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Cages, Clinics, and Consequences: The Chilling Problems of Controlling Special-Interest Extremism

Are you a domestic terrorist if your ideology drives you to destroy a medical facility? The answer is yes, provided the facility is one that performs animal experiments and not abortions. If your mission compels multiple murders of abortion providers, you are merely a criminal, albeit a particularly dangerous one. If your victims are vivisectionists, however, you are labeled a terrorist. You need not even commit the murders. Placing your victims in reasonable fear of serious injury will qualify as terrorism.

Confused? Uneasy? Uncertainty about the eventual scope of enforcement of the recently enacted Animal Enterprise Terrorism Act ("AETA")[1] has made some nonviolent animal rights advocates feel the same way.[2] Opponents of abortion

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1 Pub. L. No. 109-374, 120 Stat. 2652 (codified as amended at 18 U.S.C. § 43 (2006)).

2 *See* Vince Patton, *Fur Store Owner: Terror Charges for Activists*, KGW.COM, Nov. 29, 2006, http://www.kgw.com/news-local/stories/kgw_112806_news_schumacher_terrorists.33a8771c.html ("What [AETA] is certainly doing is putting a chill on the animal advocacy movement because nobody knows exactly where the line is." (quoting Laura Ireland Moore, Director, Animal Law Center, Northwestern School of Law of Lewis & Clark College)).

rights felt similarly unnerved after the 1994 enactment of the Freedom of Access to Clinic Entrances Act[3] ("FACE").[4] But because AETA brands militant animal protectionists as terrorists, mainstream animal rights supporters fear the graver consequences that accompany that despicable label.[5]

In many ways, AETA parallels FACE. AETA and FACE have similar statutory wording and address similar criminal conduct. AETA lawmakers appear to have borrowed some of FACE's clauses to avoid impinging on protesters' First Amendment rights. Indeed, both laws prompt some of the same constitutional concerns.

Despite these concerns, federal courts have broadly upheld FACE.[6] Assuming AETA also is upheld, a result that seems likely for reasons this Comment will discuss, AETA's application of the politically charged terrorism label will continue to impose a greater chilling effect on animal rights advocates than FACE places on abortion opponents.

AETA's use of the terrorism label potentially is harmful in several ways. First, characterizing aggressive animal activists as terrorists may hamper the pursuit of genuine terrorists by confusing them with those who commit ordinary property

3 18 U.S.C. § 248 (2006).

4 *See, e.g.*, *FACE: Challenges Accrue, Totalling 7; Rescues Planned*, ABORTION REP., June 10, 1994 (citing statement of Beverly LaHaye, President, Concerned Women of America, that FACE will have a "chilling effect on peaceful protest").

5 *See generally* PHILLIP HERBST, TALKING TERRORISM: A DICTIONARY OF THE LOADED LANGUAGE OF POLITICAL VIOLENCE 164 (2003) ("Conveying criminality, illegitimacy, and even madness, the application of *terrorist* shuts the door to discussion *about* the stigmatized group . . . while reinforcing the righteousness of the labelers, justifying their agendas and mobilizing their responses."). For a discussion of the importance and difficulty of distinguishing terrorism from legitimate political violence, see John Alan Cohan, *Necessity, Political Violence, and Terrorism*, 35 STETSON L. REV. 903 (2006).

6 *See, e.g.*, United States v. Bird, 401 F.3d 633, 634 (5th Cir. 2005); Norton v. Ashcroft, 298 F.3d 547, 552 (6th Cir. 2002); United States v. Hart, 212 F.3d 1067, 1073 (8th Cir. 2000); United States v. Gregg, 226 F.3d 253, 256 (3rd Cir. 2000); United States v. Wilson, 154 F.3d 658, 660 (7th Cir. 1998); United States v. Weslin, 156 F.3d 292, 294 (2d Cir. 1998); Hoffman v. Hunt, 126 F.3d 575, 589 (4th Cir. 1997); Terry v. Reno, 101 F.3d 1412, 1413 (D.C. Cir. 1996); Cheffer v. Reno, 55 F.3d 1517, 1519 (11th Cir. 1995); *see also* Heather J. Blum-Redlich, Annotation, *Validity, Construction, and Application of Freedom of Access to Clinic Entrances Act (FACE) (18 USCS § 248)*, 134 A.L.R. FED. 507 (1996) (describing cases upholding FACE against constitutional challenges).

crimes.[7] Second, a definition of terrorism that punishes those who destroy civilian property while excluding those who murder civilians is perverse. Third, such a definition imposes fear that chills politically unpopular protest against the enterprises that AETA purports to protect. The thousands of terrorism investigations pursued since September 11, 2001—or almost any image of Guantanomo Bay "detainees"—suggests that such a fear is rational.[8] Finally, reducing protest removes an incentive that can prompt enterprises to recognize the business value of making improvements in areas of social concern. While reducing protest and its associated burdens of decreased sales and increased public relations costs may have potential short-term benefits, this Comment suggests that delaying improvements in areas of social concern ultimately may weaken competitiveness.

Part I of this Comment provides a background on AETA from its origins in the bioresearch industry to its adoption as law. Part II compares the crimes of militant animal protectionists with those of militant abortion opponents. Part III then compares AETA and FACE, analyzing AETA's constitutionality using as a model decisions upholding FACE. Part III concludes that AETA does not violate the First Amendment. Part IV argues that since AETA is likely to withstand First Amendment scrutiny, the law legitimizes an inconsistent use of the terrorism label that will hinder protected protest activity. Finally, Part V suggests reasons that this chilling effect is not benign,[9] including societal consequences of constraining protest and economic consequences for protested enterprises.

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[7] *See* GEN. ACCOUNTING OFFICE, GAO-03-519T, COMBATING TERRORISM: OBSERVATIONS ON NATIONAL STRATEGIES RELATED TO TERRORISM 7 (2003) [hereinafter GAO, COMBATING TERRORISM] (statement of Richard J. Decker, Director, Defense Capabilities and Management, explaining risks of duplicated efforts and misallocation of resources from multiple definitions of terrorism).

[8] "[F]ederal investigators have interviewed more than 15,000 'persons of interest' in connection with activities investigators associate with terrorism" since September 11, 2001. Allen Pusey, *Every Terrorism Case Since 9/11*, A.B.A. J., Sept. 2007, at 16 (citing a Transactional Records Access Clearinghouse of Syracuse University analysis of Justice Department data). These investigations have led to more than 4300 prosecutions and almost 3000 convictions. *Id.* The average sentence has been twenty-seven months. *Id.*

[9] *See generally* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

I
BACKGROUND ON THE ANIMAL ENTERPRISE TERRORISM ACT

President Bush signed AETA on November 27, 2006.[10] Members and trade groups of the agricultural, fashion, and pharmaceutical industries immediately cheered what they saw as the accomplishment of a mission:[11] to "create[] penalties for persons encouraging, financing, assisting or engaged in acts of animal and ecological terrorism."[12]

Also having reason to celebrate were other "animal enterprises."[13] AETA defines this term broadly, including business interests ranging from breeders and circuses to pet stores, rodeos, and zoos.[14] The term covers any "commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing."[15] AETA gives these interests powerful enforcement tools by significantly expanding the scope of conduct criminalized under its predecessor statute, the 1992 Animal Enterprise Protection Act ("AEPA").[16]

Despite existing laws prohibiting generally the same conduct—including AEPA, which specifically addressed violence against animal enterprises[17]—AETA's proponents

10 Press Release, Office of the Press Secretary, White House, President Signs S. 435, S. 819, S. 1131, S. 2462, and S. 3880 (Nov. 27, 2006), http://www.whitehouse.gov/news/releases/2006/11/20061127-1.html.

11 *See, e.g.*, Fur Comm'n USA, Mission Accomplished! AETA Passes Both Houses!, http://www.furcommission.com/resource/Resources/AETA.pdf (last visited Jan. 11, 2007) (listing industry groups supporting AETA).

12 Press Release, Am. Legis. Exch. Council, ALEC Offers Legislation to Fight Domestic Terror by Animal and Eco-Extremist Groups (Sept. 15, 2003) [hereinafter ALEC Press Release], 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.

13 *See, e.g.*, Statement of Norman Abrams, Acting Chancellor, Univ. of Cal., L.A., A Message from the Chancellor on Animal Research Legislation (Nov. 2006), http://www.ucla.edu/chancellor/statement-researchlaw.html.

14 18 U.S.C. § 43(d)(1)(B) (2006).

15 § 43(d)(1)(A).

16 18 U.S.C. § 43 (1992) (amended 2006).

17 AEPA originated with the National Association for Biomedical Research. The law created the crime of "animal enterprise terrorism," defined as "intentionally stealing, damaging or causing the loss of, any property (including animals or records) used by the animal enterprise . . . or conspir[ing] to do so." § 43(a)(2) (1992) (amended 2006).

argued that a gap in the law allowed underground militant activists to "exploit current law's inadequacy of addressing and protecting non-primary targets."[18] Some prosecutors, however, argue that convictions of "eco-terrorists" need not require "an exotic anti-terror law."[19] Indeed, prosecutors have used existing criminal laws to obtain convictions of animal rights activists on arson, burglary, conspiracy, theft, and trespass charges[20] arising from conduct that AETA now regulates as terrorism.[21]

Notwithstanding prosecutorial successes, law enforcement against militant animal rights protectionists has not been without challenges. Militant animal rights activists often work independently and lack hierarchical organizations, making surveillance difficult.[22] Consider the Animal Liberation Front ("ALF"). The group, which the Federal Bureau of Investigation considers most representative of the threat from domestic

18 *Animal Enterprise Terrorism Act: Hearing on H.R. 4239 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 29 (2006) (statement of William Trundley, Vice President, Global Corporate Security and Investigations, GlaxoSmithKline).

19 *E.g.*, Joshua K. Marquis & Danielle M. Weiss, *Eco-Terror: Special Interest Terrorism*, PROSECUTOR, Jan.-Feb. 2005, at 30, 35.

20 *See, e.g.*, State v. Troen, 786 P.2d 751 (1990); *Eco-Terrorism and Lawlessness on the National Forests: Oversight Hearing Before the Subcomm. on Forests and Forest Health of the H. Comm. on Resources*, 107th Cong. 52 (2002) [hereinafter *Eco-Terrorism and Lawlessness Hearing*] (statement of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, Federal Bureau of Investigation) (noting successful prosecutions of "individuals alleged to have perpetrated acts of eco-terrorism" on arson and extortion charges). Major incidents of animal rights or eco-extremism declined in 2004, effectively deterred by existing criminal laws. *Current and Projected National Security Threats to the United States: Hearing Before the Select S. Comm. on Intelligence*, 108th Cong. 26 (2005) [hereinafter *National Security Threats Hearing*] (statement of Robert S. Mueller III, Director, Federal Bureau of Investigation).

21 The U.S. District Court for the District of Oregon has held that the terrorism enhancement under U.S. Sentencing Guidelines § 3A1.4 could apply to defendants convicted of conspiracy to commit arson and destruction of an energy facility. United States v. Thurston, No. CR 06-60069-01-AA, 2007 WL 1500176, at *20 (D. Or. May 21, 2007). The court emphasized that "the definition of 'federal crime of terrorism' explicitly requires an intent 'to influence or affect the *conduct of government* by intimidation or coercion, or to retaliate against *government conduct*.'" *Id.* at *15. The court appeared to recognize effects of the terrorist label beyond those on the defendants' sentences, noting that "[t]he issue the court must decide is not whether the defendants are 'terrorists' as the word commonly is used and understood in today's political and cultural climate." *Id.* at *1.

