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United States v. Fullmer and the Animal Enterprise Terrorism Act: "True Threats" to Advocacy

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UNITED STATES V. FULLMER AND THE ANIMAL ENTERPRISE TERRORISM ACT: "TRUE THREATS" TO ADVOCACY

INTRODUCTION

The past three decades witnessed the emergence of animal law and a diffusion of animal welfare beliefs and practices throughout society.[1] An increasing number of Americans adhere to vegetarianism and veganism, oppose the use of animals in research, and believe that animals have the right to an existence free from suffering.[2] This increased acceptance, like most change, is directly attributable to the efforts of advocates and the robust and uninhibited protection of speech that the First Amendment affords them, but recent

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[1] The Animal Legal Defense Fund was founded in 1979. For information regarding the history of the ALDF, see *About Us*, ANIMAL LEGAL DEFENSE FUND, http://www.aldf.org (last visited Feb. 26, 2011); *see also* Fran Ortiz, *Animal Law: A New Breed of Practice*, HOUSTON LAWYER, May/June 2008, *available at* http://www.thehoustonlawyer.com/aa_may08/page 30.htm (stating that, as of 2008, 117 American law schools have student ALDF chapters and that over 90 offer at least one course in animal law, up from only nine in 2000).

[2] *See* Richard Corliss, *Should We All Be Vegetarians?*, TIME, Jul. 15, 2002, at 48, 49 (stating that, as of 2002, "[s]ome 10 million Americans . . . consider themselves to be practicing vegetarians," and another 20 million have tried it); *see also* Tom L. Beauchamp et al., *Can There Be Cruelty-Free Cosmetic Testing?*, *in* THE HUMAN USE OF ANIMALS: CASE STUDIES IN ETHICAL CHOICE 201, 206 (Tom L. Bueaucham, et al., eds., 2d. ed. 2008) ("Polls have shown that 85–96% of the public is against animal testing of beauty, vanity, and household products.") (citation omitted) [hereinafter *Cruelty-Free*]; Winston J. Craig, *Health Effects of Vegan Diets*, 89 AM. J. CLINICAL NUTRITION 1627S, 1627S (2009) ("A nationwide poll in April 2006 by Harris Interactive reported that 1.4% of the American population is vegan, in that they eat no meat, fish, dairy, or eggs."); Colin Jerolmack, *Tracing the Profile of Animal Rights Supporters: A Preliminary Investigation*, 11 SOC'Y & ANIMALS 245, 246 (2003) ("In a 1995 poll conducted by the Associated Press, two-thirds of respondents agreed with the statement, 'an animal's right to live free of suffering should be just as important as a person's right to live free from suffering.'"); Heidi Benson, *No To Meat, But Yes To Skin: Vegan Vixens Use Cheesecake To Promote Cause*, S.F. CHRON., Nov. 18, 2007, at F1 ("A 2003 Harris Interactive poll found that 2.8 percent of the U.S. adult population is vegetarian, representing a nearly .5 percent increase in three years when compared with 2000 U.S. Census statistics.").

developments in the law threaten to halt further growth. This Note argues that poorly crafted legislation threatens to cast a substantial amount of traditionally protected advocacy under the shadow of terrorism, and this threat is intensified by a recent judicial decision that is likely to criminalize a significant amount of speech in need of First Amendment protection.

Part I of this Note briefly addresses the modern animal rights movement and its early achievements. It further discusses how the perception of animal rights supporters was transformed from peaceful reformers willing to fight for even the smallest of causes to militant extremists aimed at ending science. Part II addresses how Congress responded to this new image by enacting the Animal Enterprise Protection Act of 1992 ("AEPA").[3] In addition, Part II analyzes the recent decision in *United States v. Fullmer*,[4] the only judicial decision to interpret AEPA. It argues that the United States Court of Appeals for the Third Circuit's determination that advocacy of a future illegal act is capable of meeting the *Brandenburg* standard of incitement and its application of the "true threats" doctrine to public communications places the free speech rights of activists in jeopardy. Part III addresses the Animal Enterprise Terrorism Act ("AETA"),[5] a controversial and highly criticized amendment to the Animal Enterprise Protection Act. This Note argues that its reliance on expansive terms, which other courts have interpreted as inescapably intertwined with speech, brings AETA squarely into the realm of First Amendment scrutiny. In addition, its inconsistent use of expansive terms allows its plainly legitimate sweep to proscribe a substantial amount of protected speech. Part III further argues that in light of judicial decisions interpreting statutes similar in terms and structure, AETA is not a content-neutral restriction on speech and is not narrowly tailored to meet a legitimate state interest. Finally, for many of the same reasons that it is overbroad, AETA is unconstitutionally vague in that it fails to provide fair notice of what conduct it prohibits and obliges those entrusted to enforce its provisions to make key policy decisions on an ad hoc and subjective basis.

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[3] Pub. L. No. 102–346, 106 Stat. 928 (codified as amended 18 U.S.C. § 43 (2006)).
[4] 584 F.3d 132 (3d Cir. 2009).
[5] 18 U.S.C. § 43 (2006).

I. A BRIEF HISTORY OF THE MODERN ANIMAL RIGHTS MOVEMENT

A. Who Are Animal Rights Activists?

While the belief that animals possess "rights" necessitating treatment commensurate to humans has antecedents in antiquity, the modern animal rights movement emerged approximately three decades ago.[6] Proponents of animal rights are divided between those who believe animals possess rights or inherent value,[7] and those who believe it is only animals' capacity to suffer that must be acknowledged.[8] Despite these philosophical differences, the animal rights movement is "committed to a number of goals, including: the total abolition of the use of animals in science; the total dissolution of commercial animal agriculture; [and] the total elimination of commercial and sport hunting and trapping."[9] Activists are most often

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[6] The history of animal rights can be traced to at least 260 B.C.E. *See* PETER HARVEY, AN INTRODUCTION TO BUDDHISM: TEACHINGS, HISTORY AND PRACTICES 75–76 (1990) (discussing emperor Asoka's general shift to Buddhist principles during which he emphasized the moral improvement of his citizens, including a focus on the humane treatment of animals Many important facets of the modern animal rights movement came into being between the mid-1970s and early-1980s. *See, e.g.*, PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS (1975) (arguing for the end of "speciesism" or the subjugation of animal interests to human interests). The Animal Liberation Front, a clandestine animal rights organization often considered militant, was formed in England in 1976. *See* Ann McWilliams, Commentary, *How Animal Rights Activists Threaten the Veterinary Profession*, 30 CAN. VETERINARY J. 716, 719 (1989) (commenting that the Animal Liberation Front is the militant arm of the animal rights movement). People for the Ethical Treatment of Animals was formed in 1980. *All About PETA*, PETA, http://www.peta.org/about/learn-about-peta/default.aspx (last visited Feb. 26, 2011). The first lawyer-centered animal protection society, the Animal Legal Defense Fund, was created in 1979. *See About Us*, *supra* note 1. There were numerous highly influential events and publications that predated this period, of course. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Ch. XVII, at 283 (J. H. Burns & H. L. A. Hart eds., Athlone Press 1970) (1789) ("[T]he question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?"); JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 58 (Ernest Rhys, ed. Everyman's Library 1936) (1859) (noting Jeremy Bentham's notion of conferring moral equality regardless of species within the hedonic equation where "everybody to count for one, nobody for more than one"). The first anti-vivisection societies were created in England in the 19th century and the American Humane Society was created in 1954. Many scholars have compiled thorough histories of the Animal Rights movement. *See, e.g.*, Susan L. Goodkin, *The Evolution of Animal Rights*, 18 COLUM. HUM. RIGHTS. L. REV. 259 (1987).

[7] *See, e.g.*, TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983); PAUL W. TAYLOR, RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS (1986); CHRISTOPHER D. STONE, EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM (1987); Tom Regan, *The Case for Animal Rights*, *in* IN DEFENSE OF ANIMALS 13 (Peter Singer ed., 1985); Christopher D. Stone, Should Trees Have Standing? *Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1 (1985).

[8] *See, e.g.*, SINGER, *supra* note 6.

[9] TOM REGAN, *The Case for Animal Rights*, *in* ANIMAL EXPERIMENTATION: THE MORAL ISSUES 77, 77 (Robert M. Baird & Stuart E. Rosenbaum eds., 1991).

educated, upper middle-class, and white, and the movement is overrepresented by women.[10]

B. Early Achievements of the Modern Animal Rights Movement

Within a few years of its formation, the American animal rights movement had made considerable strides toward achieving its ultimate goal of abolishing the use of animals in research, both commercial and academic.[11] The primary weapon in the animal rights movement's arsenal was evidence of animal abuse and legal violations obtained by undercover journalists and whistleblowers, who were known to volunteer for assignments at laboratories.[12] Images and descriptions of laboratory conditions spurred strong public sentiment. Two particularly high profile cases of demonstrated abuse and legal violations at federally funded research institutions propelled the animal rights movement into the public's consciousness.

In 1981, police raided the Institute for Behavioral Research and charged the lead scientist and an assistant with fifteen counts of animal cruelty after a member of the newly formed People for the Ethical Treatment of Animals smuggled out pictures of laboratory conditions.[13] The evidence revealed that in order to imitate stroke-like conditions, researchers routinely severed the spinal cords and nerves

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[10] *See* Shelley L. Galvin & Harold A. Herzog, Jr., *Ethical Ideology, Animal Rights Activism, and Attitudes Toward the Treatment of Animals*, 2 ETHICS & BEHAV. 141, 141–49 (1992) (arguing that research reveals that the stereotypical profile is middle-aged, white, and possessing at least a bachelor's degree); McWilliams, *supra* note 6, at 717 ("The majority of Animal Rights activists are white, fairly young, well-educated women."); Eugene S. Uyeki & Lani J. Holland, *Diffusion of Pro-Environment Attitudes?*, 43 AM. BEHAV. SCI., 646, 653, (2000) (noting that some studies have indicated that women are more likely to support animals rights than are men of similar socio-economic status). *But see* Adrian Franklin et al., *Explaining Support for Animal Rights: A Comparison of Two Recent Approaches to Humans, Nonhuman Animals, and Postmodernity*, 9 SOC'Y & ANIMALS 127, 139 (2001) (arguing that animal-rights support is increasing independent of age, race, and education); Jerolmack, *supra* note 2, at 245 (reporting results of a study that did not support the stereotype of animal rights advocates as upper-middle class, middle aged, and white, but found that young, less-educated, non-black minorities were likely to support animal rights).

[11] *See* DEBORAH RUDACILLE, THE SCALPEL AND THE BUTTERFLY: THE WAR BETWEEN ANIMAL RESEARCH AND ANIMAL PROTECTION 157 (2000) (discussing amendments to the 1966 Laboratory Animal Welfare Act passed during the 1970s and 1980s that increased the regulation of the use of animals in experimentation)).

[12] *See* McWilliams, *supra* note 6, at 718 (describing the general activist infiltration strategy and specific high-profile infiltrations). McWilliams warns other researchers to be weary of individuals who volunteer or accept low level assignments because of the numerous instances in which these "volunteers" were in fact animal rights activists who smuggled out evidence and then used it against the laboratory. *Id.*

[13] *See Scientist, Assistant Face 15 Charges of Cruelty to Animals*, WASH. POST, Sept 29, 1981, at B3 [hereinafter *Charges*] ("The chief scientist and an assistant at the Institute for Behavioral Research were formally charged yesterday with 15 counts of animal cruelty involving the research monkeys seized in a Silver Spring police raid . . . .").

within the arms of alert monkeys, crippled the arms and legs of many more, and sewed shut the eyes of others to determine if they could recover from such impairment.[14] The stolen images revealed that the animals were kept in unsanitary, thirteen-inch cages, and with wounds undressed, sometimes with fingers or entire hands torn off.[15] Soon after the images were released, federal funding for the research was discontinued and the researchers were arrested.[16]

In 1984, the animal rights organization Animal Liberation Front released videotapes obtained from the University of Pennsylvania Head Injury Clinic where researchers had developed a device that inflicted an impact 2,000 times the force of gravity to a baboon's skull to simulate head injuries, which caused coma and paralysis.[17] Excerpts from these videos were released and immediately attracted worldwide media attention.[18] "One excerpt showed a baboon repeatedly writhing on a table as a hydraulic piston hit the animal's head. Just before the head injury, the animals were seen with their eyes open, twisting on the table in an attempt to turn their bodies over."[19] Other excerpts showed researchers severing a baboon's ear with a hammer and chisel while trying to remove the contraption and researchers mocking the animals during experimentation.[20] Federal funding for the research was terminated after four days of sit-ins by animal rights activists at the National Institute of Health's headquarters.[21]

Congress responded to the public outcry by amending the Animal Welfare Act[22] to increase oversight of animal research.[23] The 1985

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[14] James J. Kilpatrick, *Caged in Poolesville*, WASH. POST, May 12, 1986, at A15; *see also* Robert Reinhold, *Fate of Monkeys, Deformed for Science, Causes Human Hurt After 6 Years*, N.Y. TIMES, May 23, 1987, at 8 (noting that the monkeys garnered so much public sympathy that Robert C. Smith, a Republican Congressman from New Hampshire, offered to purchase the monkeys himself so that he could assure them a place in an animal sanctuary).

[15] Kilpatrick, *supra* note 14; *see also* Reinhold, *supra* note 14.

[16] *Charges*, *supra* note 13; *see also* Kilpatrick, *supra* note 14 (citing statements by the chief executive officer of the National Institute of Health noting that the accused researcher discontinued his research efforts in the absence of further NIH funding).

[17] Tom L. Beauchamp et al., *Head Injury Experiments on Primates at the University of Pennsylvania*, *in* THE HUMAN USE OF ANIMALS: CASE STUDIES IN ETHICAL CHOICE, *supra* note 2, at 177–79 (Tom L. Beauchamp, et al. eds., 2008) [hereinafter *Head Injuries*].

[18] *Id.* at 179.

[19] *Id.*

[20] *See* GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 179–84 (1995) (providing a detailed account of the incidents).

[21] *Head Injuries*, *supra* note 17, at 181–82; *see also* McWilliams, *supra* note 6, at 718–19 (detailing the events and describing PETA's tactics as unethical, although effective)).

[22] Laboratory Animal Welfare Act, Pub. L. 89–544, 80 Stat 350, (1966) (codified as amended at 7 U.S.C. § 2131 (2006)) (authorizing the Secretary of Agriculture to regulate the transportation, sale, and handling of animals intended to be used for research or experimentation). The Laboratory Animal Welfare Act's stated objective was to prevent

amendments urged researchers to find alternative methods to those likely to inflict pain on subjects.[24] The amendments also required that research centers establish an Animal Welfare Information Center and Institutional Animal Care and Use Committee[25] to review all uses of animals in research.[26]

C. Industry Responses to the Modern Animal Rights Movement

Public criticism over the use of animals in research was mounting.[27] The cosmetic industry, recognizing the commercial benefit of "cruelty-free" products, quickly modified its practices and became one of the most ardent supporters of alternative testing methods.[28] Unlike the retail industry, which saw alternative testing as a profitable and therefore beneficial endeavor, the biomedical research community viewed these "achievements" as a potentially devastating affront to science and an attempt by anti-intellectuals to control research.[29]

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companion animals from being stolen from homes for research. Ensuring a level of treatment for animals used in research was only its tertiary purpose. *Id.*

[23] Pub. L. 99–198, § 1751(3), 1756(b), 99 Stat. 1354, 1645, 1650 (1985) (broadening the definition of "animal" and recognizing that "measures which eliminate or minimize the unnecessary duplication of experiments on animals can result in more productive use of Federal Funds").

[24] Food Security Act, 7 U.S.C § 2143(a)(7) (2006).

[25] *See id.* § 2143(e) (information center); *id.* § 2143(b)(1) (care and use committee).

[26] RUDACILLE, *supra* note 11, at 157–58 (stating that the Institutional Animal Care and Use Committees were developed to increase animal welfare and not the scientific value of the research).

[27] *See id*. at 161 (discussing the increased public concern with respect to cosmetics testing on animals). On April 15, 1980, a full-page advertisement by the Coalition to Abolish the Draize Test appeared in the New York Times. The words "HOW MANY RABBITS HAS REVLON BLINDED FOR BEAUTY'S SAKE?" were superimposed over a picture of a rabbit about to have a chemical solution forced into its eyes. *Id.* The Draize Test is used to determine the eye irritancy of many products. It usually consists of restraining a rabbit in an enclosure where only its head remains visible, and chemicals are placed in the rabbit's eyes. Rabbits are primarily used in the experiments because they lack tear ducts and therefore are incapable of flushing the solution. This allows researchers to monitor the effects for greater periods of time, usually one week. For a full discussion of the Draize Test, see RUDACILLE, *supra* note 11, at 160–61, and for images of the Draize Test, see SINGER, *supra* note 6, at 142.

[28] *See* RUDACILLE, *supra* note 11, at 161 ("Within a year [Revlon] had donated $750,000 to the Rockefeller Institute to fund research into alternatives to the Draize [Test]."); *see also Cruelty-Free*, *supra* note 2, at 201 ("It has become increasingly apparent that the public does not want products that have been tested on laboratory animals, so many companies have ended their testing.").

[29] RUDACILLE, *supra* note 11, at 158. Rudacille states that many researchers viewed this legislation as an attack on academic freedom and another hurdle to obtaining grants for research. However, she also notes the perversity of this reaction because the use of animals in research had been steadily declining since the late 1960s. *Id.*; *see also Head Injuries*, *supra* note 17, at 185 (chronicling the extreme reactions by the research community to the termination of funding for the University of Pennsylvania Head Injury experiments); William A. Gibson, Editorial, *The Animal Rights War on Biomedical Research: A Call to Arms*, 69 J. OF DENTAL RES. 1703, 1704

Many researchers perceived the animal rights movement as an attack on their scholarship and personally vowed to oppose not only the animal rights movement, but also any legislation aimed at limiting the use of animals in research.[30] The research community responded by lobbying Congress and reframing the debate over animal research.[31] They described evidence gathered by whistleblowers as "faked" or "fabricated."[32] The techniques employed by researchers in the Silver Spring and University of Pennsylvania Head Injury Clinic cases, which led to dozens of animal cruelty charges and Animal Welfare Act violations, were described as "debatable,"[33] and the animal rights advocates who revealed these violations were described as "unethical" for impeding research.[34] Supporters of animal welfare

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(1990) (describing the animal rights movement as "essentially anti-intellectual and anti-scientific").

[30] *See* Gibson, *supra* note 29, at 1703 (calling on members of the biomedical community to oppose such legislation, and support legislation that criminalizes break-ins and acts of vandalism committed by animal rights protesters at research facilities). Gibson continues:

> We, as members of [the biomedical] community, whether we use animals in our research or not, have a responsibility to help thwart the efforts of those who seek to end the use of animals in research . . . . The time has come for all of us in the biomedical research community to do our part in actively opposing the animal rights movement . . . .

Id. at 1703–04.

[31] In direct response to the efforts of animal welfare supporters, the National Association for Biomedical Research ("NABR") was formed. Originally formed in 1979 as the Research Animal Alliance, and changing its name to the NABR in 1981, the NABR represents animal research-related firms in the courts and on Capitol Hill. It opposes many regulations and restrictions placed on the use of animals in research and is the only lobby group that advocates solely for the use of animals in research. *See A Voice in Government*, NAT'L ASS'N FOR BIOMED. RESEARCH, http://www.nabr.org/About_NABR/Government.aspx (last visited Feb. 26, 2011) [hereinafter *Voice in Government*]; *see also* NAT'L ASS'N FOR BIOMED. RESEARCH, 25 YEARS OF ADVOCATING SOUND PUBLIC POLICY 3 (2005), *available at* http://www.nabr.org/Portals/8/NABR_25th _revised-LR.pdf [hereinafter *Public Policy*] (stating that NABR's "membership comprises more than 300 . . . animal research-related firms," and noting its current political influence, and crediting NABR with passing the majority of legislation that has restricted the animal rights movement); Coco Ballantyne, *The Lobbying Landscape and Beyond: 15 Groups to Know*, 14 NATURE MED. 1002, 1003 (2008) ("Established in 1979 when the scientific community was coming under increased scrutiny from animal rights groups, NABR now represents around 300 institutions involved in animal research.").

[32] *See* Gibson, *supra* note 29, at 1703 ("'Evidence' of inhumane or cruel treatment of animals has been faked, and statements about the purpose and nature of the research have been fabricated.").

[33] *See* McWilliams, *supra* note 6, at 718 (stating that at Silver Spring, PETA "found unsanitary conditions and *debatable* animal care") (emphasis added).

[34] *See Public Policy*, *supra* note 31, at 4–5 (negatively chronicling the activities of animal rights activists against research laboratories from the early 1980s to the present day). Under the heading "Combating a movement meant to immobilize research: Over the years, animal rights groups have proven themselves savvy, sophisticated and unrelenting in their aim to halt biomedical research," NABR refers to the animal-rights successes in the Silver Spring Monkey Case and the University of Pennsylvania Head Injury Clinic as "stunts" by an "extremist group."

in general were described as "terrorist[s]," "extremists," and "misguided fanatics"[35] bent on immobilizing research.[36]

In 1988, the American Medical Association ("AMA") began combating the animal rights movement through a series of unpublished "White Papers."[37] Shortly thereafter, an internal AMA document titled "Animal Research Action Plan" was leaked to the animal rights organization PETA.[38] The document urged individual researchers to take a "strong concerted effort" to "shrink the size of the sympathizers" by isolating "the hardcore activists from the general public . . . by *exploiting the differences* that already exist over goals and tactics – *especially the use of violence*."[39] The document recommended that "[t]he animal activist movement must be shown to be not only anti-science but also a) *responsible for violent and illegal acts* that endanger life and property and b) a threat to the public's freedom of choice."[40] The document further promoted the formation

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Id. at 4. The NABR now describes the Silver Spring monkey case as one of many stunts and illegal acts that have garnered public attention in their war against science. NABR writes, "PETA (People for the Ethical Treatment of Animals), the movement's most familiar group, formed in 1980 and gained notoriety by leading the charge in the case of the 'Silver Springs Monkeys,' . . . [where] activists claimed their first major victory in their war to end all animal research." *Id.* Emboldened by these successes, "U.S. groups orchestrated major raids to confiscate animals, particularly at primate research facilities. Their stunts garnered a vast amount of press coverage on the use of laboratory animals." *Id.*; *see also* Tzachi Zamir, *Killing for Knowledge*, 23 J. APPLIED PHIL. 17, 19–29 (2006) (providing a detailed exposition of many of the arguments used in pro-vivisection literature); Arthur S. Brisbane, *HHS Sanction Against Animal Research Upheld*, WASH. POST, Jun. 16, 1984, at B3 (reporting that the Department of Health and Human Services upheld the termination of the National Institutes of Health research grant because of inhumane treatment of the animals, which it concluded was unavoidable given the nature of the experiments).

[35] *See, e.g.*, Gibson, *supra* note 29, at 1703–04 (arguing that proponents of animal rights are anti-intellectual, anti-scientific, and "misguided fanatics" whose aim is to place the welfare of the public at risk by ending research).

[36] *See Public Policy*, *supra* note 31, at 4–5. (describing the historical threat that the animal rights movement has posed to the biomedical research community since its inception in the early 1980s).

