

SENTINEL SPECIES: THE CRIMINALIZATION OF ANIMAL RIGHTS ACTIVISTS AS “TERRORISTS,” AND WHAT IT MEANS FOR CIVIL LIBERTIES IN TRUMP’S AMERICA

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ABSTRACT

The animal rights movement has pioneered new, diverse forms of social activism that have rapidly redefined how we view animals. But those remarkable successes have been met with an increasingly aggressive backlash, including new terrorism laws, widespread surveillance, experimental prisons, and legislation explicitly criminalizing journalists and whistleblowers. This Article will explain how, if left unchecked, these attacks on animal advocacy will become a blueprint for the wider criminalization of dissent.

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INTRODUCTION

Much of what we now understand about human survival in extreme conditions can be traced back to John Scott Haldane.¹ During the first world war, the Scottish physiologist traveled to the front to study chlorine gas used by German forces and then devised makeshift respirators and a prototype gas mask.² Haldane also developed a decompression chamber for British divers returning from deep explorations and a few years later led a scientific expedition to Pike's Peak in Colorado to study how the human body responds to high altitude.³ The motto of his aristocratic Scottish family was, poignantly, "suffer," and Haldane saw it as a duty to do so himself because it might protect others from the same fate.⁴ For instance, he inhaled toxic chemicals, and instructed his teenage daughter, stationed outside the room, to come to his aid only if he collapsed.⁵ Biographer Martin Goodman said Haldane's life was "[t]he greatest sustained physiological experiment in the history of the human lung."⁶ Whether it was war, terrifying depths, or extreme heights, Haldane's life was the obsessive study of how we might survive dangerous environments—and safely return home.⁷

His most famous work came from his studies of mine disasters.⁸ Haldane would rush to the scene, with his children in tow, and scour the site for postmortem clues.⁹ He realized that the greatest threat to the workers was not a violent blast; it was that we, as a species, are exceptionally ill-equipped to notice atmospheric changes until it is too late.¹⁰ In a groundbreaking report on his research, Haldane "made suggestions as to the means by which the lives of those who were outside the immediate zone of an explosion might be saved, emphasizing the great value of a mouse or other small animal as an index of the danger."¹¹ Those tiny ani-

1. See KC Sekhar & SSC Chakra Rao, *John Scott Haldane: The Father of Oxygen Therapy*, 58 INDIAN J. ANAESTHESIA 350, 350–52 (2014).

2. Kat Eschner, *The Man Who Invented the First Gas Mask*, SMITHSONIAN.COM (May 3, 2017), <https://www.smithsonianmag.com/smart-news/man-who-invented-first-gas-mask>.

3. C. Gordon Douglas et al., *Physiological Observations Made on Pike's Peak, Colorado, with Special Reference to Adaptation to Low Barometric Pressures*, 203 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON B 185, 185–86 (1913).

4. MARTIN GOODMAN, *SUFFER AND SURVIVE: GAS ATTACKS, MINERS' CANARIES, SPACESUITS AND THE BENDS: THE EXTREME LIFE OF DR. J.S. HALDANE* 53 (Simon & Schuster Ltd. 2007).

5. *Id.* at 164.

6. *Id.* at 44.

7. See Sekhar & Rao, *supra* note 1.

8. Andy Meharg, *One-Man Canary*, 449 NATURE 981, 981 (2007) (book review).

9. See *id.*

10. C. G. Douglas, *John Scott Haldane*, in 2 OBITUARY NOTICES OF FELLOWS OF THE ROYAL SOCIETY 1936–1938, 116, 118 (1945).

11. *Id.*

imals are what environmental and medical-health scientists describe as sentinel species.¹² Haldane learned to monitor vulnerable elements in any environment, for the canaries becoming ill is an early warning system of our fate.¹³

First Amendment law, and more broadly the defense of civil liberties, depends upon a constant examination of such sentinel species: the protesters, the radicals, and those on society's fringes. Through their acts of dissent, they reflect the quality of the atmosphere for the rest of us. If they lack the air they need to march, protest, and engage in nonviolent civil disobedience, it is a warning that other political advocates should heed. The freedoms of the marginal and vulnerable are a measurement of the health of our democracy.

For nearly twenty years my research has documented the government's domestic terrorism operations, and I have found that one social movement has been the target of repressive measures post-9/11 more than any other.¹⁴ Animal rights and environmental activists have pioneered new, diverse forms of social activism that have exposed widespread industry cruelty and environmental abuses; ushered in new legal standards; derailed multinational corporations; and rapidly redefined how we view animals and the natural world. These remarkable successes have been met with increasingly harsh repression, including new terrorism and censorship laws, widespread surveillance, ambitious civil and criminal lawsuits, disproportionate prison sentences, and experimental prison units.¹⁵ The corporate-led backlash against these social movements has become a blueprint of how to repress protest groups in the modern era, and identical tactics have now been used against other contemporary social movements, both in the United States and internationally.¹⁶ In short, these activists are a sentinel species of protester. If we miss their warning signs, we will be faced with a much broader criminalization of dissent.

I. MEET THE WORLD'S NEWEST TERRORIST

This political climate did not emerge spontaneously after the terrorist attacks of September 11, as one might think.¹⁷ The campaigns to label protest as terrorism had been building for decades.¹⁸ In the early 1980s, the animal rights and environmental movements were growing quickly and

12. David L. Wheeler, *A Scholar Uses Bees as a 'Sentinel Species' to Track the Path of Pollutants*, CHRON. HIGHER EDUC., Jan. 16, 1998, at A16.

13. See Sekhar & Rao, *supra* note 1.

14. See WILL POTTER, GREEN IS THE NEW RED: AN INSIDER'S ACCOUNT OF A SOCIAL MOVEMENT UNDER SIEGE 46 (2011).

15. See Will Potter, *The Secret US Prisons You've Never Heard of Before*, TED, (Aug. 2015), https://www.ted.com/talks/will_potter_the_secret_us_prisons_you_ve_never_heard_of_before.

16. See, e.g., Will Potter, *Attack on Factory Farm Whistleblowers Goes Global*, DODO (Feb. 16, 2014), <https://www.thedodo.com/attack-on-factory-farm-whistle-432282967.html>.

17. See *infra* notes 19–24 and accompanying text.

18. See *infra* notes 19–24 and accompanying text.

boldly.¹⁹ They had widespread popular support, even for their more radical tactics.²⁰ Groups like the Animal Liberation Front (ALF) were breaking into animal experimentation laboratories and fur farms, rescuing animals.²¹ National organizations like People for the Ethical Treatment of Animals (PETA) used video footage obtained by these groups in their lawful campaigns.²² When ALF activists rescued a primate named Britches who had his eyes sewn shut in sight-deprivation experiments, they turned over the footage anonymously to PETA.²³ PETA used it for advocacy campaigns, sent it to media, and pressured politicians.²⁴

Major media outlets reported favorably on these protest tactics, calling the activists “heroes.”²⁵ One *Los Angeles Times* article in 1986, for example, was headlined, *Environmental ‘Warriors’ Use Radical Tactics to Make Point*.²⁶ It praised environmentalists locking their bodies to bulldozers, spiking trees to sabotage timber sales, and employing other Edward Abbey-style monkeywrenching.²⁷ The press and the public loved these radicals.²⁸

For the corporations targeted, though, the activists were a serious problem.²⁹ These protest tactics were changing the public discussion.³⁰ A unified social movement with broad popular support and a willingness to act represented an immediate threat to profits. To protect their business, corporations needed to displace these activists from their moral high ground and demonize them in the eyes of the public.³¹ Their plan of attack was quite brilliant; it relied on the power of language.³² As Aldous Huxley, the author of *Brave New World*, wrote in one of his essays, “[t]he propagandist’s purpose is to make one set of people forget that certain other sets of people are human.”³³ Corporations needed to reframe how protesters

19. William Robbins, *Animal Rights: A Growing Movement in U.S.*, N.Y. TIMES, June 15, 1984, at A1.

20. Lisa Levitt Ryckman, *Environmental ‘Warriors’ Use Radical Tactics to Make Point*, L.A. TIMES, Jan. 26, 1986, at 3.

21. Animal Liberation Front, *Introducing the Animal Liberation Front*, in TERRORISTS OR FREEDOM FIGHTERS?: REFLECTIONS ON THE LIBERATION OF ANIMALS 7–8 (Steven Best & Anthony J. Nocella II eds., 2004).

22. Ben A. Franklin, *Going to Extremes for ‘Animal Rights’*, N.Y. TIMES, Aug. 30, 1987, at E7.

23. *Britches’ Story: Eyes Sewn Shut*, PETA, <https://www.peta.org/videos/britches-story-eyes-sewn-shut> (last visited Apr. 20, 2018).

24. *See id.*

25. Richard R. Knabel, Opinion, *Bureaucracy and the Environment*, N.Y. TIMES, Nov. 2, 1986, at WC11.

26. Ryckman, *supra* note 20.

27. *Id.*

28. *See id.*

29. *See* Jim Robbins, *Saboteurs for a Better Environment*, N.Y. TIMES, July 9, 1989, at E6.

30. *Id.*

31. *See* Ron Arnold, *Eco-Terrorism*, REASON (Feb. 1983), <https://reason.com/archives/1983/02/01/eco-terrorism>.

32. *See generally* POTTER, *supra* note 14 (providing a detailed history on the term eco-terrorist).

33. ALDOUS HUXLEY, *THE OLIVE TREE AND OTHER ESSAYS* 99 (reprt. 1960).

were perceived, so in 1985, industry groups created a new word: “eco-terrorist.”³⁴ They just made it up.³⁵ They knew that if they could control the terms of the debate, then they could shift public perception of these activists so that we no longer saw them as “heroes” or “warriors,” and not even “saboteurs” or “monkey-wrenchers.”³⁶ Instead, the public would call them “terrorists.”³⁷

Over the next several decades, corporations used this language relentlessly in media campaigns.³⁸ One ad from the fur industry in the 1980s proclaimed, “Meet the world’s newest terrorist.”³⁹ It pictured a figure in a black ski mask wielding an axe.⁴⁰ Underneath the image it said, “Don’t tolerate terrorism in America. Fur is for life.”⁴¹ Thirty years later, the same imagery is still being used.⁴² Industry groups hired public-relations firms to insert eco-terrorism into the national security dialogue.⁴³ The Clorox Corporation, for instance, hired Ketchum Public Relations in 1991 to develop a crisis-management plan; among Ketchum’s recommended tactics was a “Stop Environmental Terrorism” media campaign.⁴⁴

An essential component of this media manipulation has been seizing every available opportunity to repeat the eco-terrorist language.⁴⁵ For instance, when the popular children’s movie *Hoot* was released in theaters in 2006, industry groups sent out press releases calling it “soft-core eco-terrorism for kids.”⁴⁶ When the iconic children’s book *Charlotte’s Web* was adapted for film, the Center for Consumer Freedom warned parents “images prodding your kids toward the multiplex might be more about animal rights than E.B. White.”⁴⁷ James Cameron’s *Avatar*, about indigenous blue aliens who defended their home from developers, was dubbed a “recruiting film for eco-terrorists.”⁴⁸ No matter how absurd all of this

34. See generally POTTER, *supra* note 14.

35. Lawrence Buell, *What Is Called Ecoterrorism*, 16 GRAMMA: J. THEORY & CRITICISM 153, 156 (2009).

36. *Id.* at 154–64.

37. *Id.* at 156.

38. See *infra* notes 39–44 and accompanying text.

39. Advertisement (on file with author).

40. *Id.*

41. *Id.*

42. See Will Potter, *Green-Scaremongers Place Anonymous New York Times Ad*, GREEN IS THE NEW RED (May 1, 2006), <http://www.greenisthenewred.com/blog/nyt-ad>.

43. See ANDREW ROWELL, GREEN BACKLASH: GLOBAL SUBVERSION OF THE ENVIRONMENTAL MOVEMENT 81–82, 112, 150–51, 247 (1996).

44. *Circling the Wagons: One P.R. Firm’s Offensive Strategy*, GREENPEACE MAG., July/Aug. 1991, at 6.