22 *See Eco-Terrorism and Lawlessness Hearing*, *supra* note 20, at 53.

terrorism directed toward animal enterprises,[23] has no apparent organization; anyone committing a "direct action" that serves ALF's published goals may claim credit in its name.[24] Describing the proposed legislation, AETA's drafters expressed the frustration of many law enforcement professionals with the prosecutorial challenges that the autonomy of ALF activists presents: the group's "lack of membership rules would make the cells seemingly easy to penetrate by undercover law enforcement agencies. However, it's [*sic*] non-hierarchical structure and lack of membership rosters rather effectively thwart gathering usable evidence."[25]

These law enforcement challenges offered AETA's conservative drafters an opportunity to promote the model bill as addressing what they viewed as existing law's greatest shortcoming: the government's inability to reach the assets of legitimate nonviolent animal rights groups such as People for the Ethical Treatment of Animals ("PETA"). AETA's drafters accused PETA of conspiring with and supporting ALF through financial contributions and statements of support in principle for criminal conduct directed toward animal enterprises.[26] The drafters also cited the development of "ALF splinter group" Stop Huntingdon Animal Cruelty ("SHAC") as another justification for a new law.[27] New Jersey and California courts have upheld injunctive relief against SHAC on accusations that the group, like PETA, conspired with violent activists by publishing information on their actions.[28]

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23 *See id.*

24 Andrew N. Ireland Moore, *Caging Animal Advocates' Political Freedoms: The Unconstitutionality of the Animal and Ecological Terrorism Act*, 11 ANIMAL L. 255 (2005).

25 AM. LEGIS. EXCH. COUNCIL, ANIMAL & ECOLOGICAL TERRORISM IN AMERICA 9 (2003) [hereinafter ALEC REPORT], *available at* http://www.alec.org/meSWFiles/pdf/AnimalandEcologicalTerrorisminAmerica.pdf.

26 *Id.* at 8; *cf.* Randy Borum & Chuck Tilby, *Anarchist Direct Actions: A Challenge for Law Enforcement*, *in* 28 STUDIES IN CONFLICT & TERRORISM 201, 220 (2005) (discussing similar challenges for law enforcement in investigating decentralized political revolutionary groups).

27 ALEC REPORT, *supra* note 25, at 8. "Huntingdon" refers to Huntingdon Life Sciences, a United Kingdom-based "pharmaceutical company that tests drugs on animals." *Id.*

28 *See generally* Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 50 Cal. Rptr. 3d 27 (Cal. Ct. App. 1st Dist. 2006); TEVA

AETA is a legislative byproduct of the American Legislative Exchange Council ("ALEC"), a collaborative of industry representatives and legislators formed during the early Reagan administration to advance conservative policies by developing and introducing model legislation.[29] In building support for the model bill that became AETA, ALEC suggested a need to protect animal-using industries from groups such as PETA and SHAC,[30] which often release documentary evidence obtained during break-ins.[31] Exposing the treatment of animals inside animal enterprises such as vivisection facilities and factory farms can have significant economic effects on such enterprises. For example, a 1993 DOJ report noted "in the fur industry, the impact of an attack on local public opinion can translate into the gradual and potentially permanent loss of clientele."[32] SHAC has claimed that negative public opinion generated by its campaigns led at least thirty-four companies to end business relationships with animal testing provider Huntingdon Life Sciences.[33]

To protect its industry members from these economic threats, ALEC proposed to "jail[] and penalize[] animal and eco-terrorists and their sympathetic financial agents for what they are—domestic terrorists."[34] AETA accomplishes this goal by imposing graduated penalties tiered to "economic damage" on anyone who "travels in interstate or foreign commerce . . . for the purpose of damaging or interfering with the operations of an animal enterprise."[35] This language roughly parallels AEPA, enacted in 1992. Unlike AEPA, however, AETA criminalizes intentionally placing a person in reasonable fear of death or serious bodily injury,[36] or conspiring or attempting to do so for

Pharmaceuticals USA, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 2005 WL 1010454 (N.J. Super. Ct. Ch. Div. 2005).

29 Am. Legis. Exch. Council, Background About ALEC, http://www.alec.org/about (last visited Jan. 11, 2007).

30 *See* ALEC REPORT, *supra* note 25, at 7, 8.

31 U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE EXTENT AND EFFECTS OF DOMESTIC AND INTERNATIONAL TERRORISM ON ANIMAL ENTERPRISES 7 (1993) [hereinafter DOJ REPORT].

32 *Id.* at 22.

33 Borum & Tilby, *supra* note 26, at 214.

34 ALEC Press Release, *supra* note 12.

35 18 U.S.C. § 43(a)(1) (2006).

36 § 43(a)(2)(B).

the purpose of damaging or interfering with animal enterprise operations.[37] AETA thus widens the scope of conduct subject to classification under the label of terrorism. In broadening the reach of that inflammatory term, the new law risks chilling protected protest activity.

II
SPECIAL-INTEREST EXTREMISM AND TERRORISM

A. Defining Terrorism

The definition of terrorism shares with its practitioners an uncanny ability to elude pursuit. The concept of terrorism has persisted throughout history,[38] but resists capture in a universal definition despite the efforts of sociologists, theologists, philosophers, psychologists, and lawmakers. As Emanuel Gross, Haifa University Professor of Criminal Law and a former Israeli military court judge, explains, no definitive agreement on "which circumstances, if any, would denude a particular act of its terrorist attributes" exists.[39] Here and abroad, debate over the elements of terrorism continues.[40]

At least twenty-two definitions or descriptions of "terrorism" and terms relating to support of terrorism occur in U.S. federal law.[41] The analytical vagueness is important for two reasons. First, because terrorist acts and ordinary criminal acts consume different law enforcement resources, it is important to avoid misidentifying one as the other, even though terrorism may encompass criminal acts.[42] Second, denomination of a violent act as an act of terrorism carries significant individual and societal

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37 § 43(a)(2)(C).

38 EMANUEL GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM 11 (2006).

39 *Id.* at 11–12.

40 *Id.* at 12–16 (comparing terrorism statutes in the United States, Britain, and Israel).

41 *See* Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 255 n.48 (2004) (citing numerous statutory definitions). "[T]he search for a single definition has come to resemble the quest for the holy grail." *Id.* at 249 n.2 (quoting OMAR MALIK, ENOUGH OF THE DEFINITION OF TERRORISM xvii (2000)).

42 GROSS, *supra* note 38, at 13.

consequences.[43] As this Comment will show, characterization of violent activism as terrorism is likely to repress willingness to engage in nonviolent protest for those causes. Confrontational protest activities, such as those of radical environmentalists, antiglobalization advocates, and abortion opponents, may be vulnerable to characterization as acts of domestic terrorism,[44] placing protected speech in these areas at risk under sweeping definitions.

Shaping a definition for various applications, such as for criminal or diplomatic contexts, is not necessarily an unworkable practice. The extremely malleable meanings given to terrorism, however, promote inefficient use of law enforcement resources,[45] as well as the criticism that the United States fails to act consistently toward those it accuses of terrorism.[46]

Moreover, the various definitions create the danger of improperly attaching a pejorative and politically powerful label. As Nancy Chang, Senior Litigation Attorney at the Center for Constitutional Rights, cautioned after passage of the USA PATRIOT Act, "protest activities that previously would most likely have ended in a charge of disorderly conduct under a local ordinance can now lead to federal prosecution and conviction for terrorism."[47] A RAND Corporation chronology of incidents of international terrorism since 1968 highlights the potential for political misuse of the label, noting that definitions of terrorism appear viewpoint dependant.[48] A report on the RAND compilation concluded that the terrorist label condemns both politically and socially because it "implies a moral judgment; and if one party can successfully attach the label . . . to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint."[49]

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43 *See* HERBST, *supra* note 5, at 163 ("Carrying enormous emotional freight, [the label of] *terrorism* is often used to define reality in order to place one's own group on a high moral plane, condemn the enemy, rally members around a cause, silence or shape policy debate, and achieve a wide variety of agendas.").

44 NANCY CHANG & CTR. FOR CONSTITUTIONAL RIGHTS, SILENCING POLITICAL DISSENT 45 (2002).

45 *See* GAO, COMBATING TERRORISM, *supra* note 7, at 7.

46 Perry, *supra* note 41, at 270.

47 CHANG ET AL., *supra* note 44, at 113.

48 BRIAN MICHAEL JENKINS, THE STUDY OF TERRORISM: DEFINITIONAL PROBLEMS 1 (1980).

49 *Id.*

A comparative study of definitions used in the United States, Britain, and Israel revealed the common factors as ideological motivation and the use of acts that provoke various degrees of fear among all or part of the public.[50] These two elements are found in the FBI's definition, which describes terrorism as including "unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[51] The U.S. Department of State adopted the definition given in 22 U.S.C. § 2656f(d)(2), identifying terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience."[52] The Patriot Act sets out the legal standard, limiting domestic terrorism to activities that:

> (A) [I]nvolve acts dangerous to *human life* that are a violation of the criminal laws of the United States or of any State;
> (B) appear to be intended—(i) to intimidate or coerce *a civilian population*; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by *mass destruction, assassination, or kidnapping*; and
> (C) occur primarily within the territorial jurisdiction of the United States.[53]

In contrast, AETA criminalizes the conduct of anyone who:

> (A) [I]ntentionally damages or causes the loss of any real or personal *property* (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise;
> (B) intentionally places a person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family . . . of that person, or a spouse or intimate partner of that person by a course of conduct

50 *See* GROSS, *supra* note 38, at 16.

51 28 C.F.R. § 0.85(l) (2007).

52 UNITED STATES DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM 2001 xvi (2001) (footnote omitted), *available at* http://www.state.gov/documents/organization/10286.pdf.

53 18 U.S.C. § 2331(5) (2006) (emphasis added); *see also* Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protectionists as Terrorists*, 22 PACE ENVTL. L. REV. 261, 273–74 (2005).

> involving *threats*, acts of *vandalism*, *property damage*, *criminal trespass*, *harassment*, or *intimidation*; or
> (C) conspires or attempts to do so.[54]

Although AETA amended AEPA by substituting the term "Terrorism" for "Protection," AETA's definition of terrorism differs in two significant ways from that of the Patriot Act. First, AETA includes in its definition of terrorism acts of less magnitude than the Patriot Act requires. Second, AETA outlaws conduct without reference to political objective.

In AETA's case, the elimination of a political motivation element from the bill's original draft ensured passage. ALEC's model bill applied to any "animal or ecological terrorist organization or any person acting on its behalf or at its request or for its benefit or any individual whose intent to commit the activity was {optional language insert 'politically motivated'}."[55] The revised bill omitted any content-based language referring to political motivation. That result apparently addressed the First Amendment concerns of most legislators,[56] as well as the American Civil Liberties Union,[57] which dropped its opposition.[58]

Deletion of political purpose as an element of the offense allows AETA to avoid attack as a form of unconstitutional viewpoint discrimination, as Part III discusses. The "optional" language in the model bill's text, however, indicates that political motivation may have been merely a red herring designed to allow proponents to strike an obviously unconstitutional provision without affecting the bill's actual scope. The

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54 18 U.S.C. § 43(a)(2) (2006) (emphasis added).

55 ALEC REPORT, *supra* note 25, at 22.

56 *But see* 152 Cong. Rec. H8590, 8594 (statement of Rep. Kucinich contending that "what we have done here is we have crippled free expression").

57 *Id.* (statement of Rep. Sensenbrenner noting that while the ACLU "ask[ed] for minor changes, . . . they did not express one concern about constitutionally protected first amendment rights being infringed upon or jeopardized in any way by this bill").

58 Letter from Caroline Fredrickson, Director, Washington Legislative Office, ACLU, to F. James Sensenbrenner, Chairman, House Judiciary Committee (Oct. 30, 2006), *available at* http://www.aclu.org/images/general/asset_upload_file809_27356.pdf ("The ACLU does not oppose [AETA], but believes that . . . minor changes are necessary to make the bill less likely to chill or threaten freedom of speech. . . . While the ACLU does not condone violence or threats, we are concerned when a law singles out a specific group that engages in expressive activity.").

increased likelihood that AETA will pass constitutional muster gives this deviation from the Patriot Act's definition of terrorism greater potential to chill protected speech.

