
Homeland Insecurities: A Critical Policy Analysis of the *Animal Enterprise Terrorism Act of 2006*

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Introduction

Before the miasma of dust and debris lifted from the ruins of the World Trade Center and the Pentagon after the September 11, 2001, terrorist attacks orchestrated by Al-Qaeda, America's leaders were quickly enacting a new generation of counterterrorism laws and national security apparatuses meant to safeguard the country from additional attacks. The Bush Administration, buttressed by a wave of public support and a legislative mandate, pushed through an aggressive counterterrorism agenda creating the Department of Homeland Security and passing the controversial *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA PATRIOT Act).¹ This mandate continued for several years, helped lead to war in Iraq in March 2003, and allowed the expansion of the federal government's eavesdropping powers with the *FISA Amendments Act of 2008*, a revision of the post-Watergate *Foreign Intelligence Surveillance Act of 1978* (FISA).²

The media and the academic and legal communities have explored the narratives of those acts, but less scrutiny has focused on the ways the post 9/11 environment is shaping domestic counterterrorism legislation aimed directly at the very citizens it seeks to protect. One example of domestically focused legislation is the *Animal Enterprise Terrorism Act*

of 2006 (AETA),³ an amendment to the *Animal Enterprise Protection Act of 1992* (AEPA).⁴ The newer act extends the protections of the AEPA to tertiary enterprises and affiliated individuals conducting business with animal enterprises. Further, the AETA reclassifies certain crimes committed against animal enterprises as federal crimes of terrorism with sanctions mostly contingent on the amount of economic damages incurred.

Passed in the waning days of the 109th Congress before Democrats assumed control of both houses, the law is unique because it focuses exclusively on American citizens and because it brings the commission of non-violent property crimes and other low-level offenses under the banner of terrorist acts. Also, the law specifically targets the animal rights movement and, despite being characterized as a mere amendment, drastically alters and leaves the original act virtually unrecognizable. Despite these major modifications, Congress treated the AETA as non-controversial legislation, allowing it virtually to sail through both the committee process and through the limited floor debate. A critical analysis of this seemingly innocuous, but far-reaching act is an important first step to open a dialogue regarding this little known yet quite controversial law.

Background

The *Animal Enterprise Terrorism Act of 2006* was proposed in order to address what proponents argued were weaknesses and insufficiencies in the *Animal Enterprise Protection Act of 1992*. The original act afforded protections to animal enterprises exclusively and required that a tangible “physical disruption” to the animal enterprise be demonstrated. Using the Interstate Commerce Clause of the U.S. Constitution, Congress proscribed actions that intentionally caused a “physical disruption to the functioning of an animal enterprise by intentionally stealing, damaging, or causing the loss of any property (including animals or records) used by an animal

enterprise, and thereby causes economic damages exceeding \$10,000 to that enterprise or conspir[ing] to do so.” The act set a penitentiary term of one year plus payment of restitution for anyone convicted of an AETA-defined crime. The act also stipulated that if the defendant caused serious bodily injury or death to an individual, it would be treated as an “aggravated” offense.⁵

By adding the clause defining an “aggravated offense,” Congress addressed changes in tactics of radical animal rights groups such as the Animal Liberation Front (ALF) and Stop Huntingdon Animal Cruelty (SHAC). Those groups had tailored their campaigns to bypass the restrictions of the earlier AEPA. Rather than focus their efforts on an animal enterprise directly, activists began targeting employees of tertiary or peripheral enterprises that conduct business with the animal enterprise such as banks, suppliers, pharmaceutical companies, universities, and insurers. The groups used a wide range of tactics including vandalism, threats, harassments, property destruction, fraud, identity theft, and even bomb threats and deployments of improvised explosive devices (IED).⁶

In testimony presented in May 2004 before the Senate Judiciary Committee hearing “Animal Rights: Activism vs. Criminality,” California District Attorney McGregor Scott cited an FBI report that attributed over 1,000 “acts of terrorism” and \$100 million in losses since 1996 to animal rights and ecological activists.⁷ During a Senate hearing in 2005 on “special interest extremist groups,” John Lewis, Deputy Assistant Director of the FBI, stated that although no death or serious injury could be attributed to radical environmental and animal rights groups, they represented “one of the most serious domestic terrorism threats” facing the nation.⁸

Witness testimony presented at the Senate hearing revealed a coordinated campaign of “terror” unleashed by animal rights activists on these tertiary targets. One prominent example focused on Stop Huntingdon

Animal Cruelty (SHAC) and its campaign against Huntingdon Life Sciences (HLS). The campaign was partly inspired by an undercover video put out by People for the Ethical Treatment of Animals (PETA) showing HLS employees physically and verbally abusing beagles used for research. The video later led to the dismissal and convictions of several HLS employees⁹ and a civil suit that HLS filed against PETA but later settled out of court.¹⁰

Originally started in the U.K., the campaign against HLS migrated to the U.S. with the establishment of SHAC USA, and began aggressively to target tertiary companies to induce them to sever their business relationship with HLS. William Green, Senior Vice President of Chiron Corporation, a biotechnology firm headquartered in Emeryville, California, gave testimony about SHAC's campaign against employees of Chiron. Green testified to the committee about several specific tactics, often called "direct actions," deployed against employees of Chiron. Included in the list of tactics were "home visits," for which a group of activists assembled outside of the employee's home, shouted obscenities, rattled doors and windows, harassed neighbors and family members (including children), and distributed leaflets alleging that the targeted employee abused animals. Other tactics included fraudulent subscriptions to magazines in the targeted person's name, phone harassment, and the posting of personal information about employees, including home addresses, on the internet to encourage other activists to target them. Green also testified that employees of Chiron had been victims of numerous property crimes such as vandalism and property damage ranging from spray-painted messages such as "puppy killer" on a target's home to sprays of corrosive acids on their vehicles. He testified that two pipe bombs had been detonated at Chiron's California headquarters, shattering the glass entrance, and alleged that activists had begun to make similar bomb threats against individual employees.

