

Green is the New Red:
A Comparison of the Government's Treatment of
Those Who Dare to Dissent

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Those who claim history does not repeat itself have probably claimed that before.

There have been some dark times in our nation's history. Times when a government meant to protect the people scared them instead. Times when a government founded on the free exchange of ideas silenced dissent. Times when a government for the people and by the people, monitored its people. Those times are here again.

Citizens were targeted because of their ideals during two eras of this nation's history: the First Red Scare, and the Second, Great American Red Scare. In both eras, intolerance for ideas challenging the status quo pervaded the country. During both eras, "Communist" was a label to be avoided, and any ideas perceived to be "un-American" were subverted.

During the First Red Scare three laws were passed, most notably the Espionage Act, to punish treasonous activities.¹ They were applied in a much broader sense, and were used to quiet so-called radicals.²

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¹ ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920 13-14 (1955).

² *Id.*

During the Great American Red Scare, laws and public hearings were combined to create an atmosphere of intolerance.³

Today, history is repeating itself. The fear of “terrorism” in a post 9/11 world bears a striking resemblance to the anti-communist sentiments during fearful and intolerant post-war eras in this nation’s history. Just as the assumption that the country was under attack by Communists was popular during these post-war eras, the assumption that terrorists are targeting us today is just as prevalent. However, the “communist” label, and fear of what that meant, was used to subvert any and all who would dissent. Today the “terrorist” label is being used in much the same way in the name of economic interests.

Today, there is a fear of being labeled a “terrorist” within the animal rights movement.⁴ Because the term “eco-terrorism” is used to encompass most acts of environmental or animal rights activism, the fear is well placed.⁵ The FBI 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.”⁶ Through legislation, the government has singled out property crimes.⁷ Because action on behalf of animals

³ ALBERT FRIED, MCCARTHYISM: THE GREAT AMERICAN RED SCARE, A DOCUMENTARY HISTORY 15-18 (1997).

⁴ Dane E. Johnson, *Cages, Clinics, and Consequences: The Chilling Problems of Controlling Special-Interest Extremism*, 86 OR. L. REV. 249, 249 (2007).

⁵ Jared S. Goodman, *Shielding Corporate Interests From Public Dissent: An Examination of the Undesirability and Unconstitutionality of "Eco-Terrorism" Legislation*, 16 J.L. & POL'Y 823, 833 (2008).

⁶ *Id.*

⁷ *Id.*

or the environment is adverse to corporate interests, it therefore threatens the status quo.⁸ To respond to this threat, corporate interests have lobbied to have animal and environmental activists labeled as terrorists, marking them in much the same way as Communists were during the post-war era.⁹

The Animal Enterprise Terrorism Act (AETA) has codified the labeling of animal rights activists as terrorists.¹⁰ With sweeping language reminiscent of Red Scare legislation, the AETA has criminalized once lawful activities engaged in by animal and environmental advocates, such as protests and boycotts. Protected free speech activities on behalf of billions of animals used for food, clothing and research in this country have been chilled as a result of the possible “terrorist” label.¹¹

This note explores the parallels between the two Red Scares and today’s movement to label animal and environmental activists as eco-terrorists. The laws enacted during the Red Scares and those enacted today regarding eco-terrorism have striking similarities, as do their uses. The first section explores the history of the First Red Scare, the Second, Great American Red Scare and animal rights targeted legislation, including the Animal Enterprise Protection Act (AEPA) and Animal Enterprise Terrorism Act (AETA). The second section explores the similarities between trials conducted during the First Red Scare and the trial of the Stop Huntingdon Animal Cruelty 7 (SHAC 7) under the

⁸ *Id.* at 833–834.

⁹ *Id.* at 838.

¹⁰ 18 U.S.C. § 43 (2006).

¹¹ Goodman, *supra* note 5, at 846.

AEPA, as well as the parallels between the Great American Red Scare and the use of the AETA. The note concludes with recommended revisions for the AETA.

I. THE RED MENACE

A. THE FIRST RED SCARE, 1919–1921

The First Red Scare provides an example of what happens when a democratic nation supplants reason with fear.¹² It also demonstrates how easily excessive hate and intolerance can spread through the entire social system.¹³ It offers valuable lessons to today's country.¹⁴

During World War I, the government demanded absolute loyalty, and this demand permeated the entire social structure.¹⁵ Independent agencies such as the National Security League and the American Defense Society, along with the government-sponsored American Protective League, converted thousands of Americans into "super-patriots" by spreading propaganda on the dangers of wartime sabotage.¹⁶ The American Protective League worked with the Justice Department's Bureau of Investigation to ferret out internal enemies.¹⁷ These agencies were purported to be the "first line of defense against wartime subversive activity."¹⁸ By the end of the war, however, these agencies were more interested in increasing economic and political

¹² MURRAY, *supra* note 1, at ix.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 12.

¹⁷ Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 76 (2002).

¹⁸ MURRAY, *supra* note 1, at 12.

conservatism than in fostering healthy patriotism.¹⁹ The agencies often used patriotism to tarnish the reputation of people or groups whose opinions they either feared or hated.²⁰

Both state and federal governments passed legislation seeking to enforce loyal conduct during the war. Most of this legislation was still in effect in 1919, after the war had ended. The laws served as a reminder that animosity to nonconformity was still the norm. Three federal laws passed during this era played a significant role in the social atmosphere of the First Red Scare. These three laws were the Espionage Act of 1917, the Sedition Act of 1918, and a third law directed at suppressing the free thought and speech of aliens. The Espionage Act of 1917 primarily targeted treason. However, it was so poorly constructed and broadly interpreted that it covered activity that was not quite disloyal.²¹ The law made it a crime to

convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies . . . or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or . . . willfully obstruct recruiting or enlistment service.²²

Violation of the law was punishable by a \$10,000 fine and twenty years imprisonment.²³

The Espionage Act gave the post office broad new powers.²⁴ The post office could exclude “any material advocating or urging

¹⁹ *Id.*

²⁰ *Id.*

²¹ MURRAY, *supra* note 1, at 13.

²² *Id.* at 13–14.