Animal rights activists may be less likely to engage in nonviolent protest against enterprises that allegedly exploit animals for profit if the activists fear that indirectly attacking those enterprises or expressing support for direct attacks may be characterized as terrorism. Ironically, by deleting the political motivation requirement to avoid threatening protected speech, legislators enhanced the law's ability to hinder constitutionally protected conduct that cannot be condemned plausibly as terrorism.

B. Animal Rights-Influenced Violence

A fundamental aspect of the animal rights movement is moral philosophy.[59] A number of philosophical theories contend for support within and around the movement.[60] This diversity of perspectives extends to considerations of the morality of violent acts in defense of animals.[61] For the most part, however, major scholarly works articulating tenets of the animal rights movement share a disavowal of violence aimed at safeguarding animals and insist instead on nonviolence.[62]

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[59] *See* GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 12 (1996).

[60] *Id.*

[61] *Compare* MARK ROWLANDS, ANIMALS LIKE US 188 (2002) ("You cannot be violent *to* a table. You can be violent *with* a table—as when you hit somebody over the head with it—but your violence is then directed against the person and not the table. In any reasonable sense of the term, you can be violent only against things that can suffer.") *with* TOM REGAN, EMPTY CAGES: FACING THE CHALLENGE OF ANIMAL RIGHTS 188 (2004) ("Someone who sets fire to an empty abortion clinic or torches a vacant synagogue causes no physical injury to any sentient being, but to suppose that those acts of arson are nonviolent distorts what violence means.").

[62] *See, e.g.*, Gary L. Francione, *Abolition of Animal Exploitation: The Journey Will Not Begin While We Are Walking Backwards*, ABOLITIONIST-ONLINE, http://www.abolitionist-online.com/article-issue05_gary.francione_abolition .of.animal.exploitation.2006.shtml (last visited Jan. 11, 2007) ("Not only is violence problematic as a moral matter, it is unsound as a practical strategy."); Jeff Perz, *Exclusive Non-Violent Action: Its Absolute Necessity for Building a Genuine Animal Rights Movement*, ABOLITIONIST-ONLINE, http://www.abolitionist-online.com/article-issue05_exclusive.non.violent.jeff-perz.shtml (last visited Jan. 11, 2007); REGAN, *supra* note 61, at 191 ("[U]ntil [animal rights advocates] have done the demanding nonviolent work that needs to be done, the use of violence, in my judgment, is not morally justified. . . . It is also a tactical disaster.").

Militant activists appear to share with some animal rights philosophers a moral compass pointing toward acceptance of property destruction as nonviolent action because it is not directed against beings that can suffer. ALF, for example, "carries out direct action against animal abuse in the form of rescuing animals and causing financial loss to animal exploiters."[63] Those who act in the group's name[64] use violence against property "to save as many animals as possible and directly disrupt the practice of animal abuse.[65] ALF's credo, however, mandates "a nonviolent campaign, activists taking all precautions not to harm any animal (human or otherwise)."[66] Thus, while ALF has been described as "one of the most active extremist elements in the United States"[67] and "the most dangerous of domestic terror threats,"[68] the group's philosophy and precautions have prevented the loss of any human life during any of its "direct actions."[69] These usually involve vandalism, theft, or release of animals.[70] ALF's tactics have less frequently included arson and "the occasional use of explosive devices."[71]

Although large-scale property destruction is only a small part of animal rights extremism, such destruction still induces fear. Industry groups estimate that damages from acts of major vandalism since 1993 exceed $45 million.[72] In that sense, militant animal protectionism certainly merits definition as intimidation. Even so, it falls outside the Patriot Act definition of domestic terrorism. Militant activists target particular enterprises, not

63 Animal Liberation Front, The ALF Credo and Guidelines, http://www.animalliberationfront.com/ALFront/alf_credo.htm (last visited Jan. 31, 2007) [hereinafter ALF Credo].

64 "Whether ALF in the United States can be characterized as an organization . . . or as an 'umbrella' ideology or cause, is an issue still being debated." DOJ REPORT, *supra* note 31, at 6.

65 ALF Credo, *supra* note 63.

66 *Id.*

67 *Eco-Terrorism and Lawlessness Hearing*, *supra* note 20, at 50.

68 ALEC REPORT, *supra* note 25, at 22.

69 DOJ REPORT, *supra* note 31, at 16.

70 *Id.* at 15 (categorizing 76 percent of incidents attributed to animal rights extremists between 1977 and 1993 as minor property damage or theft/release of animals).

71 *National Security Threats Hearing*, *supra* note 20, at 26.

72 *See Eco-Terrorism and Lawlessness Hearing*, *supra* note 20, at 50 (citing estimates of Fur Commission and National Association for Biomedical Research).

civilian populations. Militant activists' activities have not involved taking human lives, although they have included threats and harassment.[73]

AETA's enactment, however, suggests that the terrorism label adheres equally to vandals in empty research labs and hijackers in fully loaded passenger planes, a consequence that seems absurd. At the same time, a distinction based on the use of force against human beings poses another problem. Violence against another human being does not inevitably make the aggressor a terrorist. Battery is not a terrorist act. If mass destruction, assassination, or kidnapping are prerequisites for the terrorist label,[74] then that designation should not also apply to trespassers and thieves, even if their actions result in significant property damage. Further, if the definition of terrorism includes coercion of a civilian population,[75] it is difficult to argue that property destruction, without more, should qualify. One cannot coerce property; hence, force directed against property, or the fear that destruction of property may invoke, must be sufficiently extreme before application of the terrorist label becomes reasonable.[76]

Under AETA, however, punishment for "animal enterprise terrorism" is possible even if the offense results in no economic damage or bodily injury.[77] Use of the law against an act that implicates neither of the two most common components of a terrorism definition—violence and political purpose[78]—would expand the legal meaning of terrorism dramatically. As Professor Mark Rowlands, applying a terrorism definition similar to that used by the FBI,[79] notes, "[a]t most, only a tiny

73 *See, e.g.*, Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 29 Cal. Rptr. 3d 521, 531–33 (Cal. Ct. App. 4th Dist. 2005).

74 18 U.S.C. § 2331(5)(B) (2006).

75 § 2331(5)(B)(i).

76 *See* ROWLANDS, *supra* note 61, at 189.

77 § 43 (b)(1)–(1)(A) (specifying punishment of fine or imprisonment "under this title . . . if the offense does not instill in another the reasonable fear of serious bodily injury or death and . . . results in no economic damage or bodily injury").

78 *See* Perry, *supra* note 41, at 251 (citing ALEX P. SCHMID, POLITICAL TERRORISM: A RESEARCH GUIDE TO CONCEPTS, THEORIES, DATA BASES, AND LITERATURE 119–52 (1983) (cataloging elements of over 109 terrorism definitions)).

79 The FBI applies the definition of terrorism found in 28 C.F.R. § 0.85(l) (2007).

fraction of extreme animal rights action qualifies as terrorism."[80] Thus, the breadth of AETA's definition of terrorism is questionable, especially since, as AETA's drafters noted, "the federal definition of terrorism requires the death of or harm to people, an element not characteristic of eco-terrorists."[81] Moreover, given the divergent treatment of abortion opponents under FACE, discussed below, AETA's application of the terrorism label to criminal trespass or acts of simple vandalism is unjustifiable.

C. Antiabortion-Influenced Violence

The crimes against abortion clinics, providers, and staff carried out at the height of the antiabortion movement surpass in severity and frequency even those of the most militant balaclava-wearing animal rights extremist.[82] FBI data for 1977 to 1993 document the following incidents of violence attributed to animal rights extremists: one assassination attempt;[83] twenty-nine threats against individuals; fourteen firebombings; twenty-one arson attacks; sixteen bomb threats; nine bomb hoaxes; twenty-six incidents of major property damage; 160 incidents of vandalism; and seventy-seven thefts or animal releases.[84] In contrast, antiabortion extremists committed at least one murder; three attempted murders; two kidnappings; seventy-two butyric acid attacks; eighty-eight incidents of assault and battery; twenty-eight bombings; 113 arson attacks; sixty-one attempted bombings or arson attacks; and 543 incidents of vandalism

80 ROWLANDS, *supra* note 61, at 193.

81 ALEC REPORT, *supra* note 25, at 15.

82 *See Eco-Terrorism and Lawlessness Hearing*, *supra* note 20, at 50 ("Despite the destructive aspects of [the Animal Liberation Front's] operations, [it] . . . discourages acts that harm 'any animal, human and nonhuman' . . . [and has] generally adhered to this mandate.").

83 DOJ REPORT, *supra* note 31, at 16. The report provides no information on the subject of the alleged attempt. It emphasizes, however, that "there is no evidence to indicate that firearms were used during the course of any of the documented incidents in the United States." *Id.* at 15.

84 *Id.* at 15–16. The report presents data on 313 incidents over a 16-year period. The report does not include "demonstrations, sit-ins, and other protests," and notes that because the types of conduct documented "often overlap in any given incident, total of the activities would far exceed the incident total and therefore is not stated." *Id.* at 15.

during this period.[85] In addition, antiabortion extremists issued 166 death threats.[86] An additional murder of a clinic owner and abortion provider may have been abortion related.[87] In total, instances of antiabortion-driven violence outnumbered incidents of animal rights-driven violence three to one. Table 1 compares the frequency of these crimes.

TABLE 1

COMPARISON OF ANIMAL RIGHTS AND ABORTION EXTREMIST VIOLENCE 1977–1993[88]

	Animal Rights Extremists	**Antiabortion Extremists**
ACTIONS AGAINST PEOPLE		
Murders		1
Attempted Murders	1	3
Kidnappings		2
Butyric Acid Attacks		72
Assault and Battery Incidents		88
Threats	29	166
ACTIONS AGAINST PROPERTY		
Bombings	14	28
Arson Attacks	21	113
Attempted Bombing or Arson		61
Major Property Damage	26	
Minor Property Damage	160	543
Thefts	77	
Bomb Hoaxes	9	
Kidnappings		2
Total Incidents	337	1079

[85] NAT'L ABORTION FED'N, NAF VIOLENCE AND DISRUPTION STATISTICS: INCIDENTS OF VIOLENCE & DISRUPTION AGAINST ABORTION PROVIDERS IN THE U.S. & CANADA, *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_statistics.pdf.

[86] *Id.*

[87] Police categorized a second murder of a clinic owner and abortion provider as a bungled robbery. PATRICIA BAIRD-WINDLE & ELEANOR J. BADER, TARGETS OF HATRED: ANTI-ABORTION TERRORISM 352 (2001).

[88] These statistics reflect DOJ and National Abortion Federation data. *See supra* notes 83–85 and accompanying text.

The annual number of murders of abortion providers peaked at four in 1994, when FACE was enacted.[89] The year 1994 also saw eight attempted murders, fifteen successful or attempted bombings or arson attacks, eight acid attacks, and fifty-nine death threats.[90] Yet, under FACE, this conduct was not defined as terrorism. FBI Director William H. Webster refused to categorize the violence as terrorism because its intent was not to shift or overthrow the government but rather to further a social objective.[91] When leaders of the pro-choice movement heavily criticized Webster's statements as clinic violence intensified, he eventually allowed that if the terrorism label were applied "in a semantical term, I'm not going to quarrel with it."[92] FACE's title, however, remained neutral, like that of AEPA, AETA's predecessor.

While animal rights extremists have continued to use violent tactics since 1993, they have not taken lives. AETA's creators, however, presented their model legislation as necessary to protect against a threat comparable to that of al-Qaeda.[93] Despite the FBI's acknowledgment of the effective deterrence that successful prosecutions under existing criminal laws had achieved,[94] ALEC posited a rising—and deadly—"wave of domestic terrorism"[95] attributable to animal rights and environmental extremists:

> Notably, it has been a matter of ALF doctrine that no person may be killed or seriously injured in the pursuit of fulfilling a mission. However, this principle seems to be largely ignored by the highly extreme wings of the organization. As former ALF spokesman Kevin Jonas said, "When push comes to shove, we're ready to push, kick, shove, bite, do whatever to win."[96]

89 *See* NAT'L ABORTION FED'N, *supra* note 85.