[37] *See* AMERICAN MEDICAL ASSOCIATION, USE OF ANIMALS IN BIOMEDICAL RESEARCH: THE CHALLENGE AND RESPONSE, AMA WHITE PAPER (Mar. 1988); *see also* TOM REGAN, EMPTY CAGES: FACING THE CHALLENGE OF ANIMAL RIGHTS 12 (2004) (discussing the AMA White Paper and its effect on the animal rights movement).

[38] AMERICAN MEDICAL ASSOCIATION, ANIMAL RESEARCH ACTION PLAN 2 (1989) (unpublished internal document) (on file with author); *see also* DEBORAH BLUM, THE MONKEY WARS 145 (1994) (discussing the AMA's Attempt to undermine the animal rights movement through its Animal Research Action Plan); HAROLD D. GUITHER, ANIMAL RIGHTS: HISTORY AND SCOPE OF A RADICAL SOCIAL MOVEMENT 123 (1998) (explaining the steps taken by the AMA in the late 1980s, including the publication of its White Paper and the development of the Animal Research Action Plan).

[39] *See* ANIMAL RESEARCH ACTION PLAN, *supra* note 38, at 2.

[40] *Id.*; *see also* Steven J. Smith & William R. Hendee, *Animals in Research*, 259 J. AM. MED. ASS'N 2007 (1988) (advocating that physicians take an active role defending animal research not only at the national level but at the local and even personal level). Many researchers have supported these recommendations because of their belief that if the animal

of a special investigative unit to monitor animal rights activities.[41] The AMA's recommendations were borne out by the case of Fran Trutt discussed below.

D. The Marriage of Animal Rights and Terrorism

U.S. Surgical, a manufacturer of medical supplies, was long targeted by animal rights activists for its practice of using live dogs in its sales demonstrations.[42] Acting on a tip from an informant, police arrested Fran Trutt, an animal rights supporter, on November 11, 1988, after she placed a pipe bomb at U.S. Surgical's headquarters.[43] Trutt was charged with attempted murder.[44] U.S. Surgical was quick to condemn the act as "an example of growing fanaticism in the animal-rights movement."[45] The attempted bombing immediately made national headlines and instilled fear that supporters of animal rights had become militant extremists.[46] Only two weeks after the arrest, Time Magazine reported, "Trutt's arrest raised the possibility that the animal-rights movement, which in the past has confined itself to public appeals, lobbying for anticruelty legislation and an occasional raid on research facilities to free the animals inside, has entered a *terroristic phase*."[47]

Months after the would-be bombing made national headlines, U.S. Surgical acknowledged that several months before the arrest it had hired a surveillance company to infiltrate an animal rights group and

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rights movement were to prevail, the future of science would be bleak. *See, e.g.*, Jerod M. Loeb et al., *Human vs Animal Rights: In Defense of Animal Research*, 262 J. AM. MED. ASS'N 2716 (1989) (condensing an analysis by the AMA regarding the use of animals in research and concluding that although animals should be treated as humanely as possible, animal research is essential to investigating medical advances). Many scholarly works discuss the AMA White Paper and its recommendations at length. *See, e.g.*, REGAN, *supra* 9, at 12 (arguing that the AMA document was a substantial contributor to the backlash against activists in the 1980s and 1990s).

[41] *See* ANIMAL RESEARCH ACTION PLAN, *supra* note 38, at 10.

[42] *See* Carole Bass, *Animal Activists: Target of Covert Campaign?*, CONN. LAW TRIBUNE, December 19, 1991, at 1, 5 (noting that U.S. Surgical was long targeted by animal rights activists for the "company's practice of cutting live dogs, then stapling their intestines" during sales demonstration and the subsequent killing of the dogs after each sales demonstration).

[43] *A Serious Case of Puppy Love*, TIME, Nov. 28, 1988, at 24 (providing a brief overview of Trutt's actions, her arrest, and the parties in the case); *see also* Celestine Bohlen, *Animal-Rights Case: Terror or Entrapment,?*, N.Y. TIMES, Mar. 3, 1989, at B1 (reporting on the arrest of Fran Trutt and describing the growing concern of the police and the biomedical companies of potentially violent acts by protesters).

[44] *Pipe Bomb Suspect Offers No-Contest Plea: Animal Activist Trutt Charged in Murder Attempt*, NEWSDAY (USA), Apr. 17, 1990.

[45] Bohlen, *supra* note 43, at B1.

[46] *See* RUDACILLE, *supra* note 11, at 156 (discussing the exploitation of the Trutt case by the biomedical community to raise fear about future threats by animal activists).

[47] *A Serious Case of Puppy Love*, *supra* note 43, at 24 (emphasis added).

befriend Trutt,[48] and that the surveillance company stated that it was paid by U.S. Surgical to orchestrate the bombing in order to portray the animal rights movement as militant.[49] The Norwalk police allegedly participated in the setup.[50] Trutt's attorney linked the bombs to the surveillance company and established a sufficiently close relationship between U.S. Surgical and the police to argue entrapment.[51] Fearful that the prosecution would make good on its announcement that it would play tapes recorded during the surveillance that would reveal Trutt's secret lesbian relationship, Trutt pled no contest to attempted murder in exchange for a reduced sentence.[52] Because there was no trial, the seemingly illegal dealings of U.S. Surgical and the Norwalk police were never brought to the public's attention, and the perception that animal rights had entered a "terroristic phase" was born.[53]

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[48] *See* RUDACILLE, *supra* note 11, at 155 (discussing the argument presented by Trutt's attorney that U.S. Surgical knew about Trutt's hatred for its president and knew of Trutt's plans through surveillance and informants); Diane Alters, *Spies for Profit Track Social Activists*, SEATTLE TIMES, July 14, 1989, at A12 (reporting on the actions of Mary Louise Sapone, an employee at a security firm hired by U.S. Surgical, who infiltrated an animal rights group in Norwalk and befriended Trutt); Bohlen, *supra* note 43, at B4 (discussing efforts by agents of Perceptions International, a security consultant company hired by U.S. Surgical, to infiltrate animal rights protests, befriend Trutt, and report back to U.S. Surgical's president, Leon Hirsch); Nick Ravo, *U.S. Surgical Admits Spying on Animal-Rights Groups*, N.Y. TIMES, Jan. 26, 1989, at B1 (reporting that the president of U.S. Surgical, Leon Hirsh, admitted that he had hired informants to infiltrate animal rights organizations, but he denied allegations of entrapment).

[49] *See* Ravo, *supra* note 48, at B1 (discussing U.S. Surgical's admission that it sent agents to infiltrate animal rights groups).

[50] *See* Bohlen, *supra* note 43, at B4 (reporting the alleged instructions of the Norwalk police department to Perceptions International informants to help Trutt take the bomb to U.S. Surgical's headquarters); *see also* RUDACILLE, *supra* note 11, at 152 (discussing that Marcus Mead, of Perceptions International later told reporters that he was given explicit instructions regarding where to park when he drove Trutt to U.S. Surgical with the bomb because the "police wanted us to be in the fenced area so that when they came after us, she would have no way of escaping").

[51] *See* Bohlen, *supra* note 43, at B4 (detailing evidence cited by Trutt's attorney that U.S. Surgical monitored Trutt's actions through surveillance, paid informants, and knew of her bombing plan in advance); *see also* RUDACILLE, *supra* note 11, at 155 (noting that the prosecution had recordings of Trutt's conversations with informants expressing her "desire to kill Leon Hirsch").

[52] *See* John T. McQuiston, *Woman Enters No-Contest Plea in a Bomb Plot*, N.Y. TIMES, Apr. 17, 1990, at B3 (reporting that Fran Trutt contested all the facts of the case but chose to plea bargain because the prosecution was prepared to introduce recordings that detailed her sexual relationship with a female lover).

[53] *See* Bohlen, *supra* note 43, at B4 (discussing the attitude of the president of Perceptions International regarding the potential threat of violent actions by animal rights groups); *see also* Larry Horton, *The Enduring Animal Issue*, 25 IN VITRO CELL. & DEV. BIOLOGY 486, 489 (1989) (noting that while the animal rights movement had not caused the death of any human, the then pending prosecution of Trutt was an indication of the increased violence and likely deaths that would be caused by animal rights activists in the future).

Shortly after Trutt's arrest, an industry newsletter describing this new era of animal rights extremism was disseminated throughout the research community.

> Just as the shooting down of a civilian Rhodesian airliner by a local terrorist group in the 1970's created an environment in which murderous attacks like the Achille Laro incident could be conceived and implemented by dedicated extremists, so might Trutt's action stand as a milestone for the Animal Rights Movement.[54]

Within one year of Trutt's arrest, animal rights organizations were added to the FBI's list of domestic terrorist organizations.[55]

II. THE ANIMAL ENTERPRISE PROTECTION ACT

A. The Legislative Response to Animal Rights Terrorism

The Trutt incident cause substantial anxiety, and almost immediately, the biomedical community began pressuring Congress for tighter restrictions on animal rights activists.[56] Congress responded to concerns that animal rights had entered an era of extremism by enacting the Animal Enterprise Protection Act of 1992 ("AEPA")[57] less than a year after Trutt pled no contest to attempted murder.[58] While the sparse legislative history reveals that AEPA was aimed solely at halting extreme acts of violence against certain institutions, AEPA's drafters unfortunately relied on the amorphous term "physical disruption" in criminalizing acts against animal enterprises.[59] The House Judiciary Committee immediately expressed

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[54] *A Violent Edge*, ANIMAL RTS. REP., Dec. 1988, at 11

[55] *See* Gibson, *supra* note 29, at 1703 (noting that the Animal Liberation Front was named a domestic terrorist organization in 1988).

[56] *See* PETER SINGER, ETHICS INTO ACTION: HENRY SPIRA AND THE ANIMAL RIGHTS MOVEMENT 156 (1998) (noting that the early 1990s saw a tremendous backlash against animal rights activists and recounting an incident on June 10, 1990 when Louis Sullivan, then Secretary of Health and Human Services, referred to 25,000 animal rights protestors in Washington D.C. as terrorists).

[57] Pub. L. 102–346, 106 Stat. 928 (codified as amended at 18 U.S.C. § 43 (2006)); *see also Public Policy*, *supra* note 31, at 7 ("NABR led the initiative to pass the *Animal Enterprise Protection Act of 1992*, making it a federal offense to destroy research. This was the first of several NABR-endorsed pieces of legislation designed to protect research facilities and individuals targeted by animal rights groups.").

[58] Fran Trutt entered a plea of no contest to attempted murder and possession of explosives on April 16, 1990. *See Animal-Rights Activist Gets 32 Months*, WASH. TIMES, July 18, 1990, at A6.

[59] *See* § 2, 106 Stat. at 928 ("[I]ntentionally causes *physical disruption* to the functioning

concerns that "physical disruption" is an ambiguous term, and that without clarification it could be used to prosecute what have traditionally been legally protected activities merely because they affect an animal enterprise.[60] Congress ultimately provided a definition of "physical disruption," but it failed to remedy the statute's ambiguity.[61] It defined a "physical disruption" as a disruption that is not lawful, but since Congress failed to provide a definition of what disruptions are lawful, the definition added little clarity.[62] In addition, the exemption for lawful disruption placed criminal liability in the hands of third parties because it only exempted a disruption that "results from lawful public, governmental, or animal enterprise employee *reaction* to the disclosure of information about an animal enterprise."[63] This definition grounds criminal liability not in the lawfulness of the initial disclosure or conduct, but in the public, governmental, or animal enterprise employee's reaction to that disclosure or conduct, which itself raises constitutional concerns.[64] Despite these concerns, there was only speculation about AEPA's practical application prior to the Stop Huntingdon Animal Cruelty campaign.[65]

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of an animal enterprise . . . .") (emphasis added). *See generally* Michael Hill, Comment, *The Animal Enterprise Terrorism Act: The Need for a Whistleblower Exception*, 61 CASE. W. RES. L. REV. (forthcoming 2011) (providing a detailed discussion of AEPA's history).

[60] *See* H.R. REP. NO. 102–498(II), at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 816, 818 ("The ambiguous term 'physical disruption' is not defined, and could be construed to make criminal whistleblowing activity that results in a facility being shut down by regulators or protests. At best, this would have chilled whistleblowing; at worst, it could have resulted in actual prosecutions of whistleblowers.").

[61] *See* Animal Enterprise Control Act, Pub. L. 102–346, 106 Stat. at 929 ("[T]he term 'physical disruption' does not include any lawful disruption that results from lawful public, governmental, or animal enterprise employee reaction to the disclosure of information about an animal enterprise . . . .") When Congress codified the Animal Enterprise Control Act, it changed "physical disruption" to "economic damage." *See* 18 U.S.C. § 43(d)(3) (2006) ("[T]he term 'economic damage' . . . does not include any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise . . . .").

[62] Animal Enterprise Control Act, 106 Stat. at 929.

[63] *Id.* (emphasis added).

[64] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) (holding that liability may not be imputed from the audience to the speaker unless there is a substantial showing of improper motives of all parties). The problematic definition of "physical disruption" in the Animal Enterprise Protection Act was later included as the definition of "economic disruption" in the Animal Enterprise Terrorism Act. *See* discussion *infra* Part III.A.1.ii.

[65] *See* Laura G. Kniaz, Comment, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFF. L. REV. 765, 818 n.296 (1995) (expressing concerns over AEPA's application because it was duplicative of state laws that proscribed the same conduct and speculating about its reach).

B. United States v. Fullmer

In 1997, a British journalist gained employment at Huntingdon Life Sciences and released videos of researchers' repeated violations of animal welfare laws, which ultimately led to 48 citations.[66] Of all the events caught on tape, the beating of a four-month-old beagle puppy and the dissection of a live monkey received the most attention.[67] The footage evoked a strong emotional response from activists and the public.[68] The animal rights organization, Stop Huntingdon Animal Cruelty ("SHAC"), was created in direct response to these videos.[69]

SHAC's purpose was to oppose what it perceived as animal cruelty at Huntingdon Life Sciences by making available information and organizing protests that would lead to the company's ultimate downfall.[70] SHAC's website served as its primary tool for organizing protest campaigns.[71] The website contained a page dedicated to "direct action," a phrase used to denote action taken directly against the source of opposition and commonly used to refer to illegal means of protest.[72] It stated:

> We operate within the boundaries of the law, but recognize and support those who choose to operate outside the confines of the legal system.
> . . .

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[66] *See* Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protectionists as Terrorists*, 22 PACE ENVTL. L. REV 261, 269 n.35 (2005) (describing the clandestine journalism that spawned outrage against Huntingdon Life Sciences and providing a list of the charges levied against Huntingdon Life Sciences that ultimately resulted in 32 citations for violating the Animal Welfare Act and 16 citations for violating the Good Laboratory Practices Act); *see also* Lee Hall, *Disaggregating the Scare From the Greens*, 33 VT. L. REV. 689, 702 (2009) (reporting that Stop Huntingdon Animal Cruelty's website indicated that Huntingdon Life Sciences had also falsified data and "violat[ed] Good Laboratory Practice laws over 600 times") (quoting SHAC 7, What is HLS?, http://shac7.com/hls.htm (last visited May 14, 2009)).

[67] *See* Will Potter, *The Beagle Brigade: A Law That Tells Animal Rights Activists to Heel*, LEGAL AFFAIRS, Sept./Oct. 2004, at 11 (discussing the events captured on video).

[68] *See id*. (discussing the response to the notorious events).

[69] *See* United States v. Fullmer, 584 F.3d 132, 139 (3d. Cir. 2009) (recounting the facts relating to the formation of Stop Huntingdon Animal Cruelty).

[70] *See id.* at 139–42 (describing the specific tactics utilized by Stop Huntingdon Animal Cruelty).

[71] *Id*. at 139 ("SHAC's primary organizing tool is its website, through which members coordinate future protests.").

[72] *Id*. ("The website includes a page dedicated to the concept of 'direct action,' which all parties concede is a type of protest that includes the illegal activity in this case.").

> SHAC does not organize any such actions or have any knowledge of who is doing them or when they will happen, but [SHAC] encourage[s] people to support direct action when it happens and those who may participate in it.[73]

The website allowed users to post updates directly to the website, and many of the updates reported incidents of illegal activity committed by activists claiming to be unaffiliated with SHAC, including several instances of property damage committed in the U.S.[74] Accompanying each of these reports was a disclaimer stating that SHAC neither organizes nor engages in illegal activity.[75] The website also provided information that personally identified Huntingdon Life Sciences executives and the executives of companies that transacted with Huntingdon, including their names, phone numbers, and addresses.[76] In addition, the website urged visitors to engage in electronic civil disobedience on the first Monday of each month by sending numerous emails or faxes to companies associated with Huntingdon Life Sciences.[77] In 2004, six SHAC members were convicted of conspiracy to violate AEPA for operating the SHAC website.[78]

In *United States v. Fullmer*, the United States Court of Appeals for the Third Circuit, the only appellate court to review AEPA's language, upheld the convictions.[79] The only issues before the court were whether AEPA was void for vagueness and, if not, whether the defendants' pure speech violated its conspiracy provision.[80] The court rejected the defendants' arguments that AEPA was void for vagueness and that their speech was protected by the First

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[73] *Id.* (alterations in original).

[74] *See id.* at 142–47 (detailing a number of incidents of property damage at Huntingdon Life Science employees' homes including spray painting messages on garage doors, breaking doors and windows, throwing smoke bombs, throwing paint on the front walk of a home, and placing stickers with pictures of mutilated animals on a house, the majority of which were attributed to the Animal Liberation Front).

[75] *Id.* at 140 ("These bulletins almost always contained a disclaimer that 'all illegal activity is done by anonymous activists who have no relation with SHAC.'").

[76] *Id.* at 142.

[77] *Id.* at 141 ("Electronic civil disobedience involves a coordinated campaign by a large number of individuals to inundate websites, e-mail servers, and the telephone service of a targeted company.").

[78] *Id.* at 151.

[79] *Id.* at 137.

[80] *Id.* The only charge before the court was whether the defendants' speech on the internet constituted a conspiracy to violate AEPA. They were not accused of committing any acts of vandalism, property destruction, criminal trespass, or illegal conduct other than their pure speech.

Amendment.[81] In the course of upholding the convictions, the court committed three critical errors: (1) it failed to provide any explanation for its holding that "physical disruption" is not vague; (2) it vastly and inappropriately expanded on the *Brandenberg* test in finding that SHAC's advocating electronic civil disobedience amounted to incitement; and (3) it did not explain why, under existing precedent, the defendant's public speech was a "true threat."[82]

1. AEPA Not Void for Vagueness

The defendants argued that "physical disruption" is ambiguous and therefore failed to provide fair warning of what activity AEPA prohibited.[83] The court rejected this argument and held that "the term 'physical disruption' has a well-understood, common definition."[84] The court cited no authority for this determination either with respect to judicial decisions interpreting "physical disruption" or similar terms or by other reference.[85] The court merely asserted that "physical disruption" is a common phrase with a common meaning, but the court never articulated this meaning.[86] In light of the fact that AEPA's legislative history reveals serious concerns about the ambiguity of this term and its likelihood to result in multiple, conflicting interpretations, the court should have undertaken a more exacting analysis.[87]

In addition to holding that "physical disruption" has a common meaning and is therefore not vague, the court held that by operating the SHAC website in the manner that they did, the defendants were on notice that their speech was "clearly within the heartland of the statute."[88] The court premised this holding on SHAC's use of

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[81] *See id.* at 151–56 (holding that Animal Enterprise Protection Act was not unconstitutionally vague as applied, did not criminalize constitutionally protected speech, and refusing to consider a facial challenge because the court found that defendant did not have standing to challenge other than on an as-applied basis).

[82] *See id.*

[83] *Id.* at 151–52 ("Defendants argue that the statute has a chilling effect on speech because protestors will refrain from all speech, even protected speech, due to the ambiguity of what the statute proscribes.").

[84] *Id.* at 153.

[85] The court did not provide evidence of a single case, treatise, periodical, dictionary or any other source that supported this conclusion. *See id.*

[86] *See id.* The court does not provide any greater rationale than that "physical disruption" has a common meaning, and it fails to clarify why or how this is so, or even what that meaning is.

[87] *See supra* note 60 and accompanying text.

[88] *Fullmer*, 584 F.3d at 153.

encryption software.[89] The court reasoned that because encryption software can be used to evade law enforcement by preventing third parties from monitoring emails and erasing sensitive data, it was evidence of SHAC's consciousness of guilt.[90] The court, however, failed to consider the numerous lawful reasons for using encryption software, including the very reasons articulated by the court, to prevent third parties from monitoring emails or to otherwise protect sensitive data for purely innocent purposes.[91]

2. SHAC's Speech Was Not Protected by the First Amendment

The Constitution mandates an open marketplace of ideas.[92] An open marketplace of ideas requires the open and unrestricted dissemination of political, social, religious and other beliefs and viewpoints, many of which not only conflict with but are offensive to customary thought.[93] Because society as a whole benefits from the truth derived from these diverse views, the interests at stake are not merely those of the speaker but include the public's interest in hearing all sides of the debate.[94] Recognizing that freedom of speech is of paramount importance to a free society, the Supreme Court has made clear that its protection is almost absolute.[95] Despite near absolute

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[89] *Id.* ("The record is rife with evidence that Defendants were on notice that their activities put them at risk for prosecution, including the extensive use of various encryption devices and programs used to erase incriminating data from their computer hard drives.")

[90] *See id*.

[91] *See, e.g.*, Ken Belson, *Hackers Are Discovering a New Frontier: Internet Telephone Service*, N.Y. TIMES, Aug. 2, 2004, at C4 (recommending the use of encryption software to protect against hackers); John Markoff, *A Method for Stealing Critical Data*, N.Y. TIMES, Feb. 22, 2008, at C1 (noting that encryption software is widely used in computers to prevent the loss of data by third-party actions).

[92] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he theory of our Constitution" is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

[93] *See* Virginia v. Black, 538 U.S. 343, 366 (2003) (noting that the burning of a cross at a rally to support the Ku Klux Klan would be protected speech); Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding that burning the American flag at a rally is protected speech); Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (holding that an activist's conditional statement that he would shoot President Johnson was protected speech).

[94] *See* Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 445 (2009) (arguing that our system of self-government is directly tied to the principle of the marketplace of ideas and its mandate that we are able to hear all sides of the debate).

[95] FCC v. League of Women Voters, 468 U.S. 364, 377–78, 380 (1984) ("[It] is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, . . . the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . may not constitutionally be abridged . . . ." (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

protection, the First Amendment does not protect certain categories of speech because they are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[96] Unprotected categories of speech include incitement, fighting words, obscenity, defamatory and libelous statements, and other harmful speech of only de minimis social import.[97]

a. Inciting Speech

The *Fullmer* court held that the portion of SHAC's website that encouraged visitors to engage in electronic civil disobedience and provided information about how to participate in virtual sit-ins was not protected by the First Amendment because it incited lawlessness.[98] The court could have attempted to circumvent the *Brandenburg* incitement standard by arguing that SHAC's website was "crime-facilitating speech,"[99] a category of speech that is not protected because it allows individuals to further a criminal act, but instead the court explicitly relied on the *Brandenburg* standard.[100]

In *Brandenburg v. Ohio*,[101] the Supreme Court overturned an Ohio statute that prohibited advocating violence, sabotage, or unlawful methods of terrorism and for assembling with any group that advocates such uses for political or social reform.[102] Clarence Brandenburg, a Ku Klux Klan leader, was arrested after a video aired in which 12 hooded figures, many of whom were armed, gathered around a burning cross in one scene, and in another scene Brandenburg made a speech in which he stated that the KKK should "[s]end the Jews back to Israel", "[b]ury the niggers", and obtain

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[96] Chaplinksy v. New Hampshire, 315 U.S. 568, 572 (1942) (noting in dicta a list of categorically unprotected speech, including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words").