45. See *infra* notes 46–49 and accompanying text.

46. Marc Morano, *New Movie Called ‘Soft Core Eco-Terrorism’ for Kids*, CYBERCAST NEWS SERV. (May 1, 2006), <https://web.archive.org/web/20080213141840/http://www.cnsnews.com/View-Print.asp?Page=/SpecialReports/archive/200605/SPE20060501a.html>.

47. *Charlotte’s (Tangled) Web*, CTR. FOR CONSUMER FREEDOM (Dec. 7, 2006), <https://www.consumerfreedom.com/2006/12/3194-charlottes-tangled-web>.

48. Waylon Lewis, *Is Avatar a ‘Recruiting Film for Eco Terrorists?’*, HUFFPOST (Mar. 18, 2010, 5:12 AM), https://www.huffingtonpost.com/waylon-lewis/is-avatar-is-green-propag_b_415601.html.

sounds, claims such as this were published in national media outlets, and the new rhetoric of eco-terrorism continued to spread.⁴⁹

As press releases and public-relations campaigns inserted this new language into the public dialogue, corporations such as GlaxoSmithKline⁵⁰ and trade associations such as the Center for Consumer Freedom⁵¹ were pressuring lawmakers to hold congressional hearings. Much like the strategic creations of political spectacle by Senator Joseph McCarthy during the anticommunist hysteria of the Red Scare, these congressional hearings were designed to attract media attention. They were sensational and inflammatory and made international headlines.⁵² There was a complete absence of critical press examinations into this new “terrorism,” and who was behind it. With each subsequent story, this made-up label was used in headlines and articles, legitimizing this repression.

II. NUMBER ONE DOMESTIC TERRORISM THREAT

The unwillingness of the press to challenge this eco-terrorism rhetoric, combined with the aggressive lobbying efforts of special-interest groups, set the stage for a radical assault on the civil liberties of these social movements. On September 11, as emergency crews were still attempting to rescue people from the Twin Towers, some politicians were already exploiting the tragedy and claiming that the terrorist attack was the work of environmentalists.⁵³ On September 12, 2001, Representative Greg Walden, a Republican from Oregon, said that “eco-terrorists” posed a threat “no less heinous than what we saw occur yesterday here in Washington and in New York.”⁵⁴ The next month, the *Washington Times* called for war against the “eco-al-Qaeda.”⁵⁵ Kimberley Strassel of the *Wall Street Journal* heralded a new political climate for neutralizing activists as “eco-terrorists.”⁵⁶ “The indulgent world in which these groups had operated collapsed on Sept[ember] 11,” she wrote.⁵⁷

49. See, e.g., *id.*

50. See *The 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. 16–19 (2006) [hereinafter *House Hearing*] (statement of William Trundley, Vice President, Global Corporate Security and Investigations, GlaxoSmithKline).

51. *Full Committee Hearing: Eco-Terrorism: Hearing Before the S. Comm. on Env't & Pub. Works*, 109th Cong. (2005) [hereinafter *Senate Hearing*] (statement of David Martosko, Director of Research, Center for Consumer Freedom).

52. Shaun Waterman, *Analysis: New Animal Rights Terror Law*, UPI DEF. NEWS (Nov. 29, 2006, 10:56 AM), https://www.upi.com/Business_News/Security-Industry/2006/11/29/Analysis-New-animal-rights-terror-law/UPI-34661164815778.

53. See, e.g., Walden: *Earth Liberation Front a Threat*, CONGRESSDAILY, Sept. 12, 2001, at 12.

54. *Id.*

55. *War Against Eco-Terrorists*, WASH. TIMES (Oct. 7, 2001), <https://www.washington-times.com/news/2001/oct/7/20011007-025834-9663r>.

56. Kimberley A. Strassel, Opinion, *Left Behind: These Are Lean Times for Fringe Activists*, WALL STREET J., (Oct. 4, 2001), <https://www.wsj.com/articles/SB122393012454529901>.

57. *Id.*

Post-9/11, warnings of eco-terrorism saturated mainstream media.⁵⁸ Travis Wagner, a professor of environmental science and policy at the University of Southern Maine, has studied how national newspapers portray these activists.⁵⁹ Examining top-tier newspaper articles from 1984 through 2006, he found that terrorism rhetoric appeared throughout the timeline, but its frequency increased dramatically after September 11 and has continued climbing since then.⁶⁰ Wagner noted that this increase in ecotage-related stories accompanied a decline in actual crimes.⁶¹ According to the North American Animal Liberation Press Office—not one to downplay radical activism—crimes decreased by forty-seven percent after September 11.⁶² As warnings of eco-terrorism made headlines, the threat itself waned.⁶³

Eventually, this language worked its way into the top levels of government.⁶⁴ “‘The No. 1 domestic terrorism threat is the eco-terrorism, animal-rights movement,’ said John Lewis, an FBI deputy assistant director and top official in charge of domestic terrorism [in 2005].”⁶⁵ Even in their most militant and potentially dangerous actions, the FBI acknowledges that so-called eco-terrorists have never harmed a single human being and their codes of conduct include prohibitions against acts that harm “any animal, human and nonhuman.”⁶⁶ Yet the FBI listed an alleged animal rights fugitive on its “most wanted terrorists” list alongside Osama bin Laden, sending a very clear message to the public and the press about law enforcement’s priorities and institutionalizing this new terrorism framework.⁶⁷

III. MOBILIZING LAW ENFORCEMENT

Within the FBI, the characterization of animal rights and environmental activists as terrorists, and designation of their protest activity as a

58. Travis Wagner, *Reframing Ecotage as Ecoterrorism: News and the Discourse of Fear*, 2 ENVTL. COMM. 1, 25, 32–34 (2008).

59. *Id.* at 26–27.

60. *Id.* at 32–34.

61. *Id.* at 34.

62. N. AM. ANIMAL LIBERATION FRONT PRESS OFFICE, 2001 YEAR-END DIRECT ACTION REPORT 9 (2002).

63. *Id.*

64. See *infra* notes 65–67 and accompanying text.

65. Henry Schuster, *Domestic Terror: Who’s Most Dangerous?*, CNN (Aug. 24, 2005, 2:14 PM), <http://www.cnn.com/2005/US/08/24/schuster.column>; see *FBI: Eco-Terrorism Remains No. 1 Domestic Terror Threat*, FOX NEWS (Mar. 31, 2008), <http://www.foxnews.com/story/2008/03/31/fbi-eco-terrorism-remains-no-1-domestic-terror-threat>.

66. *The Threat of Eco-Terrorism: Hearing Before the H. Res. Comm., Subcomm. On Forests & Forest Health*, 107th Cong. (2002) (statement of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, Federal Bureau of Investigation).

67. See Vivian Ho, *Daniel Andreas San Diego Listed on FBI’s Most Wanted*, SFGATE (Dec. 13, 2013, 5:05 PM), <http://www.sfgate.com/crime/article/Daniel-Andreas-San-Diego-listed-on-FBI-s-most-5062632.php>; see also Juliet Eilperin, *As Eco-Terrorism Wanes, Governments Still Target Activist Groups Seen as Threat*, WASH. POST (Mar. 10, 2012), https://www.washingtonpost.com/national/health-science/as-eco-terrorism-wanes-governments-still-target-activist-groups-seen-as-threat/2012/02/28/gIQAA4Ay3R_story.

counter-terrorism priority, has been institutionalized.⁶⁸ One way that these priorities have become entrenched is through FBI training materials for new agents.⁶⁹ In documents obtained through the Freedom of Information Act—the U.S. open records law—the FBI’s training materials on “eco-terrorism” are not about violence.⁷⁰ They are about a “public relations war.”⁷¹ The FBI lists lawful First Amendment activity and low-level criminal activity (such as nonviolent civil disobedience) as examples of domestic terrorism by animal advocates, and pays special attention to how these groups use information in their campaigns.⁷² Examples of information gathering listed by the FBI include requests for public documents under the Freedom of Information Act.⁷³ Open records requests are listed as examples of “[u]niversity targeting.”⁷⁴ The FBI also warns of activist attempts to use “false employment,” which is clearly in reference to activists who seek employment at factory farms for the purpose of undercover investigations.⁷⁵

The training materials summarize the threat of animal advocates in bulleted points:

- Media is vital part of every action [sic]
- Media sometimes slanted in favor of activists
- Celebrities support & fund AR/Eco movement
- Activists spin the truth.⁷⁶

I discussed the FBI’s training materials with former FBI agent Mike German, who has worked undercover infiltrating right-wing groups for the bureau.⁷⁷ Law enforcement considers political activists to be a terrorism threat, he said, “[b]ecause the FBI appears to be training them to believe there is one using factually flawed materials.”⁷⁸

68. See Will Potter, *Newly Released FBI “Domestic Terrorism” Training on Anarchists, Environmentalists, Show COINTELPRO Tactics*, GREEN IS THE NEW RED (May 29, 2012), <http://www.greenisthenewred.com/blog/fbi-domestic-terrorism-training-anarchists-eco>.

69. See *id.*

70. See *id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Michael German, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/expert/mike-german> (last visited Apr. 20, 2018).

78. Potter, *supra* note 68 (quoting Michael German, *Manufacturing a “Black Separatist” Threat and Other Dubious Claims: Bias in Newly Released FBI Terrorism Training Materials*, ACLU (May 29, 2012, 1:31 PM), <https://www.aclu.org/blog/national-security/manufacturing-black-separatist-threat-and-other-dubious-claims-bias-newly>).

These instructions for law enforcement are also coming from for-profit corporations.⁷⁹ TransCanada, the company building the \$5.3 billion Keystone XL oil pipeline, has been the target of a diverse protest campaign against the 2,000-mile project, including environmental lawsuits, tree sits and blockades, and civil disobedience at the White House.⁸⁰ In response, TransCanada has held daylong “strategy meeting[s]” and “training session[s]” with the FBI about how to best protect the corporation from environmental protests.⁸¹

Documents obtained through open records laws have also revealed that TransCanada has delivered PowerPoint presentations to law enforcement in which corporate representatives identified protesters by name and photo and instructed police how they should go about prosecuting them as terrorists.⁸² The presentation includes publicly available photos from organization websites and background information on “Tar Sands Blockade Leadership: Professionals [sic] Organizers.”⁸³ Scott Parkin, for example, is described as a “professional activist.”⁸⁴ He is a senior campaigner for the Rainforest Action Network, a nonprofit environmental group described by *Forbes* magazine as experts in “how to get under the skin of big business.”⁸⁵ TransCanada’s presentation warns that he “conducts most of the Non Violent Direct Action training”⁸⁶ and that his colleague, Rae Breaux, is an “expert rock climber and trainer for Tree Sitting projects” and “has presented speeches.”⁸⁷

TransCanada does not cite any protester violence in its presentation and acknowledges that none has occurred.⁸⁸ Instead, the company warns

79. See *infra* notes 80–92 and accompanying text.

80. Steven Mufson, *Keystone XL Pipeline Opponents Turn to Civil Disobedience*, WASH. POST (Oct. 15, 2012), https://www.washingtonpost.com/business/economy/keystone-xl-pipeline-opponents-turn-to-civil-disobedience/2012/10/15/2d0a8310-16e5-11e2-a55c-39408f6e6a4b_story.

81. Adam Federman, *FBI Held 2012 Strategy Meeting with TransCanada, Industry Partners*, EARTH ISLAND J. (Mar. 13, 2014), http://www.earthisland.org/journal/index.php/elist/eListRead/fbi_held_2012_strategy_meeting_with_transcanada_industry_partners.

82. Isaac Arnsdorf, *Big Oil’s Fight for Keystone XL Includes Tracking Critics, Activists*, SEATTLE TIMES (Feb. 24, 2015, 5:28 PM), <https://www.seattletimes.com/news/big-oils-fight-for-keystone-xl-includes-tracking-critics-activists>.

83. Will Potter, *TransCanada Is Secretly Briefing Police About Keystone XL Protests and Urging Terrorism Prosecutions*, GREEN IS THE NEW RED (June 12, 2013), <http://www.greenisthenewred.com/blog/transcanada-police-presentation-on-protests> (quoting TransCanada Presentation, DESMOG, <https://www.desmogblog.com/sites/beta.desmogblog.com/files/TransCanada%20Protesting%20Pipeline%20Criminal%20Charges.pdf> (last visited Apr. 20, 2018) [hereinafter TransCanada Presentation]).

