

COMMENTS

CAGING ANIMAL ADVOCATES' POLITICAL FREEDOMS: THE UNCONSTITUTIONALITY OF THE ANIMAL AND ECOLOGICAL TERRORISM ACT

By
Andrew N. Ireland Moore*

The animal advocacy movement is facing another obstacle, resulting from the creation of the Animal and Ecological Terrorism Act (AETA). The Act seeks to create harsh penalties including a Terrorist Registry for acts performed by the Animal Liberation Front (ALF) and ALF-type actors. In addition, the proposed legislation will affect animal advocates not involved with the ALF. However, the model legislation, as written, must pass Constitutional scrutiny. This paper argues that the proposed Animal and Ecological Terrorism Act is unconstitutional due to its infringement on the First Amendment, its overbreadth, and its vagueness.

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* © Andrew N. Ireland Moore 2005. Mr. Moore received his B.A. in Environmental Studies and Political Science from Lewis and Clark College in 2001 and his J.D. from Lewis & Clark Law School in 2004. He is currently studying Fisheries and Wildlife Science at Oregon State University.

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I. INTRODUCTION

In the wake of September 11, a right-wing faction joined in the fight against terrorism. While most United States citizens appreciate legislation that protects the country from groups such as al-Qaeda, the U.S. Sportsmen's Alliance (USSA), with the support of the American Legislative Exchange Council (ALEC), went too far in targeting environmental and animal rights activists as a serious domestic terrorist threat. In the literature sponsored by ALEC proposing model legislation for the Animal and Ecological Terrorism Act (AETA or "the Act"), the authors aim to make one believe that animal and ecological activist groups like the Animal Liberation Front (ALF) and the Earth Liberation Front (ELF) are comparable to groups like al-Qaeda.¹ The comparison leads one to believe that freeing animals from research labs is as much of a threat to our society as commercial airplanes flying into skyscrapers. The goals and methods of ALF are drastically different from those of terrorist groups. ALF's guidelines expressly state its intention "to take all necessary precautions against harming any animal, *human and non-human*."² Nonetheless, the USSA and ALEC are using the events of September 11, 2001 and U.S. citizens' fear to pass extreme legislation.

Proposed legislation in various states that is modeled after the Animal and Ecological Terrorism Act (AETA)³ aims to create stiff penalties for acts such as vandalism and information distribution committed by animal and ecological activists in furtherance of their cause.⁴

¹ Am. Legis. Exch. Council, *Animal and Ecological Terrorism in America* (Sandy Liddy Bourne & Matthew McNabb eds., Am. Legis. Exch. Council 2003) (available at <http://www.alec.org/meSWFiles/pdf/AnimalandEcologicalTerrorisminAmerica.pdf>).

² Animal Liberation Front, *The Credo/Guidelines of the Animal Liberation Front*, http://www.animalliberationfront.com/ALFront/alf_credo.htm (accessed Mar. 13, 2005) (emphasis added).

³ Am. Legis. Exch. Council, *supra*. n. 1, at 21-24; *infra* app.

⁴ See *e.g.* Wash. Sen. 6114, 58th Legis., 2004 Reg. Sess. § 3, 4-5 (Jan. 30, 2004) (available at <http://www.leg.wa.gov/pub/billinfo/2003-04/senate/6100-6124/6114-5.pdf>) (punishing a prohibited act as a class C felony if the act results in damages exceeding

This paper proposes that the AETA is unconstitutional under the First Amendment's protection of free expression because the Act regulates solely on the basis of political motivation. Furthermore, the AETA is unconstitutionally overbroad and vague. Although the AETA covers both animal and ecological terrorism, this analysis will focus on its effect on the animal advocacy community.

II. BACKGROUND

A. History of USSA and ALEC

In 2002, USSA announced its plan to launch an attack on the animal rights movement with the intent to bring about its "ultimate defeat."⁵ USSA's efforts produced draft legislation entitled "The Animal and Ecological Terrorism Act," which USSA presented to ALEC for endorsement.⁶ ALEC is a right-wing lobbyist group, but it was founded in 1973⁷ as a bipartisan group that shared "a common commitment to the Jeffersonian principles of individual liberty, limited government, federalism, and free markets."⁸

ALEC consists of state legislators and members of the private sector.⁹ What began as a group of twenty-seven participants operating on a \$250 budget¹⁰ currently runs on an almost \$6 million budget,¹¹ primarily funded by over 300 corporate sponsors.¹² ALEC gives the following description of its mission:

Assist legislators in the states by sharing research information and staff support facilities; establish a clearinghouse for bills at the state level, and provide for a bill exchange program; disseminate model legislation and pro-

\$1,500, and as a class B felony if the act results in bodily harm); Mo. Sen. 1376, 92nd Gen. Assembly, 2d Reg. Sess. (Mar. 1, 2004) (available at <http://www.house.state.mo.us/bills041/billtxt/senate/intro/sb1376.htm>) (punishing a prohibited act as a class D felony if the act results in damage exceeding three hundred dollars, and as a class C felony if the damage exceeds ten thousand dollars); S.C. H. 4439, 115th Sess. (Jan. 13, 2004) (available at http://www.scstatehouse.net/cgi-bin/query2003.exe?first=DOC&querytext=terrorism&category=summary&session=115&conid=1270119&result_pos=O&keyval=1154439&printornot=N) (punishing a prohibited act as a felony if the act results in damage exceeding five hundred dollars).

⁵ U.S. Sportsmen's Alliance, *U.S. Sportsmen's Alliance Launches Assault on Animal Rights Movement*, <http://www.wlfa.org/interactive/features/Read.cfm?ID=968> (accessed Dec. 20, 2002).

⁶ *Id.*

⁷ Defenders of Wildlife & Nat. Resources Def. Council, *Corporate America's Trojan Horse in the States: The Untold Story behind the American Legislative Exchange Council* 8, (Alecwatch 2002) (available at <http://www.alecwatch.org/11223344.pdf>).

⁸ Am. Legis. Exch. Council, *ALEC 2002 Annual Report* 7 (Am. Legis. Exch. Council 2002) (available at http://www.alec.org/meSWFiles/pdf/2002_Annual_report.pdf).

⁹ *Id.* at 3.

¹⁰ Defenders of Wildlife & Nat. Resources Def. Council, *supra* n. 7, at 32.

¹¹ *Id.* at 4.

¹² *Id.* at 21. Corporate sponsors include Chevron, Shell, Coors, Texaco, Philip Morris, R.J. Reynolds and previously Enron. *Id.* at 1.

mote the introduction of companion bills in Congress and state legislatures; [and] formulate legislative action programs.¹³

ALEC consists of nine internal Task Forces detailing nearly all aspects of state government.¹⁴ Shortly after ALEC's founding, the organization "began to shift from clearinghouses of ideas submitted by ALEC members into freestanding think tanks and model bill movers. They began to actively solicit more input from private sector members"¹⁵ Despite the equality in voting, the funding practices illustrate the disproportionate influence of corporate entities. ALEC receives almost all of its funding from corporate entities.¹⁶ State legislators pay dues of \$50 for two-year memberships, but corporate entities pay \$5,000 to \$50,000 each year, as well as \$1,500 to \$5,000 each year to participate in Task Forces.¹⁷ Through these well-funded Task Forces, ALEC is a policy powerhouse throughout the nation, primarily at the state level.¹⁸

The Criminal Justice Task Force is a key sponsor of the AETA. The Task Force creates model legislation for state legislatures, including bills on prison privatization, drunk-driving prevention, and the war on terrorism.¹⁹ The AETA designates certain acts by animal and environmental advocates as terrorist activities and increases penalties for such acts, penalizing those who aid or assist them, and creates a database of the Act's offenders in a Terrorist Registry.²⁰

¹³ *Id.* at 33.

¹⁴ *Id.* at 21. Task forces include: Civil Justice; Commerce and Economic Development; Criminal Justice; Trade and Transportation; Education; Energy, Environment, Natural Resources and Agriculture; Health and Human Services; Tax and Fiscal Policy; Trade and Transportation; and Telecommunications and Information Technology. Defenders of Wildlife & Nat. Resources Def. Council, *supra* n. 7, at 22.

¹⁵ Am. Legis. Exch. Council, *Background About ALEC, From Clearing House to Think Tanks*, <http://www.alec.org/viewpage.cfm?pgname=1.1c> (accessed Mar. 13, 2005).

