

ANIMAL LOVERS AND TREE HUGGERS ARE THE NEW COLD-BLOODED CRIMINALS?: EXAMINING THE FLAWS OF ECOTERRORISM BILLS

DARA LOVITZ*

INTRODUCTION

Sometime between the beginning of the world and the last decade of the twentieth century, animal lovers and tree huggers lost their societal statuses as peaceful, benevolent, left wing activists.¹ Subsequent to this loss of identity (that is, the identity which was given to them by others), they somehow became the target of a vicious campaign that baptized them as the country's most threatening and violent domestic terrorists.² Quite a transformation – from gentle pacifist to violent criminal in one single bound. Although the exact reason for this conversion in characterization is unknown, the political history surrounding the shift suggests that some acts of animal liberation, tree sit-ins, and other protests against facilities that exploit, abuse, and/or threaten animals or natural resources, began to threaten the financial integrity of some major corporations.³ Having bankrolled some political think tanks to lobby for their interests, these corporations were ultimately successful in securing legislation that would protect their dollars.⁴ Such legislation came in the form of “ecoterrorism bills.”

Part I of this article seeks to define the term “ecoterrorism” and explore the term’s origin in both popular and political lexicons. The part will explain how the term “ecoterrorism” was created and defined by those who felt threatened by the progress of animal rights and environmental activists, which in itself reveals the problematic nature of such a subjective label. Part I also explores the history of the concept of ecoterrorism. The part will examine how increased financial support from certain corporations helped lay a solid foundation for the introduction of ecoterrorism bills⁵ in the aftermath of the horrific events of September 11, 2001.⁶

Part II examines the general linguistic rubric of various states’ ecoterrorism bills. The linguistic terms that are highlighted will be the focus of the later discussion on what renders the bills unconstitutionally vague and overbroad. The remainder of the part highlights Pennsylvania’s HB 213, which includes a unique immunity section.

Part III of the article, offers a critique of attaching the suffix “terrorism” to the activities of so-called “ecoterrorists.” As per the exploration of the opposition to Pennsylvania’s ecoterrorism bill, opponents of ecoterrorism bills have voiced condemnations similar to those of

* The author would like to express sincere gratitude to Professor Rebecca Bratspies for her generosity in providing her time, guidance, and feedback. In addition, the author would like to thank Alex Bomstein, Andrea Pace, and Ryan McCarthy for their valuable research assistance. Dara Lovitz is an attorney with Schutjer Bogar LLC in Philadelphia.

¹ As Dr. Thomas Fuller said, “He that plants trees loves others beside himself.”

² United States Department of Justice, *Report to Congress on the Extent and Effects of Domestic and International Terrorism on Animal Enterprises*. Washington, DC, August 1993.

³ Steven Best, Ph.D., *Terrorists or Freedom Fighters? Reflections on the Liberation of Animals* (New York Lantern Books 2004), p.313.

⁴ *Id.*

⁵ *Id.*

⁶ S. Res. 165 § 1(b)(1)(A), (D), 107th Cong. (2001), LEXIS 2001 S. Res. 165.

the author, while some opponents even conceded a preference for the term “eco-intimidation.”⁷ Part III illuminates the sickening irony of the use of the term “terrorism” to describe acts of loving-kindness towards animals while many of those who support such usage are the ones who themselves engage in acts of animal mutilation including: tail docking, teeth cutting, debeaking, castration, confinement, scalding, mutilating, chemical poisoning, skinning, and dismembering.⁸

The majority of ecoterrorism bills infringe on activists’ First Amendment rights. Part IV examines the ways in which the overbroad and vague language of ecoterrorism bills places unacceptable limitations on speech activities that fall within the ambit of constitutionally protected speech. The part discusses how, by their very nature, ecoterrorism bills are nothing short of bonafide viewpoint discrimination. The article concludes this part with an assessment of the political nature of the passage of such unconstitutional bills.

I. SO-CALLED “ECOTERRORISM” EXPLAINED

A. SOME DEFINITIONS

As explained, *infra*, there is not one clear definition of “terrorism.” Terrorism generally has been considered the systematic threatening or intimidating of one individual or group to another, usually characterized by an act of destruction or violence.⁹ Terrorist acts are generally those that harm unarmed civilians who, except by way of their unfortunate location in the world, otherwise have little to do with the politics that inspire the acts.¹⁰

There are various definitions of “ecoterrorism” including “threats and acts of violence (both against people and against property), sabotage, vandalism, property damage and intimidation committed in the name of environmentalism” and “crimes committed against companies or government agencies and intended to prevent or to interfere with activities allegedly harmful to the environment.”¹¹ Relevant to the discussion of the government’s target of animal rights and environmental activists is the FBI’s Domestic Terrorism Section’s definition:

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, or aimed at an audience beyond the target, often of a symbolic nature.¹²

⁷ See Heidi Prescott’s testimony in opposition to Pennsylvania’s ecoterrorism bill, HB 213. (Richard Fellingner, Evening Sun, Harrisburg Bureau, Animal rights, research advocates spar over proposed eco-terror bill - Bill would allow some protesters to be labeled as 'eco-terrorists,' June 07, 2005).

⁸ *Terrorists or Freedom Fighters*, at p.93.

⁹ Combination of various definitions from Merriam-Webster, American Heritage Dictionary, Wordnet, etc.

¹⁰ See Barr and McBride, *Military Justice for al Queda*, Wash. Post, Outlook Section, Nov. 18, 2001 (defining terrorism as "unprovoked surprise attacks out of uniform with the clear intent to target unarmed civilians"); Professor Caleb Carr, *Wrong Definition of War*, WASH. POST, July 28, 2004, at A19. "Certainly terrorism must include the deliberate victimization of civilians for political purposes as a principal feature--anything else would be a logical absurdity."

¹¹ The first definition comes from <http://en.wikipedia.org/wiki/Ecoterrorism>. The second definition is from the Encyclopaedia Britannica.

¹² <http://www.fbi.gov/congress/congress04/lewis051804.htm>

Most of the traditional definitions apparently do not include acts by animal rights activists although the Animal and Ecological Terrorism Act, a bill proposed by the American Legislative Exchange Council (ALEC) in Texas, begins with a summary which explains that the act is designed to penalize persons who are found to encourage, finance, assist, or engage in politically motivated acts of animal or ecological terrorism.¹³ In its forward, this particular bill delineates numerous acts that it has labeled as ecoterrorism such as arsons set at the University of Washington Center for Urban Horticulture by the Environmental Liberation Front and the release of 10,000 minks from a farm near Sultan, Washington by the Animal Liberation Front.¹⁴

Despite the linguistic nature of the prefix “eco” and the preliminary definitions, the term “ecoterrorism” is understood by proponents of ecoterrorism bills as well as opponents thereof, that the term describes both animal and environmental activists alike. Indeed, at the Hearing before the Subcommittee on Crime of the Committee on the Judiciary, Ron Arnold, author of the book: *Ecoterror—The Violent Agenda to Save Nature*, clarified in no uncertain terms:

I am stating that there is no difference between ecoterrorism and animal rights terrorism, and there evidently has been some dispute about that difference. The perpetrators are, in large part, the same people; and the solidarity of action between them is openly declared.¹⁵

B. WHEN/WHERE THE CONCEPT OF ECOTERRORISM ORIGINATED

Governmental efforts to combat ecoterrorism arguably began in 1992 with the passage of the Animal Enterprise Protection Act, which directed a joint study “on the extent and effects of domestic and international terrorism on enterprises using animals for food or fiber production, agriculture, research, or testing . . .”¹⁶ In compliance with this mandate, the Criminal Division of the Department of Justice and the Animal and Plant Health Inspection Service of the Department of Agriculture (APHIS) issued a report which documented “animal rights extremism in the United States and abroad.”¹⁷ The report provided information as to the transition from animal

¹³ Animal and Ecological Terrorism in America pamphlet, issued by American Legislative Exchange Council, on Sept. 1, 2003.

<http://www.alec.org/meSWFiles/pdf/AnimalandEcologicalTerrorisminAmerica.pdf#search=%22%22animal%20and%20ecological%20terrorism%22%20ALEC%22>

¹⁴ *Id.* at pp. 5-6.

