The American Legislative Exchange Council's attack on civil liberties:

A critical analysis of the "Animal and Ecological Terrorism Act" and "Environmental Corrupt Organizations - Preventative Legislation and Neutralization Act"

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January 2004

I. Introduction

Today, lawmakers and citizens alike place national security among the foremost of their concerns. In a post-911 world in which America is waging a "war on terrorism," one of the most critical issues facing our nation is how to ensure national security while safeguarding the civil liberties guaranteed by the U.S. Constitution.

Against the backdrop of this political climate, the American Legislative Exchange Council ("ALEC"), a right-wing organization primarily comprised of business interests and state legislators, has drafted and is promoting three related bills: 1) the "Animal and Ecological Terrorism Act" ("AETA"), released as part of the alarmist report Animal & Ecological Terrorism in America ("AETA Report");[1] 2) the "Environmental Corrupt Organizations - Preventative Legislation and Neutralization Act" ("ECO-PLAN"); and 3) the "ECO-PLAN Forfeiture Act" (together, "ECO-PLAN Acts"). ALEC claims that these bills will help safeguard the nation against acts of domestic ecoterrorism. However, the bills plainly violate civil rights guaranteed by the U.S. Constitution.

As identified by ALEC and others, the primary agents of "ecoterrorism" are the underground organizations Earth Liberation Front ("ELF") and Animal Liberation Front

("ALF").[2] These organizations participate in violent, destructive forms of "direct action," usually involving destruction of property to interfere with business operations that harm animals or the environment. The broad base of citizens concerned about the environment and animal welfare agrees that such acts of violence in American society cannot be condoned, regardless of the motivations behind the acts.

Unfortunately, AETA and the ECO-PLAN Acts do not limit their prohibitions and penalties to organizations like ELF and ALF. Rather, ALEC is taking advantage of public emotions by using the term "terrorism" to characterize a much broader class of animal and environmental activism, including protest activities that are both legal and constitutionally protected. By misapplying this powerful imagery, ALEC attempts to manipulate the public into believing that animal and environmental activists are "terrorists" who aim to harm innocent citizens. This is false imagery, and right-wing legislators and business interests cannot be allowed to misuse facts to infringe upon the rights of the majority of animal and environmental advocates, who, unlike ELF or ALF, engage in constitutionally protected forms of political activity.[3]

A. AETA: an overview

The Animal and Environmental Terrorist Act ("AETA") would "recognize[] animal rights and eco-terrorism as forms of domestic terrorism."[4] While AETA does not in fact define "ecoterrorism," it identifies "animal or ecological terrorist organization[s]" as any entities protesting any "lawful animal activity, animal facility, research facility, or the lawful activity of

mining, foresting, harvesting, gathering or processing natural resources."[5] Further, AETA includes an optional definition of "politically motivated" activity, which is "any activity where the principal purpose is to influence a unit of government to take a specific action or to persuade the public to take specific action."[6] While these definitions encompass violent acts causing property damage or bodily harm, as ALEC claims, they also encompass legal, peaceful, constitutionally protected means of activism.

AETA prohibits "animal and ecological terrorists" from participating in a number of already illegal activities, such as arson, trespass, burglary, and destruction of property.[7] Additionally, AETA prohibits animal and environmental advocates from participating in a number of legal activities, or from exercising various civil liberties.[8]

At best, AETA is an unnecessarily repetitive bill prohibiting activities that are already illegal. At worst, AETA is an unconstitutional bill which strips animal and environmental activists of civil liberties guaranteed by the Bill of Rights.

B. The ECO-PLAN Acts: an overview

The ECO-PLAN Acts are modeled after the federal statute Racketeer Influenced and Corrupt Organizations ("RICO"), a chapter of the Organized Crime Control Act ("OCCA").[9] Although the federal statute was enacted to fight organized crime, ALEC's state ECO-PLAN bills would unnecessarily, and likely illegally, apply RICO-like prohibitions to environmental organizations.[10]

ALEC asserts that the ECO-PLAN bills are necessary to deter and penalize "acts of

violence and crime used in the name of protecting the environment."[11] To that end, they criminalize any support given to organizations or individuals that have violated legislation based on AETA.[12] Further, they allow for criminal and civil forfeiture of all property derived from such support.[13]

Like AETA, the ECO-PLAN Acts serve the purpose of attempting to silence environmentalists and animal advocates. As demonstrated below, the ECO-PLAN Acts, in addition to implementing poor public policy, also violate First Amendment freedom of speech.

II. AETA and the ECO-PLAN Acts violate freedoms guaranteed by the First Amendment.

Any acts of violence are cause for concern in our society, and the majority of environmentalists and animal advocates agree that such acts should not be condoned, whether from political activists or anyone else. Although some violent activists do exist, the vast majority of tactics used by animal and environmental advocates are legal, nonviolent, and protected by the First Amendment of the U.S. Constitution. Yet nonviolent advocates also come within the reach of ALEC's "ecoterrorism" acts, due simply to the subject matter of their activism.