¹⁶ Defenders of Wildlife & Nat. Resources Def. Council, *supra* n. 7, at 5. Additionally, "[a]n examination of ALEC's tax returns shows that more than 95% of its revenue typically comes in form of 'contributions, gifts, grants, and similar amounts' received from corporations and charitable foundations as well as other money received in connection with its conferences and seminars, as membership fees for its task forces, and as revenue from the sale of its publications." *Id.* at 20.

¹⁷ *Id.* at 6.

¹⁸ Nat. Resources Def. Council and Defenders of Wildlife contend that ALEC takes advantage of state legislators and relaxed or non-existent public reporting requirements "that would require disclosure of junkets and gifts awarded to legislators by ALEC, and little or no lobbying disclosure laws require public release of information about ALEC's funding support and methods of operation." *Id.* at 20. Furthermore, the report states, "[s]tate legislatures are often made up of underpaid, under-appreciated, part-time lawmakers with few if any personal staff to help research, evaluate and enact complex laws, and are notoriously parsimonious in providing for their own analytical means. Meanwhile, the public advocacy groups most likely to oppose corporate excesses are too thinly funded to compete effectively in most states." *Id.*

¹⁹ Am. Legis. Exch. Council, *supra* n. 8, at 23-24.

²⁰ *Infra* app.

After the events of September 11, 2001 ALEC developed a Homeland Security Working Group.²¹ The group adopted the AETA legislation and published a pamphlet called *Animal and Ecological Terrorism in America* on September 4, 2003. The pamphlet's chapters include selected descriptions of the history and actions of the ALF and the ELF, as well as the model legislation itself.²²

B. *Animal and Ecological Terrorism in America*

ALEC's *Animal and Ecological Terrorism in America* pamphlet compares animal and ecological activists to members of al-Qaeda and claims that the purpose of the model legislation is to restrain such "terrorists" from using violence to create political change rather than the means permitted by our Constitution.²³ As discussed below, however, the AETA itself will prevent political activists from using the very means the Constitution was created to protect.

The *Animal and Ecological Terrorism in America* pamphlet also provides a description of the history and development of animal and environmental extremism that amounts to a slanted analysis with the purpose to promote opposition to the animal advocacy movement.²⁴ The preface states that animal activists are "hell-bent on revolutionizing a system of perceived abuse."²⁵ There is a timeline tracing events and acts of animal rights organizations since 1859, including such violent acts as releasing two dolphins from the University of Hawaii and the enactment of the Endangered Species Act.²⁶

The pamphlet goes on to describe "The Nature of the Threat," with a focus on the ALF in sections entitled "History,"²⁷ "Notable At-

²¹ Am. Legis. Exch. Council, *supra* n. 1.

²² *Id.*

²³ Defenders of Wildlife & Nat. Resources Def. Council, *supra* n. 7 at 4, 9, 12.

²⁴ *Id.*

²⁵ *Id.* at 5.

²⁶ *Id.* Of note is the following description of an event in 1991: "Publication of 'Screaming Wolf,' a pseudonym for 'A Declaration of War: Killing People to Save Animals and the Environment,' which effectively acted as a 'call to arms.'" *Id.* Although the publication is found on ALF's website, the site's writers denounce the author's call for violence, stating, "All statements are those of the author, screaming wolf, and not those of [ALF]. This book is presented for informational purpose only, we discourage all people to commit illegal activities." ALF, *A Declaration of War: Killing People to Save Animals and the Environment*, <http://www.animalliberationfront.com/Philosophy/Legal/legality.htm>; *select* Declare War (accessed Mar. 13, 2005). *See generally* Dan Barry, *For 'Eco-Terrorism' Group, A Hidden Structure and Public Message*, 151 N.Y. Times B2 (Jan. 8, 2001); Bryan Denson, *Scientists Get Letters Rigged with Razors*, 150 Oregonian A11 (Oct. 27, 1999); Will Woodward, *On Campus, Animal Rights v. Animal Research: U. of Minnesota Emerges as Focal Point after Raid on Labs, Violent Threats*, Wash. Post 1A (Nov. 5, 1999) (stating that humans have only been harmed by animal advocates through the mailing of razor blades to research scientists).

²⁷ Am. Legis. Exch. Council, *supra* n. 1, at 7. Briefly, the pamphlet says that ALF was formed in the mid-1970s in England, its first attack was a firebombing of an animal research facility in 1975, and the organization spread to the U.S. a few years later. *Id.* at 5. It states that the organization's "effectiveness in changing public policy is lacking"

tacks,”²⁸ “Credo,”²⁹ “Modus Operandi,”³⁰ “ALF Signature,” and “The Future of ALF.”³¹ Finally, the pamphlet describes the suggested responses in state jurisdictions, as well as responses in the federal jurisdiction, followed by a copy of the actual model legislation.³²

C. *The Animal Liberation Front*

According to the ALF’s website, the ALF “carries out direct action against animal abuse in the form of rescuing animals and causing financial loss to animal exploiters, usually through the damage and destruction of property.”³³ The group consists of individuals or small groups who carry out direct action according to ALF guidelines. Further, any individual or group of people who are vegetarians or vegans and who carry out actions according to the ALF guidelines may regard themselves as part of the ALF.³⁴ The ALF also has a Supporters Group which operates to lend support by all lawful means possible.³⁵

which leads to the ALF using above-ground animal advocacy groups like People for the Ethical Treatment of Animals (PETA) to release photos, video, or other “propaganda” of ALF. *Id.* at 7. Furthermore, ALEC states that “there is evidence that PETA has supported ALF members financially” and PETA has access to ALF Support Groups “which aid in legal defense of ALF activists charged with crimes.” *Id.* at 8. Finally, ALEC states the ALF and its allies have caused over \$50 million in property damage. *Id.* at 8.

²⁸ *Id.* at 8 (listing incidents of arson, vandalism, and releases of animals).

²⁹ Am. Legis. Exch. Council, *supra* n. 1, at 8 (stating ALF’s mission statements and discussing ALF’s doctrine not to harm people). ALEC states that “this principle seems to be largely ignored by the highly extreme wings of the organization.” *Id.* at 8. ALEC does not, however, provide explicit evidence or reference to any ALF incident with any physical harm to humans. *Id.* at 8–9.

³⁰ *Id.* at 9 (likening ALF to al-Qaeda and the Irish Republican Army in that they are comprised of autonomous cells that are able to communicate with each other and the public through aboveground groups). ALEC also describes how ALF operates including gaining employment by the entities they target. *Id.* at 9.

³¹ *Id.* (stating that there is fear by the judicial and corporate animal communities that ALF will become more violent in the near future).

³² *Id.* at 12–24. *See generally infra* app. (providing the wording of the proposed legislation).

³³ Animal Liberation Front, *supra* n. 2, at http://www.animalliberationfront.com/ALFront/alf_credo.htm.

³⁴ *Id.* The ALF guidelines are as follows:

1. T[o] 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 from suffering.
2. T[o] inflict economic damage to those who profit from the misery and exploitation of animals.
3. T[o] reveal the horror and atrocities committed against animals behind locked doors, by performing non-violent direct actions and liberations.
4. T[o] take all necessary precautions against harming any animal, human and non-human.

Id.

³⁵ The activities include: “[1. support] of imprisoned activists, 2. support and defense of the [ALF], 3. educating the public as to the need and rationale of direct action, 4. providing a communication forum through the Supporters Group newsletter, 5. raising funds for all the above S.G. activities.” *Id.*

The Federal Bureau of Investigation (FBI) classifies the ALF as a terrorist group, which is defined as a group that attempts to create “social and political change through the use of force and violence.”³⁶ In a Congressional Statement from February of 2002, the FBI stated that the ALF engages in criminal activity seeking economic loss or to destroy the facility operations.³⁷ The ALF directs these activities primarily at “fur companies, mink farms, restaurants, and animal research laboratories.”³⁸ The FBI estimates damage in the past ten years to fur and research facilities at more than \$45 million.³⁹ The FBI documented acts of arson, property destruction, and animal releases.⁴⁰ There are no documented acts of physical harm to humans.⁴¹

III. CONSTITUTIONAL LAW

A. Introduction

The events of September 11, 2001 triggered a strong response to terrorism in the United States. The War on Terror appears to dominate the nation’s focus since the atrocities of that infamous day through legislation such as the Patriot Act⁴² and the creation of the Department of Homeland Security.⁴³ While providing national security and protecting United States citizens from terrorist acts should be a priority, continuing to uphold the Constitutional protections on which the nation was founded must be a priority above all others. Without constitutional protections, the United States is destined to become the sort of tyrannical empire from which its founders sought freedom.