He implored the committee to pass legislation to help protect Chiron and other tertiary targets.¹¹

In spite of its alleged weaknesses, the AEPA was successfully invoked to secure the convictions of six members of SHAC USA on March 3, 2006. The six co-defendants were convicted by a federal jury in New Jersey of conspiracy to violate the AEPA and several counts of interstate stalking and harassment. The jury found that, although none of the defendants themselves had been shown to have participated directly in crimes against HLS, the group's website had served to incite acts of violence against associates of HLS by posting their names and addresses on the website and by boasting about successful "direct actions," often using the word "we." Collectively, the six co-defendants were sentenced to over 23 years in prison.¹²

Although the convictions were a rebuke to the animal rights groups, representatives and lobbyists of biomedical technology firms, pharmaceutical enterprises and research universities still actively lobbied Congress to clamp down on radical animal and environmental activists. Those pressing for firmer action found a friend in the American Legislative Exchange Council (ALEC). ALEC advertises itself as a nonpartisan, conservative think tank with membership drawn from members of state legislatures and "over 300 corporate and private foundation members."¹³ It boasts that it "provides its public and private sector members a unique opportunity to work together to develop policies and programs that promote the organization's mission." That mission focuses on introducing and promoting legislation at the state level that promotes "free markets, limited government, and federalism,"¹⁴ but ALEC has been involved with promoting several pieces of federal legislation as well.

One attempt at federal legislation was a model bill, titled the *Animal and Ecological Terrorism Act*, that ALEC wrote after issuing a report

similarly titled *Animal and Ecological Terrorism in America*. The ALEC report denounced the increasingly aggressive threats and escalating costs on enterprises targeted by animal and ecological “terrorists.” The model bill, though ultimately unsuccessful, contained far harsher provisions than the AETA, going so far as to recommend a national registry listing the names of those convicted of animal or ecologically motivated offenses, similar to sex offender databases.¹⁵

After ALEC’s model bill failed to generate congressional support, some supporters and others interested in the issue turned their attention to amending the AEPA. The *Animal Enterprise Terrorism Act*, introduced in the House of Representatives by Representative Tom Petri (R-WI), was first referred to the House Judiciary Committee’s Subcommittee on Crime, Terrorism, and Homeland Security. The House hearing featured witness testimony from Brent McIntosh, Deputy Assistant Attorney General of the United States Department of Justice. McIntosh testified that although the *Animal Enterprise Protection Act*, in conjunction with interstate stalking laws, had been used successfully to indict and convict the six members of SHAC USA, incidents of “animal rights terrorism” perpetrated by members of the Animal Liberation Front and other radical animal rights groups were on the rise and required an aggressive federal response. He also testified to the difficulties inherent in investigating and prosecuting members of ALF because of its non-hierarchical structure. Organized in loosely affiliated “cells,” members of the ALF conduct “direct actions” that are merely attributed to the ALF name and reported on their website, provided the participants adhere to the ALF Credo: “to take all necessary precautions against harming any animal, human and non-human.”¹⁶ McIntosh testified that although the actual crimes perpetrated by animal rights activists are state crimes, state resources and investigative capabilities are insufficient because of the interstate nature of the planning and execution of the actions.¹⁷

Unlike the Senate hearing, "Activism vs. Criminality," the House hearing regarding the AETA offered an opposition witness, William Potter, a freelance journalist who had done extensive reporting on animal rights groups. Potter opened his testimony by reminding the committee "he was not a lawyer, or a constitutional law expert" but went on to express concerns about the proposed law's negative effects on legitimate protest activities and free speech. He also questioned the government's assertion that current federal and state laws were inadequate to combat radical animal rights (and environmental) activists and cited the recent arrests of members of the Earth Liberation Front (ELF) for a series of arsons in the western U.S. and the successful prosecution of SHAC USA.¹⁸ Potter was the only witness called to testify against passage of the AETA. No witnesses from either mainstream or more radical animal rights groups, nor any constitutional law or civil liberties groups appeared before the committee to discuss the bill or raise objections to the AETA.

The American Civil Liberties Union (ACLU) initially opposed the bill. In a "Letter to Congress" written in March of 2006, the ACLU expressed concerns that the AETA would criminalize protected First Amendment activities and argued that amending the AEPA was not necessary.¹⁹ But the ACLU dropped its initial *in toto* opposition to the AETA after some minor changes were made to the bill. On October 30, 2006, the ACLU sent a letter to James Sensenbrenner, Jr., then Chairman of the House Judiciary Committee, officially withdrawing its opposition to the AETA. Instead, the ACLU recommended a few "minor changes" be made to the law such as clarifying that the law pertained only to lawful animal enterprises.²⁰ The ACLU also urged that the AETA be amended to exclude economic damages "resulting from a boycott, protest, demonstration, investigation, whistleblowing, reporting on any animal mistreatment, or any public, governmental, or business reaction to the disclosure of information

concerning the animal enterprise.” Although the language recommended by the ACLU was not included in the final version of the bill, the suggestions helped lead to the inclusion of a section titled Rules of Construction meant to provide exemptions for protected First Amendment speech activities.²¹

The Senate passed the AETA unanimously by a voice vote on September 29, 2006.²² The House of Representatives passed the law under a “suspension of the rules” on November 13.²³ Bills considered under a “suspension” are deemed non-controversial and require approval of two-thirds of the representatives present to suspend the rules. After the rules have been suspended, debate is limited to forty minutes and no additional amendments may be offered.²⁴ On November 27, 2006, President George W. Bush signed the AETA into law without comment.