[97] *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam) (incitement); *Chaplinsky*, 315 U.S. at 572 ("fighting words"); *Watts*, 394 U.S. at 708 ("true threats"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (libel).

[98] United States v. Fullmer, 584 F.3d 132, 155 (3d Cir. 2009) ("We emphasize that much of the speech on the website does not run afoul of the *Brandenburg* standard. . . . However, we find that the posts that coordinate electronic civil disobedience . . . are more problematic.").

[99] *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1103 (2005) (providing a review of tests, discussing the Supreme Court's failure to address the issue, and addressing the distinctions between crime-facilitating speech and the *Brandenburg* test).

[100] *Fullmer*, 584 F.3d at 155 ("This type of communication is not protected speech under the *Brandenberg* standard.").

[101] 395 U.S. 444.

[102] *Id.* at 444–45.

"[f]reedom for the whites."[103] He also stated, "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[104] In overturning the statute and Brandenburg's conviction, the Supreme Court created the *Brandenburg* test for incitement:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[105]

The Supreme Court has noted that it generally disfavors punishing speech under the incitement doctrine because in almost all circumstances it is better to punish the actor rather than the speaker.[106] Under the *Brandenburg* test, however, speech can be proscribed when the speech is intended to create lawlessness, where the speech is likely to create lawlessness, and when such lawlessness is imminent.[107] Where the resulting illegal act is not imminent, the advocacy that inspires the act is not proscribable under the incitement doctrine.[108]

The incitement doctrine is premised on the notion that speech has an explosive or arousing character that, when spoken in a certain context, has the capacity to cause immediate illegal activity, and this has often been associated with mob-like violence.[109] The necessity of

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[103] *Id*. at 446 n.1.

[104] *Id.* at 446.

[105] *Id.* at 447.

[106] *See* Bartnicki v. Vopper, 532 U.S. 514 (2001) (holding that a radio commentator's on-air disclosure of an intercepted telephone conversation regarding union negotiations was protected by the First Amendment).

[107] *See* Volokh, *supra* note 99, at 1189 (noting that the Court's intent-plus-imminence-plus likelihood test was a large shift from the Court's previous test, which only required intent and likelihood, and was modified in order to allow more speech).

[108] *See* Hess v. Indiana, 414 U.S. 105, 108–109 (1973) (per curiam) (holding that imminence requires more than a likelihood of future crime).

[109] *See* Citizen Publ'g Co. v. Miller, 115 P.3d 107, 113 (Ariz. 2005) (en banc) (holding that a letter to the editor that advocated the murder of Muslims could not be considered incitement, even though people were murdered shortly after its publication, because it was not spoken to a mob but published in a newspaper); *see also* JOHN STUART MILL, ON LIBERTY 56 (Stefan Collini ed., Cambridge University Press 1989) (1859) ("An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer . . . .").

this explosive quality of speech makes the written medium ill-suited to the incitement doctrine.[110] While the Supreme Court has never specifically addressed the issue of whether written words can satisfy the *Brandenburg* standard, a number of courts have addressed this question and have concluded that it cannot, and they have done so in a wide variety of contexts, including published writings, letters, and more recently emails and blogs.[111] The Department of Justice has also

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[110] *See Recent Decisions: The United States Court of Appeals for the Fourth Circuit*, 58 MD. L. REV. 1221, 1269 (1999) (noting that the poor fit between inciting speech and the written word makes it uncertain that *Brandenburg* would apply to written material).

[111] A number of courts have determined that published writings cannot meet the *Brandenburg* standard, even if they instill an idea that causes the ultimate act. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1023 (5th Cir. 1987) (in overturning a judgment premised on the notion that the magazine's publication of an article about auto-erotic asphyxiation incited a person to attempt the act, during which he died, the court noted that the written words at hand did not meet the *Brandenburg* test, but refused to speculate as to whether written words might ever be capable of unprotected incitement); Thonen v. Jenkins, 491 F.2d 722, 723 n.3 (4th Cir. 1973) (per curiam) (holding that an editorial published in a university newspaper could not be considered incitement); *Citizen Publ'g*, 115 P.3d at 113 (a letter to the editor regarding the war in Iraq and proposing death of Muslims did not meet the test in *Brandenburg*); People v. Keough, 290 N.E.2d 819, 820 (N.Y. 1972) (reversing appellate court decision that writings and photographs could be restricted as likely to incite disorder). *Contrast* Rice v. Paladin Enter., Inc., 128 F.3d 233 (4th Cir. 1997), where the court held that the publisher of a book entitled HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS could be held civilly liable in a wrongful death action after a reader killed her eight-year-old quadriplegic child and her child's nurse. However, this decision was based on the publisher's admission that it "not only knew that its instructions might be used by murderers, but that it actually *intended* to provide assistance to murderers and would-be murderers which would be used by them 'upon receipt,' and that it in fact assisted [the murderer] in particular in the commission of the murders . . . ." *Id.* at 242. The court went on to state that its holding was limited to the particular facts of the case, including the admission, and the fact that "an inference of impermissible intent on the part of the producer or publisher would be unwarranted as a matter of law." *Id.* at 265–66.

Courts looking at whether a letter sent to multiple individuals can constitute incitement under the *Brandenburg* standard have concluded that it cannot. *See, e.g.*, Delano Vill. Cos. v. Orridge, 553 N.Y.S.2d 938, 942 (N.Y. Sup. Ct. 1990) (dismissing case on the grounds that racist letters sent to apartment owners advocating that they break civil rights laws by refusing to rent to minority tenants were protected speech because, although sharp and unpleasant, written statements cannot meet the *Brandenburg* standard).

More recently cases have arisen addressing whether the words written in email and on blogs amount to incitement, and like other written contexts, the courts have been reluctant to conclude that such communications can meet the *Brandenburg* standard. *See* United States v. White, No. 7:08-CR-00054, 2010 WL 438088 at *13–14 (W.D. Va. Feb. 4, 2010) (granting defendant's motion for acquittal to a jury finding that he made true threats and incited violence by email communication after he sent an email to a newspaper advocating for an anti-Jewish uprising and a call to arms to overthrow the Canadian government on a finding that email communications cannot be used to prove incitement because to do so would eviscerate the First Amendment); *see also* David J. Loundy, *E-Law 4: Computer Information Systems Law and System Operator Liability*, 21 SEATTLE U. L. REV. 1075, 1115–1118 (1998) (arguing that while the words posted to the Internet can constitute "true threats" or "fighting words," because these doctrines are dependent either on the intent of the speaker or the response of the listener independent of when they were written, they cannot meet the imminence requirement of

announced that Internet advocacy campaigns, even those that espouse hate-based violent illegal activity, cannot be criminalized under the *Brandenburg* standard because they cannot meet its imminence requirement.[112]

Not only is the written word ill-suited to meeting the *Brandenburg* imminence requirement, the specific facts addressed in *Fullmer*, regardless of the medium used, fall far short of *Brandenburg*'s imminence requirement. In *Hess v. Indiana*,[113] the first incitement case the Court decided after *Brandenburg*, the Court overturned Hess' conviction for obstruction.[114] Hess was arrested during an anti-war demonstration at the University of Indiana when he yelled to a sheriff, "We'll take the fucking street later."[115] The Court held that Hess' speech could not be prohibited because "at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time."[116] Although the Supreme Court has not provided a bright line rule, commentators have argued, and lower courts have held, that *Hess* requires that the illegal act immediately follow the speech, where "'[i]mmediately' means within a period which does not give time for reflection."[117]

Brandenburg); *cf.* United States v. Wilcox, 66 M.J. 442, 449 (C.A.A.F. 2008) (holding that a paratrooper's online profile that advocated for white supremacy and anarchy as well as espousing similar messages through internet communications could not meet the *Brandenburg* test).

[112] *See* COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION, U.S. DEP'T OF JUSTICE, LEGAL ASPECTS OF GOVERNMENT-SPONSORED PROHIBITIONS AGAINST RACIST PROPAGANDA ON THE INTERNET: THE U.S PERSPECTIVE, PRESENTED AT HATE SPEECH AND THE INTERNET, BEFORE THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (Nov. 1997), *available at* http://www.justice.gov/criminal/cybercrime/racismun.htm (noting that there has never been a case in which the publication of written works was found to meet the *Brandenburg* standard and therefore speech on the Internet, no matter what its content, could not either); *see also* Ronald J. Rychlak, *Compassion, Hatred, and Free Expression*, 27 MISS. C. L. REV. 407, 422 (2008) (noting that the United States signed the Convention on Cybercrime but refused to sign the Additional Protocol, which regulated hate speech, because most Internet communications are generally protected to a greater degree in the United States than in Europe); Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 J. TRANSNAT'L L. & POL'Y 253, 272 (2003) (noting that the United States cannot sign the Additional Protocol because internet communications that advocate violence or hatred are not inciting within the meaning of *Brandenburg*).

[113] 414 U.S. 105 (1973) (per curiam).

[114] *Id.* at 108–09.

[115] *Id.* at 107.

[116] *Id.* at 108.

[117] Nat'l Org. for Women, Inc. v. Scheidler, 897 F. Supp. 1047, 1087 (N.D. Ill. 1995) (striking portions of a RICO complaint alleging that the defendant anti-abortion advocate's speech was the cause of multiple violent acts against abortion providers because although they may have been the ultimate cause, the effect was not felt immediately after the speech was made); *see also* Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1280–81 (D. Colo. 2002) (in dismissing a claim against a videogame manufacturer the court held that there must be

The *Fullmer* court acknowledged that much of SHAC's advocacy could not meet the imminence requirement.[118] The court concluded, for example, that simply listing personally identifiable information on their website was not incitment because the protests that the posting inspired occurred a minimum of three weeks after it was made.[119] The court, however, did hold that SHAC's email entitled "Electronic Civil Disobedience" met the *Brandenburg* test.[120] Although SHAC claimed that it did not participate in direct action, as part of its advocacy campaign SHAC encouraged people to engage in virtual sit-ins, which it likened to traditional civil disobedience.[121] The court reasoned that because the email was entitled "Electronic Civil Disobedience," which denotes an illegal act, the "message encouraged and compelled an imminent, unlawful act that was not only likely to occur, but provided the schedule by which the unlawful act was to occur."[122] Under the prevailing interpretation of *Brandenburg*, however, the lawlessness that this email encouraged was hardly imminent.[123]

As already discussed, the written word is poorly suited to the incitement doctrine,[124] and accordingly, it is highly questionable whether an email has the arousing or explosive capacity that incitement requires.[125] It is difficult to conceptualize an email recipient as similar to a member of an angry mob where upon hearing

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a sufficiently close connection between speech and the corresponding action such that there is not time for reflection and suggesting that this may not be possible in a case of written material); Marc Rohr, *Grand Illusion?: The* Brandenburg *Test and Speech That Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 12 (2002) (arguing that the Court's decision in *Hess* mandates an almost contemporaneous connection between the speech and the accompanying act).

[118] *See* United States v. Fullmer, 584 F.3d 132, 155 (3d Cir. 2009) ("We emphasize that much of the speech on the website does not run afoul of the *Brandenburg* standard.").

[119] *See id*. at 155 n.10 (noting that the posting of the "Top Twenty Terror Tactics" on March 6, 2001 could not be used as proof of inciting an unlawful act on March 31, 2001).

[120] *Id.* at 155 (stating that the speech encourages imminent unlawfulness because it provided a specific date for the virtual sit-in).

[121] *See id.* at 139–41 (noting that SHAC's website had a disclaimer stating that it did not participate in direct action and did not know who did).

[122] *Id*. at 155.

[123] *See* text accompanying *supra* note 108 (noting the immediacy component that courts have interpreted *Brandenburg* to require).

[124] *See supra* notes 99–109 and accompanying text.

[125] *See* United States v. White, No. 7:08-CR-00054, 2010 WL 438088, at *13–15 (W.D. Va. Feb. 4, 2010) (holding that email was not inciting and noting that an email is poorly suited to meeting *Brandenburg's* imminence requirement); *see also* Loundy, *supra* note 108, at 1116 (arguing that email cannot meet *Brandenburg*, although instant messaging potentially could); *cf.* United States v. Wilcox, 66 M.J. 442, 449 (C.A.A.F. 2008) (holding posted online material is not inciting).

highly provocative speech they spontaneously and thoughtlessly act.[126] Rather, these are individuals receiving a message on a personal computer, which is much more similar to receiving a letter.[127] The court's error goes beyond the problem of the medium, however. The court stated that the email urging direct action was sent on October 26, 2003, but in an earlier portion of the opinion the court explicitly stated, "SHAC sponsored monthly electronic civil disobedience campaigns on the first Monday of every month."[128] This would mean that SHAC was advocating an illegal activity that would, at the very earliest, take place on Monday, November 3, 2003, at least eight days after the message was sent, and perhaps significantly later.[129] The intervening period between SHAC's sending the message and the anticipated virtual sit-in exceeds *Brandenburg*'s requirement that there be an immediate connection between the speech and the illegal act.[130] SHAC's speech merely advocated participation in the virtual sit-in and provided notice of when it would occur.[131] Where at all possible, punishment should be reserved for those who participate in the illegal act and not those who advocate participation.[132]

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[126] *See* Citizen Publ'g Co. v. Miller, 115 P.3d 107, 113 (Ariz. 2005) (en banc) (holding that a letter to the editor that advocated the murder of Muslims could not be considered incitement, even though people were murdered shortly after its publication, because it was not spoken to a mob but published in a newspaper); *see also* MILL, *supra* note 106, at 56 ("An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer . . . .").

[127] *See* Delano Vill. Cos. v. Orridge, 553 N.Y.S.2d 938, 942–43 (N.Y. Sup. Ct. 1990) (holding that letters advocating illegal activity and sent to private individuals cannot meet the *Brandenburg* standard).

[128] *Fullmer*, 584 F.3d at 141.

[129] The court did not state when the virtual sit-in would take place. The next Monday of the following month was November 3, 2003; however, the court did not indicate that the email was urging participation in that particular sit-in or a later one or simply making a general statement that SHAC encouraged participation in sit-ins. *See id.* (noting only that, in the October 26 e-mail, a link would be provided the following day to the SHAC-Moscow website where the electronic civil disobedience would take place).

[130] *See* Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1281 (D. Colo. 2002) (requiring a sufficiently close connection between speech and the corresponding act such that the "speech at issue must be 'likely' to produce imminent lawless action" (citing Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curium))); Nat'l Org. for Women, Inc. v. Scheidler, 897 F. Supp. 1047, 1087 (N.D. Ill. 1995) ("'Immediately' means within a period which does not give time for reflection.").

[131] *See Fullmer*, 584 F.3d at 155 (sending an email and suggesting a date to engage in virtual sit-ins).

[132] *See Brandenburg*, 395 U.S. at 447 (holding that advocacy is protected in all but the most extreme circumstances, even where the speech advocates violent, hate-based, illegal conduct).

At most, SHAC's website had the secondary effect of causing its members to commit criminal acts, which is insufficient to place it speech outside of First Amendment protection. The Supreme Court held in *Ashcroft v. Free Speech Coalition*[133] that more than a showing of likelihood to provoke illegal conduct is needed to for Internet speech to be unprotected by the First Amendment.[134] In *Free Speech Coalition*, the federal government defended a law that made possession of virtual child pornography a criminal offense.[135] The government's principle contention was that virtual child pornography is not protected speech because virtual images encourage pedophiles to create actual images with children.[136] In rejecting this argument, the Court held that "the Government may not prohibit speech on the ground that it may encourage . . . illegal conduct."[137]

The *Fullmer* decision is troubling for a number of reasons but none is greater than the effect that it will have on social justice campaigns. The most pressing social transformations in this nation's history were directly furthered through civil disobedience, from the Boston Tea Party, to the abolition of slavery, to women's suffrage, and more recently the civil rights struggle.[138] Although few people deplore

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[133] 535 U.S. 234 (2002).

[134] *See id.* at 253–54 ("Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.").

[135] *Id.* at 241.

[136] *Id.*

[137] *Id.* at 253–54.

[138] It is well recognized that the Boston Tea Party of 1773 and the purposeful destruction of property it involved was one the first acts of organized civil disobedience in United States history. *See* CIVIL DISOBEDIENCE IN FOCUS 1, 8 (Hugo Adam Bedau ed., 1991) (noting that the Boston Tea Party of 1773 was a tactical destruction of property on political grounds). Proponents of the abolition of slavery were well known for intentionally breaking laws as a means of civil disobedience. *See* DANIEL B. STEVICK, CIVIL DISOBEDIENCE AND THE CHRISTIAN 75 (1969) (noting that those who participated in the Underground Railroad, including individuals like Harriet Tubman, spirited Quakers, and other abolitionists, all defiantly broke the law in furtherance of their cause and that it was an act of civil disobedience in its purest form); LARRY GARA, THE LIBERTY LINE: THE LEGEND OF THE UNDERGROUND RAILROAD xii (1996 ed.) (noting that abolitionists openly violated federal and state laws by harboring slaves or actually liberating slaves). The movement for women's suffrage was driven by civil disobedience ranging from non-violent protests to violent acts of dissent. *See, e.g.*, SUFFRAGE AND BEYOND: INTERNATIONAL FEMINIST PERSPECTIVES 21 n.21 (Caroline Daley & Melanie Nolan eds., 1994) ("Suffragettes chained themselves to railings, fire-bombed post boxes and went on hunger strikes while imprisoned on civil disobedience charges."). The Civil Rights Movement in the Southern United States embodies the concept of civil disobedience as a tactical measure in a long fought political struggle. *See, e.g.*, THE CIVIL DISOBEDIENCE HANDBOOK: A BRIEF HISTORY AND PRACTICAL ADVICE FOR THE POLITICALLY DISENCHANTED 32 (James Tracy ed., 2002) (discussing the "freedom rides" of 1961 in which civil rights workers would travel on segregated busses and break segregation laws); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 38 (1998) (noting that the civil rights

these acts in retrospect, civil disobedience itself has always been illegal.[139] The court's decision takes this a step further, however, and punishes not only the civil disobedience itself but those who advocate for it.[140] The court's sweepingly broad holding assaults the very ideals the First Amendment embodies and criminalizes the teachings propounded by this Nation's great civic champions, from Henry David Thoreau to Dr. Martin Luther King Jr., both of whom strongly advocated illegal means of direct-action protest and provided specific instructions on how to do so.[141] Virtual sit-ins are the natural evolution of direct-action, and, like other forms of civil disobedience, they are illegal.[142] But simply because they occur in a new medium does not mean that those who advocate for them deserve fewer constitutional protections.[143]

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movement employed civil disobedience against segregation laws wherever they were found as a way of forcing the effect of segregation into the oppressor's mind).

[139] *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 105 (1985) ("People in the center as well as on the left of politics give the most famous occasions of civil disobedience a good press, at least in retrospect.").

[140] *See* United States v. Fullmer, 584 F.3d 132, 155 (3d Cir. 2009) (holding that encouraging direct action campaign was not protected speech).

[141] *See* HENRY DAVID THOREAU, *Civil Disobedience*, (1849) *reprinted in* THE MAJOR ESSAYS OF HENRY DAVID THOREAU 47, 47–67 (Richard Dillman ed., 2001). Thoreau's influential essay was originally titled "Resistance to Civil Government." *See* Raymond Adams, *Thoreau's Sources for "Resistance to Civil Government,"* 42 STUDIES IN PHILOLOGY 640, 640 n.1 (1945) ("In 1903 the essay was first published separately by The Simple Life Press, London, under the title *On the Duty of Civil Disobedience*, a title which has been frequently used since."). Thoreau's work argued for opposition to an unjust government based on moral reasons by, among others, refusing to pay taxes and disobey unjust laws, and was highly influential to leaders of the civil rights movement in the American South. *See* MARTIN LUTHER KING JR., THE AUTOBIOGRAPHY OF MARTIN LUTHER KING JR. 14 (Clayborne Carson ed., 2001) ("I became convinced that noncooperation with evil is as much a moral obligation as is cooperation with good. No other person has been more eloquent and passionate in getting this idea across than Henry David Thoreau."). King also advocated illegal conduct. He famously told reporters: "If a law is unjust . . . we have a moral responsibility to disobey the unjust law." RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 302 (2006) (quotation marks omitted) (discussing Dr. King's account to reporters after Birmingham, Alabama Circuit Judge Francis Thompson ruled that a Freedom Rider was guilty of inciting a breach of the peace and sentenced him to six months in jail while another judge enjoined civil rights workers from conducting "freedom rides," in which they would ride buses and break segregation laws). On numerous other occasions King argued for direct action. *See* MARTIN LUTHER KING JR., LETTER FROM THE BIRMINGHAM JAIL 7 (HarperSanFrancisco 1994) (1963) [hereinafter *Letter from the Birmingham Jail*] ("[T]he purpose of the direct action is to create a situation so crisis-packed that it will inevitably open the door to negotiation.").

[142] *See Fullmer*, 584 F.3d at 141 (noting that virtual sit-ins are illegal); *see also* Konstantin Beznosov & Olga Beznosova, *On the Imbalance of the Security Problem Space and Its Expected Consequences*, 15 INFO. MGMT. & COMPUTER SEC. 420, 425–26 (2007) (discussing the increasing use and effectiveness of virtual sit-ins).

[143] *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 241 (2002) (treating internet virtual pornography as speech despite its use of a new medium and refusing to rely on a secondary effects test); United States v. White, No. 7:08-CR-00054, 2010 WL 438088, at *13–

b. True Threats

In addition to incitement, the *Fullmer* court relied on the "true threats" doctrine to reach the conclusion that the content of SHAC's website was not protected by the First Amendment.[144] The court premised its holding that the content of SHAC's website was a "true threat" on three separate determinations: (1) publicizing personally identifiable information is not protected by the First Amendment; (2) historical context can be used in analyzing whether speech is a "true threat;" and (3) the subjective knowledge of the listener can be used to determine whether the listener was reasonable in regarding public speech as a "true threat."[145] Each of these determinations runs against Supreme Court precedent and is a sizeable shift from traditional First Amendment jurisprudence.[146]

c. Public Speech and the Internet

The court held that while SHAC's advocacy was protected by the First Amendment, its "speeches, protests, and web postings" were not because they were "true threats."[147] Like inciting speech, "true threats" are a class of speech not protected by the First Amendment.[148] The Supreme Court has stated that three principle reasons for not protecting "true threats" are (1) to protect individuals

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14 (W.D. Va. Feb. 4, 2010) (applying traditional *Brandenburg* test to the internet and email).

[144] *See Fullmer*, 584 F.3d at 155–56 (noting that the content of the website was not protected because it furthered SHAC's advocacy, which included criminal conduct, even though the advocacy itself was protected).

[145] *Id.* at 155–57 (relying on a researcher's subjective awareness of an assault on a researcher in England in 2001 to determine whether a researcher's subjective belief that he was in danger was reasonable).