One of the freedoms that the Constitution seeks to protect is freedom of expression found in the First Amendment of the Constitution.⁴⁴ The Supreme Court goes to great lengths to protect freedom of expression because of the First Amendment’s essential role in a free society.⁴⁵ Despite the Supreme Court’s efforts, however, historically, the

³⁶ James F. Jarboe, Dom. Terrorism Sec. Chief, Counterterrorism Div., FBI, Congressional Testimony, *The Threat of Eco-Terrorism*, before the House Resources Committee, Subcommittee on Forests and Forest Health (Feb. 12, 2002) (available at <http://www.fbi.gov/congress/congress02/jarboe021202.htm>).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

⁴³ See Department of Homeland Security, *Department of Homeland Security Home*, <http://www.dhs.gov/dhspublic/> (accessed Mar. 12, 2005) (providing information on the Department and its activities).

⁴⁴ U.S. Const. amend. I.

⁴⁵ See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523–24, 527 (1993) (city ordinances regulating ritual sacrifice of animals held to violate the First Amendment and thus were invalid).

United States government does violate citizens' rights in connection with political activism.⁴⁶ Due to the historical violations by the U.S. Government, a thorough analysis of legislation that threatens to be in violation of fundamental freedoms is important. Components of the AETA threaten the protections provided for by the First Amendment and thus must be thoroughly analyzed.

B. Constitutional Protections

The First Amendment of the Constitution protects U.S. citizens' freedom of expression.⁴⁷ The Supreme Court in *Turner Broadcasting System, Inc. v. Federal Communications Commission*⁴⁸ states: "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."⁴⁹ When the government enacts legislation that restricts or chills citizens' ideas or beliefs, constitutional analysis is required.

The AETA walks a thin constitutional line. The drafters of the AETA carefully drafted the Act to avoid actions that involve pure speech. The basis of the AETA, however, is to deter a particular political viewpoint. Further, the Act's language is overbroad and vague. This paper seeks to shed light on the unconstitutional aspects of the Act by analyzing and distinguishing conduct from speech, as well as highlighting examples where the Act is unnecessarily inclusive.

⁴⁶ See Sen. Select Comm. to Study Govtl. Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans*, 94th Cong., 2d. Sess. (Apr. 26, 1976) (available at <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIa.htm>) (detailing the committee's findings on FBI activities affecting the rights of American citizens); David Cole & James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (2d ed., N.Y. Press 2002) (discussing the role of the U.S. government, specifically in regard to the Patriot Act); Ward Churchill & Jim Vander Wall, *Agents of Repression: The FBI's Secret Wars against the Black Panther Party and the American Indian Movement* (South End Press 1990) (discussing the role of the FBI in counterintelligence activities against the Black Panther Party and the American Indian Movement); Ward Churchill & Jim Vander Wall, *The Cointelpro Papers: Documents from the FBI's Secret Wars against Dissent in the United States* (South End Press 1990) (providing discussion and copies of documents from the FBI's role in counterintelligence activities against the Black Panther Party, the American Indian Movement, The New Left, the Communist Party USA, and other like groups); and Brian Glick, *War at Home: Covert Action against U.S. Activists and What We Can Do about It* (South End Press 1989) (detailing FBI activities against U.S. activist groups).

⁴⁷ U.S. Const. amend. I.

⁴⁸ 512 U.S. 622 (1994).

⁴⁹ *Id.* at 641.

C. The Difference between Speech and Conduct

1. United States v. O'Brien

The Supreme Court adopted a test in *United States v. O'Brien*⁵⁰ to determine what conduct the government may regulate. The case involved persons who burned their draft cards in violation of a 1965 amendment to the Selective Service Act, which criminalized an act by any person “who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate”⁵¹ O'Brien argued that the statute violated First Amendment guarantees that protect freedom of expression, including communication through conduct.⁵² The Court responded that non-verbal expression is not always protected by the First Amendment, which is vulnerable to certain limits.⁵³

The Court denied O'Brien's argument that the act of burning his draft card was constitutionally protected “symbolic speech.”⁵⁴ The Court could not “accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”⁵⁵ Otherwise, the Court would be declaring any criminal activity committed with an expressive purpose as constitutional. The Court held that there are circumstances where the government is within its power to regulate an activity:

[I]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁵⁶

The Court found that drafting persons for military service is undoubtedly a justifiable power of Congress.⁵⁷ Further, using draft cards and prohibiting any damage to them was deemed an appropriate means with a focus narrow enough to meet the government's legitimate purpose and withstand constitutional analysis.⁵⁸

O'Brien also argued that the 1965 Amendment was unconstitutional due to Congress' alleged intent to suppress freedom of expression.⁵⁹ The Court rejected this proposition, stating, “this Court will not strike down an otherwise constitutional statute on the basis of an al-

⁵⁰ 391 U.S. 367 (1968).

⁵¹ *Military Selective Service Act*, 50 U.S.C.A. app. § 462(b)(3) (West 1948).

⁵² *O'Brien*, 391 U.S. at 376.

⁵³ *Id.*

⁵⁴ *Id.* at 376.

⁵⁵ *Id.*

⁵⁶ *Id.* at 377.

⁵⁷ *Id.*

⁵⁸ *O'Brien*, 391 U.S. at 382.

⁵⁹ *Id.* at 382–83.

leged illicit legislative motive.”⁶⁰ The *O’Brien* test continues to serve as the foundation for cases involving conduct that communicates.⁶¹

2. *Spence v. Washington*

In *Spence v. Washington*,⁶² the U.S. Supreme Court considered whether a person who taped a peace sign to an American flag was communicating for purposes protected by the First Amendment.⁶³ The case occurred after the shootings at the Kent University protests regarding the invasion of Cambodia.⁶⁴ The defendant taped a peace sign on an upside down American flag to protest the shootings and the state of the country.⁶⁵ The government charged the defendant for violation of Washington’s improper use statute.⁶⁶ The Court, in deciding whether the act was communicative, noted that “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”⁶⁷ The Court found that the act of placing a peace sign on a flag was “not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government.”⁶⁸ Because the defendant placed the peace sign on the flag to convey his grief and frustration with the government, and the action occurred within the context of the Kent State protests, the Court recognized the importance and symbolic meaning of the action.⁶⁹ Thus, the Court sanctioned the act as a protected form of speech.⁷⁰

O’Brien and *Spence* demonstrate the Court’s willingness to protect speech when it believes pure speech is being regulated. On the other hand, these cases also demonstrate the unwillingness to protect acts the Court considers to be merely conduct. The difference in the cases

⁶⁰ *Id.* at 383.

⁶¹ *Tex. v. Johnson*, 491 U.S. 397, 403–08 (1989); *Spence v. Wash.*, 418 U.S. 405, 409 (1974); *Roulette v. City of Seattle*, 97 F.3d 300, 303 n. 6 (9th Cir. 1996).

⁶² 418 U.S. 405.

⁶³ *Id.*

⁶⁴ *Id.* at 408.

⁶⁵ *Id.*

⁶⁶ *Id.* at 406-07. The language of the statute was:

No person, shall in any manner, for exhibition or display: (1) Place or cause to be placed any word figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such work, figure, mark, picture, design, drawing or advertisement. . . .

Wash. Rev. Code Ann. § 9.86.020 (West 2003) This statute was recently amended slightly. Wash. Rev. Code Ann. § 9.86.0202 (West Supp. 2005).

⁶⁷ *Spence*, 418 U.S. at 410-11.

⁶⁸ *Id.* at 411.

⁶⁹ *Id.* at 414-15.

⁷⁰ *Id.* at 415.

rests on the conduct regulated. While burning a draft card could be considered symbolic speech, it is not as apparent as taping a peace symbol onto the American flag. The following section will discuss additional cases involving speech and conduct using examples of flag desecration, sitting on sidewalks, hate crimes, and hunter harassment.

