groups.html>).

animal enterprises.²⁶ As evidence of this alleged need, the FBI pointed to Stop Huntingdon Animal Cruelty (SHAC), an animal advocacy group that maintained a website that reported direct actions—both legal and illegal—taken by third parties against companies doing business with Huntingdon Life Sciences, a notorious animal testing facility.²⁷

C. *Animal Enterprise Terrorism Act*

Last November, the FBI got what it wanted.²⁸ Following two unsuccessful related bills,²⁹ Senator James M. Inhofe (R-OK) introduced Senate Bill 3880—now the AETA—to amend and rectify alleged gaps and loopholes in the existing AEPA.³⁰ The AETA serves the primary function of expanding the AEPA to cover secondary and tertiary targets, such as family members or any “person or entity having a connection to, or relationship with, or transactions with an animal enterprise.”³¹ It also disproportionately increases penalties and permanently brands alleged perpetrators—even those who are *not* accused of instilling fear, inflicting bodily injury, or causing any economic damage—as terrorists.³²

The AETA was strongly supported by industry-backed advocacy groups such as ALEC,³³ the Center for Consumer Freedom (CFC),³⁴ and the United States Sportsmen’s Alliance (USSA).³⁵ However, the driving force behind the AETA was the Animal Enterprise Protection Coalition (AEPC).³⁶ Founded by

²⁶ U.S. Sen. Comm. Jud., *Animal Rights: Activism vs. Criminality: Statement of John E. Lewis, Deputy Assistant Director: Counterterrorism Division: Federal Bureau of Investigation: Before the Senate Judiciary Committee*, http://judiciary.senate.gov/testimony.cfm?id=1196&wit_id=3460 (May 18, 2004).

²⁷ *Id.*

²⁸ Pub. L. No 109-374, 120 Stat. 2652 (2006) (amended AEPA, and changed title to AETA).

²⁹ Sen. 1926, 109th Cong. (Oct. 27, 2005) (sponsored by Senator James M. Inhofe (R-OK); not enacted into law); H.R. 4239, 109th Cong. (Nov. 4, 2005) (sponsored by Representative Thomas E. Petri (R-WI); not enacted into law).

³⁰ Sen. 3880, 109th Cong., 2nd Sess. (Sept. 8, 2006). During the House of Representatives AETA hearing, the DOJ emphasized how its “hands were tied” from protecting the targets of animal rights advocates under existing law, but failed to mention the successful prosecution and conviction of the SHAC7 only months earlier using the very law it now claimed was inadequate. Will Potter, *An Analysis of the Animal Enterprise Terrorism Act*, <http://www.greenisthenewred.com/blog/aeta-analysis-109th/> (Oct. 10, 2006); Press Release, U.S. Atty’s Office: Dist. of N.J., *Militant Animal Rights Group, Six Members Convicted in Campaign to Terrorize Company, Employees and Others* (March 2, 2006) (available at http://www.usdoj.gov/usao/nj/press/files/shac0302_r.htm).

³¹ 120 Stat. at 2653–2654 (amending 18 U.S.C.A. § 43(a)(2)(A)).

³² *See id.* at § 43(b)(1) (penalties apply “if the offense does not instill in another the reasonable fear of serious bodily injury or death”).

³³ Press Release, Natl. Laws. Guild, *National Lawyers Guild Opposes Animal Enterprise Terrorism Act* (Oct. 30, 2006) (available at http://www.nlg.org/news/statements/AETA_Act.htm).

³⁴ Ctr. Consumer Freedom, *New Law Scares the Animal Rights Fringe. It Should.*, http://www.consumerfreedom.com/news_detail.cfm?headline=3179 (Nov. 14, 2006).

³⁵ U.S. Sportsmen’s Alliance, *Federal Bills Crack Down on Animal Rights Terrorism*, <http://www.ussportsmen.org/Read1.cfm?ID=1825&programdocs=AH> (July 24, 2006).

³⁶ Natl. Assn. Biomedical Research, *Animal Enterprise Protection Coalition*, <http://www.nabr.org/AEPC/OnePager.htm> (accessed Nov. 26, 2007).

the National Association of Biomedical Researchers (NABR),³⁷ the AEPC comprises a multitude of deep-pocketed animal exploiting industries, including furriers, ranchers, hunters, biomedical researchers, rodeos, circuses, and pharmaceutical companies.³⁸ Members of the AEPC have a vested financial interest—as the types of enterprises afforded unprecedented special protection under the AETA—as well as the resources and political clout necessary to push the AETA through Congress.