[146] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909–10 (1982) (holding that publicizing personally identifiable information is protected by the First Amendment); Watts v. United States, 394 U.S. 705, 707–08 (1969) (per curiam) (holding that the context of the particular utterance is important regarding the determination of a threat); Virginia v. Black, 538 U.S. 343, 359–60 (2003) (holding that there must be a showing of intent to intimidate on the part of the speaker).

[147] *Fullmer*, 584 F.3d at 156 (noting that the content was not protected because it furthered SHAC's efforts).

[148] *See Watts*, 394 U.S. at 707. Watts, an eighteen-year-old anti-war advocate, announced during a public protest of the Vietnam War that if he were drafted and given a gun, "the first man I want to get in my sights is L.B.J." *Id.* at 706. Although the Court held that Watts had not made a threat against the President but, rather, was speaking in "political hyperbole," *id* at 708, it stated in dicta that the federal statute criminalizing threats against the President was valid. *Id.* at 707. It is well established amongst scholars that this was the beginning of the true threats exception. *See, e.g.*, Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1338 n. 4 (2006) (noting that with the Court's statement that the statute was valid the threats exception was born).

from fear of violence, (2) to protect against disruption caused by the threat, and (3) to allow law enforcement to intervene and incarcerate people likely to carry out those threats.[149] Unlike incitement, however, courts have traditionally applied the "true threats" doctrine only to private communications.[150] The rationale driving this public versus private distinction is twofold. First, one-on-one communications often intend to convey the literal meaning of the stated words while public speech is often rhetorical or "political hyperbole."[151] Second, threats made in one-on-one communications are likely to be heard only by the actual recipient of the threat.[152] Thus, they contribute little, if anything, to the overall marketplace of ideas, and their suppression does not offend the notion that the First Amendment promotes truth through unfettered access to information.[153]

The Supreme Court has gone to considerable lengths to distinguish public from private communications in analyzing whether some speech is a "true threat."[154] The Supreme Court's holdings explicitly state that speech that may be considered a "true threat" when uttered in a one-on-one communication will not be considered a "true threat" when made in public debate.[155] The Supreme Court has articulated this point in each of its "true threat" decisions.

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[149] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (providing a list of reasons for removing true threats from First Amendment protection); *see also* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 290–92 (2002) (adding an additional reason why "true threats" are not protected by the First Amendment, "to prevent people from being coerced into acting against their will").

[150] *See* Rothman, *supra* note 149, at 336 ("All courts agree that a direct threat, which is not said as rhetorical hyperbole or in jest and is not a highly conditional statement, is unprotected.").

[151] *See id.* at 337 (noting that no reasonable listener would interpret a direct threat made in jest); *see also Watts*, 394 U.S. at 708 (holding that a Vietnam War protestors proclamation that if drafted he would shoot President Johnson was not a "true threat" but mere hyperbole).

[152] *See* Karst, *supra* note 148, at 1390 (noting that threats are typically worthless at informing the decision making abilities of the public because, except in unusual circumstances, they will never hear of these communications).

[153] *See* Watts v. United States, 394 U.S. 705, 706 (1969) (per curiam); *id*. (noting that face-to-face threats are outside the scope of the First Amendment).

[154] *See Watts*, 394 U.S. at 706 (holding that a Vietnam War protestor's proclamation that if drafted he would shoot President Johnson was not a "true threat" but mere hyperbole given its public nature); Brandenburg v. Ohio, 395 U.S. 444, 446 n.1 (1969) (per curiam) (finding that a Ku Klux Klan leader's chanting "bury the Nigger" and suggestion of "revengeance" against the Supreme Court, Congress, and the President was protected by the First Amendment because it was a public speech); *see also* Planned Parenthood of Columbia/Willamette, Inc. v. American Coal. of Life Activists, 290 F.3d 1058, 1088–89 (9th Cir. 2002) (Reinhardt, J., dissenting) (noting in a one paragraph dissent that where speech is public, it deserves the full protection of the First Amendment, and for that reason alone he would dissent from the majority's opinion, which found activists liable for threatening physicians over the internet).

[155] *See NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 902–06 (1982) (claim by leader

In *Watts v. United States*,[156] the Court was confronted with the question of whether an eighteen-year-old anti-war demonstrator's statement to a crowd of fellow protestors that if the government gave him a gun he would shoot President Johnson first, amounted to a threat against the President.[157] The Court held that the statement was not a "true threat" but was mere "political hyperbole."[158] The Court's holding that Watts' made his statement in jest was based on an assumption that public debates or rallies, as opposed to private speech, are not the type of venues where the literal meaning of words should be attributed to speech.[159]

Similarly, in *NAACP v. Claiborne Hardware Co.*,[160] the Court reviewed numerous statements and actions made during boycotts of white-owned businesses in Claiborne County, Mississippi.[161] Charles Evers, an NAACP organizer, who had already announced that blacks who violated the boycott "would be watched" and "warned that the Sheriff could not sleep with boycott violators at night," declared during a rally that "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck."[162] The Court indicated that had this speech been privately communicated it may not have been protected, but ultimately held that it was, although threatening, not a "true threat."[163] The Court stated that Evers' speech is the kind of rousing, spontaneous speech necessary for advocacy and protected by the First Amendment.[164] In its most recent "true threats" analysis, *Virginia v. Black*,[165] the Court again relied on this public-private distinction.[166] The Court distinguished the act of

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of civil rights boycott in segregated South that "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck" was constitutionally protected); *Watts*, 394 U.S. at 706 (finding that statement to a third party was not a "true threat"); *see also* Rothman, *supra* note 149, at 299–301 (arguing that in both *Watts* and *Claiborne* the audience was not threatened, but rather a warning or threat was made against a third-party, which looks more like political hyperbole than a threat against a specific person, even if a specific person has been implicated in the threat).

[156] 394 U.S. 705 (1969) (per curiam).

[157] *Id.* at 705.

[158] *Id*. at 708.

[159] *See id* at 707–708. (much of the Court's finding that the statement was in jest was because it was aimed at an audience other than the person being threatened and the crowd reacted with laughter to Watts' speech).

[160] 458 U.S. 886 (1982).

[161] *Id.* at 888.

[162] *Id.* at 900 n.28, 902.

[163] *See id*. at 907–12 ("[T]he boycott clearly involved constitutionally protected activity.").

[164] *Id.* at 911–12.

[165] 538 U.S. 343 (2003).

[166] *Id.* at 344.

burning a cross at a Ku Klux Klan rally, which it noted is protected by the First Amendment, from the act of burning a cross in a person's yard without consent, which it held could be considered a "true threat."[167] There is an utter lack of Supreme Court precedent supporting the conclusion that public speech, absent a showing of incitement, is a "true threat."[168]

Although the Supreme Court has not ruled on a case of "true threats" involving the Internet, courts and commentators generally agree that it poses no new, significant problems simply because it is a different medium of expression and therefore, courts should analyze it using the traditional public-private distinction.[169] The most discussed case dealing with "true threats" over the Internet is *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*.[170] In *Planned Parenthood*, anti-abortion advocates posted the names of physicians and other clinicians known to perform abortions on "wanted posters," which were displayed on a webpage entitled the "Nuremberg Files."[171] When a physician was murdered his name was crossed out; when a physician was wounded his name was grayed out.[172] On three consecutive occasions, doctors were murdered shortly after their names were posted on the webpage.[173] The United States Court of Appeals for the Ninth Circuit held that the website could be found civilly liable for posting the names of additional doctors because a "reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to

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[167] *See id*. at 365–66 (plurality opinion) (differentiating between "cross burning directed at an individual [and] cross burning directed at a group of like-minded believers"). A plurality of justices upheld a statute proscribing the burning of a cross with the intent to intimidate, though it struck down a provision mandating that cross burning be considered prima facie evidence of that intent. The plurality noted that a public cross burning was protected speech when it was intended to express the ideology of the Ku Klux Klan. *Id.*

[168] *See supra* notes 154–67 and accompanying text.

[169] *See* United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997) (noting that "threats are tools that are employed when one wishes to have some effect, or achieve some goal, through intimidation," and can potentially be made through email); *see also* Rothman, *supra* note 149, at 331 (noting that there is nothing unique about internet communications that removes them from the traditional public-private distinction).

[170] 290 F.3d 1058 (9th Cir. 2002) (en banc).

[171] *Id.* at 1062–66 (four physicians and two health centers brought suit under the Freedom of Access to Clinics Entrances Act, which prohibits threats against a person because that person has engaged in reproductive health services).

[172] *Id.* at 1065.

[173] *See id.* at 1085 (despite the apparent connection between the posters and the murders the case was decided by a closely divided 6-5 court).

harm."[174] Commentators have been highly critical of the decision because of its tendency to blur the public-private speech distinction, and courts have resisted applying *Planned Parenthood*'s reasoning beyond the unique facts addressed in the case, which were multiple murders immediately following the posting of personally identifiable information.[175]

d. Personally Identifiable Information Is Not Protected Speech

The court stated that publicizing personally identifiable information including names, telephone numbers, and home addresses is beyond First Amendment protection.[176] Contrary to the court's holding, however, courts have consistently been protected the publicizing of personally identifiable information, in both newspapers and on the Internet.[177] Not only is the publication of personally identifiable information protected by the First Amendment, the Supreme Court has stated that such speech, though "offensive" and "coercive" serves the protected function of persuading others to join your cause "through social pressure and the 'threat' of social

[174] *Id.* at 1074 (quoting United States v. Orozco–Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)).

[175] *See* United States v. Lincoln, 403 F.3d 703, 706 (9th Cir. 2005) (refusing to extend to *Planned Parenthood* to a case of threats against the President); United States v. White, 638 F. Supp. 2d 935, 948–49 (N.D. Ill. 2009) (limiting the application of *Planned Parenthood* to multiple murders following dissemination of "wanted" posters); United States v. Carmichael, 326 F. Supp. 2d 1267, 1284 (M.D. Ala. 2004) (refusing to extend *Planned Parenthood* beyond context of several murders soon after the postings were made); Sheehan v. Gregoire, 272 F. Supp. 2d 1135, 1140–42 (W.D. Wash 2003) (holding that *Planned Parenthood* could not be extended to the more general situation where personally identifiable information is posted on the Internet with the intent of intimidating the person, but is limited to the specific facts addressed in the case).

[176] *See* United States v. Fullmer, 584 F.3d 132, 155 (3d Cir. 2009) (classifying the conduct at issue as "news"-like postings taken from anonymous sources and finding the dissemination of "the personal information of individuals employed by Huntingdon and affiliated companies . . . more problematic").

[177] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (evaluating numerous statements and actions made during boycotts of white-owned businesses in Claiborne County, Mississippi). The Court held that reading the names of boycott violators aloud at a public meeting and publishing their names in newspapers are speech in its most direct form and are protected by the First Amendment. *Id.* at 909–10. Lower courts have also held that personally identifiable information is protected by the First Amendment, even where it puts the identified individual at risk of physical harm. *See Carmichael*, 326 F. Supp. 2d at 1280–89 (holding that the posting of information, names and personal addresses, of a number of government informants and agents was protected by the First Amendment and not a "true threat"); *Gregoire*, 272 F. Supp. 2d at 1145–46 (refusing to issue an injunction to remove personally revealing information about law enforcement officers on a website because the information was protected by the First Amendment and holding that the posting of that information, even if it was intended to intimidate the officers, is protected as a matter of law).

ostracism."[178] Publicizing personally identifiable information is fundamental to having a voice in the political process because identifying which individuals are associated with what group allows the audience to determine with whom to associate or whom to ostracize.[179]

In *Claiborne Hardware*, the boycott organizers placed watchers outside of stores in order to identify the individuals that were breaking the boycott.[180] The names of those individuals were then published in a newspaper and read aloud during NAACP meetings.[181] This all occurred against the backdrop of Charles Evers' statements that any individual caught breaking the boycott would have his neck broken,[182] and the Court held that publicizing the names was protected speech because it served the legitimate purpose of furthering the boycott.[183]

Similar to *Claiborne Hardware*, SHAC posted the personally identifiable information of Huntingdon Life Science executives and the executives of companies that transacted with Huntingdon so that activists could protest those specific individuals.[184] Once posted, SHAC members were able to identify the source of their opposition and protest accordingly, which is exactly the rationale that the *Fullmer* court identified.[185] Rather than protecting this information, the *Fullmer* court, without citing any authority for its determination, broadly held that the First Amendment does not protect publicizing personally identifiable information.[186]

e. Historical Context of Speech

In *Planned Parenthood*, the court relied on the historical context of SHAC's speech in determining that it was a "true threat."[187] Context

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[178] *Claiborne Hardware*, 458 U.S at 909–12.

[179] *See* Volokh, *supra* note 99, at 1114-15 (arguing that publicizing names and addresses fosters participation in public debate and provides otherwise unavailable information about who to boycott and ostracize, hallmarks of civil disobedience).

[180] *Claiborne Hardware*, 458 U.S. at 903–04, 929 n.72.

[181] *Id*. at 903–04.

[182] *See id*. at 902 (stating that blacks who traded with white merchants were traitors who would be disciplined and have their necks broken).

[183] *Id*. at 909–10.

[184] United States v. Fullmer, 584 F.3d 132, 155 (3d Cir. 2009).

[185] *See id.* at 142–46 (noting that some individuals were picketed after their information was published).

[186] *Id*. at 155.

[187] *See id*. at 138–46 (describing past acts of violence that took place all across the United States and in Europe).

is critical to a "true threat" analysis.[188] In fact, it is often outcome determinative.[189] Traditionally, however, courts have limited considerations of context to the circumstances immediately surrounding the utterance itself and have refused to consider the speaker's past communications[190] or current affiliations.[191] For example, in evaluating whether the act of burning a cross, perhaps the single most threatening symbol in American history, is a true threat, the Supreme Court reviews only the context in which the cross burning occurs, and not the history of violence associated with the Ku Klux Klan.[192] The Court limits its determination of context to the events and circumstances surrounding the specific cross burning.[193] It is a question of whether the cross burning occurs on another's property without consent or at a public demonstration.[194]

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[188] *See* United States v. Hanna, 293 F.3d 1080, 1084 (9th Cir. 2002) (defining a true threat as "a statement, written or oral, [made] in a *context* or under such circumstances . . . [that indicate] a serious expression of an intention to inflict bodily harm upon or to take the life of the President") (emphasis added).

[189] *See* Watts v. United States, 394 U.S. 705, 707–08 (1969) (per curiam) (noting that "[t]aken in context" the speaker's words were merely political hyperbole, and this determination was reinforced by the crowd's laughter at his declaration of his intention to shoot the president); Karst, *supra* note 148, at 1338 (noting that the key question in analyzing "true threats" is "considered in its context, does this statement express a threat, or not?").

[190] *See* United States v. Lincoln, 403 F.3d 703, 707 (9th Cir. 2005) (holding that a conversation in which a defendant told a law enforcement officer that he wanted to kill President Bush could not be used to prove the context of a letter written to President Bush stating that he would die when the conversation with the law enforcement officer occurred six months before the letter was written). This has been so even where past speech is alarming and particularly relevant to the consideration of the speaker's intent. *See* United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997) (holding that email messages expressing violence against women did not constitute a threat). Alkhabaz was arrested under a statute prohibiting threats when it was determined that he had corresponded with an Internet pen pal about very specific desires and plans to abduct, rape, torture, and kill a young girl or woman. *Id.* at 1498–1502 (Krupansky, J., dissenting). The court held that no threat had been made and refused to read the emails under a broader historical context, which included the defendant's writing and posting a story on the Internet that personally identified a classmate of his and described how he and an accomplice would attack, abuse, rape, torture, kill, and set her on fire. *Id.*

[191] *See* Virginia v. Black, 538 U.S. 343, 365 (2003) (plurality opinion) (finding that a Virginia statute banning cross burnings impermissibly blurs the necessary contextual distinction between cross burnings that act as "constitutionally proscribable intimidation" and cross burnings that are "core political speech"). Justice Thomas argued that the Ku Klux Klan's history of violence should be considered in determining whether the act of burning a cross at a white supremacy rally should be considered a "true threat." *Id.* at 389 (Thomas, J., dissenting). No other members of the Court accepted Justice Thomas' view. *Id.* at 366.

[192] *See id.* at 365–66 (noting that the provision in issue does not allow a court to differentiate between a cross burning as core political speech and a cross burning done for the purpose of threatening a victim).

[193] *Id.*

[194] *See id.* at 366–67.

In *Planned Parenthood*, the Ninth Circuit expanded the analysis of context in determining whether the "Nuremberg Files" was a true threat, because it looked not only at the speech itself but the acts that immediately followed the speech.[195] Even this analysis, which was a significant break from precedent, was narrowly tailored to the specific postings of the "wanted posters" and the murders that immediately followed them.[196] The court held that because three postings were immediately followed by murders, a fourth post could be construed as a "true threat."[197] The court emphasized that this historical context was limited to the posting and the murders that followed by explaining that had the deaths not occurred, the postings would not have constituted "true threats," even if they "endorsed or encouraged the violent actions of others, [their] speech would be protected."[198]

Without explanation, the *Fullmer* court vastly expanded on the Ninth Circuit's reasoning.[199] The court identified specific instances of illegality, including property damage that was not attributed to SHAC and one assault that occurred in England two years prior to the SHAC arrests, and used these incidents to frame the content of the SHAC website as a "true threat."[200]

f. Intent to Threaten

It has long been suggested that an objective test reduces First Amendment protection by creating a negligence standard whereby the speaker must regulate his speech according to the anticipated response of a reasonable listener.[201] Objective standards can cause

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[195] Planned Parenthood of Columbia/Williamette, Inc. v. American Coal. Of Life Activists, 290 F.3d 1058, 1085 (9th Cir. 2002).

[196] *See id* (holding that the posters were a true threat even though they connote something they do not specifically say).

[197] *See id.* (concluding that the posters were a true threat because, while the posters did not literally threaten, they implied a message that both the actor and recipient understood).

[198] *Id.* at 1072. The Sixth Circuit took a similar approach in an earlier decision, holding that a series of emails describing a sexual desire to commit violent acts against women following the online publication of a story discussing the rape, torture, and murder of the author's identified classmate was not a "true threat." United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997).

[199] *See* United States v. Fullmer, 584 F.3d 132, 155–57 (3d Cir. 2009) (finding that some of the speech on the SHAC's website was not protected by the First Amendment when viewed in context and that defendants who created or disseminated the speech were also not protected by the First Amendment).

[200] *See id.* at 138–43 (identifying an assault in England in 2001 and a number of acts of property destruction that occurred throughout the United States).

[201] *See* Rogers v. United States, 422 U.S. 35, 43–44 (1975) (Marshall, J., concurring) (arguing that the reasonable listener and speaker tests place the protection of speech in the hands of a reasonable audience and have the effect of chilling speech by forcing speakers to steer clear

speech to be punished as a threat where the speaker had no intention to threaten.[202] The circuit courts traditionally split with respect to whether the speaker must intend his speech as a threat or whether it is sufficient to show that a reasonable listener or reasonable speaker would perceive the speech as a threat.[203] In *Virginia v. Black*, the Supreme Court provided some guidance about the scienter requirement.[204] The Court held that there must be a showing of intent to intimidate before speech loses its First Amendment protection under the "true threat" doctrine.[205] Commentators have generally agreed that after *Black*, "true threats" only apply when the speaker has intended to threaten.[206] Acknowledging the Supreme Court's decision in *Black*, the Ninth Circuit narrowed the *Planned Parenthood* holding in *United States v. Cassel*,[207] where it held that to prove that speech is a "true threat" in a criminal proceeding, the

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of controversial speech that the audience could potentially consider a threat but where the speech itself is not threatening).

[202] *See* Rothman, *supra* note 149, at 314–16 (noting that both the reasonable speaker and listener tests result in ambiguous language being construed as a threat and punished where the speaker had no intent to threaten and his only intent was to use his speech as a rhetorical device).

[203] *Id.* at 302 (noting that the Second Circuit has traditionally taken the strongest stance with respect to mandating that there be an intent to threaten while the other circuits have adopted some variation of an objective standard).

[204] Virginia v. Black, 538 U.S. 343, 359–60 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat." (citation omitted)).

[205] *Id.* (noting that some cross burnings indisputably constitute a true threat because "the history of cross burning . . . shows that [it] is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.").

[206] *See, e.g.*, Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1294 (2005) (accepting that the decision mandates an intent requirement but criticizing the court's simultaneous extension of a threat exception to an "intimidating" symbol while recognizing the protected status of the same symbol as "political" speech in a different context); Karst, *supra* note 148, at 1347–48 (arguing that *Black*'s definition of "threat" requires a showing of intent); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 218–24 (noting that *Black* assumes a specific intent to intimidate). Commentators argued that an intent requirement was mandatory under the First Amendment prior to *Black*, as well. *See* Stephen G. Gey, *The* Nuremberg Files *and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 546–53 (2000) (arguing that political advocacy is at the heart of the First Amendment and the only way to protect this is by limiting the threat exception to those cases that fall within the *Brandenburg* doctrine for incitement to unlawful action, which requires, in part, intent that a threat be acted upon); Rothman, *supra* note 149, at 316–17 (arguing that an objective test leads to a chilling of speech because of the ambiguity created when First Amendment protection is placed in the hands of the listener).

[207] 408 F.3d 622 (9th Cir. 2005). Cassel was convicted of interfering with the sale of federal land when he threatened to burn down any house built on federal property near his home. *Id*. at 625.

prosecution must demonstrate that the defendant subjectively intended the speech as a threat.[208] Under the Supreme Court's ruling in *Black* and the Ninth Circuit's holding in *Cassel*, the determination of whether some statement or action is a "true threat" is a question of whether the speaker intends to intimidate.[209] The *Fullmer* court ignored this approach.[210]

The *Fullmer* court relied on a reasonable listener standard, but also considered the subjective knowledge of the listener to determine whether the speech was a "true threat," which is especially dangerous given the court's framing of SHAC's speech within an expansive context.[211] As the court noted, the primary use of the website was as an organizing tool for group members.[212] SHAC used the website to coordinate group activities and allow communication between activists.[213] There is no suggestion in the court's analysis that SHAC ever intended Huntingdon Life Science executives or individuals other than its own members to view the content of the website, and, thus, there is no indication that it was intended to intimidate or threaten those individuals.[214] Where the speaker never intended to communicate the speech to the end listener, there is no threat. Courts have enforced this principle even under a reasonable listener standard where the speech at issue is especially egregious and frightening.[215]

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[208] *Id.* at 633.

[209] *See Black*, 538 U.S. at 359–60 (finding that a true threat requires an intent to intimidate, but that the speaker need not intend to carry out the threat); *Cassel*, 408 F.3d at 631–33 (holding that in a criminal case the government must prove a subjective intent to threaten before speech can be removed from First Amendment protection).

[210] United States v. Fullmer, 584 F.3d 132, 157 (3d Cir. 2009) (ruling that one of the individuals discussed on the website was reasonable in believing that he was threatened because of his awareness, among other incidents, of a previous assault that occurred in England years earlier).

[211] The court does not expressly adopt a standard, but its analysis and reasoning indicate that it adopted a reasonable listener standard. *See id.* at 154 (noting that in determining whether a statement constitutes a true threat, a court should consider the totality of the circumstances including the reaction of the listener).

[212] *Id.* at 139.