²³ MURRAY, *supra* note 1, at 13.

treason, insurrection, or forcible resistance to any law of the United States.”²⁵ Albert S. Burleson, the Postmaster General at the time, used this new power to exclude any material critical of the war from the mail.²⁶ Socialist newspapers and publications became the main target.²⁷

The Sedition Act of 1918, amending the Espionage Act, dealt more directly with sedition, stating a person could not utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the uniform of the Army or Navy of the United States, or any language intended to . . . encourage resistance to the United States, or to promote the cause of its enemies.²⁸

Violation of the Sedition Act was also punishable by a fine of \$10,000 and twenty years in prison.²⁹

The third law passed during World War I was aimed at restricting the activities of nonconforming aliens thought to be a threat to the nation.³⁰ The law, passed in October of 1918,³¹ stated that all aliens who were anarchists or believed in the violent overthrow of the American government or advocated the assassination of public officials were henceforth to be excluded from admission into the United States . . . any alien who, at any

²⁴ CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA 9 (2007).

²⁵ *Id.*

²⁶ *Id.*; CHRISTOPHER CATHERWOOD & JOE DIVANNA, THE MERCHANTS OF FEAR: WHY THEY WANT US TO BE AFRAID 19 (2008).

²⁷ FINAN, *supra* note 24, at 10.

²⁸ MURRAY, *supra* note 1, at 14.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens [above mentioned] . . . shall upon warrant of the Secretary of Labor, be taken into custody and deported.³²

Deportation was the instrument of choice for disposing of undesirable aliens.³³ It was much quicker than criminal indictments, trials and appeals.³⁴ An accused alien was given a hearing in which the Secretary of Labor's decision was final if the alien was found deportable.³⁵ The alien's ties to America (i.e. American spouse and/or children) and length of residence in America made no difference in the deportation hearings.³⁶ This system of deportation was viewed as a veiled and unjust punishment for dissent by most civil libertarians.³⁷

Many prosecutions for violations of these laws during wartime appeared in courts after the war had ended³⁸ because returning soldiers pushed for the immediate punishment of such nonconformity.³⁹ These prosecutions and cries for punishment served as a reminder that there was still disloyalty in the nation's midst, feeding the apprehension of a fearful nation.⁴⁰

³² *Id.*

³³ TED MORGAN, *REDS: MCCARTHYISM IN TWENTIETH CENTURY AMERICA* 60 (2003).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 60-61.

³⁸ MURRAY, *supra* note 1, at 14.

³⁹ *Id.*

⁴⁰ *Id.*

The First Red Scare occurred in the midst of this intolerant social atmosphere.⁴¹ The Red Scare grew out of the Bolshevik Revolution of 1917⁴² and the Russian peace agreement with Germany in March of 1918.⁴³ As a result of this peace agreement with their enemy, the Allies, including the United States, falsely concluded that the Bolshevik movement was German controlled.⁴⁴ The Bolsheviks' disregard for tradition shocked the American public.⁴⁵ The separate peace agreement with Germany was considered a betrayal.⁴⁶ The nation watched with apprehension as the "Red Scourge" moved into Europe, and then seemingly into their neighborhoods.⁴⁷

The media fed this atmosphere of fear.⁴⁸ The press disseminated exaggerated information on the "Bolshevik reign in Russia."⁴⁹ On November 1, 1919, *The Saturday Evening Post* reported that the "'Russo-German movement' was trying to 'dominate America.'"⁵⁰ The *Los Angeles Times* reported that "Bolshevism is a right-here-now American menace and the sooner the American people wake up the quicker the problem will be solved."⁵¹ Even the clergy

⁴¹ *Id.* at 15.

⁴² *Id.* at 15; Murray & Wunsch, *supra* note 17, at 76; The Bolsheviks denied most of the principles that older governments had been founded upon, and attempted to advance the idea of "world-wide proletarian revolution." MURRAY, *supra* note 1, at 15.

⁴³ MURRAY, *supra* note 1, at 15.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ MURRAY, *supra* note 1, at 15.

⁴⁷ *Id.*

⁴⁸ *Id.* at 15-16.

⁴⁹ *Id.*

⁵⁰ MORGAN, *supra* note 33, at 63.

⁵¹ *Id.*

joined in the persecution.⁵² One such clergyman was quoted calling for deportation of Bolsheviks “in ships of stone with sails of lead, with the wrath of God for a breeze and with hell for their first port.”⁵³

The bad press and fear sparked two divergent reactions. Conservatives seized upon the bad press and fear to further a campaign of suppressing political and economic liberalism. American radicals who sympathized with the Russian revolution countered this campaign. Some radicals even advocated a similar revolution in the United States.⁵⁴

Two American Communist parties existed by 1919, the Socialist Party and the Industrial Workers of the World. These domestic Communists held meetings, distributed leaflets and literature, and even held parades. Some even published revolutionary manifestos and sent out calls for action. The open presence of these radicals in the United States fed into the atmosphere of fear in an intolerant post-war era. The assumption that the country was actually under attack from the Communists, known as the Reds, was widely accepted. Even protests centering on the economy after the war were attributed to the Reds.⁵⁵

The nation was overwhelmed with fear following the war. The public reached exaggerated and unjustified conclusions on the size and influence of the Bolshevik movement in the United States. The public was assailed daily with dire warnings from business organizations, scare propaganda from the patriotic agencies, and press coverage of the

⁵² *Id.* at 63-64.

⁵³ *Id.*

⁵⁴ MURRAY, *supra* note 1, at 16.

⁵⁵ *Id.* at 16, 19.

ideals of a small group of radicals. Hysteria ensued.⁵⁶ As one English journalist observed:

No one who was in the United States as I chanced to be, in the autumn of 1919, will forget the feverish condition of the public mind at the time. It was hag-ridden by the spectre of Bolshevism. It was like a sleeper in a nightmare, enveloped by a thousand phantoms of destruction. Property was in an agony of fear, and the horrid name 'Radical' covered the most innocent departure from conventional thought with a suspicion of desperate purpose. 'America,' as one wit of the time said, 'is the land of liberty—liberty to keep in step.'⁵⁷

B. THE GREAT AMERICAN RED SCARE: MCCARTHYISM

McCarthyism was born in February of 1950, when Senator Joseph R. McCarthy gave a speech to a small meeting of Republicans in West Virginia. The speech was unrecorded, and those in attendance gave conflicting reports of its content. According to the summary carried by newswires, McCarthy claimed the State Department contained exactly 205 Communists (meaning traitors). These reports, which normally received little attention at the time, made headlines.⁵⁸

McCarthy's accusations incensed the administration and Democrats. Instead of offering proof, McCarthy offered more accusations, this time with names. He began his campaign by destroying the reputations of specific individuals. Because denials did not get as much press as accusations, the charges stuck.⁵⁹

But the Great American Red Scare began years before McCarthy's appearance in the public eye. The far right was frustrated

⁵⁶ MURRAY, *supra* note 1, at 16.