84. *Id.* (quoting TransCanada Presentation, *supra* note 83).

85. Marc Gunther, *The Mosquito in the Tent: A Pesky Environmental Group Called the Rainforest Action Network Is Getting Under the Skin of Corporate America*, FORTUNE, May 31, 2004, at 158.

86. Potter, *supra* note 83 (quoting TransCanada Presentation, *supra* note 83).

87. *Id.* (quoting TransCanada Presentation, *supra* note 83).

88. Joyce Nelson, *Hardball Tactics, Co-operation from CSIS Give TransCanada Edge over Pipeline Opponents*, CCPA: CANADIAN CTR. FOR POL’Y ALTERNATIVES (Dec. 1, 2014), <https://www.policyalternatives.ca/publications/monitor/hardball-tactics-co-operation-csis-give-transcanada-edge-over-pipeline>.

of nonviolent civil disobedience and “landowner court challenges” as examples of “potential security concerns.”⁸⁹ In Oklahoma, “a protester walked into the lane of a slow moving vehicle,” and in Texas there have been “demonstrations/protest activity,” “tree houses,” “banners,” and “social media organization.”⁹⁰ In Nebraska, where this briefing took place, there has been “protest/demonstrations” and “opposition attendance” at public meetings.⁹¹ “Another slide on activist motivation describes the type of people TransCanada fears. The first quotation says, ‘I have been an activist for fifty years. I am seventy.’”⁹²

What is particularly troubling about this presentation is that a corporation is briefing law enforcement about who, when, why, and *how* they should prosecute. “TransCanada offers police a playbook on how to go after activists. The[] company suggests prosecuting using criminal trespass, criminal conspiracy, criminal instrument or device (the [plastic pipes and barrels] used for nonviolent civil disobedience), grand juries, and ‘federal/state anti-terrorism statutes [sic].’”⁹³

One of the final slides of the presentation is particularly revealing in terms of what is at stake here. The list of “Potential Security Concerns” includes:

- Gulf Coast Project — recent media attention.
- Keystone XL — media, high profile.⁹⁴

Much like the FBI materials, the emphasis is on public exposure through the media.⁹⁵ TransCanada is not pleading with law enforcement to crack down on property destruction or violence because that is not what this campaign is about.⁹⁶ The campaign against the Keystone XL pipeline has resulted in widespread public support and positive media coverage about people willing to nonviolently put their bodies on the line.⁹⁷ The

89. Elana Schor, *TransCanada Prepped Local Police for Prosecuting Pipeline Foes*, E&E NEWS (June 11, 2013, 2:50 PM), <https://www.eenews.net/stories/1059982632>.

90. Potter, *supra* note 83 (quoting TransCanada Presentation, *supra* note 83).

91. *Id.* (quoting TransCanada Presentation, *supra* note 83).

92. *Id.* (quoting TransCanada Presentation, *supra* note 83).

93. Mat McDermott, *According to Keystone XL Companies, Activists May Really Be Terrorists*, MOTHERBOARD (June 18, 2013, 2:05 PM) (quoting TransCanada Presentation, *supra* note 83 (alteration in original)), https://motherboard.vice.com/en_us/article/vvva8d/according-to-keystone-xl-companies-activists-may-really-be-terrorists.

94. TransCanada Presentation, *supra* note 83.

95. *See id.*

96. *See id.*

97. *See, e.g.,* Zach Pluhacek, *Keystone XL Opponents Vow “Civil Disobedience” to Stop Project*, COLUMBUS TELEGRAM (Aug. 10, 2017), http://columbustelegram.com/news/state-and-regional/keystone-xl-opponents-vow-civil-disobedience-to-stop-project/article_e4c0b4f1-3b48-5c3f-90c5-07a5db8ef691.htm; *see also, e.g.,* 7 *Arrested in Polk Co. Pipeline Protest*, KTRE, <http://www.ktre.com/story/19400667/7-arrested-in-polk-co-pipeline-protest> (last visited Apr. 20, 2018); “*Just the Beginning*”: *Anti-pipeline Protestors Vow “Rise of Resistance,”* CBC (Oct. 30, 2017, 2:29 PM), <http://www.cbc.ca/news/canada/british-columbia/just-the-beginning-anti-pipeline-protesters-vow-rise-of-resistance-1.4378845>.

campaign inspired the Sierra Club to break with tradition and engage in nonviolent civil disobedience for the first time in the history of the organization.⁹⁸

TransCanada officials says this is why they needed to hire a new public-relations firm.⁹⁹ “One of the issues we have had since the fall of 2010 is trying to rebut what our opponents are saying . . . This takes resources, and we have been dwarfed by the content the activists have and are posting online with respect to Keystone XL.”¹⁰⁰

IV. ANIMAL ENTERPRISE TERRORISM

With the new rhetoric of terrorism firmly in place, and “eco-terrorism” regularly part of media and political dialogue, corporations began chipping away at constitutionally protected protest activity with a variety of legal and legislative tactics.¹⁰¹ They have brought the Racketeer Influenced and Corrupt Organizations Act (RICO)—the law intended to be used for the mob—actions against animal rights campaigners.¹⁰² They have sought restraining orders and injunctions to stop protests.¹⁰³ And they have introduced a long list of local, state, and federal legislation to target their opposition.¹⁰⁴ By far the most significant development in this effort, though, was the creation of the crime of “animal enterprise terrorism.”

The Animal Enterprise Protection Act¹⁰⁵ is federal law passed in 1992, after heavy lobbying by animal industries, ostensibly to crack down on illegal, underground actions by groups like the Animal Liberation Front.¹⁰⁶ Years later, the law was used to prosecute the SHAC 7, who were members of an international campaign to stop the notorious animal testing lab, Huntingdon Life Sciences.¹⁰⁷ Multiple undercover investigations re-

98. *Sierra Club to Engage in Civil Disobedience for the First Time in Organization's History to Stop Tar Sands*, SIERRA CLUB (Jan. 22, 2013), <https://content.sierraclub.org/press-releases/2013/01/sierra-club-engage-civil-disobedience-first-time-organizations-history>.

99. Shawn McCarthy, *Greenpeace Sees “Dirty Tricks” in PR Firm's TransCanada Plan*, GLOBE & MAIL (Nov. 17, 2014), <https://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/greenpeace-sees-dirty-tricks-in-pr-firms-transcanada-plan/article21630761>.

100. Amy Harder, *TransCanada Steps Up Defense of Keystone XL Pipeline*, NAT'L J. (Jun. 12, 2013), <https://www.nationaljournal.com/s/77961/transcanada-steps-up-defense-keystone-xl-pipeline>.

101. See *infra* notes 102–04 and accompanying text.

102. See, e.g., *Huntingdon Life Scis., Inc. v. Rokke*, 986 F. Supp. 982, 984–85 (E.D. Va. 1997).

103. See *Commonwealth v. Gazzola*, No. 02-11098, 2004 Mass. Super. LEXIS 28, at *6 (Mass. Super. Ct. Feb. 6, 2004).

104. See Jen Fifield, *Farmers Push Back Against Animal Welfare Laws*, PEW CHARITABLE TR. (Nov. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/11/29/farmers-push-back-against-animal-welfare-laws>.

105. 18 U.S.C. § 43 (2012).

106. See *House Hearing*, *supra* note 50, at 5 (statement of Brent J. McIntosh, Deputy Assistant Att’y Gen., Office of Legal Policy, U.S. Department of Justice); *Senate Hearing*, *supra* note 51 (statement of John Lewis, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation).

107. David Kocieniewski, *Six Animal Rights Advocates Are Convicted of Terrorism*, N.Y. TIMES, Mar. 3, 2006, at B3; see Brief of Amici Curiae for Center for Constitutional Rights and First

vealed lab workers punching beagle puppies and dissecting living monkeys.¹⁰⁸ The SHAC 7 were never accused of participating in underground activity, though.¹⁰⁹ They spoke and wrote about it and published news of both legal and illegal protest activity on their website.¹¹⁰ According to prosecutors, this web publishing created a political climate that encouraged illegal acts, so they were indicted on conspiracy to commit animal enterprise terrorism and conspiracy to harass using a telecommunications device (the internet) charges.¹¹¹ They were sentenced to between four and six years in prison.¹¹²

As the SHAC 7 were awaiting sentencing, their corporate opposition—dozens of pharmaceutical and biotech companies secretly united as the “Animal Enterprise Protection Coalition”—was lobbying for even more sweeping powers.¹¹³ I was invited to testify before the U.S. Congress in 2006 about the proposal, called the Animal Enterprise Terrorism Act,¹¹⁴ which radically expanded the Animal Enterprise Protection Act.¹¹⁵ At the hearing, the Justice Department told lawmakers that the law did not go far enough and that it was impossible to crack down on extremists—despite the successful prosecution of activists for First Amendment activity under the existing, more narrowly constructed law.¹¹⁶ Brent McIntosh, Deputy Assistant Attorney General, testified that “animal rights extremists have tailored their campaigns to exploit limits and ambiguities in the statute,” adding that “the bill under consideration today would fill gaps in the current law.”¹¹⁷

The Animal Enterprise Terrorism Act was passed in 2006 with bipartisan support—and extensive lobbying by Pfizer; Wyeth; GlaxoSmithKline; the egg, meat, and dairy industries; Ringling Brothers; the Fur Commission; and many other “animal enterprises.”¹¹⁸ There are three

Amendment Lawyers Ass’n in Support of Petitioners at 2, *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009) (No. 10-7187).

108. See Gina Kolata, *Tough Tactics in One Battle over Animals in the Lab*, N.Y. TIMES, Mar. 24, 1998, at E1.

109. See Chris Maag, *America’s #1 Threat: The Latest Front in the “War on Terror”: Animal-Rights Activists*, MOTHER JONES (Jan./Feb. 2006), <https://www.motherjones.com/politics/2006/01/americas-1-threat>.

110. *Senate Hearing*, *supra* note 51.

111. See U.S. ATTORNEY’S OFFICE FOR THE DIST. OF N.J., U.S. DEP’T OF JUSTICE, THREE MILITANT ANIMAL RIGHTS ACTIVISTS SENTENCED TO BETWEEN FOUR AND SIX YEARS IN PRISON 2–4 (2006).

112. *Id.* at 2.

113. Will Potter, *Internal Industry Documents Show Plans for Labeling Activists as “Eco-Terrorists” (Part 1)*, GREEN IS THE NEW RED (Dec. 17, 2008), <http://www.greenisthenewred.com/blog/internal-industry-documents-show-plans-for-labeling-activists-as-eco-terrorists>.

114. S. 3880, 109th Cong. § 1 (2006).

115. See *House Hearing*, *supra* note 50, at 20 (testimony of William Potter, Journalist).

116. See *id.* at 8–9 (prepared statement of Brent J. McIntosh, Deputy Assistant Att’y Gen., Office of Legal Policy, U.S. Department of Justice); see also Kocieniewski, *supra* note 107 (confirming that the prosecution of activists was successful).

117. *House Hearing*, *supra* note 50, at 5–6 (statement of Brent J. McIntosh, Deputy Assistant Att’y Gen., Office of Legal Policy, U.S. Department of Justice).

118. Potter, *supra* note 113.

ways to be prosecuted under the expanded law: damaging or causing the loss of any property (which is later defined as including the loss of profits), instilling a reasonable fear in those being protested, and conspiracy.¹¹⁹ This vague, overly broad language is especially troubling in light of the political climate corporations have created through public-relations campaigns and advertising, and the lack of consistency within government agencies in the classification of terrorist groups.¹²⁰ How can we possibly describe “reasonable fear” when industries are campaigning to make the unreasonable reasonable?