The Law

The AETA amends Section 43 of Title 18 of the United States Code (formerly AEPA) to read:

(a) Offense.—whoever travels interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate commerce—

(1) for the purpose of damaging **or interfering with** the operation of an **animal enterprise**; and

(2) **in connection** with such purpose—

(A) **intentionally** 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, a relationship with, or transactions with an animal enterprise;

(B) **intentionally** places a person in reasonable fear of death or serious bodily injury to that person, a member of the immediate family...a spouse or intimate partner of that person **by a course of conduct** involving threats, acts of vandalism, property damage,

criminal trespass, harassment, or intimidation; or **conspires** to do so [emphasis added].²⁵

The broadened scope allows the AETA to cover crimes and “direct actions” against tertiary targets such as those identified in the congressional hearings. In the “intentionality clause,” the law extends protections for third parties such as banks and insurance companies by explicitly stating that interference with such third parties to target a protected animal enterprise is a violation of the law.

The AETA removed the AEPA requirement that a “physical disruption” to the animal enterprise be demonstrated. That change allowed indirect interruptions, such as black faxing (sending multiple copies of a black page with the goal of exhausting the fax machine’s supply of black ink), email jamming, and harassment such as home visits or threatening phone calls, to fall under the more ambiguous phrase “interfering with operations.” Further, the new law requires that the defendant be shown to have “intended” to damage or interfere with the animal enterprise but specifies that intent could be established by a “course of conduct” defined simply as “a pattern of conduct composed of two or more acts, evidencing a continuity of purpose.” That requirement, when combined with the interstate commerce requirement, is meant to safeguard against accidental violations that could result from legal protest activity.

The second component of the AETA’s intent requirement stipulates that a violation intentionally places “a person (or a member of that person’s family) in reasonable fear of death or serious bodily injury.” That provision brings protections to individuals who are victims of phone calls or home visits where physical harm is either directly threatened or insinuated. The provision explicitly includes crimes such as property damage, vandalism, harassment, and intimidation that are aimed at terrorizing the victim. The

final provision of this section of the act makes it equally punishable to conspire, or attempt to commit, animal enterprise terrorism.

Congress relied on its constitutional authority to regulate interstate commerce to bring these crimes under federal jurisdiction. Normally, property crimes such as vandalism and arson are state crimes (unless the target is a governmental entity) and fall under the purview of state courts. The rationale for grounding both the AEPA and the AETA on Congressional regulatory authority under the commerce clause is that, although the actual commission of the crimes is localized, the planning, funding, and preparation for them usually involves either the transportation of people or funds or both across state lines.²⁶ Also, because many groups such as SHAC, ELF, and ALF lack a centralized governing body, the internet plays a significant role in coordinating the groups' activities by facilitating access to information activists may use to commit crimes.

By creating a federal law of animal enterprise terrorism and expanding the original act's scope, resources allocated to investigate and conduct surveillance on animal rights groups could be increased. The testimony of U.S. District Attorney Brent McIntosh during the Senate hearings in 2004 revealed that the Department of Justice, in collaboration with the FBI, had established Joint Terrorism Task Forces (JTTFs) "in dozens of cities across the country." The JTTFs, initially commissioned after 9/11, had the broad purpose of "enhanc[ing] cooperation among local, state, and federal counterterrorism assets." Despite the increase in federal efforts, McIntosh spoke about the difficulties faced in investigating and prosecuting cases of animal (and ecological) domestic terrorism without the protection of adequate federal law and the budgetary increases and the enhanced investigational tools that would come along with it.²⁷

The AETA states that if a defendant has satisfied the interstate component of the act, the prosecution must also show that the defendant intentionally

damaged or interfered with the animal enterprise, or intentionally placed the victim in reasonable fear of death or serious bodily injury. In both cases, the standard of proof rests with the idea of a "course of conduct." While this "intentionality clause" appears to provide a safeguard against such accidental or unwitting violations of the act as unintended trespass during lawful demonstrations, the clause does not exempt all conceivable transgressions. The "intent" standard derives from the "course of conduct" provision and requires merely that the prosecution demonstrate that two or more acts demonstrate a "continuity of purpose." The law, however, allows other ways to meet the "course of conduct" requirement and may rest on the more nebulous "intent" to commit an act of terrorism by "instilling a reasonable fear."

Provisions such as the vague idea of "reasonable fear" have generated the most controversy and criticism from civil liberties lawyers and advocates who argue that the unspecific "course of conduct" requirement contributes to a chilling effect on free speech. A chilling effect is a concern whenever laws are passed that deal directly with, or collides with, protected First Amendment free speech activities.²⁸ The argument is that any law that involves criminalizing protest or speech activities must be carefully crafted to avoid any chance that people, seeking to exercise their protected right to speech; may not be able to discern what is, or what is not allowed under the law. Any ambiguity in the law may cause people to err on the side of caution and choose not to exercise their right to free speech, thus creating a chilling effect.