⁵⁷ *Id.* at 16-17.

⁵⁸ FRIED, *supra* note 3, at 1.

⁵⁹ *Id.*

by America's friendship with the Soviet Union during World War II and lack of concern over Communism. As soon as World War II ended, the right began to test "anti-communist waters." Republicans denounced Roosevelt and Democrats for supporting Stalin and his conquests. The Republicans swept Congress in 1946, forcing President Truman to get "tough on Communism."⁶⁰

In 1947, the Truman Doctrine⁶¹ was announced only days before a "loyalty review" program, meant to ferret out federal employees who were Communists, went into effect. Loyalty review boards based on Truman's model sprang up all across the nation. Personal lives and political beliefs were scrutinized in the public as well as private sector. The Attorney General kept a list of organizations he deemed subversive. Anyone, who at any time in their lives had belonged to any of the organizations on the list, or knew or was related to anyone belonging to any of them, was subjected to scrutiny by loyalty review boards. Legislative and administrative committees held "inquisitorial hearings" that were highly publicized, with the intent to defame and humiliate the object of their fervor.⁶²

Irony would have its day with Truman, however. Between 1949 and 1950, international events, combined with bombshells at home, turned the tide against Truman and the Democrats. Such international

⁶⁰ FRIED, *supra* note 3, at 4.

⁶¹ Truman provided economic and military support to Greek and Turkish governments. Truman presented this bold move to the public in ideological terms. He presented the move as necessary to defend against totalitarianism whose aim was the enslavement of mankind. This came on the heels of Hitler and World War II. FRIED, *supra* note 3, at 4.

⁶² *Id.* at 4.

events included: the Soviet Union detonating an atomic bomb, which meant the United States had lost its monopoly on that technology; the United States-backed Chinese government falling to Mao Zedong's Communist armies; and American soldiers beginning to fight in South Korea against Communist North Korea. Amidst these defeats abroad, Alger Hiss, a State Department official, went to jail on the home-front. A confessed Communist spy alleged, and proved to a jury, that Hiss had turned over secret State Department documents. McCarthy burst onto the scene amidst these events.⁶³

"Twenty years of treason" was McCarthy's slogan. The Truman administration was now enveloped by the Red Scare it had helped create. The Truman administration, liberal Democrats, and Cold War liberals were the targets of McCarthy's accusations. Liberals were removed from office and victimized by the Red Scare.⁶⁴

J. Edgar Hoover and the FBI he directed played an enthusiastic role in the Red Scare. Hoover gave public warnings against any group that questioned the status quo, and routinely fed slanderous information to newspapers, columnists, and "grand inquisitors", including McCarthy. Hoover's FBI committed flagrant illegalities.⁶⁵

One significant law and two important actions took place during the Great American Red Scare: The Smith Act, the House Un-American Activities Committee Hearings, and the FBI wire-tapping program.

⁶³ *Id.* at 4.

⁶⁴ *Id.* at 5.

⁶⁵ FRIED, *supra* note 3, at 6.

The Alien Registration Act, enacted in June of 1940,⁶⁶ came to be known by the name of its author, Virginia Representative Howard Smith.⁶⁷ The Smith Act gave the federal government sweeping, undefined authority to target groups it decided were subversive.⁶⁸ For example, in 1941, the Smith Act was used to jail eighteen Trotskyists⁶⁹ simply because they were Trotskyists.⁷⁰ The Smith Act went into full effect during McCarthyism, used to persecute liberals and Socialists.⁷¹ The Smith Act, which is still on the books today, criminalized:

[1] Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or [2] Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or [3] Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or

⁶⁶ *Id.* at 15.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Trotskyism is a form of Communism advocated by Leon Trotsky, "based on an immediate, worldwide revolution by the proletariat." Dictionary.com, <http://dictionary.reference.com/browse/Trotskyism> (last visited Feb. 17, 2009).

⁷⁰ FRIED, *supra* note 3, at 15.

⁷¹ *Id.*

destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof.⁷²

In 1938, the House of Representatives created a “Special Committee on Un-American Activities” (HUAC).⁷³ Its job was to expose Communists in the government, trade unions, Hollywood and anywhere else they may hide.⁷⁴ HUAC fell into disuse during World War II, but was brought back to life in 1945.⁷⁵ It was sponsored by John E. Rankin, a notorious racist and anti-Semite.⁷⁶ HUAC was authorized to investigate:

(1) the extent, character and objects of un-American propaganda activities in the United States (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of domestic origin and attacks the principles of the form of government as guaranteed by the Constitution.⁷⁷

The powers given to the Committee were extremely broad.

Finally, the FBI, with Hoover at the helm, began conducting wiretaps on anyone it considered subversive.⁷⁸ President Roosevelt had authorized the FBI to conduct wiretaps as long as they were for “reasons of national defense” and approved by the Attorney General.⁷⁹ In 1946, Hoover requested that approval from Attorney General Tom Clark.⁸⁰ However, in his request, Hoover omitted any mention of

⁷² 18 U.S.C. § 2385 (1948).

⁷³ FRIED, *supra* note 3, at 16.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 19.

⁷⁹ FRIED, *supra* note 3, at 19.

⁸⁰ *Id.*

national defense.⁸¹ Clark approved the request, and President Truman signed Clark's letter of approval to the FBI. The FBI now had full authority to wiretap anyone it deemed subversive.⁸²

II. THE GREEN MENACE

A. THE ANIMAL ENTERPRISE PROTECTION ACT

The Animal Enterprise Protection Act (AEPA) was the predecessor of the Animal Enterprise Terrorism Act (AETA). The AEPA had its beginnings in the late 1980's and early 1990's. During this time, Representative Charles W. Stenholm (D-TX) attempted to enact federal legislation "to prevent, deter, and penalize crimes . . . against U.S. farmers, ranchers, food processors, and agricultural and biomedical researchers." Representative Stenholm's attempts included the proposed Farm Animal and Research Facilities Protection Act of 1989, the Farm Animal and Research Facilities Protection Act of 1991, and the Animal Rights Terrorism Act of 1992. These legislative measures were designed to amend the Food Security Act of 1985. The legislation called for harsh penalties, lacked a requirement for interstate travel, and included private rights of action for animal facility owners. Stenholm's attempts were unsuccessful, however, and none of these measures were enacted into law.⁸³

Congress finally enacted the AEPA in 1992.⁸⁴ The National Association for Biomedical Research pushed the legislation through

⁸¹ *Id.*

⁸² *Id.*

⁸³ Kimberly E. McCoy, *Subverting Justice: An Indictment of the Animal Enterprise Terrorism Act*, 14 ANIMAL L. 56, 56 (2007).