First Amendment freedoms are made applicable to the states through the Due Process Clause of the Fourteenth Amendment, meaning that states cannot enact laws that violate the First Amendment.[14] AETA fails under First Amendment analysis, as it unconstitutionally infringes upon the freedoms of speech, assembly, and association. Further, the ECO-PLAN Acts

unconstitutionally violate freedom of speech. As discussed in the subsections below, the regulation of activist tactics based on the content of the message they convey is impermissible.

A. AETA and the ECO-PLAN Acts violate freedom of speech.

The familiar passage of the First Amendment, "Congress shall make no law abridging the freedom of speech," applies not only to the spoken word, but also to conduct that expresses an idea. The Supreme Court calls such conduct "symbolic speech" or "expressive conduct." The Court's general rule on symbolic speech is that "above all else the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[15] Thus, the Court has held that the First Amendment protects activities such as picketing,[16] draft card burning,[17] and flag burning.[18] Again and again, Supreme Court case law establishes that First Amendment protection of symbolic speech is far-reaching. It goes so far as to protect the burning of a cross on an African-American family's lawn, even when that conduct is intended to intimidate the family.[19]

The first question a court considers in a symbolic speech case is whether the conduct is sufficiently expressive to come within the protections of the First Amendment.[20] The Supreme Court has held that the First Amendment applies to conduct if it is "sufficiently imbued with elements of communication" such that "an intent to convey a particularized message" is present, along with a great likelihood "that the message would be understood by those who viewed it."[21]

If a court finds that the conduct constitutes symbolic speech, it then turns to the second step of the analysis. In this step, a court determines whether the state's regulation is related to

the suppression of free expression.[22] At this stage, a court will apply one of two levels of judicial scrutiny: 1) strict scrutiny, under which virtually all regulations have been found to be unconstitutional;[23] or 2) intermediate scrutiny, under which regulations are almost certain to be found valid.[24]

Strict scrutiny applies if the restrictions on symbolic speech are "content based" – that is, if regulation of the behavior is related to the suppression of expression. Under this level of scrutiny, the government must show that the restriction is narrowly tailored to further a compelling state interest.[25] Alternatively, if the regulation is "content neutral" and not related to the suppression of expression, then the less demanding, intermediate level of scrutiny applies, and the regulation is outside of First Amendment protections.[26]

1. *AETA's freedom of speech violations*

On its face, ALEC's AETA contains a content based restriction on expressive conduct. It prohibits the conduct only of those protesting animal and environmental issues, as demonstrated in the title and throughout the text of the bill. This conduct is alleged to be "terrorism," though the bill fails specifically to define "terrorism." Thus, to determine whether an act amounts to terrorism, a court must resort to the definition of an "animal or ecological terrorist organization," which identifies entities engaging in the following:

> . . . any {optional language insert "politically motivated"} activity through intimidation, coercion, force, or fear that is intended to obstruct, impede or deter any person from participating in a lawful animal activity, research facility, or the lawful activity of mining, foresting, harvesting, gathering or processing natural

resources.[27]

This broad language could be used to label a wide range of lawful activities as "terrorism," including protests, boycotts, public speeches, picketing, demonstrations, and other campaigns in protest of animal and natural resource industries. All these activities could be considered forms of "coercion" to "deter" persons or entities from participating in ecologically harmful practices. Clearly, this conduct is all expressive, as it is "imbued with elements of communication" that "convey a particularized message."[28] The message, of course, is opposition to the practices of animal and natural resource industries. While activists' protests may incite anger among industry supporters, this alone is not enough to justify the prohibitions contained in AETA. Rather, an important "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[29] Further, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[30]

In ALEC's AETA, as in Spence, "[w]e are confronted with a case of prosecution for the expression of an idea through activity."[31] Strict scrutiny under the First Amendment therefore applies in a constitutional challenge to AETA. As mentioned earlier, the government must show that the regulation is narrowly tailored to further a compelling state interest.[32] This is such a high burden of proof for the government that virtually no regulation has withstood it;[33] and under strict scrutiny, AETA must fail too. Certainly the regulation is not narrowly tailored. Rather, its language is so overly broad to include "any association, organization, entity, coalition, or

combination of two or more persons" supporting or engaged in any activity – even a lawful activity – that is "intended to obstruct, impede or deter any person from participating in a lawful animal activity . . . [or] activity of mining, foresting, harvesting, gathering or processing natural resources."[34] This language encompasses most, if not all, activist tactics by even moderate environmental or animal welfare organizations. AETA thus violates freedom of speech as guaranteed by the First Amendment.