¹⁵ June 9, 1998. *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS*, Hearing before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session.

¹⁵ United States Department of Justice, *Report to Congress on the Extent and Effects of Domestic and International Terrorism on Animal Enterprises*. Washington, DC, August 1993.

¹⁶ <http://www.usdoj.gov/criminal/publicdocs/11-1prior/crm21.pdf>. The Report begins with the following quote from Tim Daley, British Animal Liberation Front Leader:

In a war you have to take up arms and people will get killed, and I can support that kind of action by petrol bombing and bombs under cars, and probably at a later stage, the shooting of vivisectioners on their doorsteps. It's a war, and there's no other way you can stop vivisectioners.

welfare to “animal rights extremism” and provided charts detailing the types of enterprises that have been “victimized” by animal rights “extremists,” the number of times each was “victimized,” the types of activity, e.g., threats, vandalism, etc., and the number of incidents in each state.”¹⁸

Six years later, in 1998¹⁹, the increasing intolerance of animal rights and environmental activism continued at the June 9, 1998 Hearing before the House of Representatives entitled, *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS*.²⁰ The organizing committee, the House of Representatives Subcommittee on Crime Committee on the Judiciary, was led by Chairman of the subcommittee, Bill McCollum, a Republican Congressman who is perhaps most famous for his role as one of the House Managers of President Clinton’s impeachment trial.²¹ At the Hearing, various conservative politicians including Representatives Stephen E. Buyer, Steve Chabot, Asa Hutchinson and Howard Coble, convened to “consider the growing and extremely disturbing problem of violent acts” by “radical” animal rights and environmental organizations, otherwise referred to as “ecoterrorism.”²² In addition to the unanimously Republican politicians, all of the presenters were either so-called victims of what they called “ecoterrorism” or open opponents thereof. Speakers included Bruce Vincent, business manager of his family company, Vincent Logging, and President of Alliance for America, an umbrella group for several hundred farming, ranching, mining, logging, fishing and private property grassroots groups; Cathi Peterson, a skidder operator for the logging industry and former Forest Service employee; Ron Arnold, author of the book, *Ecoterror – The Violent Agenda to Save Nature*; and Barry Clausen, a former licensed private investigator who spent a year pretending to support the activities of the environmental group Earth First! and author of the book, *Walking on the Edge—How I Infiltrated Earth First!*²³ Notably absent from the Hearing was testimony from any environmental or animal rights activist groups.

Although the 1990s proved to be the starting point for the campaign against environmental and animal rights activism, criminalization of environmental and animal rights activism appeared to have begun near the dawn of the twenty-first century. The devastating terrorist attacks on September 11, 2001, prompted the government to take a more serious look at the state of security of the United States. Less than one month after the attacks, Senator Pat Roberts sponsored a resolution to establish “a Select Committee on Homeland Security and

¹⁷ <http://www.usdoj.gov/criminal/publicdocs/11-1prior/crm21.pdf>.

¹⁹ The prevalence of conservative opinions on both the radio and internet helped keep the opponents of animal and environmental rights strong between 1992 and 1998. Sheldon Rampton and John Stauber, *Banana Republicans: How the Right Wing Is Turning America Into a One-Party State*, Summary of the chapter entitled “The Echo Chamber.” http://www.sourcewatch.org/index.php?title=Banana_Republicans:_The_Echo_Chamber (“The number of talk-radio stations in the United States jumped from 200 in 1986 to more than 1,000 eight years later, mostly featuring conservative hosts and heavily Republican audiences. Conservatives have also used the Internet effectively as part of an integrated communications strategy, which, like direct mail, blurs the boundaries between news, commentary, advertising and partisan advocacy.”)

¹⁹ June 9, 1998. *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS*, Hearing before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session.

²¹ http://en.wikipedia.org/wiki/Bill_McCollum

²² June 9, 1998. *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS*, Hearing before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session. At p.7.

²³ June 9, 1998. *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS*, Hearing before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session.

Terrorism" with stated purposes including assisting "the Senate in coordinating and prioritizing Federal reforms . . . to detect, deter, and manage the consequences of terrorism . . . ; and to make such recommendations, including recommendations for new legislation and amendments to existing laws" ²⁴ The result of this resolution was the October 26, 2001 passage of the USA Patriot Act, which was essentially designed to "deter and punish terrorist acts in the United States and around the world." ²⁵ In its efforts to do so, however, the Patriot Act created a new legal category of "domestic terrorism," broadly defined as, "activities that . . . appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion. . . ." ²⁶

The Patriot Act provides the framework for various ecoterrorism state bills designed to criminalize constitutionally protected speech activity when said activity is performed by environmentalists or animal rights activists. ²⁷ Paralleling the wording of the Patriot Act, state ecoterrorism bills penalize individuals who "intimidate," "deter," "disrupt" or "obstruct" facilities that are involved in the exploitation of animals or natural resources. ²⁸ The connection between the government's response to the 9/11 attacks and the rise of ecoterrorism bills is most apparent in consideration of Republican Congressman Don Young's statement on the day of the 9/11 attacks that "There's a strong possibility that [ecoterrorists] could be one of the groups [responsible for the attacks]." ²⁹

Congressman Young's statement should not come as a surprise after the political animosity towards animal rights and environmental activists had time to brew in the preceding decade and had gained sufficient support to inspire post-Patriot Act ecoterrorism bills. The political nature of the bills cannot be denied in consideration of other criminal acts that do not, according to lawmakers, rise to the highest level of domestic "terrorism," such as those of the anti-abortion movement. Indeed, despite the fact that anti-abortion efforts, which are specifically designed to "intimidate," "deter," and "disrupt" the daily procedures at abortion clinics, have resulted in horrific murders, ecoterrorism state bills target only those acts that interfere with industries involved in the exploitation of natural resources or animals.

²⁴ S. Res. 165 § 1(b)(1)(A), (D), 107th Cong. (2001), LEXIS 2001 S. Res. 165.

²⁵ HR 3162 RDS, 107th Congress, 1st Session, IN THE SENATE OF THE UNITED STATES, October 24, 2001

²⁶ *Id.*

²⁷ Ethan Carson Eddy credits the Model Animal and Ecological Terrorist Act, promoted by the U.S. Sportsmen's Alliance and ALEC, for providing states with the ecoterrorism bills' linguistic structure. 22 Pace Env't. L. Rev. 261, 263-264 (2005).

²⁸ *See fn 29.*

²⁹ Case Note: THE USA PATRIOT ACT: ADDING BITE TO THE FIGHT AGAINST ANIMAL RIGHTS TERRORISM? Fall, 2002, 34 Rutgers L. J. 187, Denise R. Case (citing Paul Clarke, Proceeding with Caution: In the Wake of September 11, Environmental Direct-action Groups Change their Tactics, 13 E 14 (2002).

"Congressman Young soon joined his colleagues in condemning Osama bin Laden, but the targets of his original accusations are not entirely at ease.")

II. ECOTERRORISM BILLS ACROSS THE UNITED STATES³⁰

As of this writing, at least thirty states³¹ have passed into law some form of an ecoterrorism bill.³² Some bills clearly proscribe “terrorist” activity against facilities that involve natural resources or animals³³ while some target acts by animal liberationists, specifically proscribing the taking of animals from an animal facility.³⁴ Usually containing at least one of the aforementioned proscriptions, some bills also contain specific prohibitions against the unauthorized possession or taking of documents, information, or data by any and all means, including video and photography.³⁵

³⁰ This article focuses on bills that have already been signed into law. The author would be remiss in neglecting to mention, however, the bill that is pending as of the time of this writing called the Animal Enterprise Terrorism Act, which contains amendments to the Animal Enterprise Protection Act, 18 U.S.C. §43. The amendments, S.1926, introduced by Senator James Inhofe (R-OK), and H.R. 4239, introduced by Rep. Thomas Petri (R-WI), seek to amend the Animal Enterprise Terrorism Act by, inter alia, expanding the class of criminal behavior from “physical disruption” to activity “damaging” or “disrupting” an animal enterprise and expanding the class of criminal behavior to include threatening conduct. The proposed bill is riddled with the same flaws as the ecoterrorism bills that are the subject of this article.