⁸⁴ Goodman, *supra* note 5, at 836.

Congress.⁸⁵ The AEPA created the crime of "animal enterprise terrorism,"⁸⁶ creating a punishable offense for anyone who:

(1) travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility in interstate or foreign commerce, for the purpose of causing physical disruption to the functioning of an animal enterprise; and (2) 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 . . .⁸⁷

The term "animal enterprise" is defined as: "(A) a commercial or academic enterprise that uses animals for food or fiber production, agriculture, research, or testing; (B) a zoo, aquarium, circus, rodeo, or lawful competitive animal event; or (C) any fair or similar event intended to advance agricultural arts and sciences."⁸⁸

The AEPA provided for a fine, imprisonment of up to one year or both for a violation.⁸⁹ It also provided for increased penalties of up to ten years if a violation resulted in serious bodily injury to an individual, and life in prison if a violation resulted in death.⁹⁰

The AEPA remained merely a threat to activists until September 16, 1998. It was then that Peter Young and Justin Samuel were indicted by a federal grand jury in Wisconsin for animal enterprise terrorism.

⁸⁵ *Id.*

⁸⁶ 18 U.S.C. § 43 (1992).

⁸⁷ 18 U.S.C. § 43(a) (1992).

⁸⁸ 18 U.S.C. § 43(d)(1)(A)-(C) (1992).

⁸⁹ 18 U.S.C. § 43(a) (1992).

⁹⁰ 18 U.S.C. § 43 (1992); Goodman, *supra* note 5, at 836-837.

The indictment alleged Young and Samuel's connection to a raid on fur farms in 1997. During this raid, between 8,000 and 12,000 mink were released from mink farms in the Midwest over a two-week period. Samuels pled guilty, received a two-year sentence and was ordered to pay over \$360,000 in fines. After seven years on the run, Young was apprehended and pled guilty to animal enterprise terrorism charges under the AEPA. Young was sentenced to "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."⁹¹

Despite these convictions, the animal enterprise industry pushed to broaden animal enterprise terrorism legislation.⁹² "Heavy lobbying from animal-testing firms and pharmaceutical companies" resulted in amendments to various provisions of the AEPA in 2002.⁹³ The 2002 revisions eliminated the \$10,000 requirement for economic damage, providing a federal cause of action for nominal economic loss.⁹⁴

B. THE ANIMAL ENTERPRISE TERRORISM ACT

President Bush signed the Animal Enterprise Terrorism Act (AETA) into law on November 27, 2006.⁹⁵ The AETA grew out of efforts by industry groups and lobbyists seeking to shield their corporate interests from all opposition.⁹⁶ Although the AEPA had been used successfully to prosecute individuals who did not engage in any direct

⁹¹ Goodman, *supra* note 5, at 837.

⁹² *Id.* at 838.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 847; Johnson, *supra* note 4, at 252.

⁹⁶ Goodman, *supra* note 5, at 843-844.

action,⁹⁷ animal industry groups pushed for broader legislation and greater maximum sentences that would extend beyond direct actions on paper as well as in practice.⁹⁸

In May of 2004, the Senate Committee on the Judiciary held hearings on "Animal Rights: Activism vs. Criminality."⁹⁹ Government officials, corporate executives and animal experimenters discussed what they perceived as the need for stronger legislation regarding animal and environmental activists.¹⁰⁰ The FBI Deputy Assistant Director of the Counterterrorism Division, John E. Lewis, argued "while 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 . . . in federal court."¹⁰¹ The proposed amendments included: (1) "a provision to prohibit causing economic loss, even in the absence of any physical destruction;" (2) "expanding the act to include tertiary targets;" (3) "expanding the definition of "animal enterprise" to

⁹⁷ "Direct 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. 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." Goodman, *supra* note 5, at 829-830. (quoting Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), available at http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html).

⁹⁸ Goodman, *supra* note 5, at 843.

⁹⁹ *Id.* at 844.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

include the use of animals ‘for education ... [and] for the purpose of advancing biomedical sciences;’” and (3)[sic.] “increasing the maximum prison sentence to ten years for physical or economic disruption.”¹⁰²

In 2005, Senator James Inhofe (R-OK) and Representative Thomas Petri (R-WI) introduced the AETA as an amendment to the AEPA. It was drafted with help from the Department of Justice and the FBI. The proposed purpose was to “enhance the effectiveness of the U.S. Department of Justice's response to recent trends in the animal rights terrorist movement.” The final version of the bill was introduced to Congress in 2006.¹⁰³

Animal advocacy and civil rights organizations opposed the AETA. Of particular concern was the AETA’s characterization of the loss of property. The AETA’s characterization of property had the potential to infringe upon time honored and constitutionally protected forms of activism such as demonstrations, undercover investigations, leafletting and boycotts. These groups argued that the AETA “would have had a chilling effect on free speech” because traditionally protected forms of activism could potentially be criminalized leaving animal advocates unclear on what they could and could not legally do.¹⁰⁴

The American Civil Liberties Union (“ACLU”) sent a letter to the House Judiciary Committee stating it would not oppose the AETA if changes were made to protect free speech. The ACLU stated that the AETA should define “‘real or personal property’ as ‘tangible’ property to avoid penalizing legitimate and otherwise legal activity that results in

¹⁰² Goodman, *supra* note 5, at 844.

¹⁰³ *Id.* at 845.

¹⁰⁴ *Id.* at 845-46.

lost profits.” The ACLU also asked that a provision imposing a penalty for actions not causing any reasonable fear of bodily harm, any actual bodily injury or economic damage, be applied only to conspiracies or attempted violations of the Act. However, these recommendations received little consideration, and the changes were not made.¹⁰⁵

The AETA expands the scope of “animal enterprise terrorism” beyond that of the AEPA.¹⁰⁶ The AETA eliminates the “physical disruption” requirement of the AEPA, and criminalizes all conduct engaged in “for the purpose of damaging or interfering with the operations of an animal enterprise.”¹⁰⁷ The AETA also broadens the scope of individuals and entities enjoying its protections.¹⁰⁸ “Animal enterprise” was redefined to include

(A) a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing; (B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or (C) any fair or similar event intended to advance agricultural arts and sciences . . .¹⁰⁹

This definition practically covers any industry or company involved in the exploitation of animals, whether directly or indirectly.¹¹⁰ “Tertiary targeting”¹¹¹ is also included within the AETA’s scope, expanding the

¹⁰⁵ *Id.* at 846–47.

