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**SHIELDING CORPORATE INTERESTS  
FROM PUBLIC DISSENT:  
AN EXAMINATION OF THE  
UNDESIRABILITY AND  
UNCONSTITUTIONALITY OF  
“ECO-TERRORISM” LEGISLATION**

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INTRODUCTION

Every year, in the United States alone, more than nine billion animals<sup>1</sup> are slaughtered for food.<sup>2</sup> More than 100 million are subjected to painful procedures or toxic exposures in laboratories on college campuses and research facilities throughout the country for biomedical research and to test the safety of cosmetics, household cleaners and other consumer products.<sup>3</sup> Hundreds of millions more are killed or exploited for hunting and entertainment and to manufacture fur and leather clothing.<sup>4</sup> “More than 300

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<sup>1</sup> For the purposes of this Note, the term “animal” will refer to only birds and nonhuman mammals.

<sup>2</sup> See U.S. DEP’T OF AGRIC., NAT’L AGRIC. STATISTICS SERV., AGRICULTURAL STATISTICS VIII-36 (2005), available at <http://www.usda.gov/nass/pubs/agr05/agstats2005.pdf>.

<sup>3</sup> See Madhusree Mukerjee, *Speaking for the Animals*, SCIENTIFIC AMERICAN, Aug. 2004, at 96–97; In Defense of Animals: The Truth About Vivisection, <http://www.vivisectioninfo.org> (last visited Feb. 21, 2008).

<sup>4</sup> GARY L. FRANZIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? xx–xxi (2000) [hereinafter *YOUR CHILD OR THE DOG*].

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mammals and birds die each time your heart beats.”<sup>5</sup>

The magnitude of this institutionalized exploitation leaves animal rights activists with what may seem to be an unattainable goal: societal recognition of the inherent value of the lives of animals. Activists who wish to provide immediate sanctuary to these animals have begun to employ nonviolent,<sup>6</sup> but often illegal, tactics against animal enterprises.<sup>7</sup> The goal of these tactics, which range from demonstrations at the offices and homes of company officials to property damage, is to inflict economic damage on those who profit from the exploitation of animals, ultimately making it unprofitable to continue with their practices.<sup>8</sup>

Fearing the increasing intensity and effectiveness of the domestic animal rights movement, various private groups have urged Congress to broaden the reach and increase the penalties of existing federal legislation applicable exclusively to animal advocates.<sup>9</sup> One result of this corporate campaign, led primarily by

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<sup>5</sup> Steven M. Wise, *Animal Rights, One Step at a Time*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 19, 19 (Cass R. Sunstein & Martha C. Nussbaum eds., 2005).

<sup>6</sup> The definition of “violence” with regards to activism is currently up for debate. However, for the purposes of this Note, “violence” may be defined as “physical violence against animals, human or non-.” Posting of Justin Goodman to Connecticut for Animals, <http://connecticutforanimals.blogspot.com/2007/09/on-non-violent-direct-action.html> (Sept. 9, 2007, 01:09 EST) (citing GENE SHARP, *THERE ARE REALISTIC ALTERNATIVES*, 1 n.1 (2003)). Physical obstructions and forms of property destruction that do not carry a substantial risk of injury will be considered nonviolent direct action and outside the purview of this framework.

<sup>7</sup> The term “animal enterprise” refers to: a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research or testing; a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or any fair or similar event intended to advance agricultural arts and sciences. Animal Enterprise Terrorism Act § 43(d)(1), 18 U.S.C. § 43 (2006).

<sup>8</sup> See Animal Liberation Front, *The ALF Credo and Guidelines*, [http://www.animalliberationfront.com/ALFront/alf\\_credo.htm](http://www.animalliberationfront.com/ALFront/alf_credo.htm) (last visited Feb. 21, 2008).

<sup>9</sup> The National Association for Biomedical Research (“NABR”) has been credited with ensuring the passage of animal enterprise protection legislation

representatives of the agricultural, biomedical research and pharmaceutical industries, has been the enactment of the federal crime of “animal enterprise terrorism.”<sup>10</sup> With this legislation, the government has branded and successfully prosecuted individuals who have engaged in nonviolent activism as “eco-terrorists.”<sup>11</sup> Industry groups have taken full advantage of that characterization to demonize those who associate with, ideologically support, or simply refuse to condemn the actions of “eco-terrorists.”<sup>12</sup>

Part I of this Note will provide a brief overview of the history of animal rights theory and the current philosophies behind the belief that animals should be afforded certain moral and legal rights. It will also examine the operational methods of animal rights activists and illustrate their role in achieving this underlying goal. Part II of this Note will discuss the impropriety of characterizing activists as “terrorists” in order to promote a particular political agenda. Part III will outline the measures animal enterprises and industries involved in animal exploitation have taken to urge the federal government to put an end to the activist tactics that have successfully caused them to sustain economic loss. Specifically, it will examine “animal enterprise terrorism” legislation<sup>13</sup> and how it

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through Congress. See, e.g., Edward J. Walsh, *The Animal Enterprise Protection Act: A Scientist’s Perspective Brings the Law into Focus*, <http://www.naiaonline.org/body/articles/archives/animalenterprise.htm> (last visited Feb. 21, 2008). NABR is an organization comprised of hundreds of universities, medical and veterinary schools, health agencies, professional societies, pharmaceutical companies and other animal research-related firms. NABR: About Us, <http://www.nabr.org/about.html> (last visited Feb. 21, 2008).

<sup>10</sup> See *id.*; Animal Enterprise Protection Act of 1992, 18 U.S.C.A. § 43 (West 2008) (amended 1996, 2002 & 2006).

<sup>11</sup> See *infra* text accompanying notes 53–67, 89–114.

<sup>12</sup> For example, the Center for Consumer Freedom has accused mainstream animal advocacy organizations such as the Humane Society of the United States and the Physicians Committee for Responsible Medicine of “consorting with terrorists” for allowing nonviolent direct action organization Hugs For Puppies to set up an informational table at an animal advocacy conference. Will Potter, Industry Group Says Mainstream Animal Advocates “Consorting With Terrorists,” <http://www.greenisthenewred.com/blog/2007/08/15/tafa-terrorists/> (Aug. 15, 2007).

<sup>13</sup> Specifically, Part III will analyze the Animal Enterprise Terrorism Act, 18 U.S.C. § 43(a)(1) (2006), passed on November 27, 2006, as well as its

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has been used successfully to prosecute the nonviolent activism of Stop Huntingdon Animal Cruelty USA, Inc. (“SHAC USA”). Part III will also discuss the “terrorism enhancement” penalties applicable to nonviolent activism. Part IV will examine how the application of such ideology-specific legislation has encroached upon traditionally protected speech. Finally, Part V concludes that “animal enterprise terrorism” legislation should be a concern not only of animal rights activists, but of all advocates of social or political change because of a subsequent chilling effect on the exercise of free speech.

## I. BACKGROUND

### A. *Animal Rights Theory*

Animal advocacy can be traced as far back as the sixth century B.C. when Greek philosopher Pythagoras urged respect for animals because he believed in the transmigration of souls between human and nonhuman animals.<sup>14</sup> In the 18th century, English philosopher and legal theorist Jeremy Bentham rejected the position that because nonhuman animals allegedly lack rationality or the ability to communicate using language, humans may use them as a means to their own desired ends and owe them no moral obligations.<sup>15</sup> Instead, Bentham suggested that the primary characteristic relevant to the attribution of moral consideration is sentience, i.e., the ability to experience sensation or feeling.<sup>16</sup>

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precursor, the Animal Enterprise Protection Act of 1992, 18 U.S.C.A. § 43 (West 2008) (amended 1996, 2002 & 2006).

<sup>14</sup> ANGUS TAYLOR, ANIMALS AND ETHICS 34 (2003) (“Pythagoras . . . rejected the claim that we have nothing significant in common with animals and therefore cannot be said to treat them unjustly. [He] . . . believed that animals may be former human beings, now reincarnated in non-human form.”).

<sup>15</sup> JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 283 n.b (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1789).

<sup>16</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). In suggesting that the mistreatment of nonhuman animals was akin to the evils of racial discrimination, Bentham stated:

However, it was not until 1983 that a thorough argument in favor of animal rights was presented by American philosopher Tom Regan in his book, *The Case for Animal Rights*.<sup>17</sup> The general theory of animal rights is based upon the premise that individuals—human and non-human animals—are due equal respect for their equal inherent value.<sup>18</sup> To Regan, the fundamental attribute all humans share is that each of us is the “subject-of-a-life;” that is, a conscious creature with an individual welfare important to us, logically independent of our usefulness to anyone else.<sup>19</sup> Humans have, *inter alia*, beliefs and desires, perception, memory, a sense of the future, feelings of pain and pleasure, preference- and welfare-interests, and the ability to act in furtherance of those goals.<sup>20</sup> Regan argues that because the same is true of certain animals, such as mammals aged one year or more, they too are subjects-of-a-life

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The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of the legs, [or] the villosity of the skin . . . are reasons equally insufficient for abandoning a sensitive being to the same fate? [A] full grown horse or dog, is beyond comparison a more rational, as well as a more conversible animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? [T]he question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?

BENTHAM, *supra* note 15, at 283 n.b.

<sup>17</sup> TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983). Prior to the 1970’s, animal advocacy was largely concerned with the welfare of animals. Animal welfare, as opposed to animal rights, “concerns the treatment of animals and has as its central focus the regulation of animal exploitation. Animal welfare maintains that it is acceptable to use nonhumans as long as we treat them ‘humanely.’” Gary L. Francione, *Animal Rights: The Abolitionist Approach—Mission Statement* [hereinafter *The Abolitionist Approach*], [http://www.abolitionistapproach.com/index.php?page\\_id=54](http://www.abolitionistapproach.com/index.php?page_id=54) (last visited Feb. 21, 2008).

<sup>18</sup> *See, e.g.*, *The Abolitionist Approach*, *supra* note 17 (“[A]ll sentient beings should have at least one right—the right not to be treated as property. If we recognized this one right, we would be compelled to abolish institutionalized animal exploitation.”).

<sup>19</sup> REGAN, *supra* note 17, at 243.

<sup>20</sup> *Id.*

with their own inherent value.<sup>21</sup> Finally, it follows that the basic moral right of all who possess inherent value is the right never to be harmed “on the grounds that all those affected by the outcome will thereby secure ‘the best’ aggregate balance of intrinsic values (e.g., pleasures) over intrinsic disvalues (e.g., pains).”<sup>22</sup>

Similarly, law professor Gary Francione maintains that true recognition of animal rights requires the complete abolition of animal exploitation.<sup>23</sup> However, contrary to Regan, Francione argues that a theory of abolition should not require that animals have any cognitive characteristic beyond sentience to be full members of the moral community, entitled to the basic moral right not to be the property of humans.<sup>24</sup> Francione’s theory has three components: first, society regards it as a moral imperative to protect all humans from the suffering caused by being used exclusively as the resource of another; second, animals and humans are similar in that they are sentient beings; and third, if animal interests in not suffering are to be morally significant, then the principle of equal consideration demands that we extend the basic right not to be treated as things to animals.<sup>25</sup> Simply, if animal interests are to be taken seriously, we must treat their similar interests in a similar fashion.<sup>26</sup>

Thus, because the theory of animal rights rejects treating animals as property, it “rejects completely the institutionalized exploitation of animals, which is made possible only *because* animals have property status.”<sup>27</sup> The theory ensures that relevant animal interests are completely protected and not sacrificed for

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<sup>21</sup> *Id.* at 78. This concept is further illustrated by the inherent value ascribed to humans who are not capable of rational thought, such as the infants referred to by Bentham and the severely mentally impaired. See BENTHAM, *supra* note 15, at 283 n.b.

<sup>22</sup> REGAN, *supra* note 17, at 286.

<sup>23</sup> Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 108 (Cass R. Sunstein & Martha C. Nussbaum eds., 2005).

<sup>24</sup> *Id.* at 121, 124–25.

<sup>25</sup> YOUR CHILD OR THE DOG, *supra* note 4, at xxvi.

<sup>26</sup> *Id.* at 99.

<sup>27</sup> GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 2 (1996).

human benefit, no matter how “humane” the exploitation or how stringent the safeguards from “unnecessary suffering.”<sup>28</sup> To deny animals this one basic right would be speciesist<sup>29</sup>—a prejudice which, like racism or sexism, is based upon a morally irrelevant physical characteristic. “It is a bias, arbitrary as any other.”<sup>30</sup>

*B. Direct Action and the Role of Animal Advocates*

Just as nineteenth-century white abolitionists in the [United States] worked across racial lines to create new forms of solidarity, so the new freedom fighters reach across *species* lines to help our fellow beings in the animal world.<sup>31</sup>

When conventional methods of achieving social and political change are believed to be slow and inadequate, activists often employ direct action tactics.<sup>32</sup> “[D]irect action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue.”<sup>33</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> Speciesism is defined as “Human intolerance or discrimination on the basis of species, especially as manifested by cruelty to or exploitation of animals.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

<sup>30</sup> Wise, *supra* note 5, at 26.

<sup>31</sup> Steven Best & Anthony J. Nocella II, *Behind the Mask: Uncovering the Animal Liberation Front*, in *TERRORISTS OR FREEDOM FIGHTERS* 9, 12 (Steven Best & Anthony J. Nocella II eds., 2004). Steven Best is Associate Professor of Humanities and Philosophy at the University of Texas, El Paso, and is co-founder and Chief Editor of the peer-reviewed online journal, *Critical Animal Studies Journal*. Dr. Steve Best, Biography, <http://www.drstevebest.org/InPages/Personal.htm> (last visited Mar. 1, 2008).

<sup>32</sup> Examples of conventional, indirect methods of affecting change are collecting signatures on a petition, writing letters to representatives in office, or voting for those who assure the public that they will provide a remedy at some point in the future if elected.