³¹ Alabama, Code of Ala. § 13A-11-150 et seq.; Arizona, A.R.S. §13-2301 et seq. (fits into larger racketeering statute but specifically defines “animal facility”); Arkansas, A.C.A. §5-62-201 et seq.; California, Cal. Pen Code §602, enacted through S.993, 2003-04 Reg. Sess. (Cal 2003); Florida, Fla. Stat. §828.40 et seq.; Georgia, O.C.G.A. §4-11-30; Idaho, Idaho Code §§18-7040, 22-5001; Illinois, 720 ILCS 215/1 et seq.; Iowa, Iowa Code §717A.1 et seq.; Kansas, KSA §47-1825 et seq.; Kentucky, KRS §437.410 et seq.; Louisiana, La. R.S. 14:228 et seq., La. R. S. 14:102.9; Maine, LD 1789; Maryland, Md. CRIMINAL LAW Code Ann. §6-208; Minnesota, Minn. Stat. §§346.56, 604.13; Mississippi, Miss. Code Ann. §69-29-301 et seq.; Missouri, §§578.405 R.S. Mo. et seq., 578.414 R.S. Mo. et seq.; Montana, Mont Code Ann. §81-30-101; New Hampshire, N.H. Rev. Stat. Ann. §644:8-e; New York, N.Y. Agric. & Mkts. Law §378; North Dakota, N.D. Cent. Code §12.1-21.2-01; Ohio, Ohio Rev. Code Ann. §§2909.21, 2923.31; Oklahoma, Okla Stat. tit. 2, §5-104 et seq., Okla. Stat. tit. 21, §1680; Oregon, H.R. 3518, 72nd Leg. Assem.; Pennsylvania, HB 213, 18 Pa. Cons. Stat. §3311, 42 Pa. Cons. Stat. §8319; South Carolina, S.C. Code Ann. §47-21-20; South Dakota, S.D. Codified Laws §40-38-1; Tennessee, Tenn. Code Ann. §39-14-801 et seq.; Utah, HB 322, Utah Code Ann. §§76-6-110, 76-6-206, 76-10-2401, 76-10-2401; Washington, Wash. Rev. Code §§4.24.570, 9.08.080; Note that the author purposefully excluded Colorado, C.R.S. 35-31-201; Hawaii, HRS §141-8 and West Virginia, HB2744 (2001 W.Va. Acts, Ch. 7), statutes that only proscribe the taking or tampering of agricultural crops.

³² The first ecoterror bills to have passed were seemingly that of Minnesota (1988) and Louisiana (1989), however Minnesota’s statute (346.56) appears to be less broad, in that it applies only to the “release” of animals and does not provide criminal penalties (only a right of the owner to sue for damages).

³³ See, e.g., Arkansas, A.C.A. §5-62-201 et seq.; California, Cal Pen Code §602, enacted through S.993, 2003-04 Reg. Sess. (Cal. 2003); Washington, Title 4, Ch. 4.24, §4.24.580 et seq.; Mississippi, Miss. Code Ann. §69-29-301 et seq.; Florida, Fla. Stat. §828.40 et seq.; Ohio, Ohio Rev. Code Ann. §§2909.21, 2923.31; South Dakota, S.D. Codified Laws §40-38-1.

³⁴ See e.g. Missouri, §578.407 R.S. Mo. (“No person shall: (1) Release, steal or otherwise intentionally cause the . . . loss of any animal . . . from an animal facility and not authorized by that facility...”); Minnesota, Minn. Stat. §346.56 (“A person who without permission releases an animal lawfully confined for science, research, commerce, or education is liable: (1) to the owner of the animal for damages . . .”); Louisiana, La. R. S. §14:228.1 (“It shall be unlawful for any person to intentionally and without permission, release any animal, bird, or aquatic species which has been lawfully confined for agriculture, science, research, commerce, public programming, protective custody, or education. . .”); see also ³⁴ Alabama, Code of Ala. § 13A-11-150 et seq.; New York, N.Y. Agric. & Mkts. Law §378, Idaho, Idaho Code §§18-7040, 22-5001; Illinois, 720 ILCS 215/1 et seq.; Iowa, Iowa Code §717A.1 et seq.; ; South Carolina, S.C. Code Ann. §47-21-20.

³⁵ See e.g., Kansas, KSA §47-1827(c) (“No person shall, without the effective consent of the owner (4) enter an animal facility to take pictures by photograph, video camera or by any other means. . . .”); Illinois, 720 ILCS 215/4 (“It shall be unlawful for any person, (4) to enter an animal facility with an intent to . . . obtain unauthorized possession of records, data, materials, equipment, or animals; (5) by theft or deception knowingly to

This article will focus on the bills that proscribe acts that clearly fall within the ambit of the First Amendment and therefore are arguably unenforceable.³⁶ Many of the ecoterrorism bills employ the same linguistic rubric with regard to anticipated activities of animal rights and animal welfare activists:

No person shall, without the effective consent of the owner of an animal facility disrupt or damage the enterprise conducted at the animal facility.³⁷

The obvious pivotal word that creates a First Amendment concern is the vague and overbroad term, “disrupt.”³⁸ In Section III, A of this article, *infra*, the author will discuss the First Amendment concerns of the ecoterrorism bills at length.

One state’s ecoterrorism bill presents unique language that distinguishes it from its counterparts. Pennsylvania’s ecoterrorism bill includes a phrase that, if applied properly, would protect against First Amendment restrictions. The bill had passed the House by a wide margin in March 2005 and gained considerable support after members of the Animal Liberation Front caused almost \$40,000 in damage to a local peony farmer who wanted to house 500 monkeys for research laboratories.³⁹ Various special-interest groups lobbied for the bill such as the pharmaceutical industry, biotech industry, Pennsylvania Farm Bureau, and Pennsylvania Forestry Association.⁴⁰ In April 2006, Pennsylvania’s Governor Ed Rendell signed into law HB 213, which is entitled “Ecoterrorism” and provides in pertinent part:

§3311. Ecoterrorism

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

obtain control over records, data, materials, equipment, or animals of any animal facility. . . .”); *see also* ; Idaho, Idaho Code §§18-7040; Alabama, Code of Ala. § 13A-11-150 et seq; North Dakota, N.D. Cent. Code §12.1-21.2-01.

³⁶ It should be noted that to date, it does not appear that any individual has been prosecuted under these state offenses, which causes one to doubt their utility and even further question the true intent of the drafters.

³⁷ *See e.g.*, O.C.G.A. 4-11-32(a)(1)(“A person commits an offense if, without the consent of the owner, the person acquires or otherwise exercises control over an animal facility, an animal from an animal facility, or other property from an animal facility with the intent to deprive the owner of such facility, animal, or property and to disrupt or damage the enterprise conducted at the animal facility.”); Miss. Code Ann. §69-29-305 (“A person shall not, without the effective consent of the owner, acquire or otherwise control over an animal facility or other property from an animal facility with the intent to deprive the owner of the facility, animal or property and to disrupt or damage the enterprise conducted at the animal facility.”); *see also* Arkansas, A.C.A. §5-62-201 et seq; Kentucky, KRS §437.410 et seq; Florida, Fla. Stat. §828.40 et seq; .; Iowa, Iowa Code §717A.1 et seq.

³⁸ A handful of states that have analogous prescriptions use terms other than “disrupt,” such as “obstruct” (South Dakota, S.D. Codified Laws §40-38-1 and Ohio, Ohio Rev. Code Ann. §§2909.21, 2923.31). This term is obviously vague and overbroad as well, but for purposes of focus, the author chooses to narrow in on the term “disrupt” as more statutes employ this term over other broad and vague terms.

³⁹ Online news article by Alison Hawkes, “Fighting ‘ecoterrorism’”, The Intelligencer - 2005 Copyright Calkins Media, Inc.