When I testified in opposition to the Animal Enterprise Terrorism Act, the primary concern I raised was that the law would have a chilling effect on lawful protest activity.¹²¹ It would contribute to a growing climate of fear being used to deter free speech and advocacy.¹²² The law does not explicitly outlaw protest, but it makes people afraid of using their rights, lest they be labeled a terrorist.¹²³ In addition, the vague language of the law could be used to wrap up a wide range of activities that threaten corporate profits, such as nonviolent undercover investigations and whistleblowing.¹²⁴ Members of Congress angrily dismissed such arguments, saying the law was tailored to illegal, underground groups.¹²⁵ Whistleblowers and lawful protesters would never be affected, they said: the law would only be used against people who do things like burn buildings.¹²⁶

Unfortunately, my concerns about the law turned out to be true.¹²⁷ The first use of the new law, in 2008, did not involve arson.¹²⁸ A group of protesters in California were prosecuted as terrorists for protesting outside of animal experimenters’ homes with signs and bullhorns, and writing protest slogans on the street using children’s sidewalk chalk.¹²⁹ That prosecution was dismissed when the judge agreed that the government had not revealed enough about what, exactly, the activists had allegedly done to warrant terrorism charges.¹³⁰ It was an important victory, but the prosecution itself instilled widespread fear in activist communities that anyone could be prosecuted as a terrorist for lawful protest activity.

119. 18 U.S.C. § 43(a)(2) (2012).

120. See JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42536, THE DOMESTIC TERRORIST THREAT: BACKGROUND AND ISSUES FOR CONGRESS 5 (2013).

121. See *House Hearing*, *supra* note 50, at 21 (statement of William Potter, Journalist).

122. *Id.*

123. *Id.*

124. *Id.* at 22 (prepared statement of William Potter, Journalist).

125. See *id.* at 26–27 (statement of Rep. Tom Feeney).

126. See *id.*

127. See Will Potter, *FBI Arrests 4 Activists as “Terrorists” for Chalking Slogans, Leafleting, and Protesting*, GREEN IS THE NEW RED (Feb. 22, 2009), <http://www.greenisthenewred.com/blog/aeta-arrests>.

128. See *id.*

129. *United States v. Buddenberg*, CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/united-states-v-buddenberg> (last visited June 9, 2018).

130. Will Potter, *Breaking: AETA 4 Case Dismissed, but Re-indictment Possible*, GREEN IS THE NEW RED (July 12, 2010), <http://www.greenisthenewred.com/blog/aeta-4-case-thrown-out-dismissed>.

Similarly, statements that the Animal Enterprise Terrorism Act would never be used against undercover investigators were later revealed to be dishonest.¹³¹ The FBI Joint Terrorism Task Force has kept files on activists who expose animal welfare abuses on factory farms and recommended prosecuting them as terrorists, according to a document uncovered through the Freedom of Information Act.¹³² As I first reported on *Green-IsTheNewRed.com*:

The 2003 FBI file details the work of several animal rights activists who used undercover investigations to document repeated animal[welfare] violations. The FBI special agent who authored the report said they “illegally entered buildings owned by [redacted] Farm . . . and videotaped conditions of animals.” The animal activists caused “economic loss” to businesses, the FBI [argued]. And they also openly rescued several animals from the abusive conditions. This was not done covertly in the style of underground groups like the Animal Liberation Front—it was an act of nonviolent civil disobedience and, as the FBI agent note[d], the activists distributed press releases and conducted media interviews taking responsibility for their actions. Based on these acts—trespassing in order to photograph and videotape abuses on factory farms—the agent conclude[d] there “is a reasonable indication” that the activists [committed “animal enterprise terrorism.”]¹³³

“It is deeply sobering to see one’s name in an FBI file proposing terrorism charges,” said Ryan Shapiro, a doctoral candidate at the Massachusetts Institute of Technology, in an email interview. He went on to say:

It is even more sobering to realize the supposedly terroristic activities in question are merely exposing the horrific cruelty of factory farms, educating the public about what goes on behind those closed doors, and openly rescuing a few animals from one of those farms as an act of civil disobedience.¹³⁴

Most people never heard about the Animal Enterprise Terrorism Act, including members of Congress. It passed the Senate in the middle of the night, with no discussion or debate.¹³⁵ In the House, the bill was snuck through on the very first day back from congressional recess.¹³⁶ The Ani-

131. See Will Potter, *FBI Says Activists Who Investigate Factory Farms Can Be Prosecuted as Terrorists*, GREEN IS THE NEW RED (Dec. 20, 2011), <http://www.greenisthenewred.com/blog/fbi-undercover-investigators-animal-enterprise-terrorism-act>.

132. *Id.*

133. *Id.*

134. *Id.*

135. See 152 CONG. REC. S10793–94 (daily ed. Sept. 29, 2006).

136. See 152 CONG. REC. H8594 (daily ed. Nov. 13, 2006).

mal Enterprise Terrorism Act was passed as part of the suspension calendar,¹³⁷ which is a procedure used to expeditiously deal with noncontroversial legislation.¹³⁸ That week, the procedure was also used to honor the St. Louis Cardinals for winning the World Series.¹³⁹ Only one percent of lawmakers were in the room for the vote.¹⁴⁰ The rest were outside at a new memorial.¹⁴¹ They were praising Dr. Martin Luther King Jr., as his style of nonviolent civil disobedience was being labeled terrorism—if done in the name of protecting animals.¹⁴²

V. FROM THE MARGINS TO THE MAINSTREAM: “AG-GAG” LAWS

Over time, the focus of these anti-activist campaigns shifted from the more militant, grassroots animal rights groups to mainstream, national nonprofit organizations, including the Humane Society of the United States, Mercy For Animals, Compassion Over Killing, and the American Society for the Prevention of Cruelty to Animals (ASPCA). New laws are being created that explicitly target undercover investigations by these organizations or anyone who photographs or videotapes animal cruelty or environmental pollution on industrial farms.¹⁴³

In one such investigation in California, the Humane Society of the United States documented cows too sick to even walk—so common that they are called “downers” by the industry¹⁴⁴—entering the food supply.¹⁴⁵ Workers at the Hallmark/Westland Meat Packing Company were using heavy machinery to push cows into the “kill box” so that they could be slaughtered.¹⁴⁶ Workers were recorded beating and kicking the cows, applying electric shocks, and stabbing them with the blades of a forklift.¹⁴⁷ The slaughterhouse was the U.S. Department of Agriculture’s (USDA) second-largest supplier and was named a “supplier of the year” for 2004—

137. *Id.*

138. CONG. RESEARCH SERV., RL32474, SUSPENSION OF THE RULES IN THE HOUSE OF REPRESENTATIVES (2005).

139. See 152 CONG. REC., H8651 (daily ed. Nov. 15, 2006) (statement of Rep. Foxx).

140. Will Potter, *Lobbying Documents Show How Corporations Snuck “Eco-Terrorism” Law Through Congress (Part 2)*, GREEN IS THE NEW RED (Dec. 19, 2008), <http://www.greenisthenewred.com/blog/lobbying-documents-show-how-corporations-snuck-eco-terrorism-law-through-congress>.

141. See Associated Press, *Bush, Others at King Memorial Groundbreaking*, NBC NEWS.COM (Nov. 13, 2006, 1:11 PM), http://www.nbcnews.com/id/15699682/ns/us_news-life/t/bush-others-king-memorial-groundbreaking.

142. See 152 CONG. REC. H8590–92 (daily ed. Nov. 13, 2006) (statement of Rep. Scott).

143. Richard A. Oppel, Jr., *Taping of Farm Cruelty Is Becoming the Crime*, N.Y. TIMES (Apr. 7, 2013), <http://www.nytimes.com/2013/04/07/us/taping-of-farm-cruelty-is-becoming-the-crime.html>.

144. JASPER WOMACH, CONG. RESEARCH SERV., 97-905, AGRICULTURE: A GLOSSARY OF TERMS, PROGRAMS, AND LAWS 80 (2005).

145. *Rampant Animal Cruelty at California Slaughter Plant*, HUMANE SOC’Y U.S. (Jan. 30, 2008), http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html.

146. *Id.*

147. *Id.*

2005.¹⁴⁸ These sick animals would have been fed to school children in thirty-six states as part of the USDA's national school-lunch program.¹⁴⁹ The exposure of these practices prompted the recall of 143 million pounds of meat,¹⁵⁰ the largest meat recall in U.S. history.¹⁵¹

Rather than by condemning these abuses, changing their policies, and responding to consumer demand, the agriculture industry has responded by attempting to shoot the messenger.¹⁵² The industry has labeled whistleblowers as “terrorists” and supported new laws to silence them.¹⁵³ “Ag-gag” laws—“ag” is for agriculture, “gag” is to silence—are an explicit attempt to outlaw undercover investigations and whistleblowing if they negatively portray the industry.¹⁵⁴ These proposals—introduced in twenty-eight states, passed into law in eight¹⁵⁵—eliminate the only meaningful oversight of this massive industry and allow it to continue operating without oversight or accountability.

Laws with provisions similar to ag-gag have existed since the early 1990s.¹⁵⁶ In Montana, North Dakota, and Kansas, “agricultural interference” laws include outright bans on photography and video recording.¹⁵⁷ Each includes similar language, against those who “[e]nter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment.”¹⁵⁸ These laws remained on the books and set a legal precedent, but they were not enforced.¹⁵⁹ Undercover investigations were simply not as common as they are today.

As undercover investigations became more frequent and effective, and as the Animal Enterprise Terrorism Act became law, the animal-agriculture industry began targeting investigators as terrorists.¹⁶⁰ In California,

148. *Hallmark/Westland Meat Recall: Hearing Before the Subcomm. of the S. Comm. on Appropriations*, 110th Cong. 37 (2008) (statement of Wayne Pacelle, President and CEO, The Humane Society of the U.S.).

149. Joe Roybal, *California Nightmare*, BEEF (Mar. 1, 2008), <http://www.beefmagazine.com/beef-quality/cattle-handling/california-nightmare>.

150. Associated Press, *USDA Recalls 143 Million Pounds of Beef*, NBC NEWS.COM (Mar. 3, 2008, 10:39 AM), <http://www.nbcnews.com/id/23212514>.

151. David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST (Feb. 18, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021701530.html>.

152. See Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960, 10965 (2012).

153. *Id.*

154. *What Is Ag-Gag Legislation?*, ASPCA, <https://www.aspc.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation/ag-gag-bills-state-level> (last visited June 9, 2018).

155. *Id.*

156. See Alicia Prygoski, *Brief Summary of Ag-Gag Laws*, MICH. ST. U. ANIMAL LEGAL & HIST. CTR. (2015), <https://www.animallaw.info/article/brief-summary-ag-gag-laws>.

157. KAN. STAT. ANN. § 47-1827(c)(4) (2018); MONT. CODE ANN. § 81-30-103(e) (2017); N.D. CENT. CODE § 12.1-21.1-02(6) (2017).

158. N.D. CENT. CODE § 12.1-21.1-02(6); see KAN. STAT. ANN. § 47-1827(c)(4); MONT. CODE ANN. § 81-30-103(e).

159. CTR. FOR CONSTITUTIONAL RIGHTS & DEFENDING RIGHTS & DISSENT, *AG-GAG ACROSS AMERICA: CORPORATE-BACKED ATTACKS ON ACTIVISTS AND WHISTLEBLOWERS* 12 (2017).

160. Devin Nunes, *Eco-Extremists Strike Again*, DEVINNUENES.BLOGSPOT.COM (Aug. 23, 2012), <http://devinnunes.blogspot.com/2012/08/eco-extremists-strike-again.html>.

for example, an investigation by Compassion Over Killing of Central Valley Meat Company revealed such extreme cruelty that the government actually shut down the slaughterhouse.¹⁶¹ This type of intervention by the USDA is extraordinarily rare.¹⁶² The footage was so shocking that McDonald's, Costco, and In-N-Out Burger quickly cut ties with the supplier.¹⁶³

The animal-agriculture industry, not surprisingly, was outraged. The industry pressured members of Congress to take action, and a few days after the plant was shuttered, three U.S. Representatives from California sent a letter to the USDA calling for the immediate reopening of the slaughterhouse.¹⁶⁴ U.S. Representatives Devin Nunes, Kevin McCarthy, and Jeff Denham said that its closure was hurting the economy and the government needed “to intervene against the onslaught of attacks that are occurring at the behest of radical groups.”¹⁶⁵ In a blog post, Representative Nunes compared the nonviolent undercover filming to arson and described it as “economic terrorism.”¹⁶⁶ As a result, the slaughterhouse reopened.¹⁶⁷

The first use of an ag-gag law, much like the first use of the Animal Enterprise Terrorism Act, was for clearly constitutionally protected activity.¹⁶⁸ In Utah, a young woman named Amy Meyer saw a sick cow being pushed by a bulldozer outside of Dale Smith Meatpacking Company.¹⁶⁹ She did what any of us would do in the age of iPhones and YouTube: she filmed it.¹⁷⁰ She was standing on the public street.¹⁷¹ I found out about the

161. *Feds Close Central Valley Slaughterhouse*, NBCLOSANGELES.COM (Aug. 21, 2012, 6:40 AM), <https://www.nbclosangeles.com/news/local/Feds-Close-Central-Valley-Slaughterhouse-Central-California-Central-Valley-Meat-Company-166880466.html>.