D. Examples of Speech Versus Conduct

1. Flag Desecration

In *Texas v. Johnson*,⁷¹ the court convicted a man of desecrating the American flag after the man burned a flag in a protest at the Republican National Convention.⁷² The Court's analysis relied on *Spence* to determine whether the defendant's burning of the flag was communicative and examined *O'Brien* to determine whether the statute related to the suppression of free expression.⁷³ The defendant's burning of the flag was found to be communicative, as he was expressing "dis-satisfaction with the policies of this country, expression situated at the core of our First Amendment values."⁷⁴

Further, the Court pointed out that the statute distinguished between people who burned the flag because of ideas like the defendant's and people who burn flags to dispose of them.⁷⁵ People who burn flags to dispose of them were not subject to the flag desecration legislation. Thus, Johnson's political expression was restricted due to the content of his message.⁷⁶ As a result, the Court must "subject the State's asserted interest [national unity] in preserving the special symbolic character of the flag to 'the most exacting scrutiny.'"⁷⁷ The Court found that Texas' interest in preventing flag burning did not withstand constitutional scrutiny: "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 itself offensive or disagreeable."⁷⁸

2. The Act of Sitting

In *Roulette v. City of Seattle*,⁷⁹ the United States Court of Appeals for the Ninth Circuit considered the validity of Seattle's ordinance prohibiting sitting or lying on sidewalks in commercial areas.⁸⁰ The

⁷¹ 491 U.S. 397 (1989).

⁷² *Id.* at 397.

⁷³ 491 U.S. at 397-98.

⁷⁴ *Id.* at 411.

⁷⁵ *Id.*

⁷⁶ *Id.* at 412.

⁷⁷ *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

⁷⁸ *Id.* at 414.

⁷⁹ 97 F.3d 300 (9th Cir. 1996).

⁸⁰ *Id.* at 302.

court relied heavily on the language of *Broadrick v. Oklahoma*⁸¹ and held that while the act of sitting can at times be expressive, legislation based primarily on conduct will not be deemed unconstitutional.⁸² The court in *Roulette* referred to the lesson from *Broadrick*, stating, “[A] facial freedom of speech attack must fail unless, at a minimum, the challenged statute ‘is directed narrowly and specifically at expression or conduct commonly associated with expression.’”⁸³ Interestingly, the court’s dicta made reference to other activities that would not be protected by the First Amendment, including a person who might “spike trees in a logging forest to demonstrate stricter environmental laws . . . or bomb military research centers in a call for peace.”⁸⁴ In addition, the court went on to say that such acts provide no basis upon which to use freedom of speech arguments against laws such as vandalism or destruction of property.⁸⁵

3. *Hate Crimes*

The U.S. Supreme Court has considered a similar question regarding political motivation of traditional crimes in the context of hate crime legislation.⁸⁶ Hate crime legislation generally seeks to prohibit acts motivated by particular characteristics of the victim.⁸⁷ Wisconsin, for example, enacted legislation that enhanced the penalties for traditional crimes committed on the basis of racial discrimination.⁸⁸ In *Wisconsin v. Mitchell*, the Court found that enhancing penalties on the basis of racial motivation was constitutional.⁸⁹ The Court based its decision, in part, on a distinction between the conduct and the expressive intent that went along with the conduct, and noted that “a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.”⁹⁰ In addition, the Court quoted *Roberts v. United States Jaycees*:⁹¹ “[Violence] or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.”⁹²

⁸¹ 413 U.S. 601 (1973). Oklahoma state employees brought a suit seeking a declaration that a state statute regulating political activity by state employees was invalid. *Id.* at 602. The Supreme Court held that the statute was “not unconstitutional on its face.” *Id.* at 618. The court also held that the statute was not substantially overbroad. *Id.*

⁸² *Roulette*, 97 F.3d at 303–04.

⁸³ *Id.* at 305 (quoting *City of Lakewood v. Plain Dealer Publg. Co.*, 486 U.S. 750, 760 (1988)).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Wis. v. Mitchell*, 508 U.S. 476, 482 (1993).

⁸⁷ *Id.* at 482.

⁸⁸ Wis. Stat. Ann. § 939.645(1)(b) (West 1996).

⁸⁹ *Mitchell*, 508 U.S. at 483.

⁹⁰ *Id.* at 484.

⁹¹ 468 U.S. 609, 628 (1984).

⁹² *Id.*

In an earlier Supreme Court case, *R.A.V. v. City of St. Paul*,⁹³ the Court also considered hate crime legislation. The legislation in *R.A.V.* concerned an ordinance prohibiting bias-motivated disorderly conduct rather than penalty enhancement.⁹⁴ In that case the petitioner had burned a cross in an African-American's yard.⁹⁵ St. Paul prosecuted the petitioner under the city's hate crime legislation.⁹⁶

The Court found the legislation to be unconstitutional because the ordinance was content-based.⁹⁷ Using the flag burning example, the Court states the difference between content-based and content-neutral legislation: "[N]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not."⁹⁸ The Court held that St. Paul's ordinance was unconstitutional because the statute looked towards the ideas that formed the motivation for burning a cross in someone's yard, not the action of burning a cross.⁹⁹ While the Court noted its disgust with the defendant's action, it pointed out that the city had other means to address the situation rather than regulating someone's viewpoint.¹⁰⁰ For example, the city already had arson and trespass ordinances that the city could use to prosecute the offenders, because the statutes look at the criminality of the act itself.¹⁰¹

4. Hunter Harassment

Hunter harassment legislation is typically aimed at preventing conduct or speech that interferes with a hunter's ability to kill wildlife.¹⁰² No case involving hunter harassment has reached the U.S. Supreme Court and state supreme courts have split on the issue. This section will discuss hunter harassment cases from the perspective of New Jersey and Idaho courts.

New Jersey's Superior Court held that the state law regarding hunter harassment was constitutional.¹⁰³ In *Binkowski v. State*,¹⁰⁴ the

⁹³ 505 U.S. 377 (1992).

⁹⁴ *Id.* at 380.

⁹⁵ *Id.* at 379.

⁹⁶ *Id.* at 380 (citing St. Paul Bias-Motivated Crime Ordin. Minn. Stat. § 292.02 (1990)).

⁹⁷ *R.A.V.*, 505 U.S. at 390.

⁹⁸ *Id.* at 385.

⁹⁹ *Id.* at 396.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 379.

¹⁰² See Katherine Hessler, *Where Do We Draw the Line between Harassment and Free Speech? An Analysis of Hunter Harassment Law*, 3 *Animal L.* 129 (1997) (providing discussion of the constitutionality of hunter harassment laws); Jacqueline Tresl, *Shoot First, Talk Later: Blowing Holes in Freedom of Speech*, 8 *Animal L.* 177 (2002) (discussing the constitutionality of hunter harassment laws in regard to freedom of speech).

¹⁰³ N.J. Stat. Ann. §§ 23:7(a)(1)-(a)(3) (2004).

¹⁰⁴ 731 A.2d 64 (N.J. Super. App. Div. 1999).

court considered legislation that prohibited “hindering or preventing the lawful taking of wildlife.”¹⁰⁵ The plaintiff-appellants argued that the statute was unconstitutional because it prohibited a particular point of view, the anti-hunting point of view.¹⁰⁶ The court was not persuaded because it found that the legislation regulated conduct and not a message. The court explained, “By its terms, the statute plainly regulates conduct. Further, the regulated conduct is not sufficiently expressive to constitute speech.”¹⁰⁷ Thus, the court found that the statute had nothing to do with the message being regulated, but instead was based only on the conduct prohibited. As a result, the legislation survived a facial constitutional challenge.

The Supreme Court of Idaho also considered hunter harassment legislation in *State v. Casey*.¹⁰⁸ The defendant-appellants were similarly unsuccessful on the facial challenge to the legislation as impermissibly content-based.¹⁰⁹ Again, the court based its decision on the fact that the statute on its face only regulated conduct.¹¹⁰ The appellants, however, were successful on an overbreadth challenge, and the Idaho court found the legislation unconstitutional.¹¹¹ The overbreadth ruling in this case is further discussed in the section that follows.

E. Overbreadth

A statute is unconstitutionally vague if it regulates too much speech.¹¹² That is, if a statute regulates so much speech that constitutionally protected speech is also regulated, then the statute is unconstitutionally overbroad.¹¹³ The *Casey* court stated, “The overbreadth doctrine recognizes that a statute which has the effect or the potential effect of chilling or inhibiting speech protected by the First Amendment is unconstitutional.”¹¹⁴

The Idaho hunter harassment statute “reaches a substantial amount of constitutionally protected conduct. Its prohibition against someone entering or remaining on property with the ‘intent to interfere’ includes protected speech in its proscriptions.”¹¹⁵ The court found the statute so broad that it would necessarily regulate conduct protected by the First Amendment. Through providing one example of a person who could be prosecuted under the statute, the court explained that “someone might enter an area where wildlife could be legally hunted and do nothing more than announce his intention to interfere

¹⁰⁵ *Id.* at 67.