⁴⁰ <http://pittsburgh.indymedia.org/?PHPSESSID=64b062986e8237d2c94b73190a833473>

- (1) Intimidate or coerce⁴¹ an individual lawfully:
 - (i) Participating in an activity involving animals, plants or activity involving natural resources; or
 - (ii) Using an animal, plant or natural resource facility.
- (2) Prevent or obstruct an individual from lawfully:
 - (i) Participating in an activity involving animals, plants, or an activity involving natural resources; or
 - (ii) Using an animal, plant or natural resource facility

(c.1) Immunity – A person who exercises the right of petition or free speech under the United States Constitution or the Constitution of Pennsylvania on public property or with the permission of the landowners where the person is peaceably demonstrating or peaceably pursuing his constitutional rights shall be immune from prosecution for these actions under this section or from civil liability under 42 Pa. C.S. §8319 (relating to ecoterrorism).⁴²

The above immunity section is what makes this ecoterrorism bill unique among the other bills across the country.⁴³ It clearly expresses legislative concern that First Amendment rights should not otherwise be abridged by the enactment of the law. Nonetheless, the immunity provision did not satisfy animal rights and environmental activist groups in Pennsylvania, and some objected by way of formal letters,⁴⁴ while others objected by testifying at the June 6, 2005 Senate Judiciary Committee meeting.⁴⁵

Obvious concerns of animal rights and welfare groups were that their otherwise legal acts, such as certain protests, shutting down puppy mills and rescuing pigeons injured in shoots, would be considered criminally prosecutable under the broad terms of the Act.⁴⁶ Other concerns

⁴¹ These terms are verbatim lifted from the Patriot Act. HR 3162 RDS, 107th Congress, 1st Session, IN THE SENATE OF THE UNITED STATES, October 24, 2001

⁴² 18 Pa. C.S.A. §3311.

⁴³ *See fn 29.*

⁴⁴ E.g., The Sierra Club, Animal Agricultural Alliance, and Citizens for Consumer Justice submitted written testimony. Eric A. Failing, Report prepared by Pennsylvania Legislative Services, Subject: Senate Judiciary Committee Meeting from 6-6-05, HARRISBURG - (6/06/05, 10:00 a.m., Room 8E-B East Wing).

⁴⁵ E.g., Humane Society of the United States, American Civil Liberties Union, Pennsylvania Legislative Animal Network, P.N.C., Inc., Gaia Defense League, Coalition for Animals Rights and Animal Welfare, etc. - Eric A. Failing, Report prepared by Pennsylvania Legislative Services, Subject: Senate Judiciary Committee Meeting from 6-6-05, HARRISBURG - (6/06/05, 10:00 a.m., Room 8E-B East Wing).

⁴⁶ Eric A. Failing, Report prepared by Pennsylvania Legislative Services, Subject: Senate Judiciary Committee Meeting from 6-6-05, HARRISBURG - (6/06/05, 10:00 a.m., Room 8E-B East Wing); *see also* Richard Fellingner, Evening Sun, Harrisburg Bureau, Animal rights, research advocates spar over proposed eco-terror bill - , Bill would allow some protesters to be labeled as 'eco-terrorists,' June 07, 2005.

voiced by activists were with the offensive nomenclature chosen for the Act; Heidi Prescott, Senior Vice President of the Humane Society of the United States, advocated changing the term “eco-terrorism” to “eco-intimidation.”⁴⁷ Larry Frankel, of the American Civil Liberties Union, pointed out that the bill discriminates based on viewpoint and carries the risk of zealous and uncontrolled prosecution that could likely result from the passage of the bill,⁴⁸ both constitutional issues of which will be discussed at length in Section III, A, *infra*. Along with concerns of infringement on previously legal animal rights and environmental activities, there is an additional concern about fair notice: there is little doubt that when the Commonwealth attempts to enforce this law, and a defendant seeks to invoke the immunity exemption, the modifying adverbs “peaceably” might be up for judicial interpretation and analysis which can lead to unpredictable results. Despite the arguments in opposition to it, HB 213 was signed into law in April 2006.⁴⁹

III. THE ILL-CHOSEN TERM “--TERRORISM”

A. FLAWED FOUNDATION

Antoine de Saint-Exupery wisely declared that “language is the source of misunderstandings.”⁵⁰ The flaws in the English language are most obvious in consideration of the term at issue: “ecoterrorism.” How can there be any accuracy in such a term when the foundational subject, “terrorism,” is so egregiously misunderstood?

The term “terrorism” is over two centuries old⁵¹ and was purportedly coined by the government during the French Revolution.⁵² Federal law alone now contains at least nineteen definitions or descriptions of “terrorism”⁵³ and a terrorism analyst has documented at least 109 definitions of the term.⁵⁴ No single definition has been universally accepted⁵⁵ and, as such, member states of the U.N. Security Council are permitted to define the term based on their own respective domestic legislative purposes.⁵⁶ As far as national security concerns go, terrorism is

⁴⁷ Richard Fellingner, Evening Sun, Harrisburg Bureau, Animal rights, research advocates spar over proposed eco-terror bill - , Bill would allow some protesters to be labeled as ‘eco-terrorists,’ June 07, 2005.

⁴⁸ Eric A. Failing, Report prepared by Pennsylvania Legislative Services, Subject: Senate Judiciary Committee Meeting from 6-6-05, HARRISBURG - (6/06/05, 10:00 a.m., Room 8E-B East Wing).

⁴⁹ <http://www.state.pa.us/papower/cwp/view.asp?Q=451790&A=11> - April 14, 2006

⁵⁰ *Le Petit Prince* (1943); ; North Dakota, N.D. Cent. Code §12.1-21.2-01; ; Oregon, H.R. 3518, 72nd Leg. Assem.;

⁵¹ Frank Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 *CASE W. RES. J. INT’L L.* 1, 6 N.20 (2002), citing MICHAEL CONNOR, *TERRORISM: ITS GOALS, ITS TARGETS, ITS METHODS, THE SOLUTIONS* 1 (1987).

⁵² David B. Kopel & Joseph Olson, Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation, 21 *Okla. City U. L. Rev.* 247, 251 (1996). (explaining that the term “terrorist” was first defined as, “In the French Revolution, an adherent or supporter of the Jacobins, who advocated and practised methods of partisan repression and bloodshed in the propagation of the principles of democracy and equality.” The New Shorter Oxford English Dictionary 3258 (1993)).

⁵³ Nicholas J. Perry, The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails, 30 *J. Legis.* 249, 255 (2004).

⁵⁴ Alex Schimd & Albert J. Jongman, Political Terrorism 119-52 (1983).

⁵⁵ Lucien J. Dhooge, A PREVIOUSLY UNIMAGINABLE RISK POTENTIAL: SEPTEMBER 11 AND THE INSURANCE INDUSTRY, 40 *Am. Bus. L.J.* 687, 733 (2003).

⁵⁶ Stefan Talmon, NOTE AND COMMENT: THE SECURITY COUNCIL AS WORLD LEGISLATURE, 99 *A.J.I.L.* 175, 189 (2005); Interestingly, he notes that such “latitude enabled Syria, for example, to adopt the definition of terrorism contained in the Arab Convention for the Suppression of Terrorism, ‘which clearly

the new Communism and in fact this replacement of our perceived enemy is ubiquitously reflected in the American lexicon.⁵⁷ It has been noted that the definition of “terrorism” has become even more cryptic since the September 11th attacks.⁵⁸ Indeed, “[a] new vocabulary emerged from the rubble and debris,” including global buzzwords like “evildoers” or the commonly iterated “axis of evil.”⁵⁹

Due to its imprecision and ambiguity, the term “terrorism,” remarked noted author R.R. Baxter, serves “no operative legal purpose.”⁶⁰ In fact, in numerous judiciary opinions in which the courts attempted to apply various statutes that define terrorism to actual controversies, the results have been inconsistent and irreconcilable.⁶¹ It is agreed upon that terrorism, however aimlessly defined, is political in nature and designed to inflict fear upon a specific group to advance a political or ideological agenda.⁶² It should be no conceptual stretch then to consider that a government’s efforts to combat terrorism would also be crafted to serve certain political agendas. Different groups, governmental and otherwise, manipulate the definition of terrorism to include particular targets in order to effectuate a certain political agenda,⁶³ hence the cliché “one man's terrorist is another man's freedom fighter.”⁶⁴ The fact that states found a pressing need to craft anti-“terrorism” bills designed specifically to combat activities of two main special interest groups, environmentalists and animal rights/welfarists leads one to the conclusion that the term “terrorism” is haphazardly guided by the speaker’s moral compass, sensibilities, and judgment in the murky waters of subjectivity.⁶⁵

distinguishe[s] between terrorism and legitimate struggle against foreign occupation,’ excluding violent acts by groups such as Hamas, the Al Aqsa Martyrs Brigades, and Islamic Jihad (which are seen as fighting the Israeli occupation of Arab territories in Palestine) from the application of the resolution [1373].”) Id.