On the other side of the field—voicing direct opposition to the AETA—stands a very different coalition. The Equal Justice Alliance (EJA), formed in response to this legislative assault on animal advocates, is a national alliance of more than two hundred social advocacy groups.³⁹ Despite opposition from these hundreds of groups and concerned individuals, the far-from-non-controversial AETA was stealthily pushed through the House of Representatives (House) with minimal debate and passed by a voice vote of only five representatives.⁴⁰ Ironically, this vote took place mere hours after a groundbreaking ceremony for a national memorial honoring Martin Luther King, Jr., during which congressmen praised King's once-controversial civil rights tactics—similar to those currently employed by animal advocates—as “good [and] necessary trouble.”⁴¹ The AETA was officially signed into law on November 27, 2006.⁴²

Perhaps most disconcerting is the lack of leadership demonstrated by the American Civil Liberties Union (ACLU) on this matter. While groups like the National Lawyers Guild spoke out vehemently against the AETA,⁴³ the ACLU wavered between supporting and opposing the bill. Initially, the ACLU strongly urged Congress to oppose the AETA, citing numerous flaws in earlier versions of the bill.⁴⁴ Several months later, the ACLU withdrew its opposition, while simultaneously continuing to express several serious concerns.⁴⁵ Not surprisingly, the changes recommended by the ACLU were

³⁷ *Id.*

³⁸ Fur Commn. U.S., *Animal Enterprise Protection Coalition: Supporting Groups*, <http://www.furcommission.com/resource/pressSFbills.htm> (accessed Nov. 26, 2007).

³⁹ Equal Just. Alliance, *AETA Opposition List*, <http://www.noaeta.org/opposition.htm> (accessed Nov. 26, 2007). The Equal Justice Alliance continues to monitor the application of the AETA and fight for its repeal. *Id.*

⁴⁰ Will Potter, *Animal Enterprise Terrorism Act Signed into Law*, 27:2 Earth First! J. 8, 8–9 (Jan. 2007) (available at <http://www.earthfirstjournal.org/article.php?id=1&PHPSESSID=ab319fd6fbce5fdc0c7fe92af6cde736>). Congressman and 2008 Presidential Candidate Dennis Kucinich (D-OH) provided the only voice of dissent. See Equal Just. Alliance, *AETA Report*, <http://www.noaeta.org/report.htm> (Nov. 13, 2006) (eye witness account of Kucinich's participation by Dr. Alex Hershaft, founder of Farm Animal Reform Movement).

⁴¹ Pub. Broad. Serv., *Thousands Attend Groundbreaking for MLK Memorial: Leaders Reflect on King's Work*, http://www.pbs.org/newshour/bb/social_issues/july-dec06/mlk_11-13.html (Nov. 13, 2006).

⁴² 120 Stat. (amending 18 U.S.C.A. § 43).

⁴³ Press Release, *supra* n. 33.

⁴⁴ American Civil Liberties Union (ACLU), *ACLU Letter to Congress Urging Opposition to the Animal Enterprise Act, S. 1926 and H.R. 4239*, <http://aclu.org/freespeech/gen/25620leg20060306.html> (Mar. 6, 2006).

⁴⁵ Ltr. from Caroline Fredrickson, Dir., Wash. Legis. Off. ACLU & Marvin J. Johnson, Legis.

not incorporated into the final version of the bill.⁴⁶ After the House vote, but before the AETA was signed into law, the ACLU stated that it “did not and does not support the AETA [and] that expanding 18 U.S.C. § 43 [the AEPA] was unnecessary.”⁴⁷ The ACLU noted that it was “disappointed” with the final version of the AETA and would monitor its application in the future.⁴⁸ Quite possibly, the ACLU’s silence on this issue gave a green light for “the Green Scare,”⁴⁹ allowing an unconstitutional and unnecessary piece of legislation to be signed into federal law with the seeming endorsement of the ACLU.

III. UNCONSTITUTIONALITY

Drafters of the AETA have gone to great lengths to reassure Congress and members of the public that the statute is, in fact, constitutional.⁵⁰ However, “saying, ‘[t]his law is constitutional,’ doesn’t make it so. If anything, it’s an admission that the bill has serious flaws.”⁵¹ The AETA is unconstitutional because it is impermissibly vague, overbroad, and based entirely on content and viewpoint.