When some lawmakers and civil liberties experts raised concerns about the chilling effect and the AETA, proponents countered that the section of the act titled Rules of Construction provide an adequate safeguard. Although the Rules of Construction do exempt many types of protest activities such as economic disruption from a lawful boycott, problems with the language

remain and could contribute to a chilling effect. The Rules of Construction of the AETA state that the act shall not be construed:

- (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) **protected from legal prohibition** by the First Amendment to the Constitution;
- (2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, regardless of the point of view expressed, or to limit any existing legal remedies for such interference; or
- (3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this action, or to preempt State or local laws that may provide such penalties or remedies [emphasis added].²⁹

The provisions of the AETA exempted from prosecution only those who are engaged in expressive conduct “protected from legal prohibition.” Many protest activities used by activists across the political spectrum are not actually protected from legal prohibition by the First Amendment. Protest techniques such as civil disobedience are often left unprotected by the First Amendment because they are on private property and are therefore in violation of trespass laws. Indeed, authorities often use trespass laws and arrests to bring such actions to an end. Also left unprotected are private, undercover investigations and clandestine videotaping of animal abuse. Those actions likewise often violate trespass laws. Finally, the act provides no exemption for whistleblowers.

Therefore, the AETA, while providing protections for some types of protest activities, fails to exempt one of the more effective means of protest available to activists. If, during the Civil Rights movement, the lunch counters of the South had enjoyed protections similar to those the AETA affords to animal enterprises, hundreds of otherwise law-abiding

citizens might have found themselves being branded as “terrorists” under the letter of the law.

The most significant flaw in the AETA is the broadening of the federal definition of domestic terrorism and the widening of the types of crimes that are considered to be acts of terrorism. The AETA, for the first time, codifies at the federal level the crime of terrorism for property crimes. For example, a defendant who releases mink from a farm and is convicted under the AETA would be convicted as a terrorist. While such an action is a crime, one must ask: does it constitute an act of terrorism? Should the perpetrator of such a crime be treated as a terrorist on the same level as a member of Al-Qaeda? Even the Patriot Act defines domestic terrorism more narrowly as actions that:

- A) involve **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 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 boundaries of the United States [emphasis added].³⁰

Under the AETA, property crimes such as vandalism, theft, arson, and trespass, even when steps are clearly taken to assure that no human life is endangered, become acts of terrorism, and the perpetrators become terrorists.

Definitions

The AETA provides criminal penalties for intentionally instilling in the victim a “reasonable fear of death or serious bodily injury.” Many acts and crimes committed by members of radical animal rights or

environmental groups could conceivably be found to instill a reasonable fear. What researcher would not fear bodily harm or even death after receiving ominous, threatening phone calls in the middle of the night, or falling victim to one of the home visits? People would be right to fear for their lives after hearing that a pipe bomb had been detonated at their lab, or in the car of a colleague. Any such action is serious, criminal, and should be met with the full force of the law. Those crimes are designed to terrorize their victims, and as such it is easy to argue that they invoke terror in their targets. Similar crimes, however, such as those levied against abortion providers, have not been prosecuted as acts of terrorism.³¹

More difficult are those cases in which “reasonable fear” is more convoluted. The definitions section of the AETA is eerily silent about what constitutes a “reasonable fear.” Four lines provided in the definitions section relate to serious bodily injury, and an additional seven lines define a substantial bodily injury. But no definition provides guidance for what constitutes a “reasonable fear of death or serious bodily injury.” Therefore considerable gray areas exist in the law, for no two individuals are likely to calculate fear and risk the same way. What may invoke terror in one person, may merely trouble another.

A definition of reasonable fear would help to mitigate concerns that the AETA creates a chilling effect on speech, because a definition of fear would clearly establish where the line is drawn. Protests outside a researcher’s home may be annoying for the researcher and for their neighbors, but protesters have found that tactic to be a useful tool to compel their targets to abandon their use of animals in research, lessen the use of animals, or conduct animal research more humanely. The presence of protesters outside one’s home, however, especially if those protestors are often referred to as “terrorists” and “extremists” by the news media, may cause some individuals to experience a reasonable fear. If the law required that specific crimes or actions be shown, or a standard of proof be met, the law

could still protect and defend victims properly, while avoiding the issues presented by vagueness.

The final provision of the act stipulates that conspiracies to commit, or attempt to commit, the crime of animal enterprise terrorism are equally punishable under the law. The conspiracy clause of the AETA is problematic in two key ways. First, by not distinguishing between an actual violation and a planned violation, the act provides no incentives for an individual to opt out of a planned crime, especially if that person fears surveillance or the negative testimony of a co-conspirator. Of course, a criminal who is merely thwarted before he or she is able to execute a crime should not be rewarded, but in many areas of law the penalty for attempting a crime is substantially less than the penalty for committing it. For example, differences in punishment are quite distinct between a conspiracy to commit murder and murder.

The second issue that arises in relation to the conspiracy clause is that once again the definitions section is silent about what constitutes a conspiracy or an attempted conspiracy. Nor is the act clear about what burden of proof the state must demonstrate to secure a conviction using that clause. The penalties section of the AETA demonstrates how the above gaps could become problematic because the graduated punishments for violations of the act are determined partly by the sum of economic damages sustained by the animal enterprise. Further, the definition of "economic damages" suggests that the act may come up against real, but conflicting issues, if it is used to prosecute a defendant merely on the grounds of conspiracy or attempt to violate the AETA. In that circumstance, the prosecution will require that the state calculate the appropriate criminal sanction based on hypothetical economic costs to the targeted animal enterprise from a likewise hypothetical crime.

