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. 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. 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. 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. For instance, he inhaled toxic chemicals, and instructed his teenage daughter, stationed outside the room, to come to his aid only if he collapsed. Biographer Martin Goodman said Haldane’s life was “[t]he greatest sustained physiological experiment in the history of the human lung.” 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.

His most famous work came from his studies of mine disasters. Haldane would rush to the scene, with his children in tow, and scour the site for postmortem clues. 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. 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.” Those tiny ani-
mals are what environmental and medical-health scientists describe as sentinel species. Haldane learned to monitor vulnerable elements in any environment, for the canaries becoming ill is an early warning system of our fate.

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. 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. 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. 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. The campaigns to label protest as terrorism had been building for decades. In the early 1980s, the animal rights and environmental movements were growing quickly and

17. See infra notes 19–24 and accompanying text.
18. See infra notes 19–24 and accompanying text.
They had widespread popular support, even for their more radical tactics. Groups like the Animal Liberation Front (ALF) were breaking into animal experimentation laboratories and fur farms, rescuing animals. National organizations like People for the Ethical Treatment of Animals (PETA) used video footage obtained by these groups in their lawful campaigns. 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. PETA used it for advocacy campaigns, sent it to media, and pressured politicians.

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

For the corporations targeted, though, the activists were a serious problem. These protest tactics were changing the public discussion. 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. Their plan of attack was quite brilliant; it relied on the power of language. 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.” Corporations needed to reframe how protesters

24. See id.
27. Id.
28. See id.
30. Id.
32. See generally POTTER, supra note 14 (providing a detailed history on the term eco-terrorist).
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.
36. Id. at 154–64.
37. Id. at 156.
38. See infra notes 39–44 and accompanying text.
40. Id.
41. Id.
45. See infra notes 46–49 and accompanying text.
sounds, claims such as this were published in national media outlets, and the new rhetoric of eco-terrorism continued to spread. \footnote{49}{See, e.g., id.}

As press releases and public-relations campaigns inserted this new language into the public dialogue, corporations such as GlaxoSmithKline\footnote{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).} and trade associations such as the Center for Consumer Freedom\footnote{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).} 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. \footnote{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.} 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. \footnote{53}{See, e.g., Walden: Earth Liberation Front a Threat, CONGRESSDAILY, Sept. 12, 2001, at 12.} 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.” \footnote{54}{Id.} The next month, the *Washington Times* called for war against the “eco-al-Qaeda.” \footnote{55}{War Against Eco-Terrorists, WASH. TIMES (Oct. 7, 2001), https://www.washingtontimes.com/news/2001/oct/7/20011007-025834-9663.} Kimberley Strassel of the *Wall Street Journal* heralded a new political climate for neutralizing activists as “eco-terrorists.” \footnote{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.} “The indulgent world in which these groups had operated collapsed on Sept[ember] 11,” she wrote. \footnote{57}{Id.}
Post-9/11, warnings of eco-terrorism saturated mainstream media.\textsuperscript{58} Travis Wagner, a professor of environmental science and policy at the University of Southern Maine, has studied how national newspapers portray these activists.\textsuperscript{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.\textsuperscript{60} Wagner noted that this increase in ecotage-related stories accompanied a decline in actual crimes.\textsuperscript{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.\textsuperscript{62} As warnings of eco-terrorism made headlines, the threat itself waned.\textsuperscript{63}

Eventually, this language worked its way into the top levels of government.\textsuperscript{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].\textsuperscript{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."\textsuperscript{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.\textsuperscript{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

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\textsuperscript{59} \textit{Id.} at 26–27.

\textsuperscript{60} \textit{Id.} at 32–34.

\textsuperscript{61} \textit{Id.} at 34.

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

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{See infra notes 65–67 and accompanying text.}


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

69. See id.
70. See id.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
These instructions for law enforcement are also coming from for-profit corporations. 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. 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.

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. The presentation includes publicly available photos from organization websites and background information on “Tar Sands Blockade Leadership: Professionals [sic] Organizers.” Scott Parkin, for example, is described as a “professional activist.” 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.” TransCanada’s presentation warns that he “conducts most of the Non Violent Direct Action training” and that his colleague, Rae Breaux, is an “expert rock climber and trainer for Tree Sitting projects” and “has presented speeches.”