⁵⁷ Popular media, language, and legislation reflect this shift. Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. Pitt. L. Rev. 767, 786 (2002) (“The [Patriot] Act threatens to resurrect many of the abuses reminiscent of the Cold War. For example, in 1991 Congress repealed the much-criticized provision of the McCarran-Walter Act, which permitted the government to deny entry to any immigrant because their speech or writings supported Communism. Section 4511 of the [Patriot] Act resurrects this provision but substitutes terrorism for Communism.”); see also 35 Geo. Wash. Int’l L. Rev. 411, 423 (2003) THE STEVEN L. CANTOR INTERNATIONAL TAX SYMPOSIUM: ARTICLE: REMARKS OF THE HONORABLE MIA MOTTLEY ATTORNEY GENERAL & MINISTER OF HOME AFFAIRS OF BARBADOS

⁵⁸ Vincent-Joel Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify As Crimes Against Humanity?* 19 Am. U. Int’l L. Rev. 1009, 1030 (2004).

⁵⁹ Vincent-Joel Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify As Crimes Against Humanity?* 19 Am. U. Int’l L. Rev. 1009, 1030 (2004).

⁶⁰ R.R. Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 Akron L. Rev. 380, 380 (1973).

⁶¹ Lucien J. Dhooge, *A Previously Unimaginable Risk Potential: September 11 and the Insurance Industry*, 40 Am. Bus. L.J. 687, 732 (2003).

⁶² FRANCISCO J. GONZALEZ MAGAZ, *Can good fences make good neighbors?: The Virtues of the Green Line Fence*, 74 Rev. Jur. U.P.R. 173, 201 (2005); Vincent-Joel Proulx, 19 Am. U. Int’l L. Rev. 1009, 1035 (2004).

⁶³ H.H.A. Cooper, *Terrorism: The Problem of the Problem of Definition*, 26 Chitty’s L.J. 105, 106-7 (1978) (“The term ‘terrorism’ is a judgmental one in that it not only encompasses some event produced by human behavior but seeks to assign a value or quality to that behavior The problem of the definition of terrorism is more than semantic. It is really a cloak for a complexity of problems, psychological, political, legalistic, and practical.”)

⁶⁴ Matthew H. James, *COMMENT: Keeping the Peace - British, Israeli, and Japanese Legislative Responses to Terrorism*, 15 Dick. J. Int’l L. 405, 406 (1997).

⁶⁵ New York Times columnist William Safire said it best: “The name you choose to give [hostilities, violence, war] not only reflect your view about the current state of affairs but is also an indication of where you stand on what our policy should be. Labels are the language’s shorthand for judgments.”); 12.17.06 “On Languages”, New York Times Magazine., p.24.

B. WILL THE REAL TERRORIST PLEASE STAND UP?

Despite the humane goal of animal liberationists, they are considered by the FBI to be the most active and threatening domestic terrorists in the United States.⁶⁶ There are currently over 700 hate groups in the United States,⁶⁷ including neo-Nazi and white supremacist groups, in addition to armed militiamen and snipers, who are all being overlooked now that the FBI is focusing its efforts on the domestic terrorists that cause them the most concern: those whose main goal is to free animals from violent, harmful, and life-threatening exploitation.⁶⁸ Accusations of terrorist activity are not directed solely at animal liberationists – these baseless attacks target the gamut of animal rights and animal welfarists, and have even focused on health groups that advocate a vegetarian diet.⁶⁹ Thus seemingly no one with any concern for animal welfare is safe from accusations of terrorism.

Because the term “terrorism” is so commonly used and so frequently abused, it can apply to “actions ranging from flying fully loaded passenger planes into buildings to rescuing pigs and chickens from factory farms.”⁷⁰ Key players in the disparaging categorization of animal rights activists and welfarists are the agricultural industry, in which farm animals including cows, pigs, and chickens are housed in windowless metal warehouses, rotted wire cages, and/or gestation crates;⁷¹ the clothing industry, in which animals such as minks, cows, and sheep, are skinned alive, castrated without anesthetics, and/or eventually killed by anal or genital electrocution;⁷² and the scientific industry, in which animals including dogs, mice, and monkeys, are subjected to being forced to inhale cigarette smoke, having probes inserted into their heads, and/or being made sick by deadly viruses.⁷³ Animal rights activists, welfarists, and liberationists share the special concern for the interests and safety of nonhuman animals, and seek ways to reduce, and ultimately completely abolish, the human-imposed suffering of nonhuman animals.⁷⁴ The

⁶⁶ Congressional Testimony of John E. Lewis, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation, Before the Senate Judiciary Committee, May 18, 2004 – <http://www.fbi.gov/congress/congress04/lewis051804.htm> (“During the past several years special interest extremism, as characterized by the Animal Liberation Front (ALF), the Earth Liberation Front (ELF), and related extremists, has emerged as a serious domestic terrorist threat. . . . In recent years, the Animal Liberation Front and the Earth Liberation Front have become the most active criminal extremist elements in the United States.”)

⁶⁷ The Southern Poverty Law Center is tracking over 700 hate groups around the nation.

<http://www.splcenter.org/intel/intpro.jsp>

⁶⁸ The author recognizes that there are members of the animal liberation movement who apparently thrive in the accusation of terrorism and certainly do not help the author’s argument that animal liberationists should not be called terrorists. See, e.g., the following quote attributed to Mike Roselle, of Earth First, “. . . This is Jihad, pal. There are no innocent bystanders, because in these desperate hours, bystanders are not innocent. We’ll broaden our theater of conflict.” <http://www.envirottruth.org/ecoterrorism.cfm>, or the quote by Tim Daley in fn __, *supra*.

⁶⁹ Feb. 20, 2004 episode of Dateline, in which Veronica Atkins, the widow of the man who invented the Atkins diet, compared a pro-vegetarian public health advocacy group directly to the Taliban. 22 Pace Env’t. L. Rev. 261, fn315 (2005) (citing Patrick Whittle, Vegetarians Chew the Fat Over the Atkins Diet, Herald-Trib. (Sarasota, Fla.), Feb. 23, 2004.)

⁷⁰ Best, Steven, Ph.D., Nocella, Anthony J. II, editors, *Terrorists or Freedom Fighters? Reflections on the Liberation of Animals*, (New York Lantern Books 2004), p.361.

⁷¹ <http://www.peta.org/actioncenter/food.asp>

⁷² <http://www.peta.org/actioncenter/clothing.asp>

⁷³ <http://www.stopanimaltests.com/feat/thelab/index.html>

⁷⁴ The intersection of beliefs apparently stops there. Gary Francione delineates the various differences in beliefs and goals of various animal-related movements. Gary L. Francione, *Abolition of Animal Exploitation: The Journey Will Not Begin While We Are Walking Backwards* (2006). http://www.abolitionist-online.com/article-issue05_gary.francione_abolition.of.animal.exploitation.2006.shtml

inaccurate usage of the term “terrorism” to describe acts of animal rights and welfare activism⁷⁵ is especially preposterous in consideration of the compassion, empathy, and justice that activists express for all living beings, especially the particular species who remain vulnerable and voiceless in the face of some of the life-threatening and/or otherwise violent acts of various agricultural, industrial, and scientific facilities.⁷⁶ Animal liberationists, it has been argued, are the antithesis of the terrorists that the government and industries accuse them of being.⁷⁷ One might even remark that it is not animal rights and welfare activists who engage in violent and terrorist activities, but the proponents of the ecoterrorism bills, i.e., the industries and facilities that profit from the exploitation of animals, that do so by engaging in such acts as, branding, tail docking, teeth cutting, debeaking, castration, confinement, scalding, mutilating, chemical poisoning, skinning, and dismembering.⁷⁸