Penalties

The penalties section of the AETA is distinctly different from that of its predecessor. The AEPA established a six-month sentence for a person convicted of causing a "physical disruption to the functioning of an animal enterprise," causing damages or causing "the loss of any property used by the animal enterprise" valued at less than \$10,000 if no one was harmed. That sentence would, of course, be in addition to any sanctions from any accompanying property crime or other subsequent convictions that may have been levied against the defendant. If the crime resulted in "major economic damage" to the enterprise (\$10,000 or more), but had not caused serious bodily injury or death, the AEPA established a sentence of up to three years.³²

If the crime resulted in "serious bodily injury or death" it was to be treated as an aggravated offense and the penalties (again, likely levied in addition to other state or federal charges) were much stiffer, calling for a term of up to 20 years for an offense that caused serious bodily injury to another individual. No provision in the AEPA provided for charges for merely "instilling a reasonable fear of serious bodily harm or death." The AEPA also provided for possible restitution for the animal enterprise to recover damages "for the reasonable cost of repeating any experimentation that was interrupted or invalidated as a result of the offense; and the loss of food production or farm income reasonably attributable to the offense."³³

The AETA, however, departs from that format entirely and metes out graduated or tiered penalties derived either from the amount of economic damages done to the animal enterprise or victim, or by being shown to have "instilled a reasonable fear of death or serious bodily injury" to the enterprise or the individuals who work there. The penalties section of the AETA appears as follows:

(b) Penalties—The punishment for a violation of section (a) or an attempt or conspiracy to violate subsection (a) shall be—

(1) a fine under this title or imprisonment not more than 1 year, or both, if the offense does not instill in another the reasonable fear of serious bodily injury or death and—

(A) the offense results in no economic damage or bodily injury;
or

(B) the offense results in economic damage that does not exceed \$10,000

(2) a fine under this title or imprisonment for not more than 5 years, or both, if no bodily injury occurs and—

(A) the offense results in economic damage exceeding \$10,000 but not exceeding \$100,000; or

(B) the offense instills in another the reasonable fear of serious bodily injury or death;

(3) a fine under this title or imprisonment for not more than 10 years, or both, if—

(A) the offense results in economic damage exceeding \$100,000

(B) the offense results in substantial bodily injury to another individual;

(4) a fine under this title or imprisonment for not more than 20 years, or both, if—

(A) the offense results in serious bodily injury to another individual;
or

(B) the offense results in economic damage exceeding \$1,000,000;
and

(5) imprisonment for life or for any terms of years, a fine under this title, or both, if the offense results in death of another individual.³⁴

The AETA completely alters the penalties originally established in the AEPA. The lowest level offense provides for a one-year sentence, fine,

or both, for damages less than \$10,000, or for violations that render no economic damage at all. Whereas the AEPA had a maximum sentence with a three-year cap for "victimless" crimes with damages exceeding \$10,000, the tiered structure of the AETA calls for a sentence of up to five years if the crime causes economic damages between \$10,000 and \$100,000 but no serious bodily injury. If the crime causes more than \$100,000 in damages or results in substantial bodily injury (defined as "deep cuts or abrasions," "broken bones," "significant physical pain," or "illness") the defendant may be sentenced to up to 10 years. Finally, the act provides for a sentence of up to twenty years if the damages exceed \$1,000,000 or if the crime results in serious bodily injury to another individual.

Concurrently, the act also calls for a sentence of up to five years if the offense "instills in another a reasonable fear of serious bodily injury or death." That provision is separate from any necessity to demonstrate economic damages, but remains tied to the intentional violation of one of the provisions against trespass, harassment, or intimidation. Finally, the act provides for life imprisonment if the offense results in the death of another person.

The term "economic damages" is defined in the definitions section of the AETA as:

(A) means the 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 of 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; but

(B) does not include any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or

business reaction to the disclosure of information about an animal enterprise [emphasis added].³⁵

The language above suggests that a wide range of possible damages may be included when tabulating the sentence for an offense that violates the AETA. “[I]ncreased costs, including losses and increased costs resulting from [violations]” could allow the prosecution to include the costs to an animal enterprise or individual of any security systems installed in response to a defendant’s actions or threatened actions. While that cost tabulation makes sense for the purpose of restitution, it is less clear that the defendant’s sentence or level of punishment should be tabulated using such an ambiguous methodology. For example, a defendant who willfully commits property crimes of trespass and theft by releasing mink from a mink farm, could face a substantially stiffer criminal penalty under the methods of tabulation allowed in the AETA.

While not considered protected speech, low-level crimes such as trespass have been committed throughout history to advance causes such as the Civil Rights Movement in the United States. In that case, protestors knew that their actions were illegal, that they would be subject to arrest, and that they would be issued relatively predictable criminal sanctions. Therefore, they were able to conduct a personal “cost-benefit analysis” about whether to take part in extra-legal forms of protest. Having charges tied to economic damages clouds the question of whether to participate in protest and lends support to concerns that the AETA could chill speech by discouraging dissent.

As the conspiracy to commit or attempt to commit the crime of animal enterprise terrorism is equally punishable under the AETA, a clear system is necessary to determine the economic damages resulting from what, in some cases, will be only a hypothetical crime. In fact, defendants charged under the conspiracy clause of the AETA may find themselves facing a

more serious sentence merely by being caught before the commission of the crime. Before the act is committed, its success is impossible to know; nor can anyone know whether the act would have caused the desired amount of damage to the enterprise. An arson meant to destroy a building may merely cause superficial damages and, as such, the amount of economic damages included to calculate the defendant's sentence could have the ironic outcome of resulting in lesser charges. If, however, investigators thwarted a defendant in the planning stages of the same arson, that defendant could potentially face a far harsher criminal penalty, assuming that the prosecution includes the hypothetical economic damages that may have resulted if the planned arson were successful. Such inconsistencies call attention to the inherent problem of providing no distinction between planned and executed crimes in the AETA. Altering the penalties section in a way that eliminates the double hypothetical could mitigate the problem.