<sup>33</sup> Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), available at [http://www.stanford.edu/group/King/popular\\_requests/frequentdocs/birmingham.pdf](http://www.stanford.edu/group/King/popular_requests/frequentdocs/birmingham.pdf).

These tactics are intended to have an immediate impact on a problem or its causes, and can include legal and illegal activities, such as demonstrations, boycotts, civil disobedience, vandalism and property damage.<sup>34</sup>

In the animal rights context, activists often resort to illegal direct action because conventional advocacy alone is insufficient to rescue the countless animals facing present dangers.<sup>35</sup> Activists have resorted to illegal actions because of the substantial cultural, political, economic, legal, and psychological impediments to their agenda of abolishing institutionalized animal oppression and obtaining moral rights for animals.<sup>36</sup>

There are three specific fundamental obstacles that preclude successful advocacy through legal means.<sup>37</sup> First, although there are laws in the United States aimed at regulating animal usage, they rarely go beyond prescribing minimal guidelines to ensure that animals are used efficiently.<sup>38</sup> Because animals are considered private property, their interests are always secondary to those of their owners.<sup>39</sup> Second, despite the weakness of animal protection laws, many activists attempt to use these laws to effect change.<sup>40</sup> However, legal advocacy is rarely successful in obtaining protection for animals because activists typically lack legal standing to litigate the specific instances of cruelty that fall within the purview of the legislation.<sup>41</sup> Finally, and perhaps most

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<sup>34</sup> See Patrice Jones, *Mothers with Monkeywrenches: Feminist Imperatives and the ALF*, in *TERRORISTS OR FREEDOM FIGHTERS* 137, 137–38 (Steven Best & Anthony J. Nocella II eds., 2004).

<sup>35</sup> Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 *BUFF. L. REV.* 765, 781 (1995).

<sup>36</sup> *Id.* at 796.

<sup>37</sup> *Id.* at 781.

<sup>38</sup> *YOUR CHILD OR THE DOG*, *supra* note 4, at 10.

<sup>39</sup> *See id.* at 10.

<sup>40</sup> Kniaz, *supra* note 35, at 794.

<sup>41</sup> Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. *BLACK'S LAW DICTIONARY* (8th ed. 2004). For examples of cases where the lack of standing has been a procedural bar to bringing claims for violations of animal protection legislation, *see, e.g.*, *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004) (In declining to grant the cetaceans standing to bring suit in their own name under the

importantly, “animal enterprises wield extraordinary cultural and political power in the United States.”<sup>42</sup> Enormous transnational industries are involved in raising and killing billions of animals for food, clothing, product testing, biomedical research, and entertainment each year.<sup>43</sup> Today, products that result from animal exploitation are so abundant that it is nearly impossible to live without supporting the abuse of animals in some fashion, whether directly or indirectly.<sup>44</sup>

As a result of the limitations of legal activism for animals, illegal direct action is sometimes perceived as the most effective method of animal rights advocacy. The Animal Liberation Front (“ALF”), a decentralized conglomerate of small autonomous groups, is among the most notorious for employing illegal direct action as its primary method of abolishing the property status of animals.<sup>45</sup> Any individual may regard him/herself as part of the ALF so long as he/she carries out his/her actions in accordance with ALF guidelines:

1. TO liberate animals from places of abuse, i.e. laboratories, factory farms, fur farms, etc, and place them in good homes where they may live out their natural lives, free

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Endangered Species Act, the court stated that “[i]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly.” (quoting *Citizens to End Animal Suffering and Exploitation v. The New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993)); *Animal Legal Def. Fund v. Glickman*, 204 F.3d 229, 236 (D.C. Cir. 2000) (animal welfare organization denied standing to bring action against the United States Department of Agriculture, challenging regulations promulgated under Animal Welfare Act); *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 922 (Fed. Cir. 1991) (third parties do not have standing to challenge a rule indicating that genetically engineered animals are patentable subject matter).

<sup>42</sup> Kniaz, *supra* note 35, at 781.

<sup>43</sup> See *supra* notes 2–5 and accompanying text.

<sup>44</sup> Wise, *supra* note 5, at 20.

<sup>45</sup> See *Addressing the Threat of Animal Rights Extremism and Eco-Terrorism: Hearing Before the S.Comm. on Env’t and Pub. Works*, 109th Cong. (2005) [hereinafter *2005 Hearing*] (testimony of John E. Lewis, Deputy Assistant Dir., Counterterrorism Div., FBI), available at <http://www.fbi.gov/congress/congress05/lewis051805.htm> (declaring the ALF “[o]ne of today’s most serious domestic terrorism threats”).

from suffering.

2. TO inflict economic damage to those who profit from the misery and exploitation of animals.
3. TO reveal the horror and atrocities committed against animals behind locked doors, by performing non-violent direct actions and liberations.
4. TO take all necessary precautions against harming any animal, human and non-human.
5. TO analyze the ramifications of all proposed actions, and never apply generalizations when specific information is available.<sup>46</sup>

The ALF's short-term goal is "to save as many animals as possible and directly disrupt the practice of animal abuse," while their long term intention is to end all animal suffering by making it unprofitable for companies engaging in animal abuse to remain in business.<sup>47</sup> ALF activists often force entry into animal enterprise facilities that confine animals in order to release<sup>48</sup> or rescue them.<sup>49</sup> They typically operate at night, wearing balaclavas and in small groups of people.<sup>50</sup> After removing animals from these facilities, ALF activists seize or destroy equipment and other property that has been used to exploit animals, and they sometimes use arson to destroy buildings and laboratories.<sup>51</sup> "They have cost the animal exploitation industries hundreds of millions of dollars. They willfully break the law, because the law wrongly consigns animals to cages and confinement, to loneliness and pain, to torture and death."<sup>52</sup>

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<sup>46</sup> Animal Liberation Front, *supra* note 8.

<sup>47</sup> *Id.*

<sup>48</sup> Mink or coyotes are released from confinement and left to acclimate to the wild. Best & Nocella, *supra* note 31, at 11.

<sup>49</sup> Cats, dogs, mice, and guinea pigs are not merely released, but rescued and taken with activists. *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

II. ACTIVISTS AS “TERRORISTS”

[M]ost Americans would not consider the harassment of animal testing facilities to be “terrorism,” any more than they would consider anti-globalization protestors or anti-war protestors or women’s health activists to be terrorists.<sup>53</sup>

- Sen. Patrick Leahy (D-VT)

The Federal Bureau of Investigation (“FBI”) has branded direct action by animal and environmental activists “eco-terrorism.”<sup>54</sup> It defines eco-terrorism as “the use or threatened use of violence of a criminal nature against innocent victims or property by an environmentally-oriented, subnational group for environmental-political reasons . . . .”<sup>55</sup> This characterization of violence is troublesome because the government, motivated by politics and the ideological biases of lawmakers, has singled out property crimes committed by these activists.<sup>56</sup> The fundamental disparity between standard criminal behavior and direct action on behalf of animals or the environment is that the latter is adverse to corporate interests

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<sup>53</sup> *Animal Rights: Activism vs. Criminality: Hearing Before the S. Judiciary Comm.*, 108th Cong. (2004) [hereinafter *2004 Hearing*] (statement of Sen. Patrick Leahy, Vt.), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=1196&wit\\_id=2629](http://judiciary.senate.gov/member_statement.cfm?id=1196&wit_id=2629).

<sup>54</sup> Henry Schuster, *Domestic Terror: Who’s Most Dangerous?*, CNN, Aug. 14, 2005, <http://www.cnn.com/2005/US/08/24/schuster.column/index.html>.

<sup>55</sup> *The Threat of Eco-Terrorism: Hearing Before the H. Res. Subcomm. on Forests and Forest Health*, 107th Cong. (2002) [hereinafter *2002 Hearing*] (testimony of James F. Jarboe, Domestic Terrorism Sec. Chief, FBI), available at <http://www.fbi.gov/congress/congress02/jarboe021202.htm>.

<sup>56</sup> See, e.g., ROBERT F. KENNEDY, JR., *CRIMES AGAINST NATURE* 5 (2004).

Almost all the top positions at the agencies that protect our environment and oversee our resources have been filled by former lobbyists for the biggest polluters in the very businesses that these ministries oversee. These men and women seem to have entered government service with the express purpose of subverting the agencies they now command.

*Id.*

and consequently threatens the political status quo.<sup>57</sup>

In 2005, the Senate Environment and Public Works Committee met to discuss the alleged threat posed by these “eco-terrorists,” as well as the measures the federal government is taking to “detect, disrupt, and dismantle the animal rights and environmental extremist movements.”<sup>58</sup> Addressing the committee, FBI Deputy Assistant Director of the Counterterrorism Division John E. Lewis declared that “[o]ne of today’s most serious domestic terrorism threats come from special interest extremist movements such as the Animal Liberation Front (ALF), the Earth Liberation Front (ELF), and Stop Huntingdon Animal Cruelty (SHAC) campaign.”<sup>59</sup> In fact, Lewis has stated that “[t]he *No. 1* domestic terrorism threat is the eco-terrorism, animal-rights movement.”<sup>60</sup> Contrary to what these remarks may suggest, however, the ALF, which is generally cited as the archetype of eco-terrorism, explicitly denounces violence against both human and nonhuman animals.<sup>61</sup>

In light of the FBI’s classification of animal rights activists as the nation’s top priority of domestic terrorism, “Americans should question whether the Justice Department is making America’s far-

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<sup>57</sup> Industry lobbying to Congress and federal agencies has undoubtedly played a significant part in the classification of direct action as “terrorism.” For example, the American Medical Association and the Pharmaceutical Research and Manufacturers of America—two representatives of the pharmaceutical industry and its unwavering commitment to animal experimentation—rank among the top five spenders in the country in governmental lobbying. Combined, they have spent almost \$300,000,000 between 1998 and 2007. Opensecrets.org, Lobbying Spending Database, <http://www.opensecrets.org/lobbyists/index.asp?txtindextype=s> (last visited Feb. 21, 2008).

<sup>58</sup> 2005 Hearing, *supra* note 45 (testimony of John E. Lewis, Deputy Assistant Dir., Counterterrorism Div., FBI), available at <http://www.fbi.gov/congress/congress05/lewis051805.htm>.

<sup>59</sup> *Id.*

<sup>60</sup> Schuster, *supra* note 54 (emphasis added). It is noteworthy that Lewis and other governmental agents consistently refer to these activist organizations as “eco-terrorists” and “violent,” while failing to mention that “not a single incident of so-called [eco-terrorism] has killed anyone.” Steven Best, *Showtrials and Scarecrows: “Ecoterrorism” and the War on Dissent*, IMPACT PRESS, Summer 2005, <http://www.impactpress.com/articles/summer05/bestsummer05.html> (quoting Sen. Frank Lautenberg (D-NJ)).

<sup>61</sup> Animal Liberation Front, *supra* note 8.

right fanatics a serious priority.”<sup>62</sup> For example, on an internal list of threats to the nation’s security, the Department of Homeland Security does not list anti-government groups, white supremacists and other radical movements that have staged various terrorist attacks and have killed hundreds of Americans.<sup>63</sup> Criticizing the politically charged use of terrorist discourse, the Southern Poverty Law Center has pointed out that “for all the property damage they have wreaked, eco-radicals have killed no one—something that cannot be said of the white supremacists and others who people the American radical right.”<sup>64</sup> Between 1995 and 2005, white supremacist and other extremist groups produced 60 terrorist plots, including plans to bomb or burn government buildings, abortion clinics, places of worship, and bridges; assassinate police officers, judges, politicians, civil rights figures and abortion providers; and stockpile illegal machine guns, missiles, explosives, and biological and chemical weapons.<sup>65</sup>

Given the demonstrated violent propensities of many of the country’s extremist groups and the government’s subsequent focus on animal and environmental rights activists, it is evident that the priorities of federal law enforcement have become misplaced. After 168 individuals were killed and over 800 injured in the Oklahoma City attack by anti-government militia sympathizers Timothy McVeigh and Terry Nichols, a Justice Department official stated,

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<sup>62</sup> Daniel Levitas, *Our Enemies at Home*, N.Y. TIMES, Dec. 13, 2003, at A19.

<sup>63</sup> Justin Rood, *Animal Rights Groups and Ecology Militants Make DHS Terrorist List, Right-Wing Vigilantes Omitted* (Mar. 25, 2005), [http://www.cq.com/public/20050325\\_homeland.html](http://www.cq.com/public/20050325_homeland.html).

<sup>64</sup> Southern Poverty Law Center, *Decade of domestic terror documented by Center* (Sept. 2005), <http://www.splcenter.org/center/splcreport/article.jsp?aid=164>.

<sup>65</sup> Andrew Blejwas et al., Southern Poverty Law Center, *Terror From the Right*, INTELLIGENCE REPORT, Summer 2005, <http://www.splcenter.org/intel/intelreport/article.jsp?aid=549>. Since 1993, anti-abortion extremists alone have murdered seven abortion providers, attempted fifteen murders, mailed 656 anthrax threats, and engaged in hundreds of other instances of physical violence. National Abortion Federation, *Violence and Disruption Statistics* (Aug. 31, 2007), [http://www.prochoice.org/pubs\\_research/publications/downloads/about\\_abortion/violence\\_statistics.pdf](http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_statistics.pdf).

“Unfortunately, keeping track of right-wing and neo-Nazi hate groups isn’t necessarily a path to career advancement in the Bureau.”<sup>66</sup> Under pressure from the White House and conservative Republicans, national security organizations have made the troubling political decision to discount the life-threatening violence emanating from Americans on the far-right fringe, and instead focus on nonviolent activist groups.<sup>67</sup>

### III. “ECO-TERRORISM” LEGISLATION AND ITS APPLICATION

#### A. *The Animal Enterprise Protection Act*

As a response to the increase in effective direct action activism, Congress enacted the Animal Enterprise Protection Act of 1992 (“AEPA”).<sup>68</sup> This legislation, shepherded by the National Association for Biomedical Research,<sup>69</sup> created the crime of “animal enterprise terrorism.”<sup>70</sup> In doing so, it amended federal criminal law to provide a fine, up to one year in prison, or both, for anyone who intentionally causes 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 the animal enterprise, and thereby causes economic damage exceeding \$10,000 to that enterprise, or conspires to do so.”<sup>71</sup>

The AEPA also provided for increased imprisonment penalties of

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<sup>66</sup> Levitas, *supra* note 62 (internal quotation marks omitted).