¹⁰⁶ *Id.* at 69.

¹⁰⁷ *Id.*

¹⁰⁸ 876 P.2d 138 (Idaho 1994) (considering Idaho Code § 36-1510(1)(c) (1987)).

¹⁰⁹ *Casey*, 876 P.2d at 139–40.

¹¹⁰ *Id.* at 140.

¹¹¹ *Id.* at 141.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Casey*, 876 P.2d at 140.

with such taking.”¹¹⁶ Thus, the Idaho court found the legislation to be overbroad.¹¹⁷

F. Vagueness

Perhaps the most effective constitutional tool against overly restrictive legislation is the vagueness doctrine. A law is unconstitutionally vague if one is unable to tell what conduct is or is not regulated under the statute.¹¹⁸ The power of the doctrine rests in the fact that vagueness invalidates an entire statute rather than allowing just a section of the statute to be stricken.¹¹⁹ Further, vagueness invalidates a statute even when the conduct or speech regulated is not protected by the Constitution.¹²⁰ That being said, the courts pay particular attention to legislation that involves expression, out of concern for chilling protected activities.¹²¹

*Coates v. City of Cincinnati*¹²² involved an ordinance that regulates conduct on a sidewalk.¹²³ The law states that it is illegal for “three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by”¹²⁴ The city convicted a student of violating the ordinance while involved in a demonstration.¹²⁵ On appeal, the Supreme Court found the ordinance to be overly vague because it is impossible for a person to know what annoys another person and, therefore, one cannot be put on notice as to whether her conduct is illegal or not.¹²⁶ Thus, a statute must be precise enough to be able to put citizens on notice as to what is considered illegal conduct. A statute cannot be left so vague that it leaves the decision entirely to the discretion of law enforcement to decide whether or not one’s conduct is illegal.¹²⁷

This section has laid out what the government may regulate as protected speech, as well as how the government may go about regulating speech under the Constitution. The following section will apply these principles to three arguments against the constitutionality of AETA: 1) AETA is an unconstitutional measure because of its infringement on First Amendment activities; 2) the AETA is unconstitutional because it is overbroad; and 3) AETA is unconstitutional because it is impermissibly vague.

¹¹⁶ *Id.* at 140-41.

¹¹⁷ *Id.*

¹¹⁸ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

¹¹⁹ *NAACP v. Button*, 371 U.S. 415, 466 (1963).

¹²⁰ *Id.*

¹²¹ *Id.* at 433.

¹²² 402 U.S. 611 (1971).

¹²³ *Id.* at 611.

¹²⁴ *Id.* at n. 1 (citing the Code of Ordinances of the City of Cincinnati (Ohio) § 901(l)(6) (1956)).

¹²⁵ *Coates*, 402 U.S. at 621.

¹²⁶ *Id.* at 614.

¹²⁷ *Id.*

IV. ANALYSIS OF CASES AND EXAMPLES

A. *Political Message*

The AETA seeks to limit the activities of people with a certain point of view or with a particular political message, particularly animal advocacy groups, and most notably ALF and ALF-type activities.¹²⁸ The AETA does not, however, regulate pure speech. The drafters carefully drafted the model statute to avoid a successful constitutional challenge by excluding acts that involve verbal or other explicitly communicative activity. Despite the drafter's precautions, the AETA would not, and should not, survive a constitutional challenge.

The first problem with the AETA is the use of the term "politically motivated."¹²⁹ The model statute uses "politically motivated" as the *mens rea* for committing a crime under the model legislation.¹³⁰ Using the third element of the *O'Brien* test, the language fails to pass constitutional analysis, because under this test, regulation is only sound as long as it is not related to suppressing freedom of expression.¹³¹ The intent element of the crime in the AETA is founded upon political motivation, such as protesting the actions of a unit of government—one of the most fundamentally protected activities under the First Amendment of the Constitution. Thus, the term "politically motivated" must be struck from the legislation.¹³²

Further, the AETA seeks to differentiate identical acts solely on the basis of the actor's political purpose.¹³³ For instance, a person who breaks into a research facility to release animals because that person is morally opposed to testing on animals will be treated as a terrorist under the Act.¹³⁴ If a person breaks into a research facility to release animals for fun, she will not be treated as a terrorist.¹³⁵ The person in the latter situation will simply be prosecuted under existing criminal laws such as trespass, breaking and entering, and criminal mischief. The discrepancy between the two examples shows how the AETA seeks to bar the animal activist's point of view.

On the other hand, the cases summarized in Section III illustrate the difficulty in making the above argument. If the Act focused on con-

¹²⁸ Am. Legis. Exch. Council, *supra* n. 1 and accompanying text (describing ALEC and its purpose).

¹²⁹ The definition of politically motivated "means any activity where the principle [sic] purpose is to influence a unit of government to take specific action or to persuade the public to take specific action, or to protest the actions of a unit of government, corporation, organization or the public at large." *Infra* app. § 2(N).

¹³⁰ *Id.* (stating that "any individual whose intent to commit the activity was politically motivated is prohibited from" activities listed in the AETA).

¹³¹ *O'Brien*, 391 U.S. at 377.

¹³² *Infra* app. at § 2(N).

¹³³ *Id.* at § 3.

¹³⁴ *Id.*

¹³⁵ *Id.*

duct rather than on a message, it would likely survive constitutional scrutiny even though a particular message may be regulated.¹³⁶ In *Johnson*, however, the Court ruled that the flag desecration statute was unconstitutional because the statute was limiting the defendant's political expression.¹³⁷ Although the court convicted Johnson for an act that was closer to an expressive activity, the basis of the Supreme Court's ruling was that the statute restricted a particular point of view.¹³⁸

The case examples above illustrate the difficulty of making the argument that an act restricts a particular message. The argument, however, is still one worth making, especially because of the "politically motivated" language in the AETA.¹³⁹ Additional support comes from the *Roulette* case, where the Court found that legislation based primarily on conduct will not be deemed unconstitutional.¹⁴⁰ It seems clear that the AETA primarily seeks to limit a particular viewpoint rather than just conduct. Without the "politically motivated" language, the statute has a much greater probability of withstanding constitutional scrutiny. This proposition begs the question: What does the legislation regulate that is not already regulated?

The AETA, absent regulating politically motivated individuals, simply regulates acts that are already illegal.¹⁴¹ Any crime within the legislation is already covered under existing criminal statutes such as trespass, theft, vandalism, criminal mischief, arson, and breaking and entering. The Act is seemingly without purpose unless it is able to regulate political acts. Hate crime cases provide a good analogy.

In *R.A.V.*, the Court found that while the city could clearly punish the defendants under existing criminal laws such as arson for burning a cross in the victim's yard, regulating such conduct under the city's hate crime statute was unconstitutional.¹⁴² The statute was found unconstitutional because it focused not on the conduct that occurred, but on the ideas expressed by the conduct.¹⁴³ The Court's message is that legislation is constitutional if it looks at the criminality of the act itself. The AETA, by seeking to limit a point of view, is unconstitutional because the legislation restricts freedom of expression without regard to the pre-existing criminality of the regulated acts.

Hunter harassment cases may eventually provide clearer guidance on the issue. If the lower courts are any indication of how the Supreme Court will rule, the political message argument may be dealt a serious blow. The lower courts in *Binkowski* and *Casey* both determined that hunter harassment statutes are constitutional as applied

¹³⁶ *O'Brien*, 391 U.S. at 383–86.

¹³⁷ *Johnson*, 491 U.S. at 412.

¹³⁸ *Id.* at 435.

¹³⁹ *Infra* app. §§ 2–3.

¹⁴⁰ *Roulette*, 97 F.3d at 312.

¹⁴¹ *Infra* app. § 2.

¹⁴² *R.A.V.*, 505 U.S. at 378.

¹⁴³ *Id.*

to expressive activity.¹⁴⁴ These courts stated that the hunter harassment schemes do not regulate speech, only conduct. For example, the statute in *Binkowski* prohibited anyone from interfering with lawful hunting.¹⁴⁵ Thus, the statutes had nothing to do with whether or not a person prevented someone from hunting by yelling, but rather, they focused on the hunter's ability to kill an animal.

This is not the case in the AETA. The AETA does not regulate everyone that vandalizes an animal research facility. It only regulates those people who spray paint "Animal Liberation" for example. Thus the AETA *is* regulating the message, not merely conduct, by focusing on persons whose motivation is animal advocacy. The AETA's entire focus is on persons who act on behalf of animal interests. If a person is not in some way classified as an animal advocate, she will only be punished under traditional criminal laws.