Perhaps the AETA could be amended or modified so that the commission of particular crimes covered under the act would generate particular penalties. That modification would allow the AETA to accomplish its intended goal of providing a federal remedy for addressing escalating instances of crimes committed against animal enterprises and individuals associated with them, while eliminating many of the more problematic and, in some cases, controversial elements of the act. An excellent model for how such a modification might be accomplished presents itself in Pennsylvania's recently enacted ecoterrorism law.

The Pennsylvania Ecoterrorism Law

On April 14, 2006, Pennsylvania Governor Edward Rendell signed into law House Bill 213 amending the state criminal code Titles 18 (Crimes and Offenses) and 42 (Judiciary and Judicial Procedure) to add "an offense and civil action relating to the crime of 'ecoterrorism.'" The law appears in the Pennsylvania criminal code as:

§ 3311. Ecoterrorism.

(a) General rule.—A person is guilty of ecoterrorism if the person commits a specified offense against property intending to do any of the following:

(1) Intimidate or coerce an individual lawfully:

(i) participating in an activity involving animals, PLANTS[sic] or an activity involving natural resources; or

(ii) using an animal, PLANT or natural resource facility.

(2) Prevent or obstruct an individual from lawfully:

(i) participating in an activity involving animals, PLANTS or an activity involving natural resources; or

(ii) using an animal, PLANT or natural resource facility.³⁶

The bill listed specific offenses against property including certain arson offenses, causing or risking catastrophe, criminal mischief, institutional vandalism, agricultural vandalism, agricultural crop destruction, burglary if committed in order to commit another specified offense, criminal trespass if the crime is committed to threaten or terrorize the owner or occupant of the premises, starting a fire or defacing or damaging the premises, theft by unlawful taking, and theft by deception, forgery, or identity theft.

The list of crimes covers many of the tangible and intangible offenses committed by radical animal and ecological activists highlighted in the congressional hearings and provides victims with protection from most of the more egregious crimes. Like the AETA, the Pennsylvania law does not create any new crimes; it merely allows for enhanced criminal penalties based on the motivation or target of the crime, but the act clearly delineates the enhanced penalties. A defendant convicted of having committed a crime of ecoterrorism, faces an increase of one degree on the subsequent property crime charge. For example, if the specified property crime was a third degree misdemeanor, it will be increased to the second

degree. Likewise, a first-degree misdemeanor will be increased to a Class C felony. If the specified offense against property is already a first-degree felony, such as arson, the defendant's possible sentence could be enhanced to a term of up to 40 years. The penalties in the Pennsylvania law are severe enough to dissuade activists from committing these crimes but are not based on methodologies that are open to conjecture as is the case with the AETA.

By clearly stipulating both the crime and the expected punishment, and by tying more obfuscated crimes like harassment or intimidation to the commission of a property crime such as trespass conducted "in order to threaten or terrorize the owner or occupant of the premises," the Pennsylvania law seems to avoid the more problematic elements of the AETA. Pennsylvania allows for victims of animal and ecologically motivated crimes to seek appropriate reprieve from the government, while avoiding a lack of clarity in either the crime or the punishment.

The Pennsylvania law does not contain a conspiracy clause as does the AETA, but other state laws cover attempts and "conspiracies to commit" some of the crimes listed in the ecoterrorism law. Like the AETA, the Pennsylvania law allows the recovery of damages to the enterprise or individual, but the restitution damages are limited to tangible losses and must be demonstrated to be a result of the specified crime used to secure conviction. A separate section also allows for civil action and relief by "an individual aggrieved by the offense of ecoterrorism." Finally, the Pennsylvania law also contains a section similar to AETA's Rules of Construction which immunizes protected free speech activities from prosecution under both the federal and the state Constitution, although with many of the same limitations present in the AETA.

Civil liberties groups raised objections and concerns about the Pennsylvania law just as they did about the AETA. In testimony presented

to the Pennsylvania Senate Judiciary Committee, Larry Frankel, Legislative Director of the American Civil Liberties Union of Pennsylvania, expressed concerns about the constitutionality of the law because of its specialized focus on animal and environmental activists, asserting that the law unfairly engages in “viewpoint discrimination.” Critics of AETA had expressed similar objections, asserting that the laws unfairly target animal and environmental protestors in order to stifle dissent. Critics argue that, despite containing provisions protecting and exempting legal, legitimate protest activities, both AETA and the Pennsylvania law present First Amendment issues because they seem to target issue-specific political speech.³⁷ The AETA would likely survive First Amendment challenges, however, because the First Amendment provides protections only for legal speech, subject to what is known as “time, place, and manner” restrictions. Many of the techniques used by radical animal rights activists against their targets are extra-legal and outside of the bounds of protected speech activities.

The AETA and FACE

An examination of rulings involving the *Federal Access to Clinic Entrances Act of 1994* (FACE) provides a good predictor of how the court may view the constitutionality of the AETA. In his article, “Cages, Clinics, and Consequences: The Chilling Problems of Controlling Special-Interest Extremism,” Dane Johnson offered a comparative analysis of FACE and the AETA. He asserted that those who crafted the AETA borrowed language and clauses from FACE, particularly the Rules of Construction. The passage of FACE created a firestorm of commentary alleging that it would chill the exercise of speech and that its language was too ambiguous and broad. Johnson analyzed the cases filed against FACE, and noted that the law withstood not only First Amendment Free Speech challenges, but

Commerce Clause and “vagueness and substantial overbreadth” challenges as well. He predicted that, because of the similarities the two laws share, AETA would survive similar challenges. Although FACE and AETA mirror each other, some distinct differences exist. The text of the Freedom of Access to Clinic Entrances of 1994 helps highlight the issues.