¹⁰⁶ Goodman, *supra* note 5, at 848.

¹⁰⁷ *Id.*; 18 U.S.C. § 43 (2006).

¹⁰⁸ Goodman, *supra* note 5, at 848.

¹⁰⁹ 18 U.S.C. § 43(d)(1)(A)–(C) (2006).

¹¹⁰ Goodman, *supra* note 5, at 848.

¹¹¹ Tertiary targets are defined as any “person or entity having a connection to, relationship with, or transactions

breadth of protections offered beyond those that fell within the definition of animal enterprise under the AEPA.¹¹²

III. DISSENT ON TRIAL: SOCIALISTS AND SHAC 7

A. SOCIALISTS ON TRIAL

Socialists faced difficulty with the general public during the First Red Scare.¹¹³ The difficulty they faced with the courts, however, was much more frightening.¹¹⁴ When these Socialists were brought to trial, the courts applied the Espionage Act so strictly it is surprising everyone accused was not convicted.¹¹⁵

Two trials held pursuant to the original Espionage Act and the amended version including the Sedition Act, set the stage for an atmosphere of intolerance during the First Red Scare.¹¹⁶ These trials were that of Victor L. Berger and Charles T. Schenck.

1. VICTOR L. BERGER

Victor Berger was a pacifist, a Socialist and a member of the United States House of Representatives. Berger helped form the Socialist party in the United States in 1901, and served on its Executive Board. In 1910, he became the first Socialist to be elected and serve in the United States House of Representatives. He was reelected in 1912 and 1914. Berger believed that socialism could only be achieved

with an animal enterprise." 18 U.S.C. § 43(a)(2)(A) (2006).

¹¹² Goodman, *supra* note 5, at 848.

¹¹³ MURRAY, *supra* note 1, at 20.

¹¹⁴ *Id.*

¹¹⁵ MURRAY, *supra* note 1, at 20-21; FINAN, *supra* note 24, at 27.

¹¹⁶ MURRAY, *supra* note 1, at 21-26; CATHERWOOD & DIVANNA, *supra* note 26, at 16.

through peaceful means. He opposed all anarchists and direct-actionists within the Socialist party. As a result, many radical Socialists actually considered him “bourgeois.”¹¹⁷

Because of his pacifist position, Berger had opposed the war from the outset. The public and the courts took this as an indication he supported Germany. Berger made statements to the contrary, such as, “Personally, I was against the war before war was declared . . . But now since [w]e are in the war, I want to win this war—for democracy . . . Let us hope we will win the war quickly.” However, more charged statements made trouble for the peace loving Socialist. On one occasion he wrote, “The war of the United States against Germany can not be justified,” and on another, “the blood of American boys [is] being coined into swollen profits for American plutocrats.”¹¹⁸

In February 1918, Berger was indicted for violation of the Espionage Act for expressing his opinions on the war. He was not tried until ten months later. During the interim he was reelected to the House of Representatives on a peace platform. Two months after his reelection, Berger was found guilty for conspiracy to violate the Espionage Act.¹¹⁹ Judge Kenesaw Mountain Landis sentenced him to twenty years in Fort Leavenworth.¹²⁰ Two years earlier, Judge Landis had expressed his opinion on free speech in a case against 166 members of the Industrial Workers of the World.¹²¹ He stated, “When

¹¹⁷ MURRAY, *supra* note 1, at 21-22.

¹¹⁸ *Id.* at 22.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA* 87 (Oxford University Press 1992).

the country is at peace it is the legal right of free speech to oppose going to war. . . . But when once war is declared this right ceases.”¹²² Berger was convicted for expressing his opinion of the war, he had not engaged in any treasonous activities.¹²³

2. CHARLES T. SCHENCK

Charles T. Schenck was a Socialist who distributed unpopular information.¹²⁴ Schenck was the general secretary for the Socialist party.¹²⁵ As part of his duties, he printed and distributed approximately 15,000 leaflets discouraging enlistment in the armed forces.¹²⁶ One side of the leaflet quoted the Thirteenth Amendment of the Constitution, with the caption “Do not submit to intimidation.”¹²⁷ The leaflet confined itself to peaceful measures such as a petition for the repeal of the act.¹²⁸ The other side decried the conscription as invalid and urged those drafted to “Assert Your Rights.”¹²⁹ Schenck was tried and convicted for violating the Espionage Act.¹³⁰

The importance of this case lies in the Supreme Court’s decision on appeal. Justice Oliver W. Holmes, Jr. wrote for a unanimous court.¹³¹ He likened the distribution of this information to a man falsely shouting fire in a theatre and causing a panic.¹³² Justice Holmes wrote, “The

¹²² *Id.* at 88.

¹²³ MURRAY, *supra* note 1, at 22.

¹²⁴ *Id.* at 22-23.

¹²⁵ *Id.* at 22.

¹²⁶ *Id.*

¹²⁷ *Id.* at 23.

¹²⁸ *Schenck v. United States*, 249 U.S. 47, 51 (1919).

¹²⁹ MURRAY, *supra* note 1, at 23.

¹³⁰ *Id.*

¹³¹ *Schenck*, 249 U.S. at 47.

¹³² *Schenck*, 249 U.S. at 52.

question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”¹³³ The Court decided that in this case the words used, words which quoted the Constitution, presented a clear and present danger, and affirmed the conviction.¹³⁴

The Court had fundamentally undermined the First Amendment with this decision.¹³⁵ The Court used a “bad tendency” test for speech, and upheld a long jail sentence for someone urging people to exercise their constitutional rights.¹³⁶ Justice Holmes made the observation that First Amendment protections are not absolute, and imposed additional limitations during wartime.¹³⁷ This was the first era in which courts played a significant role in restricting freedom of expression.¹³⁸

B. SHAC 7

¹³³ *Id.*; Justice Holmes later reconsidered his stance in *Schenck* and dissented in *Abrams v. United States*, joined by Louis D. Brandeis. In his dissent, Justice Holmes called for a “free trade in ideas.” He stated: “It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loath and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.” FINAN, *supra* note 24, at 33

¹³⁴ *Schenck*, 249 U.S. at 53; MURRAY, *supra* note 2, at 23.