B. Overbreadth

Overbreadth is another tool available to a lawyer seeking to challenge constitutionality as demonstrated in *Casey*.¹⁴⁶ One can argue overbreadth when activities that are constitutionally protected might be restricted by the legislation in question. The purpose of striking down an overbroad act is to prevent the government from chilling First Amendment activity.¹⁴⁷ The *Casey* court found the hunter harassment statute to be unconstitutionally broad because it prohibited protected speech by proscribing any intent to interfere with hunting.¹⁴⁸ The court found that the statute regulated more conduct than necessary and thus encapsulated free speech.¹⁴⁹

The AETA may also be overly broad. For example, the model statute prohibits "participating in or supporting animal or ecological terrorism" including encouraging, promoting, or aiding an act of so defined terrorism.¹⁵⁰ The wording is unclear, with one major weakness being the term "encourage." For example, if someone says that they support animals being liberated from factory farms or animal research facilities, they may be found to be in violation of the statute. Therefore, the AETA regulates First Amendment expressive activity by proscribing a person's speech supporting a political cause.

Additionally, the language of the AETA prohibits one from publicizing an act of animal terrorism.¹⁵¹ So, if People for the Ethical Treatment of Animals (PETA), any other animal advocacy organization, or a news agency receives an anonymous videotape with footage of a beagle being beaten by a research scientist because the puppy will

¹⁴⁴ *Casey*, 876 P.2d at 140; *Binkowski*, 731 A.2d at 68.

¹⁴⁵ *Binkowski*, 731 A.2d at 68.

¹⁴⁶ *Casey*, 876 P.2d 138.

¹⁴⁷ *Id.* at 140.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 141.

¹⁵⁰ *Infra* app. § 3(A)(3).

¹⁵¹ *Id.*

not obey the scientist's demands, that organization may be prosecuted under the Act. Again, this is a clear violation of the First Amendment. The legislation's language is overbroad and therefore unconstitutional.

C. Vagueness

Along similar grounds, the AETA is unconstitutionally vague. A statute is unconstitutionally vague if an individual is unable to tell from the language of the statute what conduct is prohibited.¹⁵² Statutes must give notice of what is prohibited to prevent law enforcement from enforcing laws at their complete discretion.¹⁵³ Further, if a person does not know what conduct is illegal, the person cannot avoid engaging in that conduct.¹⁵⁴ Like the overbreadth doctrine, the vagueness doctrine is similarly powerful in that if a statute is found to be unconstitutionally vague, the entire statute is void.¹⁵⁵

The *Coates* case provides an example of a statute that is ambiguous about what types of conduct are illegal, and thus it can be subjectively enforced and is consequently unconstitutionally vague.¹⁵⁶ The wording of the statute makes it impossible for a person to know exactly what actions may annoy another individual, therefore the statute was void for vagueness.¹⁵⁷ Prohibited acts under the AETA are similarly ambiguous.

For instance, the "politically motivated" language is ambiguous because it is unclear what this language actually prohibits.¹⁵⁸ A person might guess that the purpose of the statute is to regulate only ALF-type activities. Many people involved in the animal advocacy movement may be politically motivated to enter an animal research facility with intent to take pictures to show the public what is occurring inside in order to create political change. However, those people, who just take pictures to distribute them to the public, are most likely not involved in the ALF-type activities that the Act is designed to prevent. Nevertheless, those who do engage in this type of activity may, or may not be, prosecuted under the Act as a terrorist, leaving animal advocates with no real idea of what the line is between legal and illegal activity.

In addition, the Act prohibits one from remaining concealed in an animal or research facility, damaging or destroying property on the premises, and entering with an intent to defame the facility or its owner, among other acts.¹⁵⁹ Even taking "defame" as a legal term of art, assuming it is an illegal act, the "remaining concealed" portion is not clear enough to effectively put one on notice as to what conduct is

¹⁵² *Coates*, 402 U.S. at 614.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Coates*, 402 U.S. at 614.

¹⁵⁹ *Infra* app. § 3(A)(2).

illegal under the statute.¹⁶⁰ For instance, animal advocates or investigators will seek employment in animal facilities to see whether the facilities violate animal welfare regulations without telling the employer their background or motivation. First, it is unclear if this is considered concealment under the AETA. For instance, a broad interpretation may be that a person is considered concealed under the statute if a facility owner does not know the person's thoughts, purposes, or beliefs. Second, in the course of his employment the employee may break equipment needed for operating the facility, in which case it would be unclear whether the action could lead to prosecution as a terrorist act requiring an investigation into the person's intent.

Finally, the Act prohibits supporting animal terrorism by "raising, soliciting, collecting, or providing any person with material, financial support or other resources . . . or aid[ing] an act" of animal terrorism.¹⁶¹ This proposed statutory language is entirely unclear. Conceivably, this could lead to the prosecution of an animal law attorney as a terrorist for the act of providing pro bono legal assistance to an ALF member who has been charged with a crime. For example, Utah State Representative Paul Ray claimed that PETA's contribution of legal fees to animal rights activist Rodney Coronado was a "form of harboring a terrorist."¹⁶²

V. CONSTITUTIONAL LAW AND THE FREEDOM OF RELIGION

The First Amendment of the Constitution not only protects free speech but also the freedom of religion. While the AETA does not seek to regulate religion, an important case to include in an analysis of the constitutionality of the act is *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹⁶³

The case involved city ordinances forbidding the slaughter of animals for religious purposes.¹⁶⁴ The city drafted the ordinances as anti-animal cruelty statutes that appeared neutral on their face.¹⁶⁵ The Court, however, found that several of the ordinances were unconstitutional because the purpose of the statute was to target practitioners of the Santeria religion who engaged in ritual animal slaughter.¹⁶⁶

In determining the purpose of the law, the Court looked at

the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at § 3(A)(3).

¹⁶² U.S. Sportsmen's Alliance, *Utah Representative Links PETA to Terrorism*, <http://www.wlfa.org/interactive/features/read-print.cfm?id=769> (accessed Mar. 13, 2005).

¹⁶³ 508 U.S. 520 (1993).

¹⁶⁴ *City of Hialeah, Fla.*, Ordin. 87-40 (June 9, 1987); *City of Hialeah, Fla.*, Ordin. 87-90 (June 1987); *City of Hialeah, Fla.*, Ordin. 87-71 (Sept. 1987); *City of Hialeah, Fla.*, Ordin. 87-52 (Sept. 1987); *City of Hialeah, Fla.*, Ordin. 87-72 (Sept. 1987).

¹⁶⁵ *Id.*

¹⁶⁶ *Church of Lukumi*, 508 U.S. at 521.

legislative or administrative history, including contemporaneous statements made by members of the decision making body.¹⁶⁷

Thus, for one to determine the constitutionality of a statute, a person must take into account not only the plain language of the statute, but also the statute's overall purpose.

Examining the overall purpose within a statutory analysis is an important lesson for animal advocates to take into consideration while formulating arguments against the constitutionality of the AETA. For instance, as discussed previously, the AETA's purpose of disrupting politically motivated activity is unconstitutional. However, if the drafters of the statute revise the model legislation to remove the "politically motivated" language in order to make the bill look more facially neutral, animal advocates can still turn to evidence of the overall purpose of the legislation, as was done in *Church of Lukumi*,¹⁶⁸ and argue that the AETA's purpose remains limiting politically protected activity, which is unconstitutional.

The *Lukumi* case is one that protects the freedom of religion rather than the freedom of speech. However, both of these First Amendment rights receive a similarly high level of protection.¹⁶⁹ The Court concluded in *Lukumi*: "Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."¹⁷⁰ This same reasoning and language could be used in an argument to protect freedom of speech. The result is that legislators are not permitted to disguise attacks on our political freedoms with seemingly neutral language.

VI. STATE ANIMAL AND ECOLOGICAL TERRORISM LEGISLATION

At the time of this writing several states have begun processing pieces, or the entirety, of the AETA. An increasing number of state legislatures are introducing AETA-type bills into their legislatures.¹⁷¹ Some states have enacted AETA-type bills into law,¹⁷² others have come as close as sending the bill to the State's Governor only to have it

¹⁶⁷ *Id.* at 540.

¹⁶⁸ *Id.*

¹⁶⁹ Any legislation must promote a substantial or compelling government interest, and the means by which the government achieves its goal must be narrowly tailored. *Id.* at 521 (regarding religion); *O'Brien*, 391 U.S. at 376-77 (regarding expressive speech).