A. *Vagueness Doctrine*

As a matter of constitutional due process, laws must be drafted clearly; the language used must put the public on notice as to what specific conduct will trigger prosecution.⁵² The vagueness doctrine is one facet of this notice requirement. Under the vagueness doctrine, a statute is unconstitutional and must be struck down if it fails to specify a standard of conduct, such that “men of common intelligence must necessarily guess at its meaning.”⁵³ In *Coates v. City of Cincinnati*, the United States Supreme Court found invalid an ordinance prohibiting three or more people from assembling on a sidewalk and engaging in conduct that was “annoying” to others.⁵⁴ The Court held that the ordinance was vague, because what “annoys some people does not annoy others.”⁵⁵ Members of the public must not be left guessing at what

Counsel ACLU, to Hon. F. James Sensenbrenner, Jr., Chairman, H. Jud. Comm. & Hon. John Conyers, Jr., Ranking Member, H. Jud. Comm., *ACLU Urges Needed Minor Changes to AETA, But Does Not Oppose Bill (S. 3880, the “Animal Enterprise Terrorism Act”)* 1 (Oct. 30, 2006) (available at http://www.aclu.org/images/general/asset_upload_file809_27356.pdf).

⁴⁶ E-mail from ACLU to Equal Just. Alliance, *RE: S 3880 (LTK6907566704X)* (Nov. 20, 2006, 9:32 a.m. EDT) (available at <http://www.noaeta.org/aclu.htm>).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Potter, *supra* n. 40.

⁵⁰ 120 Stat. at 2654 (amending 18 U.S.C.A. § 43(e)) (“Nothing in this section shall be construed . . . to prohibit any expressive conduct . . . protected . . . by the First Amendment . . . or to preempt State or local laws.”).

⁵¹ Potter, *supra* n. 40.

⁵² *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

⁵³ *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (quoting *Connally*, 269 U.S. at 391).

⁵⁴ *Id.* at 611.

⁵⁵ *Id.* at 614.

is prohibited, but should be given fair warning and a precise description of the prohibited conduct, so that they may act accordingly.⁵⁶

Similar to the word “annoying” in the *Coates* ordinance, the word “interfere” in the AETA subjects people to an “unascertainable standard.”⁵⁷ The potential for infringement of First Amendment rights calls for a greater than usual clarity; however, the AETA does not define the term “interfere” or set forth in a precise manner what would trigger prosecution. The AEPA, prior to its amendment by the AETA, criminalized the “*physical* disruption” of an animal enterprise.⁵⁸ This language was expanded by the AETA to include not only physical disruption, but seemingly any form of interference with an animal enterprise.⁵⁹ But what sort of conduct constitutes “interference”? In the absence of any limiting construction or clarification, it is difficult for a reasonable person to be expected to understand exactly what conduct is prohibited.

The term “property” is also not defined by the AETA, creating another vagueness issue. The ACLU expressed concerns that the AETA’s failure to specify “real or personal property” as “tangible” property could lead to prosecution based on intangibles, such as lost profits or loss of business good will.⁶⁰ Such losses are the very goal of peaceful activities such as boycotts, protests, demonstrations, undercover investigations, and whistle blowing. The ACLU noted that while lawful economic disruption is exempted in the penalty provisions of the AETA, an additional and explicit exemption from “the broad prohibition on ‘the loss of any real or personal property’” is necessary to avoid infringement upon legitimate activities.⁶¹

In addition to the danger of “trap[ping] the innocent,” the AETA’s vagueness creates an opportunity for arbitrary and discriminatory enforcement.⁶² When explicit standards are not provided in the language of a statute, upon whose discretion do those determinations rest? Who decides what constitutes interference or whether loss of business good will is a legitimate basis for prosecution? These policy judgment calls would be delegated to police officers, judges, and jurors, but such delegation is constitutionally impermissible due to its “ad hoc and subjective” nature.⁶³ Equally problematic is the chilling effect resulting from the vague language of the AETA. This effect will be discussed in greater detail below.

B. Overbreadth Doctrine

Even if the AETA were not vague, it would still be unconstitutional,

⁵⁶ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

⁵⁷ *Coates*, 402 U.S. at 614.

⁵⁸ AEPA, 18 U.S.C.A. § 43(a)(1) (emphasis added).

⁵⁹ 120 Stat. at 2652 (amending 18 U.S.C.A. § 43(a)(1)) (“for the purpose of damaging or interfering with the operations of an animal enterprise”).

⁶⁰ Ltr. from Caroline Fredrickson, *supra* n. 45, at 1–2.

⁶¹ *Id.* at 2.

⁶² *Grayned*, 408 U.S. at 108.

⁶³ *Id.* at 108–09.

because the Act prohibits protected conduct.⁶⁴ Under the overbreadth doctrine, if a statute forbids the sort of expression that may not legally be regulated—expression protected by the First and Fourteenth Amendments of the United States Constitution, such as civil disobedience—it is considered overbroad and, thus, void. Even Representative Robert Scott (D-VA), a strong proponent of the AETA, expressed concerns during a congressional hearing on an earlier version of the bill that civil disobedience could potentially be covered under the AETA.⁶⁵ Such concerns are not to be taken lightly.