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

79. See infra notes 80–92 and accompanying text.
84. Id. (quoting TransCanada Presentation, supra note 83).
86. Potter, supra note 83 (quoting TransCanada Presentation, supra note 83).
87. Id. (quoting TransCanada Presentation, supra note 83).
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 statues [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. TransCanada is not pleading with law enforcement to crack down on property destruction or violence because that is not what this campaign is about. 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.

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 say 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-
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

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110. Senate Hearing, supra note 51.
112. Id. at 2.
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.

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.
128. See id.
Similarly, statements that the Animal Enterprise Terrorism Act would never be used against undercover investigators were later revealed to be dishonest. 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. 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 noted, 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 concluded there “is a reasonable indication” that the activists [committed “animal enterprise terrorism.”]

“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.

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. In the House, the bill was snuck through on the very first day back from congressional recess. The Ani-

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132. Id.
133. Id.
134. Id.
mal Enterprise Terrorism Act was passed as part of the suspension calendar, which is a procedure used to expeditiously deal with noncontroversial legislation. That week, the procedure was also used to honor the St. Louis Cardinals for winning the World Series. Only one percent of lawmakers were in the room for the vote. The rest were outside at a new memorial. 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.

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.

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 industry—entering the food supply. 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. Workers were recorded beating and kicking the cows, applying electric shocks, and stabbing them with the blades of a forklift. 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.
146. Id.
147. Id.
2005. These sick animals would have been fed to school children in thirty-six states as part of the USDA’s national school-lunch program. The exposure of these practices prompted the recall of 143 million pounds of meat, the largest meat recall in U.S. history.

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. The industry has labeled whistleblowers as “terrorists” and supported new laws to silence them. “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. These proposals—introduced in twenty-eight states, passed into law in eight—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. In Montana, North Dakota, and Kansas, “agricultural interference” laws include outright bans on photography and video recording. 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.” These laws remained on the books and set a legal precedent, but they were not enforced. 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. In California,
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

¹⁶⁵.  Id.
¹⁶⁶.  Nunes, supra note 160.
¹⁷⁰.  See Lennard, supra note 168.
¹⁷¹.  See id.
case and broke the story on my website. Within twenty-four hours it had created such an uproar that prosecutors dropped all charges.

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. 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. 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.

“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. “[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.”

This was the foundation of a constitutional challenge to Idaho’s ag-gag law. 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. A wide range of organizations supported the lawsuit by filing amicus briefs. They represented food-safety, environmental, labor, whistleblower, and journalism organizations.

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178. Id.
180. Id.
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.\textsuperscript{183} Video footage that is favorable to the industry would not be subject to prosecution: it is only critical reporting that is at risk.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{187} “Many legislators made their intent crystal clear by comparing animal rights activists to terrorists . . . .”\textsuperscript{188}

Nevertheless, ag-gag proposals continue to be introduced at the state level in evolved forms.\textsuperscript{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.\textsuperscript{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.\textsuperscript{191} North Carolina’s H.B. 405,\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{194}

\textsuperscript{183} Otter, 118 F. Supp. 3d at 1202.
\textsuperscript{184} Id. at 1206.
\textsuperscript{185} Id. at 1207.
\textsuperscript{186} Id. at 1202.
\textsuperscript{187} Id. at 1210.
\textsuperscript{188} Id.
\textsuperscript{190} See id.
\textsuperscript{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.”

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.”

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. This includes anti-abortion extremists, neo-Nazis, and right-wing militias who have seized federal land with assault rifles.

Right-wing violence has increased by more than 400% since the 1990s, according to a study by West Point’s Combating Terrorism Center. 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. In the three years after September 11, alone, there were 283 injuries and 71 deaths caused by these groups. 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.

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).
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. In either case, this puts public safety in danger. When FBI agents are attempting to infiltrate vegan potlucks, 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. The FBI was urged to no longer “spend time and resources on lower-threat activities by social protesters.”

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.” 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.”

The FBI has ignored all of these warnings and maintained its focus. 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. The activists had released mink into the wild and vandalized property by painting “[l]iberation is [l]ove.”