162. See Peter Eisler, *Veterinarian to Detail Slaughterhouse Breaches*, USA TODAY, https://usatoday30.usatoday.com/news/health/2010-03-03-food-safety_N.htm (last visited Apr. 21, 2018).

163. Christine Hauser, *Work at Slaughterhouse Is Halted After Graphic Undercover Videos*, N.Y. TIMES: THE LEDE (Aug. 22, 2012, 4:04 PM), <http://thelede.blogs.nytimes.com/2012/08/22/work-at-slaughterhouse-is-halted-after-graphic-undercover-videos>.

164. Letter from Representative Devin Nunes, Representative Kevin McCarthy & Representative Jeff Denham to the Honorable Thomas Vilsack, Sec'y of the U.S. Dep't of Agric. (Aug. 23, 2012) (on file with Rep. Devin Nunes's office).

165. *Id.*

166. Nunes, *supra* note 160.

167. *Update: Hanford Slaughterhouse Gets USDA Approval to Reopen Today*, SENTINEL (Aug. 27, 2012), http://hanfordsentinel.com/update-hanford-slaughterhouse-gets-usda-approval-to-reopen-today/article_d80b0d72-f05a-11e1-942c-0019bb2963f4.html.

168. See Natasha Lennard, *First "Ag-Gag" Charges Brought . . . and Then Dropped*, SALON (Apr. 30, 2013, 1:48 PM), https://www.salon.com/2013/04/30/first_ag_gag_charges_brought_and_then_dropped.

169. Emiley Morgan, *Charges Dropped Against Woman in Utah's First 'Ag-Gag' Case*, DESERET NEWS UTAH (Apr. 30, 2013, 2:00 PM), <https://www.deseretnews.com/article/865579223/Charges-dropped-against-woman-in-Utahs-first-ag-gag-case>.

170. See Lennard, *supra* note 168.

171. See *id.*

case and broke the story on my website.¹⁷² Within twenty-four hours it had created such an uproar that prosecutors dropped all charges.¹⁷³

The most significant impact of ag-gag laws is that they have brought together a wide range of groups that typically do not engage in dialogue.¹⁷⁴ It has helped build multi-issue coalitions that never existed before, including Amnesty International, PETA, labor unions, the American Civil Liberties Union, the Sierra Club, Human Rights Watch, and many others.¹⁷⁵ The message of these groups has been that if we allow this to take place, if we allow factory farms to silence their critics, other whistleblowers will be next.¹⁷⁶

“What at first might appear to be exclusively an animal abuse issue is, on closer inspection, clearly also a freedom of expression issue, a workers’ rights issue, an environmental issue[,] and a public health issue,” Amnesty International said in a statement.¹⁷⁷ “[S]unshine—in our case, the proverbial candle—really is the best disinfectant. We have no hope of stopping abuses if we can’t even bring them to light.”¹⁷⁸

This was the foundation of a constitutional challenge to Idaho’s ag-gag law.¹⁷⁹ The Animal Legal Defense Fund led the legal effort, arguing that ag-gag is an unconstitutional attempt by the agriculture industry to silence journalists, animal advocates, and whistleblowers who expose cruel farming practices.¹⁸⁰ A wide range of organizations supported the lawsuit by filing amicus briefs.¹⁸¹ They represented food-safety, environmental, labor, whistleblower, and journalism organizations.¹⁸²

172. See Will Potter, *First “Ag-Gag” Prosecution: Utah Woman Filmed a Slaughterhouse from the Public Street*, GREEN IS THE NEW RED (Apr. 29, 2013), <http://www.greenisthenewred.com/blog/first-ag-gag-arrest-utah-amy-meyer>.

173. Jim Dalrymple II, *Utah Prosecutor Dismisses Suddenly High-Profile “Ag-Gag” Case*, SALT LAKE TRIB. (May 1, 2013, 7:39 AM), <http://archive.sltrib.com/article.php?id=56240592&itype=CMSID>.

174. See *Statement of Opposition to Proposed “Ag-Gag” Laws from Broad Spectrum of Interest Groups*, ASPCA, <https://www.aspc.org/animal-cruelty/factory-farms/statement-opposition-proposed-ag-gag-laws-broad-spectrum-interest> (last visited June 9, 2018).

175. See *id.*; *What Are “Ag-Gag” Bills?*, PETA, <https://www.peta.org/action/alerts/ag-gag-bills> (last visited June 9, 2018).

176. See Gabe Rottman, *“Ag-Gag” Not Just About Animal Welfare*, ACLU (May 3, 2013, 9:54 AM), <https://www.aclu.org/blog/national-security/ag-gag-not-just-about-animal-welfare>.

177. Vienna Colucci, *Amnesty Makes it 60*, AMNESTY INT’L USA: HUM. RTS. NOW BLOG (May 24, 2013, 3:15 PM), <http://blog.amnestyusa.org/us/amnesty-makes-it-60>.

178. *Id.*

179. Civil Rights Complaint at 1–2, *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195 (D. Idaho 2015), *aff’d in part & rev’d in part sub nom.* *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (No. 1:14-CV-104).

180. *Id.*

181. *ALDF v. Otter*, ACLU IDAHO, <https://www.acluidaho.org/en/cases/aldf-v-otter> (last visited June 9, 2018) (providing access to the court documents filed in the case).

182. John Sowell, *Free Speech Advocates Rush to Oppose Idaho’s Ag-Gag Law in 9th Circuit Appeal*, IDAHO STATESMAN (Apr. 21, 2017, 04:30 PM), <http://www.idahostatesman.com/news/business/article145847014.html>.

In a landmark decision against ag-gag, a U.S. district court ruled that the law infringed upon First Amendment activity by criminalizing news-gathering and distribution.¹⁸³ Video footage that is favorable to the industry would not be subject to prosecution: it is only critical reporting that is at risk.¹⁸⁴ The ag-gag law “gives agricultural facility owners veto power, allowing owners to decide what can and cannot be recorded, effectively turning them into state-backed censors able to silence unfavorable speech about their facilities,” Judge Lynn Winmill said in the ruling.¹⁸⁵

Idaho’s ag-gag law also violated the Equal Protection Clause of the U.S. Constitution “because it was motivated in substantial part by animus towards animal welfare groups,” Judge Winmill said.¹⁸⁶ “The overwhelming evidence gleaned from the legislative history indicates that § 18-7042 was intended to silence animal welfare activists, or other whistleblowers, who seek to publish speech critical of the agricultural production industry,” Winmill wrote.¹⁸⁷ “Many legislators made their intent crystal clear by comparing animal rights activists to terrorists”¹⁸⁸

Nevertheless, ag-gag proposals continue to be introduced at the state level in evolved forms.¹⁸⁹ The most recent ag-gag law, which went into effect in early 2016 in North Carolina, marked a sweeping expansion of the scope of this legislation.¹⁹⁰ The bill was introduced on the same day that a fifth Butterball employee pled guilty to criminal cruelty to animals—charges that would not be possible without the undercover investigations that bills like this aim to criminalize.¹⁹¹ North Carolina’s H.B. 405,¹⁹² the Commerce Protection Act, does not “include any ‘terrorism’ language, as others have in the past, and it [does not] mention animal agriculture at all.”¹⁹³ Instead, it says: “It is unlawful for any person to willfully make false statements or representations or to fail to disclose requested information as part of an employment application” if the purpose is “to create or produce a record that reproduces an image or sound occurring within the employer’s facility, including a photographic, video, or audio” or “to capture or remove data, paper, records, or any other documents.”¹⁹⁴ It goes

183. *Otter*, 118 F. Supp. 3d at 1202.

184. *Id.* at 1206.

185. *Id.* at 1207.

186. *Id.* at 1202.

187. *Id.* at 1210.

188. *Id.*

189. *See, e.g.*, N.C. GEN. STAT. § 99A-2 (2017).

190. *See id.*

191. *See* Vandhana Bala, *Breaking News: Yet Another Butterball Turkey Employee Convicted of Cruelty to Animals*, MERCY FOR ANIMALS (Apr. 4, 2013), <http://www.mercyforanimals.org/breaking-news-yet-another-butterball-turkey-employee-convicted-of-cruelty-to-animals>.

192. H.B. 405, 2015 Gen. Assemb. (N.C. 2015).

193. Will Potter, *Breaking: New Ag-Gag Bill Introduced in North Carolina on Same Day Butterball Worker Pleads Guilty to Cruelty*, GREEN IS THE NEW RED (Apr. 8, 2013), <http://www.greenis-thenewred.com/blog/north-carolina-ag-gag-whistleblower-law/6851>.

194. S.B. 648 at § 14-105.1(a)(1)–(2).

on to say that “[a]ny recording . . . shall be turned over to local law enforcement within 24 hours.”¹⁹⁵

As the *New York Times* noted in an editorial against the measure: “The law originally singled out factory-farm exposés, but after it twice failed to pass in the face of resistance from animal-rights activists, lawmakers succeeded in pushing through a version that covered everyone equally.”¹⁹⁶

VI. RIGHT-WING VIOLENCE IGNORED

I have discussed at length what is being labeled as terrorism and how alleged terrorists are being treated. But equally, if not more important, is who is *not* being labeled as terrorists. Right-wing groups who have a history of bloodshed are repeatedly left out of FBI and Homeland Security listings.¹⁹⁷ This includes anti-abortion extremists,¹⁹⁸ neo-Nazis,¹⁹⁹ and right-wing militias who have seized federal land with assault rifles.²⁰⁰

Right-wing violence has increased by more than 400% since the 1990s, according to a study by West Point’s Combating Terrorism Center.²⁰¹ That is an average of 140 injuries a year, and 30 deaths, primarily caused by the targeting of people because of their race or sexual orientation.²⁰² In the three years after September 11, alone, there were 283 injuries and 71 deaths caused by these groups.²⁰³ When I studied every data set available from the FBI for domestic terrorism incidents, though, I found something even more disturbing. According to the bureau, every single act of domestic terrorism in this period, except for one, was the work of animal rights advocates and environmentalists with no history of bloodshed.²⁰⁴

There are two possible explanations for this. One is that the FBI—the lead agency responsible for investigating domestic terrorism—has absolutely no idea that this right-wing violence is taking place. The second is that law enforcement is intentionally ignoring or downplaying threats to human lives to focus antiterrorism resources on political activists who

195. *Id.* at § 14-105.1(c).

196. The Editorial Board, Opinion, *No More Exposés in North Carolina*, N.Y. TIMES, Feb. 1, 2016, at A20.

197. See, e.g., FED. BUREAU OF INVESTIGATION, TERRORISM 2002–2005, at 1, <https://www.fbi.gov/stats-services/publications/terrorism-2002-2005> (last visited June 9, 2018).

198. See, e.g., NAT’L ABORTION FED’N, 2016 VIOLENCE AND DISRUPTION STATISTICS: AN ESCALATION IN HATE SPEECH, INTIMIDATION, AND OBSTRUCTION, AS WELL AS A DECREASE IN EXTREME VIOLENCE 1 (2016).

199. See, e.g., *Documenting Hate*, PROPUBLICA, <https://projects.propublica.org/graphics/hate-crimes> (last visited June 9, 2018).