IV. ECOTERRORISM BILLS AND THEIR INHERENT VIOLATIONS OF THE FIRST AMENDMENT

The text of the original Constitution itself provides a remarkable framework for the ideals of our founding fathers. But that text was ratified only with the assurance that the Bill of Rights would attach.⁷⁹ Only a rigorous analysis of the people’s “unalienable rights” and the laws that seek to restrict those rights can further the principles of freedom that are central to the First Amendment.⁸⁰ It is well understood that, in the wide-open marketplace of ideas, only through the unrestricted publication of these ideas can truth prevail.⁸¹

A. OVERBROAD AND VAGUE ECOTERRORISM BILLS INFRINGE ON THE FREEDOM OF SPEECH THAT IS VITAL TO OUR NATION’S PROGRESS

Freedom of speech in the First Amendment is thus considered by the courts to be “almost absolute” and vital to bring about political, social, and economic change.⁸² Freedom of speech is not completely absolute as there are time, place, and manner restrictions, and discrete categories of speech that are condemnable based on their content.⁸³ These categories include yelling “fire” in a crowded theatre, child pornography, fighting words, and, to a limited extent, libel.⁸⁴ Such

⁷⁵ Mark Bernstein, Ph.D. comments on the significance of the connotations of our language: “terrorism” is negative; “liberation” is positive. *Terrorists or Freedom Fighters, supra*, p.93. Notably, animal liberationists are called “terrorists” by those who know that distinction.

⁷⁶Indeed, even the individual whom many call the father of the animal liberation movement, Peter Singer, advocates making changes by way of civil disobedience. He wrote, “Nonviolent responses to the frustrations of the democratic process carry less risk of doing damage to the fabric of civil society. Gandhi and Martin Luther King have shown that civil disobedience can be an effective means of demonstrating one’s sincerity and commitment to a just cause.” Singer, *In Defense of Animals, The Second Wave*, p. 10 (Blackwell 2006).

⁷⁷ *Id.* at p.12.

⁷⁸ *Id.* at p.31.

⁷⁹ *The UWM Post, Inc. v. Univ. of Wisconsin*, 774 F. Supp. 1163, 1181 (E.D. Wisc. 1991).

⁸⁰ *Id.*

⁸¹ *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984)(citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

⁸² See *UWM Post, Inc.*, 774 F. Supp. at 1181; see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).

⁸³ *R.A.V.*, 505 U.S. at 400.

⁸⁴ See *id.*; see also *UWM Post Inc.*, 774 F. Supp. at 1169.

expressions of speech are considered to be of such slight social value, and because of their *de minimus* value, their costs to order in society outweigh any benefit that may be otherwise derived from them.⁸⁵

Outside of this realm of low value speech, however, the Court has sanctioned a rigidly speech-protective set of standards and sustains content-based restrictions only in the most exceptional of circumstances.⁸⁶ The Constitution's protection of speech is essentially a "pre-commitment" of the government to abstain from inhibiting the free expression of ideas, which thereby ensures the "continued building of our politics and culture."⁸⁷ In fact, this pre-commitment is such that it seeks to protect not only expressions with cognitive value, as the marketplace of ideas concept suggests, but also expressions with emotive value.⁸⁸ In any case, laws that proscribe any type of speech must err on the side of narrowness, not overbreadth, as the First Amendment should "not permit legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set a large.'"⁸⁹

1. OVERBROAD

In the First Amendment context, criminal statutes must be narrowly drafted so that protected speech is not inhibited.⁹⁰ A criminal statute will be deemed facially invalid where it makes unlawful a substantial amount of constitutionally protected conduct even where the statute otherwise has a legitimate application.⁹¹ The governmental purpose for the restriction, albeit legitimate and substantial, "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."⁹² So while the courts recognize that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," there is no question that when a statute lumps together unprotected speech with protected speech, the statute fails for being overbroad.⁹³ The Court has so found for fear that "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . ."⁹⁴ The Court thus sanctioned the 'overbreadth doctrine' in order to prevent the possible chilling of protected expression by state laws.⁹⁵

Ecoterrorism bills fail under the overbreadth doctrine as they widely proscribe forms of speech that are constitutionally protected. The majority of ecoterrorism bills use a proscription similar to, "No person shall . . . disrupt the enterprise conducted at an animal facility." The pivotal term in these bills is "disrupt." The verb "disrupt" has been defined by multiple sources generally as "(1) to interrupt the usual course of a process or activity; (2) to destroy the order or

⁸⁵ *UWM Post Inc.*, 774 F. Supp. at 1169.

⁸⁶ *UWM Post Inc.*, 774 F. Supp. at 1174.

⁸⁷ *UWM Post Inc.*, 774 F. Supp. at 1174.

⁸⁸ *Cohen v. California*, 403 U.S. 15, 26 (1971).

⁸⁹ *City of Chi v. Morales*, 527 U.S. 41, 60 (1999).

⁹⁰ See *UWM Post, Inc.*, 774 F. Supp. at 1168.

⁹¹ *R.A.V.*, 505 U.S. at 414 ("Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment.")

⁹² *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964).

⁹³ *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972).

⁹⁴ *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

⁹⁵ *R.A.V.*, 505 U.S. at 402.

orderly progression of something.”⁹⁶ Activities that could essentially “disrupt” the enterprise conducted at an animal facility could include a person walking by the window with a brightly colored tee-shirt, the wording on which conspicuously described damaging information about the torturous conditions at the animal facility, or a peaceful assembly outside of the facility during which protesters pass out leaflets to passersby, which describe the acts that are taking place within the facility. Both activities can be considered “disruptive” to the enterprise conducted at the facility, but both activities are also typically considered lawful protest activities.⁹⁷

Ecoterrorism bills also fail under the overbreadth doctrine as they proscribe activity that is already otherwise covered in criminal laws and, as already noted, statutes are deemed overbroad where the generalized prohibited activity is already proscribed in narrower statutes already in effect.⁹⁸ The states that have passed ecoterrorism bills all have criminal codes that already proscribe most, if not all, of the criminal acts in the ecoterrorism bills, such as penal statutes proscribing harassment, placing another in fear of imminent physical injury, danger or damage to another’s real property, vandalism, and criminal trespass.⁹⁹ The acts that are not covered by the above list of crimes fail nonetheless for overbreadth as they involve acts of “disruption” or “obstruction.”

2. VAGUENESS

A penal statute may be considered unconstitutionally vague for either of two independent reasons: (1) it fails to provide sufficient notice to enable ordinary people to understand what conduct is prohibited; or (2) it may authorize or encourage arbitrary and discriminatory enforcement.¹⁰⁰

The first void-for-vagueness characteristic of a statute is where the statute requires a person to conform her conduct to an imprecise standard and as a result, “men of common intelligence must necessarily guess at its meaning.”¹⁰¹ A penal statute thus must define the criminal offense with sufficient specificity so that ordinary people can understand exactly what conduct is being proscribed.¹⁰² A penal statute otherwise is at risk of having a double meaning and the citizen could risk acting upon one conception of its requirements and the courts upon

⁹⁶ Encarta World English Dictionary, North American edition.

<http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1861605371>; see also The American Heritage® Dictionary of the English Language: Fourth Edition. 2000,

<http://www.bartleby.com/61/55/D0285500.html> (“1. To throw into confusion or disorder: *Protesters disrupted the candidate's speech.* 2. To interrupt or impede the progress, movement, or procedure of: *Our efforts in the garden were disrupted by an early frost.* 3. To break or burst; rupture.”); Cambridge International Dictionary of English, <http://dictionary.cambridge.org/define.asp?key=22586&dict=CALD> (“to prevent something, especially a system, process or event, from continuing as usual or as expected”).

⁹⁷ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987).

⁹⁸ *Coates*, 402 U.S. at 614 (“The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited.”).

⁹⁹ See, e.g., Pennsylvania’s criminal codes, 18 Pa. C.S.A. §2701, 18 Pa. C.S.A. §2705, 18 Pa. C.S.A. §2709, 18 Pa. C.S.A. §3301, 18 Pa. C.S.A. §3304, 18 Pa. C.S.A. §3307, 18 Pa. C.S.A. §3309.