There are two main ways in which the AETA is overbroad. First, the dictionary definition of “interference” covers a substantial amount of protected speech. Second, the term “animal enterprise” could be interpreted to include unlawful animal industries, as well as lawful ones. These potential problems are discussed in greater detail below.

First, courts often look to the common usage or dictionary definition of a term that is not defined by a statute.⁶⁶ “Interference” is commonly defined as “the act of meddling in another’s affairs; an obstruction or hindrance.”⁶⁷ This definition clearly reaches a substantial amount of constitutionally protected speech, as it provides no limiting principle to “restrict the statute’s reach only to speech that rises ‘far above public inconvenience, annoyance, or unrest.’”⁶⁸ The danger of overbreadth is that it might lead people to refrain from the expression of valuable and constitutionally protected speech for fear of criminal sanctions, based on uncertainty as to whether the AETA could reach their expression.

Second, under the AETA, an “animal enterprise” is defined to include virtually any business that uses or sells animals or animal products in any way and for any purpose.⁶⁹ This definition, coupled with the fact that remote second and third parties have now been folded into the statute,⁷⁰ effectively means that anyone with any connection to a business using animals in any way is afforded special protection. The long list of protected animal

⁶⁴ *Id.* at 114.

⁶⁵ H. R. Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Jud., *Animal Enterprise Terrorism Act: Hearing on H.R. 4239*, 109th Cong 3 (available at <http://judiciary.house.gov/media/pdfs/printers/109th/27742.pdf>) (May 23, 2006).

⁶⁶ *Fed. Deposit Ins. Co. v. Meyer*, 510 U.S. 471, 476 (1993); Ronald Benton Brown & Sharon Jacobs Brown, *Statutory Interpretation: The Search for Legislative Intent*, 38–40 (National Institute for Trial Advocacy 2002).

⁶⁷ *Black’s Law Dictionary* 831 (Bryan A. Garner, ed., 8th ed., West 2004).

⁶⁸ ACLU, Brief for Amicus Curiae American Civil Liberties Union in Support of Appellant at 7, *Cmmw. Pa. v. Haagensen* (Dec. 28, 2005) (quoting *Terminello v. Chicago*, 337 U.S. 1, 4 (1949)) (“Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”) [hereinafter *Amicus Brief*].

⁶⁹ See 120 Stat. at 2653 (amending 18 U.S.C.A. § 43(d)(1)) (including an entity that is a “commercial or academic enterprise,” “zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event,” and any event “intended to advance agricultural arts and sciences”).

⁷⁰ *Id.* at 2652 (amending § 43(a)(2)(A)).

enterprises not only includes grocery stores, restaurants, clothing stores, and the usual suspects—factory farms, furriers, laboratories, rodeos, and circuses—but could also be interpreted to mandate the protection of *unlawful* animal enterprises from interference by concerned persons. The ACLU cautions that, in an earlier version of the Act, a person who rescues an animal before an illegal fight could be charged as a terrorist under the AETA.⁷¹ Despite modifications specifying the protection of “*lawful* competitive animal event[s],” the AETA remains overbroad, because it does not make clear that interference with other unlawful animal enterprises does not trigger the statute.⁷²

C. Content and Viewpoint Basis

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”⁷³ The First Amendment forbids government regulation of speech when the rationale for restriction is based on the speaker’s “ideology[,] opinion or perspective.”⁷⁴ The danger inherent in favoring one viewpoint at the expense of another is that doing so permits the government to “effectively drive certain ideas or viewpoints from the marketplace.”⁷⁵ The AETA indisputably singles out animal advocates based upon their ideology and seeks to suppress a particular point of view. As such, the AETA is presumptively invalid.⁷⁶

When contrasted with other politically motivated crimes—especially those involving actual violence—the singling out of animal advocates based on viewpoint becomes particularly evident. For example, it is well documented that anti-abortion activists have threatened, injured, and even *murdered* doctors for performing abortions.⁷⁷ Congress’s response to these violent and sometimes deadly crimes was to enact the Freedom of Access to Clinic Entrances Act (FACE).⁷⁸ Under FACE, first time offenders who cause no bodily injury may receive up to six months imprisonment.⁷⁹ Meanwhile, their nonviolent counterparts under the AETA are inexplicably subject to

⁷¹ Ltr. from Caroline Fredrickson, *supra* n. 45, at 2.

⁷² *Id.*

⁷³ *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (“The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.”).

⁷⁴ U.S. Const. amend. I; *Rosenberger v. Rector & Visitors U. Va.*, 515 U.S. 819, 829 (1995).