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.” In 2010, the

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205. See generally POTTER, supra note 14 (discussing in detail how these priorities were influenced by corporate lobbying efforts).
208. Id. at 94.
212. Id.
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

217. Id.
218. Perliger, supra note 201, at 114.
220. Id. at 7–8.
Fascist groups like Identity Evropa, the Proud Boys, Lion Guard, and others have mobilized to take advantage of this political environment. They have published lists of businesses “openly hostile to . . . Trump.” They have held rallies with torches. 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. When three men intervened to stop him, he killed two of them and slit the other’s throat. In the courtroom on May 30, Christian yelled, “Free speech or die, Portland,” and “You call it terrorism, I call it patriotism.” In August 2017, so-called alt-right groups marched in Charlottesville, Virginia, alongside neo-Nazis and armed militias. On that day a black protester, Deandre Harris, was beaten by white supremacists with metal poles. 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. 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.
In Nebraska, a heavily armed white supremacist—carrying his National Socialist Movement membership card—managed to stop an Amtrak train. He said he was interested in “killing black people.”

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 hasOverhauled the Countering Violent Extremism program to focus solely on Islam and exclude right-wing terrorism. Funding through the Department of Homeland Security for a program to fight white supremacists was revoked. Neo-Nazis like Andrew Anglin of the Daily Stormer have celebrated and proclaimed “Trump is setting us free.”

Trump has clearly inspired the far right, but the FBI has known for decades that these groups pose a growing threat. Neo-Nazis 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. Now, as these extremist groups increasingly deliver on their promises for bloodshed, the FBI is dodging responsibility. An FBI official told Politico that the bureau is constrained by legal protections that make it difficult to target white nationalists.

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243. See supra Part VI.
244. See supra notes 226–37 and accompanying text.
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

248. See Watkins & Meyer, supra note 245.
249. See supra notes 210–17 and accompanying text.
252. See infra notes 253–56 and accompanying text.
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. The Trump-affiliated Breitbart News labeled Earth First! a “terror-affiliated group” and warns, “[T]he Earth First! Journal is very media-savvy.” A top executive of Energy Transfer Partners, the company building the Dakota Access Pipeline, said pipeline opponents are terrorists. 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.

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

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

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257. See infra notes 258–60 and accompanying text.
tests” in her state after the protest led by Native American tribes at Standing Rock. 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. 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.

Perhaps the best illustration of how these repressive measures have expanded comes from Washington state. 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. 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.’” But protesters are not the only targets. 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.”

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.” Ericksen acknowledges that the “Pre-

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269. See infra notes 270–72 and accompanying text.
273. Id.
vening 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

278. See id.
281. See, e.g., id.
282. See id.
283. See id.
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, 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, dangerous legal precedents have been established, and legislative proposals to criminalize protest have been codified. 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. The FBI and Homeland Security have issued confidential intelligence briefings about anarchists and antifascists, or “antifa,” that mirror similar warnings about “eco-terrorism.” More than 200 people, including journalists, were arrested at protests of Trump’s inauguration. They faced felony riot charges, decades in prison, and a media smear campaign describing them as “anarchists” and domestic terrorists. Mark Goldstone, who represented six of the “J20” defendants, said the charges were “unprecedented territory.” “In my over thirty years of practicing law,” he said, “I’ve never seen anything like this.” Hundreds of thousands of people have signed a White House petition that urged Trump to label antifa as terrorists. “[J]ust as [the United States] rightfully declared ISIS a terror group,” the petition says, “they must declare AntiFa a terror group.” 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.
295. Id.
299. Id.
301. Id.
Trump’s political strategist Roger Stone falsely told journalists that antifascists and anarchists were the “prime suspect” and “have blood on their hands now, very clearly.”

The tactics that have been pioneered against animal rights and environmental activists are not just expanding domestically, they are being exported internationally. 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. Europol, the European police agency, published a report on terrorism threats meant as a warning for law enforcement agencies. The report included the 2005 bombing of the London subway, for example, and the 2004 bombing of the Madrid train system. The report also included a section on animal rights activists and a warning about activists with cameras. “ARE [animal rights extremists] activists also use disinformation methods in order to discredit their targets and weaken their public acceptance,” the report says. “Images of sick and abused animals are embedded in video footage and made public.” 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.” “Farmers [even offered a $10,000 (AUS) reward to anyone who can help convict an animal activist.”


305. See id.

306. See id. at 4.

307. Id. at 13.

308. Id. at 32.

309. Id.

310. Id.


at night.” The agriculture industry in Australia is openly, explicitly modeling Australian proposals after U.S. legislation. 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.