90 *Id.*

91 *Blasts Not on F.B.I. Terrorism List*, N.Y. TIMES, Dec. 5, 1984, at A23.

92 Ed Magnuson, *Explosions over Abortion*, TIME, Jan. 14, 1985, at 16 (highlighting that "[o]ne focus of controversy has been the FBI's reluctance to label [clinic] bombings as terrorist acts").

93 *See* ALEC REPORT, *supra* note 25, at 9.

94 *National Security Threats Hearing*, *supra* note 20, at 26.

95 ALEC REPORT, *supra* note 25, at 4.

96 *Id.* at 8 (footnote omitted).

ALEC went on to speculate that the most extreme elements of militant special-interest activist groups "might splinter off and start escalating the violence of their attacks. If their voice isn't heard by burning buildings, perhaps it may be heard by cutting throats."[97]

While militant animal rights protectionists likely will continue destroying property to cause economic harm, they are unlikely to begin using deadly violence like that occurring at the height of antiabortion extremism. Hence, the application of the terrorism label to animal rights extremists is inconsistent at best. If AETA withstands constitutional scrutiny, a result that seems probable, Congress should amend AETA to restore its original title and remove the terrorist label. Alternatively, Congress might consider changing FACE's title to the "Freedom from Abortion Clinic Terrorism Act." Terrorism's definitional malleability promotes politicization of the term, as the RAND report cited in Part I suggests.[98] The terrorism label is "politically loaded," attachable at political will to "political extremists, common criminals, and authentic lunatics."[99] The label defies removal.[100] Thus, if, as ALEC suggested in promoting its model bill, criminal law should "call a terrorist, a 'terrorist,'"[101] lawmakers and courts should take care that it does so consistently.

III

CONSTITUTIONAL ANALYSIS

Abortion opponents wasted no time in contesting FACE's constitutionality.[102] Despite a barrage of legal challenges, however, each of the nine U.S. Courts of Appeals that has considered a FACE case on constitutional grounds has upheld it, and the Supreme Court to date has refused to consider cases

97 *Id.* at 11 (positing rising trend of future violence by members of Earth Liberation Front); *cf. id.* at 9 (predicting that violence of ALF actions will also increase).

98 *See* JENKINS, *supra* note 48, at 2.

99 *Id.* at 9–10.

100 *Id.* at 2 ("[T]errorism can mean just what those who use the term . . . want it to mean—almost any violent act by an opponent.").

101 ALEC Press Release, *supra* note 12.

102 Regina R. Campbell, Comment, *"FACE"ing the Facts: Does the Freedom of Access to Clinic Entrances Act Violate Freedom of Speech?*, 64 U. CIN. L. REV. 947, 964 (1996).

challenging FACE.[103] Since FACE and AETA implicate largely the same constitutional concerns, FACE provides a useful predictor for future AETA challenges. This Part compares the two statutes against the body of FACE case law.

A. Commerce Clause Analysis

Like FACE, AETA draws its regulatory authority from the Commerce Clause.[104] Thus, it is important to examine briefly AETA's vulnerability to a Commerce Clause challenge. FACE has survived several Commerce Clause attacks[105] and the Supreme Court has shown no willingness to alter what appears to be the general agreement that FACE is a proper exercise of the commerce power.[106]

One example of that apparent consensus is *Hoffman v. Hunt*, in which the Fourth Circuit found that FACE regulates activity—the blocking of clinic entrances—that is connected closely to interstate commerce.[107] Accordingly, the court held that Congress had authority under the Commerce Clause to enact FACE.[108] The Fourth Circuit earlier had upheld FACE against a similar challenge in *American Life League, Inc. v. Reno*.[109]

Reexamining its reasoning in light of the Supreme Court's decision to narrow the scope of Congress's commerce power in *United States v. Lopez*,[110] the Fourth Circuit in *Hoffman* again found that the provision of reproductive health care services

103 United States v. Bird, 401 F.3d 633, 634 (5th Cir. 2005); Norton v. Ashcroft, 298 F.3d 547, 552 (6th Cir. 2002); United States v. Hart, 212 F.3d 1067, 1073 (8th Cir. 2000); United States v. Gregg, 226 F.3d 253, 256 (3rd Cir. 2000); United States v. Wilson, 154 F.3d 658, 660 (7th Cir. 1998); United States v. Weslin, 156 F.3d 292, 294 (2d Cir. 1998); Hoffman v. Hunt, 126 F.3d 575, 589 (4th Cir. 1997); Terry v. Reno, 101 F.3d 1412, 1413 (D.C. Cir. 1996); Cheffer v. Reno, 55 F.3d 1517, 1519 (11th Cir. 1995). The Supreme Court denied petitions for certiorari in each case.

104 *See* 18 U.S.C. § 43(a) (2006).

105 Blum-Redlich, *supra* note 6, at 507.

106 *See* Norton v. Ashcroft, 537 U.S. 1172 (2003) (denying petition for certiorari); *see also* Nicole Huberfeld, *Be Not Afraid of Change: Time to Eliminate the Corporate Practice of Medicine Doctrine*, 14 HEALTH MATRIX 243, 284–85 (2004) (discussing reasoning in line of cases upholding FACE under the Commerce Clause).

107 126 F.3d 575, 579 (4th Cir. 1997).

108 *Id.* at 588.

109 47 F.3d 642 (4th Cir. 1995).

110 514 U.S. 549 (1995).

substantially affects interstate commerce.[111] Unlike the connection to commerce of handguns in schools, which the Supreme Court in *Lopez* found insufficient to support the Gun-Free School Zones Act of 1990,[112] the obstruction of clinic entrances could provide "a rational basis for Congress to conclude 'that the regulated activity affects interstate commerce.'"[113] Women travel across state lines seeking reproductive health services. Medical supplies also move through interstate commerce.[114] Thus, the court found sufficient authority under the commerce power for Congress to enact FACE.[115]

Similar reasoning should support AETA against a Commerce Clause challenge, although the commerce connection is less apparent. Professor John Nagle notes that "[i]t is easier to make the link between abortion *clinics* and interstate commerce than . . . between abortion *protesters* and interstate commerce."[116] Similarly, the relationship between the Commerce Clause and the activity of animal rights activists is more obscure than that between the Commerce Clause and the activity of animal enterprises.[117] AETA prohibits using interstate commerce to damage the property of any animal enterprise or anyone connected with an animal enterprise. Thus, like FACE, AETA addresses a "typically *interstate* activity by regulating typically *intrastate* actors."[118] Offenses under AETA committed *solely* by intrastate actors would appear beyond reach. Criminalizing conspiracy to commit any of AETA's enumerated offenses[119] helps AETA avoid such a narrowing construction.

Moreover, the prevalence of electronic communications in modern activism affords AETA another nexus with interstate

111 *Hoffman*, 126 F.3d at 588.

112 *Lopez*, 514 U.S. at 559–63.

113 *Hoffman*, 126 F.3d at 583 (quoting *Am. Life League, Inc.*, 47 F.3d at 647).

114 *Id.*

115 *Id.* at 588.

116 John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 210 (1998) (emphasis added).

117 *Cf.* United States v. Wilson, 73 F.3d 675, 692 (7th Cir. 1995) (Coffey, J., dissenting) ("[FACE] applies to the *activity of the demonstrators*, not to the *activity of the clinic itself*. A federal statute that thus regulates purely non-commercial activity, while at the same time absent jurisdictional language, is unprecedented.").

118 Nagle, *supra* note 116, at 210 (emphasis added).

119 18 U.S.C. § 43(a)(2)(C) (2006).

commerce. The Internet and e-mail are essentially instruments of interstate commerce.[120] Activists' use of these and other communication tools for organizing, publicizing, or expressing support for violent actions easily could bring them within AETA's reach.[121]

B. First Amendment Analysis: Content-Neutrality

Just as our society enshrines free expression as the "transcendent value" that the Supreme Court first recognized in *Speiser v. Randall*,[122] our First Amendment jurisprudence establishes content-neutrality as the beacon of freedom of speech analysis. Even those whose speech is not threatened may be heard to declare against content-based restrictions.[123] Indeed, the distinction between content-based and content-neutral restrictions determines nearly every modern free speech case.[124]

The distinction turns on whether the government's regulation of certain speech stems from its disagreement with the message of that speech.[125] Disagreement with the speech's subject matter or the speaker's point of view is a presumptively invalid basis for restricting freedom of expression.[126] A statute challenged as a content-based regulation therefore provides the starting point for analysis and determines the appropriate level of scrutiny.

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120 *See* Kiera Meehan, Note, *Installation of Internet Filters in Public Libraries: Protection of Children and Staff vs. the First Amendment*, 12 B.U. PUB. INT. L.J. 483, 490 (2003) ("The Internet (like railways and highways) is by its very nature an instrument of interstate commerce.").

121 *See, e.g.*, Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 29 Cal. Rptr. 3d 521, 530 (Cal. Ct. App. 4th Dist. 2005) ("[C]ertain entries SHAC USA published on its Internet Web site constituted a 'credible threat of violence.'"); United States v. Mathison, Crim. No. 95-085-FVS (E.D. Wash. 1995).

122 357 U.S. 513, 526 (1958).

123 *See* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) ("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser.").

124 Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 53 (2000).

125 Hill v. Colorado, 530 U.S. 703, 719 (2000) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

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

1. FACE's Incidental Effect on Protected Expression

FACE does not apply directly to speech.[127] Even so, a statute that regulates only conduct that the First Amendment does not protect may affect some conduct with protected elements.[128] Thus, in *Norton v. Ashcroft*, the most recent published appellate opinion to have examined FACE under the First Amendment,[129] the Sixth Circuit began with an assessment of content-neutrality.

In *Norton*, antiabortion activists sought declaratory and injunctive relief after federal agents advised them that picketing, praying, and counseling on the sidewalk outside an abortion clinic put them at risk of violating FACE.[130] The court upheld FACE as content neutral despite the implication that FACE impinged protected expression.[131] FACE, the court explained, proscribes interference with access to reproductive health services regardless of the reason.[132] The court cited the prosecution under FACE of a pro-choice protester who made a threatening phone call to "an anti-abortion facility" as an example of the law's indifference to content.[133] Further, the court suggested that clinic workers on strike might face prosecution under FACE if they blocked clinic entrances, despite protesting for reasons entirely unrelated to abortion.[134]

The *Norton* court also found it irrelevant that antiabortion protesters faced greater frequency of prosecution under FACE than did those demonstrating for choice.[135] In support of this proposition, the *Norton* court cited the Seventh Circuit case *United States v. Soderna* in which the court reasoned that

127 Norton v. Ashcroft, 298 F.3d 547, 552 (6th Cir. 2002).

128 *Id.*

129 In the most recent federal case to examine FACE at the circuit court level, the Fifth Circuit vacated a decision finding FACE unconstitutional under the Commerce Clause. *See* United States v. Bird, 401 F.3d 633, 634 (5th Cir. 2005).

130 *Norton*, 298 F.3d at 551.

131 *Id.* at 553.

132 *Id.*

133 *Id.* (citing United States v. Mathison, Crim. No. 95-085-FVS (E.D. Wash. 1995)) (Daniel Adam Mathison was charged with one count of violating FACE and one count of making an unlawful interstate communication after he allegedly called a pregnancy-support service and told the operator that he had a gun and intended to shoot abortion protestors outside clinics. *Man Indicted for Anti-Abortion Threats*, OREGONIAN, Apr. 13, 1995, at F6.).