¹⁷⁰ *Church of Lukumi*, 508 U.S. at 547.

¹⁷¹ See *infra* nn. 176-96 and accompanying text (providing information on some of those bills).

¹⁷² See e.g. Ohio Rev. Code Ann. § 901.511 (West Supp. 2004) (prohibiting certain acts that relate to agricultural products or equipment); Okla. Stat. Ann. tit. 2 §§ 5-103 to 5-106 (West Supp. 2005) (prohibiting certain acts that relate to animals and animal facilities or crops and related facilities).

vetoed,¹⁷³ or have gone no further than allowing the bill to sit in committee.¹⁷⁴ This section is intended to highlight examples of how states are interacting with the proposed legislation.

Ohio and Oklahoma have enacted forms of the AETA-inspired legislation into law.¹⁷⁵ The Ohio Statute presents a watered-down version of the AETA meant to protect the agricultural industry.¹⁷⁶ The statute prohibits offenses against agricultural products and equipment (which likely includes setting animals free) in addition to prohibiting “material support” for those who commit such acts.¹⁷⁷ Although most of the language from the model AETA is gone, the law is clearly in the spirit of the AETA in deterring direct action against businesses.¹⁷⁸ Also of interest in Ohio’s law is a section that allows the court to order restitution to the victim of up to three times the actual value of any property damage.¹⁷⁹

Oklahoma was also successful in passing AETA-like legislation.¹⁸⁰ Oklahoma’s law more closely represents the model AETA language.¹⁸¹ The statute is designed to prevent offenses against animals used in agriculture and research.¹⁸² The legislation makes it a felony to free animals from, damage property at, or exercise control over research and farm facilities with the intent to disrupt or cause damage.¹⁸³

Arizona came very close to passing legislation that followed the USSA and ALEC model statute nearly verbatim, even including the terrorist website registry.¹⁸⁴ The legislation was passed by both the Arizona House and Senate and was sent to the Governor for approval.¹⁸⁵ However, Governor Janet Napolitano vetoed the bill and in a letter to the President of the Arizona State Senate, Ken Bennett, she noted that the bill was “unnecessary, and susceptible to a host of unintended and negative consequences.”¹⁸⁶ The Governor also remarked that Arizona’s criminal code is already sufficient to deal with issues

¹⁷³ This was the case in Arizona, where Governor Janet Napolitano vetoed the bill. *Ariz. Gov. Mess.*, 46th Leg., 2d Reg. Sess. (May 12, 2004).

¹⁷⁴ See *infra* nn. 190-93 and accompanying text (referring to AETA-inspired legislation that has not gone further than committee).

¹⁷⁵ See *e.g.* Ohio Rev. Code Ann. § 901.511 (2004); Okla. Stat. Ann. tit. 2 §§ 5-103 to 5-106 (2003) (both state’s statutes prohibit certain acts related to agricultural products or animal facilities).

¹⁷⁶ *Id.*

¹⁷⁷ Ohio Rev. Code Ann. § 901.511.

¹⁷⁸ Similar to the AETA’s spirit of deterring animal advocates from taking direct action against businesses that use animals for agriculture, research, and the like, the spirit of these laws is to deter animal advocates from taking direct action against businesses that use animals for agriculture.

¹⁷⁹ Ohio Rev. Code Ann. § 901.511(D)(1).

¹⁸⁰ Okla. Stat. Ann. tit. 2 §§ 5-103 to 5-106.

¹⁸¹ See *infra* app. (for comparison).

¹⁸² Okla. Stat. Ann. tit. 2 §§ 5-103 to 5-106.

¹⁸³ *Id.*

¹⁸⁴ *Ariz. Sen.* 6114, 46th Leg., 2d Reg. Sess. (Jan. 14, 2004).

¹⁸⁵ *Ariz. Gov. Mess.*, 46th Leg., 2d Reg. Sess. (May 12, 2004).

¹⁸⁶ *Id.*

addressed by the legislation.¹⁸⁷ Furthermore, quoting the Attorney General, Governor Napolitano added that the provisions included in the bill are “so broad that they will . . . unnecessarily threaten protected speech.”¹⁸⁸ The Arizona bill did not include the “politically motivated” language, but nevertheless was rightfully vetoed for its unconstitutional implications.

Many other states have considered forms of the model AETA legislation but the legislation has not had the same success as in the states previously mentioned. For example, state legislatures used model AETA-type legislation in Washington,¹⁸⁹ Texas,¹⁹⁰ Missouri,¹⁹¹ and Hawaii,¹⁹² but all died in committee. Other states such as New York¹⁹³ and South Carolina¹⁹⁴ have referred the legislation to committee and are still considering the drafted legislation at the time of this writing. Many other states may be working on this legislation as well.¹⁹⁵

VII. CONCLUSION

At this time, the USSA and ALEC are distributing drafts of the AETA to state legislators across the nation. Propaganda attached to the AETA is meant to sway us and our Members of Congress into believing that animal advocates are deadly and dangerous terrorists. However, the reality is that animal advocates, even those who participate in direct and illegal actions, are much different than terrorists who seek to harm Americans. The fundamental purpose of animal advocates' actions is to create a sense of compassion and understanding for animals and to expose the animals' suffering, thus encouraging change. The legislation proposed by the USSA and ALEC is not narrowly tailored, nor drafted for the purpose of preventing living beings from being harmed. Instead, the legislation is a means used by entities that depend on the exploitation of animals in order to make a profit. In

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Wash. Sen. 6114, 58th Leg., Reg. Sess. (Jan. 12, 2004).

¹⁹⁰ Tex. H. 433, 78th Leg., Reg. Sess. (Jan. 16, 2003); Tex. H. 1516, 78th Leg., Reg. Sess. (Mar. 3, 2003).

¹⁹¹ Mo. Sen. 882, 92d Gen. Assembly, 2d Reg. Sess. (Jan. 7, 2004); Mo. H. 1176, 92d Gen. Assembly, 2d Reg. Sess. (Jan. 21, 2004); Mo. Sen. 1376, 92d Gen. Assembly, 2d Reg. Sess. (Mar. 1, 2004).

¹⁹² Haw. H. 2550, 22d Leg., Reg. Sess. (Jan. 27, 2004).

¹⁹³ N.Y. Assembly 4884, Reg. Sess. (Feb. 20, 2003); N.Y. Sen. 2996, Reg. Sess. (Mar. 13, 2003).

¹⁹⁴ S.C. H. 4439, 115th Sess. (Jan. 13, 2004).

¹⁹⁵ Other states mentioned include Illinois, Oregon, Pennsylvania, Wisconsin, Mississippi, New York, Texas, Washington, and Utah. See *Terrorists or Freedom Fighters?* 317 (Steven Best et al. eds., Lantern Books, 2004) (regarding Illinois, Oregon, Pennsylvania); U.S. Sportsmen's Alliance, *supra* n. 5, at <http://www.wlfa.org/interactive/features/Read.cfm?ID=968> (regarding Wisconsin, Mississippi, New York, Texas, Washington); U.S. Sportsmen's Alliance, *supra* n. 163, at <http://www.wlfa.org/interactive/features/read-print.cfm?id=769> (regarding Utah).

doing so, the proposed legislation tramples upon the fundamental freedoms guaranteed by the U.S. Constitution.

This paper is meant to serve as a tool to formulate arguments against unconstitutional legislation. It is not meant to suggest that acts such as vandalism, destruction of property, theft, or arson are beyond the scope of the government's regulation and interest.¹⁹⁶ Governments have a legitimate and rational basis for regulating such activity in order to protect their citizens. Regulations and prohibitions, however, should be entirely based on the offender's conduct rather than the actor's politics or moral beliefs. Legislation that ventures outside these bounds places the government in a position to violate our most fundamental freedoms and the founding principles embodied in our Constitution.

¹⁹⁶ Furthermore, although the paper focuses on the ALF guidelines that restrict actions meant to harm humans and non-humans alike, it should be noted that there are other, more extreme thoughts in the animal advocacy movement that advocate the use of violence. See Craig Rosebraugh, *The Logic of Political Violence: Lessons in Reform and Revolution* (Arisa Media Group 2004) (advocating the use of any means necessary to attain revolution in the U.S.). Again, however, such acts already have proper governmental regulation in the form of traditional criminal laws, such as prohibitions against murder and assault. Although recent acts of terror have given rise to a desire to punish such acts more harshly because of the motivation behind them, it should be clear that acts of terror that seek to seriously injure and kill people are distinguishable from acts such as spray painting a billboard or releasing animals from a research lab. Elevating acts that are most commonly misdemeanors to the level of murder or rape is nonsensical. This is especially the case when the basis behind doing so rests solely on the actor's moral philosophy.