200. See Les Zaitz, *Militia Takes over Malheur National Wildlife Refuge Headquarters*, OREGONIAN: OREGONLIVE (Jan. 2, 2016, 6:15 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/drama_in_burns_ends_with_quiet.html.

201. ARIE PERLIGER, COMBATING TERRORISM CTR. AT W. POINT, CHALLENGERS FROM THE SIDELINES: UNDERSTANDING AMERICA’S VIOLENT FAR-RIGHT 87 (2012).

202. See *id.* at 100 fig.4, 106 fig.9.

203. *Id.* at 100 fig.4.

204. FED. BUREAU OF INVESTIGATION, *supra* note 197.

threaten corporate profits.²⁰⁵ In either case, this puts public safety in danger. When FBI agents are attempting to infiltrate vegan potlucks,²⁰⁶ they are not investigating legitimate terrorism threats.

Time and again, this warning has come from top levels of government. In 2003, the Justice Department warned the FBI that its obsessive focus on animal rights and environmental activists—what the bureau deems its “number one domestic terrorism threat”—was leaving dangerous threats unchecked.²⁰⁷ The FBI was urged to no longer “spend time and resources on lower-threat activities by social protesters.”²⁰⁸

In 2005, ten years after the bombing of the Oklahoma City Federal Building, the House Committee on Homeland Security released a report urging the Department of Homeland Security to work more closely with the FBI and address the growth of “right-wing domestic terrorist groups.”²⁰⁹ In 2012, another congressional report on domestic terrorism echoed these concerns, saying: “[T]he crimes committed by animal rights extremists and eco-terrorists cannot be compared to clearly violent attacks.”²¹⁰

The FBI has ignored all of these warnings and maintained its focus.²¹¹ For example, the very same week that a terrorist attack killed forty-nine people at a gay nightclub in Florida in 2016, the FBI distributed a press release about animal rights activists who freed animals from a fur farm.²¹² The activists had released mink into the wild and vandalized property by painting “[l]iberation is [l]ove.”²¹³

FBI training documents warn of a “[p]ublic [r]elations [w]ar” by animal activists, yet say “[m]ilitia [e]xtremists”—who are now openly carrying assault rifles as security forces at neo-Nazi rallies—are less of a threat because “[m]ovement burn[ed] out by late 1990s.”²¹⁴ In 2010, the

205. See generally POTTER, *supra* note 14 (discussing in detail how these priorities were influenced by corporate lobbying efforts).

206. Mark Frauenfelder, *FBI Looking for Vegan Potluck Terrorists*, BOINGBOING (May 21, 2008, 10:08 AM), <https://boingboing.net/2008/05/21/fbi-looking-for-vega>.

207. See U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 04-10, THE FEDERAL BUREAU OF INVESTIGATION’S EFFORTS TO IMPROVE THE SHARING OF INTELLIGENCE AND OTHER INFORMATION 93–94 (2003).

208. *Id.* at 94.

209. BENNIE G. THOMPSON, HOUSE COMM. ON HOMELAND SEC., 10 YEARS AFTER THE OKLAHOMA CITY BOMBING, THE DEPARTMENT OF HOMELAND SECURITY MUST DO MORE TO FIGHT RIGHT-WING DOMESTIC TERRORISTS 2 (2005).

210. CONG. RESEARCH SERV., R42536, THE DOMESTIC TERRORIST THREAT: BACKGROUND AND ISSUES FOR CONGRESS 37 (2014).

211. See *Animal Rights Extremists: Pair Took Law into Their Own Hands*, FBI (June 10, 2016), <https://www.fbi.gov/news/stories/animal-rights-extremists>.

212. *Id.*

213. *California Men Accused of Releasing 2,000 Minks from Illinois Farm*, CHI. TRIB. (July 10, 2014, 7:39 PM), <http://www.chicagotribune.com/news/local/breaking/chi-minks-released-morris-20140710-story.html>.

214. See FED. BUREAU OF INVESTIGATION, ANIMAL RIGHTS/ECO EXTREMISM STRATEGY FBI026250, FBI026276, FBI026277 (2011).

FBI shockingly sent out an intelligence bulletin titled “White Supremacist Extremist Violence Possibly Decreases.”²¹⁵ That has not happened.²¹⁶ Instead, right-wing violence has continued to climb.²¹⁷ As the authors of the West Point study ominously warned in 2012: “[E]lection years, as well as an increase in the power of conservative political forces, are normally accompanied by increased levels of far right violence.”²¹⁸

VII. TRUMP’S ENVIRONMENT

With the rise of Donald Trump, right-wing violence has spiked dramatically.²¹⁹ Neo-Nazis, armed militias, and avowedly fascist groups have been inspired and emboldened.²²⁰ Trump has built a political platform on anti-immigrant and antirefugee rhetoric.²²¹ His former chief strategist, Steve Bannon, is a white supremacist.²²² His former deputy assistant, Sebastian Gorka, proudly wears a medal associated with Hungary’s Nazi collaborators.²²³ Trump has called for border walls and crackdowns on sanctuary cities.²²⁴ Immediately after the recent terrorist attack on a pop concert in London, he said it was more evidence of why the United States needed a Muslim ban.²²⁵

215. See FED. BUREAU OF INVESTIGATIONS, WHITE SUPREMACIST EXTREMIST VIOLENCE POSSIBLY DECREASES BUT RACIST SKINHEADS REMAIN THE MOST VIOLENT 1 (2010).

216. See Arie Perliger, *Homegrown Terrorism and Why the Threat of Right-Wing Extremism Is Rising in America*, NEWSWEEK (June 4, 2017, 4:00 AM), <http://www.newsweek.com/homegrown-terrorism-rising-threat-right-wing-extremism-619724>.

217. *Id.*

218. PERLIGER, *supra* note 201, at 114.

219. ANTI-DEFAMATION LEAGUE, MURDER AND EXTREMISM IN THE UNITED STATES IN 2017, at 7 (2017).

220. *Id.* at 7–8.

221. Philip Klinkner, Commentary, *Anti-immigrant Views Helped Trump Win. Will They Also Cause His Undoing?*, CHI. TRIB. (April 18, 2017, 1:15 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-trump-supporters-anti-immigrant-20170418-story.html>.

222. See Eric Levitz, *Steve Bannon’s Nationalism Isn’t About the Economy, Stupid*, N.Y. MAG.: DAILY INTELLIGENCER (Sept. 11, 2017, 4:53 PM), <http://nymag.com/daily/intelligencer/2017/09/steve-bannons-nationalism-isnt-about-the-economy-stupid.html>; Sarah Posner, *How Donald Trump’s New Campaign Chief Created an Online Haven for White Nationalists*, MOTHER JONES (Aug. 22, 2016, 10:00 AM), <https://www.motherjones.com/politics/2016/08/stephen-bannon-donald-trump-alt-right-breitbart-news>.

223. Alexander Smith & Vladimir Banic, *Sebastian Gorka Made Nazi-Linked Vitezi Rend ‘Proud’ by Wearing Its Medal*, NBC NEWS.COM (Apr. 8, 2017, 9:40 AM), <https://www.nbcnews.com/news/world/sebastian-gorka-made-nazi-linked-vitezi-rend-proud-wearing-its-n742851>.

224. See Ashley Parker et al., *Trump’s Wall: The Inside Story of How the President Crafts Immigration Policy*, WASH. POST (July 19, 2017), https://www.washingtonpost.com/politics/trumps-wall-the-inside-story-of-how-the-president-crafts-immigration-policy/2017/07/19/b11b8b94-68da-11e7-8eb5-cbccc2e7bfbf_story.html; Eli Rosenberg, *Federal Judge Blocks Trump’s Executive Order on Denying Funding to Sanctuary Cities*, WASH. POST (Nov. 21, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/11/21/federal-judge-blocks-trumps-executive-order-on-denying-funding-to-sanctuary-cities>.

225. Mark Landler & Maggie Haberman, *Trump’s Tweets About London Bombing Anger British Leaders*, N.Y. TIMES (Sept. 15, 2017), <https://www.nytimes.com/2017/09/15/us/politics/trump-seizes-on-london-attack-to-push-for-expanding-a-travel-ban.html>.

Fascist groups like Identity Evropa, the Proud Boys, Lion Guard, and others have mobilized to take advantage of this political environment.²²⁶ They have published lists of businesses “openly hostile to . . . Trump.”²²⁷ They have held rallies with torches.²²⁸ In May 2017, a white supremacist and alt-right supporter named Jeremy Christian yelled racist comments at Muslim women on a train in Portland, Oregon.²²⁹ When three men intervened to stop him, he killed two of them and slit the other’s throat.²³⁰ In the courtroom on May 30, Christian yelled, “Free speech or die, Portland,”²³¹ and “You call it terrorism, I call it patriotism.”²³² In August 2017, so-called alt-right groups marched in Charlottesville, Virginia, alongside neo-Nazis and armed militias.²³³ On that day a black protester, Deandre Harris, was beaten by white supremacists with metal poles.²³⁴ In a separate incident that day, a twenty-year-old white nationalist drove his car into the crowd of counter-protesters, murdering thirty-two year old Heather Heyer and injuring nineteen others.²³⁵ There have been at least two other incidents of right-wing extremists driving cars into crowds of protesters, in

226. See *infra* notes 227–39 and accompanying text.

227. See Trevor Baratko, *More: Leesburg Woman, Business Owner Receives Startling ‘Anti-election’ Email*, LONDON TIMES-MIRROR (Jan. 26, 2017), https://www.loudountimes.com/news/article/leesburg_woman_and_business_owner_receives_startling_anti_election_email432.

228. See Madison Park, *Charlottesville Mayor Slams ‘Despicable Visit’ as Another Torch Rally Held*, CNN (Oct. 8, 2017, 1:21 PM), <https://www.cnn.com/2017/10/08/us/charlottesville-torch-rally/index.html>.

229. Doug Brown, *Suspect in Portland Hate Crime Murders Is a Known White Supremacist*, PORTLAND MERCURY (May 27, 2017, 5:33 AM), <https://www.portlandmercury.com/blog-town/2017/05/27/19041594/suspect-in-portland-hate-crime-murders-is-a-known-white-supremacist>.

230. *Portland Train Stabbing Suspect Said “That’s What Liberalism Gets You,” Docs Say*, CBS NEWS (May 31, 2017, 1:28 PM), <https://www.cbsnews.com/news/portland-train-stabbing-suspect-thats-what-liberalism-gets-you-docs>.

231. Phil Helsel & Miguel Almaguer, *Portland Stabbing Suspect Yells “Free Speech or Die” in Court Appearance*, NBC News (May 30, 2017 (8:11 PM), <https://www.nbcnews.com/news/us-news/portland-stabbing-suspect-yells-free-speech-or-die-first-court-n766416>.

232. Associated Press, *Portland Stabbing Suspect: “You Call It Terrorism, I Call It Patriotism!”*, POLITICO (May 30, 2017, 7:34 PM), <https://www.politico.com/story/2017/05/30/portland-attacks-muslims-bias-238955>.

233. See Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline>.

234. Loulla-Mae Eleftheriou-Smith, *Charlottesville: Black Protester Deandre Harris ‘Beaten with Metal Poles’ by White Supremacists*, INDEPENDENT (Aug. 15, 2017, 3:48 PM), <http://www.independent.co.uk/news/world/americas/charlottesville-deandre-harris-black-protester-white-supremacists-beat-metal-poles-neo-nazis-a7894916.html>.

235. Justin Carissimo, *1 Dead, 19 Injured After Car Plows into Protesters in Charlottesville*, CBS NEWS (Aug. 12, 2017, 2:02 PM), <https://www.cbsnews.com/news/1-dead-19-injured-after-car-plows-into-protesters-in-charlottesville>; Christina Caron, *Heather Heyer, Charlottesville Victim, Is Recalled as “a Strong Woman,”* N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/heather-heyer-charlottesville-victim.html>.