134 *Id.*

135 *Id.*

antiabortion protesters are more likely to face prosecution because "it is mainly they who are interfering with the provision of pregnancy-related services, just as it was Vietnam War protesters who burned their draft cards."[136]

Like those Vietnam-era activists, modern protesters using violent forms of expression face the question of whether their conduct equals speech.[137] Conduct that does not communicate does not receive heightened scrutiny.[138] The court in *Norton*, however, did not need to apply the test set out in *Spence v. Washington*[139] to determine whether the conduct prohibited under FACE—force, threat of force, or physical obstruction[140]—was communicative. Neither actual or threatened force nor obstruction had occurred.[141] Rather, the court recognized that FACE affected the nonverbal conduct of "peaceful but unobtrusive picketing."[142] It considered FACE under the intermediate scrutiny appropriate to content-neutral regulations of communicative conduct,[143] applying the four-part test articulated in *United States v. O'Brien*.[144] Under *O'Brien*, which applies to conduct that is intended to convey a particularized message and likely to do so, the Sixth Circuit first found that FACE furthered an important governmental interest unrelated to suppression of free expression: safeguarding access to reproductive health services.[145] Next, the court concluded that FACE ameliorated any incidental hindrance of expressive conduct[146] by expressly excluding protected speech and leaving ample alternative channels for communication.[147] Perceiving no greater restriction on First Amendment freedoms than

136 82 F.3d 1370, 1376 (7th Cir. 1996).

137 *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 402–06 (1989).

138 *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

139 *See* 418 U.S. 405, 410–11 (1974).

140 18 U.S.C. § 248(a) (2006).

141 Norton v. United States, 298 F.3d 547, 551–52 (6th Cir. 2002).

142 *Id.* at 552.

143 *Id.* at 553.

144 391 U.S. 367, 377 (1968).

145 *Norton*, 298 F.3d at 553.

146 18 U.S.C. § 248(d)(1) (2006).

147 *Norton*, 298 F.3d at 553.

necessary, the court found that FACE satisfied *O'Brien*'s requirements.[148]

2. AETA's Content-Neutrality

Like FACE, AETA's regulation appears content neutral because it excludes viewpoint-based discrimination against protected protest activities.[149] AETA prohibits two broad categories of action. First, it proscribes property-based conduct intended to damage or interfere with animal enterprises, including causing the loss of property, animals, or records used by those enterprises or the people or entities connected to them.[150] Second, AETA addresses personal attacks, including the intentional placement of another person in reasonable fear of death or serious injury.[151]

As the Supreme Court noted in *NAACP v. Claiborne Hardware Co.*,[152] the Constitution affords violence no protection whether or not the violent actor intends by his conduct to express a message.[153] Thus, while AETA's second proscribed category, assault, "is not by any stretch of the imagination expressive conduct protected by the First Amendment," as the Court described assault in *Wisconsin v. Mitchell*, AETA's first category of prohibited action, regarding property-based conduct, potentially could support a statutory interpretation that includes protected conduct.[154]

Damage of another person's property, of course, is clearly outside the First Amendment's protection, even if one demonstrates by that conduct intent to convey a particularized message. The status of AETA's purpose element appears somewhat less certain. A violator must intend to "damag[e] or interfer[e] with the operations of an animal enterprise."[155] AETA leaves "interfere with" undefined, but AETA's offense element, which shadows the purpose provision, prohibits

148 *Id.*

149 §§ 43(e)(2), 248(d)(2).

150 § 43(a)(1)–(2)(A).

151 § 43(a)(2)(B).

152 458 U.S. 886 (1982).

153 *Id.* at 916.

154 508 U.S. 476, 484 (1993).

155 § 43(a)(1).

"damag[ing] or caus[ing] the loss of" an enterprise's property.[156] AETA bridges these provisions by defining the offense as prohibited conduct done "in connection with" the requisite purpose.[157] Thus, an actor would appear to violate AETA if, "in connection with" the "purpose of damaging" an animal enterprise, he or she "intentionally damage[d]" the property of that enterprise. As AETA's purpose element captures both "damaging" and "interfering with," it therefore seems plausible that the conduct described in my previous sentence would trigger AETA's penalties equally if "interfere with" replaces "damage." Applying such a statutory construction would subject an actor to prosecution under AETA if, "in connection with" the "purpose of . . . interfering with" an animal enterprise, he or she "intentionally [interfered with]" the property of that enterprise.

As Part II.B. explained, militant animal protectionists attempt, at minimum, to accomplish exactly that sort of interference. They intend violent conduct to convey unambiguous messages critical of those who, they contend, exploit animals for profit.[158] Some prominent animal welfare organizations appear to share this purpose, although they denounce violence and militant tactics.[159] If organization members engage in the protest activities traditionally entitled to constitutional protection, such as boycotts, picketing, or leafleting,[160] and that conduct is construed as "interference with" the property of an enterprise, AETA would implicate the First Amendment interests surrounding symbolic speech.

The enterprises targeted by such activity often conduct research involving vivisection or animal experimentation, methodologies which a California Court of Appeals noted are

156 § 43(a)(2)(A).

157 § 43(a)(2).

158 After break-ins or trespasses, typical messages left behind in the form of graffiti on walls and windows include "Animal Auschwitz" and "Meat is Murder." DOJ REPORT, *supra* note 31, at 12 n.10.

159 *See* EQUAL JUSTICE ALLIANCE, ANIMAL ENTERPRISE TERRORISM ACT (AETA) OPPOSITION LIST (2007), http://www.noaeta.com/AETAOppositionList.pdf (listing some 200 organizations including the ASPCA, Humane Society of the United States, National Lawyers Guild, and Natural Resources Defense Council).

160 *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909 (1982) (upholding boycott as a form of protected speech); Martin v. City of Struthers, 319 U.S. 141, 146–47 (1943) (upholding pamphleteering); Thornhill v. Alabama, 310 U.S. 88, 104 (1940) (upholding peaceful picketing).

"area[s] of widespread public concern and controversy."[161] In *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, a trespass and harassment suit against protestors of an animal testing laboratory and its employees, the court emphasized that commenting on matters of public concern is core political speech.[162] Accordingly, "the viewpoint of animal rights activists contributes to the public debate."[163] Because AETA affects this protected expression, AETA must withstand the intermediate scrutiny applicable to content-neutral regulations under *O'Brien*'s balancing of interests test.

AETA is likely to withstand this step in the analysis. Nonviolent advocates for animals may agree in principle with the militants of the ALF, who seek to influence behavior by affecting the economics of corporations "who profit from the misery and exploitation of animals."[164] But the notoriety of violent activism associated with the animal rights and environmental movements—like that associated with extremist opponents of abortion—increases the likelihood that courts will accept AETA's facial neutrality and exclusion clause as vouchsafing protest speech. While abortion-inspired violence has taken lives and animal rights-inspired violence has emphasized property damage, courts probably will find this a distinction without a difference. The California Supreme Court, for example, has explained that actual or threatened violence can "play no part in the 'marketplace of ideas.'"[165] Regardless of its motivation, violence is coercion through unlawful conduct, not persuasion by expression.[166] As Justice Rehnquist observed in his dissent in *Smith v. Goguen*, "[o]ne who burns down the factory of a company whose products he dislikes can expect his First Amendment defense to a consequent arson prosecution to

161 Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 29 Cal. Rptr. 3d 521, 536 (Cal. Ct. App. 4th Dist. 2005).

162 *Id.* at 535–36 (citing Schenck v. Pro-Choice Network, 519 U.S. 357, 377 (1997)).

163 *Id.* at 536.

164 ALF Credo, *supra* note 63.

165 *In re* M.S., 896 P.2d 1365, 1373–74 (1995).

166 *Huntingdon Life Sciences, Inc.*, 29 Cal. Rptr. 3d at 538.

be given short shrift by the courts."[167] The same reasoning probably will apply in consequent prosecutions under AETA.[168]

The government's interest in protecting individuals from fear of violence excludes both threatened and actual violence from First Amendment protection.[169] Additionally, courts likely will find that AETA serves other important governmental interests. If maintaining access to reproductive health services[170] and reducing disincentives for doctors to provide those services are important interests,[171] for example, then protecting medical, research, and food production facilities—the first and fourth most targeted types of enterprises "victimized by animal rights extremists . . . during the 1977–June 1993 period"[172]—can be expected to survive intermediate scrutiny.

C. First Amendment Analysis: Vagueness and Substantial Overbreadth

Challenges to FACE included claims that it was both unconstitutionally vague and substantially overbroad.[173] There was serious concern that ambiguity and potentially far-reaching enforcement would chill protected speech.[174]

Commentators likewise argued that FACE could inhibit peaceful protests.[175] FACE explicitly excluded "peaceful

167 Smith v. Goguen, 415 U.S. 566, 594 (1974) (Rehnquist, J., dissenting).

168 *See generally* Moore, *supra* note 24, at 270–71 ("If the Act focused on conduct rather than on a message, it would likely survive constitutional scrutiny even though a particular message may be regulated. . . . Without the 'politically motivated' language [in the model bill that became AETA], the statute has a much greater probability of withstanding constitutional scrutiny.").

169 R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

170 Norton v. United States, 298 F.3d 547, 553 (6th Cir. 2002).

171 *See* H. R. REP. NO. 103-306, at 3 (1993), *as reprinted in* 1994 U.S.C.C.A.N. 699, 699–700.

172 DOJ REPORT, *supra* note 31, at 11. Protecting access to medical and food production facilities may be interests of sufficient importance to satisfy intermediate scrutiny, but it seems less clear that protecting access to fur retailers—the second most targeted type of enterprise—should support restricting activist speech.

173 Campbell, *supra* note 102, at 977.

174 *Id.*

175 Angela Hubbell, Comment, *'FACE'ing the First Amendment: Application of RICO and the Clinic Entrances Act to Abortion Protestors*, 21 OHIO N.U. L. REV. 1061, 1078 (1995) (citing Michael W. McConnell, *Rule of Law: Free Speech Outside Abortion Clinics*, WALL. ST. J., Mar. 31, 1993, at A15).

picketing or other peaceful demonstration,"[176] but left "peaceful" protest undefined.[177] Given the Supreme Court's recognition that because First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society[,] [and that] [t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions,"[178] opponents appeared to have good grounds for challenging FACE.[179]

Despite its potential chilling effects, however, FACE survived numerous attacks based on vagueness and overbreadth.[180] The Sixth Circuit in *Norton* simply agreed with its sister circuits in upholding FACE against a vagueness challenge,[181] and the court's analysis of potential overbreadth took one short paragraph.[182] Several elements of FACE compelled this determination.

First, FACE prohibits only a limited range of conduct,[183] none of which is constitutionally protected. Second, FACE sets out prohibited conduct in plain language, much of it lifted from state and federal statutes that courts already have upheld against vagueness challenges.[184] Finally, FACE expressly forbids any construction that would interfere with activity protected under the First Amendment.[185]

These three elements, and even some of the same language, also are found in AETA. AETA borrows FACE's exclusion clause, trimming only a provision against construction that would interfere with state regulation of abortion.[186] Thus, both statutes expressly disclaim interference with protected expressive conduct.

176 18 U.S.C. § 248(d)(1) (2006).

177 Hubbell, *supra* note 175, at 1078.

178 NAACP v. Button, 371 U.S. 415, 433 (1963).

179 *See generally* Michael Stokes Paulsen & Michael W. McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 VA. J. SOC. POL'Y & L. 261, 286–89 (1994).

180 Norton v. United States, 298 F.3d 547, 553 (6th Cir. 2002).

181 *Id.*

182 *Id.* at 553–54.

183 *Id.*

184 Campbell, *supra* note 102, at 978 (citing S. REP. NO. 103-117, at 22–23, 30 (1993)).

185 18 U.S.C. § 248(d)(1)–(2) (2006).

186 *See* § 248(d)(4). No similar provision appears in AETA to indicate that states wishing to provide greater restrictions on animal cruelty could do so.