⁷⁵ *Members City Council v. Taxpayers Vincent*, 466 U.S. 789, 804 (1984); *Amicus Brief, supra* n. 68, at 14 (quoting *Simon & Schuster, Inc. v. Members St. Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

⁷⁶ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

⁷⁷ Frederick Clarkson, *Anti-Abortion Violence: Two Decades of Arson, Bombs and Murder*, <http://www.splcenter.org/intel/intelreport/article.jsp?aid=411> (accessed Nov. 26, 2007) (a Southern Poverty Law Center Intelligence Report from Summer 1998).

⁷⁸ Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (2000).

⁷⁹ *Id.* at § 248(b)(1).

twice the imprisonment—up to one year.⁸⁰ The only difference here is the ideology behind the crimes.

Unlike animal advocates, anti-abortion activists—who have a history of violence and murder—have not been labeled by the government as terrorists. One must wonder why a statute designed to prosecute violent activists was given such a benign name. Why was FACE not entitled the Abortion Clinic Terrorism Act? The word terrorism was certainly being tossed about at that time.⁸¹ FACE was enacted two years after the original AEPA, which even then was placed in its own newly created statutory category of “Animal Enterprise Terrorism.”⁸²

The answer to this question is simple: the AETA was specifically designed to target and suppress the viewpoints of animal advocates. There is no better way to stifle dissent and drive a viewpoint from the marketplace than to brand its proponents as terrorists. While a person who murders an abortion doctor is not labeled a terrorist, a person who spray paints the word “murderer” on a fur store window without harming a single human could be convicted under a federal terrorism statute and thus placed on par with the perpetrators of such atrocities as the Oklahoma City bombing, the Atlanta Olympic Park bombing, or 9-11.

Even perpetrators of hate crimes have been protected against laws that would single them out for their beliefs. In *R.A.V. v. City of St. Paul, Minnesota*, the Supreme Court found a local hate crime ordinance facially invalid on the basis of content discrimination.⁸³ In *R.A.V.*, a group of teenagers accused of burning a cross in the fenced yard of an African-American family was punished under the St. Paul Bias-Motivated Crime Ordinance.⁸⁴ This ordinance prohibited any act designed to arouse “anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender.”⁸⁵ While hate crimes are undeniably repugnant, other laws existed in this case—such as those dealing with arson and trespass—that would have been sufficient for prosecution.⁸⁶ Despite understanding the city’s desire to

⁸⁰ 120 Stat. at 2652 (amending 18 U.S.C.A. § 43(b)(1)).

⁸¹ See Tamar Lewin, *Clinic Firebombed in Pennsylvania*, N.Y. Times, <http://query.nytimes.com/gst/fullpage.html?res=9F0CE2DB153EF933A0575AC0A965958260> (Sept. 30, 1993) (reporting that the president of Planned Parenthood demanded that the U.S. Attorney General classify violent attacks on abortion clinics as domestic terrorism); Douglas Jehl, *Iran-Backed Terrorists Are Growing More Aggressive, U.S. Warns*, N.Y. Times (March 18, 1993) (available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE4D61638F93BA25750C0A965958260>) (reporting that U.S. officials feared Iranian militant groups represented the greatest threat of a likely increase in terrorism around the world).

⁸² Pub. L. No. 102-346, § 2(a), 106 Stat. 928 (1992) (“IN GENERAL.—Title 18, United States Code, is amended by inserting after section 42 the following: ‘§ 43. Animal enterprise terrorism’”); Upon amendment by the AETA, section 43 was renamed “Force, violence, and threats involving animal enterprises,” and the word “terrorism” was shifted into the very title of the Act. 18 U.S.C.A. § 43.

⁸³ 505 U.S. at 377.

⁸⁴ *Id.* at 380.

⁸⁵ *Id.*

⁸⁶ *Id.* at 379–80.

communicate that it did not condone hate crimes, the Court held that this desire “does not justify selectively silencing speech on the basis of its content” and struck the ordinance down as unconstitutional.⁸⁷

Valid constitutional legislation must examine the criminality of an act, rather than the motivation behind it. “[N]onverbal expressive activity can be banned because of the action it entails, but *not* because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.”⁸⁸ Consider, for example, an angry woman who crosses state lines to smash the computers at her husband’s laboratory, release the subjects of his research, and spray paint the word “adulterer” on the wall after learning that the husband had cheated on her with his research assistant. She might be charged under *state* law for crimes such as trespass, property destruction, theft, or vandalism. But if that same woman was driven by an ideological opposition to animal testing—rather than an emotional reaction to her husband’s infidelity—and had spray painted the acronym “ALF” on the laboratory wall instead of the word “adulterer,” she could be branded a terrorist and prosecuted under the *federal* AETA for committing the *exact same crimes*.