California²³⁶ and Missouri.²³⁷ In Nebraska, a heavily armed white supremacist—carrying his National Socialist Movement membership card—managed to stop an Amtrak train.²³⁸ He said he was interested in “killing black people.”²³⁹

Rather than direct law enforcement to address this crisis, or even issue a strong public condemnation from the White House, President Trump has rolled back some of the few, modest initiatives targeting right-wing violence. He has overhauled the Countering Violent Extremism program to focus solely on Islam and exclude right-wing terrorism.²⁴⁰ Funding through the Department of Homeland Security for a program to fight white supremacists was revoked.²⁴¹ Neo-Nazis like Andrew Anglin of the *Daily Stormer* have celebrated and proclaimed “Trump is setting us free.”²⁴²

Trump has clearly inspired the far right, but the FBI has known for decades that these groups pose a growing threat.²⁴³ Neo-Nazi marching through the streets of America, advocating violence while carrying firearms, and driving into crowds of peaceful protesters—nightmarish scenes like this did not emerge overnight.²⁴⁴ Now, as these extremist groups increasingly deliver on their promises for bloodshed, the FBI is dodging responsibility.²⁴⁵ An FBI official told *Politico* that the bureau is constrained by legal protections that make it difficult to target white nationalists.²⁴⁶

236. Jeremy B. White, *Man Drives Car into Crowd Protesting Trump Immigration Policy*, INDEPENDENT (Oct. 27, 2017, 7:21 PM), <http://www.independent.co.uk/news/world/americas/us-politics/trump-protest-man-drives-car-protesters-california-brea-a8023716.html>.

237. Daniel Victor, *Man Drives Car Through Activists Protesting Transgender Woman's Death*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/us/stlouis-protest-transgender-death.html>.

238. Andrew J. Nelson, *FBI: Man with White Supremacist Ties Stopped Train in Rural Nebraska with Intent to Harm Passengers*, OMAHA WORLD-HERALD (Jan. 5, 2018), http://www.omaha.com/news/crime/fbi-man-with-white-supremacist-ties-stopped-train-in-rural/article_76a73b7d-d667-55ae-98cd-5a4af26fde6b.html.

239. Lori Pilger, *FBI Accuses White Supremacist of Terror Attack on Amtrak Train in Rural Nebraska*, LINCOLN J. STAR (Jan. 4, 2018), http://journalstar.com/news/state-and-regional/nebraska/fbi-accuses-white-supremacist-of-terror-attack-on-amtrak-train/article_82f0860e-3c75-5a66-ab0c-a2e3a3c16aab.html.

240. Julia Edwards Ainsley et al., *Exclusive: Trump to Focus Counter-Extremism Program Solely on Islam – Sources*, REUTERS, Feb. 1, 2017, <https://www.reuters.com/article/us-usa-trump-extremists-program-exclusiv-idUSKBN15G5VO>.

241. Ron Nixon & Eileen Sullivan, *Revocation of Grants to Help Fight Hate Under New Scrutiny After Charlottesville*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/right-wing-extremism-charlottesville.html>.

242. Heidi Beirich, *Domestic Terror Threat Remains Serious Five Years After Sikh Massacre*, S. POVERTY L. CTR. (Aug. 4, 2017), <https://www.splcenter.org/news/2017/08/04/domestic-terror-threat-remains-serious-five-years-after-sikh-massacre>.

243. See *supra* Part VI.

244. See *supra* notes 226–37 and accompanying text.

245. See, e.g., Ali Watkins & Josh Meyer, *Domestic Hate Groups Elude Feds*, POLITICO (Aug. 15, 2017, 1:04 PM), <http://www.politico.com/story/2017/08/15/us-hate-groups-legal-protections-241653>.

246. *Id.*

Foreign Policy reported receiving a recent FBI intelligence bulletin that warned of right-wing violence and said FBI warnings went unheeded.²⁴⁷

This could not be further from the truth. The FBI has not been sounding the alarm about white-supremacist violence; it has been silencing it.²⁴⁸ The problem has never been a lack of resources or investigatory power; the problem is a lack of political will. The top domestic terrorism agency in the United States has repeatedly minimized the threat of right-wing violence while defending its focus on nonviolent protesters and, among them, animal rights and environmental activists.²⁴⁹

However, the trends I have documented are not just a danger to public safety. If left unchecked, they are a threat to democracy itself.

VIII. ALARMING AND UNDEMOCRATIC TREND

For the first time in twenty-seven years, Human Rights Watch has listed the United States as a global threat to human rights, citing the rise of Donald Trump and warning that his presidency could “cause tremendous harm to vulnerable communities, contravene the United States’ core human rights obligations, or both.”²⁵⁰ For the first time in its history, the Economist Intelligence Unit, which is the sister company of the *Economist* newspaper, has listed the United States as a “flawed democracy” (rather than a “full democracy”) in its annual Democracy Index.²⁵¹ Through it all, Trump has been the master of obfuscation.²⁵² Anything critical is “fake news.”²⁵³ His supporters are not white supremacists, they are the “alt-right.”²⁵⁴ Journalists who challenge him are “the enemy of the American people.”²⁵⁵ He officially declared his inauguration day the “National Day of Patriotic Devotion.”²⁵⁶

247. Jana Winter, *FBI and DHS Warned of Growing Threat from White Supremacists Months Ago*, FP (Aug. 14, 2017, 11:26 AM), <http://foreignpolicy.com/2017/08/14/fbi-and-dhs-warned-of-growing-threat-from-white-supremacists-months-ago>.

248. See Watkins & Meyer, *supra* note 245.

249. See *supra* notes 210–17 and accompanying text.

250. Mark Landler, *Human Rights Group Portrays U.S. as Major Threat, Citing Trump*, N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/us/politics/human-rights-watch-trump.html>.

251. The Data Team, *Declining Trust in Government Is Denting Democracy*, ECONOMIST (Jan. 25, 2017), <https://www.economist.com/blogs/graphicdetail/2017/01/daily-chart-20>.

252. See *infra* notes 253–56 and accompanying text.

253. See Meg Kelly, *President Trump Cries “Fake News” and the World Follows*, WASH. POST (Feb. 6, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/02/06/president-trump-cries-fake-news-and-the-world-follows>.

254. Anti-Defamation League, *Alt Right: A Primer About the New White Supremacy*, ADL.ORG, <https://www.adl.org/education/resources/backgrounders/alt-right-a-primer-about-the-new-white-supremacy> (last visited June 9, 2018).

255. See Michael M. Grynbaum, *Trump Calls the News Media the “Enemy of the American People,”* N.Y. TIMES, Feb. 17, 2017, at A15.

256. Abby Phillip, *Trump Names His Inauguration Day a “National Day of Patriotic Devotion,”* WASH. POST (Jan. 23, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/01/23/trump-names-his-inauguration-day-a-national-day-of-patriotic-devotion>.

In the first year of the Trump Administration, there has already been a resurgence, and expansion, of many tactics used to criminalize animal rights and environmental activists.²⁵⁷ The Trump-affiliated *Breitbart News* labeled Earth First! a “terror-affiliated group” and warns, “[T]he *Earth First! Journal* is very media-savvy.”²⁵⁸ A top executive of Energy Transfer Partners, the company building the Dakota Access Pipeline, said pipeline opponents are terrorists.²⁵⁹ Greenpeace is being sued by Resolute Forest Products, one of the largest logging and paper companies; the company argues that Greenpeace and the environmental movement were part of a mob-like conspiracy under RICO.²⁶⁰

In at least eighteen states, Republican lawmakers have introduced bills to restrict the right to protest,²⁶¹ prompting the United Nations to warn that the United States is witnessing an “alarming and undemocratic trend” that chills dissent.²⁶² In Minnesota, a proposal was introduced to allow cities to sue protesters for the cost of policing their protests.²⁶³ In Iowa, a bill was introduced to make blocking the road with a march or protest a felony.²⁶⁴ In at least six states, Republican lawmakers have introduced proposals to protect drivers who run over protesters with their car.²⁶⁵

Jennifer Cook, policy director of the American Civil Liberties Union of North Dakota, said there was a “concentrated effort to criminalize pro-

257. See *infra* notes 258–60 and accompanying text.

258. Lee Stranahan, *Terror-Affiliated Group Is Part of Coalition to Stop Trump Inauguration*, BREITBART.COM (Jan. 19, 2017), <http://www.breitbart.com/big-government/2017/01/19/terror-affiliated-group-is-part-of-coalition-to-stop-trump-inauguration>.

259. Matthew Daly, *Dallas Pipeline Exec Compares Dakota Protesters to Terrorists*, STAR-TELEGRAM (Feb. 15, 2017, 1:53 PM), <http://www.star-telegram.com/news/business/article132908744.html>.

260. Nicholas Kusnetz, *Industry Lawsuits Try to Paint Environmental Activism as Illegal Racket*, INSIDE CLIMATE NEWS (Oct. 5, 2017), <https://insideclimatenews.org/news/04102017/greenpeace-rico-racketeering-lawsuit-environmental-activism-resolute-dakota-access->.

261. See Christopher Ingraham, *Republican Lawmakers Introduce Bills to Curb Protesting in at Least 18 States*, WASH. POST (Feb. 24, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states>.

262. Amanda Erickson, *Americans' Right to Protest Is in Grave Danger Under Trump, United Nations Warns*, WASH. POST (Apr. 2, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/04/02/americans-right-to-protest-is-in-grave-danger-under-trump-united-nations-warns>; see also United Nations Human Rights Office of the High Comm'r, *UN Rights Experts Urge Lawmakers to Stop “Alarming” Trend to Curb Freedom of Assembly in the US* (Mar. 30, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21464&LangID=E>.

263. Jared Goyette, *Minnesota Bill Would Make Convicted Protesters Liable for Policing Costs*, GUARDIAN (Jan. 25, 2017, 8:54 AM), <https://www.theguardian.com/us-news/2017/jan/25/minnesota-protesters-bill-liable-policing-costs>.

264. William Petroski & Brianne Pfannenstiel, *Iowa Bill: 5 Years in Prison for Highway Protesters*, DES MOINES REG. (Jan. 23, 2017, 4:06 PM), <https://www.desmoinesregister.com/story/news/politics/2017/01/23/iowa-bill-5-years-prison-highway-protesters/96956940>.

265. Dakin Andone, *These States Have Introduced Bills to Protect Drivers Who Run over Protesters*, CNN (Aug. 19, 2017, 3:36 AM), <http://www.cnn.com/2017/08/18/us/legislation-protects-drivers-injure-protesters/index.html>.

tests” in her state after the protest led by Native American tribes at Standing Rock.²⁶⁶ In Colorado, a bill targeted environmentalists who tamper with oil and gas equipment in acts of civil disobedience; under the proposal, antipipeline protesters would face felony charges and up to eighteen months in prison.²⁶⁷ At the federal level, more than eighty members of Congress signed a letter to Attorney General Jeff Sessions urging the Justice Department to investigate environmentalists as domestic terrorists.²⁶⁸

Perhaps the best illustration of how these repressive measures have expanded comes from Washington state.²⁶⁹ The deputy director of the Trump campaign there has promised to introduce new legislation that would punish protest as a felony if it causes “economic disruption” and hurts corporate profits.²⁷⁰ State Senator Doug Ericksen, the author of the bill, says “protests that block highways or roads—such as recent Black Lives Matter protests, or the indigenous movement at Standing Rock against the Dakota Access Pipeline—are ‘economic terrorism.’”²⁷¹ But protesters are not the only targets.²⁷² In a statement on his website, Ericksen says that the bill will also criminalize those who “fund, organize, sponsor or otherwise encourage others to commit acts of economic terrorism.”²⁷³

This is the exact language and legislation that has been used for decades to target animal rights and environmental activists. Similar proposals in the same state, such as S.B. 6566, targeted “terrorist acts against animal and natural resource facilities.”²⁷⁴ Ericksen acknowledges that the “Pre-

266. Mitch Smith & Michael Wines, *Across the Country, a Republican Push to Rein in Protesters*, N.Y. TIMES, Mar. 2, 2017, at A11.

267. S.B. 17-035, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017); see also COLO. REV. STAT. § 18-1.3-401(1)(a)(V)(A) (2017) (stating that the minimum sentence for a class-six felony in Colorado is eighteen months).

268. See Press Release, Kristi Noem, Representative from S.D., Noem Urges Justice Department to Evaluate Pipeline Security in Lieu of Recent Threats (Oct. 23, 2017) (on file with Rep. Kristi Noem’s office).