<sup>67</sup> Schuster, *supra* note 54.

<sup>68</sup> Animal Enterprise Protection Act of 1992, 18 U.S.C.A. § 43 (West 2008) (amended 1996, 2002 & 2006).

<sup>69</sup> Steven Best, *New, Improved, and ACLU Approved*, <http://www.animalliberationfront.com/ALFront/AgainstALF/AETANew.htm> (last visited Mar. 11, 2008).

<sup>70</sup> Marjorie A. Berger, ed., *2006 Legislative Review*, 13 ANIMAL L. 299, 301 (2007).

<sup>71</sup> Animal Enterprise Protection Act of 1992, 18 U.S.C.A. § 43 (West 2008) (amended 1996, 2002 & 2006).

up to ten years if a violation results in serious bodily injury to an individual and life in prison if a violation results in death.<sup>72</sup>

The AEPa was not used until September 16, 1998, when a federal grand jury in Wisconsin indicted activists Peter Young and Justin Samuel for, inter alia, animal enterprise terrorism.<sup>73</sup> The indictment alleged their connection to a raid of fur farms in the Midwest in October 1997, in which an estimated 8,000 to 12,000 mink were released from five mink farms over a two week period.<sup>74</sup> In 2000, after Samuel was apprehended in Belgium and subsequently extradited to the United States, he entered a plea agreement with federal prosecutors to implicate Young in exchange for a lighter sentence.<sup>75</sup> Samuel pled guilty to two misdemeanor offenses under the AEPa,<sup>76</sup> and was sentenced to two years in prison and ordered to pay over \$360,000 in fines.<sup>77</sup>

On March 31, 2005, Young was arrested after seven years of FBI pursuit.<sup>78</sup> After rejecting various plea deals in exchange for becoming an undercover agent in the animal rights movement or providing investigators with the names of other activists, the government dropped four of the felony counts and Young eventually pled guilty to the remaining animal enterprise terrorism

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<sup>72</sup> *Id.*

<sup>73</sup> 2002 Hearing, *supra* note 55 (testimony of James F. Jarboe, Domestic Terrorism Sec. Chief, FBI), available at <http://www.fbi.gov/congress/congress02/jarboe021202.htm>.

<sup>74</sup> SupportPeter.com, Background Information, <http://web.archive.org/web/20070429230300/http://www.supportpeter.com/background.htm> (last visited Feb. 21, 2008). Justin Samuel testified before a federal grand jury that he and Young cut the perimeter fence of the mink farm, entered the barn type structures in which the mink were kept, and opened the cages for the mink to escape. SupportPeter.com, Justin Samuel’s 2000 Grand Jury Transcripts, <http://web.archive.org/web/20070103160201/http://supportpeter.com/jstestimony2.html> (last visited Feb. 21, 2008).

<sup>75</sup> SupportPeter.com, Background Information, *supra* note 74.

<sup>76</sup> Kevin Murphy, *Washington State Man Admits Releasing Hundreds of Minks by Cutting Fences*, MILWAUKEE J. SENTINEL, Aug. 31, 2000, at B2.

<sup>77</sup> Will Potter, *Animal Enterprise Protection Act*, <http://www.greenisthenewred.com/blog/aepa/> (July 29, 2006).

<sup>78</sup> SupportPeter.com, Background Information, *supra* note 74.

charges under the AEPA.<sup>79</sup> He received a sentence of two years in federal prison, 360 hours of community service at a charity to benefit “humans and no other species,” \$254,000 restitution, and one year probation.<sup>80</sup>

Despite these sentences, industry groups pushed for expansions of “animal enterprise terrorism” legislation, alleging that the AEPA was an ineffective prosecutorial tool due to the limited penalties available for violations and its sparing application.<sup>81</sup> In response to the heavy lobbying from animal-testing firms and pharmaceutical companies, Congress amended various provisions of the AEPA in 2002.<sup>82</sup>

While opponents of animal enterprise terrorism legislation take little issue with Congress’ decision to increase the maximum prison sentence for causing serious bodily injury,<sup>83</sup> the expansion of the scope of the statute and the increased penalties for nonviolent actions are much more controversial.<sup>84</sup> This 2002 revision eliminated the requirement that economic damage to an animal enterprise must exceed \$10,000, thereby providing a federal cause of action for even minimal economic loss.<sup>85</sup> The newly created remedy for “economic damage,” defined as damage “not exceeding \$10,000 to an animal enterprise,” consisted of a fine, maximum imprisonment of six months, or both.<sup>86</sup> Further, “major economic damage,” defined as “economic damage exceeding \$10,000 to an animal enterprise,” could result in a fine and imprisonment of up to three years, tripling the maximum sentence previously permitted

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (internal quotation marks omitted).

<sup>81</sup> *See, e.g.,* Walsh, *supra* note 9 (“Penalties attached to crimes committed against businesses and laboratories are appropriate, by some minimal definition, and, simultaneously, they are glaringly ineffective. This paradox constitutes the most serious practical problem confronting the Act’s utility as either a deterrent to terrorism or a prosecutorial tool.”).

<sup>82</sup> The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107–188, sec. 336, § 43(a) (2002) (amending the Animal Enterprise Protection Act of 1992).

<sup>83</sup> Pub. L. 107-188, sec. 336(b), § 43(b)(3) (2002).

<sup>84</sup> *Id.* § 43(b).

<sup>85</sup> *Id.* § 43(b)(1).

<sup>86</sup> *Id.*

under the Act.<sup>87</sup> Lastly, this revision included a catch-all category for restitution, authorizing such an order “for any other economic damage resulting from the offense.”<sup>88</sup> Thus, the legislation addressed the concerns of lobbyists, increasing scope of the Act and the penalties applicable to offenses that constitute “animal enterprise terrorism.”

*B. The Case of the SHAC 7*

Since 1999, animal rights activists have waged an aggressive direct action campaign and utilized high-pressure tactics to advocate the closure of Huntingdon Life Sciences (“HLS”). HLS is a contract research laboratory<sup>89</sup> with facilities in New Jersey and England that purportedly kills 180,000 animals per year to test pharmaceutical products, pesticides, industrial and other chemicals.<sup>90</sup> This international campaign, known as Stop Huntingdon Animal Cruelty (“SHAC”), has targeted HLS because five undercover investigations at the labs have revealed appalling

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<sup>87</sup> *Id.* § 43(b)(2). Prior to this amendment, the AEPA provided that an individual could be imprisoned for up to one year for economic damage exceeding \$10,000. Animal Enterprise Protection Act of 1992, 18 U.S.C.A. § 43 (West 2008) (amended 1996, 2002 & 2006).

<sup>88</sup> Pub. L. 107-188, sec. 336(c)(3), § 43(c) (2002). The previous text of the AEPA provided restitution only for: (1) “the reasonable cost of repeating any experimentation that was interrupted or invalidated as a result of the offense”; and (2) “the loss of food production or farm income reasonable attributable to the offense.” Animal Enterprise Protection Act of 1992, 18 U.S.C.A. § 43 (West 2008) (amended 1996, 2002 & 2006).

<sup>89</sup> A “[c]ontract research organization . . . assumes, as an independent contractor with the sponsor, one or more of the obligations of a sponsor, e.g., design of a protocol, selection or monitoring of investigations, evaluation of reports, and preparation of materials to be submitted to the Food and Drug Administration.” 21 C.F.R. § 312.3(b) (2008). Companies often outsource various forms of testing to contract research laboratories for products such as “pharmaceuticals, food additives and a variety of crop protection and consumer chemicals.” Huntingdon Life Sciences, Company Overview, <http://www.huntingdon.com/index.php?currentNumber=0&currentIsExpanded=0> (last visited Feb. 21, 2008).

<sup>90</sup> Barbara Stagno, *Life Science or Living Hell?*, SATYA, Nov./Dec. 2000, accessed at <http://www.satyamag.com/novdec00/stagno.html>.

acts of animal cruelty and countless violations of the Animal Welfare Act.<sup>91</sup> Video footage obtained during those investigations showed workers punching beagle puppies in the face, dissecting live monkeys and falsifying scientific data.<sup>92</sup>

SHAC activists campaigning against HLS in the United States developed methodological approaches to activism that were new to the animal rights movement, as well as to social justice movements in general.<sup>93</sup> They utilized direct action tactics, the internet, an understanding of the legal system, and a singular focus on eliminating HLS as a primary representative of the evils of the vivisection industry.<sup>94</sup> These strategies resulted in the creation of Stop Huntingdon Animal Cruelty USA (“SHAC USA”), an incorporated organization whose sole purpose was to provide information, distinct from the SHAC campaign in which activists participate in both legal and illegal forms of direct action.<sup>95</sup> Fundamentally, SHAC USA merely operated a website that provided information and ideological support for protest activity against HLS, and significantly, its business affiliates.<sup>96</sup> “By maintaining [this] vital distinction . . . SHAC . . . pushed the political envelope as a movement while technically remaining within its rights as an organization.”<sup>97</sup>

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<sup>91</sup> For more information on HLS and a video that was filmed during one of the undercover investigations, see SHAC7.com, HLS & Vivisection, <http://www.shac7.com/hls.htm> (last visited Feb. 21, 2008).

<sup>92</sup> *Id.* A recent lawsuit filed by a former HLS employee alleges that he was fired without explanation in 2005 after refusing “to change his interpretation of research data to show a test resulted in a success instead of the actual failure” so the company would be able to continue billing its clients for further unnecessary testing. Ken Serrano, *Suit Cites False-Data Desires, Racial Bias at Lab*, HOME NEWS TRIB., Nov. 4, 2007, <http://www.thnt.com/apps/pbcs.dll/article?AID=/20071104/NEWS/711040457/1001>.

<sup>93</sup> See Steven Best and Richard Kahn, *Trial By Fire: The SHAC7, Globalization, and the Future of Democracy*, 2 ANIMAL LIBERATION PHIL. AND POL’Y J. 1, 1 (2004).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 18.

<sup>96</sup> SHAC7.com, The Case, <http://www.shac7.com/case.htm> (last visited Feb. 21, 2008).

<sup>97</sup> Best & Kahn, *supra* note 93, at 18.

However, on May 26, 2004, disregarding the distinction between SHAC USA and the SHAC direct action campaign, federal agents descended upon six animal rights activists involved with SHAC USA with guns drawn and helicopters over head.<sup>98</sup> These activists, along with the SHAC USA organization, have come to be known as the SHAC 7.<sup>99</sup>

The SHAC 7 were indicted by a New Jersey grand jury on federal charges alleging they had orchestrated an interstate campaign of terrorism and intimidation, amounting to a conspiracy to violate the AEPA.<sup>100</sup> These charges were based solely on the existence of the SHAC USA website, which contained home addresses and other personal information about Huntingdon Life Sciences employees, associates, and their family members, as well as news and anonymous communiqués submitted by activists that did engage in direct action.<sup>101</sup> However, the creators of the site and the organization did not advocate any particular direct action tactics or direct action in general.<sup>102</sup> In fact, the bottom of each page on the website contained a disclaimer which read: “[SHAC USA does] not advocate any form of violent activity, and in fact . . . urge[s] people that when they write letters or they send emails, that they’re polite, they’re to the point, they’re not threatening in nature.”<sup>103</sup> Instead, the website was meant to remind those who opposed the practices at HLS that the company’s employees and affiliates were supporting its existence, without which it could no longer operate.<sup>104</sup>

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<sup>98</sup> See *id.*, at 1; Chris Maag, *America’s #1 Threat*, MOTHER JONES, Jan. 1, 2006, at 18.

<sup>99</sup> The SHAC 7 consists of: Kevin Kjonaas, Lauren Gazzola, Jacob Conroy, Darius Fullmer, Andrew Stepanian, and Joshua Harper. John McGee, a seventh activist, was also charged originally but was later dropped from the case. SHAC7.com, *The Case*, *supra* note 96.

<sup>100</sup> *Id.*

<sup>101</sup> Telephone Interview by Amy Goodman of Democracy Now! with Andrew Stepanian, member of the SHAC 7, and Andrew Erba, a lead attorney in the SHAC 7 case (Oct. 3, 2006) [hereinafter Democracy Now! Interview], available at <http://www.democracynow.org/article.pl?sid=06/10/03/142235>.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

The activists denied any involvement with the vandalism, threats, and other forms of direct action that were subsequently carried out against Huntingdon Life Sciences employees and insisted they were “simply trying to shame their targets into dissociating themselves from the company . . . .”<sup>105</sup> In fact, federal prosecutors failed to introduce any evidence that the individual defendants or the organization directly participated in any direct action.<sup>106</sup> Instead, the government argued to jurors that the information contained on the SHAC USA website enabled activists to target those affiliated with the company and incited illegal direct action.<sup>107</sup>

The government attempted to attribute to the SHAC 7 the violence that did occur as part of the campaign to close HLS.<sup>108</sup> Various government witnesses testified about the protest activity and criminal actions carried out against HLS, its employees, and its affiliates.<sup>109</sup> However, the one significant commonality among the testimony of the government’s witnesses is that none were able to identify any of the defendants as activists who engaged in criminal acts against them.<sup>110</sup>

Nonetheless, on March 2, 2006, after fourteen hours of deliberation, the jury returned a verdict of guilty on all counts.<sup>111</sup> All six defendants were found guilty of “[c]onspiracy to violate the Animal Enterprise Protection Act”<sup>112</sup> and became the first

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<sup>105</sup> David Kocieniewski, *Six Animal Rights Activists are Convicted of Terrorism*, N.Y. TIMES, Mar. 3, 2006, at B3.