VIII. APPENDIX: MODEL TEXT OF THE ANIMAL AND
ECOLOGICAL TERRORISM ACT¹⁹⁷

Section 1. {Short Title} This act shall be known as the Animal Ecological Terrorism Act.

Section 2. {Definitions}

- A. "Animal" means any warm-blooded or cold-blooded animal lawfully confined for food, fur, or fiber production, agriculture and its related activities, research, testing, education or wildlife.¹⁹⁸
- B. "Animal activities" means any activity involving the use of animals or animal parts to include hunting, fishing, trapping, traveling, camping, production, preparation or processing food or food products, clothing or garment manufacturing, medical or other research, entertainment, recreation, agriculture, biotechnology or any other services involving the use of animals.¹⁹⁹
- C. "Animal facility" includes a vehicle, building, structure, research facility, nature preserve, or other premises where an animal is lawfully kept, handled, housed, exhibited, bred or offered for sale, to include a zoo, rodeo, circus, amusement park, hunting preserve, and horse and dog event.²⁰⁰
- D. "Animal or ecological terrorist organization" means any association, organization, entity, coalition or combination of two or more persons with the primary or incidental purpose of supporting any {optional language insert "politically motivated"} activity through intimidation, coercion, force or fear that is intended to obstruct, impede or deter any person from participating in a lawful animal activity, animal facility, research facility or the lawful activity of mining, foresting, harvesting, gathering or processing natural resources.
- E. "Consent" means agreement in fact, whether express or apparent. Absence of either verbal or nonverbal communication shall not be construed to fall under this definition.
- F. "Ecological" means the relationship between organisms and their environment.
- G. "Effective consent" means consent by the owner or by a person legally authorized to act for the owner. Absence of either verbal

¹⁹⁷ Am. Legis. Exch. Council, *supra* n. 1, at 21-24.

¹⁹⁸ Note the difference between the definitions of animal in most state animal cruelty legislation and the definition here. Cruelty legislation often exempts animals that are covered here, thus leaving such animals unprotected and hidden from public scrutiny. See Or. Rev. Stat. § 167.335 (2003) (exemptions from animal cruelty laws for common husbandry practices, poultry, animals used in rodeo, hunting, and fishing, and animals used in research); see also Rosebraugh, *supra* n. 193 (advocating the use of any means necessary to attain revolution in the U.S.).

¹⁹⁹ See *supra* n. 195 (this legislation does not include the typical exemptions found in cruelty legislation).

²⁰⁰ *Id.*

- or nonverbal communication shall not be construed to fall under this definition. Consent is not effective if it is:
- (1) induced by force or threat;
 - (2) given by a person whom the offender knows or reasonably should have known is not an agent for the owner; or
 - (3) given by a person who by reason of youth, mental disease, or defect, or being under the influence of drugs or alcohol, is known by the offender to be unable to make reasonable decisions.
- H. “Natural resource” means a material source of wealth, such as timber, fresh water or a mineral deposit, that occurs in a natural state and has economic value.
- I. “Notice” means:
- (1) oral or written communication by the owner or someone with apparent authority to act for the owner;
 - (2) fencing or other enclosure obviously designed to exclude intruders or to contain animals; or
 - (3) a sign or signs posted on the property or at the entrance to a building that are reasonably likely to come to the attention of intruders and that indicate entry is forbidden.
- J. “Owner” means a person who has:
- (1) title to the property; or
 - (2) lawful possession of the property.
- K. “Person” means an individual, governmental unit, corporation, association, nonprofit corporation, joint-stock company, firm, trust, partnership, limited liability company, two or more persons having a joint or common interest or some other legal entity.
- L. “Possession” means actual care, custody, control or management.
- M. “Research facility” means a place, laboratory, institution, medical care facility, government facility, elementary school, high school, college, university or nature preserve at which a scientific test, experiment or investigation involving the use of animals or other ecological organisms is lawfully carried out, conducted or attempted.
- N. {Optional language insert “Politically motivated” means any activity where the principal purpose is to influence a unit of government to take a specific action or to persuade the public to take specific action or to protest the actions of a unit of government, corporation, organization or the public at large.}

Section 3. {Prohibited Acts}

- A. An animal or ecological terrorist organization or any person acting on its behalf or at its request or for its benefit or any individual whose intent to commit the activity was {optional language insert “politically motivated”} is prohibited from:

1. Depriving the owner of an animal or natural resource from participating in an animal or natural resource by:
 - (a) obstructing the lawful use of an animal, natural resource or other property from the owner permanently or for such a period of time that a significant portion of the value or enjoyment of the animal, natural resource or property is lost to the owner by way of coercion, fear, intimidation, or property damage;
 - (b) taking or detaining the animal, natural resource or other property and agreeing to restore only upon reward or other compensation; or
 - (c) disposing of an animal, natural resource or other property or to so alter its condition or usefulness that the value of the animal, natural resource or other property is substantially reduced.
 2. Obstructing or impeding the use of an animal facility or the use of a natural resource without the effective consent of the owner by:
 - (a) damaging or destroying an animal or research facility, or other property in or on the premises;
 - (b) entering an animal or research facility that is at the time closed to the public;
 - (c) remaining concealed in an animal facility with the intent to commit an act prohibited by this chapter;
 - (d) entering an animal research facility and committing or attempting to commit acts prohibited by this chapter;
 - (e) entering an animal research facility to take pictures by photograph, video camera, or other means with the intent to commit criminal activities or defame the facility or its owner;
 - (f) entering or remaining on the premises of an animal or research facility if the person or organization:
 - (i) had notice that the entry was forbidden; or,
 - (ii) received notice to depart but failed to do so.
 3. Participating in or supporting animal or ecological terrorism to include raising, soliciting, collecting or providing any person with material, financial support or other resources such as lodging, training, safe houses, false documentation or identification, communications, equipment or transportation that will be used in whole or part, to encourage, plan, prepare, carry out, publicize, promote or aid an act of animal or ecological terrorism, the concealment of, or an escape from, an act of animal or ecological terrorism.
- B. The provisions of this chapter do not apply to activities of a:
1. Government agency or its employees who are carrying out their responsibilities under law or to lawful activities or a financial institution or other secured party; and

2. Humane animal treatment shelter or its employees whose primary purpose is the bona fide control or humane care of animals when acting within the scope of their employment.

Section 4. {Damages and Penalties}

- A. A person that violates the Animal and Ecological Terrorism Act and that results in \$500 or less in physical damage or destruction of property shall be guilty of a {enter appropriate high degree misdemeanor} and fined not more than {insert appropriate dollar amount} or be imprisoned in the county jail for a term not to exceed {insert appropriate time period}, or both.
- B. A person that violates the Animal and Ecological Terrorism Act and that results in more than \$500 in physical damage or destruction of property shall be guilty of a {enter appropriate law degree felony} and fined not more than {insert appropriate dollar amount} or be imprisoned in the state prison for a term not to exceed {insert appropriate time period}, or both.
- C. Any person convicted of or that pleads guilty to violating the Animal and Ecological Terrorism Act and such activity intentionally or negligently results in bodily harm to any individual, the penalty classification shall be elevated one (1) degree.
- D. A person who has been damaged by a violation of the Animal and Ecological Terrorism Act may bring against the person who has caused the damage an action in {enter name of appropriate court} court to recover:
an amount equal to three times all economic damages to include the cost of lost or damaged property, records, the cost of repeating an interrupted or invalidated experiment, loss of profits or other consequential damages; and court costs and reasonable attorney fees.

Section 5. {Terrorist Registry}

There is hereby created the registry of animal and ecological terrorists. A person who is convicted of or pleads guilty to an act that violates any section of the Animal and Ecological Terrorism Act shall be registered with the Attorney General on a form prescribed by the Attorney General. The registry shall contain the name, a current address, a recent photograph, and signature of the offender. The offender is required to provide written notice to the Attorney General regarding any change in name or residence address within thirty (30) days of making the change. The Attorney General shall create a website containing the information set forth in this paragraph for each person who is convicted or pleads guilty to a violation of the Act. Information regarding an offender shall remain on the website for no less than three (3) years at which time the registrant may apply to the Attorney General for removal after a hearing on the application for removal.