[213] *See id.* (noting that the SHAC members used the website to coordinate future protests and publish information about past protests).

[214] *See id.* (discussing the contents of the website in general without reference to external viewers).

[215] *See* United States v. Alkhabaz, 104 F.3d 1492, 1495–1502 (6th Cir. 1997) (holding that email messages in question did not constitute a true threat because the emails were not being conveyed as intimidation). After the defendant was discovered to have personally identified a classmate by name and address in a story he posted on the Internet (in which he and another male kidnapped, raped, and tortured her through very specific sadistic acts before killing her and setting her on fire), the FBI investigated and discovered emails exchanged between the defendant and another male discussing plans to commit similar acts against a woman. The emails also discussed whether the female victim would be one of the defendant's classmates.

The *Fullmer* decision turned not on a question of intent but on the expectation of the audience in light of the historical context of the speech, which includes the audience's subjective awareness of past acts of violence caused by individuals unrelated to the speaker and even where the speech may not have been intended for the listener.[216] Under the ruling in *Fullmer*, individuals with the same intent and who speak identical words will be afforded different constitutional protection based purely on the way the audience perceives the speaker.[217]

The court's decision poses grave consequences for speakers of minority views who may inappropriately be feared by members of the majority. By focusing on specific instances of violence associated with the speaker and the subjective response of the audience, the speaker is faced with the impossible task of determining how all listeners will react.[218] Prior to the *Fuller* decision, however, the listener was only reasonable in perceiving the speech as a threat if the specific context in which the speech was uttered indicated the presence of a threat.[219] Under *Fullmer*, the listener may reasonable simply because the group to which the speaker belongs is associated with illegal acts, even if those acts occurred years earlier, in different locations, and were credited to different organizations.[220] In addition

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The court held that the emails could not be considered a true threat because there was no intent that the female classmate identified in the online story ever read them. *Id.*

[216] *See Fullmer*, 584 F.3d at 157 (discussing awareness of previous attacks).

[217] *See id.* (stating that even if the speech possessed political value, it was not protected because the third-party listener was "keenly aware" of the organization's previous actions, and, thus, the fear was reasonable).

[218] *See* Rogers v. United States, 422 U.S. 35, 43–44 (1975) (Marshall, J., concurring) ("[T]he jury was permitted to convict on a showing merely that a reasonable man in petitioner's place would have foreseen that the statements he made [threatening the President's life] would be understood as indicating a serious intention to commit the act.").

> In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. . . . [W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech . . . [because it] would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect.

Id. at 47–48 (internal quotations and citations omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[219] *See, e.g.*, Watts v. United States, 394 U.S. 705, 705–07 (1969) (per curiam) (limiting the discussion of context to the utterance itself).

[220] *See Fullmer*, 584 F.3d at 156 (relying on several acts of property damage that were committed throughout the United States over the course of several years for which the Animal Liberation Front and not SHAC took credit and the assault of a researcher that took place in England in 2001).

to regulating whether the context of the speech itself will be regarded as a "true threat," the speaker must determine how listeners will react in light of her association with a specific group and that group's actions over an unidentified span of time and in a wide range of locations.[221]

This is likely to have a chilling effect on speakers of controversial social movements because at some level all social movements are associated with instances of past violence and are suggestive of future violence.[222] In 1963, while imprisoned in a Birmingham, Alabama jail, Dr. Martin Luther King, Jr. stated that if blacks in Birmingham were prohibited from civil disobedience, violence would erupt.[223] The civil rights movement was linked to violence in many demonstrable ways.[224] If read against a broad historical backdrop, a person with subjective knowledge of these past criminal acts, including civil disobedience and race riots, could reasonably construe Dr. King's message as a threat.[225] The *Fullmer* court's decision to consider the historical context of speech under a reasonable listener standard places a heavy burden on a speaker to anticipate not only the emotional toll her speech will have on a reasonable listener, but also the emotional toll her speech will have on a reasonable listener in light of the listener's subjective knowledge of the speaker and her affiliations. It is only after making these determinations that the activist is assured constitutional protection. Placing such a heavy burden on the speaker has the potential to end the rousing and spontaneous speech that is necessary for activism and protected by

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[221] *Id.* at 157 (noting that this reasonableness determination was built upon the subjective knowledge of the listener, who was aware of specific events that although were not caused by the speaker were enough to implicate his speech as a threat).

[222] *See supra* notes 138–41 and accompanying text.

[223] *See Letter from the Birmingham Jail*, *supra* note 141.

[224] *See* THOMAS ADAMS UPCHURCH, RACE RELATIONS IN THE UNITED STATES, 1960–1980 33 (Ronald H. Bayor ed., 2008) (discussing the rise of the "Black Power" movement, the violence that surrounded it, and the media attention that it received in the early 1960s); Susan Olzak & Suzanne Shanahan, *Deprivation and Race Riots: An Extension of Spilerman's Analysis*, 74 SOC. FORCES 931, 938 (1996) (noting that while there were few race riots before 1954, by 1961 race riots had occurred in many major metropolitan centers and by 1963 race riots had occurred in Birmingham, Alabama); Hazel Erskine, *The Polls: Demonstrations and Race Riots*, 31 PUB. OPINION Q. 655, 655 (1967) [hereinafter *Polls: Race Riots*] (in a 1944 nationwide poll 72% of respondents stated that they were aware of race riots between whites and blacks); Hazel Gaudet Erskine, *The Polls: Race Relations*, 26 PUB. OPINION Q. 137, 137–39 (1962) (nationwide polls taken in 1962 evidenced that whites had a strong distrust of "Freedom Riders" and other groups directly involved in the struggle for civil rights).

[225] *See Polls: Race Riots*, *supra* note 224, at 655 (noting that the vast majority of Americans were aware of violence caused by tension between blacks and whites nearly two decades before King's inspiring words).

the First Amendment.[226] These concerns are heightened by amendments to AEPA that increase its scope and are intended to place further controls on animal rights activists.[227]

III. THE ANIMAL ENTERPRISE TERRORISM ACT

A. Expanding AEPA

The SHAC arrests occurred during a time of great national insecurity. The FBI, the lead federal agency for investigating suspected acts and threats of terrorism, was vigorously investigating groups of dissent, often through the unprecedented power conferred by the Patriot Act[228] and, at times, through illegal means.[229]

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[226] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (noting that an advocate must be free to speak with emotion and spontaneity and where excessive restrictions are placed on the speaker to consider the actions of third parties this is lost).

[227] *See infra* Part III.A.1.iii.

[228] 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, § 106, 115 Stat. 272, 277–278 (2001) (amending 50 U.S.C. § 1702(a)(1)(B) (2006) and adding 50 U.S.C. § 1702(c) (2006)).

[229] *See* Childs v. Dekalb Cnty., 286 F. App'x 687, 694 (11th Cir. 2008) (holding that the constitutional rights of animal rights advocates who peacefully picketed and leafleted on a public sidewalk were violated when an undercover Department of Homeland Security officer secretly monitored, followed, and arrested the protestors in 2004). Freedom of Information Act requests showed that police officers assigned to the FBI's Joint Terrorism Task Force were spying on activists in violation of previously settled lawsuits for similar privacy invasions. Among the 'spy files' recovered were the names and license plate numbers of peaceful demonstrators, a report on a filmmaker planning to make a documentary criticizing the FBI, and intercepted emails of an animal rights organization's plans to demonstrate. *See* Ford Fessenden & Michael Moss, *Going Electronic, Denver Reveals Long-Term Surveillance*, N.Y. TIMES, Dec. 21, 2002, at A12 (revealing that Denver Police had actually been spying on activists since the 1950s); ACLU, *The Denver Police Spy Files*, http://aclu-co.org/our-work/litigation-legal-advocacy/denver-police-spy-files. As part of a 2005 lawsuit challenging FBI surveillance, more than 100 pages of heavily censored FBI files were released to the ACLU. The documents showed that while no crimes had been discovered by the surveillance, the FBI used secret informants to track and infiltrate the People for the Ethical Treatment of Animals for years. All told, the FBI released 2,357 pages of files on the ACLU, Greenpeace, the American-Arab Anti-Discrimination Treaty, and People for the Ethical Treatment of Animals. Spencer S. Hsu, *FBI Papers Show Terror Inquiries Into PETA; Other Groups Tracked*, WASH. POST., Dec. 20, 2005, at A11; *see also* David Cole, *Misdirected Snooping Doesn't Stop Terror*, N.Y. TIMES, Jun. 4, 2002, at A19 (arguing that the passage of the Patriot Act allowed the government to engage in unpatriotic activity); Lisa Rein & Josh White, *Maryland State Police Surveillance More Extensive than Previously Acknowledged*, WASH. POST, Jan. 4, 2009, at A1 (reporting that in 2008 it was revealed that until late 2007 police officers in Maryland were infiltrating animal-rights groups and monitoring members); Bob Drogin, *Spying on Pacifists, Greens and Nuns*, L.A. TIMES, Dec. 7, 2008, at A18 (reporting that between 2005 and 2007 an undercover agent who went by the name "Lucy" monitored the activities of numerous peace groups including animal rights, and despite the fact that Maryland State Police acknowledge that throughout this time no criminal acts were identified the names of at least 53 people were placed in a terrorist database that was shared with law enforcement agencies).

Organizations from the far left to the extreme right were for the first time labeled terrorist organizations.[230] Freedom of Information Act[231] requests for information is presumptively disclosable under the Freedom of Information Act were denied with increased frequency as the longstanding position of disclosure was replaced by policy instructions to deny requests.[232] As a result of these policy changes, activists detained because of their placement on terrorist "watch lists" were denied explanation, even when they were not currently under criminal investigation.[233]

It was against this backdrop that the FBI argued that SHAC was an example of animal rights terrorism that posed a threat to the security of all Americans.[234] The FBI openly acknowledged that the American

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[230] *See Animal Rights: Activism vs. Criminality: Hearing Before the S. Judiciary Comm., 108th Cong*. 67 (2004) (statement of Sen. Patrick Leahy) [hereinafter *Animal Rights Hearing*] (arguing that the Bush administration was too eager to use the term terrorism for acts and numerous organizations that did not merit it.). Senator Leahy said, "most Americans would not consider the harassment of animal testing facilities to be 'terrorism,' any more than they would consider anti-globalization protestors or anti-war protestors or women's health activists to be terrorists." *Id.*

[231] 5 U.S.C. § 552 (2006).

[232] *See* David A. Anderson, *Confidential Sources Reconsidered*, 61 FLA. L. REV. 883, 895 (2009) (arguing that prior to the Bush administration there was a presumption in favor of disclosing information). In a memorandum to all federal departments and agencies, Attorney General John Ashcroft instructed federal department and agency heads that

> [a]ny discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. . . . When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

Id. at 895 n.70 (quoting Department of Justice, Memorandum from Attorney Gen. John Ashcroft on The Freedom of Information Act to Heads of All Federal Departments and Agencies (Oct. 12, 2001), *available at* http://www.usdoj.gov/archive/oip/foiapost/2001foiapost19.htm (last visited Oct. 22, 2009)).

[233] *See* Barnard v. Dep't. of Homeland Sec., 531 F. Supp. 2d 131, 141 (D.D.C. 2008) (holding that although petitioner was not currently under investigation, the Department of Homeland Security properly invoked FOIA Exemption (7)(a), which is reserved for cases in which the revelation of agency documents are expected to interfere with enforcement proceedings). Neil Barnard, president of Physicians for Responsible Medicine, a physicians committee that opposes animal testing was detained seventeen times between 2003 and 2007, and on at least one occasion he read the words "Terrorist Organization Member: Caution" on an airport computer screen. *Id.*

[234] *See Eco-Terrorism Specifically Examining the Earth Liberation Front and the Animal Liberation Front: Hearing Before the Sen. Comm. on Env't and Pub. Works*, 109th Cong. 11 (2005) [hereinafter *Eco-Terrorism Hearing*] (statement of John Lewis, Deputy Assistant Dir., Fed. Bureau of Investigation) (identifying SHAC as a domestic threat and a special interest extremist movement along with ALF and ELF); *see also Threat of Terrorism to the United*

animal rights movement had not caused the loss of a single human life but nonetheless argued that "today's most serious domestic threats, coming from the special interest extremist movements [such as] . . . Stop Huntingdon Animal Cruelty, commonly known as (SHAC)."[235] The FBI and the biomedical community argued that AEPA's scope was too limited to effectively combat this new breed of animal rights terrorism.[236] They advocated for legislation that was capable of punishing not only acts that caused physical disruption of an animal enterprise but also those that caused economic harms to

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States: The Fed. Bureau of Investigation Hearings Before the United States S. Comms. on Appropriations, Armed Servs., & Select Comm. on Intelligence, 108th Cong. (2001) (statement of Louis J. Freeh, Dir., Fed. Bureau of Investigation), *available at* http://www.fbi.gov/news/testimony/threat-of-terrorism-to-the-united-states (providing an update on terrorist threats, recent trends in terrorism, and the FBI's counterterrorism strategy); *Animal Rights Hearing*, *supra* note 230 (discussing the role and importance of animal and eco-terrorism).

[235] *Eco-Terrorism Hearing*, *supra* note 234, at 11 (arguing for increased legislation because although animal rights activists have not targeted human life, the FBI believes that this could change).

> The Department of Justice and the Department of Homeland Security agree that eco-terrorism is a severe problem, naming the [most] serious domestic terrorist threat in the United States today as the Earth Liberation Front (ELF) and the Animal Liberation Front (ALF) which, by all accounts, is a converging movement with similar ideologies [and] common personnel. . . . ELF and ALF [are] the No. 1 domestic terror concern over the likes of white supremacists, militias, and anti-abortion groups. . . . Experts agree that although they have not killed anyone to date, it is only a matter of time until someone dies as a result of ELF and ALF criminal activity.

Id. at 1–3 (statement of Sen. James M. Inhofe); *see also* Southern Poverty Law Center, *Domestic Terrorism, Animal Activists Accused of Attempted Murder*, 132 INTELLIGENCE REPORT 5 (Winter 2008) (discussing non-governmental groups that monitor hate crimes and terrorist activity have also concluded that animal rights organizations have not targeted humans).

[236] *See Eco-Terrorism Hearing*, *supra* note 234, at 39–40 ("One of our greatest challenges has been the lack of Federal criminal statutes to address multi-state campaigns of intimidation . . . . Therefore, the existing statutes may need refinements to make them more applicable to current animal rights/eco-extremist actions and to give law enforcement more effective means to bring criminals to justice."). Proponents argued that AETA was necessary because although the AEPA was an important tool for prosecutors, it was ultimately too limited to stop combat the threat of terrorism. It was strongly urged that "SHAC and other animal rights extremists have recognized limits . . . in the statute," and that AETA did not offend the First Amendment. *Animal Enterprise Terrorism Act: Hearing on H.R. 4239 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 8 (2006) (statement of Brent McIntosh, Deputy Assistant Att'y Gen., Office of Legal Policy) [hereinafter *McIntosh Statement*]. The Animal Enterprise Protection Coalition, a special interest group founded and organized by the National Association of Biomedical Research, Lobbied for an expansion to AEPA. "NABR created the Animal Enterprise Protection Coalition (AEPC) to engage the biomedical research community into a much-needed grassroots campaign that underscored the public support for the legislation." National Association for Biomedical Research, *Animal Enterprise Terrorism Act (AETA)*, *available at* http://www.nabr.org/Animal_Activism/Animal_Enterprise_Terrorism_Act.aspx (last visited Feb. 3, 2011).

individuals with a secondary or tertiary relationship to an animal enterprise or caused emotional harm to a person.[237] In response, Congress enacted the Animal Enterprise Terrorism Act ("AETA").[238]

AETA expanded AEPA in four important ways. First, it replaced the phrase "causing physical disruption" with the broader phrase "damaging or interfering."[239] Second, it increased the number of entities whose property was protected under AETA to include, in addition to animal enterprises, "any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise."[240] Third, it created an independent source of liability for an interference that "places a person in reasonable fear of . . . death . . . or serious bodily injury," but it did not include a requirement that such a person have any connection to an animal enterprise.[241] Fourth, it created an independent source of liability for any individual who "conspires or attempts" to interfere with an animal enterprise.[242] In addition, AETA retained the broad definition of an animal enterprise as any

> (A) commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing;
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> (B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or
>
> (C) any fair or similar event intended to advance agricultural arts or sciences.[243]

The Department of Justice explicitly stated that AETA would not be used to "prohibit or discourage the protected activities of whistleblowers, protestors, and leafleters."[244] According to proponents of AETA, traditional criminal laws were incapable of preventing animal rights extremism because of the clandestine and undetectable nature of the crimes committed by activists.[245] Despite

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[237] *See McIntosh Statement*, *supra* note 236, at 8–9 (listing numerous ways SHAC has terrorized animal enterprises with economic harm, and discussing the need for new legislation tailored to criminalize such activity).

[238] 18 U.S.C. § 43 (2006).

[239] *Id.* § 43(a)(1).

[240] *Id.* § 43(a)(2)(A).

[241] *Id.* § 43(a)(2)(B).

[242] *Id.* § 43(a)(2)(C).

[243] *Id.* § 43(d)(1)(A)–(C).

[244] *McIntosh Statement*, *supra* note 236, at 10.

[245] *See Animal Enterprise Terrorism Act: Hearing on H.R. 4239 Before the Subcomm. on*

these assurances, a coalition of AETA opponents voiced strong criticisms that its effect would be a chilling of free speech.[246]

B. Constitutional Concerns for the Animal Enterprise Terrorism Act

1. AETA Violates the First Amendment Overbreadth Doctrine

The First Amendment overbreadth doctrine enables litigants who otherwise would not have standing to contest the constitutionality of a statute to bring suit on the basis that the statute targets primarily protected speech and is, thus, likely to cause individuals to refrain from engaging in protected speech.[247] The overbreadth doctrine is grounded not in the individual right of the speaker to speak but in what the public loses if the speaker is prevented from speaking.[248] "Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."[249] A court may not

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Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 109th Cong. 5 (2006) (testimony of Brent McIntosh, Deputy Assistant Att'y Gen., Office of Legal Policy) [hereinafter *McIntosh Testimony*] (arguing that although it was an effective start, AEPA was ultimately too limited to effectively combat animal right terrorism because its scope was too limited).

[246] *Animal Terrorism Act: Hearing on H.R. 4239 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 23 (2006) (statement of William Potter, Journalist) [hereinafter *Potter Statement*] ("This legislation . . . will force Americans to decide if speaking up for animals is worth the risk of being labeled a 'terrorist,' either in the media or in the courtroom. That's not a choice anyone should have to make."); *see also* 152 CONG. REC. 21,836 (2006) (statement of Rep. Dennis Kucinich) [hereinafter *Kucinich Statement*] (stating that AETA's language "paint[s] everyone with the broad brush of terrorism who might have a legitimate objection to a type of research or treatment of animals that is not humane. . . . This bill is written in such a way as to have a chilling effect on the exercise of peoples' first amendment rights."); National Lawyer's Guild, *National Lawyer's Guild Opposes Animal Enterprise Terrorism Act*, (Oct. 30, 2006), http://www.commondreams.org/news2006/1030-14.htm; (stating that the AETA will deter lawful activities protected by the First Amendment); Equal Justice Alliance, *Our Allies*, http://www.noaeta.org/allies.htm (last visited Feb. 27, 2011) (providing a list of more than 250 organizations that oppose the Animal Enterprise Terrorism Act including the American Civil Liberties Union, the Center for Constitutional Rights, and the Equal Justice Alliance).

[247] *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.") *see also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863 (1991) (noting the overbreadth doctrine's break from the traditional as-applied requirement).

[248] *See* Coplan, *supra* note 94, at 449 (arguing that the potential loss to a deliberate citizenry of what a speaker might say is the foundation on which the overbreadth principle lies).

[249] Virginia v. Hicks, 539 U.S. 113, 119 (2003) (citation omitted).

apply a statute in its present form if it has the effect of prohibiting a significant amount of constitutionally protected speech.[250] It may be applied upon a judicial narrowing of the statute such that its application does not violate the Constitution. A statute is only struck down in its entirety if no constitutionally permissible application is available.[251] Where both protected speech and vagueness are at issue, however, the reviewing court must be especially scrutinizing in its analysis. A statute may be found unconstitutional even where the statute would neither be found overbroad nor void for vagueness if each was examined independently because the constitutional infirmity exists in the penal statute's susceptibility to sweep too broadly and deter protected speech, even where it has not criminalized it.[252]

AETA violates the First Amendment overbreadth doctrine. In addition to penalizing activity that is properly criminalized, AETA's plainly legitimate sweep proscribes a substantial amount of protected speech. AETA uses expansive terms; yet, it fails to limit the scope of these terms by reference to a definition. AETA restricts speech on the basis of content and viewpoint. In addition, even if AETA is considered a content-neutral restriction on speech, it does not fulfill a legitimate governmental interest in the least restrictive manner.

a. AETA Reaches a Substantial Amount of Constitutionally Protected Speech

i. "Interfere" Encompasses Expressive Conduct

Under an overbreadth analysis, the initial question is whether the regulation in question "criminalizes a substantial amount of protected

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[250] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 397 (1992) (White, J., concurring) (agreeing with the Court's invalidation of the city's Bias-Motivated Crime Ordinance, but suggesting that the case "could easily be decided . . . by holding . . . that the . . . ordinance is fatally overbroad"); Fallon, *supra* note 247, at 855 (describing the First Amendment's overbreadth doctrine as prophylactic in nature); Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063, 1064 (1997) (noting that upon a showing that a law is overbroad it may not be applied in its present form because to do so would be to enforce a constitutionally violative law).

[251] *See* Hill, *supra* note 250, at 1067 ("It is a basic principle of constitutional adjudication that a statute should not be held unconstitutional unless the court has first determined that the statute cannot be saved by a validating construction.").

[252] *See* NAACP v. Button, 371 U.S. 415, 428–29, 433 (1963) (overturning a Virginia statute prohibiting solicitation of legal services because of its potential to extend into the civil rights movement and noting that First Amendment freedoms are "precious" and that "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions").

expressive activity."[253] AETA prohibits an individual from interfering with an animal enterprise but does not define "interfere."[254] The plain meaning of the term "interfere" reaches expressive conduct.[255] In *United States v. Willfong*,[256] the United States Court of Appeals for the Ninth Circuit relied on the dictionary definition to conclude that "[t]o 'interfere' is to 'oppose, intervene, hinder, or prevent.'"[257] The legal dictionary definition of "interference" is equally encompassing. Interference is defined as "[t]he act of meddling in another's affairs. . . . An obstruction or hindrance."[258] These common meanings demonstrate AETA's reach into expressive conduct. Picketing, protesting, leafleting, and numerous other constitutionally protected speech fit squarely within these definitions, but to criminalize these modes of expression, regardless of the views they express, denies individuals their right to speak and denies society the opportunity to hear the views they may advance.[259]

The Supreme Court has stated that unless otherwise specified by statute, terms like "interfere" plainly encompass the verbal as well as the physical aspect of conduct.[260] State and federal courts have held that the term "interfere" naturally includes verbal interferences and have overturned statutes under the overbreadth doctrine when the statute failed to clearly limit the terms breadth by definition.[261] In

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[253] United States v. Williams, 128 S. Ct. 1830, 1841 (2008) (noting that the first step in the overbreadth analysis is to determine the statute's sweep); Virginia v. Hicks, 539 U.S. 113, 118–19 (2003) (stating that a law is overbroad if it prohibits a "'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep'" (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973))).

