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Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protectionists As Terrorists

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Since President Bush signed the USA Patriot Act² into law on November 26, 2001, more than 357 legislative bodies, including four states, have passed resolutions condemning the law's encroachment upon civil liberties.³ The Maine legislature, for example, found the USA Patriot Act so fearsome that it resolved, in the Act's wake, to "reaffirm [its] sworn oaths to defend" its citizens' "freedom of expression [and] . . . freedom of association, including the ability to attend meetings without being monitored or belong to an organization without fear of reprisal."⁴ The State of Hawai'i urged its Congressional delegation to work to repeal the USA Patriot Act, recalling that many of its residents, during World War II and the Japanese internment, had "experienced first hand the dangers of unbalanced pursuit of security without appropriate checks and balances for the protection of basic liberties."⁵

Despite the outpouring of condemnation from anxious state and local governments, at least thirteen state legislatures, including that of Hawaii, have either passed or are currently considering

1. The author is a December 2004 graduate of the concurrent JD/MPH program between Northeastern University School of Law and Tufts University School of Medicine. He wishes to thank Professor Wendy Parmet, Professor Taylor Flynn, Emily Read, and Tobin, Margaret, and Garrison O'Brien.

2. The USA Patriot Act is the labored acronym for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended at titles 8, 12, 15, 18, 20, 21, 22, 28, 31, 42, 47, 49, and 50 of the United States Code).

3. The American Civil Liberties Union (ACLU) maintains on its website a tally of jurisdictions that have passed resolutions expressing disapproval of the USA Patriot Act. See ACLU <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207> (last modified September 29, 2004). The four states that have condemned the USA Patriot Act as of November, 2004 are Alaska, Hawai'i, Maine, and Vermont. *Id.*

4. H.R. Res., 121st Leg., 2d Spec. Sess. (Me. 2003).

5. S. Con. Res. 18, 22d Leg. (Haw. 2003).

versions or parts of a model bill⁶ that borrows the legal framework of the USA Patriot Act and manipulates its anti-terror rhetoric to wage an even broader offensive against civil liberties. These so-called Animal and Ecological Terrorism bills would make it a felony to, among other things, “deter” the business activities of industries engaged in the exploitation of animals and natural resources by “protest[ing] the actions of a . . . corporation” or “influenc[ing] a unit of government to take a specific action.”⁷ Although the bills also address a range of destructive activities, these other provisions are merely a reiteration of existing state criminal codes.⁸ Accordingly, these bills’ only real contribution to the black-letter law is to confer bald economic protectionism upon their drafters and chief proponents – a limited set of favored business enterprises – by criminalizing speech acts that are critical of their practices.

Part I of this Article describes the model Animal and Ecological Terrorism Act (hereinafter the Model Act), its permutations currently pending in state legislatures, its proponents, and their motivations. Part I also explains the legal and rhetorical parallels between the Model Act and the USA Patriot Act. Part II of this Article predicts that courts will find the bills’ constraints on speech to be undeniably content-based and without a sufficiently compelling state interest. Part II also predicts that should any of the bills become law, they will not withstand First Amendment scrutiny in actions brought in federal courts, as they are both vague and overbroad.

Part III situates these bills within the long and familiar history of restraints on speech in the name of both public and private interests. Although federal and state governments have historically placed civilly and criminally enforceable restraints on speech in the name of private economic interests and national security, respectively, this Article argues that the bills represent a significant departure from their historical antecedents, in that they

6. See American Legislative Exchange Council, *Animal & Ecological Terrorism in America*, available at <http://www.alec.org/meSWFiles/pdf/AnimalandEcologicalTerrorismInAmerica.pdf> (2003) [hereinafter ALEC]. A nearly identical draft of the model bill has been published by the U.S. Sportsmen’s Alliance. See U.S. Sportsmen’s Alliance, *The Animal and Ecological Terrorism Act*, at <http://www.wlfa.org/interactive/features/read.cfm?ID=1129> (last visited July 13, 2004).

7. ALEC, *supra* note 6, §§ 2(D), 2(N), 3(A)(1)(a). A felony sentence is triggered if violation of the Act results in a loss of more than \$500 to the affected business entity. *Id.* § 4(B).

8. See *infra* text accompanying note 26.

mark the first time that speech activity has been criminalized in the name of private economic interests.⁹ Moreover, to the extent that the bills draw upon or incorporate the specific legal standards expressed in each of the historical constraints, this Article argues that every time, the particular doctrine has been manipulated or misapplied.