2. *The ECO-PLAN Acts' freedom of speech violations*

Like AETA, ALEC's ECO-PLAN Acts contain restrictions on expressive conduct that are plainly and impermissibly content-based. As demonstrated in the Acts' titles and their references to AETA, they target those organizations working on environmental and animal issues. The conduct prohibited by AETA and penalized by the ECO-PLAN acts encompasses a range of activities, including protests, boycotts, and picketing, that clearly are "imbued with elements of communication" that "convey a particularized message."[35] In ALEC's model bills, as in AETA, "[w]e are confronted with a case of prosecution for the expression of an idea through activity,"[36] and thus strict scrutiny applies in a constitutional analysis of the ECO-PLAN acts.

As noted above, strict scrutiny imposes such a high burden of proof for the government that virtually no regulation has withstood it.[37] The ECO-PLAN Acts must also fail under strict scrutiny, as they are not narrowly tailored. Rather, the acts cover all "enterprise[s]," broadly defined as follows:

> [A]ny person, sole proprietorship, partnership, corporation, business trust or other profit or nonprofit legal entity, and includes any union, or group of individuals association in fact although not a legal entity, and both illicit and licit enterprises and governmental and nongovernmental entities.[38]

Due to the inclusion of the word "environmental" in the acts' titles, as well as the reference to AETA in the ECO-PLAN Act's definitions section, a reader may assume that this overarching definition of "enterprise" is limited to those entities with purposes relating to the environment and/or animal welfare. Regardless, the regulation imposes broad-sweeping coverage and is far from narrowly tailored.[39]

Interestingly, although the ECO-PLAN acts define "enterprise," they fail to define an "environmental" or "corrupt" organization.[40] To help determine what entities are covered by the Act, a reader can look only to the definition of "illicit activity," which includes conduct of an "animal or ecological terrorist organization" as defined by AETA.[41] Again, an "animal or ecological terrorist organization" includes any group of one or more persons, either formally or loosely associated, that engages in the following:

> . . . any {optional language insert "politically motivated"} activity through intimidation, coercion, force, or fear that is intended to obstruct, impede or deter any person from participating in a lawful animal activity, research facility, or the lawful activity of mining, foresting, harvesting, gathering or processing natural resources.[42]

As discussed earlier, this broad language could be used to label a wide range of lawful activities as "terrorism," including protests, boycotts, public speeches, picketing, demonstrations, and other campaigns in protest of animal and natural resource industries. All these activities could be

considered forms of "coercion" to "deter" persons or entities from participating in ecologically harmful practices – but when legally engaged in, all these activities are protected by the First Amendment freedom of speech.[43]

Regrettably, ALEC is seizing an opportunity to take advantage of the public's fears and emotions surrounding terrorist and criminal activity. By inappropriately including even legal, nonviolent animal and environmental advocacy in the definitions of "ecoterrorism" and "corrupt[ion]," conservative state legislators are attempting to criminalize and punish constitutionally protected public action on environmental issues.

B. AETA violates the freedoms of association and peaceful assembly.

Freedom of association is guaranteed by the First Amendment and is intertwined with freedom of speech.[44] Federal doctrine on the freedom of association is heavily influenced by historic public policy. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."[45] The Supreme Court has succinctly defined the "freedom to engage in association for the advancement of beliefs and ideas":

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly . . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[46]

The strict scrutiny level of analysis requires that any limitation on the right to associate must serve a compelling governmental interest unrelated to suppressing the message advanced by the association.[47]

AETA prohibits obstruction of "the lawful use of an animal or natural resource or other property from the owner . . . by way of coercion, fear, [or] intimidation . . . ."[48] It further prohibits "[o]bstructing or impeding the use of an animal facility or the use of a natural resource" by "entering or remaining on the premises of an animal or research facility if the person or organization . . . received notice to depart but failed to do so."[49] The language of these prohibitions encompasses activities such as picketing or demonstrating outside of a business or facility. However, this type of activity is afforded First Amendment protection, even if the purpose is "to advise customers and prospective customers of the [reason for protest] and thereby to induce such customers not to patronize the employer."[50] Thus AETA's broad prohibitions cannot be upheld.

Additionally, AETA's infringement upon freedom of assembly is clearly related to the message advanced by organizations. AETA's title, definitions, and text as a whole target only those organizations whose message is related to animal or environmental issues.

Under the freedom of association guaranteed by the First Amendment, AETA plainly unconstitutionally hinders animal and environmental advocates' right of assembly and protest.