[254] *See* 18 U.S.C. § 43(a)(1), (d) (2006).

[255] *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495–96 (1982) (finding that the village's ordinance did not interfere with Flipside's First Amendment rights because it did not prohibit or regulate the sale of Flipside's literature).

[256] 274 F.3d 1297 (9th Cir. 2001).

[257] *Id.* at 1301 (quoting WEBSTER'S NEW WORLD DICTIONARY 704 (3d College ed. 1998)).

[258] BLACK'S LAW DICTIONARY 888 (9th ed. 2009).

[259] *See* The Hon. John Paul Stevens, The *Freedom of Speech*, 102 YALE L.J. 1293, 1298 (1993) (noting that it is now well settled that picketing, protesting, leafleting, some libelous false statements, as well as burning flags, crosses, and effigies are protected forms of communication). Some courts that have directly addressed whether animal rights activists have a First Amendment right to picket and protest an animal enterprise have answered in the affirmative. *See, e.g.*, Childs v. DeKalb Cnty 286 F. App'x 687, 693–94 (11th Cir. 2008) (holding that the constitutional right of freedom of assembly and association of animal rights advocates were violated when they were arrested by members of the Joint Terrorism Task Force for leafleting on a public sidewalk outside of a Honey Baked Ham store).

[260] *Cf.* City of Hous. v. Hill, 482 U.S. 451, 455 (1987) (rejecting as overbroad an ordinance making it unlawful to "'in any manner oppose, molest, abuse or interrupt any policemen in the execution of his duty, or any person summoned to aid in making an arrest'" (quoting HOUS., TEX., CODE OF ORDINANCES § 34-11(a) (1984))).

[261] *See. e.g.*, State v. Casey, 876 P.2d 138, 140–41 (Idaho 1994) (holding that a statute

Dorman v. Satti,[262] the United States Court of Appeals for the Second Circuit overturned the Connecticut Hunter Harassment Act,[263] a statute very similar in scope to AETA, on account of its overly broad restriction on speech.[264] The act prohibited an individual from interfering with persons engaged in the lawful taking of wildlife.[265] Like AETA, the statute did not define "interfere" and did not limit the effect of the clause to any specific time, place, or manner.[266] The court held that because it failed to define the nature of the interference it proscribed, it swept broadly into the zone of protected speech and was therefore invalid under the overbreadth doctrine.[267] AETA proscribes interfering with specific entities but does not restrain its reach by reference to a specific conduct or other definition.[268] Other courts have held that they are incapable of curing the statute's overbreadth even where the legislature has provided a definition of interference as specific conduct and provided an exclusive list of instances that are prohibited under the statute, because speech and expression are inescapably intertwined with the term "interfere."[269] Therefore, as a threshold matter, AETA reaches the communicative aspect of the conduct it prohibits.[270]

Where a statute's plainly legitimate reach extends to a substantial amount of protected speech "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[271] A

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making it a misdemeanor to enter or remain in an area with the intent to interfere with the lawful taking or pursuit of wildlife was unconstitutionally overbroad); *Opinion of the Justices*, 509 A.2d 749, 752–53 (N.H. 1986) (at the request of the New Hampshire House of Representatives, the Surpeme Court of New Hampshire issued an opinion that a statute prohibiting the harassment of hunters, fishers, and trappers was constitutionally overbroad).

[262] 862 F.2d 432 (2d Cir. 1988).

[263] CONN. GEN. STAT. § 53a-183a (1985).

[264] *Dorman*, 432 F.2d at 437. Like AETA, the Hunter Harassment Act prohibited with interfering and did not provide a statutorily fixed meaning. *See* § 53a-183a ("No person shall: (1) Interfere with the lawful taking of wildlife by another person, or acts in preparation for such taking, with intent to prevent such taking; or (2) harass another person who is engaged in the lawful taking of wildlife or acts in preparation of such taking.").

[265] *Id.*

[266] *Id.*

[267] *See Dorman*, 862 F.2d at 437 (stating that the statute is not sufficiently tailored to avoid criminalizing protected expression).

[268] *See* 18 U.S.C § 43(d) (2006).

[269] *See* State v. Ball, 627 A.2d 892, 897 (Conn. 1993) (stating that a statute articulating specific triggering conduct does not escape First Amendment consideration because the conduct itself, interference, is inescapably imbued with speech and expression).

[270] *See* 18 U.S.C. § 43(a)(1) (proscribing activity that "interfere[s] with the operations of an animal enterprise").

[271] Gonzales v. Carhart, 550 U.S. 124, 153 (2007) (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

saving construction can reel in an otherwise unconstitutionally broad statute by interpreting and applying its terms in a constitutionally acceptable manner.[272] There are two significant obstacles to creating a saving construction that reels "interfere" out of the realm of protected speech, however. First, courts interpreting similar statutes have found that "interfer[ence]" is inescapably intertwined with expressive conduct such that the two are not readily distinguishable.[273] Where the term "interfere" is used without limitation by statute, courts have little judicial authority to interpret it in a manner that is noticeably different than the purpose for which it was enacted.[274] Thus, "interfere" reaches the verbal as well as the physical aspect of conduct.[275]

The second significant obstacle is related to the decision in *Fullmer*. In light of *Fullmer*, it is apparent that pure speech can violate AETA.[276] The *Fullmer* court was interpreting AEPA, the reach of which is substantially less than AETA, and the purpose behind enacting AETA was to cast a broader net.[277] In *Fullmer*, the Third Circuit held that posting personally identifiable information and advocating unlawful protests, including virtual sit-ins, violated AEPA.[278] The court did not indicate that its holding was limited to the specific facts of the case. As a result, it could be applied to a broad range of factual scenarios that involve the dissemination of personally identifiable information or the advocacy of future illegal acts.[279] The

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[272] *See* Hill, *supra* note 250, at 1067 (noting that it is a cardinal rule of interpretation that a statute should not be invalidated unless the court has determined that there is no saving construction).

[273] *See Ball*, 627 A.2d at 896–97 (holding that even where the legislature has provided a conduct specific definition, and provided an exclusive list of punishable actions, a statute that proscribes interfering is overbroad because the term is inescapably imbued with speech).

[274] *See* Dorman v. Satti, 862 F.2d 432, 436 (2d Cir. 1988) (stating that "interfere" is such an expansive term that to ask a court to define it would be to ask the court to perform the legislature's job); State v. Casey, 876 P.2d 138, 140–41 (Idaho 1994) (holding that a statute that made it a misdemeanor to enter or remain in an area with the intent to interfere with the lawful taking or pursuit of wildlife was unconstitutionally overbroad and could not limited by judicial construction); *Opinion of the Justices*, 509 A.2d 749, 752–53 (N.H. 1986) (replying to a certified question from the New Hampshire House of Representatives that a statute prohibiting the harassment of hunters, fishers, and trappers was unconstitutionally overbroad and incapable of being saved by judicial construction).

[275] *See* City of Hous. v. Hill, 482 U.S. 451, 460–61 (1987) (noting that unless otherwise limited by statute, the term "interfere" means verbal as well as physical interference).

[276] *See* United States v. Fullmer, 584 F.3d 132, 154–56 (3d Cir. 2009) (stating that speech which invites imminent lawlessness, coupled with evidence that lawlessness is likely to occur, is not protected by the First Amendment and may be found to violate the statute that regulates the prospective lawlessness).

[277] *See* discussion accompanying *supra* note 239–41.

[278] *Fullmer*, 584 F.3d at 154–56.

[279] *See id.*

court blurred the lines between protected advocacy and "true threats" or incitement to such a degree that it is difficult to draw a line between the two, which creates another obstacle to formulating a proper saving construction.[280]

ii. Loss of Real or Personal Property

An interference that "causes the loss of any real or personal property . . . used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise" satisfies the elements of AETA.[281] AETA does not define either "damage" or "personal property."[282] Personal property is a broad classification, defined as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property."[283] Courts have frequently found that personal property includes lost revenue[284] and goodwill,[285] as well as ancillary business costs.[286] Congress's inclusion of the term personal property and failure to include a limiting definition or other means by which to guide the statute's construction confers prosecutorial discretion to enforce AETA against individuals who interfere with an animal enterprise or entity related to an animal enterprise that results in lost or profits or good will.[287]

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[280] *See id.* at 154–55 (stating that the content of SHAC's website was not protected speech because it furthered SHAC's anti-Huntingdon Life Sciences campaign).

[281] 18 U.S.C. § 43(a)(2)(A) (2006).

[282] *See id.* § 43(d).

[283] BLACK'S LAW DICTIONARY 1337 (9th ed. 2009).

[284] *See* Radiation Sterilizers, Inc. v. United States, 867 F. Supp. 1465, 1472 (E.D. Wash. 1994) (citing Backus v. Ft. Street Union Depot Co., 169 U.S. 557, 580 (1898) ("It is long established . . . that a business's property includes intangibles such as loss of profits and goodwill."); Martin v. Loula, 194 N.E. 178, 180 (Ind. 1935) ("It cannot be doubted that 'debts, earnings, salaries, wages, incomes from trust funds or profits' are property . . . .").

[285] *See* Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 194 (1936) ("[G]ood will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject of legislation."); United States v. Baldinger, 838 F.2d 176, 179 (6th Cir. 1988) ("It is beyond dispute that and well settled that 'good will' is property of an intangible nature and the term 'property' includes 'good will.'"); Falstaff Beer, Inc. v. Comm'r, 322 F.2d 744, 748 (5th Cir. 1963) (Wisdom, J.) ("Good will is 'property' in the legal sense . . . ." (quoting J.L. Cooper & Co. v. Anchor Securities Co., 113 P.2d 845, 849 (Wash. 1941))); *Ford v. Ford*, 782 P.2d 1304, 1309 (1989) (per curiam) (treating goodwill as property in the context of a dissolution proceeding).

[286] *See* United States v. Fullmer, 584 F.3d 132, 142 (9th Cir. 2009). The court indicated that SHAC members intentionally damaged or attempted to cause the loss of property by sending numerous emails that resulted in Huntington Life Science having to purchase upgraded software equipment, and AEPA used language very similar to AETA. In addition, this could also fall into the category of lost profits.

[287] Expressive Conduct can interfere with a business by decreasing profits and business

Often the very reason for protests, leafleting campaigns, speeches, and other protected forms of advocacy is to direct negative attention in a specific direction with the purpose of reducing that entity's revenue to such an extent that the targeted entity agrees to change its policies or practices or to drive the entity from the market altogether.[288] Under AETA's language, individuals could be punished merely because their campaign is successful.[289] This concern has not been lost on critics. Congressman Steve Israel noted, "the bill fails to define what 'real or personal property' means. As a result, legitimate advocacy—such as a boycott, protest, or mail campaign—that causes an animal enterprise to merely lose profits could be criminalized under [the Act]."[290] Recent newspaper and media reports have also addressed these concerns and speculated about whether individual protestors or individuals who come forward with incriminating information about an animal enterprise that results in lost revenue will be prosecuted under AETA.[291] Even if prosecutions do not result from such campaigns, the threat of prosecution is enough to cause individuals to avoid politically motivated activity and drive debate on these issues from the marketplace.[292] Such concerns are at the very heart of First Amendment protection.[293]

The broad definition of "animal enterprise" contributes to AETA's overbreadth. The definition of an animal enterprise includes entities only tangentially related to the use of animals, including any facility

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good will in a number of ways. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909–12 (1982) (speech that accompanied boycott of white owned businesses interfered with businesses by ostracizing individuals who attempted to shop at those stores).

[288] *See* Thornhill v. Alabama, 310 U.S. 88, 99 (1940) (holding that picketing is entitled to First Amendment protection even where the intent of the picketers is to discourage patronizing the store and ultimately to reduce the customer base and drive the store out of business altogether).

[289] *See* 18 U.S.C. § 43(a)(2)(B) (2006).

[290] 152 CONG. REC. E2100 (Nov. 13, 2006) (statement of Steve Israel).

[291] *See* Kim Severson, *Upton Sinclair, Now Playing on YouTube*, N.Y. TIMES, Mar. 12, 2008, at F1 (noting that AETA could be used to prosecute an individual who on behalf of the Humane Society videotaped the on goings of a slaughterhouse that led to the largest recall of meat in American history); Seth Prince & Spencer Heinz, *Activist Looks Beyond Fur Shop's Move*, THE OREGONIAN, Nov. 30, 2006, at B2 (discussing whether AETA would be used to prosecute protesters that forced a furrier to go out of business); Doug Erickson, *Protecting Researchers or Chilling Free Speech? Opponents and Animal Rights Activists Say the Law Goes Too Far, but Advocates Say It Gives Needed Protection*, WIS. STATE J., Nov. 26, 2006, at A1 (expressing concerns that AETA could be used to prosecute leafleting near a fur store because it results in lost profits and discussing the impact that such concerns have on activism).

[292] *See* NAACP v. Button, 371 U.S. 415, 433 (1963) (noting that the mere prospect of prosecution and the prosecutions themselves are what make a statute constitutionally infirm).

[293] *See id.* (overturning a Virginia statute prohibiting solicitation of legal services because of its potential to create a fear of prosecution that would affect speech).

that sells or uses animal products.[294] There is no requirement that these enterprises use or sell animal products in any specific amount or degree.[295] In addition to covering a remarkably broad body of business enterprises, there is no requirement that the offender interfere with these entities because of their use of animals or animal products.[296] Under the statute's plainly legitimate sweep, a person would be in violation of AETA for interfering with an automobile manufacturer[297] because it failed to disclose internal safety reports about faulty engineering that put the public's safety in jeopardy and where such interference causes the manufacturer to lose $10,000 in lost profits or consumer good will. Likewise, a person who interferes with a clothing manufacturer's[298] plans to relocate to South America violates AETA if that interference causes the loss of personal property, including lost profits or customer good will, in excess of $10,000. This invades upon a substantial amount of traditionally protected advocacy, and the threat of prosecutions leaves open few opportunities for debate on a host of issues.[299]

iii. Reasonable Fear Component

Interference that "intentionally places a person in reasonable fear" satisfies the elements of AETA.[300] This has the potential to create criminal liability for the arousing and emotionally charged speech that has traditionally been afforded protection under the First Amendment.[301] Emotionally charged speech and spontaneous rhetoric can have profound emotional effects on listeners.[302] Despite this emotional toll, the Supreme Court has declared that advocates must

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[294] *See* 18 U.S.C. § 43(d)(3)(A)–(B) (2006).

[295] *See id.*

[296] *See id.* § 43(a)(1) (requiring an intent to interfere but no motivational requirement as to why they intended to interfere).

[297] Under AETA's broad definition of "animal enterprise," automobile and other manufacturers only minimally related to animals are animal enterprises because they use leather, an animal product, in the design and manufacture of seats. *See id.* § 43(d)(1).

[298] Under AETA's definition of animal enterprise any clothing manufacturers that uses wool, silk, leather, fur or other animal product is an animal enterprise. *See id.*

[299] *See* Thornhill v. Alabama, 310 U.S. 88, 99 (1940) (holding that protestors have a First Amendment right to picket even where the specific intent is to reduce profits to the company).

[300] 18 U.S.C. § 43(a)(2)(B).

[301] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (holding that the threatening speech was warranted because it furthered the boycott against white-owned stores); *see also* Watts v. United States, 394 U.S. 705, 706 (1969) (per curiam) (noting the crowd's laughter as it reacted to Watts' comment that he would kill President Johnson if drafted).

[302] *See Claiborne Hardware*, 458 U.S. at 928 (noting the effect on the audience of Evers' claim that anyone who violated the boycott would have his neck broken).

be free to stimulate their audiences through "spontaneous and emotional appeals for unity and action."[303] The Supreme Court has relied on

> the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[304]

AETA places this principle in jeopardy by placing the determination of whether the elements of the offense have been met on the emotional response of the listener.[305]

Heightening this risk is the fact that unlike the personal property provision, AETA does not require that the person placed in fear have any connection to an animal enterprise.[306] The provision merely requires that a person interfere with an animal enterprise and place a person in reasonable fear of death or bodily injury.[307] Two reasons compel the conclusion that Congress intended this exclusion. First, Congress specifically addressed a class of effected individuals covered by the damage or loss of property subsection.[308] Second, Congress intended to substantially increase AEPA's reach in amending AETA.[309] This reach is overinclusive, however, in that it prohibits interfering speech that causes a person to fear death or substantial bodily injury, even when no threats or incitement have been made.[310]

Fuller exacerbated this concern by allowing the listener's subjective knowledge of past illegal acts to determine whether the listener's subjective response was reasonable in interpreting the speech as a "true threat" and therefore not protected by the First

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[303] *Id.*

[304] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (reversing the conviction of a Ku Klux Klan member who threatened "revengeance" for the suppression of the white race).

[305] *See* 18 U.S.C. § 43(a)(2)(B) (requiring that the listener be placed in a position of fear).

[306] *See id.* § 43(a)(1)(B).

[307] *Id.*

[308] *See id.* § 43(a)(2)(A); Russello v. United States, 464 U.S. 16, 23 (1983) ("'W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (alteration in original) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

[309] *See supra* notes 239–41 and accompanying text.

[310] *See* § 43(a)(2)(B).

Amendment.[311] The *Fullmer* court's analysis is particularly relevant because it was applying this reasoning to AEPA, AETA's predecessor.[312] By grounding the determination of whether the elements of the statute have been met in the reasonableness of the listener's response, the same concerns regarding historical context of the speech as determinate of its constitutional protection that arose under AEPA arise under AETA.[313] Any person, either connected to an animal enterprise or not, who is subjectively aware of past illegal acts committed by activists may reasonably fear speech that endorses violence or illegality by activists.[314] On some level, researchers may be reasonable in fearing animal rights activists because of the groups' historically adversarial relationship.[315] This alone, however, cannot establish that expressive conduct is beyond First Amendment protection.[316] If such reasoning was applied to the First Amendment, the Ku Klux Klan would have been silenced long ago, but the Supreme Court has explicitly protected its speech.[317] This charges "the defendant with responsibility for the effect of his statements on his listeners . . . . [Such a test] would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect."[318] This concern is enhanced by the fact that, in addition to the intended recipient of the speech, it

[311] United States v. Fullmer, 584 F.3d 132, 157 (3d Cir. 2009) (noting that an employee's subjective fear that protestors would harm him was reasonable in light of his personal knowledge that activists assaulted a researcher in England).

[312] *See id.* at 137.

[313] In *Fullmer*, the court based the determination of a reasonable threat in the listener's subjective knowledge of illegal acts committed by animal rights activists. *See id.* at 157. Because AEPA is intended to cover a similar, albeit more extensive, amount of conduct and because it is dealing with the same groups and their responses to one another it is likely that the decision in *Fullmer* will have a substantial impact.

[314] *See id.*

[315] *See* discussion *supra* Part I.

[316] Many groups have enjoyed adversarial and antagonistic relationships because of religious differences or racial hatred, but the Supreme Court has stated that past relationship are not enough to draw speech from First Amendment protection. This was most evident in a cross-burning case in which only Justice Thomas held the view that the history of violence committed by the Ku Klux Klan should be considered in the present context of the speech. *See* Virginia v. Black, 538 U.S. 343, 389 (2003) (Thomas, J., dissenting).

[317] *See, e.g.*, *id.* at 359 (noting that burning a cross at a rally to promote the Ku Klux Klan would be protected speech); R.A.V. v. City of St. Paul, 505 U.S. 377, 414 (1992) (holding that a statute prohibiting speech that aroused anger or fear on the basis race, gender, religion, or creed was a viewpoint-based discrimination and invalidating conviction under statute for burning a cross); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (invalidating conviction of Clarence Brandenburg, a KKK member, for threatening speech).

[318] Rogers v. United States, 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

applies to any individual who might hear and be emotionally affected by the arousing speech.[319]

iv. Conspire or Attempt to Interfere

Conduct or speech that does not rise to the level of an actual interference or cause fear or loss of property may still be criminal under AETA's conspiracy or attempt provision.[320] This subsection reaches pure speech, as is evidenced by both the decision in *Fullmer* and more recently the arrests in *United States v. Buddenberg*.[321] The defendants in *Buddenberg* were charged with violating AETA for allegedly attempting to enter a professor's home during a protest, which is not protected conduct, and conspiracy to violate AETA for conduct traditionally protected speech,[322] including protesting on sidewalks outside of a private residence[323] and distributing leaflets

[319] *See id.* at 48 (arguing that with respect to speech and threats a narrow construction must be applied in order to avoid the chilling of speech for fear of what the unanticipated response might be).

[320] *See* 18 U.S.C.§ 43(a)(2)(C) (2006).

[321] *See* United States v. Fullmer, 584 F.3d 132 (3rd Cir. 2009) (the SHAC convictions were based purely on their speech and were under the conspiracy provision of AEPA); United States v. Buddenberg, No. CR-09-00263 RMW, 2009 U.S. Dist. Lexis 100477, at *2–5 (N.D. Cal. Oct. 28, 2009) (denying defendant's motion to dismiss indictment).

[322] *See Buddenberg*, 2009 U.S. Dist. Lexis 100477, at *2–5. The defendants were charged under AETA for a series of incidents: (1) on October 21, 2007, twenty individuals protested in front of a University of California Berkeley professor's home; (2) on January 27, 2008, a group of eleven demonstrators marched, chanted, and chalked comments on public sidewalks; (3) on February 24, 2008, five to six individuals attempted to enter a professor's home during his child's birthday party, and he claimed to have been hit by an object; and (4) on July 29, 2008, a stack of leaflets identifying University of California researchers were left at a café. Federal Bureau of Investigation Press Release, Feb. 20, 2009, "Four Extremists Arrested for Threats and Violence against UC Researchers," *available at* http://www.state.gov/m/ds/rls/119478.htm (last accessed Feb. 28, 2011). The defendants were charged for conspiracy to violate AETA pursuant to 18. U.S.C. section 371 but the court noted that there was no reason for this choice over AETA's own conspiracy provision. *Buddenberg*, 2009 U.S. Dist. Lexis 100477 at *3 n.1. They were charged with attempting and conspiring to violate AETA for leaving a stack of leaflets containing personally identifiable information, chalking sidewalks, and focused picketing outside of the researcher's home. They were also charged with one count of AETA for the alleged July 29 act. The charge did not indicate what provision of AETA it fell under, but the court noted that it most likely fell under section (a)(2)(B), which prohibits causing fear of death or bodily injury. *Id.* at *2–3. The court denied the defendant's motion to dismiss the indictment on the mistaken belief that the defendants do not have standing to challenge a statute's overbreadth other than on an as applied basis. *See id.* at *5–12. The events are described in detail in an FBI press release. *See* Federal Bureau of Investigation Press Release, *supra*. The attempted entrance has less of an impact on speech and even many supporters of focused picketing find such activity, although expressive, to be outside the protection of the First Amendment. *See* Frisby v. Schultz, 487 U.S. 474, 491–96 (1988) (Brennan, J., dissenting).