269. See *infra* notes 270–72 and accompanying text.

270. See *Ericksen Introduces Preventing Economic Disruption Act*, SRC (Dec. 16, 2016), <http://dougericksen.src.wastateleg.org/ericksen-introduces-preventing-economic-disruption-act>; see also S.B. 5009, 65th Leg., Reg. Sess. (Wash. 2017).

271. Will Potter, *Trump Supporter Promises Legislation to Label Protest as “Economic Terrorism,”* GREEN IS THE NEW RED (Nov. 22, 2016), <http://www.greenisthenewred.com/blog/preventing-economic-terrorism-act/8706>; see Jim Brunner, *Trump Supporter in State Senate Says Some Protests Are “Economic Terrorism,” Should Be Felonies,* SEATTLE TIMES (Nov. 16, 2016, 8:33 PM), <https://www.seattletimes.com/seattle-news/politics/state-senator-some-protests-should-be-treated-as-felonies>.

272. Potter, *supra* note 271.

273. *Id.*

274. Will Potter, *Washington “Eco-Terrorist” Bill Includes Civil Disobedience and First Amendment Activity,* GREEN IS THE NEW RED (Feb. 17, 2010), <http://www.greenisthenewred.com/blog/washington-eco-terrorism-law-free-speech/2514>; see S.B. 6566, 61st Leg., Reg. Sess. (Wash. 2010).

venting Economic Terrorism Act” is not limited to animal rights and environmental activists, as originally intended.²⁷⁵ After the presidential election and in the wake of mass national protests against President Trump, he decided to drop those limitations entirely.²⁷⁶

IX. SLOW RECOVERY

John Scott Haldane, the nineteenth-century physiologist, radically reshaped our understanding of how to survive dangerous environments.²⁷⁷ His groundbreaking work continues to shape environmental and medical-health sciences today.²⁷⁸ It was not until 1986—ninety years after he recommended monitoring canaries in coal mines—that an alternative method was developed.²⁷⁹

In all of Haldane’s many investigations and recommendations, though, there was rarely, if ever, a fast or easy solution.²⁸⁰ Many of his answers were counterintuitive.²⁸¹ In his studies of deep sea divers and decompression sickness, for example, Haldane learned that divers cannot quickly ascend.²⁸² They must move slowly and stop at incremental depths along the way.²⁸³ In one of his mining studies, Haldane brought his son, Jack, into a deep underground mine filled with gas.²⁸⁴ He told him to recite Mark Antony’s speech from Shakespeare’s *Julius Caesar*, to gauge how long he could speak before passing out.²⁸⁵ Soon after “friends, Romans, countrymen,” his son began to pant, his legs buckled, and he collapsed.²⁸⁶ Methane gas is lighter than air, Haldane learned.²⁸⁷ If workers attempt to escape a mine by running, they will be breathing in methane and poison themselves.²⁸⁸ Instead, he warned, they must crawl slowly on the ground to safety.²⁸⁹

275. Potter, *supra* note 271; see also Essex Porter, *Protest Bill Creates Crime of “Economic Terrorism,”* KIRO 7 (Nov. 18, 2016, 9:41 AM), <http://www.kiro7.com/news/local/washington-state-senator-seeks-to-criminalize-illegal-protests/467962158> (“Senator Ericksen has oil refineries in his district and says he’s really trying to go after people who try to block oil trains.”).

276. Potter, *supra* note 271; see Brooke Seipel, *Washington Republican Proposes Charging Protesters with “Economic Terrorism,”* HILL (Nov. 17, 2016, 12:46 PM), <http://thehill.com/blogs/blog-briefing-room/306580-washington-republican-floats-charging-protesters-with-economic-terrorism>.

277. See Sekhar & Rao, *supra* note 1.

278. See *id.*

279. Kat Eschner, *The Story of the Real Canary in the Coal Mine*, SMITHSONIAN.COM (Dec. 30, 2016), <https://www.smithsonianmag.com/smart-news/story-real-canary-coal-mine>.

280. See, e.g., A.E. Boycott et al., *The Prevention of Compressed-Air Illness*, 8 J. HYGIENE 342, 358–61 (1908).

281. See, e.g., *id.*

282. See *id.*

283. See *id.*

284. JAY KATZ, EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS AND STATE IN THE HUMAN EXPERIMENTATION PROCESS 141 (1972).

285. *Id.*

286. *Id.*

287. *Id.*

288. See *id.*

289. See *id.*

This is becoming a toxic political environment for dissent in the United States,²⁹⁰ and it is just the beginning of the Trump Administration. But we have to remember that this political climate—the composition of the air in our mine—can only partially be attributed to President Trump. The rhetoric of terrorism has been institutionalized,²⁹¹ dangerous legal precedents have been established,²⁹² and legislative proposals to criminalize protest have been codified.²⁹³ These dangerous conditions have been growing over decades, across both Democratic and Republican Administrations, including President Barack Obama’s.

Now, this political climate has been inherited by an authoritarian, and new enemies are being identified.²⁹⁴ The FBI and Homeland Security have issued confidential intelligence briefings about anarchists and antifascists, or “antifa,” that mirror similar warnings about “eco-terrorism.”²⁹⁵ More than 200 people, including journalists, were arrested at protests of Trump’s inauguration.²⁹⁶ They faced felony riot charges, decades in prison, and a media smear campaign describing them as “anarchists” and domestic terrorists.²⁹⁷ Mark Goldstone, who represented six of the “J20” defendants, said the charges were “unprecedented territory.”²⁹⁸ “In my over thirty years of practicing law,” he said, “I’ve never seen anything like this.”²⁹⁹ Hundreds of thousands of people have signed a White House petition that urged Trump to label antifa as terrorists.³⁰⁰ “[J]ust as [the United States] rightfully declared ISIS a terror group,” the petition says, “they must declare AntiFa a terror group.”³⁰¹ When a train crashed in Washington,

290. See *supra* Part VII.

291. See *supra* Part I.

292. See *supra* Part IV.

293. See *supra* Parts IV, V.

294. See, e.g., Josh Meyer, *FBI, Homeland Security Warn of More “Antifa” Attacks*, POLITICO (Sept. 1, 2017, 4:55 AM), <https://www.politico.com/story/2017/09/01/antifa-charlottesville-violence-fbi-242235>.

295. *Id.*

296. Adam K. Raymond, *J20 Defendants Cleared of Charges in Trump Inauguration Arrests*, N.Y. MAG.: DAILY INTELLIGENCER (Dec. 21, 2017, 3:41 PM), <http://nymag.com/daily/intelligencer/2017/12/defendants-cleared-of-charges-in-inauguration-day-arrests.html>; Sean Rossman, *Free Speech or Destruction: First Trump Inauguration Protesters Go on Trial*, USA TODAY (Nov. 20, 2017, 5:24 PM), <https://www.usatoday.com/story/news/nation-now/2017/11/20/free-speech-destruction-first-trump-inauguration-protesters-go-trial/882512001>.

297. Elizabeth King, *Inside the J20 Prosecution: How the Feds Are Criminalizing Dissent*, PAC. STANDARD (Dec. 12, 2017), <https://psmag.com/social-justice/j20-defendants-and-the-crackdown-on-protest>.

298. Natasha Lennard, *How the Government Is Turning Protesters into Felons*, ESQUIRE (Apr. 12, 2017), <https://www.esquire.com/news-politics/a54391/how-the-government-is-turning-protesters-into-felons>.

299. *Id.*

300. Lucy Pasha-Robinson, *Hundreds of Thousands Urge Donald Trump to Label Anti-Fascists “Terrorists” in White House Petition*, INDEPENDENT (Aug. 21, 2017, 12:32 PM), <http://www.independent.co.uk/news/world/americas/donald-trump-anti-fascists-terrorists-white-house-petition-charlottesville-president-a7904631.html>.

301. *Id.*

Trump's political strategist Roger Stone falsely³⁰² told journalists that antifascists and anarchists were the "prime suspect" and "have blood on their hands now, very clearly."³⁰³

The tactics that have been pioneered against animal rights and environmental activists are not just expanding domestically, they are being exported internationally.³⁰⁴ In 2011, for example, at about the same time modern ag-gag laws emerged in the United States, undercover investigations of animal abuse started being classified as "terrorism" throughout Europe.³⁰⁵ Europol, the European police agency, published a report on terrorism threats meant as a warning for law enforcement agencies.³⁰⁶ The report included the 2005 bombing of the London subway, for example, and the 2004 bombing of the Madrid train system.³⁰⁷ The report also included a section on animal rights activists and a warning about activists with cameras.³⁰⁸ "ARE [animal rights extremists] activists also use disinformation methods in order to discredit their targets and weaken their public acceptance," the report says.³⁰⁹ "Images of sick and abused animals are embedded in video footage and made public."³¹⁰ In Austria, Spain, Norway, and many other countries, ambitious prosecutions of animal rights and environmental activists as "terrorists" have been directly modeled on U.S. case law. In Australia, corporations have copied this playbook verbatim. Katrina Hodgkinson, the former New South Wales Primary Industries Minister, said animal advocates who film farms without permission are "akin to terrorists."³¹¹ "Farmers [even offered a] \$10,000 (AUS) reward to anyone who can help convict an animal activist."³¹² The pig industry has paid for television ads that say animal activists with cameras "terrorist pigs

302. See Michael Edison Hayden, "Antifa" Falsely Linked to Amtrak Train Derailment by Right-Wing Conspiracy Peddlers, NEWSWEEK (Dec. 18, 2017, 6:14 PM), <http://www.newsweek.com/antifa-falsely-linked-amtrak-train-derailment-right-wing-conspiracy-peddlers-751893> (stating that the link between "Antifa" and the Amtrak train derailment is false).

303. Andrew Blake, *Washington Train Crash Linked to Antifa by Conspiracy Theorists, Trump Allies*, WASH. TIMES (Dec. 19, 2017), <https://www.washingtontimes.com/news/2017/dec/19/washington-train-crash-linked-antifa-conspiracy-th>.

304. See, e.g., EUROPOL, TE-SAT 2011: EU TERRORISM SITUATION AND TREND REPORT 31–32 (2011).

305. See *id.*

306. See *id.* at 4.

307. *Id.* at 13.

308. *Id.* at 32.

309. *Id.*

310. *Id.*

311. *Animal Rights Activists "Akin to Terrorists," Says NSW Minister Katrina Hodgkinson*, ABC NEWS (July 17, 2013, 9:54 PM), <http://www.abc.net.au/news/2013-07-18/animal-rights-activists-27terrorists272c-says-nsw-minister/4828556>.

312. Will Potter, *Attack on Factory Farm Whistleblowers Goes Global* (Feb. 16, 2014), <https://www.thedodo.com/attack-on-factory-farm-whistle-432282967.html>; Simon Thomsen, *Australian Farmers Have a \$10,000 Bounty out on Animal Rights Activists over Farm Raids*, BUS. INSIDER AUSTRAL. (Dec. 11, 2013, 2:05 PM), <http://www.businessinsider.com.au/australian-farmers-have-a-10000-bounty-out-on-animal-rights-activists-over-farm-raids-2013-12>.

at night.”³¹³ The agriculture industry in Australia is openly, explicitly modeling Australian proposals after U.S. legislation.³¹⁴ In my research, I found that portions of it were directly copied and pasted verbatim from U.S. legislation.

Unlike John Scott Haldane, I can make no assertions about the point at which the air in our political environment is no longer breathable. First Amendment law, civil liberties, and social movements are all decidedly unscientific areas of study. But I do know that people around the world are watching the U.S. democracy as a sentinel species. In my research, I have repeatedly been told by lawyers, protesters, civil liberties groups, and lawmakers around the world that they are studying us—not just animal rights and environmental activists but the broader political environment in the United States—as a warning of what is to come.

313. John Stewart, *Animal Rights Battle*, ABC NEWS (Nov. 5, 2013, 4:56 AM), <http://www.abc.net.au/news/2013-11-05/animal-rights-battle/5072026>.

314. See VOICELESS LTD. & BARRISTERS ANIMAL WELFARE PANEL LTD., JOINT SUBMISSION ON THE ALRC’S REVIEW ON “SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA,” 15–16 (2013).