¹³⁵ FINAN, *supra* note 24, at 27.

¹³⁶ *Id.*

¹³⁷ *Id.* at 28.

¹³⁸ Murray & Wunsch, *supra* note 17, at 77.

Beginning in 1999, animal rights activists engaged in a direct action campaign against Huntingdon Life Sciences (HLS). HLS is a contract research laboratory. HLS is purported to kill 180,000 animals per year testing “pharmaceutical products, pesticides, industrial and other chemicals.” The international campaign was known as Stop Huntingdon Animal Cruelty (SHAC). HLS was targeted due to five undercover investigations. The investigations revealed animal cruelty and violations of the Animal Welfare Act. Video footage acquired during the investigations showed workers “punching beagle puppies in the face, dissecting live monkeys and falsifying scientific data.”¹³⁹

SHAC activists “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.” Stop Huntingdon Animal Cruelty USA (SHAC USA) was the result of the campaign. SHAC USA was an incorporated organization whose purpose was “to provide information, distinct from the SHAC campaign in which activists participate in both legal and illegal forms of direct action.” SHAC USA operated a website providing information and support for protests against HLS and its business associates. The activists running the website, which was distinct from the direct action campaign, were raided and arrested by federal agents in May of 2004. The six activists, along with SHAC USA, are known as the SHAC 7.¹⁴⁰

¹³⁹ Goodman, *supra* note 5, at 839–40.

¹⁴⁰ Goodman, *supra* note 5, at 839–841; 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,

The SHAC 7 were charged and indicted for conspiracy to violate the AEPA. The charges were based on the mere existence of the SHAC USA website. The activists responsible for the creation of the site did not advocate any direct action. The website actually included a disclaimer at the bottom of each page, 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.”¹⁴¹

Federal prosecutors, failing to produce any evidence of direct action involvement, instead argued that the information contained on the website enabled activists to target affiliates of HLS and encouraged illegal direct action. In March of 2006, the SHAC 7 were found guilty on all counts. Each of the defendants was found guilty of “conspiracy to violate the Animal Enterprise Protection Act.” They became the first to be found guilty of animal enterprise terrorism. The sentences for the activists ranged from one to six years in federal prison. SHAC USA received five years probation and was ordered to pay \$1,000,001 in restitution to HLS. The individual defendants are responsible for the restitution payment.¹⁴²

C. FROM THE ESPIONAGE ACT TO SHAC

Victor Berger, Charles Schenck and the SHAC 7 all have something in common: they expressed an unpopular opinion in an intolerant legal system. They did not have a treasonous or terrorist

<http://www.shac7.com/case.htm> (last visited Feb. 16, 2009).

¹⁴¹ Goodman, *supra* note 5, at 841.

¹⁴² Goodman, *supra* note 5, at 842–43

intent. They were expressing an opinion, disseminating information, and showing the public the realities of different situations. These opinions, information and realities were disliked, however, by the government and the interests that too often infect the legal process.

The Socialist trials of the First Red Scare and the case of the SHAC 7 are frighteningly similar. Both cases concern forms of speech traditionally protected by the First Amendment. Both used speech that expressed an unpopular viewpoint; dissent from the status quo. Additionally, both cases demonstrate the influence of special interests behind the laws guiding the trials, and an overbroad interpretation of the laws by the judicial system.

Victor Berger was a pacifist who pushed for a peaceful path to Socialism.¹⁴³ He openly opposed anarchists and direct action campaigns.¹⁴⁴ The SHAC 7 likewise did not advocate any direct action.¹⁴⁵ The website they were convicted for maintaining included a disclaimer disavowing any violence and urging a peaceful, even polite, campaign.¹⁴⁶ Berger made the mistake of speaking ill of the wealthy during his time.¹⁴⁷ He spoke out about the profits the wealthy were making on the war.¹⁴⁸ The SHAC 7 posted videos and blogs of protest information concerning one of the largest suppliers of laboratory test

¹⁴³ MURRAY, *supra* note 1, at 21.

¹⁴⁴ *Id.* at 21-22.

¹⁴⁵ Goodman, *supra* note 5, at 841.

¹⁴⁶ *Id.*

¹⁴⁷ MURRAY, *supra* note 1, at 22.

¹⁴⁸ *Id.*

animals.¹⁴⁹ It was businesses such as this that pushed for an animal terrorism laws in the first place in order to protect their profits.¹⁵⁰

Charles Schenck printed and distributed leaflets containing opinions on the legality of the draft, information about the draft, and information about people's rights with respect to the draft.¹⁵¹ The leaflet actually quoted the Thirteenth Amendment of the Constitution.¹⁵² Schenck confined the substance of the leaflet to peaceful measures such as petitions.¹⁵³ In a similar vein, the SHAC 7 disseminated information containing their opinion of the legality of HLS activities.¹⁵⁴ SHAC confined its suggested actions to peaceful measures such as letter writing campaigns.¹⁵⁵ Despite no direct action tactics and peaceful disclaimers, Schenck was found to be disseminating information that presented a clear and present danger to the country,¹⁵⁶ while the SHAC 7 were found to be disseminating information that encouraged illegal direct action.¹⁵⁷

The Espionage Act of 1917 was primarily directed at treason.¹⁵⁸ However, it was poorly constructed and broadly construed.¹⁵⁹ The trials of Berger and Schenck prove that in reality, it covered activity of a

¹⁴⁹ Goodman, *supra* note 5, at 840.

¹⁵⁰ *Id.* at 836.

¹⁵¹ MURRAY, *supra* note 1, at 22.

¹⁵² *Id.* at 23.

¹⁵³ *Schenck*, 249 U.S. at 51.

¹⁵⁴ Goodman, *supra* note 5, at 840.

¹⁵⁵ *Id.* at 841.

¹⁵⁶ MURRAY, *supra* note 1, at 23.

¹⁵⁷ Goodman, *supra* note 5, at 842.

¹⁵⁸ MURRAY, *supra* note 1, at 13.

¹⁵⁹ *Id.*

much less sinister character.¹⁶⁰ It was used to target speech the government, and public to a large extent, disagreed with.¹⁶¹ Similarly, the AEPA was primarily directed at terrorist activities.¹⁶² Its aim was to prohibit intentional physical disruption to the functioning of an animal enterprise.¹⁶³ As the case of the SHAC 7 demonstrates, however, the law was used to target mere speech on the subject of an animal enterprise. The SHAC 7 ran a website broadcasting information on the activities of protestors.¹⁶⁴ Much like Schenck, they were merely disseminating information. Although both laws were directed at specific criminal behavior, the courts broadly interpreted these laws to include unpopular speech.