[323] *See Frisby*, 487 U.S. at 488 (holding that picketing is protected in the absence of a narrowly tailored time, place, and manner restriction); Dean v. Byerley, 354 F.3d 540, 551 (6th Cir. 2004) (holding that in the absence of a narrowly tailored time, place, and manner restriction

containing personally identifiable information.[324] These incidents occurred on different days over a several month period, and provide some insight into AETA's reach into the realm of traditionally protected speech.[325]

b. AETA's Restriction on Speech is Not Content-Neutral

"The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience."[326] Content-neutral restrictions on speech, which regulate matters such as whether residents can place signs in their lawns[327] or how loud speech can be,[328] do not garner special constitutional protection and are upheld so long as the statute in question reasonably regulates the time, place, or manner of speech, irrespective of its particular content.[329] Where a regulation restricts speech or expressive conduct on the basis of content or the speaker's viewpoint, however,

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there is a First Amendment right to engage in focused picketing in residential areas); City of Seven Hills v. Aryan Nations, 667 N.E.2d 942, 949 (Ohio 1996) (holding that a trial court abuses its discretion when it enjoins residential picketing by groups with contrary views); United Elec., Radio & Mach. Workers of Am. v. State Emp't Relations Bd., 710 N.E.2d 358, 364 (Ohio Ct. App. 1998) (holding that a statute that prohibited focused picketing outside of a private residence violated the First Amendment).

[324] *See* United States v. Grace, 461 U.S. 171, 176 (1983) (stating that as a general rule leafleting and picketing "are expressive activities involving 'speech' protected by the First Amendment"); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909–10 (1982) (reading aloud names of boycott violators at a public meeting and publishing their names in newspaper are protected speech). Lower courts have also held that publishing personally identifiable information is protected by the First Amendment. *See* United States v. Carmichael, 326 F. Supp. 2d 1267, 1280–89 (M.D. Ala. 2004) (addressing why posting the names and personal addresses of government informants and agents did not satisfy the true threat doctrine and was protected by the First Amendment); Sheehan v. Gregoire, 272 F. Supp. 2d 1135, 1145–46 (W.D. Wash. 2003) (refusing to issue an injunction to remove personally revealing information about law enforcement officers on a website because the information was protected by the First Amendment and holding that the posting of that information, even if it was intended to intimidate the officers, is protected as a matter of law).

[325] *See Buddenberg*, 2009 U.S. LEXIS 100477, at *2 (noting that the defendants engaged in "a series of threatening demonstrations").

[326] Hill v. Colorado, 530 U.S. 703, 716 (2000).

[327] *See* City of Ladue v. Gilleo, 512 U.S. 43, 49 (1994) (holding that a city ordinance prohibiting residents from placing signs in their yards was a content-neutral restriction because it applied regardless of the message contained on the sign).

[328] *See* Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) (holding that a prohibition against objectionably loud speech is content-neutral because it restricts the volume of all speech, whether it is rock music or a nursery rhyme).

[329] *See* United States v. Hicks, 980 F.2d 963, 971 (5th Cir. 1992) (ruling that a statute that prohibited making threats to the crew of an airplane while in flight warranted only rational basis review because it was a content-neutral regulation of time, place, and manner of speech and not a regulation of content).

the regulation must be narrowly tailored and support a compelling governmental interest.[330]

i. AETA Restricts Speech on the Basis of the Speaker's Viewpoint

The Free Speech Clause of the First Amendment prohibits the government from restricting speech where the rationale is based upon the speaker's viewpoint.[331] While there are instances in which the government may restrict the content of speech,[332] the government may not favor one viewpoint over another.[333] The Supreme Court has announced that viewpoint restrictions are per se unconstitutional and the most egregious form of free speech deprivation.[334] Viewpoint discrimination occurs when the government allows expression on one side of a debate but prohibits its opposing view.[335] The prohibition on viewpoint discrimination extends to what is often considered abhorrent conduct, so long as it has some expressive quality,[336] even when the expressive conduct may be restricted on the basis of its proscribable content without offending the First Amendment.[337] The

[330] *See* United States v. Cassel, 408 F.3d 622, 626–27 (9th Cir. 2004) (applying strict scrutiny to a statute prohibiting interfering with a federal land sale because it has a content-based element).

[331] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 391 (1993) (holding that a New York school district violated the First Amendment speech rights of the Lamb's Chapel when it prevented it from using a facility to air religious oriented film series although it allowed other organizations to use the facility to air films that demonstrate a different viewpoint).

[332] There are categories of speech that are not afforded First Amendment protection. *See, e.g.*, United States v. Hanna, 293 F.3d 1080, 1084 (9th Cir. 2002) (stating that the Supreme Court has "left no doubt that true threats could be criminalized because they are not protected speech") (citing Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam)).

[333] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 837 (1995) (holding that a policy denying funds to a student publication based on its religious viewpoint violates the First Amendment); R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (holding that even where the speech is not protected by the First Amendment and may be prohibited it must not be selectively prohibited on the basis of the speaker's viewpoint).

[334] *See Rosenberger*, 515 U.S at 829 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); Cornelius v. NAACP Legal Def. & Educ. Fund., Inc., 473 U.S. 788, 806 (1985) (holding that government may exclude participants for reasonable purposes but may not do so on the basis of the speaker's viewpoints or beliefs).

[335] *See R.A.V.*, 505 U.S. at 392 (holding that the state may not endorse one view over another, even where the opposing is highly disruptive); Texas v. Johnson, 491 U.S. 397, 412–13 (1989) (holding that a prohibition against burning the American flag is an unconstitutional viewpoint discrimination because it endorses the government's view at the exclusion of its opposing view).

[336] *Johnson*, 491 U.S. at 414 ("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.").

[337] *See R.A.V.*, 505 U.S. at 381 (holding that even where the speech considered "fighting

prohibition on viewpoint-based restrictions is not limited to statutes that name a particular viewpoint. Where a statute does not address a particular viewpoint but only proponents of a specific view could reasonably fall under the statute's sweep, the act is considered viewpoint-based for First Amendment Purposes.[338] Invalidation of statutes because of their disparate impact on holders of specific views have included, *inter alia*, statutes regulating leafleting door-to-door,[339] requiring street demonstration fees,[340] requiring individual street performer fees,[341] and proscribing interfering with a person lawfully engaged in the act of hunting.[342]

Where a disparate impact falls on bearers of a specific viewpoint, the threat to free speech is enormous, and courts must be especially exacting in their analysis of the legislative judgment behind the statute.[343] By its very terms, AETA only restricts speech that

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words," and is thus not traditionally afforded First Amendment protection and may be prohibited, it must not be selectively prohibited on the basis of the speaker's viewpoint).

[338] *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 14 (1986) (plurality opinion) (holding that an order to include a consumer group's newsletter in a public utility's billing envelope was viewpoint discrimination because it did "not equally constrain both sides of the debate about utility regulation"); *see also* Biddulph v. Mortham, 89 F.3d 1491, 1500 (11th Cir. 1996) (noting that if a state adopted initiative that had a disparate impact on certain views it would be a viewpoint based discrimination); NAACP v. City of Richmond, 743 F.2d 1346, 1356 (9th Cir. 1984) ("Within that framework of facial neutrality, however, we must examine restrictions on speech with particular care when their effects fall unevenly on different viewpoints and groups in society."); Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1204 (D. Wyo. 2002) ("The Court would obviously be concerned about Grace United's free speech and associational rights if Cheyenne enacted a zoning regulation that: (1) was content-based; (2) had a disparate impact on certain religious viewpoints; or (3) although facially neutral, was applied in a discriminatory manner."), *aff'd*, 451 F.3d 643 (10th Cir. 2006); Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 848 (2004) (noting that laws that have a disparate impact on one viewpoint run the risk of being viewpoint-based); *cf.* Carey v. Brown, 447 U.S. 455, 459 (1980) (overturning a ban on picketing that contained an exemption for labor picketing because it was viewpoint-based).

[339] *See* Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (noting that leafleting is "essential to the poorly financed causes of little people").

[340] *See* Forsythe Cnty. v. Nationalist Movement, 505 U.S. 123, 133 (1992) (invalidating demonstration fee requirements because they might give too much discretion to municipalities in favoring one viewpoint over another).

[341] *See* Berger v. City of Seattle, 569 F.3d 1029, 1052 (9th Cir. 2009) (overturning solicitation statute that required permits for individual street performers because it allowed city to approve specific views over others).

[342] *See* Dorman v. Satti, 678 F. Supp. 375, 381 (D. Conn. 1988) (granting plaintiff's motion for summary judgment and holding that the act that proscribed interfering with hunters was viewpoint based discrimination), *aff'd*, 862 F.2d 432 (2d Cir. 1988) .

[343] *See* Huhn, *supra* note 338, at 848 (arguing that courts should remain sensitive to viewpoint-based discrimination even where the statute is facially neutral, but when it has a disparate impact on holders of a certain view and should scrutinize the connection between the means selected by the legislature and the end sought).

interferes with an animal enterprise or person related to an animal enterprise.[344] It only reasonably affects individuals holding the minority view that the use of animals for certain purposes is objectionable, but the fact that it is a view endorsed by a minority of citizens does not remove it from constitutional scrutiny.[345] AETA's viewpoint-based restriction on speech is evidenced by the fact that a person could be subject to terrorist charges for interfering or attempting or conspiring to interfere with an animal enterprise while another person in the same location, at the same time, and engaging in the same conduct but promoting rather than interfering with an animal enterprise would be free from criminal liability.[346] Thus, two individuals will be treated differently under the law where the only distinction is the specific viewpoint expressed.

Multiple courts have overturned statutes similar to AETA, namely, those that prohibit interfering or disrupting a person engaged in hunting, on the basis that they restrict speech on the basis of the speaker's viewpoint.[347] Courts have held that such restrictions are viewpoint-based because it does not extend to all discussions on hunting but only those motivated by the specific view that hunting is objectionable.[348] Moreover, courts and commentators have taken special notice of the fact that such laws were advanced by pro-hunting lobbies in response to the growth in anti-hunting advocacy campaigns and only individuals morally and philosophically opposed to hunting were arrested under the statutes.[349] Like these invalidated statutes,

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[344] 18 U.S.C. § 43(a)(1) (2006).

[345] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (arguing that the repugnant nature of the conduct and the fact that it is greatly disavowed by most people does not alter the applicable level of constitutional scrutiny).

[346] *See* 18 U.S.C. § 43(a)(1).

[347] *See Dorman*, 862 F.2d at 437 (invalidating statute that prohibited interfering with hunters because it was a viewpoint-based discrimination); State v. Ball, 627 A.2d 892, 895 (Conn. 1993) (holding that a statute that prohibited interfering with hunting was an unconstitutional viewpoint-based discrimination because of its disparate impact on individuals who morally and philosophically object to hunting); People v. Sanders, 696 N.E.2d 1144, 1150 (Ill. 1998) (Harrison, J., concurring) (noting that statute prohibiting disturbing an individual engaged in hunting is not only overbroad but also viewpoint-based); State v. Miner, 556 N.W.2d 578, 583 (Minn. Ct. App. 1996) (holding that statute prohibiting the disruption of the lawful taking of wildlife was an unconstitutional viewpoint- and content-based restriction and overly broad as applied); *Opinion of the Justices*, 509 A.2d 749, 752 (N.H. 1986) (finding that statute prohibiting harassment of hunters was viewpoint-based).

[348] *See, e.g.*, *Dorman*, 862 F.2d at 435 (discussing the First Amendment dimensions of hunting regulations).

[349] *See, e.g.*, *Sanders*, 696 N.E.2d at 1150 (Harrison, J., concurring) (finding that statute prohibiting disturbing hunters was facially overbroad and noting that all similar laws are unconstitutional viewpoint-based discriminations proliferated by groups aimed at reducing activism as evidenced by the fact that their development directly corresponds with successful

AETA's reach does not extend to all expressive conduct relating to the subject of animal enterprises, but only to that which expresses a specific ideology.[350] Like statutes aimed at prohibiting interference with hunting, AETA and its predecessor statute were drafted in response to the increased campaigns of animal rights activists and were promoted by lobbyists aimed at suppressing those views.[351]

Even if AETA's reach extends to no more than "true threats," it is an unconstitutional viewpoint-based restriction. Whether a restriction is viewpoint-based is not a question of what speech is regulated but how the government has chosen to regulate it.[352] In *R.A.V. v. City of St. Paul*, individuals were arrested under a statute that prohibited acts aimed at inciting "anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender" after they burned a cross in an African-American family's yard.[353] The Supreme Court held even after accepting the Minnesota Supreme Court's construction of the statute as only reaching conduct that amounted to "fighting words," which are outside of First Amendment protection, that the statute was facially invalid.[354] The court explained that defamation, obscenity, "fighting words," "true threats," and other speech may be limited by statute without offending the First Amendment.[355]

> [However,] they are [not] categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their

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activism campaigns and additionally noting that this viewpoint-based discrimination was emphasized by the fact that only individuals holding the view that hunting is morally objectionable have been arrested under the acts); Katherine Hessler, *Where Do We Draw the Line Between Harassment and Free Speech?: An Analysis of Hunter Harassment Law*, 3 ANIMAL L. 129, 161 n.21 (1997) (noting that hunter harassment laws were promoted by the Sportsman's Caucus and the Wildlife Legislation Fund of America, which are pro-hunting lobby groups).

[350] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The principle inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

[351] *See Public Policy*, *supra* note 31, at 7 ("NABR led the initiative to pass the *Animal Enterprise Protection Act of 1992*, making it a federal offense to destroy research. This was the first of several NABR-endorsed pieces of legislation designed to protect research facilities and individuals targeted by animal rights groups."). On its website the NABR credits AETA's passing to the pressure it placed on Washington and warns that without this law animal rights activists would be much more effective in pushing for alternative sources of testing. *Id.*

[352] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992).

[353] *Id.* at 380 (quotations omitted) (quoting ST. PAUL, MINN. LEGISLATIVE CODE § 292.02 (1990)).

[354] *Id.* at 381.

[355] *Id.*

> distinctly proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.[356]

The fact that expressive conduct can be proscribed for one reason does not entail that it can be proscribed for another.[357] The *R.A.V.* Court overturned the statute on the basis that while the legislature was permitted to prohibit "fighting words," it may not do so only against speakers who express a specific view.[358] Under the Minnesota statute, a person who uses "fighting words" in opposition to specific races, colors, creeds, religions, or gender roles has violated the law while a person who uses "fighting words" to counter those views has not.[359] The legislature has no "authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[360]

It is within the purview of the legislature to prohibit "true threats," but it may not prohibit only "true threats" that endorse a particular view.[361] Even where AETA is interpreted to reach only "true threats," the law is viewpoint-based because it proscribes only "true threats" that interfere with an animal enterprise, which is another way of saying that it prohibits "true threats" made in support of the animal rights view that animals should not be used for commercial, entertainment, and research purposes.[362] AETA's reach does not extend to "true threats" made by supporters of the contrary view, however. Thus, the government has demanded that one side of the debate abide by more stringent rules than the other.

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[356] *Id.* at 383–84.

[357] *See id.* at 386 (noting that simply because speech can be proscribed on the basis of noise control does not mean that it can be prohibited on the basis of obscenity).

[358] *Id.* at 390–91.

[359] *See id.* The court uses the example of an individual who under the statute would be able to hold up a sign stating that "'anti-Catholic bigots' are misbegotten" while another individual would commit a criminal act by stating that all "'papists' are [misbegotten]." *Id.* at 391–92.

[360] *Id.* at 392.

[361] *See id.* at 390–91 (noting that the city may prohibit "fighting words" generally, but not where it singles out "fighting words" spoken by a specific group who opposed non-whites).

[362] *See* REGAN, *supra* note 9, at 330–98 (discussing that the principles of animal rights are the dissolution of the use of animals in research, animal products in food and materials, and sport hunting and trapping).

ii. AETA Restricts Speech on the Basis of Content

Content-based restrictions are those that restrict speech beyond mere time, place, or manner but do not restrict a specific viewpoint.[363] Content-based restrictions on speech are inherently dangerous because they "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[364] The Supreme Court has explained that "[t]he government's purpose is the controlling consideration" in whether a law is content-based or content-neutral.[365] Where a statute prohibits conduct that contains both speech and non-speech elements, and where the restriction on speech is more than merely incidental to the restriction on conduct, the courts consider the restriction content-based for First Amendment purposes.[366]

AETA penalizes interfering or attempting or conspiring to interfere with an animal enterprise.[367] The term interfere includes a substantial amount of expressive conduct.[368] In invalidating a statute that prohibited interfering "with the lawful taking of wildlife by another person," the United States Court of Appeals for the Second Circuit concluded that the statutory term "interfere" could not be justified as a reasonable time, place, or manner restriction.[369] Courts interpreting similar language in similar contexts have ruled accordingly.[370] Because "interfer[ence]" has a significant speech

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[363] *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 388–91 (1993) (discussing the distinction between viewpoint- and content-based restrictions on speech).

[364] Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (holding that a law aimed at compensating victims by placing all profits that a criminal makes from any book that discusses the crime was invalid because although it expressed a legitimate state interest in compensating victims and preventing criminals from profiting from their crimes, it was sufficiently overinclusive in that it targeted all money related to any book that expresses any thoughts on the crime, even those that are only tangentially or incidentally related).

[365] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[366] *See* United States v. Cassel, 408 F.3d 622, 626 (9th Cir. 2005) ("[W]hen the definition of a crime or tort embraces any conduct that causes or might cause a certain harm, and the law is applied to speech whose communicative impact causes the relevant harm, we treat the law as content-based." (citing Hustler Magazine v. Falwell, 485 U.S. 46 (1988))) The court applied this reasoning to conclude that a statute that interfered with a land sale was content based. *Id.*

[367] 18 U.S.C. § 43(a) (2006).

[368] *See* discussion *supra* Part III.B.1.a.i.

[369] Dorman v. Satti, 862 F.2d 432, 433, 437 (2d. Cir. 1988) (quoting CONN. GEN. STAT. § 53a-183a).

[370] *See* State v. Ball, 627 A.2d 892, 895 (Conn. 1993) (because it is the communicative aspect of the conduct that is being prohibited, it must be viewed as a content-based restriction); State v. Casey, 876 P.2d 138, 140 (Idaho 1994) (rejecting appellant's argument that a statute that made it a misdemeanor to enter or remain in an area with the intent to interfere with the lawful taking or pursuit of wildlife was unconstitutionally content-based); State v. Sanders, 696

component and it is the communicative aspect of the speech that causes the specific harm, this restriction must be viewed as content-based.[371]

Content-based restrictions are evaluated under the public forum doctrine.[372] Whether content-based restrictions are constitutional is often a question of where the speech is being restricted.[373] Traditional public forums are locations that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[374] They include places such as: streets, parks, sidewalks, areas around state capitals, and town halls.[375] The government may only restrict the content of speech in traditional public forums where the restriction supports a compelling governmental interest and is narrowly tailored to meet that end.[376]

Protecting the safety of citizens and their property is one of the most basic and essential Police Powers, and it naturally follows that ensuring the safety of individuals associated with animal enterprises is a compelling governmental interest.[377] This is not the interest

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N.E.2d 1144 (Ill. 1998) (holding that a statute prohibiting the disturbing of another engaged in the lawful taking of a wildlife animal with the intent to dissuade was an impermissible content-based restriction on speech and violated the First Amendment); Opinion of the Justices, 509 A.2d 749 (N.H. 1986) (statute that prohibited the harassment of hunters, fishers, and trappers was constitutionally objectionable in that it was content-based and swept too broadly); State v. Miner, 556 N.W.2d 578 (Minn. Ct. App. 1996) (holding that a statute prohibiting the disruption of the lawful taking of wildlife was an unconstitutional content-based restriction).

[371] *See Cassel*, 408 F.3d at 626 (holding that a statute prohibiting interfering with a federal land sale is content-based because it is the communicative aspect of the conduct that causes the harm).

[372] *See* David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 160–203 (1992) (arguing that the public forum doctrine's emphasis on formalism actually has the effect of restricting speech, but is consistently what the Supreme Court applies).

[373] *See* Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984) (arguing that the formalistic nature of the public forum doctrine disrupts the content-based analysis, which should be central).

[374] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939) (Roberts, J., concurring)).

[375] *See id*. (streets and parks are public forums and not all speech may be prohibited within a public forum); *see also* Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (holding that mall surrounding Ohio's State Capital building is a traditional public forum); Texas v. Johnson, 491 U.S. 397, 412 (1989) (concluding that plaza surrounding city hall is a traditional public forum); Boos v. Barry, 485 U.S. 312, 318 (1988) (plurality opinion) (ruling that a sidewalk is a traditional public forum); United States v. Grace, 461 U.S. 171, 177 (1983) (holding that sidewalks are traditional public forums).e

[376] Farber & Nowak, *supra* note 373, at 1220 (discussing the constitutionality of regulations covering classic public forums).

[377] *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (noting that it is a traditional exercise of the police powers to protect the safety of citizens).

articulated by the statute, however. AETA's stated interest is to protect against interferences that cause lost revenue to animal enterprises.[378] This is a substantially broader concept, and whether restricting interference with the profits or good will of a broad class of business enterprises is a compelling governmental interest is a different question altogether.[379] Assuming arguendo that the interest at stake is the prevention of harm to employees and damage to facilities, the identified interest does not appropriately fit the means selected to serve that interest. [380] Even where such a content-based restriction serves a compelling governmental interest, it must be narrowly tailored so that it does not excessively restrict speech.[381] AETA proscribes interferences regardless of where, when, or how they occur, within traditional public forums or otherwise.[382] The statute goes so far as to proscribe conduct that does not interfere with an animal enterprise but where the actor has conspired or attempted to do so.[383] These activities are prohibited irrespective of where they occur, whether in a traditional public forum or otherwise.[384] Blocking such a broad category of speech without exception to where it occurs runs afoul of the First Amendment.[385]

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[378] *See* 18 U.S.C. § 43(a)(1), (c) (2006).

[379] In similar contexts, courts have determined that preventing interference from hunting, which is logically related to animal enterprises because they both involve the killing of animals for food and clothing, is not a compelling governmental interest. *See* Dorman v. Satti, 862 F.2d 432, 437 (2d Cir. 1988) ("There is no showing that protecting hunters from harassment constitutes a compelling state interest."); *cf.* State v. Miner, 556 N.W.2d 578, 583 (Minn. Ct. App. 1996) (assuming arguendo that hunting was a compelling state interest, the court nonetheless found that prohibiting only expressive conduct that interfered with hunting was not necessary to protect that interest).

[380] *See* Farber & Nowak, *supra* note 373, at 1240 (discussing the role of consistency between the government's goal and First Amendment values).

[381] *Id*. at 1220.

[382] *See* Day, *supra* note 372, at 180–90 (noting that despite the doctrine's flaws, the Supreme Court has consistently used the public forum doctrine in evaluating content-based restrictions).

[383] 18 U.S.C. § 43(a)(2)(C).

[384] *See id.* § (a)(2)(A)–(C) (the statute does not provide any limitations with respect to where violations must occur).