Additionally, FACE and AETA employ much of the same plain language in describing their offenses. FACE subjects to penalties anyone who "intentionally damages or destroys the property of a facility . . . because such facility provides reproductive health services."[187] Similarly, AETA permits the prosecution of anyone who "intentionally damages or causes the loss of any real or personal property . . . used by an animal enterprise."[188] A notable difference is that AETA lacks the kind of motive clause on which some defendants and commentators have challenged FACE as a content-based regulation.[189] Courts have upheld such clauses as proper examples of filtering out conduct that Congress believes need not be covered by federal statute, ensuring that laws do not federalize "a slew of random crimes that might occur in the vicinity of" targeted conduct.[190] AETA declines to test judicial acceptance of motive clauses and likely eliminates the possibility of successful challenge on a motive theory by prohibiting intentional damage *of* animal enterprises, rather than, for example, prohibiting intentional damage of enterprises *because* such enterprises experiment with or upon, exhibit, sell, slaughter, or otherwise use animals. Finally, both FACE and AETA penalize the constitutionally unprotected use of threat or force to intimidate.[191] Under these circumstances, AETA is unlikely to be struck down as vague or substantially overbroad.

Just as FACE leaves undefined the term "peaceful protest," AETA also fails to resolve the meaning of important terms. As noted above, AETA neglects to specify the meaning of "interfere with." Additionally, AETA does not make clear what it means to "damage" an animal enterprise. Such obscurity already has generated a profound chilling effect among animal rights advocates.[192] A key reason is that AETA includes a

187 § 248(a)(3).

188 § 43(a)(2)(A).

189 *See, e.g.*, Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 683 (11th Cir. 2001); United States v. Dinwiddie, 76 F.3d 913, 922–23 (8th Cir. 1996); Hubbell, *supra* note 175, at 1076–77.

190 *Dinwiddie*, 76 F.3d at 923. *See also, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 487–88 (1993).

191 §§ 43(a)(2)(B), 248(a)(2).

192 Andrew Kohn, Editorial, *The Animal Enterprise Terrorism Act: A Positive for the Animal Rights Movement?*, VT. J. ENVTL. L., Dec. 14, 2006, *available at* http://vjel.org/editorials/ED10055.html.

definition of "economic damage" in its penalty section. There, AETA defines economic damage as:

> [T]he replacement costs of lost or damaged property or records, the costs of repeating an interrupted or invalidated experiment, *the loss of profits*, or increased costs, including losses and increased costs resulting from threats, acts or vandalism, property damage, trespass, harassment, or intimidation taken against a person or entity on account of that person's or entity's connection to, relationship with, or transactions with the animal enterprise.[193]

Although the penalty section is not implicated until AETA's offense elements—the intentional damage or loss of property or the placing in reasonable fear—are met, fear that causing an animal enterprise to lose profits might invoke AETA has spread rapidly among the animal rights community. Given AETA's use of the terrorist label and potential punishment of life imprisonment, assurances that reading such vagueness and substantial overbreadth into AETA is untenable can do little to dispel the chill. Many animal rights and free speech advocates worry that organizing a boycott of factory-farmed eggs, picketing a circus, or visiting a website offering to send e-mails or faxes imploring a company to end its animal experimentation have become acts of terrorism.[194] Moreover, while AETA's exclusion clause ostensibly should have reduced the law's disconcerting effect, the clause's wording instead appears to have enhanced it. The clause excludes "peaceful picketing or other peaceful demonstration."[195] As explained above, however, if "interfering with" the property of an animal enterprise offends AETA, and such interference is accomplished through picketing or other forms of nonviolent—albeit disruptive—demonstration, then such protected speech would seem to fall outside AETA's allowance for "peaceful" activity.

193 § 43(d)(3) (emphasis added).

194 *See, e.g.*, Will Potter, *Analysis of the Animal Enterprise Terrorism Act: Using "Terrorism" Rhetoric to Chill Free Speech and Protect Corporate Profits*, GREENISTHENEWRED.COM, Oct. 10, 2006 (updated July 2007), at 2–5, http://www.greenisthenewred.com/wp-content/Images/aeta-analysis-109th.pdf (last visited Sept. 15, 2007).

195 § 43(d)(1).

IV
CHILLING EFFECTS OF THE FACE/AETA APPROACH

A. Discouraging Protest

The threat of punishment chills.[196] Utilitarians consider such deterrence a fundamental objective of criminal law when applied to conduct deemed outside social norms.[197] A prohibition that inspires a fear of punishment for protected activity, however, creates a pernicious chilling effect. Harvard Law School Professor Frederick Schauer described the consequences of this effect for protected speech: "Deterred by the fear of punishment, some . . . refrain from saying or publishing that which they lawfully could, and indeed, should."[198] A law's constitutional validity does not diminish the force of this effect.[199]

AETA appears to create this chilling effect while avoiding vagueness, substantial overbreadth, or content-based discrimination, raising the question of whether fear that deters speech is simply an unfortunate side effect of a valid law. One danger of side effects is that their consequences may turn out to be more severe than the maladies they purport to relieve. These may include both individual and societal harms.[200] The violent acts of protesters, of course, carry serious societal harms of their own, whether they are murders committed by militant antiabortionists or multimillion dollar fires set by militant animal protectionists. This Comment does not defend those acts.[201] It seems likely, however, that if both violent activists and nonviolent protesters "target" the same enterprises, then

196 *See* Schauer, *supra* note 9, at 700–01.

197 *See* JEREMY BENTHAM, *Of the Principle of Utility*, *in* AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1, 15–16 (J. H. Burns & H. L.A. Hart eds., Oxford Univ. Press 1996) (1970).

198 Schauer, *supra* note 9, at 693.

199 *See* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 814 (1969).

200 *See id.*

201 *See generally* 3 ROSCOE POUND, JURISPRUDENCE 67 (1959). As explained in Part II.B., the property destruction that AETA labels as terrorism presents a larger philosophical problem. It is more difficult to argue that property crimes "so affect the activities of the state necessary to its preservation that the individual interest, even when put as a social interest in free belief and free speech may have to give way." *Id.*

members of the nonviolent group will feel that a law protecting those enterprises against the conduct of those in the violent group may nevertheless apply to them in some way. Fear of association with the violent group is likely to inhibit nonviolent expression on the same subject. Our society has a fundamental interest in avoiding such constraints,[202] whether their effects are felt by associations or individuals. Roscoe Pound described "the social interest in freedom of the individual will"[203] as an interest deserving of protection or, at least, of careful consideration before any such constraints deemed unavoidable are applied:

> If one will is to be subjected to the will of another through the force of politically organized society, it . . . is to be done upon some rational basis, which the person coerced, if reasonable, could appreciate. It is to be done upon a reasoned weighing of the interests involved and a reasoned attempt to reconcile them or adjust them.[204]

A seemingly rational response to this argument is that lawful protesters need not fear laws that do not apply to them. FACE and AETA disclaim any intent to infringe expressive conduct protected under the First Amendment.[205] AETA expressly excludes "lawful economic disruption (including a lawful boycott) that results from lawful . . . reaction to the disclosure of information about an animal enterprise" from its definition of economic damage for punishment purposes.[206]

Assuming a mistake- and cost-free legal system, relying on a law's express limitations would be a reasonable response. But a protester who knows that AETA is inapplicable must consider the risk that a court may find the law apposite.[207] Schauer explains that "[t]his possibility may be translated into . . . a fear that lawful conduct may nonetheless be punished because of the fallibility inherent in the legal process."[208]

But AETA likely would invoke fear even under a flawless adjudicative process in which innocence equaled acquittal. An accused party still would pay the costs of defense, as well as

202 *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982).

203 POUND, *supra* note 201, at 318.

204 *Id.*

205 18 U.S.C. §§ 43(e)(1), 248(d)(1) (2006).

206 § 43(d)(3)(b).

207 *See* Schauer, *supra* note 9, at 694–95.

208 *Id.* at 695.

mental and temporal tolls. The legal process inevitably produces a chilling effect, which varies only to the degree a party is willing to bear the risk.[209]

Attaching a stigmatic label heightens this intimidation.[210] An accusation may taint a reputation with the suspicion of culpability even if charges or lawsuits ultimately are resolved favorably. Imagine, for example, an unsuccessful defendant deemed a "sex offender" in a sexual harassment suit. Even if not required to register in a database tracking convicted pedophiles and molesters, such a defendant likely would find the label a significant hardship.[211] Protest groups well understand the communicative force of carefully applied identities.[212]

Application of the terrorist label, and AETA's authorization of increasing penalties based on economic damage, already have produced a pronounced chilling effect. FACE imposed similar penalties on essentially the same crimes directed at abortion clinics and successfully reduced clinic attacks.[213] Even without applying a stigmatizing label, however, FACE also shrank the numbers of antiabortion protesters willing to demonstrate at clinics or engage in nonviolent civil disobedience.[214] FACE criminalized only unprotected conduct and expressly excluded

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209 *See id.* at 700–01.

210 Sedima v. Imrex Co., 473 U.S. 479, 504 (1985) (Marshall, J., dissenting); *see also, e.g.*, Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 834 (1990) (describing intimidating effect of racketeer label).

211 The model bill that inspired AETA included just such a registration provision. It would have created a national registry in which "[a] person who is convicted of or pleads guilty to an act that violates any section of the Animal and Ecological Terrorism Act shall be registered with the Attorney General on a form prescribed by the Attorney General." ALEC REPORT, *supra* note 25, at 24. The proposed registry would have required "the name, a current residence address, a recent photograph and signature of the offender . . . [and] written notice to the Attorney General regarding any change in name or residence address within thirty (30) days of making the change." *Id.* ALEC's proposed bill also directed the Attorney General to "create a website containing the information set forth in this paragraph for each person who is convicted or pleads guilty to a violation of this Act." *Id.* The offender's personal information would have remained in the registry "for no less than three (3) years at which time the registrant may apply to the Attorney General for removal after a hearing on the application for removal." *Id.* The enacted law did not include these provisions.

212 *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 172 (1990) (noting that Operation Rescue's "carefully chosen name again illustrates the power that many ascribe to labels").

213 BAIRD-WINDLE & BADER, *supra* note 87, at 324.

214 *Id.*

protected speech, but the law still decreased the desire to participate in legal protest.[215] This is an example of the chilling effect's force. Those who would express their views must make difficult choices between nonexercise of fundamental rights and confrontation of fundamental fears.[216]

Even so, FACE probably has chilled protest speech with less force than some opponents predicted.[217] Uneven enforcement may be partly responsible.[218] Between FACE's enactment in May 1994 and September 1998, violence and intimidation at clinics remained high.[219] Prosecutors, however, brought only forty-six cases under FACE during this time period.[220] As clinic violence continued, abortion supporters attributed the apparent reluctant enforcement of FACE to the law's conflict with the beliefs of some law enforcement officials.[221]

If clinics lost some ability to control antiabortion extremists to reluctant prosecutors in FACE cases, however, they regained—and increased—that control through the novel application of the Racketeer Influenced and Corrupt Organizations Act ("RICO")[222] to antiabortion protesters. In *National Organization for Women, Inc. v. Scheidler*,[223] NOW and two women's health organizations sued abortion opponents, alleging a conspiracy to shut down abortion providers.[224] Lower courts

215 *See, e.g.*, Ana Puga, *Abortion Foes Meet Justice Department Aide*, BOSTON GLOBE, Oct. 19, 1994, at 84; NAT'L LEGAL FOUND., FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT (FACE), http://www.nlf.net/Resources/issues/face.html (last visited Jan. 25, 2007) ("This provision of the United States Code is being used to squelch legitimate political protest activity.").

216 *See* Schauer, *supra* note 9, at 693.

217 *See* Gina Holland, *Supreme Court Abortion Protest Case Worries Both Sides*, PITTSBURGH POST-GAZETTE, Dec. 5, 2002, at A10 (reporting statement of Joseph Scheidler (founder of Pro-Life Action Network, author of *Closed: 99 Ways to Stop Abortion*, and appellant in *Scheidler v. National Organization for Women, Inc.*, discussed in this section) that abortion foes feared being found guilty of racketeering more than trespass or other less serious crimes).

218 BAIRD-WINDLE & BADER, *supra* note 87, at 324–25.

219 *Id.* at 325.

220 *Id.*

221 *See* Campbell, *supra* note 102, at 980; Robert Pear, *Abortion Clinic Workers Say Law is Being Ignored*, N.Y. TIMES, Sept. 23, 1994, at A16.