¹⁰⁰ *City of Chi v. Morales*, 527 U.S. 41, 56 (1999).

¹⁰¹ *Coates*, 402 U.S. at 614 (citing *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)).

¹⁰² *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

another, resulting in an unfair prosecution.¹⁰³ Perhaps the most compelling concern with regard to vague statutes is that “[u]ncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”¹⁰⁴

Ecoterrorism bills fail under this fair notice requirement as the language in the bills are not sufficiently specific so as to put a person on notice as to what actions are and are not being proscribed. As mentioned in the overbreadth discussion, *supra*, the use of the verb “disrupt” renders ecoterrorism bills vague as a person of ordinary intelligence would have to speculate as to what is exactly proscribed and what it not. Speech activity can be disruptive sometimes to some business at an animal facility, but not necessarily all the time to every aspect of business at the animal facility. The Supreme Court has struck ordinances for vagueness that are directly analogous in this regard to the ecoterrorism bills.¹⁰⁵ One ordinance, for example, that the Supreme Court struck as unconstitutionally vague was a Cincinnati, Ohio provision, which made it a criminal offense for three or more persons to assemble on any of the city’s sidewalks and conduct themselves “in a manner annoying to persons passing by.”¹⁰⁶ The Court found that the ordinance was unconstitutionally vague because “[c]onduct that annoys some people does not annoy others.”¹⁰⁷ As “annoy” and “disrupt” are synonyms,¹⁰⁸ it can easily be analogized and argued that conduct that is disruptive to some people is not disruptive to others. The ecoterrorism bills thus fail for vagueness as they do not put one on notice as to what is illegally “disruptive” and what is not.

The second reason statutes are found to be impermissibly vague is that the lack of explicit standards for those who have to enforce them might result in arbitrary or discriminatory enforcement.¹⁰⁹ A law will be considered vague where “it impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”¹¹⁰

There is no more pressing concern for animal rights activists and welfarists than the valid fear of arbitrary and discriminatory enforcement. Indeed, vague laws like ecoterrorism bills all but invite discriminatory enforcement against those whose “ideas, . . . lifestyle, or . . . physical appearance [are] resented by the majority of their fellow citizens.”¹¹¹ Police and other personnel should not be left to make those subjective determinations of who is and is not disrupting conduct at an animal facility lest they should be influenced by public intolerance or animosity towards animal activists, which is clearly prohibited as an abridgement of constitutional freedoms.¹¹² Indeed, even constitutionally permissible restrictions on speech, such as time, place, and manner restrictions, do not allow limitations on speech unless the speech is “shown likely to produce a clear and present danger of a serious substantive evil that rises far above

¹⁰³ *Connally*, 269 U.S. at 393.

¹⁰⁴ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)(citing *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

¹⁰⁵ See, e.g., *Coates*; *City of Chi.*; It is interesting to note that Utah’s ecoterrorism bill criminalizes conduct “that tends to cause *annoyance*,” (emphasis supplied) which clearly does not pass constitutional muster following the precedent set by *Coates*.

¹⁰⁶ *Coates*.

¹⁰⁷ *Coates*, 402 U.S. at 614.

¹⁰⁸ <http://thesaurus.reference.com/search?q=annoy&start=11>

¹⁰⁹ *Grayned*, 408 U.S. at 108.

¹¹⁰ *Grayned*, 408 U.S. at 108-109.

¹¹¹ *Coates*, 402 U.S. at 616; see also *fn31* (quote from Veronica Atkins)

¹¹² *Coates*, 402 U.S. at 615.

public inconvenience, annoyance, or unrest.”¹¹³ To find otherwise would result in the loss of the very distinction that “sets [this country] apart from totalitarian regimes.”¹¹⁴

B. BONAFIDE VIEWPOINT DISCRIMINATION – ECOTERRORISM BILLS PROMOTE GOVERNMENTAL THOUGHT CONTROL

Aside from the categorical restrictions (yelling fire in a movie theatre, etc.) and time, place, and manner restrictions, the government is not permitted to restrict speech. In fact, the bedrock principle underlying the First Amendment is that the government may never restrict expression because of its message, its ideas, its subject matter, or its content.¹¹⁵ After all, the essence of the First Amendment principles derives from the Founders’ intention, which was

. . . to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.¹¹⁶

Suppression of speech, based on its content, “completely undercut[s] the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open” and is nothing short of “governmental thought control.”¹¹⁷

It is well established that when the speaker’s views differ from what the government perceives to be the larger societal view, that speaker’s ideas deserve paramount constitutional protection.¹¹⁸ Upon reviewing the legislative purposes of the ecoterrorism bills,¹¹⁹ there is no question that the viewpoint of animal rights activists widely diverges from that of the legislature. For example, Kentucky’s criminal code includes a chapter on “Offenses Against Public Peace -

¹¹³ *Karlan v. Cincinnati*, 416 U.S. 924, 927 (1974)(citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949): The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly a function of free speech under our system of government is to invite dispute Speech is often provocative and challenging . . . That is why freedom of speech, though not absolute, [citations omitted], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

¹¹⁴ *Karlan*, 416 U.S. at 927 (citing *Terminiello*, 416 U.S. at 4)).

¹¹⁵ *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, et al.*, 502 U.S. 105, 116 (1991).

¹¹⁶ *Leathers v. Medlock*, 499 U.S. 439, 448-9 (1991).

¹¹⁷ *Mosley*, 408 U.S. at 96; *UWM Post, Inc.*, 774 F. Supp. At 1174.

¹¹⁸ *Simon & Schuster*, 502 U.S. at 118 (“The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.”); see also *Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 829 (U.S. 1995); *Texas*, 491 U.S. at 414; *Mosley*, 408 U.S. at 95.

¹¹⁹ In determining the constitutionality of an ordinance, the courts typically look to the congressional purpose underlying the ordinance. *Aptheker*, 378 U.S. at 508.

Conspiracies -Protection of Animal Facilities.”¹²⁰ As a justification for the new law, the statute is introduced by the following finding of the General Assembly:

The General Assembly finds that the caring, rearing, feeding, breeding, and sale of animals and animal products, and the use of animals in research, testing, and education, represents vital segments of the economy of the state, that producers and others involved in the production and sale of animals and animal products and the use of animals in research and education have a vested interest in protecting the health and welfare of animals and the physical and intellectual property rights which they have in animals, and that there has been an increasing number of illegal acts committed against farm animal and research facilities. The General Assembly further finds that these illegal acts threaten the production of agricultural products, and jeopardize crucial scientific, biomedical, or agricultural research, and finally, the General Assembly finds that these illegal acts threaten the public safety by exposing communities to contagious diseases and damage research.¹²¹

In addition to hosting one of the seemingly longest sentences in the world, Kentucky’s legislative finding reveals its viewpoint that using animals for research and testing is beneficial to the state’s economy and therefore must be protected from those who disagree with the premise that the wealth of the state is more important than the welfare of those animals.¹²² The overbroad statute then criminalizes acts that, *inter alia*, seek to “disrupt” the enterprise “without the consent of the owner.”¹²³ By leafletting near the property with information regarding the

¹²⁰ KRS § 437.415 (2006)

¹²¹ KRS § 437.415 (2006) [Findings of the General Assembly; Illinois has a similar statute:

There has been an increasing number of illegal acts committed against animal research and production facilities involving . . . criminal trespass and damage to property. These actions not only abridge the property rights of the owner of the facility, they may also damage the public interest by jeopardizing crucial scientific, biomedical, or agricultural research or production. . . . These actions may substantially disrupt or damage publicly funded research and can result in the potential loss of physical and intellectual property. Therefore, it is in the interest of the people of the State of Illinois to protect the welfare of humans and animals as well as productive use of public funds to require regulation to prevent unauthorized possession, alteration, destruction, or transportation of research records, test data, research materials, equipment, research and agricultural production animals. 720 ILCS 215/2 (2006) [Legislative Declaration]

¹²² KRS § 437.415 (2006)

¹²³ KRS § 437.420 (2006)[Offenses]

(1) A person commits an offense if, without the effective consent of the owner, the person acquires or otherwise exercises control over an animal facility, an animal from an animal facility, or other property from an animal facility, with the intent to deprive the owner of the facility, animal, or property and to disrupt or damage the enterprise conducted at the animal facility.