III. ALEC's AETA violates Equal Protection under the Fourteenth Amendment

The Fourteenth Amendment states that "[n]o State shall make or enforce any law which

shall deny to any person within its jurisdiction the equal protection of the laws."[51] It is well established that "equal protection" includes the guarantee of equal laws. Under Fourteenth Amendment doctrine, the law cannot treat citizens differently on arbitrary grounds. Some differences in treatment are allowable, so long as the legal classifications are reasonable in relation to the objectives of the laws in question.[52] A state law may not be unconstitutionally under-inclusive, meaning that it excludes some persons who are similiarly situated to those impacted by the law; nor may it be over-inclusive, meaning that it impacts more persons than are similarly situated to those covered by the law.[53] A court answers the question of whether a law is permissibly under- or over-inclusive by applying one of three standards of review.

The standard of review employed in an equal protection case is dictated by the type of legal classification being made. Strict scrutiny applies if the classification is based on race, nationality, or sometimes alienage;[54] intermediate scrutiny applies if the classification is based on gender or legitimacy.[55] All other classifications, including the one in AETA based on political viewpoint, are subject to the lowest standard of review, or the standard of rationality.[56] This standard involves great judicial deference to the legislature. While most government regulations are deemed valid under the rational basis test, the classification still must be "rationally related to furthering a legitimate government interest."[57] The Supreme Court has held that laws unconstitutionally impede Equal Protection using the rational basis test. For example, a law will fail the rational basis test if the government does not take steps to achieve a "rough equality" among similarly situated persons affected by the law.[58] Additionally, the rational basis test cannot be met if the governmental interest advanced by the law is not legitimate,[59] or if the classification is completely arbitrary.[60]

In this case, AETA's classifications based on organizations' political beliefs must be analyzed in terms of their relationship to the government interests being furthered by the statute. The governmental interest in deterring violent criminal and tortious acts is indeed legitimate. However, that interest cannot rationally be met through AETA's means, by arbitrarily making distinctions based on beliefs surrounding animal and environmental issues. In this regard, the bill is both under-inclusive and over-inclusive. It is under-inclusive in that it prohibits only those acts of protest conducted by environmental and animal activists, and not by activists dedicated to other issues.[61] There is no rational basis for excluding other activists, particularly in light of the violent nature of some protests on other issues, such as abortion and racism. Further, AETA is irrationally over-inclusive in that it covers any environmental or animal organization, regardless of its involvement in activity that is otherwise legal outside of AETA's prohibitions.[62] The over- and under-inclusive nature of AETA's classifications preclude the law from being rationally related to the government interest of deterring acts of domestic terrorism. Thus, the bill unconstitutionally violates the Equal Protection clause of the U.S. Constitution.

IV. ALEC's AETA targets activities that are already illegal and are sufficiently addressed by our current legal system.

A. Activities causing property damage and/or bodily harm are sufficiently addressed by current laws and carry sufficiently harsh penalties.

ALEC falsely asserts that perpetrators of violent activist tactics get no more than a slap on the wrist and are treated like mere "disgruntled youths."[63] Below is a list of just a few of the torts and crimes for which perpetrators may be held accountable under state law. Not one

incident of "ecoterrorism" identified in the AETA Report falls outside this list. This is not a comprehensive list, but simply offers a snapshot of existing state laws, demonstrating that activities causing property damage or bodily harm are already illegal and carry sufficient penalties.

- *The tort and crime of trespass to land, or the unauthorized entering of another's land boundaries*.[64] Most of the acts that ALEC identifies as "ecoterrorism" can be classified, at a minimum, as trespass to land. These include the break-in at Utah State University's predator ecology project,[65] and any other incidents involving activists entering private property without authorization.

- *Trespass to chattel, or intentional interference with a plaintiff's personal property*. "Personal" property includes property other than land; and "interference" includes actions such as damaging, altering, destroying, or moving property without permission.[66] Examples of activity cited by ALEC that may constitute torts of conversion or trespass to chattel include vandalism of SUV trucks and dealerships;[67] release of minks from a fur farm;[68] and destruction of equipment at a Texas Tech University Animal Laboratory.[69]

- *The torts of intentional or reckless infliction of emotional distress, where one's conduct is extreme and outrageous and is likely to produce a severe emotional response in a normal person*.[70] Arguably, some of the incidents cited by ALEC could constitute infliction of emotional distress, depending on the impacts on affected individuals and other facts surrounding each case. However, a plaintiff may not bring a claim of infliction of emotional distress based on a statement that is protected under the First Amendment and that could not be the basis for a libel action.[71] As discussed above, many statements expressed through conduct but prohibited by AETA are protected by the First Amendment.