Part IV explains how the bills exploit the USA Patriot Act's anti-terrorism rhetoric, while in fact detracting and distracting from efforts to deter the actions of other domestic groups that have already killed and injured hundreds of Americans. Part IV also demonstrates that the bills reveal a concerted corporate strategy to manipulate the term "terrorist" and capitalize on its potency, in an anticompetitive effort to secure protectionism from the adverse economic effects of criticism, protests, and boycotts.

I. THE MODEL ANIMAL AND ECOLOGICAL TERRORIST ACT AND ITS PROGENY IN THE STATE LEGISLATURES

A. Construction of the Model Act's Primary Provision: What Does it Mean to "Deter" Business or "Coerce" Consumers?

The Model Act, broadly stated, is designed to prohibit environmental and animal rights activists from *interfering with* the companies whose corporate practices they would seek to change.¹⁰ The crux of the constitutional issues presented by the Model Act is what one means by *interference*. Unlawful, destructive activity such as sabotaging logging equipment *interferes* with business, but so does the presence of two handbillers outside a store. In its present state, the law distinguishes between the two, punishing one while protecting the other as free speech.¹¹ The Model Act and its permutations in the states, however, would blur this carefully wrought distinction and criminalize both, by using vague, undefined terms such as "deter," "obstruct," "coerce," "influence,"

9. The single exception to this pattern, as explained in Part III *infra*, is Colorado's agricultural disparagement law, which makes it a crime to "knowingly . . . make any materially false statement" regarding an agricultural product. COLO. REV. STAT. ANN. § 35-31-101 (West 2004). According to the author's search, Colorado's is the only agricultural disparagement law that provides criminal sanctions. *Id.* A search of both reported and published but not reported cases reveals that it has never been invoked.

10. ALEC, *supra* note 6, § 3A.

11. *Id.*, § 3(A)(2).

and “impede” to describe the prohibited interference.¹² In section 3(A)(1) of the Model Act, for example, this prohibition – the Model Act’s primary provision – reads:

Depriving the owner of an animal or natural resource by . . . obstructing the lawful use of an animal, natural resource or other property from the owner permanently or for such a period of time that a significant portion of the value or enjoyment of the animal, natural resource or property is lost to the owner by way of coercion, fear, intimidation, or property damage.¹³

The New York bill is nearly identical, but it substitutes the even more vague “deter” for the word “obstruct” in the Model Act.¹⁴ In the Oklahoma version of the Model Act, which has already been signed into law, the operative term is “disrupt.”¹⁵

Regardless of the synonym used to describe the prohibited interference with favored business interests, the Model Act and its bills leave these key operative terms undefined. The only other section of the Model Act that provides any context for how terms like “coerce” and “deter” should be interpreted confirms that its drafters intended the Model Act to reach to the very core of protected speech activities. Section (N) of the definitions section, which designates certain activity as “politically motivated,” indicates that the proscribed “depriv[ation]” of a business interest can also occur vis à vis:

12. Indeed, the terms “obstruct,” “deter,” and “impede” are used interchangeably even within the Model Act. ALEC, *supra* note 6. Subsection D of the definitions section, which defines an “animal or ecological terrorist organization,” groups the word “obstruct” together with the words “impede” and “deter” when describing the effect of the proscribed action upon the protected business entity. *Id.* § 2(D). When paired with section 3(A)(1), this subsection has the effect of criminalizing an entire range of activity, some of which need not involve physical obstruction. *See id.* §§ 2(D), 3(A)(1). Subsection D reads:

“Animal or ecological terrorist organization” means any association, organization, entity, coalition, or combination of two or more persons with the primary or incidental purpose of supporting any [“politically motivated”] activity through intimidation, coercion, force, or fear that is intended to obstruct, impede or deter any person from participating in a lawful animal activity, animal facility, research facility, or the lawful activity of mining, foresting, harvesting, gathering or processing natural resources.

Id. § 2(D) (emphasis added).

13. *Id.* § 3(A)(1). Note the parallel construction between this subsection and section 2(D), quoted *supra* note 12.

14. A. 4884 / S. 2996, 226th Ann. Legis. Sess. (N.Y. 2003).

15. OKLA. STAT. ANN. tit. 2, § 5-105 (West 2003).

any activity where the principal purpose is to influence a unit of government to take a specific action or to persuade the public to take specific action, or to protest the actions of a unit of government, corporation, organization or the public at large.¹⁶

Accordingly, the Model Act prohibits these politically motivated speech acts where the actor's intent is to deter or obstruct the protected business activity, or when the actor's "intent to commit the deterring activity was politically motivated."¹⁷ It should be immediately apparent that each of these prohibited "politically motivated" activities is a constitutionally protected speech action. Indeed, the opportunity for citizens to influence their government is a core function of all working democracies, if not in fact a civic duty.