IV. BIG BROTHER IS WATCHING: FROM COMMUNISM TO TERRORISM

While “Communist” was a label that would ruin lives during the Great American Red Scare, “terrorist” is a label used today to destroy lives. During the Great American Red Scare, laws were passed, lists were made, wiretaps conducted, and hearings were held all in the name of protecting the country from Communism. Today, laws have been passed, lists have been made, and wiretaps conducted all in the name of protecting the country from terrorism. We have not learned from history.

The FBI has played a significant role in monitoring both alleged Communists and supposed terrorists. The FBI conducted wiretaps of

¹⁶⁰ See discussion *supra* Sections I.A.1-2.

¹⁶¹ See discussion *supra* Sections I.A.1-2.

¹⁶² Goodman, *supra* note 5, at 836.

¹⁶³ 18 U.S.C. § 43(a) (1992).

¹⁶⁴ Goodman, *supra* note 5, at 840-843.

supposed subversives during the Great American Red Scare.¹⁶⁵ The scope of the wiretapping was broad, as it was not restricted by a “reasons of national defense” requirement.¹⁶⁶ Today, the FBI has been given authority to wiretap citizens under provisions of the Patriot Act.¹⁶⁷ Among the many other interceptions allowed, the FBI has been authorized to intercept communications relating to animal enterprise terrorism.¹⁶⁸ As discussed, the AETA, which defines animal enterprise terrorism, can be so broadly construed that this may include perfectly legal activities such as boycotts, protests, and dissemination of information.¹⁶⁹

A list of subversive groups seems to be consistent throughout both the Great American Red Scare and the Green Scare of today. During the Great American Red Scare, the Attorney General kept a list of organizations he deemed subversive.¹⁷⁰ Anyone, who at any time in his or her life had belonged to any of the organizations on the list, or knew or was related to anyone belonging to any of them, was subjected to scrutiny.¹⁷¹ Today, the FBI keeps a list of persons and organizations “who are known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism.”¹⁷² Loyalty review boards focused on the Communists or

¹⁶⁵ FRIED, *supra* note 3, at 19.

¹⁶⁶ *Id.*

¹⁶⁷ Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁶⁸ 18 U.S.C. § 2516(1)(c).

¹⁶⁹ See Section II (B) *supra*.

¹⁷⁰ FRIED, *supra* note 3, at 4.

¹⁷¹ *Id.*

¹⁷² Federal Bureau of Investigation, Terrorist Screening Center,

Socialists on the Attorney General's list.¹⁷³ Today, the FBI has chosen to focus on animal rights and environmental activists, despite a history of non-violence toward people.¹⁷⁴ FBI Deputy Assistant Director John Lewis has declared the environmental and animal rights movements to be the number one domestic terror threat to the United States.¹⁷⁵ Unpopular opinions have been targeted in both eras.

<http://www.fbi.gov/terrorism/counterterrorism/faqs.htm> (last visited Feb. 17, 2009).

¹⁷³ FRIED, *supra* note 3, at 4.

¹⁷⁴ Johnson, *supra* note 4, at 263. While a few animal rights extremists have used violent tactics involving property damage, there has never been any loss of life due to the movement (unlike conservative extremists such as anti-abortion activists). Those lobbying for the AETA presented the legislation "as necessary to protect against a threat comparable to that of al-Qaeda" despite acknowledgment by the FBI that successful prosecutions under existing criminal laws had achieved effective deterrence. Johnson, *supra* note 4, at 265.

The Animal Liberation Front (ALF), a militant animal rights group, is considered the "most representative of the threat from domestic terrorism directed toward animal enterprises" by the FBI. The ALF doctrine states that "no person may be killed or seriously injured in the pursuit of fulfilling a mission." Johnson, *supra* note 4, at 265. Specifically, the ALF credo states "It is a nonviolent campaign, activists taking all precautions not to harm any animal (human or otherwise)" while the ALF guidelines state "T[o] inflict economic damage to those who profit from the misery and exploitation of animals. . . . T[o] take all necessary precautions against harming any animal, human and non-human." The ALF Credo and Guidelines, http://www.animalliberationfront.com/ALFront/alf_credo.htm (last visited June 29, 2009).

¹⁷⁵ Tricia Engelhardt, *Foiling the Man in the Ski Mask Holding a Bunny Rabbit: Putting a Stop to Radical Animal Activism with Animal and Ecological Terrorism Bills*, 28 WHITTIER L. REV. 1041, 1041 (2007).

Being labeled with an unpopular identity that has grave legal and social consequences frightens many otherwise politically active individuals into silence. The HUAC hearings instilled a fear of being labeled a Communist or Communist sympathizer.¹⁷⁶ The atmosphere and the congressional investigations at the time scared many who opposed or disagreed into silence.¹⁷⁷ Being labeled a Communist meant losing one's job, becoming a social pariah, and facing possible prosecution.¹⁷⁸

Today, animal rights activists fear being labeled a terrorist under the AETA.¹⁷⁹ Peaceful animal rights supporters fear the consequences that accompany the label, such as loss of social status, intrusive monitoring by the FBI, and possible legal action under the AETA.¹⁸⁰ As in the Great American Red Scare, this fear has had a chilling effect on the political and free speech activities of law-abiding citizens.¹⁸¹ The result in both eras has been an atmosphere of chilled free speech. As Socialists feared the label "Communist" and the consequences that accompanied it, so, too, do the animal rights activists of today fear being labeled a "terrorist."

V. CONSTITUTIONAL CHALLENGES TO THE AETA

Many individuals and groups concerned about the AETA have suggested a constitutional challenge to the Act.¹⁸² While there are

¹⁷⁶ Christina E. Wells, *Fear And Loathing In Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 132 (2005).

¹⁷⁷ *Id.*

¹⁷⁸ FRIED, *supra* note 3, at 4, 15.

¹⁷⁹ Johnson, *supra* note 4, at 250.

¹⁸⁰ *Id.*

¹⁸¹ Goodman, *supra* note 5, at 848.