- *The torts and crimes of battery and assault: in tort, the defendant intentionally causes harmful and/or offensive contact with the plaintiff's person, or causes apprehension that such contact will occur;*[72] *in criminal law, battery is an unlawful application of force to the person of another, while assault is an attempted battery*.[73] ALEC identifies a number of acts which could constitute battery and/or assault, including mailing razor blades coated in rat poison to animal researchers,[74] and spraying an animal research marketing director with a substance that temporarily blinded him.[75]

- *The crimes of vandalism, destruction of property, and arson, which may carry light, moderate, or serious penalties, depending on the severity of the act*.[76] ALEC's report cites to a number of actions that could be prosecuted as crimes of vandalism and destruction of property, including the destruction of equipment at a Texas Tech

University animal research facility.[77] ALEC also cites numerous cases which could be prosecuted as cases of arson, including the burning of SUV dealerships and condominium projects,[78] and arson at animal research facilities in Arizona and Utah.[79]

- *The crime of larceny, or the taking and carrying away of another's personal property with the intent to permanently deprive the possessor of the property;*[80] *and the crime of burglary, or the unlawful entering of the dwelling of another with the intent to commit a felony inside*.[81] The following acts in ALEC's report could be prosecuted as these crimes of theft: the 1977 release of two dolphins from the University of Hawaii;[82] the 2003 release of minks from a mink farm;[83] and the 1989 theft of animals from Texas Tech University.[84]

Violent actions committed by extremist activists have been remedied with these and other torts and crime. In a statement to Congress in 2002, the Federal Bureau of Investigation's Domestic Terrorism Section Chief cited the following successful prosecutions of violent activists, among many others: 1) in 1995, a man pled guilty for arson at an animal research laboratory, and was sentenced to 57 months in federal prison, three years probation, and more than $2 million in restitution; 2) in 1997, a man who admitted to firebombing a fur breeders facility was sentenced to seven years in prison and restitution of approximately $750,000; and 3) in 1998, a man who released minks from a fur farm was sentenced to two years in prison and two years of probation, and was fined over $364,000.[85] These criminal acts were punished severely, and the defendants were treated as other than mere "disgruntled youths," as incorrectly suggested by ALEC.[86]

Upon review of the torts and crimes summarized in this subsection – comprising a list that is far from exhaustive – it becomes clear that any violent or destructive acts committed in the name of activism are already addressed by states' legal systems. These crimes and torts carry penalties that are more than sufficient to both deter and punish illegal and injurious means of protest. As seen in the examples provided, violations of criminal statutes may result in

imprisonment and/or the imposition of fines. Additionally, in tort actions, a plaintiff may recover compensatory damages, which restore the plaintiff to her/his pre-injury condition; consequential damages, which compensate injuries to third parties; and/or punitive damages, which serve to punish the defendant for her/his actions.[87] With these prohibitions and penalties firmly established in each state's legal system, many of AETA's prohibitions are duplicative and unnecessary.

B. Organizational liability already exists for organizations that sponsor illegal activity.

To justify the need for AETA's passage in the states, ALEC falsely asserts that insufficient legal mechanisms exist to hold an organization accountable when illegal actions of individual members are sanctioned or sponsored by the organization.[88] On the contrary, both nonprofit organizations and unincorporated associations may risk liability for members' illegal actions.

It is well established that corporations, including nonprofit corporations, are legal entities.[89] Unincorporated associations, defined as groups of people organized to meet common objectives, are also treated as legal entities for the purposes of filing suit.[90] Although courts have developed slightly different rules for nonprofits and unincorporated associations, both entities can be held liable for members' actions under both criminal and civil law.[91]

Under criminal law, a nonprofit organization may be liable for the actions of its agents, or its controlling officers. "[L]iability attaches if such officers authorize, acquiesce in, ratify or knowingly accept the benefits of criminal acts of the corporation's agents."[92] In an

unincorporated association, each member is liable for the acts of other members done in the course and scope of the association's business.

Organizations and associations can also be liable for members' actions under civil law:

> The law of torts has long recognized joint liability for defendants when tortious acts are committed in concert with another or pursuant to a common design . . . . Under these definitions of joint liability, an environmental organization would likely be held liable if it carried out a "direct action" in cooperation with its members that resulted in tortious conduct. Mere advice regarding or encouragement of the tortious act by the organization may impose liability as well.[93]

Thus, ALEC cannot accurately justify the need for AETA by claiming that organizations cannot be held liable for illegal activities of their members.

ALEC's report identifies the ELF and ALF as the two primary agents of ecoterrorism. However, it is important to note that while ALEC singles out these extremist organizations, AETA's broad scope encompasses lawful activities participated in by the vast majority of environmental and animal welfare organizations, which participate in nonviolent, legal means of advocacy and activism. Regardless, the governing case law summarized here clearly demonstrates that laws like AETA need not be implemented in order to hold organizations accountable for illegal activity. This liability already exists.

V. Conclusion

ALEC's AETA and ECO-PLAN Acts lay out blatantly unconstitutional provisions that violate the fundamental civil rights of Americans, including freedom of speech, freedom of assembly, and equal protection. Those provisions in AETA that are not unconstitutional are

simply useless, as they prohibit actions that are already illegal and punishable under both tort and criminal law.