<sup>106</sup> *Id.*

<sup>107</sup> Press Release, United States Attorney’s Office—District of New Jersey, Militant Animal Rights Group, Six Members Convicted in Campaign to Terrorize Company, Employees and Others (Mar. 2, 2006), [http://www.usdoj.gov/usao/nj/press/files/shac0302\\_r.htm](http://www.usdoj.gov/usao/nj/press/files/shac0302_r.htm) [hereinafter U.S. Attorney’s Press Release].

<sup>108</sup> SHAC7.com, The Case, *supra* note 96.

<sup>109</sup> *Id.* Among the witnesses was HLS director Brian Cass, who resides in the United Kingdom. *Id.* Cass testified about the campaign against the company in England, an attack on him in England in 2001, and the alleged benefits that result from the animal research conducted by the company. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Kocieniewski, *supra* note 105.

<sup>112</sup> U.S. Attorney Press Release, *supra* note 107. The six charges were as

individuals to be found guilty of animal enterprise terrorism.<sup>113</sup> The activists were sentenced to between one and six years in federal prison, and the organization received five years probation and was ordered to pay a restitution of \$1,000,001 to HLS, the responsibility of which belonged to the individual defendants.<sup>114</sup>

*C. The Animal Enterprise Terrorism Act*

The SHAC campaign was largely effective due to its innovative strategy of demonstrating against “tertiary” targets, such as the investors, insurers, and suppliers that support HLS and enable it to operate profitably but which cannot themselves be considered “animal enterprises.”<sup>115</sup> Seemingly disregarding that the AEPA had been successfully used to prosecute individuals involved in this campaign that did not personally engage in direct action, animal industry groups once again pushed for broader legislation and greater maximum sentences than those available in the recently amended legislation.<sup>116</sup> These efforts are illustrative of the driving force behind the enactment of animal enterprise legislation; that is,

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follows: count one, conspiracy to violate the AEPA; count two, conspiracy to commit interstate stalking; counts three, four and five, interstate stalking of specific victims; and count six, conspiracy to use a telecommunications device to abuse, threaten and harass persons. *Id.* Kjonaas, Gazzola, and Conroy were found guilty of all counts, Harper of counts one and six, and Stepanian and Fuller only of conspiracy to violate the AEPA. *Id.*

<sup>113</sup> SHAC7.com, *The Case*, *supra* note 96. Until 2004, the AEPA had only been used to secure the guilty pleas of Peter Young and Justin Samuel, and no defendant charged with a violation had been to trial. *See id.*

<sup>114</sup> *See* Laura Mansnerus, *Animal Rights Advocates Given Prison Terms*, N.Y. TIMES, Sept. 13, 2006, at B8 (Judge Anne E. Thompson sentenced Kjonaas to six years, Gazzola to four years and four months, and Conroy to four years in prison); *Trenton: Activist Sentenced*, N.Y. TIMES, Sept. 14, 2006, at B4 (Harper was sentenced to three years); Will Potter, *Remaining SHAC 7 Defendants Sentenced*, <http://www.greenisthenewred.com/blog/2006/09/19/remaining-shac-7-defendants-sentenced/> (Sept. 19, 2006) (Stepanian was sentenced to three years and Fullmer to twelve months and one day).

<sup>115</sup> Best & Kahn, *supra* note 93, at 17.

<sup>116</sup> *See, e.g., 2004 Hearing*, *supra* note 53 (testimony of William Green, Senior V.P. and General Counsel, Chiron Corporation), *available at* [http://judiciary.senate.gov/testimony.cfm?id=1196&wit\\_id=3462](http://judiciary.senate.gov/testimony.cfm?id=1196&wit_id=3462).

industry groups are not concerned with further criminalizing those acts that are already illegal for criminal justice purposes, but instead are urging the federal government to shield their corporate interests entirely from opposition.<sup>117</sup>

On May 18, 2004, the Senate Committee on the Judiciary held a hearing on "Animal Rights: Activism vs. Criminality," where government officials, corporate executives and animal experimenters met to discuss the perceived need for stronger legislation.<sup>118</sup> The proposed amendments included a provision to prohibit causing economic loss, even in the absence of any physical destruction; expanding the act to include tertiary targets; expanding the definition of "animal enterprise" to include the use of animals "for education . . . [and] for the purpose of advancing biomedical sciences;" and increasing the maximum prison sentence to ten years for physical or economic disruption.<sup>119</sup> John E. Lewis, the FBI Deputy Assistant Director of the Counterterrorism Division, argued to the committee that these measures were necessary because "[w]hile it is a relatively simple matter" to prosecute activists who allegedly commit arson or use explosive devices under existing federal statutes, "it is often difficult if not impossible to address a campaign of low-level . . . criminal activity like that of SHAC in federal court."<sup>120</sup>

However, the indictment of the SHAC 7 just two days after this committee hearing, and their subsequent conviction,

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<sup>117</sup> William Green of Chiron Corp., a biotechnology company that had contracted with HLS to conduct primate and other animal testing, urged Congress to adopt further means by which to prosecute animal rights activists, because "[a]s the law presently stands, tools are insufficient." *Id.* In support of this assertion, he noted that "Chiron Corporation and its employees have been the target of a . . . campaign by animal rights extremists" that has cost the company "significant time and resources to defend [itself]; resources that [it] believe[s] would have been better invested in [its] research efforts." *Id.*

<sup>118</sup> 2004 Hearing, *supra* note 53.

<sup>119</sup> *Id.* (testimony of William Green, Senior V.P. and General Counsel, Chiron Corporation), available at [http://judiciary.senate.gov/testimony.cfm?id=1196&wit\\_id=3462](http://judiciary.senate.gov/testimony.cfm?id=1196&wit_id=3462).

<sup>120</sup> *Id.* (testimony of John E. Lewis, Deputy Assistant Dir., Counterterrorism Div., FBI), available at [http://judiciary.senate.gov/testimony.cfm?id=1196&wit\\_id=3460](http://judiciary.senate.gov/testimony.cfm?id=1196&wit_id=3460).

demonstrates that the AEPA was sufficient to prosecute defendants. The legislation was interpreted so broadly as to encompass nonviolent actions that cannot be incorporated into any traditional framework of criminal activity.<sup>121</sup> Therefore, the adoption of any amendments to expand the reach of and increase penalties under the AEPA was unnecessary, and the claim that existing federal legislation was insufficient to prosecute those who demonstrate against secondary targets was illogical.

During the first session of the 109th Congress in 2005, Senator James Inhofe (R-Okla.) and Representative Thomas Petri (R-WI) introduced early versions of the Animal Enterprise Terrorism Act (“AETA”) as an amendment to the AEPA.<sup>122</sup> This legislation, drafted with assistance from the Department of Justice and the FBI, was meant to “enhance the effectiveness of the U.S. Department of Justice’s response to recent trends in the animal rights terrorist movement.”<sup>123</sup> The bill addressed the concerns being voiced by industry groups, incorporating provisions to enhance the protection of corporate interests.<sup>124</sup> No action was taken on the bill during that session other than referral to committee.<sup>125</sup> Inhofe and Petri introduced the final version of the bill to Congress in 2006.<sup>126</sup>

Throughout this process, animal advocacy and civil rights organizations expressed their opposition to the AETA to the

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<sup>121</sup> See *infra* text accompanying notes 224–55 (concluding that the activities of the SHAC 7 were entitled to the protections of the First Amendment).

<sup>122</sup> Press Release, U.S. Senate Committee on Environment & Public Works, Inhofe Introduces Animal Enterprise Terrorism Act (Oct. 28, 2005), <http://epw.senate.gov/pressitem.cfm?party=rep&id=247941>.

<sup>123</sup> *Id.*

<sup>124</sup> Incorporating the provisions recommended by industry groups expanded the scope and increased the penalties of animal enterprise terrorism legislation, providing greater protections to those encompassed by the Act. See *infra* text accompanying notes 141–51. “No other industrial sector in U.S. history has ever been given such legal protections against people’s exercising of their First Amendment free-speech rights.” PETA, Tell Congress That Exposing Animal Abuse Is Not Illegal!, <http://www.peta.org/Automation/AlertItem.asp?id=2032> (last visited Feb. 21, 2008).

<sup>125</sup> Berger, *supra* note 70, at 300.

<sup>126</sup> *Id.* at 300–01.

House Judiciary Committee.<sup>127</sup> These organizations cautioned that the AETA's characterization of the loss of property<sup>128</sup> could potentially infringe upon constitutionally protected forms of activism such as demonstrations, leafleting, undercover investigations, and boycotts.<sup>129</sup> They argued that the bill contained vague and overbroad language, and furthermore was unnecessary because federal criminal laws already provided sufficient punishments for unlawful activities by activists targeting animal enterprises.<sup>130</sup> Consequently, they argued, the legislation would have had a "chilling" effect on free speech, as animal advocates would not be aware of what traditionally protected activities would fall within the purview of the AETA.<sup>131</sup>

After the AETA passed in the Senate, the American Civil Liberties Union ("ACLU") changed its position on the legislation, stating in a letter to the House Judiciary Committee that it would not oppose the bill if minor but necessary changes were made to make it less likely to threaten free speech.<sup>132</sup> Specifically, the ACLU stated that the bill should define "real or personal property" as "tangible" property to avoid penalizing legitimate and

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<sup>127</sup> See, e.g., Caroline Fredrickson and Lisa Graves, ACLU, An Open Letter to Congress (Mar. 6, 2006), <http://www.aclu.org/freespeech/gen/25620leg20060306.html> [hereinafter ACLU Open Letter]; National Lawyers Guild, National Lawyers Guild Opposes Animal Enterprise Terrorism Act (Oct. 30, 2006), [http://www.nlg.org/news/statements/AETA\\_Act.htm](http://www.nlg.org/news/statements/AETA_Act.htm) [hereinafter National Lawyers Guild]; Humane Society of the United States, Oppose the Animal Enterprise Terrorism Act (AETA), [http://www.hsus.org/web-files/PDF/109\\_AETA\\_factsheet.pdf](http://www.hsus.org/web-files/PDF/109_AETA_factsheet.pdf) (last visited Nov. 25, 2007) [hereinafter Humane Society].

<sup>128</sup> See discussion *infra* text accompanying notes 133, 141–44.

<sup>129</sup> ACLU Open Letter, *supra* note 127; National Lawyers Guild, *supra* note 127; Humane Society, *supra* note 127.

<sup>130</sup> ACLU Open Letter, *supra* note 127; National Lawyers Guild, *supra* note 127; Humane Society, *supra* note 127.

<sup>131</sup> ACLU Open Letter, *supra* note 127; National Lawyers Guild, *supra* note 127; Humane Society, *supra* note 127.

<sup>132</sup> Letter from Caroline Fredrickson and Lisa Graves, ACLU, to James Sensenbrenner, Jr., House Judiciary Committee Chairman, and John Conyers, Jr., House Judiciary Committee (Oct. 30, 2006) [hereinafter ACLU Letter to House], available at [http://www.aclu.org/images/general/asset\\_upload\\_file809\\_27356.pdf](http://www.aclu.org/images/general/asset_upload_file809_27356.pdf).

otherwise legal activity that results in lost profits.<sup>133</sup> It further advocated for clarification that a provision, which imposes a penalty for actions that caused no reasonable fear of bodily harm, no actual bodily injury or no economic damage, applied only to conspiracies or attempts to violate the Act.<sup>134</sup> These recommended changes were not made, however, thereby keeping many forms of previously accepted forms of activism within the purview of the bill.<sup>135</sup>

Without further addressing these expressed concerns, on November 13, 2006, House Judiciary Committee Chairman James Sensenbrenner moved to suspend the rules and pass the bill.<sup>136</sup> The motion to suspend the rules was granted and the bill passed by voice vote.<sup>137</sup> With little or no dissent throughout these proceedings, the AETA was signed into law by President Bush on November 27, 2006.<sup>138</sup>

The final version of the AETA addresses the concerns of the

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<sup>133</sup> *Id.* at 1–2 (The ACLU suggested that the bill specify that it “does not include damage or loss resulting from a boycott, protest, demonstration, investigation, whistleblowing, reporting of animal mistreatment, or any public, governmental, or business reaction to the disclosure of information concerning animal enterprises.”).

<sup>134</sup> *Id.* at 2–3. The ACLU stated that

[s]ince reasonable fear of bodily harm, actual bodily injury or economic damages are all elements of crimes associated with more severe penalties under the bill, we assume the first penalty provision under the bill is meant to address conspiracies or attempts. However, this should be clarified [t]o avoid the chilling effect on those individuals considering actions that would cause no harm, either physical or economic, nor instill any fear of harm. . . .

*Id.*

<sup>135</sup> Animal Enterprise Terrorism Act, 18 U.S.C. § 43(a)(1) (2006).

<sup>136</sup> Lib. Cong., THOMAS, Search Bill Summary and Status for the 109th Congress, <http://thomas.loc.gov/bss/109search.html> (search “Animal Enterprise Terrorism Act”, select “S. 3880”, select “All Information”) (last accessed Feb. 21, 2008). Under this procedure, often used to act expeditiously on relatively non-controversial legislation, floor debate is limited and all floor amendments are prohibited. THOMAS P. CARR, SUSPENSION OF THE RULES IN THE HOUSE: PRINCIPAL FEATURES (2004), <http://www.rules.house.gov/Archives/98-314.pdf>.

<sup>137</sup> Lib. Cong., *supra* note 136.

<sup>138</sup> *Id.*

industry groups and lobbyists that pushed for its passage.<sup>139</sup> It further expands the reach of federal animal enterprise legislation and increases its penalties beyond those imposed by the AEPA as amended in 2002.<sup>140</sup> As a result, the legislation has become excessively broad and vague, creating a chilling effect on activists' exercise of constitutionally-protected speech.