(a) Prohibited Activities—Whoever—

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties.— Whoever violates this section shall—

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this

title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than \$10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than \$25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.³⁸

Like AETA, FACE protects against unwitting violations by requiring that intent be demonstrated and provides protection to abortion providers who are the targets of aggressive, sometimes violent, anti-abortion campaigns. The first and perhaps most notable distinction between the two laws is that a violation of FACE is not defined as an act of terrorism. Another difference appears in the prohibited activities section of FACE where equal protection is provided both to clinics and their opponents, thus extending protections to “any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship.” The AETA affords no such inverse protections to either animal rights activists, or to the animals they seek to protect.

Further, language in FACE directs the courts to treat a “nonviolent physical obstruction” less harshly than other, more serious violations. Clearly the authors of FACE felt it prudent to distinguish between violent and nonviolent actions with harsher penalties reserved for violent actions. Why provide such exemptions, when they conflict so sharply with the purpose of the law? Perhaps the authors hoped to mitigate a potential chilling effect by allowing protestors to understand that a peaceful violation of the law would not result in harsh sanctions until the defendant could be shown to be a habitual offender.

FACE lacks the graduated or tiered penalties found in the AETA, allowing anti-abortion activists to calculate possible penalties for violating the law. The penalties section of the AETA, with its ambiguous and possibly problematic language, may hold the most promise for challenging the law in court. No one has yet been convicted of violating the AETA, but the first charges under the AETA have now been handed down. Until that litigation works its way through the courts, no one knows whether the law will withstand the vigorous challenges that defense attorneys are likely to advance, especially if their clients face charges from the more vague or expansive provisions of the act. Still, several modifications or amendments to the law could mitigate some of these hypothetical issues and preempt later problems in court.

Conclusion

In spite of the AETA, incidents of animal rights extremism still make headlines. Recently, researchers involved with animal research at the University of California, Santa Cruz, were the targets of pipe bomb attacks,³⁹ and in the past year, four releases of mink from mink farms have occurred in the western U.S.⁴⁰ Because the AETA passed virtually uncontested, and because it addresses a legitimate and high profile legal issue, little support may exist for the outright repeal of the law. Several possible modifications, however, could improve it.

The AETA should be revisited to improve the clarity of its definitions and scope. Congressional hearings clearly demonstrated the need to extend the AEPA to include tertiary targets because its original scope was too narrow to provide protection to many of the enterprises and individuals who had been victims of animal rights extremism. Although legitimate activist groups must have their rights to protest zealously safeguarded, the government must equally safeguard the rights of its citizens to live and

work free from fear and intimidation, and keep their property safe from destruction.

Other amendments the AETA made to the AEPA are less easily justified. The inclusion of the terrorist label for non-violent property crimes broadens the legal definition of domestic terrorism and could have several negative effects. First, the fear of being branded a terrorist could dissuade individuals from engaging in some forms of extra-legal protests such as civil disobedience or campaigns that use extraordinary tactics to coerce companies and individuals to abandon their use of animals in research. Many of the techniques used by animal rights protestors are low-level offenses, and are no doubt annoying for their targets. Those techniques, however, have often brought about real changes. The law should distinguish between the actions of a protestor from those of a criminal. The former wishes to shame or annoy a company or individual into abandoning the use of animals, while the latter truly wishes to intimidate, threaten, harm, or instill fear in the target.

Given the structure of the law, activists charged with making harassing (but non-threatening) phone calls, civil disobedience, or low-level property crimes such as graffiti might not be charged under AETA even if their actions meet the definitions of being interstate in nature and consistent enough to establish a "course of conduct." A more likely scenario is that possible charges under the AETA could be used as leverage to pressure a defendant into becoming an "informant," or pleading guilty to stiffer state charges than might be the case without the threat of AETA charges.

Also, the AETA makes it a crime to "intentionally damage or interfere with the operation of an animal enterprise." Of course, the goal of many animal rights activists is to interfere with business operations and bring about reforms. Business reforms tend to be enacted only when it becomes more fiscally or operationally prudent to do so. Although the act is

purportedly written to require that the interference be caused in conjunction with "criminal acts," the language of the law actually provides for a wide net of possible infractions, many of which may better be described as nuisances than acts of terrorism.

The crafters of the bill clearly wanted to create a mechanism to distinguish crimes against animal enterprises from their apolitical counterparts. A state arson charge provides no distinction between arson for insurance purposes and arson committed to influence a company's business practices. AETA accomplishes that and more. By defining the distinctions, AETA may offer a practical solution to a need, but it may also overreach as it extends to every crime that may be perpetrated against an animal enterprise. Perhaps the Pennsylvania ecoterrorism law could provide a model for how to accomplish the general goal but in a manner that still allows for an expansion of the legal definition of terrorism to include some property crimes, while avoiding the wide net of the AETA.