(2) A person commits an offense if, without the effective consent of the owner and with the intent to disrupt or damage the enterprise conducted at the animal

physical ramifications for an animal probed by scientists in the name of research, an animal rights activist is potentially disrupting the enterprise without the consent of the owner. On the other hand, if an NRA member is leafleting in the same area regarding that state's restrictions on gun ownership, that activity is not criminally proscribed. Thus it is the viewpoint of the animal rights activist that is being punished.

Even when one considers the portions of the ecoterrorism bills that proscribe the taking of data or animals from the facility, it is clear that the proscription is viewpoint-based. What is otherwise considered a simple theft rises to the level of terrorist activity when the alleged perpetrator is furthering an animal rights cause. Such viewpoint-based discrimination is constitutionally unacceptable as it has been well established that one's speech cannot be suppressed based on the "message on the picket sign."¹²⁴

C. THE CRIMINALIZATION OF PROTECTED SPEECH ACTIVITY IS ROOTED IN MONEY AND POLITICS

Even proponents of ecoterrorism bills have conceded that the bills trample First Amendment rights of animal rights activists and environmentalists,¹²⁵ but the paths leading up to the acceptance of these ecoterrorism bills are paved with green: corporations and their professional lobbyist groups are the driving force behind the ecoterrorism bills.¹²⁶ Lobbying is often viewed as "the activity of attempting to influence legislation by privately influencing legislators"¹²⁷ Interest groups tend to spend more money on hiring a lobbyist – a decent lobbyist will earn between \$300,000 and \$400,000 a year – than on contributing to campaigns because

facility, the person damages or destroys an animal facility or any animal or property in or on an animal facility.

(3) A person commits an offense if, without the effective consent of the owner and with the intent to disrupt or damage the enterprise conducted at the animal facility, the person enters an animal facility, not then open to the public, with the intent to commit an act prohibited by this section, remains concealed, with the intent to commit an act prohibited by this section, in an animal facility, or enters an animal facility and commits or attempts to commit an act prohibited by this section.

(4) A person commits an offense if, without the effective consent of the owner and with the intent to disrupt or damage the enterprise conducted at the animal facility, the person enters or remains on an animal facility, and the person had notice that the entry was forbidden, or received notice to depart but failed to do so. For purposes of this subsection "notice" shall mean oral or written communication by the owner or someone with apparent authority to act for the owner, fencing or other enclosure obviously designed to exclude intruders or to contain animals, or a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

¹²⁴ *Mosley*, 408 U.S. at 95; *see also Rosenberger*, 515 U.S. At 829.

¹²⁵ Hon. Frank Riggs, June 9, 1998. *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS*, Hearing before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session. ("Earth First! . . . condone[s] the use of sit-ins to halt lawful logging practices or, in my office, the normal operation of business. While these protests are certainly within the rights guaranteed to every American under the Constitution, their goal is not public awareness.")

¹²⁶ Steven Best, Ph.D., *Terrorists or Freedom Fighters supra*, p. 313.

¹²⁷ Ayn Rand, *Capitalism: The Unknown Ideal*, p. 168 (Signet Classics 1967).

lobbying turns out to be a better investment.¹²⁸ After all, mindful investment in a Washington lobbyist can yield vast returns in the form of sidelined regulations or reduced taxes.¹²⁹ Because lofty political goals are often implicated, lobbying activities can range anywhere from modest social cordialities and pampered lunches to the ascending activities of ‘back-scratching’, threats, bribes, and blackmail.¹³⁰ The culture of lobbying thus is indicative of a “mixed economy – of government by pressure groups.”¹³¹

Corporate lobbyists, in particular, “have so suffused the culture of the city that at times they seem part of the government itself.”¹³² The strong influence corporations have is evidenced in the finding that in 1990 when Congress passed, and President Bush signed, a substantial deficit-reduction bill, of its approximately \$140 billion in tax increases over five years, a mere 11 percent came from corporations; the remaining 89 percent came from individual, taxpaying families.¹³³

The model Animal and Ecological Terrorism Act, which provides the Patriot Act framework for state ecoterrorism bills, for instance, was drafted by ALEC, a powerful lobbying organization of which various corporations, including tobacco companies, oil companies, agribusiness trade associations, private corrections facilities, pharmaceutical manufacturers, and the National Rifle Association, are members.¹³⁴ The model Animal and Ecological Terrorism Act was subsequently adopted and advanced by the U.S. Sportsmen's Alliance, a front organization for firearms and ammunition manufacturers.¹³⁵ For a more detailed picture of the mechanics of these special interests lobbying groups, ALEC membership, for example, earns corporations the right to attend meetings at which their input on new laws is welcome and they are enabled to contact politicians directly.¹³⁶ Of ALEC’s members are over 2,400 legislators, which is almost one third of all state and federal legislators nationwide.¹³⁷ Politicians have very little motivation to resist the arm-twisting of corporation-funded groups like ALEC and, as such, propose and support laws that infringe the rights of those whose interests may be adverse to the financial interests of the ALEC corporations.¹³⁸ Thus, the real terrorist in the minds of the legislators becomes the one who inhibits the profits of these corporations.¹³⁹

Sadly, in the debate of how much freedom of speech an animal rights activist is entitled to, the power of inanimate corporate dollars overcomes any compelling concern for the living beings that are at the heart of the otherwise constitutionally protected public discourse.

¹²⁸ Ken Silverstein, *Washington on \$10 Million A Day: How Lobbyists Plunder the Nation*, p. 3 (Common Courage Press 1998); *The Lobbyists*, p. xii (The prologue reveals that at the time of the 1992 publication of the book, Thomas Donohue, the chief lobbyist for the American Trucking Associations was paid more than \$300,000 per year.).

¹²⁹ *The Lobbyists*, at p.4.

¹³⁰ *Capitalism*, p. 168.

¹³¹ *Capitalism*, p. 168.

¹³² Jeffrey H. Birnbaum, *The Lobbyists: How Influence Peddlers Get Their Way in Washington*, p. 3 (Random House 1992).

¹³³ *The Lobbyists*, at p. 3.

¹³⁴ Eddy article, 22 Pace Env'tl. L. Rev. 261, 275-276.

¹³⁵ Eddy article, 22 Pace Env'tl. L. Rev. 261, 275 (citing Tom Pelton, Hunters, Activists Have Many States In Cross Hairs: Md. Animal-Rights Groups Join in National Fight, Balt. Sun, Oct. 24, 2004, at 1B.)

¹³⁶ Steven Best, Ph.D., *Terrorists or Freedom Fighters* *supra*, p. 313.

¹³⁷ Dolovich, Sharon, ARTICLE: STATE PUNISHMENT AND PRIVATE PRISONS, 55 Duke L.J. 437, 526 (2005).

¹³⁸ Lawrence Sampson, *Terrorists or Freedom Fighters*, *supra*, p.186 (“A politician doesn’t have a very long shelf life if he or she doesn’t kowtow to the corporate mob.”)

¹³⁹ Daniel Berry, Clearinghouse for Environmental Advocacy and Research (“If environmental groups cost business money, then they’re eco-terrorists.”) http://www.drstevebest.org/papers/vegenvani/defining_terrorism.php

V. CONCLUSION

Those seeking to engage in civil disobedience activities on behalf of animals or natural resources must now follow a different set of rules than those, e.g., who wish to engage in similar activities on behalf of citizens desiring to buy artillery without restrictions or on behalf of human embryos. Despite the judiciary's declaration that the "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction,"¹⁴⁰ the overbroad, vague, and discriminatory ecoterrorism bills promote the very evil that decades of Supreme Court decisions sought to protect against. As it is truly the 'message on the picket sign' that motivated the generation, and subsequent ratification, of ecoterrorism bills, citizens have a very valid fear that we are entering an age of governmental thought control.

¹⁴⁰ *Rosenberger*, 515 US. At 829