Whether politically motivated or not, as history demonstrates, "coercion" can be accomplished by many modalities, including brute force, threats of brute force, the mere presence of picketers or protesters, or even the verbal transmission of a speaker's opinion.¹⁸ As explained further in Part II, "coercion"

16. ALEC, *supra* note 6, § 2(N) (emphasis added).

17. *Id.* § 3(A).

18. As explained further in Part II, the Model Act and its progeny could be construed to reach speech acts and related conduct which are not fully protected by the First Amendment, such as incitement or protest activity that is disruptive of public order, obscene, or otherwise violates a legitimate exercise of a municipality's police power, such as a time, place or manner restriction. However, this Article limits its primary analysis to the impact of the Model Act upon speech acts that currently enjoy the First Amendment's full protection, such as "political speech" or the attempt to influence or participate in one's government. The Model Act prohibits non-violent consumer protests that, by design, do not include extortion, threats, hate speech, so-called "fighting words," or other incendiary modes of speech not fully protected by the First Amendment. Part II *infra* more fully explains how the Model Act does not limit itself to merely time, place and manner restrictions, but rather polices a broad range of conduct, some historically protected by the First Amendment, some not.

The "speech/conduct distinction" is immaterial here because the Model Act, by its very terms, regulates the communicative content of the speech act, as measured by its financial impact on the protected business. By contrast, courts applying the speech/conduct distinction in constitutional challenges to anti-panhandling ordinances, for example, often upheld the ordinances, finding that panhandling "'do[es] not necessarily involve the communication of information or opinion.'" Stephanie M. Kaufman, *The Speech / Conduct Distinction and First Amendment Protection of Begging in Subways*, 79 GEO. L.J. 1803, 1806 (1991) (quoting *Ulmer v. Municipal Court*, 127 Cal. Rptr. 445, 447 (Cal. Ct. App. 1976)). Even if the Model Act could be read to constrain conduct only, which is a strained reading at best, it must be remembered that "much speech is accompanied by action, and courts have afforded strict first amendment protection to many completely nonverbal acts in recognition of their expressive value." *Id.* at 1821 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969)).

that results from violence and extortion is rightfully prohibited by legislative bodies, while "coercion" that results from non-threatening speech and picketing activities has been expressly afforded First Amendment protection by the Supreme Court.¹⁹ Courts observe this distinction because they recognize that some of this "coercion" might better be understood as mere "persuasion,"²⁰ which is a lawful byproduct of protected speech activity.²¹ Indeed, as the Supreme Court admonished in *NAACP v. Claiborne Hardware*, "[s]peech does not lose its protected character . . . simply because it may embarrass others or *coerce* them into action."²²

The Model Act, however, does not adhere to this distinction. Had its drafters intended its scope to reach only violent or extortionate conduct, they could have explicitly stated so, rather than using vague and open-ended terms like "deter" without aids of construction. Of equal importance, the Model Act also fails to specify whose coercion or deterrence is prohibited – that of the protected business entity or a third party such as a consumer. Accordingly, this Article understands the term "coercion," as used in the Model Act, to embody a range of speech acts, including, most importantly, the attempt and completion of the following three-step process: (1) the speaker transmits her opinion to the listener; (2) the listener receives the message, and consciously or subconsciously, the message evokes an attitude change in the listener toward the subject matter; and (3) the listener alters his behavior based on this attitude change. In the context of protest and boycott activity, the behavior change at issue is the severance or disruption of the consumer relationship with the protected business interest. The consumer who decides of her own free will not to consume certain products has thus been "coerced" as the term is configured in the Model Act.

The Model Act's definitions of "animal facility" and "animal activities" also make it clear that the drafters intend to target ordinary consumer protests.²³ For example, "animal facility" is defined broadly to include not just facilities where animals are kept, but any environment "involving the use of animals or animal

19. Speech and picketing are, of course, still subject to "time, place, and manner" restrictions so long as the proscriptions are not based on the content of the message. See discussion *infra* Part III.

20. See, e.g., David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335-46 (1991).

21. *Id.*

22. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 910 (1982) (emphasis added).

23. See ALEC, *supra* note 6, § 2(B)-(C).

parts,”²⁴ such as a restaurant or retail store. Moreover, the key provisions of the Model Act are not limited to deterrent activity that occurs on private property, or anywhere near the actual business premises.²⁵ To be sure, the Model Act also prohibits theft,²⁶ property damage,²⁷ and trespass,²⁸ but these acts are already criminalized under state and federal criminal codes.