### *I. AETA: Offenses*

Through a series of amendments, the AETA has significantly expanded the scope of "animal enterprise terrorism" beyond its applicability under the AEPA. First, while the AEPA required that an individual have the "purpose of causing *physical disruption* to the functioning of an animal enterprise" for conduct to constitute a violation, the AETA eliminates the previous limitation of physical disruption and proscribes all conduct engaged in "for the purpose of damaging or *interfering* with the operations of an animal enterprise."<sup>141</sup> In addition, Congress has taken steps to increase the number of individuals and entities protected by the Act: the term "animal enterprise" has been broadly redefined to include essentially any industry or company that is involved in the exploitation of animals, either directly or indirectly,<sup>142</sup> and "tertiary" targeting is included within its scope, expanding the protections of the legislation far beyond those that fall within the definition of an animal enterprise.<sup>143</sup>

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<sup>139</sup> See, e.g., 2004 Hearing, *supra* note 53 (testimony of William Green, Senior V.P. and General Counsel, Chiron Corporation), available at [http://judiciary.senate.gov/testimony.cfm?id=1196&wit\\_id=3462](http://judiciary.senate.gov/testimony.cfm?id=1196&wit_id=3462).

<sup>140</sup> See discussion *infra* text accompanying notes 141–51.

<sup>141</sup> Animal Enterprise Terrorism Act, 18 U.S.C. § 43(a)(1) (2006) (emphasis added).

<sup>142</sup> *Id.* § 43(d)(1). The definition now encompasses: (1) commercial or academic enterprises that use or sell animals or animal products for profit, food or fiber production, agriculture, education, research, or testing; (2) zoos, aquariums, animal shelters, pet stores, breeders, furriers, circuses, or rodeos, or other lawful competitive animal events; and (3) any fair or similar event intended to advance agricultural arts and sciences. *Id.*

<sup>143</sup> Tertiary targets are defined as any "person or entity hav[ing] a connection to, relationship with, or transactions with an animal enterprise." *Id.*

Finally, the AETA does not proscribe only physical or economic disruption, but further prohibits individuals from “intentionally plac[ing] a person in *reasonable fear*” of death or serious bodily injury to that person, a member of their immediate family, or their partner “by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation.”<sup>144</sup> In sum, the legislation now proscribes a broader range of conduct when directed at a larger class of persons.

## 2. AETA: Penalties and Restitution

The AETA further increases the maximum penalties of the AEPA.<sup>145</sup> Most significantly, the punishment for a violation of the Act, or attempt or conspiracy to violate the Act, is a fine, imprisonment up to one year, or both if the offense *does not* instill in another the reasonable fear of serious bodily injury or death, results in *no bodily injury*, and causes *no economic damage* or economic damage not exceeding \$10,000.<sup>146</sup> In addition, a violation under the AETA will result in a fine or imprisonment for up to five years, or both, if no bodily injury occurs and the offense results in economic damage between the amounts of \$10,000 and \$100,000.<sup>147</sup>

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§ 43(a)(2)(A).

<sup>144</sup> *Id.* § 43(a)(2)(B) (emphasis added).

<sup>145</sup> *Id.* § 43(b)(1).

<sup>146</sup> *Id.* (“economic damage” is defined by § 43(d)(3) as “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 or [sic] 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.”). The AEPA did not provide for any penalty in the absence of economic damage and created a maximum of six months imprisonment for causing damage not exceeding \$10,000. Animal Enterprise Protection Act, 18 U.S.C.A. § 43(b)(1) (West 2008) (as amended in 2002).

<sup>147</sup> Animal Enterprise Terrorism Act, 18 U.S.C.A. § 43(b)(2) (2006). The AEPA previously provided for a maximum penalty of three years in prison for these violations, rather than five. Animal Enterprise Protection Act, 18

Furthermore, like the AEPA, restitution under the AETA may include costs for repeating any experimentation that was interrupted or invalidated as a result of the offense, as well as for the loss of food production or farm income.<sup>148</sup> However, the third catch-all category for “any other economic damage resulting from the offense”<sup>149</sup> now expressly includes any losses or costs caused by economic disruption.<sup>150</sup> Thus, while the revisions to these sections have increased the penalties and restitution for conduct that constituted “animal enterprise terrorism” under the AEPA, the amended sections primarily address Congress’ subsequent concern with economic loss.<sup>151</sup>

*D. The Applicability of Terrorism Sentencing Enhancements to “Animal Enterprise Terrorism”*

Another tool that the federal government has attempted to use to deter individuals from engaging in direct action is the “terrorism” sentencing enhancement in the United States Sentencing Guidelines (the “Guidelines”).<sup>152</sup> Section 3A1.4(a) of the Guidelines provides for significantly increased sentences if an offense was “a felony that involved, or was intended to promote, a federal crime of terrorism.”<sup>153</sup> If applied, the enhancement more than doubles the length of a sentence authorized by the initial sentencing guideline range.<sup>154</sup>

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U.S.C.A. § 43(b)(2) (West 2008) (as amended in 2002).

<sup>148</sup> Animal Enterprise Terrorism Act, 18 U.S.C. § 43(c)(1)–(2) (2006).

<sup>149</sup> Animal Enterprise Protection Act, 18 U.S.C.A. § 43(c)(3) (West 2008) (as amended in 2002); Animal Enterprise Terrorism Act, 18 U.S.C. § 43(c)(3) (2006).

<sup>150</sup> Animal Enterprise Terrorism Act, 18 U.S.C. § 43(c)(3) (2006).

<sup>151</sup> See discussion *supra* text accompanying notes 115–50.

<sup>152</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.4.

<sup>153</sup> *Id.* A “federal crime of terrorism” is defined as an offense that “is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” and falls under one of the many categories enumerated by the statute. 18 U.S.C.A. § 2332b(g)(5).

<sup>154</sup> United States v. Thurston, Nos. CR 06-60069-01-AA, CR 06-60070-01-AA, CR 06-60071-01-AA, CR 06-60078-01-AA, CR 06-60079-01-AA, CR 06-60080-01-AA, CR 06-60120-01-AA, CR 06-60122-01-AA, CR 06-60122-

In *United States v. Thurston*, an Oregon District Court ruled that terrorism enhancement penalties may apply to direct action by animal and environmental rights activists.<sup>155</sup> However, while “the government retains the prosecutorial discretion to request the enhancement,”<sup>156</sup> it will not be applied liberally.<sup>157</sup> The court noted that because of the substantial increase that the enhancement may provide to a relatively short sentence, the government must meet a high burden of proof.<sup>158</sup> That is, in order for the enhancement to apply, the government must prove by clear and convincing evidence that the offenses of conviction involved, or were intended to promote, a federal crime of terrorism.<sup>159</sup> In addition, if “the government is overreaching due to political considerations, either the enhancement will not apply to defendants’ offenses or defendants will be eligible for a downward departure because their conduct is outside the ‘heartland’ of terrorism offenses.”<sup>160</sup>

Perhaps the greatest protection that animal rights activists have from this enhancement being applied to instances of direct action is

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02-AA, CR 06-60123-01-AA, CR 06-60124-01-AA, CR 06-60125-01-AA, CR 06-60126-01-AA, 2007 WL 1500176, at \*19 (D. Or. May 21, 2007).

<sup>155</sup> *Id.* at \*20.

<sup>156</sup> *Id.* at \*18.

<sup>157</sup> See *infra* notes 157–62 and accompanying text.

<sup>158</sup> *Thurston*, 2007 WL 1500176, at \*19.

<sup>159</sup> *Id.* at \*1.

<sup>160</sup> *Id.* at \*18. It is noteworthy that the *Thurston* court prefaced its decision by writing that it was not “appropriate for the court to speculate whether the government seeks to promote a particular political agenda or to punish a particular form of activism in requesting the terrorism enhancement.” *Id.* at \*1. The court likely included this statement because the government appears to have sought these penalty enhancements not because of the defendants’ criminal conduct, but because of their political beliefs. While the FBI states that “[t]errorism is terrorism—no matter what the motive,” Robert S. Mueller, FBI Director, Remarks at the Operation Backfire Press Conference (Jan. 20, 2006), accessed at <http://www.fbi.gov/pressrel/speeches/mueller012006.htm>, it hasn’t sought “terrorism enhancement” for church arsons or the murders of abortion providers. Will Potter, Government Seeks “Terrorism Enhancement” for Environmental Activists, <http://www.greenisthenewred.com/blog/2007/05/11/terrorism-enhancement-hearing/> (May 11, 2007). In fact, “the enhancement has not [even] been sought . . . in prosecutions of persons who possessed biological toxins.” *Thurston*, 2007 WL 1500176, at \*18.

that the federal crime of terrorism requires that actions be calculated “to influence or affect the *conduct of government* by intimidation or coercion, or to retaliate against *government conduct*.” Thus, the government must establish that the defendants targeted government conduct rather than the conduct of private individuals or corporations.”<sup>161</sup> Animal rights activists that use direct action tactics, such as the SHAC 7, target solely corporations and their affiliates that engage in the institutionalized exploitation of nonhuman animals in an attempt to make it unprofitable or inconvenient for the businesses to continue their practices; they do not target government entities or engage in home demonstrations of governmental employees.<sup>162</sup> In fact, the term “direct action” refers to the fact that activists target the source of their concerns directly, rather than attempting to affect change indirectly through governmental means.<sup>163</sup> Accordingly, although terrorism sentencing enhancements may be applicable to defendants convicted of “eco-terrorism” offenses,<sup>164</sup> federal prosecutors face several obstacles in meeting their relatively high burden of proof.

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<sup>161</sup> *Thurston*, 2007 WL 1500176, at \*15 (quoting 18 U.S.C. § 2332b(g)(5)(A)).

<sup>162</sup> *See, e.g.*, Potter *supra* note 160 (Illegal direction action is not “meant to influence government, because the [activists have] lost all faith that government could be influenced.”).

<sup>163</sup> *See supra* text accompanying notes 32–52.

<sup>164</sup> *Thurston*, 2007 WL 1500176, at \*1.

IV. FIRST AMENDMENT CONCERNS

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.<sup>165</sup>

- Hon. Byron Raymond White

A. *Boundaries of the Protections of Free Speech*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>166</sup> However, the protection afforded by the First Amendment is not absolute and may be regulated when speech is “of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”<sup>167</sup> Two such narrowly tailored exceptions that the Supreme Court has explicitly recognized are where speech constitutes a “true threat,”<sup>168</sup> or where it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>169</sup> In addition, lower courts have, on occasion, determined that crime-facilitating speech is not protected by the First Amendment.<sup>170</sup>

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<sup>165</sup> *Red Lion Broad. Co. v. Fed. Comm’n Comm’n*, 395 U.S. 367, 390 (1969).

<sup>166</sup> U.S. CONST. AMEND. I.

<sup>167</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>168</sup> *See Watts v. United States*, 394 U.S. 705 (1969); *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>169</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*).

<sup>170</sup> *See, e.g., Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997) (*Hit Man: A Technical Manual for Independent Contractors*, a 130 page book of detailed factual instructions on how to murder and to become a professional killer, was not entitled to protection under the First Amendment).

*1. True Threats: The Requirement of Subjective Intent*

The First Amendment does not exclude all potentially threatening speech from its protections.<sup>171</sup> Instead, in *Virginia v. Black*,<sup>172</sup> the Supreme Court held that only “true threats” may be banned under the First Amendment.<sup>173</sup> “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>174</sup> The Court further noted that “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>175</sup>

While it is not required that the speaker subjectively intends to carry out the threatened action for the speech to be punishable,<sup>176</sup> the Court adopted a separate standard of subjective intent—it must be shown that the speaker intentionally threatened the individual or group of individuals.<sup>177</sup> This prohibition is not merely intended to

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<sup>171</sup> See *Watts*, 394 U.S. at 706–07 (holding that defendant’s statement, “[i]f they ever make me carry a rifle the first man I want to get in my sights is [the president,]” was not a true threat but was constitutionally protected speech). The First Amendment protects “vehement, caustic, and sometimes unpleasantly sharp attacks” as well as speech that is “vituperative, abusive, and inexact.” *Id.* at 708.

<sup>172</sup> 538 U.S. 343 (2003).

<sup>173</sup> *Id.* at 359.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 360.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 359. “The [*Black*] Court’s insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the [state] statute was unconstitutional precisely because the element of intent was effectively eliminated . . . .” *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005). Several circuit courts have modified their analysis of true threats to require this specific intent to threaten. See, e.g., *id.* (“[*Black*] embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.”); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (“Unprotected by the Constitution are threats that communicate the speaker’s intent to commit an act of unlawful violence against identifiable

protect individuals from the possibility that the threatened violence will transpire, but also from the fear of violence and “disruption that fear engenders.”<sup>178</sup> Thus, society’s interest in protecting threatening speech is secondary to that of maintaining a system of order and civility.<sup>179</sup>

2. *Incitement: Advocacy of Unlawful Action and the Requirement of Imminence*

In the absence of a “true threat,” determining whether advocacy of violence or lawless action falls outside the purview of the protections of the First Amendment becomes even more complex. Although the Supreme Court has held that advocacy is constitutionally protected if it is not directed or likely to incite imminent illegal acts,<sup>180</sup> the Court has not offered significant guidance on the meaning of “imminent.”<sup>181</sup> Recent cases, however, suggest that this standard is difficult to meet if illegal acts do not immediately follow the speech in question.<sup>182</sup>

Supreme Court opinions of the early twentieth century held that a State may reasonably and constitutionally conclude that certain instances of advocacy create such a danger to the public peace and security that they should be penalized by the use of State police power.<sup>183</sup> However, in many of those cases, Justices

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individuals.”); *Vives v. City of New York*, 405 F.3d 115, 123–24 (2d Cir. 2005).