As discussed below, every offense listed in the AETA is already an established crime. The only thing rendering the AETA unique from existing laws is its focus on the ideological motivation behind the crimes. The AETA adds nothing other than an element of special protection for animal enterprises that is based solely on the philosophy and beliefs of the perpetrators. The AETA is entirely content and viewpoint based, and thus in direct violation of the First Amendment.

IV. OTHER FLAWS

In addition to being unconstitutional, the AETA contains numerous social policy flaws. First, the AETA solely regulates existing crimes and removes these crimes from state or local jurisdiction to federal jurisdiction. Second, the Act diverts limited resources and efforts that might otherwise be directed toward fighting true terrorism. Third, the AETA was designed to stigmatize animal advocacy and generate a chilling effect within the movement. Fourth, it impedes the investigation of animal enterprises that have repeatedly violated existing animal protection laws.

A. Existing Crimes

In March 2006, the ACLU stated that the AETA is “unnecessary because federal criminal laws already provide a wide range of punishments for unlawful activities targeting animal enterprises.”⁸⁹ Animal enterprises could

⁸⁷ *Id.* at 378.

⁸⁸ Ireland Moore, *supra* n. 25, at 267 (quoting *R.A.V.*, 505 U.S. at 385) (emphasis added).

⁸⁹ Ltr. from Caroline Fredrickson, *supra* n. 45. (While this letter refers to earlier versions of

easily invoke existing laws for any of the crimes covered by the AETA. The AETA encompasses such inveterate crimes as trespass, property damage, property destruction, arson, theft, vandalism, harassment, intimidation, criminal assault, and murder, as well as conspiring or attempting to commit any of these offenses.⁹⁰ In doing so, the AETA both improperly intrudes upon state and local government jurisdiction and imposes enhanced and disproportionate penalties based solely on the motivation behind the crime. Even Representative Scott, a staunch supporter of the AETA, has acknowledged that people who, for example, sit or lie down to block traffic into a facility already run the risk of arrest under existing laws, and thus “should not be held any more accountable for business losses. . . than anyone else guilty of such activities.”⁹¹

Proponents of the AETA, such as Representative Thomas Petri (R-WI), claimed that existing laws were inadequate to provide protection to animal enterprises,⁹² despite the fact that the AEPA had recently been used to successfully prosecute members of SHAC for merely running a website.⁹³ As a result of this prosecution, six nonviolent, above-ground animal activists—not one of whom was charged with actual trespass, property destruction, or even attending demonstrations, let alone harming or attempting to harm any living being—have been permanently branded as terrorists and are currently serving significant federal prison sentences.⁹⁴

“Governments have a legitimate and rational basis for regulating such activity in order to protect their citizens. Regulations and prohibitions, however, should be entirely based on the offender’s conduct rather than the actor’s politics or moral beliefs.”⁹⁵ Under no circumstances does the conduct of the SHAC activists warrant such exaggerated and disproportionate punishment. In fact, it is questionable whether they should be punished at all for merely engaging in what many would consider protected speech on the Internet. Perhaps this is the one currently legal activity that the AETA now seeks to criminalize—the First Amendment right to free speech.

B. True Terrorism

Rather than combating true terrorism, it is arguable that “inequitable and oppressive laws” such as the AETA may actually “propel pacifists into action, as depicted in the movie, *Catch a Fire*.”⁹⁶ *Catch a Fire* tells the true

the AETA, the ACLU’s position is no less applicable, because it was directed at the bill as a whole, not individual provisions).

⁹⁰ 120 Stat. at 2652 (amending 18 U.S.C.A. § 43(a)(2)).

⁹¹ Comm. Jud., *supra* n. 65, at 3.

⁹² Potter, *supra* n. 40.

⁹³ Press Release, DOJ, *Militant Animal Rights Group, Six Members Convicted in Campaign to Terrorize Company, Employees and Others* (Mar. 2, 2006) (available at <http://newark.fbi.gov/dojpressrel/2006/nk030206usa.htm>) [hereinafter Press Release].

⁹⁴ *Id.*; The SHAC7 Support Fund, *The SHAC 7*, <http://www.shac7.com/case.htm#ssc> (accessed Nov. 26, 2007).

⁹⁵ Ireland Moore, *supra* n. 25, at 278.

⁹⁶ Charlotte Laws, *AETA and the New Green Scare: Are You the Terrorist Next Door?*,

story of a man falsely accused of bombing an oil refinery during the apartheid in 1980.⁹⁷ By labeling this innocent man a terrorist, the South African government ultimately “wakes him up to injustice and ignites him into action,” essentially creating a rebel fighter where none would otherwise have existed.⁹⁸

Whether this analogy will hold true for those accused of terrorism under the AETA remains to be seen. Regardless, treating nonviolent animal advocates as terrorists does a complete disservice to the public, as it inspires unwarranted fear and imposes a misdirected burden on efforts to combat true terrorism. The limited resources available for this purpose should not be exhausted in pursuit of nonviolent activists who pose no threat to the community.