¹⁸² See McCoy, *supra* note 83.

definite constitutional concerns, the Act as amended in 2006 will be much harder to challenge. Courts are reluctant to find a law unconstitutional if it can be construed constitutionally. The disclaimer included in the AETA will make it very difficult to convince the courts to strike the Act down.¹⁸³ It is worth noting the two bases for challenge that could be most effective.

A. VAGUENESS

A statute is unconstitutional if it “fails to specify a standard of conduct, such that men of common intelligence must necessarily guess at its meaning.”¹⁸⁴ The public must be given fair warning and a precise description of what conduct is prohibited.¹⁸⁵

The AETA is vague for several reasons. First, the AETA does not define the word “interfere.”¹⁸⁶ Instead of the vague “interference,” actual “physical disruption” was criminalized under the AEPA.¹⁸⁷ However, the AETA expanded the scope of the law, making it unlawful

¹⁸³ 18 U.S.C. § 43(e)(2006) (“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.”)

¹⁸⁴ McCoy, *supra* note 83, at 60.

¹⁸⁵ *Id.* at 61.

¹⁸⁶ 18 U.S.C. § 43(a) (2006) (“Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce— (1) for the purpose of damaging or interfering with the operations of an animal enterprise;”).

¹⁸⁷ 18 U.S.C. § 43 (1992).

to “interfere” with an animal enterprise.¹⁸⁸ Without some clarification, it is difficult for a reasonable person to understand what conduct is prohibited.¹⁸⁹ Second, the term “property” is also not defined.¹⁹⁰ Without specifying “real or personal property” as “tangible” property, the law could be used to prosecute based on intangibles, such as lost profits or loss of business good will.¹⁹¹ These losses are the very goal of traditional, peaceful forms of activism such as boycotts, protests, demonstrations, undercover investigations and whistle blowing.¹⁹² The vague construction of the AETA creates an opportunity for arbitrary and discriminatory enforcement.¹⁹³

B. CONTENT AND VIEWPOINT BASIS

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”¹⁹⁴ The First Amendment prohibits the government regulation of speech if restriction is based on the speaker's "ideology[,] opinion or

¹⁸⁸ McCoy, *supra* note 83, at 61; 18 U.S.C. § 43 (2006).

¹⁸⁹ McCoy, *supra* note 83, at 61.

¹⁹⁰ 18 U.S.C. § 43(a)(2) (“in connection with such purpose— (A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise.”).

¹⁹¹ McCoy, *supra* note 83, at 61.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 63.

perspective.”¹⁹⁵ The AETA “singles out animal advocates based upon their ideology and seeks to suppress a particular point of view.”¹⁹⁶

Branding the proponents of a certain viewpoint as terrorists is the single most effective way to stifle the dissent and eliminate the viewpoint from the marketplace.¹⁹⁷ Perpetrators of far more serious and dangerous crimes are not subjected to punishments as severe as those in the AETA.¹⁹⁸ Perpetrators of hate crimes and abortion clinic bombings have not been subjected to the terrorist label or the enhanced punishments that accompany it.¹⁹⁹ In fact, perpetrators of hate crimes have actually been protected from laws based on viewpoint.²⁰⁰

For legislation to be constitutionally valid, it must examine the criminality of the act and not the motivation behind it.²⁰¹ Each offense included in the AETA was already an established crime.²⁰² The AETA only adds a focus on the ideologies motivating the crimes and special protections for animal enterprises.²⁰³ The AETA is content and viewpoint based, and thus violates the First Amendment.²⁰⁴

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 64.

¹⁹⁸ *Id.*

¹⁹⁹ McCoy, *supra* note 83, at 64.

²⁰⁰ *Id.* at 64-65. “In *R.A.V. v. City of St. Paul, Minnesota*, the Supreme Court found a local hate crime ordinance facially invalid on the basis of content discrimination.” McCoy, *supra* note 83, at 65.

²⁰¹ McCoy, *supra* note 83, at 65.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

VI. THE DEVIL'S COMPROMISE: REWORKING THE EXISTING ACT

While the ideal situation would be a repeal of the Act, it is unlikely that anything short of the McCarthy hearings will accomplish that goal. A rewording of the existing Act, however, may alleviate some of the concerns. While amendments to the Act may solve some of the legal issues concerned, they are unlikely to solve the social ones.

The AETA should be amended and changed as the ACLU suggested to the House Judiciary Committee. The AETA should define "real or personal property" as "tangible" property to avoid penalizing legitimate and otherwise legal activity that results in lost profits.²⁰⁵ Tangible property is defined as "[p]roperty that has physical form and characteristics,"²⁰⁶ whereas intangible property is defined as "[p]roperty that lacks a physical existence. Examples include . . . business goodwill."²⁰⁷ Leaving "real or personal property" undefined within the act creates the possibility that prosecutions for things such as loss of business goodwill or profit may occur. Again, these are the very things that legal, constitutionally protected activities such as boycotts and protests are meant to affect.

The provision imposing a penalty for actions not causing any reasonable fear of bodily harm, any actual bodily injury, or economic damage should only be applied to conspiracies or attempted violations the Act.²⁰⁸

²⁰⁵ Goodman, *supra* note 5, at 846-847.

²⁰⁶ BLACK'S LAW DICTIONARY 1254 (8th ed. 2004).

²⁰⁷ *Id.* at 1253.

²⁰⁸ Goodman, *supra* note 5, at 847.

Additionally, section (a)(1) of the Act should be amended. Currently, this section reads: “Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce— (1) for the purpose of damaging or interfering with the operations of an animal enterprise[.]”²⁰⁹ This section should be amended to read: “Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce— (1) for the purpose of causing physical damage to the property of an animal enterprise.” This change will eliminate the ambiguity and vagueness of the term “interfere.” A prohibition of physical damage to property, defined as tangible property, properly puts the public on notice of what behavior is criminalized. This change will also eliminate free speech concerns, as it requires actual physical damage to property for a violation.

VII. CONCLUSION

We must wait to see if the hunt for “terrorists” will turn out as terrifying as the hunt for “reds.” As history seems to be on a course of repetition, we must hope the next stop is not hearings to ferret out animal rights sympathizers. We, as citizens, must not let the fear of the label quiet our voices and chill our speech. Our democracy was founded on the principle of free speech and a government by the people, not over the people. We must ensure that the fear of terrorism does not give the government free reign to subvert ideals that are unpopular or adverse to the status quo. We must lobby our legislators for a change in the law. Dissent is patriotic.

²⁰⁹ 18 U.S.C. § 43(a)(1) (2006).