<sup>178</sup> *Black*, 538 U.S. at 360 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

<sup>179</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>180</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*).

<sup>181</sup> Joanne Kirchner, *Threatening Abortion Providers, Inciting Violence, or Exercising First Amendment Rights? Chapter 486 Takes a Precarious Stand*, 38 MCGEORGE L. REV. 159, 171 (2007).

<sup>182</sup> See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Hess v. Indiana*, 414 U.S. 105 (1973) (*per curiam*).

<sup>183</sup> *Whitney v. California*, 274 U.S. 357, 371 (1927) (affirming the conviction of Anita Whitney, found guilty of violating the California Criminal Syndicalism Act for her role as an organizing member of the Communist Labor Party); see also *Abrams v. United States*, 250 U.S. 616, 627–28 (1919) (upholding the constitutionality of the Espionage Act, the Court upheld the

Holmes and Brandeis dissented from the reasoning of the majority,<sup>184</sup> defending the freedom of speech, stressing the distinction between advocacy and incitement, and supporting a requirement of a showing of “clear and present danger.”<sup>185</sup> Thus, they advocated that for speech to no longer be protected, “it must be shown either that *immediate* serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.”<sup>186</sup>

In the middle of the twentieth century, the Warren Court rejected previous restrictions on the exercise of free speech, and gradually adopted the Holmes-Brandeis requirement of the expectation of immediate violence.<sup>187</sup> In 1969, this rationale was adopted in *Brandenburg v. Ohio*,<sup>188</sup> and the reasoning of prior cases was expressly overruled.<sup>189</sup>

After accepting an invitation from Brandenburg, the leader of a Ku Klux Klan group, a reporter and cameraman from a local television station attended a Ku Klux Klan gathering and filmed the events.<sup>190</sup> On the basis of this gathering, Brandenburg was

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conviction of defendant for printing materials intended to incite and advocate resistance to the United States in the war with Germany).

<sup>184</sup> See *Whitney*, 274 U.S. at 372 (Brandeis, J. concurring); *Abrams*, 250 U.S. at 624 (1919) (Holmes, J. in dissent).

<sup>185</sup> *Whitney*, 274 U.S. at 376.

<sup>186</sup> *Id.* (emphasis added). Justice Brandeis further explained that “no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time [for discussion], the remedy to be applied is more speech, not enforced silence.” *Id.* at 377.

<sup>187</sup> See, e.g., *Dennis v. United States*, 341 U.S. 494, 507 n.5 (1951) (listing nine opinions that “have inclined toward the Holmes-Brandeis rationale”); *American Communications Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 412 (1950) (The First Amendment “requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result.”).

<sup>188</sup> 395 U.S. 444, 447 (1969) (*per curiam*).

<sup>189</sup> *Id.* at 449.

<sup>190</sup> *Id.* at 445. The film revealed twelve hooded figures, some of whom were armed, gathered around a large wooden cross which they eventually burned. *Id.* Portions of the film were later shown both on local and national television networks. *Id.* While most of the dialogue in the scene was unintelligible in the

convicted of violating an Ohio statute prohibiting the advocacy of unlawful acts “as a means of accomplishing industrial or political reform.”<sup>191</sup> The Supreme Court reversed the conviction, holding that the statute was unconstitutional under the First and Fourteenth Amendments because it failed to distinguish mere advocacy “from incitement to imminent lawless action.”<sup>192</sup> Thus, even advocacy of the use of force or to violate the law are protected from State prohibition by the constitutional guarantees of free speech and press, so long as that advocacy is not directed or likely to incite or produce *imminent* illegal acts.<sup>193</sup>

The Court has yet to expressly provide a clearly defined rule for determining when advocacy incites violence and thus may be prohibited by the First Amendment.<sup>194</sup> However, two recent cases involving the incitement requirement have found that the harm threatened by the defendant’s speech was not sufficiently imminent for the speech to be to be proscribed.<sup>195</sup> In the first case, *Hess v. Indiana*,<sup>196</sup> approximately one hundred protestors moved onto a public street and blocked vehicle traffic during an anti-war demonstration.<sup>197</sup> When police caused the demonstrators to

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film, scattered phrases could be understood, such as “bury the niggers” and “we intend to do our part.” *Id.* at 446 n.1.

<sup>191</sup> *Brandenburg*, 395 U.S. at 444–45. Brandenburg was charged with violating an Ohio Criminal Syndicalism statute, Ohio Rev. Code Ann. § 2923.13 (West 2008), for “advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” *Id.* (internal citations omitted). Upon conviction, he was fined \$1,000 and sentenced to one to ten years’ imprisonment. *Brandenburg*, 395 U.S. at 444–45.

<sup>192</sup> *Id.* at 448–49.

<sup>193</sup> *Id.* at 447.

<sup>194</sup> See Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO ST. L.J. 1175, 1214 (2000).

<sup>195</sup> NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam).

<sup>196</sup> 414 U.S. 105.

<sup>197</sup> *Id.* at 106.

disperse,<sup>198</sup> Hess said loudly, “[w]e’ll take the fucking street later (or again).”<sup>199</sup> The Supreme Court concluded that this statement was not intended to incite further lawless action on the part of the crowd in the vicinity of Hess, nor likely to produce such action.<sup>200</sup> The opinion noted, “[a]t best . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time.”<sup>201</sup> Thus, the Court held that these actions were not sufficient to permit the State to punish Hess for his speech.<sup>202</sup>

In the second case, *NAACP v. Claiborne Hardware Co.*,<sup>203</sup> white business owners who had suffered lost earnings as result of civil rights boycotts brought actions against the participants and civil rights organizations.<sup>204</sup> In a series of speeches, NAACP chapter leader Charles Evers stated that boycott violators “would be watched”<sup>205</sup> and “disciplined” by their own people.<sup>206</sup> Subsequently, those individuals were unlawfully disciplined.<sup>207</sup> Conceding that “[i]n the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence,” the Court held that “[t]he emotionally

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 109.

<sup>201</sup> *Id.* at 108.

<sup>202</sup> *Hess*, 414 U.S. at 108.

<sup>203</sup> 458 U.S. 886 (1982).

<sup>204</sup> *Id.* at 889–90.

<sup>205</sup> *Id.* at 900 n.28.

<sup>206</sup> *Id.* at 902. Evers further warned violators that the Sheriff could not sleep with them at night and that if any African-American was caught “in any of them racist stores, we’re gonna break your damn neck.” *Id.* The names of those who violated the boycott were then read at meetings of the local chapter of the NAACP and were published in a paper entitled the “Black Times.” *Id.* at 903–04.

<sup>207</sup> Evidence adduced at trial illustrated that shots were fired at the homes of three violators, *Claiborne*, 458 U.S. at 904–05, a brick was thrown through the windshield of a car, *id.* at 904, a flower garden was intentionally damaged, *id.* at 904, automobile tires were slashed, *id.* at 906, and two individuals were physically attacked, *id.* at 905.

charged rhetoric of Charles Evers’ speeches did not transcend the bounds of protected speech set forth in *Brandenburg*.<sup>208</sup> Essential to this determination was that the violence allegedly caused by Evers’ rhetoric occurred weeks and months after his speeches were made.<sup>209</sup>

In light of *Brandenburg* and its progeny, the Court has interpreted the First Amendment broadly and set forth expansive protections of advocacy speech.<sup>210</sup> The resulting standard of imminence is a narrow one: “speech intended to stir anger and even speech that creates a climate of violence is protected under the First Amendment.”<sup>211</sup> Thus, statements which advocate illegal action at some indefinite point in the future are insufficient to permit State proscription of speech.<sup>212</sup> This stringent standard for imminence is particularly significant given the widespread knowledge of contemporary technology and the increasing use of the internet as a tool to express dissatisfaction with societal norms and disseminate related information.<sup>213</sup>

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<sup>208</sup> *Id.* at 927–28.

<sup>209</sup> *Claiborne*, 458 U.S. at 928.

<sup>210</sup> *See Vitiello*, *supra* note 194, at 1216–17.

First, when speech values are at stake, a court has a heightened duty to review the record independently to determine whether the findings below are justified. Second, the Court will not lightly find that threatened harm is imminent, at least not absent a showing that the threatened harm has come shortly after the speech. Third, a state must prove the speaker’s intent to bring about the harm; the Court will read ambiguous evidence of the speaker’s intent in favor of the speaker. The Court requires intent, not mere knowledge, that the harm will occur.

*Id.*

<sup>211</sup> Jason Schlosberg, *Judgment on “Nuremberg”: An Analysis of Free Speech and Anti-Abortion Threats Made on the Internet*, 7 B.U. J. SCI. & TECH. L. 52, 74 (2001) (citing *Claiborne*, 458 U.S. at 926-32).

<sup>212</sup> *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam).

<sup>213</sup> *See e.g.*, The Final Nail, <http://www.finalnail.com/> (last visited Feb. 21, 2008) (providing address and contact information for laboratory animal suppliers, fur farms, slaughterhouses and companies that trap animals for fur); Close HLS, <http://www.closehls.net/> (last visited Feb. 21, 2008) (posting reports of demonstrations and providing addresses and contact information for HLS customers, lab suppliers, and financial affiliates); SHAC, <http://www.shac.net/HLS/index.html> (last visited Feb. 21, 2008) (posting detailed

### 3. Crime-Facilitating Speech

“Crime-facilitating speech” is another area in which courts have been willing to restrict the exercise of free speech.<sup>214</sup> This term refers to any communication that, intentionally or not, conveys information that makes it easier or safer for some listeners or readers to commit unlawful acts or to get away with committing them.<sup>215</sup> The Supreme Court has yet to explicitly determine when such speech is constitutionally protected,<sup>216</sup> and lower courts have not set forth any discernible rule in their unpredictable decisions.<sup>217</sup>

Crime-facilitating speech is often a form of “dual-use” material that can be used both in harmful ways and in legitimate ones.<sup>218</sup> Thus, when attempting to generate a rule to regulate such speech, it is important that only the harmful uses are proscribed.<sup>219</sup> Noting that “[m]uch crime-facilitating speech can educate readers, or give them practical information that they can use lawfully[,]” Professor

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information compiled from the undercover investigations in HLS laboratories and a listing of HLS clients). While much of this information was also contained on the SHAC USA website, the primary distinction is that these websites do not post anonymous communiqués of illegal direct action and less, if any, personal information of company officials.

<sup>214</sup> Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005); see, e.g., *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997) (holding that a book of instructions on how to become a professional killer was not entitled to First Amendment protection); *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982) (the publication and wide distribution of instructions on how to make illegal drugs is not entitled to protection of the First Amendment).

<sup>215</sup> Volokh, *supra* note 214, at 1103.

<sup>216</sup> *Stewart v. McCoy*, 537 U.S. 993, 995 (2002) (Stevens, J., respecting the denial of certiorari) (“Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech.”).

<sup>217</sup> Compare *United States v. Raymond*, 228 F.3d 804 (8th Cir. 2000) (a permanent injunction prohibiting the sale of a program that provided instructions for avoiding federal income taxation did not violate promoters’ First Amendment right to free speech), with *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002) (advising street gang members with a “blueprint on how a successful gang should be run” is protected by the First Amendment), *cert. denied Stewart v. McCoy*, 537 U.S. 993 (2002).

<sup>218</sup> Volokh, *supra* note 214, at 1126–27.

<sup>219</sup> *Id.* at 1127.

Eugene Volokh, Professor of Law at UCLA Law School and the author of *The First Amendment and Related Statutes*,<sup>220</sup> has set forth a balancing test, advocating that there should be an exception to First Amendment protections where at least one of the following three circumstances is present:

1. When the speech is said to a few people who the speaker knows are likely to use it to commit a crime or to escape punishment (classic aiding and abetting, criminal facilitation, or obstruction of justice): This speech, unlike speech that’s broadly published, is unlikely to have noncriminal value to its listeners. It’s thus harmful, [and] it lacks First Amendment value. . . .
2. When the speech, even though broadly published, has virtually no noncriminal uses . . . . This speech is likewise harmful and lacks First Amendment value. . . .
3. When the speech facilitates extraordinarily serious harms, such as nuclear or biological attacks: This speech is so harmful that it ought to be restricted even though it may have First Amendment value.<sup>221</sup>

These narrow exceptions balance the significant values of protecting the right of free speech and prohibiting “speech that substantially facilitates crime.”<sup>222</sup>

*B. Free Speech, the Internet, and the SHAC 7*

The normal method of deterring unlawful conduct is to punish the person engaging in it. It would be remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.<sup>223</sup>

- Hon. John Paul Stevens

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<sup>220</sup> EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* (2005).

<sup>221</sup> Volokh, *supra* note 214, at 1217.

<sup>222</sup> *Id.* at 1111, 1217.

<sup>223</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 529–30 (2001).

A law is “unconstitutionally broad [if] it authorizes the punishment of constitutionally protected conduct.”<sup>224</sup> Accordingly, the most problematic aspect of the SHAC 7 convictions concerns the defendants’ rights to freedom of speech and association.<sup>225</sup> It is difficult, if not impossible, to reconcile the convictions of the SHAC 7 with the protections of the First Amendment. United States Attorney Christopher Christie stated in an interview that the defendants were “exhorting and encouraging” actions not protected by free speech guarantees.<sup>226</sup> However, upon application of the First Amendment jurisprudence standards set forth above to the content of the SHAC USA website, the defendants do not appear to have engaged in any conduct that falls outside the purview of First Amendment protections.

### 1. True Threat

The information posted on the SHAC USA website did not constitute a “true threat,” as it did not “communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>227</sup> At trial, an HLS employee who visited the SHAC USA website as part of his employment with the company recited postings from the site reporting on nation-wide protests and illegal actions by unknown individuals against HLS and its affiliates.<sup>228</sup> Significantly, the pages that reported these events also contained a disclaimer, stating that the group did not direct, control or participate in the protests.<sup>229</sup>

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<sup>224</sup> Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

<sup>225</sup> Best & Kahn, *supra* note 93, at 19.