222 18 U.S.C. § 1961 (2006).

223 765 F. Supp. 937 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994).

224 *Id.* at 938.

rejected the plaintiffs' argument that donations to antiabortion protest groups were racketeering income received in pursuit of an economic purpose under RICO.[225] Construing RICO to require a profit-making motive, both the U.S. District Court for the Northern District of Illinois and the Seventh Circuit found in favor of the protesters.[226]

The Supreme Court unanimously reversed.[227] Finding no economic motive requirement in the statute, the Court explained that an enterprise must have merely a detrimental influence on interstate commerce to warrant civil liability under RICO.[228]

The Court's decision sparked an explosion of commentary.[229] Some warned that branding protesters as "racketeers," along with the possibility of liability for treble damages and crippling attorneys' fees, would increase the chilling effect.[230] Antiabortion protesters feared racketeering charges more than charges of trespassing or other less serious crimes.[231]

RICO's penalties, including the ability to compel forfeiture of assets, make it difficult to measure the independent chilling effect

225 Hubbell, *supra* note 175, at 1064–65.

226 *NOW*, 765 F. Supp. at 944; *NOW*, 968 F.2d at 630–31.

227 *NOW*, 510 U.S. at 262.

228 *See id.* at 256–58. The Court specifically declined to address First Amendment implications of its holding, noting that although respondents and amici had argued that "application of RICO to antiabortion protesters could chill legitimate expression protected by the First Amendment[,] . . . the question presented for review asked simply whether the Court should create an unwritten requirement limiting RICO to cases where either the enterprise or racketeering activity has an overriding economic motive." *Id.* at 262 n.6.

229 Jaime I. Roth, Comment, *Reptiles in the Weeds: Civil RICO vs. the First Amendment in the Animal Rights Debate*, 56 U. MIAMI L. REV. 467, 479 (2002) (citing a number of articles).

230 *See, e.g.*, Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 744 (1999) ("[T]he stigmatic label of 'racketeer' affixes to anyone against whom a RICO claim is brought—even if that person's First Amendment rights are ultimately vindicated.").

231 Holland, *supra* note 217; *see Pro-Life Protestors No Longer Racketeers, Says Concerned Women for America*, U.S. NEWSWIRE, Feb. 26, 2003 ("After years and years of litigation and the disgrace of being declared a racketeer, Joe Scheidler . . . has finally been vindicated.") (statement of Sandy Rios, President, Concerned Women for America). *But see* Campbell, *supra* note 102, at 961–62 (contending that potential application of civil RICO to abortion protestors had minimal effect on clinic violence).

of the deprecatory racketeer label.[232] Anecdotal evidence, however, suggests that the label stifled political activism and contributed to a decline in political organizing in the antiabortion context. Drafters of AETA's model bill sought the ability to apply forfeiture to the aboveground animal welfare organizations that they accused of promoting ALF actions.[233] The drafters' success in achieving AETA's passage increases the potential for application of RICO-like penalties to protestors at laboratories, circuses, and furriers.

Animal enterprises already have employed such tactics aggressively and effectively to combat nonviolent protest activity.[234] In *Huntingdon Life Sciences, Inc. v. Rokke*, for example, the U.S. District Court for the Eastern District of Virginia upheld a RICO claim against an activist who released video documentation of conditions in a vivisection facility to PETA.[235] The activist, a PETA employee, got a job in the facility and began an eight-month undercover investigation of animal abuse.[236] She brought her findings to PETA, which used them to publicize alleged abuse and to support an animal cruelty complaint filed with the U.S. Department of Agriculture.[237] During the activist's surreptitious investigation, she received a salary from the facility. She remained a PETA employee during her time in the facility and continued to earn a salary from that organization. Huntingdon Life Sciences characterized PETA's employment of the activist as part of a long-term pattern of

232 *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) ("Argument is unnecessary to demonstrate that the appellation[] 'damned racketeer' . . . [is an] epithet[] likely to provoke the average person to retaliation.").

233 ALEC Press Release, *supra* note 12 ("One difficulty in using basic vandalism, trespassing, and destruction of property laws lies in the states' inability to enter asset forfeiture proceedings.").

234 *See* Xavier Beltran, Note, *Applying RICO to Eco-Activism: Fanning the Radical Flames of Eco-Terror*, 29 B.C. ENVTL. AFF. L. REV. 281, 292–98 (2002); Press Release, Simon Ward, Fur Comm'n USA, Second RICO Suit Filed Against Fur Protesters (Aug. 8, 1999), http://www.furcommission.com/news/newsE54.htm (last visited Sept. 11, 2007).

235 986 F. Supp. 982 (E.D. Va. 1997).

236 *Id.* at 984–85.

237 *Application of the RICO Law to Nonviolent Advocacy Groups: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 124–26 (1998) [hereinafter *RICO Hearing*] (statement of Jeff Kerr, General Counsel, People for the Ethical Treatment of Animals).

investment in racketeering activity.[238] The court agreed.[239] The lawsuit settled for an undisclosed amount, but Huntingdon had sought damages and legal fees of over $10 million.[240]

The Supreme Court recently turned from an expansive view of civil RICO,[241] pleasing a broad collection of supporters of First Amendment freedoms.[242] AETA's use of the terrorist label and punishments based on economic damages, however, threatens to repeat RICO's chilling consequences. The seemingly endless controversy surrounding the pursuit and punishments of terrorists suggests strongly that the stigma of potential prosecution as either a terrorist or terrorist conspirator will prove a more effective protest deterrent than prosecution as a racketeer. Moreover, the anonymous, nonhierarchical nature of extremism in the environmental or animal rights contexts prevents concerned citizens who participate in peaceful protests, such as picketing at timber sales or leafleting in front of vivisection labs, from knowing whether they have entered inadvertently into association with violent extremists.[243] If the risk of a civil RICO suit can make nonviolent protesters reluctant to speak out on politically unpopular subjects, then the risk of a charge of conspiring to commit terrorism may be significantly greater in our post–9/11 climate.[244] If one fears the

238 *Rokke*, 986 F. Supp. at 989.

239 *Id.* at 990.

240 *See RICO Hearing*, *supra* note 237, at 125–27.

241 See *NOW*, 126 S. Ct. 1264 (2006), "a case involving nearly twenty years of litigation, including . . . three separate visits to the United States Supreme Court." Autumn Nero, Note, *Where Are We Now? Clinic Protection in the Wake of* Scheidler v. National Organization for Women, Inc., 21 WIS. WOMEN'S L.J. 73, 75 (2006).

242 *See* Daniel B. Kelly, Recent Development, *Defining Extortion: Rico, Hobbs, and Statutory Interpretation in* Scheidler v. National Organization for Women, Inc.*, 123 S. Ct. 1057 (2003)*, 26 HARV. J.L. & PUB. POL'Y 953, 954 n.5 (2003). ("[T]he American Civil Liberties Union, actor Martin Sheen, People for the Ethical Treatment of Animals, and even some organizations that support abortion rights have advocated lifting the threat of harsh penalties for pro-life demonstrators because a ruling against the protesters threatened their causes with harsh penalties for demonstrating.").

243 *See* Beltran, *supra* note 234, at 304.

244 *See, e.g.*, Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 103 (D. D.C. 2003) ("The use of the privileged medium of a lawsuit to publicly label someone an accomplice of terrorists can cause incalculable reputational damage. Placing that person in a situation in which he must retain counsel and defend himself has dramatic economic consequences as well.").

stigma of a criminal conviction over the threat of a civil penalty, one is likely to fear the charge of terrorism more than the charge of trespass.

Both sides of contentious issues freely employ this heightened deterrent effect,[245] applying "war against terrorism" rhetoric to everything from lawful protests[246] to children's movies.[247] The danger to protected speech arises when such rhetoric becomes law. Even though well intentioned, a law that characterizes the conduct of radical members of a broad ideological group cannot help but impute to mainstream members.[248] Justice Black, in *American Communications Ass'n v. Douds*, described this consequence:

> [L]aws aimed at one . . . group, however rational these laws may be in their beginnings, generate hatreds and prejudices which rapidly spread beyond control. Too often it is fear which inspires such passions, and nothing is more reckless or contagious. In the resulting hysteria, popular indignation tars with the same brush all those who have ever been associated with any member of the group under attack or who hold a view which, though supported by revered Americans as essential to democracy, has been adopted by that group for its own purposes.[249]

The reluctance of some sympathetic to the animal rights cause to participate in nonviolent protest for fear of conflation with

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245 Attorney Fay Clayton, who successfully obtained the nationwide injunction preventing antiabortion groups from interfering with women seeking abortions and other medical services from clinics that was recently overturned in *NOW v. Scheidler*, called the groups "an enterprise of terrorists that operates much like al-Qaeda." Michele Keller, *Latest* NOW v. Scheidler *Decision: Violence and Intimidation at Women's Clinics Not Protected Speech*, 34 NAT'L NOW TIMES, Jun. 30, 2002, at 5; *cf.* ALEC REPORT, *supra* note 25, at 9 ("[Animal Liberation Front] has an intriguing form of operation, much like that of al-Qaeda.").

246 Picketers who met regularly outside a Portland, Oregon, fur showroom prompted the storeowner to express his "hopes [that] anti-fur protestors will be prosecuted as terrorists under [AETA]." Patton, *supra* note 2. Nike CEO Philip H. Knight publicly condemned fair trade advocacy group Global Exchange for using what he called "terrorist tactics" in a national campaign of protest and publicity. RANDY SHAW, RECLAIMING AMERICA: NIKE, CLEAN AIR, AND THE NEW NATIONAL ACTIVISM 41 (1999).

247 Marc Morano, *New Movie Called "Soft Core Eco-Terrorism" for Kids*, CNSNEWS.COM, May 1, 2006, http://www.cnsnews.com/SpecialReports/archive/200605/SPE20060501a.html.

248 Susan Dente Ross, *An Apologia to Radical Dissent and a Supreme Court Test to Protect It*, 7 COMM. L. & POL'Y 401, 419–25 (2002).

249 339 U.S. 382, 448–49 (1950).

violent extremists in the animal rights movement suggests that Justice Black's observation is accurate.[250]

B. Reducing Economic Incentive to Invest in Social Welfare

An easier justification for placing protected speech at risk might exist if AETA added any protections not already present in existing criminal law.[251] AETA, however, merely criminalizes already prohibited conduct. At the same time, AETA stigmatizes animal rights supporters as a class by branding a small subgroup—militant extremists—with a label appropriate for perhaps the most grave of modern criminal threats.[252] The unstated justification driving this stigmatization appears to be the goal of reducing or eliminating economic burdens of responding to protesters.[253]

A chilling effect on protest is likely to contribute positively to the bottom lines of formerly targeted enterprises, although one long-term consequence of a stigmatizing approach may be to drive some animal rights supporters toward violent forms of expression.[254] One bottom-line benefit would be a reduction in the costs of security to respond to protesters. The expenses of counter-publicity and legal fees also would likely abate, along with concerns of customers disturbed by protests. When PETA distributed documentary videos of an animal testing facility, for example, a major customer of that enterprise withdrew its business.[255] PETA General Counsel Jeff Kerr asserted before a

250 *See* REGAN, *supra* note 61, at 191–92.

251 *See* Marquis & Weiss, *supra* note 19 (questioning need for new law to combat special-interest extremism).

252 *National Security Threats Hearing*, *supra* note 20, at 23–25 (describing al-Qaeda and related groups).

253 *See generally* Eddy, *supra* note 53, at 277–91 (criticizing protectionist approaches of State laws based on AETA's model act).

254 The well-established relationship between availability of nonviolent avenues for dissent and application of violence suggests that AETA risks exacerbating the problem it attempts to solve. *See* Note, *Safety Valve Closed: The Removal of Nonviolent Outlets for Dissent and the Onset of Anti-Abortion Violence*, 113 HARV. L. REV. 1210, 1221–25 (2000).