Regrettably, as conservative state legislators exploit citizens' strong emotional response to "terrorism," a number of legislatures have considered bills based on, or similar to, ALEC's model bills. For example, Oklahoma recently passed SB 584, the "Oklahoma Farm Animal, Crop, and Research Facilities Protection Act." The Act prohibits, inter alia, the disruption or damage of animal or agricultural enterprises.[94] Maximum penalties under the Act include a felony charge, up to $10,000 in fines, and up to three years imprisonment.[95] Other states that considered "ecoterrorism" bills in 2003 include Texas,[96] Missouri,[97] and New York;[98] now, in 2004, both South Carolina and Washington have introduced bills.

Although bills modeled after ALEC's AETA and ECO-PLAN Acts likely will fail constitutional challenges, they present an immediate threat to freedoms and protections guaranteed by the U.S. Constitution. Before "ecoterrorism" laws are ruled unconstitutional in court, they could result in citizens being fined and even imprisoned for exercising their right to otherwise lawful protest, and would lead to costly and time-consuming litigation. Thus, progressive legislators, environmental advocates, and anyone concerned about citizens' civil rights, should fight against the introduction or enactment of "ecoterrorism" bills.

ENDNOTES

1. (Sept. 4, 2003). The report was authored by ALEC's Homeland Security Working Group.

2. The Federal Bureau of Investigations ("FBI") has also identified ELF and ALF as the primary agents of "ecoterrorism." See, e.g., Statement of James F. Jarboe, "The Threat of Eco-Terrorism," Statement before the House Resources Committee, Subcommittee on Forest and Forest Health (Feb. 12, 2002), available at www.fbi.gov/congress/congress02/jarboe021202.htm. The report accompanying AETA makes inflammatory claims comparing environmental and animal organizations to true terrorists ("these radical organizations operate in a similar fashion to other terrorist groups like al-Qaeda," AETA Report at 4; and likening the activities of these groups to the terrorist attacks on September 11, id. at 15.

3. Some legal scholars and civil rights advocates argue that it is more important to protect citizens' civil liberties during times of war and serious national security risk than at any other time. See, e.g., Frederick Douglass, A Plea for Free Speech in Boston (Dec. 10, 1860), in ALEX BARNETT, WORDS THAT CHANGED AMERICA 155 (2003) ("No right was deemed by the fathers of the Government more sacred than the right of speech . . . . Liberty is meaningless where the right to utter one's thoughts and opinions has ceased to exist."); Daniel Webster, Second Reply to Hayne (Jan. 26, 1830), in BARNETT at 65 ("Liberty and Union [are] one and inseparable!").

4. AETA Report at 12.

5. AETA § 2D.

6. AETA § 2N.

7. See, e.g., AETA § 3A(1) (prohibiting disruption of a lawful business); and AETA § 3A(3) (prohibiting trespass and destruction of property).

8. See, e.g., AETA § 3A(3) (prohibiting monetary donations to organizations participating in AETA's definition of "animal or ecological terrorism").

9. OCCA 18 U.S.C. §§ 1961-1968 (1994).

10. It is important to note that the scope of the federal RICO has already been expanded far beyond the original focus on organized crime, and the ECO-PLAN Acts attempt to stretch RICO-based definitions even farther. RICO's scope was first expanded in United States v. Turkette, in which the U.S. Supreme Court determined that RICO applies to both "legitimate and illegitimate enterprises." 452 U.S. 576, 580 (1981). Soon after, in a highly controversial decision, the Court found that enterprises need not have economic motives to come within RICO. NOW v. Scheidler, 510 U.S. 249 (1994). Thus, the Court held that a RICO suit could be commenced against anti-abortion protesters conspiring to force closure of abortion clinics. Id. at

806.

> The U.S. Supreme Court's expansion of RICO has created much scholarly debate:
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> > In recent years, there has been a great deal of concern among commentators and practitioners that the application of civil RICO has expanded well beyond its intended sphere – and, indeed, beyond what is constitutionally permissible – particularly when applied to individuals engaged in . . . "protest activity" . . . . [T]hese critics argue that the availability of such extraordinary damages will have an unacceptable chilling effect on constitutionally protected speech.

Alexander M. Parker, Stretching RICO to the Limit and Beyond, 45 DUKE L.J. 819, 819-20 (Feb. 1996) (Note) (citations omitted). See also Jennifer G. Randolph, RICO: The Rejection of an Economic Motive Requirement, 85 J. CRIM. L. & CRIMINOLOGY 1189 (1995) (opposing the Supreme Court's application of RICO to abortion protesters); William W. Cason, Spiking the Spikers: The Use of Civil RICO Against Environmental Terrorists, 32 HOUS. L. REV. 745 (1995) (Note) (advocating the application of RICO to environmental organizations engaging in "direct action" activism).