In fact, a federal remedy already exists, one that is available to judges and accomplishes just such a distinction. Terrorist enhancement, a sentencing mechanism used at the discretion of a judge, can heighten the criminal penalties of defendants found to have committed politically or ideologically motivated crimes and distinguish those crimes as terrorist acts. Indeed, one judge used the enhancement measure to set the penalties for members of the Earth Liberation Front convicted for a series of environmentally motivated arsons in the Northwest.⁴¹ The Pennsylvania law may also provide a good model for changes that could be made to the way penalties are determined under the AETA. Rather than having the tiered or graduated penalties based largely on economic damages, the AETA could provide for an enhancement mechanism similar to the one used in the Pennsylvania law. That change would eliminate some of the most contentious elements of the AETA by providing clear criminal

punishments not subject to economic damages that may be arbitrarily tabulated.

Given the broad bipartisan support for the AETA, substantial revision of the law is doubtful. Therefore, a more likely approach could be to revisit the definitions section of the act and provide clear and specific definitions for problematic terms. For example, the definition of economic damages could be revised to remove ambiguous terms such as "increased costs or losses." Or, perhaps sub-definitions could be provided to stipulate what key terms mean, as is done to distinguish the difference between what is considered a "substantial" and "serious bodily injury."

Another way to improve the act would be to provide a definition for the term "reasonable fear." Although the prosecution must demonstrate that the defendant "instilled the reasonable fear or serious bodily injury or death" through a "course of conduct," the law offers guidelines about what qualifies as reasonable. A clear, inclusive definition of the term reasonable including a standard of proof that the prosecution is required to meet would address this problem. A further prudent change would be to require that the prosecution show clear and convincing evidence that the climate of fear was indeed the result of the defendant's actions rather than those of other, perhaps unaffiliated activists who may have been simultaneously targeting the victim.

Also, the law needs a definition for what constitutes an attempt or a conspiracy to violate the AETA. Again, the lack of a standard of proof to establish an attempt or a conspiracy is especially problematic with the AETA because of the double hypothetical it creates. Perhaps a specific "course of conduct" could be established that defines or demonstrates a conspiracy and an attempt to conspire. Given that the First Amendment provides activists with freedom of speech and freedom of association, the conspiracy clause in the AETA is far too ambiguous to allow the average

citizen to decipher where the line is drawn between supporting a more radical protest group, and actually conspiring with them.

Finally, the Rules of Construction should be rewritten to exempt certain extra-legal activities, provided those activities are conducted with the purpose of either facilitating a peaceful civil disobedience on private property or for documenting and revealing violations of animal welfare laws. These actions could still be subject to applicable state criminal charges such as trespass, or to civil suit actions such as Huntingdon's civil suit against PETA, but they should not be classified as violations of the AETA and therefore acts of terrorism. These changes represent relatively minor adjustments to the AETA but would go a long way toward addressing some of its more problematic elements. The result might provide for a better law, one that accomplishes its purpose while mitigating negative peripheral effects.

At the end of February 2009, four California residents were arrested and indicted for violating AETA. Adriana Stumpo, Nathan Pope, Joseph Buddenberg, and Maryam Khajavi face charges for violating several provisions of AETA by participating in activities the FBI alleges were aimed at intimidating and harassing several University of California researchers. Pope, Stumpo and Buddenberg face charges for publishing the names and addresses of researchers who the FBI allege were subsequently targeted in the Santa Cruz pipe-bomb attacks, although they have not been charged with participating in the pipe-bomb attacks. All four individuals face charges resulting from participation in "home visits."⁴² These prosecutions will provide the first legal test of AETA and will likely invoke several of the provisions discussed in this paper. Until the cases are litigated it is impossible to know whether the concerns of critics will become realities. These first prosecutions under AETA may demonstrate that the act accomplishes its goal of reducing animal rights

motivated crime, or reveal unintended consequences. As the law is written today, challenges highlighting problems of definitions and scope are likely to be raised by the defense.

Limited scrutiny of the bill during the committee process and the limited debate in Congress failed to show whether the AETA represented a necessary and proper solution to address incidents of animal rights extremism. The commentary offered both in defense and in opposition to the act centered almost exclusively on First Amendment concerns while little attention was given to the actual language of the law. Citizens count on lawmakers to exhaustively scrutinize legislation like the AETA, especially when it involves civil liberties and domestic security; the unabashed use of loaded rhetoric should have no role in the legislative process. The post 9/11 climate may have contributed to the dereliction of this congressional responsibility, and further study is necessary to determine what role anti-terror sentiment played in influencing lawmakers and the passage of the AETA.

Finally, a national dialogue needs to focus on the traditional legal definition of domestic terrorism and whether legislation should be focused exclusively on one particular social movement; as it is with the AETA. Measuring whether the AETA is adversely affecting legitimate animal rights groups, or chilling speech, is difficult because no empirical data currently exist that would measure whether people are "opting out" of protesting and activism because of fears of being branded a terrorist. Further, the extra-legal techniques described in this paper are not exclusively deployed by the animal rights movement but rather are emblematic of several fringe protest groups championing causes on both the right and left of the political spectrum. The ability to dissent is the cornerstone of any functioning democratic society and that right should be protected zealously even when it is politically difficult to do so. However, many of the techniques described

by witnesses and targets of animal rights extremism are deplorable and have no place in a freely functioning society. The grievances expressed are real and victims must be able to find appropriate reprieve through the legal system. As it exists today the AETA is too problematic to serve that function.

Notes

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2. *Foreign Intelligence Surveillance Act of 1978*, Public Law 95-511, U.S. Statutes at Large 92 (1978) 1783, codified as amended at U.S. Code 50 §1801.

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4. *The Animal Enterprise Protection Act of 1992*, Public Law 102-346, U.S. Statutes at Large 106 (1992): 928 codified as amended at 18 U.S. code § 43.

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