<sup>226</sup> Michael Taylor & Jim Herron Zamora, *Stalking Charges Against Animal Rights Activists*, S.F. CHRON., May 27, 2004, at A5.

<sup>227</sup> Virginia v. Black, 538 U.S. 343, 359 (2003).

<sup>228</sup> Brief of Defendant-Appellant at 17, United States v. Kevin Kjonaas, No. 06-4339 (3d Cir. filed Oct. 22, 2006) [hereinafter Kjonaas Brief].

<sup>229</sup> *Id.*; United States v. Carmichael, 326 F.Supp.2d 1267, 1281 (M.D. Ala. 2004) (in holding that the First Amendment rights of the defendant precluded the court from ordering him to take down a website containing the pictures and personal information of government agents and informants, the court noted that a disclaimer of intent is evidence that the website would not reasonably be threatening to those individuals).

The same employee testified that he viewed the posting of “Top 20 Terror Tactics.”<sup>230</sup> However, this document was not written by anyone affiliated with SHAC USA; rather, it was re-posted from the website of an organization that compiled the list to garner support against the SHAC campaign.<sup>231</sup> In fact, the heading of that page clearly stated that the list was taken from another source, and it contained a disclaimer “making it clear that SHAC did not organize or take part in any criminal activity.”<sup>232</sup> Neither these postings nor the remainder of the information contained on the website communicated a subjective intent to commit violent acts against anyone affiliated with HLS.<sup>233</sup>

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<sup>230</sup> Kjonaas Brief, *supra* note 228, at 16. To view SHAC USA’s posting of these nineteen tactics, visit: <http://web.archive.org/web/20010502223703/http://www.shacusa.net/news/3-6-01.html>. The government contended that this document implicitly encouraged the invading of offices, vandalizing property and stealing documents; physical assault, including spraying cleaning fluid into someone’s eyes; smashing windows of a target’s home or flooding the home while the individual was away; vandalizing or firebombing cars and bomb hoaxes; and threatening telephone calls or letters, including threats to kill or injure someone’s partner or children. Press Release, United States Attorney’s Office–District of New Jersey, Three Militant Animal Rights Activists Sentenced to Between Four and Six Years in Prison 4 (Sept. 12, 2006), <http://www.usdoj.gov/usao/nj/press/files/pdffiles/shac0912rel.pdf>.

<sup>231</sup> Josh Harper, *Seven HLS Campaign Volunteers Arrested by FBI, Charged with Terrorism*, 24 NO COMPROMISE, <http://nocompromise.org/issues/24shac7.html>. The list of tactics was originally written by the Research Defence Society, “a British lobby group reportedly funded by the pharmaceutical industry and universities. Its main focus is to disseminate information about, and to defend the use of, animal testing in medicine.” Research Defence Society, [http://en.wikipedia.org/wiki/Research\\_Defence\\_Society](http://en.wikipedia.org/wiki/Research_Defence_Society) (last visited Nov. 29, 2007).

<sup>232</sup> Kjonaas Brief, *supra* note 228, at 16–17. The top of the list read: “From the Research Defense Society of the U.K.” *Id.*

<sup>233</sup> The SHAC USA website acted only as an information clearinghouse, and the defendants themselves never indicated that they were going to take part in any actions. In fact, the organization “never advocated for anyone to be hurt” and the bottom of every webpage contained “a disclaimer that said that [they] do not advocate any form of violent activity, and in fact, [they] urge people that when they write letters or they send emails, that they’re polite, they’re to the point, they’re not threatening in nature.” Democracy Now! Interview, *supra* note 101.

Furthermore, the actions of the defendants cannot be considered intimidation “in the constitutionally proscribable sense of the word,” as there is no indication that the defendants directed a threat to any individual with the intent of placing them in fear of bodily harm or death.<sup>234</sup> As the SHAC 7 defendant(s) argued, at most, the evidence showed only that

animal rights activists intended to make the lives of these individuals miserable by relentlessly demonstrating in front of their homes, causing them embarrassment and emotional distress and great inconvenience, with the knowledge that this disruption of their lives would continue so long as their associations with HLS continued.<sup>235</sup>

However, “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”<sup>236</sup>

## 2. Incitement

Likewise, the maintenance of the SHAC USA website was not directed or likely to incite or produce imminent lawless action.<sup>237</sup> A claim that certain statements are not protected by the Constitution because they incite unlawful action “would be increasingly difficult if made against communications via the Web . . . [as] the indirect communicative nature of the Internet provides a strong buffer between a speaker and a threatened target.”<sup>238</sup> Nonetheless, the

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<sup>234</sup> *Id.* at 360; *cf.* *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2000) (concluding that a known anti-abortion activist’s actions were a true threat where he parked two Ryder trucks at an abortion clinic, knowing that the clinicians were aware that a similar one had been used in the Oklahoma City bombing and would fear for their lives); *Planned Parenthood of the Columbia/Williamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (concluding that in creating “Guilty” posters and a website where the personal information of abortion providers was disclosed, the actions of an anti-abortion organization constituted true “threats of force” because they intentionally replicated a pattern that preceded the past murders of three providers).

<sup>235</sup> Kjonaas Brief, *supra* note 228, at 99–100.

<sup>236</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982).

<sup>237</sup> *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

<sup>238</sup> Schlosberg, *supra* note 211, at 78–79. “[I]n *Planned Parenthood*,

case against the SHAC 7 was based primarily on the theory that the maintenance of the SHAC USA website “encouraged and incited SHAC members and followers to direct their intimidation, harassment and violence against HLS and its targeted employees, as well as secondary targets . . . in an often successful attempt to get those companies to end their business relationships with HLS.”<sup>239</sup>

The evidence presented by the government at trial consisted of the testimony of employees and former employees of HLS and its affiliates detailing instances of harassment, vandalism and property damage.<sup>240</sup> The government also presented evidence obtained from the investigation of the defendants conducted by the FBI and other law enforcement officers.<sup>241</sup> However, this evidence failed to demonstrate either that any of the defendants participated in or directed others to participate in criminal activity,<sup>242</sup> or that the criminal activity that occurred was an imminent result of the defendants’ conduct.<sup>243</sup> In fact, vandalism and property damage at homes and offices sometimes “occurred within days or weeks of SHAC USA’s postings . . . but on other occasions the Government’s evidence demonstrated no link at all between postings and the actions of anonymous third parties, either because

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Judge Kozinski in dissent noted that there was so little chance of proving that the posters and website in that case met the imminency requirement in *Brandenburg* that the plaintiffs did not even raise the argument.” *United States v. Carmichael*, 326 F.Supp.2d 1267, 1287 (M.D. Ala. 2004) (citing *Planned Parenthood*, 290 F.3d at 1092 n.5 (Kozinski, J., dissenting)).

<sup>239</sup> U.S. Attorney’s Press Release, *supra* note 107.

<sup>240</sup> Kjonaas Brief, *supra* note 228, at 10. For example, the Chairman of the holding company for HLS testified that he received offensive phone calls and mail, pictures of him labeled “puppy killer” were posted at his daughter’s apartment building, his California home was vandalized, and there were protests outside of his New York apartment. *Id.* at 20. He further testified that he did not know who was responsible for these actions, some of which were lawful protest activity. *Id.*

<sup>241</sup> Brief of Defendant-Appellant at 5–6, *United States v. Andrew Stepanian*, No. 06-4296 (3d Cir. filed Sept. 29, 2006) (this evidence included “surveillance of speaking events, protests, demonstrations, marches, electronic surveillance of the website as well as phone conversations”).

<sup>242</sup> Kjonaas Brief, *supra* note 228, at 12.

<sup>243</sup> *Id.* at 15.

the activity occurred before the postings, or months later.”<sup>244</sup> The link between the speech and the conduct was further weakened because the SHAC USA website was often not the exclusive source of the information it contained.<sup>245</sup> Thus, the government failed to show the requisite temporal nexus for the proscription of speech under this exception to the First Amendment’s protections.<sup>246</sup> At worst, the website amounted to nothing more than advocacy of illegal action at some indefinite future time, which the Supreme Court has held to be protected speech.<sup>247</sup>

### 3. *Crime-Facilitating Speech*

Finally, there is no overarching policy rationale for proscribing the SHAC 7’s conduct as impermissible crime-facilitating speech.<sup>248</sup> In fact, as a preliminary matter, it is unclear whether the maintenance of the SHAC USA website facilitated the *commission* of any crime as is required to fall within the possible exception to First Amendment protected speech.<sup>249</sup> While the website posted reports of what had occurred on prior occasions and provided the location for possible targets of protest, it did not provide specific instructions making it easier for its visitors to commit unlawful acts

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 13 (“Even the Government’s witness admitted . . . that there were other animal activist websites which publicized protest information.”). In fact, prosecutors called an activist to the stand who had participated in electronic civil disobedience (“ECD”) against an affiliate of HLS. SHAC7.com, The Case, *supra* note 96; see Wikipedia, Electronic Civil Disobedience, [http://en.wikipedia.org/wiki/Electronic\\_civil\\_disobedience](http://en.wikipedia.org/wiki/Electronic_civil_disobedience) (last visited Nov. 25, 2007) (ECD refers to a form of protest in which the participants use computer technology to carry out their actions, such as flooding a computer server with external communications requests, rendering it unable to respond to legitimate traffic). The activist testified that SHAC USA had not at all encouraged him to take these actions, and that he read about these tactics of common knowledge on a number of websites. SHAC7.com, The Case, *supra* note 96.

<sup>246</sup> See Vitiello, *supra* note 194 and accompanying text.

<sup>247</sup> *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam).

<sup>248</sup> See generally Volokh, *supra* note 214 (setting forth a test for crime-facilitating speech).

<sup>249</sup> *Id.* at 1096.

or get away with committing them.<sup>250</sup>

However, even assuming that such information can be said to constitute crime-facilitating speech, the information contained on the SHAC USA website does not fall within the any of the three proscribable circumstances posited by Professor Volokh.<sup>251</sup> First, the website was not available only to a few people which the defendants knew were likely to use the information to commit unlawful acts.<sup>252</sup> The very nature of the Internet is such that its content is available to billions of individuals, accessible at any given moment. Second, the information posted was relevant for noncriminal use.<sup>253</sup> In fact, the personal information posted about individuals who are affiliated with HLS was used for lawful purposes in this case.<sup>254</sup> Lastly, it is evident that the information provided could not facilitate extraordinarily serious harms, such as nuclear or biological attacks.<sup>255</sup> Thus, due to the First Amendment value of the information contained on the SHAC USA website and its inability to result in serious harm, the conduct of the SHAC 7 was likely insufficient to constitute proscribable crime-facilitating speech.

In sum, the maintenance of the SHAC USA website did not fall within any of the exceptions necessary to proscribe the fundamental freedom of speech: the information it contained did not communicate the requisite intent to constitute a true threat; it was not directed or likely to incite or produce imminent lawless action; and it could not be proscribed as crime-facilitating speech. Accordingly, the convictions of the SHAC 7 for conspiracy to violate the AEPA were not in accordance with the First Amendment.

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<sup>250</sup> See *id.* at 1103.

<sup>251</sup> *Id.* at 1217.

<sup>252</sup> See *id.*

<sup>253</sup> See *id.*

<sup>254</sup> Although the witnesses at trial testified that they were “upset,” “scared,” felt “threatened,” or were “concerned” about the demonstrations that occurred outside their homes, Kjonaas Brief, *supra* note 228, at 23–26, a large portion of the protests complied with the law and adhered to any injunctions that were in place at the time. *Id.*

<sup>255</sup> See Volokh, *supra* note 214, at 1217.

*C. A “Chilling” Effect on the Right to Free Speech*

“[A] statute which . . . forbids . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”<sup>256</sup> Michael Ratner, a human rights lawyer and vice-president of the Center for Constitutional Rights, noted that the AETA and its precursors are unique forms of legislation, the vagueness of which “sweep within them basically every environmental and animal-rights organization in the country.”<sup>257</sup> Even under the USA Patriot Act,<sup>258</sup> which has come under attack by virtually all concerned with the preservation of civil liberties,<sup>259</sup> the definition of domestic terrorism requires that an offense include “acts dangerous to human life,”<sup>260</sup> a defining element entirely absent from “eco-terrorism” legislation.

The problematic vagueness of the AEPA became apparent in the aftermath of the SHAC 7 convictions. “[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . .”<sup>261</sup> This Note argues that the AEPA lacked this requisite clarity. The Act provided that whoever, for the purpose of causing physical disruption to an animal enterprise, intentionally damaged or caused the loss of any property used by that enterprise or conspired to do so, was in

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<sup>256</sup> *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

<sup>257</sup> Karen Charman, *Environmentalists = Terrorists*, TOMPAINE.COM, May 8, 2003, <http://www.tompaine.com/Archive/scontent/7748.html>.

<sup>258</sup> USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 376, § 802(4) (codified as amended at 18 U.S.C. § 2331(5) (2001)).

<sup>259</sup> See, e.g., Kevin Bohn, *ACLU Files Lawsuit Against Patriot Act*, CNN, July 30, 2003, <http://www.cnn.com/2003/LAW/07/30/patriot.act/index.html>; Press Release, Center for Constitutional Rights, CCR Wins Great Victory: Key Provision of the Patriot Act Ruled Unconstitutional (Jan. 27, 2004), available at <http://ccrjustice.org/newsroom/press-releases/ccr-wins-great-victory%3A-key-provision-patriot-act-ruled-unconstitutional>.

<sup>260</sup> USA PATRIOT Act of 2001, § 802(a)(4).