[385] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (holding that although the prevention of hate crimes is a compelling governmental interest, the Minnesota hate crime prevention statute violates the First Amendment because there are content-neutral alternatives, including physical assault laws).

iii. AETA Prohibits Expressive Conduct Without Limitation to Time, Place, and Manner

Expressive conduct may be subject to "reasonable time, place, or manner restrictions . . . provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[386] "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[387] The Supreme Court has further stated that although the regulation must be narrowly tailored, it need not be the least intrusive means possible.[388]

In *Hill v. Colorado*, the Supreme Court upheld a statute prohibiting persons from knowingly approaching within eight feet of a person who is within 100 feet of a healthcare facility entrance for the purpose of displaying a sign, engaging in oral protest, education, counseling, or passing leaflets or handbills unless the individual consents to that approach.[389] The Court upheld the statute because it was content-neutral in that it prohibited all communications regardless of their content or the viewpoint they expressed, and was thus content neutral.[390] Further, the statute was limited to a specific time, place, and manner restriction: an eight-foot floating buffer zone.[391] It provided ample alternative channels of communication because it placed no restrictions on speech that occurred outside of the floating buffer zone, and it only applied to unwanted physical approach.[392] In the event that the passerby consented to the approach, the statute placed no restrictions on the speaker.[393]

AETA lacks each of the safeguards provided by the *Hill* statute. AETA proscribes interference without limitation to time, place, or manner and does not contain a consent provision or otherwise make

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[386] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[387] Frisby v. Schultz, 487 U.S. 474, 485 (1988).

[388] *See* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) ("Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.").

[389] *Id*. at 730.

[390] *Id.* at 723.

[391] *Id*. at 729–30.

[392] *Id*. at 729 ("Signs, pictures, and voice itself can cross an 8-foot gap with ease.").

[393] *Id.* at 723.

available alternative channels of communication.[394] The only requirement is that a person interferes with an animal enterprise or attempts or conspires to do so.[395] Thus, unlike an eight-foot barrier that limits but does not prohibit communications, AETA can be used as an outright ban. It does not address time, place, or manner in any respect; it simply prohibits interfering or attempting or conspiring to do so with a broadly defined set of business interests.[396] Had the *Hill* statute prohibited all expressive conduct that interfered with abortions regardless of time, speech, or manner, the Court would not have upheld the statute.[397] Courts following *Hill* have overturned statutes that have attempted to extend this buffer zone beyond eight feet because it diminishes alternative channels of communication.[398]

AETA's lack of time, place, or manner restrictions and its potential impact on expressive conduct is evidenced by the recent arrests in *United States v. Buddenberg*. In *Buddenberg*, four individuals were arrested for conspiracy to violate AETA after leaving a stack of leaflets that personally identified researchers, focused picketing outside of a researcher's private residences, and chalking messages on a public sidewalk.[399] These arrests provide a glimpse into the extent of AETA's reach in the absence of time, place, and manner restrictions.

Similarly, in *Frisby v. Schultz*,[400] the Court upheld an ordinance that prohibited "focused picketing" outside of a private residence.[401] Although the government may restrict the use of streets and sidewalks through appropriate regulation, "that right remains unfettered unless and until the government passes such regulations."[402] *Frisby* supports only the narrow proposition that the right to residential privacy may

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[394] *See* 18 U.S.C. § 43 (2006).

[395] *Id.* § 43(a)(2).

[396] *Id.*

[397] *See Hill*, 530 U.S. at 723 (noting that the statute does not violate the First Amendment where it does not ban the communications themselves but merely regulates where they can occur).

[398] *See* New York v. Operation Rescue Nat'l, 273 F.3d 184, 190 (2d Cir. 2001) (holding that an expansion of the buffer zone to fifteen feet was unconstitutional).

[399] United States v. Buddenberg, No. CR-09-00263 RMW, 2009 U.S. Dist. LEXIS 100477, at *1–5 (N.D. Cal. Oct. 28, 2009). For a description of the events that occurred over a several month period, as well as the attempted entry into a home that was charged separately, see *supra* text accompanying note 322.

[400] 487 U.S. 474 (1988).

[401] *See id*. at 483.

[402] Dean v. Byerley, 354 F.3d 540, 551 (6th Cir. 2004) (holding that there is a constitutional right to focused picketing in the absence of a narrowly tailored time, place, and manner restriction).

be a significant governmental interest that can be served through a narrowly tailored time, place, and manner restriction, and not the broader proposition that residential privacy inevitably trumps the right to focused picketing in residential areas.[403] In the absence of a narrowly tailored statute, the right to focused picketing remains unfettered.[404] The Supreme Court has also upheld regulations that restrict leafleting to designated areas,[405] but the Court has flatly rejected broader attempts at prohibiting leafleting as mere time, place, and manner restrictions.[406] Because AETA fails to define time, place, and manner restrictions, it can be used to abrogate these principles. In *Buddenberg*, there were not narrowly tailored restrictions on focused picketing or distributing leaflets as the Constitution demands.[407] Rather the court used AETA's broad provision, which proscribes conspiring or attempting to interfere with an animal enterprise, to prohibit these activities.[408]

AETA's broad definition of "animal enterprise" engulfs far more than the evil that it seeks to remedy and does not make available alternative channels of communication.[409] This definition includes businesses with even a tangential relationship to animals: almost all

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[403] *See Frisby*, 487 U.S. at 486–88 (noting that residential privacy may serve to fulfill one of the requirements that the statute serve a significant government interest, but the Court does not hold or state in dicta that residential areas are not part of the public forum or outside of First Amendment protection). This is the way that courts have interpreted *Frisby*. *See*, *e.g.*, *Dean*, 354 F.3d at 551 ("[W]e conclude that the First Amendment protects the right to engage in peaceful targeted residential picketing in the absence of a narrowly tailored time, place, or manner regulation that meets the requirements laid down in *Frisby*.").

[404] *See Dean*, 354 F.3d at 551 (relying on *Frisby* for the proposition that the government may only prohibit targeted picketing if it has articulated a legitimate governmental interest and drafted a narrowly tailored statute to fulfill that interest, but in the absence of such a statute the right to targeted picketing remains absolute).

[405] *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (upholding a restriction on leafleting to a specified booth at a state fair).

[406] *See* Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (holding that a ban on leafleting door-to-door was not a time, place, or manner restriction, but was a viewpoint based restriction because this type of communication is "essential to the poorly financed causes of little people").

[407] *See Frisby*, 487 U.S. at 486–88 (noting that focused picketing may be restricted under a well-tailored statute); *Heffron*, 452 U.S. at 654–55 (noting that leafleting may be restricted to certain areas only under a well-tailored statute).

[408] *See* United States v. Buddenberg, No. CR-09-00263 RMW, 2009 U.S. Dist. LEXIS 100477, at *2–5 (N.D. Cal. Oct. 28, 2009) (noting that the choice to charge the defendants under 18 U.S.C. § 371 rather than 18 U.S.C § 43(a)(2)(C) was inconsequential).

[409] *See* 18 U.S.C. § 43(d)(1) (2006) (defining an animal enterprise as "(A) a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing; (B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or (C) any fair or similar event intended to advance agricultural arts or sciences").

retail stores that make or sell clothing as well as grocery stores, restaurants, automobile manufacturers, automobile dealers, gas stations that sell food, schools, universities, and countless other commercial enterprises that in some way use or sell animal products.[410] AETA's reach extends beyond these entities, however, because it also ensnares individuals related to animal enterprises, as well as their family members.[411] It is difficult to imagine that a statute that placed such broad restrictions on other morally and politically based conduct would be upheld.[412]

Further militating against the proposition that AETA makes available ample alternative channels of communication is the fact that, unlike the *Hill* statute, AETA does not make exception for instances in which the audience consents to the interference.[413] If a person interferes with an animal enterprise, even where the audience consents to the interference, the individual has violated AETA.[414] An individual could potentially violate AETA for protesting a store causing it to lose greater than $10,000 in revenue or customer good will.[415] Moreover, a person violates AETA when they merely attempt or conspire to interfere with one of these entities but no actual interference occurs.[416]

Statutes that penalize interferences without limitation to specific times, places, and manners violate the overbreadth doctrine.[417] Under

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[410] *See id.*

[411] *See id.* § 43(a)(2).

[412] It is difficult to imagine that a statute aimed at halting the actions of anti-abortionists could be framed so broadly and survive constitutional scrutiny. A statute that sought to prohibit interfering with health care enterprises, for example, and then defined a health care enterprise as any entity even incidentally related to the use or sale of health care products could not survive constitutional scrutiny. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 729 (2000) (permitting an eight-foot zone in which no speech could be had because it was obvious that speech made outside of this zone was clearly heard and expressive conduct was clearly seen, and the Court indicated that had the zone been larger it would not have been upheld); New York v. Operation Rescue Nat'l, 273 F.3d 184, 190 (2001) (holding that an expansion of the buffer zone to fifteen feet violated the First Amendment).

[413] *See* 18 U.S.C. § 43.

[414] *See id.*

[415] There are real worries about whether such a prosecution will occur. *See* Prince & Heinz, *supra* note 291.

[416] 18 U.S.C. § 43(a)(2)(C).

[417] *See* Dorman v. Satti, 862 F.2d 432, 437 (2d Cir. 1988), ("[T]he Act reaches a wide range of activities confined to no particular time, place or manner."), *aff'd*, 862 F.2d 432 (2d Cir. 1988); State v. Casey, 876 P.2d 138, 141 (Idaho 1994) (holding that a statute prohibiting intentionally interfering with hunting was unconstitutionally overbroad as it was not a sufficiently limited time, place, or manner restriction); State v. Miner, 556 N.W.2d 578, 586 (Minn. Ct. App. 1996) (holding that a statute prohibiting disruption of the lawful taking of wildlife was unconstitutionally overbroad because it was not a specific time, place, or manner restriction).

this doctrine, courts strike down laws that limit expressive conduct in such an all-encompassing manner, even when the specific conduct could be limited through more narrowly tailored time, place, and manner restrictions.[418] The fact that the statute does not preclude every alternative method of communication does not mean that it has allowed ample alternative methods of communication.[419] If the evil the government seeks to prevent is physical harm to researchers or research facilities or the releasing of animals from farms, it has chosen an exceedingly broad statute to serve this purpose. AETA prohibits interfering or attempting or conspiring to interfere without exception.[420] Courts have held that where an act proscribes interference but fails "to limit the proscribed interference as to time and place, [it] carries its effect far beyond the proper scope of government regulation."[421] Other courts have concluded that the term "interfere" is incapable of being limited to a time, place, and manner restriction and it is, therefore, necessarily overbroad.[422] Either way, AETA impedes upon a substantial amount of protected speech, and because its constitutional infirmity is incapable of being saved by a narrowing construction, it violates the First Amendment overbreadth doctrine.

2. AETA Is Unconstitutionally Vague

AETA is unconstitutionally vague for the same reasons that it is overbroad, namely, its reliance on expansive terms and failure to limit the scope of those terms by reference to a limiting definition. Moreover, because AETA implicates the First Amendment, the court should read the vagueness concerns in combination with the free speech concerns.[423] AETA's imprecise and inconsistent use of

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[418] *See* Klein v. City of San Clemente, 584 F.3d 1196, 1208 (9th Cir. 2009) (holding that an anti-litter law that prohibited the distribution of leaflets onto unoccupied cars violated leafleters' First Amendment rights as it was not narrowly tailored to meet the government's interest).

[419] *Id.* (noting that by eliminating the broad class of communications it was not narrowly tailored even though there were other ways of communicating, including phone, word of mouth, and leafleting to individuals on the street or in their automobiles).

[420] 18 U.S.C. § 43(a)(2).

[421] *Dorman*, 678 F. Supp. at 382 (granting plaintiff's motion for summary judgment and holding that the Hunter Harassment Act was unconstitutionally vague and overbroad).

[422] *See* State v. Ball, 627 A.2d 892, 895 (Conn. 1993) (holding that interference is inescapably imbued with speech and expression and cannot be limited by judicial construction).

[423] *See* NAACP v. Button, 371 U.S. 415, 433 (1963) (overturning a Virginia statute prohibiting solicitation of legal services because of its potential to extend into the civil rights movement and noting that where a statute presents both vagueness and overbreadth concerns the potential for constitutional infirmity is great and the statute may be overturned in circumstances

language results in individuals having to guess at what conduct it prohibits. It also obliges those law enforcement officials charged with the responsibility of enforcing AETA to make key policy determinations about its very meaning on an ad hoc and subjective basis. Because of these infirmities, citizens must necessarily steer far wider of AETA's reach than if its boundaries were clearly identified.

A criminal statute can be held unconstitutionally vague for either of two reasons: (1) it fails to provide sufficient notice to enable people of ordinary intelligence to conform their conduct to the prohibitions of the statute; or (2) it authorizes or encourages arbitrary and discriminatory enforcement.[424] The first test is met where a statute's imprecise language prevents notice of what conduct is prohibited such that "men of common intelligence must necessarily guess at its meaning."[425] The notice requirement is essential to due process.[426] It is intended to prevent unfair prosecutions where the defendant conformed his behavior to one competing interpretation of a statute while the prosecution has adopted another interpretation, thereby preventing the individual from properly conforming his conduct to the requirements of the law.[427] "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."[428] Where a statute's language is imprecise there are two foreseeable results: (1) the individual who attempts to conform his conduct to the confines of the law risks criminal sanction because of the statute's imprecise language, and (2) "[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."[429]

a. AETA Supports Multiple Reasonable Interpretations

AETA's failure to define key terms renders it unconstitutionally vague.[430] Its repeated and inconsistent use of expansive terms that are

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it would not if only a claim of vagueness or overbreadth was made).

[424] City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (opinion of Stevens, J.).

[425] Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (quotation marks omitted) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

[426] *Morales*, 527 U.S. at 58 ("[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law.").

[427] *Connally*, 269 U.S. at 393.

[428] Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[429] Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (omission in original) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

[430] *See* Andrew N. Ireland Moore, Comment, *Caging Animal Advocates' Political Freedoms: The Unconstitutionality of the Animal and Ecological Terrorism Act*, 11 ANIMAL L. 255, 273 (2004) (arguing that the ambiguous language chosen is void for vagueness because it

not defined by statute creates an ambiguity not only about whether the incriminating fact has been proven in a particular circumstance, but also what conduct AETA prohibits.[431] The Supreme Court has consistently overturned statutes on vagueness grounds where the plain meaning of the language carries multiple interpretations.[432] Whether some activity interferes with an animal enterprise is a subjective judgment unguided by a meaningful statutory definition, narrowing context, or settled legal meaning.[433] This ambiguity is increased by AETA's criminalizing of attempt or conspiracy to interfere with an animal enterprise.[434] AETA opponents have long criticized its reliance on the use of the term "interfere" because of its propensity to be interpreted in broad and conflicting ways. These concerns are also reflected in its legislative history.[435] Recognizing this lack of interpretive guidance, other courts have stuck down statutes that rely on the term "interfere" and similar terms because of their inherent ambiguity.[436]

AETA's reliance on imprecise language causes individuals seeking to engage in advocacy to find themselves at a loss as to what conduct is prohibited.[437] The potential for multiple interpretations is evident in the pending prosecutions in *Buddenberg*.[438] Regardless of whether

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fails to provide adequate notice of what acts are prohibited).

[431] *See* United States v. Williams, 128 S. Ct. 1830, 1841 (2008) (noting that what renders a statute vague is not the inability to determine close calls or boundary cases but a lack or notice of what the prohibited fact is).

[432] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (overturning an ordinance that prohibited remaining in the same place with no apparent purpose after a dispersal warning had been given because there were multiple interpretations of what was an apparent purpose as well as what it meant to disperse); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (overturning a statute prohibiting three or more people in a group acting in a manner that annoys passersby because what annoys one person may not annoy another).

[433] *See* Dorman v. Satti, 862 F.2d 432, 437 (2d Cir. 1988) (finding that "interfere" is vague and overbroad and overturning a statute that failed to include a limiting definition).

[434] 18 U.S.C. § 43(a)(2)(C) (2006).

[435] *See Kucinich Statement*, *supra* note 246 ("[AETA] paint[s] everyone with the broad brush of terrorism who might have a legitimate objection to a type of research or treatment of animals that is not humane. . . . This bill is written in such a way as to have a chilling effect on the exercise of peoples' first amendment rights."); *Potter Statement*, *supra* note 246, at 23 ("[AETA] will force Americans to decide if speaking up for animals is worth the risk of being labeled a 'terrorist,' either in the media or in the courtroom. That's not a choice anyone should have to make.").

[436] *See, e.g.*, *Dorman*, 862 F.2d at 437 (holding that "interfere" is impermissibly vague and does not provide fair notice of what conduct is prohibited).

[437] *See generally* Severson, *supra* note 291; Prince & Heinz, *supra* note 291; Erickson, *supra* note 291.

[438] *See* Unites States v. Buddenberg, No. CR-09-00263 RMW, 2009 U.S. Dist. LEXIS 100477, at *19–23 (N.D. Cal. Oct. 28, 2009) (listing a number of different court interpretations of "interfere," "interrupt," and other such language).

focused picketing, chalking public sidewalks, and disseminating leaflets that personally identify researchers are the proper subject of criminal laws, there are concerns about whether AETA provides warning that these or similar activities are within its reach.[439] AETA's legislative history reveals that its intended aim is to prevent clandestine or otherwise untraceable offenses; yet, the arrests in *Buddenberg* involve conduct that is often adequately controlled by local ordinances.[440] Because of the inconsistency between AETA's stated aim and its recent application and its use of expansive terms that encompass a considerable amount of conduct, activists are left to guess how it will be applied in future circumstances.[441]

A clear example of this type of confusion is in the area of whistleblowing. AETA's failure to define "real or personal property" means that under well settled judicial decisions it includes good will and reduced profits.[442] Under the plain language of the statute, an individual who videotapes or even attempts to videotape the inside of an animal enterprise for the purpose of disclosing the information to the public violates its provisions.[443] When an undercover activist gained access to a slaughterhouse in 2008 and videotaped footage of cows so sick that they could not stand, footage which led to the recall of 143 million pounds of meat, the largest in American history, there were concerns over whether the activist would be prosecuted. Some suggested that had the activist not been tied to the Human Society of the United States he might have been prosecuted.[444] Whether or not such actions are of the type that are likely to be prosecuted is unclear, but the fact that it is unclear forces individuals to steer far wider than they would if the boundaries of the law were clearly marked. For a statute to require such accommodations violates the Constitution.[445]

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[439] *See* text accompanying *supra* note 339; *see also supra* notes 407–29 and accompanying text.

[440] *Cf.* Frisby v. Schultz, 487 U.S. 474, 486–88 (1988) (holding that a local ordinance banning all picketing, if narrowly tailored to the household rather than the public, is constitutional).

[441] Severson, *supra* note 291, at F3.

[442] *See* discussion at *supra* Part III.A.1.a.ii.

[443] 18 U.S.C. § 43(a)(2) (2006).

[444] *See, e.g.*, Severson, *supra* note 291, at F3 (questioning whether the tremendous economic damages caused by the recall would lead to prosecution and suggesting that had the activist been tied to PETA or another animal rights organization more controversial than the Humane Society prosecutions would have been more likely).

[445] Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

b. AETA Lacks Explicit Standards for Those Who Have to Enforce It

AETA's failure to define key terms and provide explicit standards for those whose role it is to enforce its provisions renders it void for vagueness. Laws inherently delegate some interpretive authority to those charged with enforcing them, but a law that "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" is impermissibly vague.[446] In *City of Houston v. Hill*,[447] the Supreme Court invalidated a statute that made it "unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policemen in the execution of his duty, or any person summoned to aid in making an arrest."[448] At issue was the prohibition of "in any manner . . . interrupt[ing] any policeman in the execution of his duty,"[449] which the Court invalidated because it granted authority to police officers to select which activities were an interruption.[450] Like interrupting, whether some conduct is interfering or not is a subjective judgment, but the Supreme Court has been resistant to allowing enforcement of statutes where the prohibited fact is capable of such malleability.[451] These concerns are especially apparent in AETA's conspiracy and attempt provision where the only requirement is that the offender attempt or conspire to interfere.[452] Enforcers have been delegated the impermissible authority to write the law as they go. This discretion offends the Constitution's fair notice requirement.[453] An "ordinance is unconstitutional, not because a policemen applied this discretion wisely or poorly in a particular

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[446] *Id.* at 108–09; *see also* Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966) ("[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."); Coates v. City of Cincinnati, 402 U.S 611, 616 (1971) (invalidating a regulation that prohibited individuals from "annoying" passersby because it unconstitutionally delegated interpretive authority to those whose job it was to enforce it).

[447] 482 U.S. 451 (1987).

[448] *Id.* at 455 (quoting HOUS. TEX. CODE ORDINANCES § 34–11(a) (1984)).

[449] *Id.* at 461.

[450] *Id.* (noting that regardless of how many qualifying offenses actually occurred, police were granted unguided discretion to select those that were prosecutable).

[451] *See Coates*, 402 U.S. at 614 (overturning a statute that prohibited three or more individuals from annoying passersby because what is annoying to one person may not be annoying to others).

[452] 18 U.S.C. § 43(a)(2)(C) (2006).

[453] City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (holding that a law is unconstitutionally vague when it "authorize[s] . . . arbitrary and discriminatory enforcement").

case, but rather because the policemen enjoys too much discretion in *every* case."[454]

Discretion to enforce on an ad hoc basis is always viewed with suspicion, but it is especially troublesome when those individuals likely to be impacted by the interpretation are ones whose "ideas, . . . lifestyle, or . . . physical appearance is resented by the majority of their fellow citizens."[455] The Supreme Court has stated that courts should be especially suspicious of laws whose likely targets are individuals critical of those who enforce the law[456] or a politically marginal group[457] because "a statute broadly curtailing group activity . . . may easily become a weapon of oppression, however evenhanded its terms appear."[458] In such an instance, the mere existence of the statute may freeze out all activity that encroaches upon the statute's approximate reach.[459] Animal rights activists, who are individuals that advocate for a moral and political position endorsed by only a small minority of the population and which directly challenges many of society's laws and beliefs, are undoubtedly such a group. The uncertainty caused by AETA's imprecise language will drastically curtail debate and animal rights advocacy.[460]

CONCLUSION

"[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . . ."[461] The Third Circuit's reliance on historical context to draw traditionally protected speech

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[454] *Id.* at 71 (Breyer, J., concurring).

[455] *Coates*, 402 U.S. at 616.

[456] *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1051 (1991) (noting that history indicates that speech is most likely to be "suppressed when either the speaker or the message is critical of those who enforce the law," and this effect is exacerbated when the law is written broadly enough to allow for discriminatory enforcement).

[457] *See* NAACP v. Button, 371 U.S. 415, 434–37 (1963) (overturning a broadly worded statute that prohibited solicitation of the legal profession, even though on its face it applied to all equally, because of its likely application to African-Americans).

[458] *Id*. at 435–36.

[459] *Id.* at 436 (noting that a broadly worded Virginia statute had the potential to end all activity on behalf of the civil rights movement altogether because of its potential to be enforced in a discriminatory manner, even if no prosecutions ever occurred).

[460] Despite increased acceptance in recent years, the animal rights movement remains a minority movement. Because of its beliefs and actions taken in furtherance of these moral and political beliefs, the animal rights movement is often detested by champions of industry. *See* discussion *supra* Part I.

[461] Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

from First Amendment protection in *United States v. Fullmer* places this ideal at risk. AETA's prohibition against interfering or attempting or conspiring to interfere without reference to a fixed statutory meaning or other narrowing context further endangers this principle. Even if criminal charges are unlikely to be brought in a specific context, AETA's vagueness creates the appearance of criminality, and the mere prospect of prosecution has the potential to silence debate on a wide range of important issues.

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