The fact that it has become publicly acceptable to draw comparisons between vegetarian advocacy groups and the Taliban is a clear indication that things have gone too far.⁹⁹ In 2005, Senator and 2008 Presidential Candidate Barack Obama (D-IL) testified before Congress that he does “not want people to think that the threat from [animal rights] organizations is equivalent to other crimes faced by Americans every day.”¹⁰⁰ Citing the FBI’s own statistics, Obama pointed out the vast discrepancy between hate crimes (over 7,400 in 2003) and crimes motivated by animal rights ideology (approximately 60 in 2004).¹⁰¹

The Southern Poverty Law Center (SPLC), a group that monitors hate crimes and extremist activity,¹⁰² has stated that labeling animal rights advocates as the “No. 1 threat” to the American public is “simply ludicrous.”¹⁰³ The SPLC acknowledges that no deaths have resulted from animal rights activism, and certainly “nothing on the terror scale of Oklahoma City or the 1996 Olympics has been committed.”¹⁰⁴ All too familiar with the dangers of right-wing extremist groups known to kill police officers and hundreds, if not thousands, of innocent people, it seems as though the

<http://www.counterpunch.org/laws01262007.html> (Jan. 26, 2007).

⁹⁷ *Id.*; *Catch a Fire* (Mirage Enterprises 2006) (motion picture).

⁹⁸ Laws, *supra* n. 96.

⁹⁹ Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protectionists as Terrorists*, 22 Pace Env'tl. L. Rev. 261, 326, n. 315 (2005) (discussing the fact that Veronika Atkins, widow of Dr. Atkins, creator of the Atkins diet, directly compared a pro-vegetarian health advocacy group to the Taliban during a February 20, 2004 episode of Dateline).

¹⁰⁰ U.S. Sen. Comm. Env. & Pub. Works, *U.S. Senate Committee on Environment and Public Works Hearing Statements: Statement of Senator Barack Obama: Oversight on Eco-terrorism Specifically Examining the Earth Liberation Front (“ELF”) and the Animal Liberation Front (“ALF”)*, http://epw.senate.gov/hearing_statements.cfm?id=237833 (May 18, 2005).

¹⁰¹ *Id.*

¹⁰² S. Poverty L. Ctr., *About the Center: Advocates for Justice and Equality*, <http://www.splcenter.org/center/about.jsp> (accessed Nov. 26, 2007).

¹⁰³ Henry Schuster, *Domestic Terror: Who’s Most Dangerous? Eco-terrorists Are Now above Ultra-right Extremists on the FBI Charts*, <http://www.cnn.com/2005/US/08/24/schuster.column/> (Aug. 24, 2005); Chris Maag, *America’s #1 Threat*, Mother Jones (Jan./Feb. 2006), available at http://www.motherjones.com/news/outfront/2006/01/america_no1_threat.html.

¹⁰⁴ Schuster, *supra* n. 103.

SPLC would prefer to see domestic anti-terrorism resources and energies focused on true terrorists, such as the Ku Klux Klan; anti-semitic, anti-homosexual, and other hate groups; anti-government radicals; and other violent extremists who actually pose a threat to society.¹⁰⁵ Such a focus would undoubtedly be a better use of the FBI's time and money, and would serve to protect the public from true threats of domestic terrorism.

C. Scaremongering

In an era in which a Disney-like children's movie about saving endangered owls is deemed "soft core eco-terrorism' for kids," people are understandably on edge.¹⁰⁶ The AETA was designed to further this scaremongering, sending a powerful message to above-ground activists: Watch your step, or you, too, might be convicted of terrorism. Due in large part to its vagueness and overbreadth, the AETA has, as predicted, already begun to "chill and deter Americans from exercising their First Amendment rights to advocate for reforms in the treatment of animals."¹⁰⁷ This chilling effect has been documented by Will Potter, an award-winning journalist specializing in the "war on terror" and its effect on civil liberties:¹⁰⁸ "Through my interviews with grassroots animal rights activists, national organizations, and their attorneys, I have heard widespread fears that the word 'terrorist' could one day be turned against them, even though they use legal tactics."¹⁰⁹

In a 2006 press release, the DOJ falsely vilified SHAC activists by referring to them as transients and "thugs [who] engage in . . . violence."¹¹⁰ Not one of these individuals was charged with a violent crime, but their reputations have now been permanently stained thanks to the DOJ's deceitful choice of words. Such tactics, combined with the fear inspired by the AETA itself, have certainly given activists a reason for pause and concern. No rational person wants to risk being labeled a thug and a terrorist by the United States government. Thus, the exercise of constitutionally protected speech has been put on hold by many, as people scramble to interpret this vague and overbroad statute and guess at what it might mean to them. The fact that animal advocates have additionally now been singled out for potential federal criminal wiretapping¹¹¹ or upward departure from existing federal sentencing guidelines¹¹² understandably

¹⁰⁵ *Id.*

¹⁰⁶ Marc Morano, *New Movie Called 'Soft Core Eco-terrorism' for Kids*, <http://www.cnsnews.com/ViewSpecialReports.asp?Page=/SpecialReports/archive/200605/SPE20060501a.html> (May 1, 2006).