<sup>261</sup> *Connally*, 269 U.S. at 391; accord *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997).

violation of the statute.<sup>262</sup> This language indicates that only physical disruption of an animal enterprise itself, and not economic disruption caused by the targeting of affiliated individuals and businesses, was prohibited by the statute. Nevertheless, the SHAC 7 defendants were convicted of animal enterprise terrorism for allegedly conspiring with other activists to target the employees and affiliates of HLS.<sup>263</sup>

Neither the exercise of the speech at issue, nor the conduct that allegedly resulted from the speech, was explicitly proscribed by the statute.<sup>264</sup> In fact, a chief concern of those discontented with the AEPA’s protections, and one of the primary bases for the support of its amendment, was that it did not address secondary or tertiary targeting by activists.<sup>265</sup> Accordingly, the AETA expanded the scope of the Act to explicitly include such conduct. Because Congress felt it was necessary to amend the Act in such a manner, it may be inferred that such conduct was not previously intended to be proscribed.<sup>266</sup> However, even if the Act had been intended to address these issues, these lobbying efforts demonstrate that “men of common intelligence” necessarily guessed at its meaning and differed as to its application, thereby resulting in a violation of due process as applied.<sup>267</sup>

The conscious and intentional inclusion of disclaimers throughout the SHAC USA website clearly illustrate that the SHAC 7 defendants outwardly engaged in conduct which they believed to be legal.<sup>268</sup> Consequently, these convictions have caused uncertainty in the minds of animal advocates, some of whom will

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<sup>262</sup> Animal Enterprise Protection Act, 18 U.S.C.A. § 43(a)(2) (West 2008) (as amended in 2002).

<sup>263</sup> See U.S. Attorney’s Press Release, *supra* note 107.

<sup>264</sup> See Animal Enterprise Protection Act of 1992, 18 U.S.C.A. § 43 (West 2008) (amended 1996, 2002 & 2006).

<sup>265</sup> See 2004 Hearing, *supra* note 53 (testimony of William Green, Senior V.P. and General Counsel, Chiron Corporation).

<sup>266</sup> See *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989) (“Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning.”).

<sup>267</sup> *Connally*, 269 U.S. at 391.

<sup>268</sup> See Democracy Now! Interview, *supra* note 101.

inevitably be deterred from engaging in legal activism out of fear that they may end up in federal prison.<sup>269</sup> As a result, even if animal enterprise terrorism legislation is not actively used for prosecution, “the very risk of being charged as a terrorist will almost certainly have a chilling effect on legitimate activism.”<sup>270</sup>

With the introduction of the AETA, Congress was given the opportunity to clarify the scope of animal enterprise terrorism legislation. However, although the passage of the AETA resolved the incongruity with respect to secondary targeting, it has created additional issues that are unlikely to be resolved at least until its first application. First, while the AEPA required that an individual have the purpose of causing *physical disruption* to an animal enterprise, the AETA creates a violation for those who act “for the purpose of *damaging* or *interfering* with the operations of an animal enterprise.”<sup>271</sup> The use of such vague language widens the scope of the Act greatly, potentially encompassing purely economic damage, civil disobedience and other forms of activism that are generally accepted.<sup>272</sup> The penalties provision of the legislation further supports such an expansive interpretation, as it provides a punishment for an offense that *does not* instill in another the reasonable fear of serious bodily injury or death, results in *no bodily injury*, and results in *no economic damage*.<sup>273</sup>

Significantly, the AETA also extends the crime of animal enterprise terrorism to situations in which an individual “intentionally places a person in reasonable fear of death or serious bodily injury” for the purpose of “damaging or interfering with the operations of an animal enterprise.”<sup>274</sup> Though it is uncontroversial

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<sup>269</sup> See, e.g., Humane Society, *supra* note 127.

<sup>270</sup> *Id.*

<sup>271</sup> 18 U.S.C. § 43(a)(1) (2007) (emphasis added).

<sup>272</sup> See ACLU Letter to House, *supra* note 132.

<sup>273</sup> 18 U.S.C. § 43(b)(1) (2007) (emphasis added). “One explanation for this sentencing provision is that it could be intended to target acts of ‘conspiracy.’” Will Potter, Analysis of Animal Enterprise Terrorism Act, <http://www.greenisthenewred.com/blog/wp-content/Images/aeta-analysis-109th.pdf> (July 2007). However, it may also be used to provide a fine and imprisonment up to one year for legitimate activity that results in lost profits.

<sup>274</sup> 18 U.S.C. § 43(a) (2007).

that individuals should not be threatened with such harm, there may be a potential and significant problem with the intent requirement if not interpreted narrowly by the judiciary. Those who have supported the passage of the AETA have begun a “scare-mongering campaign” to create a fear of “eco-terrorists” in the public.<sup>275</sup> Such efforts, coupled with the fact that activists have been named “the number one domestic terrorism threat” by the members of the federal government,<sup>276</sup> creates a “climate of fear” where the objectively reasonable individual may begin to fear nonviolent activists.<sup>277</sup>

By interpreting the law to require specific intent to place a person in fear of death or serious bodily injury, courts may shield innocent and lawful behavior from criminal sanction.<sup>278</sup> However, if the statutory requirement is construed to be one of general intent—whether the individual intended to engage in acts of vandalism, property damage, criminal trespass, or intimidation or conspired to do so—the statute may impermissibly infringe upon constitutionally protected freedoms or, at best, undesirably sanction methods of civil disobedience regularly employed in social justice movements as terrorism.<sup>279</sup>

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<sup>275</sup> See Potter, *supra* note 273. For example, the children’s film *Hoot*, based on the prize-winning novel by Carl Hiaasen, has been labeled “soft-core eco-terrorism,” as it tells the story of young teenagers who break the law to sabotage a construction site and protect the habitat of burrowing owls. Marc Morano, *New Movie Called ‘Soft Core Eco-terrorism’ for Kids*, CNSNEWS, May 1, 2006, <http://www.cnsnews.com/ViewSpecialReports.asp?Page=/SpecialReports/archive/200605/SPE20060501a.html>. Further, after the New York Stock Exchange announced it would not list the public offering of HLS, an anonymous full-page ad was run in the New York Times depicting a man in a black ski mask with the headline “I Control Wall Street” and noting that “NYSE employees were reportedly threatened by animal rights activists,” a claim that remains entirely unsubstantiated. NYSE Hostage, <http://nysehostage.com/ads.asp> (last visited Nov. 25, 2007).

<sup>276</sup> See discussion *supra* text accompanying notes 54–67.

<sup>277</sup> Potter, *supra* note 273 (“Through scare-mongering, the unreasonable becomes reasonable.”).

<sup>278</sup> See generally, Brief for Center for Constitutional Rights, et al. as Amici Curiae Supporting Appellants at 21-6, *United States v. Stop Huntingdon Animal Cruelty, Inc.*, No. 06-4211 (3rd Cir. Oct. 29, 2007).

<sup>279</sup> *Id.*

Finally, the illusory exemptions contained in the AETA are unsuccessful in alleviating these concerns regarding the scope of the legislation. The drafters included a section entitled “Rules of Construction,” stating:

Nothing in this section shall 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.<sup>280</sup>

However, these provisions do not serve the same purpose as the amendments recommended by the ACLU in its letter to the House Judiciary Committee to make the bill less likely to chill or threaten free speech.<sup>281</sup> In fact, these provisions state nothing more than the elementary proposition that a statute may not override a Constitutional right.<sup>282</sup> Despite the drafter’s alleged precautionary measures, the AETA should not survive a constitutional challenge.<sup>283</sup>

It is unlikely that the AETA will stop the underground, illegal direct action that it was allegedly designed to prevent.<sup>284</sup> Property

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<sup>280</sup> 18 U.S.C.A. § 43(e) (2007).

<sup>281</sup> ACLU Letter to House, *supra* note 132.

<sup>282</sup> See Potter, *supra* note 273.

<sup>283</sup> See *id.*

<sup>284</sup> See Steven Mitchell, *Analysis: Bill targets animal activists*, UNITED PRESS INTERNATIONAL, Nov. 14, 2006, [http://www.upi.com/Health\\_Business/Analysis/2006/11/14/analysis\\_bill\\_targets\\_animal\\_activists/5048/](http://www.upi.com/Health_Business/Analysis/2006/11/14/analysis_bill_targets_animal_activists/5048/) (Dr. Jerry Vlasak, a trauma surgeon and spokesman for the North American Animal Liberation Press Office, noted that “[a]s far as the underground [animal] liberation movement, [the AETA] won’t have any impact at all because . . . [t]heir activities—sabotaging, liberating animals—are already illegal so just adding one more law won’t make much difference.”).

damage, vandalism, harassment, intimidation, and any other acts that aggressive animal rights activists may commit in furtherance of their goals that are not entitled to protection under the First Amendment were plainly unlawful even prior to this ideology-specific legislation.<sup>285</sup> The presence of penalties for these actions has never been a deterrent in the past,<sup>286</sup> and their increase is not likely to significantly influence a decision to engage in illegal direct action.<sup>287</sup>

Despite activists’ resilience in the past, these further sanctions are likely to deter aboveground activists who attend protests and publicly voice their dissent, resulting in one of two possible undesirable outcomes. First, these individuals may fear expressing their opinions and their desire for change, thereby inhibiting the crucial “uninhibited marketplace of ideas” rationale behind the First Amendment.<sup>288</sup> In contrast, other individuals may be persuaded to resort to clandestine activities and simply hope that they will not be caught.<sup>289</sup> An examination of ALF activities and those of the

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<sup>285</sup> *See id.*

<sup>286</sup> Addressing the court at his sentencing on November 8th, 2005, Peter Young stated:

I am not without my regrets. I am here today to be sentenced for my participation in releasing mink from 6 fur farms. I regret it was only 6. I’m also here today to be sentenced for my participation in the freeing of 8,000 mink from those farms. I regret it was only 8,000. It is my understanding of those 6 farms, only 2 of them have since shut down. I regret it was only 2. More than anything, I regret my restraint, because whatever damage we did to those businesses, if those farms were left standing, and if one animal was left behind, then it wasn’t enough.

SupportPeter.com, Statements, <http://supportpeter.com/statements.htm> (last visited Nov. 25, 2007).

<sup>287</sup> *See Mitchell, supra* note 284.

<sup>288</sup> *Red Lion Broadcasting Co. v. Fed. Comm’n Comm’n*, 395 U.S. 367, 390 (1969). Further fostering a fear of expressing dissent by strictly legal means, industry groups have accused even the most benign animal protection organizations, such as the Humane Society of the United States, of “consorting with terrorists.” *See Potter, supra* note 12.

<sup>289</sup> Mitchell, *supra* note 284 (Camille Hankins of activist organization Win Animal Rights noted that by shepherding this legislation, the industry “could’ve taken a step that will create their worst nightmare,” because the increase in penalties may drive more people “underground because there will be

SHAC 7 reveals that it is perhaps a greater risk to post information on a website than to put on all black attire and a balaclava, travel to a fur farm or animal testing facility, and proceed to destroy thousands of dollars worth of equipment and release animals from captivity. The freedom to communicate one's ideas without fear of prosecution is essential to diminish the belief that illegal direct action is the most effective means to prevent the death of nonhuman animals.

#### CONCLUSION

The convictions of the SHAC 7 should not be perceived as merely affecting the contemporary animal rights movement because the legal implications that arise from branding activists as "terrorists" concern all individuals who advocate political and social change.<sup>290</sup> The SHAC campaign, as well as other animal rights organizations that engage in direct action, have developed effective strategies and methodological approaches to activism that are highly significant for all matters of social justice, advocacy and political struggle.<sup>291</sup>

When Congress creates legislation to proscribe the actions of advocates for one side of a debate, it must cautiously avoid silencing the discussion and dissent so fundamental to the significance of the First Amendment.<sup>292</sup> The AEPA, as first passed in 1992, appears to have been drafted to effectively balance the competing interests of activists and the federal government.<sup>293</sup> The text of the legislation protected animal rights advocacy by proscribing a relatively narrow range of activities, while also recognizing the governmental interest of protecting corporate interests from theft, vandalism and physical disruption.<sup>294</sup> However, application of and amendments to this legislation have

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little incentive to remain 'above ground' with one's identity revealed.").

<sup>290</sup> Best & Kahn, *supra* note 93 at 3, 4.

<sup>291</sup> *Id.* at 3.

<sup>292</sup> ACLU Letter to House, *supra* note 132, at 3.

<sup>293</sup> See Animal Enterprise Protection Act of 1992, 18 U.S.C.A. § 43 (West 2008) (amended 1996, 2002 & 2006).

<sup>294</sup> *Id.*

progressively tipped the scale in favor of corporate interests.<sup>295</sup> By appealing to the unrelenting lobbying efforts of industry groups, Congress has effectively disregarded the concern for protection of the legitimate activities of grassroots activists.<sup>296</sup> Accepting the industry’s unsupported claims that further measures were necessary to criminalize already illegal activities, Congress adopted the Animal Enterprise Terrorism Act, a statute that not only failed to address the problems inherent in the AEPA’s revisions, but expanded the protections of those profiting from animal exploitation in terms even more vague and overbroad.<sup>297</sup>

In light of the SHAC 7 convictions and the passage of the AETA, it is necessary for Congress to reexamine the purposes for which it serves. At the start of each new Congress, representatives must “solemnly swear that [they] will support and defend the Constitution of the United States.”<sup>298</sup> Accordingly, if it is encouraged that a proposed bill be passed to proscribe criminal conduct, Congress must make some concerted effort to verify that the bill would accomplish that end without infringing upon fundamental freedoms. In adopting legislation that impermissibly proscribes activities traditionally protected by the First Amendment, Congress abandons its duty to defend the Constitution.

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<sup>295</sup> See discussion *supra* text accompanying notes 89–151.

<sup>296</sup> See discussion *supra* text accompanying notes 165–289.

<sup>297</sup> See discussion *supra* text accompanying notes 256–89.

<sup>298</sup> U.S. Senate, Oath of Office, [http://www.senate.gov/artandhistory/history/common/briefing/Oath\\_Office.htm](http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm) (last visited Feb. 21, 2008).