Since the Scheidler decision, a RICO suit has been brought against the animal activist organization People for the Ethical Treatment of Animals ("PETA"). Huntingdon Life Sciences, Inc., v. Rokke, 986 F.Supp. 982 (E.D. Va. 1997). Although the case was ultimately settled and PETA did not appeal, the district court denied PETA's motion to dismiss the RICO claim. Thus, environmental and animal welfare organizations may see future RICO claims brought against them in the future. The validity of bills such as the ECO-PLAN Acts, therefore, is of timely importance. See generally Xavier Beltran, Applying RICO to Eco-Activism: Fanning the Radical Flames of Eco-Terror, 29 B.C. ENVTL. AFF. L. REV. 281 (2002) (Note).

11. The National Caucus of Environmental Legislators, Report on the American Legislative Exchange Council (ALEC) Annual Meeting, July 31 - August 2, 2003, at 12 (2003).

12. ECO-PLAN § 1.1(7)(a)(A).

13. See ECO-PLAN Forfeiture Act.

14. Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

15. Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

16. Thornhill v. Alabama, 310 U.S. 88 (1940).

17. United States v. O'Brien, 391 U.S. 367 (1968);

18. Texas v. Johnson, 491 U.S. 397 (1989).

19. R.A.V. v. City of St. Paul, 112 S.Ct. 2538, 2648-50 (1992).

20. Johnson, 491 U.S. at 403.

21. Spence v. Washington, 418 U.S. 405, 409; 410-11; see also Richard A. Seid, A Requiem for O'Brien: On the Nature of Symbolic Speech, 23 CUMB. L. REV. 563, 567-68 (1993).

22. Johnson, 491 U.S. at 403.

23. See Seid, supra note 21 at 571; Spence, 418 U.S. at 411.

24. Id.; O'Brien, 391 U.S. at 377.

25. Johnson, 491 U.S. at 406; Community for Creative Non-Violence v. Watt, 227 U.S.App. D.C. 19, 55-56 (1983).

26. O'Brien, 391 U.S. at 377.

27. AETA § 2D.

28. Spence, 418 U.S. at 409, 410-11.

29. Terminiello v. Chicago, 337 U.S. 1, 4 (1949), cited in Johnson, 491 U.S. at 408.

30. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).

31. 418 U.S., at 411.

32. Johnson, 491 U.S. at 406.

33. See Seid, supra note 21, at 571.

34. AETA § 2D.

35. Spence v. Washington, 418 U.S. 405, 409, 410-11.

36. Id. at 411.

37. See Seid, supra note 21, at 571.

38. ECO-PLAN § 1.1(2).

39. Notably, U.S. Supreme Court Justice Souter has recognized that the federal RICO, upon

which the ECO-PLAN acts are based, is broad enough to encompass acts that are "fully protected First Amendment activity." Scheidler, 114 S.Ct. at 807 (1994) (Souter, J., concurring), cited and further discussed in Randolph, supra note 10, at 1219-20. However, Justice Souter believes that First Amendment concerns can be "raised and addressed in individual RICO cases as they arise." Id. Even if RICO claims based on constitutionally protected activity are eventually thrown out by the court system, Justice Souter cautions that it is still "prudent to notice that RICO actions could deter protected advocacy." Id.

40. ECO-PLAN § 1.1.

41. ECO-PLAN § 1.1(7)(a)(A).

42. AETA § 2D.

43. See supra, subsections II.A.; II.A.1.

44. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907-08 (1982).

45. Citizens Against Rent Control Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 204 (1981).

46. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) (citations omitted).

47. Id.

48. AETA § 3A(1)(a).

49. AETA § 3A(2)(e).

50. Thornhill v. Alabama, 310 U.S. 88, 99 (1940).

51. U.S. CONST. amend. XIV.

52. See generally Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949).

53. See, e.g., Barnhorst v. Missouri State High School Activities Ass'n, 504 F.Supp. 449 (W.D.Mo. 1980).

54. United States v. Carolene Products Co., 304 U.S. 144 (1938).

55. Craig v. Boren, 429 U.S. 190 (1976).

56. Pennell v. City of San Jose, 485 U.S. 1 (1988).

57. Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).

58. Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 344 (1989).

59. Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985).

60. Nordlinger v. Hahn, 112 S.Ct. 2326 (1992).

61. AETA § 2D.

62. Id.

63. AETA Report at 12.

64. See, e.g., ALA. STAT. ANN. § 13A-7-1(4). Criminal trespass occurs regardless of the actor's intent to be present unlawfully. In most jurisdictions, harm to the land need not occur if a tortious trespass is intentional. Generally, if the tortious trespass is reckless or negligent, recovery is allowed to the extent of the damages incurred to the property. See generally Prosser and Keeton on the Law of Torts 622 (5th ed. 1984).