¹⁰⁷ Ltr. from Caroline Fredrickson, *supra* n. 45.

¹⁰⁸ Will Potter, *Bio*, <http://www.greenisthenewred.com/blog/bio/> (Apr. 20, 2006).

¹⁰⁹ Comm. Jud., *supra* n. 65, at 26.

¹¹⁰ Press Release, *supra* n. 93.

¹¹¹ Pub. L. No. 109-177, 120 Stat. 192, 209 (2006) (amending 18 U.S.C. § 2516(1)(c) (2000) to authorize the "interception of wire or oral communications" by the FBI "when such interception may provide . . . evidence of . . . any offense which is punishable under the [AETA]") (emphasis added).

¹¹² 18 U.S.C.S. § 2B1.1 (Lexis 2007), Commentary, § 19(A)(ii) ("An upward departure [from

adds to the existing tension.

It has long been understood by the Supreme Court that legislation of this nature serves to deter protected speech.¹¹³ “Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”¹¹⁴ The “social costs caused by the withholding of protected speech” are simply unacceptable.¹¹⁵ Moreover, people who are inclined to commit crimes such as arson, trespass, or property destruction, will not likely be deterred by the AETA, as these activities were already crimes prior to its enactment.

The real targets of this McCarthyist legislation are above-ground activists who seek to abide by the law. In this respect, the AETA hampers the flow of ideas throughout the marketplace to the detriment of society as a whole, as activists seek to avoid the disgrace and ostracism that go along with being labeled a terrorist. To be sure, a certain amount of stigma exists simply for association with someone who has been branded a terrorist. As a result, people who are sympathetic with animal rights views are encouraged to distance themselves from animal advocates for fear of guilt by association.

D. Obstruction of Justice

Finally, the AETA encumbers the investigation of animal enterprises that violate existing animal protection laws by making it difficult or impossible for concerned groups or individuals to lawfully obtain incriminating evidence against them. While the AETA excludes from its definition of “economic damage” disruptions resulting from “lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise,” it essentially criminalizes any activity that might produce such information—such as whistle blowing and undercover investigations—by failing to provide explicit exemptions for these activities.¹¹⁶

Whistle blowers and undercover investigators are not terrorists, nor should they be given reason to fear being labeled as such for speaking out against animal cruelty witnessed in their workplace. No other industry is afforded this sort of special protection, and there is no justification for it. Industry interests do not and should not be allowed to supersede the pursuit of justice or the First Amendment right to free speech.

existing federal sentencing guidelines] would also be warranted, for example, in a case involving *animal enterprise terrorism* under 18 U.S.C.A. 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed”) (emphasis added).

¹¹³ See *Grayned*, 408 U.S. at 108–09 (1972) (“Uncertain meanings inevitably lead citizens to [‘]steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” (quoting *Bagget v. Bullit*, 377 U.S. 360, 377 (1964)).

¹¹⁴ *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

¹¹⁵ *Id.*

¹¹⁶ 120 Stat. at 2654 (amending 18 U.S.C.A. § 43(d)(3)(B)).

V. CONCLUSION

In conclusion, the AETA is unconstitutional, unnecessary, and riddled with social policy flaws. The AETA is unconstitutional because it is vague, overbroad, and impermissibly content- and viewpoint-based. It is unnecessary because existing laws already cover every crime included in its language. It is additionally flawed because it detracts from efforts against true terrorism, chills social discourse and activism, and impedes the investigation of abusive animal enterprises. For the above reasons, the AETA should be repealed.

Congress is unlikely to voluntarily repeal the AETA. Thus, it makes more sense to look to the judiciary for change. One possible—and desirable—outcome is that an appeal to the recent SHAC convictions might prompt a court to invalidate the AETA. Because the AETA is merely an amended version of the AEPA, such a judgment could effectively destroy the AETA as well, eliminating this problematic legislation. In the meantime, concerned citizens should devote their time and energy to educating the public on the dangers inherent in the AETA and persuading United States Attorneys not to prosecute under this unconstitutional law.