255 *RICO Hearing*, *supra* note 237, at 130 (statement of Jeff Kerr, General Counsel, People for the Ethical Treatment of Animals, explaining that "[o]ne of the lab's customers to whom we submitted our investigation results immediately suspended all testing with Huntingdon and conducted its own investigation, saying: 'The attitudes and behavior shown by lab technicians on the [PETA undercover investigation] tape are unacceptable to us.'"). The behaviors documented on

House subcommittee that negative publicity prompted the facility to engage "the largest law firm in Boston" to file an eighty-page complaint against PETA.[256] Kerr testified that, although the suit ended in an undisclosed settlement after six months of litigation, PETA's documentary evidence helped bring about twenty-three counts of violations of the Animal Welfare Act against the facility.[257]

Protests also can launch consumer boycotts that carry severe costs.[258] The boycott of white merchants in Claiborne County, Mississippi, which gave rise to litigation that reached the Supreme Court in *Claiborne Hardware Co.*,[259] provides one well-known example. Reviewing lower court findings in his 1982 majority opinion, Justice Stevens described boycott-related business losses, including lost earnings and goodwill, as exceeding $900,000.[260] Attorney's fees for the resulting litigation brought the total cost to over $1.25 million.[261]

The rhetoric used to describe protests often parallels that of some boycotts.[262] The goals of protests and boycotts may relate as well. The Court in *Claiborne* described these similarities, noting the Court's holding in *Thornhill v. Alabama* that picketing with the express purpose of discouraging customers and thereby harming business sales was constitutionally

videotape included Huntingdon employees screaming and shaking their fists in the faces of strapped-down primates. *Id.*

256 *See id.* at 130–31.

257 *Id.* at 131.

258 In one notable case, Danish dairy company Arla Foods Amba saw annual sales in the Middle East drop from $430 million to near zero in the backlash against Danish products that followed the appearance of caricatures of the prophet Muhammad in a Danish newspaper. Richard Ettenson et al., *Rethinking Consumer Boycotts*, 47 MIT SLOAN MGMT. REV. 6, 6 (Summer 2006).

259 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 890 (1982).

260 *Id.* at 893.

261 *Id.*

262 *Compare* Earth Liberation Front statement that "[t]he only way . . . to stop th[e] continued destruction of life is to . . . take the profit motive out of killing," Brad Knickerbocker, *Firebrands of 'Ecoterrorism' Set Sights on Urban Sprawl*, CHRISTIAN SCI. MONITOR, Aug. 6, 2003, at 1, *with* 1930s pamphlet calling for boycott of silk imported from fascist Japan stating that "[i]f your stockings are silk . . . they helped . . . murder thousands of babies and women, workmen, and peasants of China." Lawrence B. Glickman, *As Business Ethics Fall, Consumer Activism Rises*, BOSTON GLOBE, July 31, 2005, at F12.

protected.[263] Open and vigorous efforts to increase public awareness of offensive business practices likewise receive First Amendment protection, as the Court in *Organization for a Better Austin v. Keefe* explained.[264]

Prescient enterprises might avoid or reduce costs associated with countering such efforts by listening to the shouts of protesters when they call for business improvements that can benefit society. Ignoring or suppressing protesting voices may remove a catalyst that serves to increase an enterprise's drive to improve products, production methods, or working conditions, unnecessarily hindering social welfare and, ironically, increase the likelihood that business opportunities will pass unnoticed. Harvard Business School Professor and former Harvard Business Review editor Theodore Levitt described this "buggywhip industry" practice in his now-classic 1960 paper *Marketing Myopia*,[265] discussing petroleum producers' entrenched resistance to demands that they change course:

> [The oil industry] is trying to improve hydrocarbon fuels rather than to develop *any* fuels best suited to the needs of their users, whether or not made in different ways and with different raw materials from oil.
>
> . . . .
>
> . . . [C]ompanies that are working on exotic fuel substitutes which will eliminate the need for frequent refueling are heading directly into the outstretched arms of the irritated motorists. They are riding a wave of inevitability, not because they are creating something which is technologically superior or more sophisticated, but because they are satisfying a powerful customer need. They are also eliminating noxious odors and air pollution.
>
> . . . For their own good the oil firms will have to destroy their own highly profitable assets. No amount of wishful thinking can save them from the necessity of engaging in this form of "creative-destruction."[266]

263 *Claiborne Hardware Co.*, 458 U.S. at 909 (citing Thornhill v. Alabama, 310 U.S. 88, 89 (1940)).

264 402 U.S. 415, 419 (1971).

265 Proffesor Levitt's paper sold some 850,000 reprints, placing it among the best-selling Harvard Business Review articles of all time. Louis Lavelle, *Theodore Levitt Dead at 81*, BUS. WEEK, June 29, 2006, *available at* http://www.businessweek.com/print/bschools/content/jun2006/bs20060629_5211_bs001.htm.

266 Theodore Levitt, *Marketing Myopia*, 53 HARV. BUS. REV. 26, 39, 44 (Sept.–Oct. 1975).

Levitt's reasoning indicates that encouraging rather than discouraging peaceful protest may produce quantifiable benefits for both society and business. Although this Comment does not probe that theory extensively, the next Section proffers one prominent example as an indication that additional exploration might prove fruitful.

C. Decreasing Long-Term Competitiveness by Rationalizing Economic Protectionism

Examining FACE and AETA under an economic lens reveals another similarity between the two laws. Destructive, violent protests, whether they concern abortion or animal rights, have a negative cost impact on business. They increase expenses, raise entry barriers, and decrease the number of competitors.[267] These negative economic effects have prompted some commentators to suggest creative remedies beyond civil RICO, including applying the force of antitrust law to nonviolent protesters.[268]

Businesses, however, also pay when laws intended to reduce the anticompetitive effects of illegal protests chill protected speech. Costs take the form of opportunities missed and resources wasted on resisting calls for improvements that, once implemented, may provide positive returns. Discouraging protest may foster, rather than prevent, damage to economic value.

Oregon's own Fortune 500 global sports and fitness company provides a notable example of a vigorous nonviolent protest that ultimately benefited both society and business. Nike, Inc. initially responded to what became a storm of discontent over its overseas labor practices with strict denials and attacks on its critics.[269] Founder and Chief Executive Officer Philip H. Knight directed his most aggressive responses toward fair trade advocates Global Exchange, condemning the group's national campaign of protest and publicity as constituting "terrorist tactics."[270] Nike resisted taking responsibility for conditions in contract factories that fabricated its products, denied claims of

267 Melanie K. Nelson, Comment, *The Anticompetitive Effects of Anti-Abortion Protest*, 2000 U. CHI. LEGAL F. 327, 349.

268 *See, e.g.*, *id.* at 356.

269 *See* SHAW, *supra* note 246, at 24–25.

270 *Id.* at 41.

abuse and exploitation, and refused calls for independent monitoring.[271] Sales stumbled as negative publicity peaked.[272] Mr. Knight characterized himself as "the poster boy on globalization."[273]

The company's evolving response suggests the folly of discouraging nonviolent protest. Dropping the strategy of denial and activist suppression, Nike began to overcome the backlash and eventually took the industry-first step of disclosing the names and locations of its more than 700 contract factories.[274] Labor activists prize such information because it allows independent assessment of working conditions.[275] Nike described its embrace of a more responsive strategy as learning "the hard way."[276]

Workers' rights advocates who campaigned against the company's practices grudgingly praised its steps toward correcting what they called "countless abuses that labor advocates have struggled to bring to light for years."[277] Shareholder advocates too must have been pleased to see the quantifiable economic benefits that accompanied improvements of at least some degree in the working conditions in overseas footwear and apparel factories. A leading socially responsible mutual fund, for example, considered Nike an acceptable

271 *See* Rachel Stevenson, *Business Analysis: Global Brands Learn to Mind Gap in Public Mood on Ethical Trade*, INDEP. (London), May 18, 2005, at 57.

272 *Special Report: The Best & Worst Managers of the Year*, BUS. WEEK, Jan. 10, 2005, at 64 ("In early 2000 kids stopped craving the latest basketball sneaker. Nike's image took a huge hit from its labor practices. Sales slumped, and costs soared.").

273 Jeff Manning, *Asian Labor Profits Nike, but Abuses Have a Price*, BIRMINGHAM NEWS (Ala.), Nov. 26, 1997, at 1C.

274 Rukmini Callimachi, *Nike No Longer Sneaky About Factories*, COURIER MAIL (Queensl.), April 14, 2005, at 28. Nike eventually admitted to "countless abuses that labor advocates [had] struggled to bring to light for years." Educating for Justice, Victory—Nike Discloses Factory Locations!, http://www.educatingforjustice.org/stopnikesweatshops.htm (last visited Jan. 17, 2007).

275 Laura Smitherman, *Nike Gets a Good Report Card: Anti-Sweatshop Watchdogs Say Apparel Maker is Doing Better*, BALT. SUN, Aug. 19, 2005, at 1E.

276 Stevenson, *supra* note 271, at 57 ("[I]t has taken a long time to get to this point at Nike and we have made many mistakes. For many years, we were defensive about it and saw it as just a PR problem. Now we see it as part of the way we run our business.") (quoting Nike Vice-President of Corporate Responsibility Hannah Jones).

277 Educating for Justice, *supra* note 274.

investment after improvements were made.[278] Nike began to consider its own corporate responsibility to be a performance enhancement, not merely a reputation protector.[279]

As the Nike example indicates, nonviolent protest can catalyze business growth. Violent forms of expression carry destructive consequences that compel their prohibition, but if targeting the violent discourages the nonviolent, the risk may be harm to the economic interests that protectionist statutes like AETA purport to safeguard.

CONCLUSION

Laws of general application are used to convict arsonists, thieves, murderers, trespassers, and vandals every day. The special interests that some who commit these crimes share provide no insulation from prosecution. Nor does the zealous commitment of extremists to causes that others advocate for with equal but nonviolent force indicate a need for particularized law enforcement tools. General laws can protect against violent extremism without risking the stigmatization of the interests that militant activists support.

The industry-specific protectionism that AETA provides, on the other hand, besmirches a whole movement by characterizing its fringe element in highly charged prejudicial terms. As the example of FACE proves, merely criminalizing in express terms a specific application of ordinary criminal conduct can generate a chilling effect on related but innocent conduct. Association of an inflammatory label such as "terrorism" with that process is likely to compound the chilling effect on protected protest speech. Indications of such augmentation are already apparent.

Congress should recognize that statutory savings clauses provide little or no reassurance to mainstream activists for animal rights or any other issue. Characterizing conduct under misapplied pejorative labels and coupling the characterization

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278 Smitherman, *supra* note 275, at 1E.

279 Michael Skapinker, *Nike Ushers In a New Age of Corporate Responsibility*, FIN. TIMES (London), Apr. 20, 2005, at 11 ("[T]he company sees business benefits from its new openness. . . . [T]he Nike Considered shoe range [is] an example. Designed in an attempt to meet consumer demand for a product containing fewer toxic chemicals, the shoe the company ended up making consumed less material and energy.").

with harsh penalties practically ensure a chilling effect, however precise the regulation. Justice Marshall, dissenting in *Arnett v. Kennedy*, pointed out that ultimate vindication "is of little consequence—for the value of a sword of Damocles is that it hangs—not that it drops."[280] Courts should treat AETA with the caution such an implement requires, distinguishing between protest activity and terrorism in unequivocal terms in their decisions on AETA and any future similar laws aimed at protecting other industries.

Activists who commit crimes in support of their causes can neither hide from existing law nor find safe haven for their actions within the Constitution. Justice Douglas made this clear in *Samuels v. Mackell*, emphasizing in his concurrence that "the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'"[281] AETA was not necessary to protect against such threats. Its passage devalues critical commentary on the hardship of animals in experimentation, food production, product testing, and entertainment. Society should hear these unpleasant but necessary expressions. The Constitution safeguards them. That fact makes AETA's Damoclean sword a threat of considerably graver concern.

280 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

281 401 U.S. 66, 75 (1971) (Douglas, J., concurring).