65. AETA Report at 7.

66. See generally John R. Faust, Jr., Distinction Between Conversion and Trespass to Chattel, 37 OR. L. REV. 256 (1958). In a trespass to chattel action, monetary remedy is available to the extent of the actual damage sustained to the property. See, e.g., Glidden v. Szybiak, 63 A.2d 233 (N.H. 1949). Thus activists who commit this tort may be liable for the full extent of the damage they inflict to a plaintiff's personal property.

67. AETA Report at 6.

68. Id.

69. Id. at 7. The same activities that constitute trespass to chattel may rise to the level of conversion. Conversion is a type of trespass action in which the harm to personal property is so substantial that the property is no longer of value to the owner.

70. This tort does not cover acts that are merely insulting or even threatening; rather, the acts must be truly shocking and indecent. See generally Daniel Gilvelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 COLUM. L. REV. 42 (1982); see also Wilson v. Bellamy, 414 S.E.2d

347 (N.C. Ct. App. 1992). Courts in many states require that the emotional distress be intentionally inflicted by the defendant. However, a number of jurisdictions allow recovery for the "reckless" infliction of emotional distress, where the defendant acted in deliberate disregard of a high risk that the conduct would result in emotional distress. Under the "reckless" standard, the defendant need not intend for the emotional distress to result. See, e.g., Boyle v. Chandler, 138 A. 273 (Del. 1927).

71. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

72. See generally Osborne M. Reynolds, Jr., Tortious Battery, 37 OKLA. L. REV. 717 (1984). Battery can include contact with the body or with something attached to the body. See, e.g., Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967). In assault, no actual physical contact need occur. Rather, a defendant commits assault when her/his acts intentionally cause apprehension in the plaintiff of immediate harmful or offensive contact. See generally Lawrence Vold, The Legal Allocation of Risk in Assault, Battery and Imprisonment, 17 NEB. L. REV. 149 (1938).

73. See generally Rollin M. Perkins, Criminal Attempt and Related Problems, 2 UCLA L. REV. 319 (1955). Most jurisdictions define an assault as the intentional placement of the victim in apprehension of an imminent battery. See, e.g., State v. Boutin, 346 A.2d 531 (Vt. 1975).

74. AETA Report at 6.

75. Id. at 9.

76. For example, in some jurisdictions, the "malicious" destruction of property is a felony. See, e.g., Mich. Stat. An.. § 777.16s. Additionally, while arson is committed when the defendant knowingly damages property with fire or explosives, see, e.g., 720 ILL. COMP. STAT. ANN. § 5/20-1, most jurisdictions place more severe penalties for aggravated arson. Aggravated arson occurs if the act either threatens or results in great bodily harm. See, e.g., 720 ILL. COMP. STAT. ANN. § 5/20-1.1.

77. AETA Report at 7.

78. Id. at 6.

79. Id. at 7.

80. See, e.g., Lee v. State, 474 A.2d 537 (Md. Ct. Spec. App. 1984); People v. Hoban, 88 N.E. 806 (Ill. 1909).

81. In many states, the "dwelling" requirement has been expanded to include places of business as well as residences.

82. AETA Report at 5.

83. Id. at 6.

84. Id. at 7.

85. Statement of James F. Jarboe, "The Threat of Eco-Terrorism," Statement before the House Resources Committee, Subcommittee on Forest and Forest Health (Feb. 12, 2002), available at www.fbi.gov/congress/congress02/jarboe021202.htm.

86. AETA Report at 12.

87. See generally Marilyn K. Minzer et al., Damages in Tort Actions (1982).

88. AETA Report at 12.

89. See, e.g., Miazga v. Int'l Union of Operating Eng'rs, 205 N.E.2d 884 (Ohio 1965); United Bhd. of Carpenters & Joiners v. Humphreys, 127 S.E.2d 98 (Va. 1986).

90. MARC J. LANE, LEGAL HANDBOOK FOR NONPROFIT ORGANIZATIONS 22 (1980), cited in Donna E. Correll, No Peace for the Greens: The Criminal Prosecution of Environmental Activists and the Threat of Organizational Liability, 24 RUTGERS L.J. 773, 796 (1993).

91. Id.

92. HOWARD L. OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS 448 (5th ed. 1988), cited in Correll at 797.

93. Correll at 797-98 (internal citations omitted).

94. OKLA. STAT. ANN. tit. 2, § 5-105(B).

95. OKLA. STAT. ANN. tit. 2, § 5-106.

96. Tex. HB 433 (2003); Tex. SB 1361 (2003).

97. Mo. SB 657 (2003).

98. N.Y. AB 4884 (2003).