In the context of the consumer protests clearly contemplated by the Model Act, “coercion” derives solely from the content of the speech, or the expressive effect of a physical gathering of people in a public forum; its measure is the effect on the listener’s decision-making as reflected by the protected business interests’ concomitant profit losses. The proscribed attitude and behavior changes come about from an exchange of *information*, and not spoken (or unspoken) threats, as in several of the early labor protest cases discussed in Part III below. As explained further in Part II, all protest activity, by its very nature, is “coercive” in that it attempts to “deter” the controversial action.

Accordingly, one need not engage in semantic acrobatics to read the Model Act as attempting to criminalize, on its face, lawful protest or boycott activity which has the effect of “deter[ring]” the activities of the protected business interest. Passing out handbills regarding the suffering of intensively confined farm animals, for instance, may deter business by influencing would-be consumers

24. *Id.* § 2(C).

25. The chief exception to this, as explained *infra* in Part I.B, is certain parts of the felony photography provision, which requires the entry of the actor onto the business premises. However, as explained below, even this provision is not wholly constrained to activities occurring on private property, as some “animal facility[ies]” are located on public property, such as a petting zoo at a municipal park. See ALEC, *supra* note 6, § 2(C).

26. See *id.* § 3(A)(1)(b). This provision prohibits “taking or detaining the animal, natural resource or other property and agreeing to restore it only upon reward or other compensation.” In New York, for example, this conduct would be prohibited under N.Y. PENAL LAW §§ 155.00 - .45 (Consol. 2004).

27. See ALEC, *supra* note 6, § 3(A)(2)(a), which prohibits “damaging or destroying an animal or research facility, or other property in or on the premises.” This activity is basically criminalized under section 378 of New York’s Agriculture and Markets Law, N.Y. AGRIC. & MKTS. LAW § 378 (Consol. 2004), as well as N.Y. PENAL LAW § 145.25 (Consol. 2004).

28. See ALEC, *supra* note 6, §§ 3(A)(2)(b), (f), which makes it unlawful to “ente[r] an animal or research facility that is at the time closed to the public,” or to “ente[r] or remain on the premises of an animal or research facility if the person or organization: (i) had notice that the entry was forbidden; or, (ii) received notice to depart but failed to do so.” Again, by way of example, New York already forbids this conduct under the trespass prohibitions in its Penal Law. See N.Y. PENAL LAW §§ 140.00 - .17 (Consol. 2004).

to choose a different product. The Model Act would make this action a felony if the protected enterprise lost more than \$500 in revenue.²⁹ In sum, without explicit statutory definitions to aid courts in their interpretation and circumscription of these terms, the Model Act and its bills criminalize a seemingly limitless range of conduct, including protected speech activity.³⁰

B. Other Controversial Provisions: The Felony Photography Prohibition and the Institutional Liability or Membership Provision

Another controversial provision of the Model Act is section 3(A)(2)(e), a felony prohibition against “entering an animal or research facility to take pictures by photography, video camera, or other means with the intent to . . . defame the facility or its owner,” even when such entry is lawful.³¹ It follows that a paying circus-goer, for example, who happens to witness acts of animal abuse during a performance and documents those events with a camera, may be subject to felony prosecution depending on how those images are ultimately used.³² By criminalizing the *intent* to

29. See ALEC, *supra* note 6, §§ 3(A)(3), 4(B).

30. Lest one surmise that these key definitions were omitted as an act of hasty or wanting draftsmanship, bear in mind that ALEC, the drafter, is an unusually effective lawmaking machine. ALEC boasts that 450 of the 3,100 bills introduced by its member lawmakers during the 1999-2000 political term were signed into law – roughly 15 percent. At times ALEC’s passage rate has been as high as 38 percent. See Defenders of Wildlife & Natural Resources Defense Council, *Corporate America’s Trojan Horse in the States: The Untold Story Behind the American Legislative Exchange Council* 39, at <http://www.alecwatch.org/11223344.pdf> (last visited Mar. 31, 2005) [hereinafter Defenders of Wildlife]. This is many times the average bill passage rate, as demonstrated by a recent legislative session in Kentucky during which only two of the more than 1,000 bills introduced were sent to the Governor. See Al Cross, *2004 Kentucky General Assembly: Legislature Handling Fewer Bills, Blaming Politics, Budget Woes*, COURIER-JOURNAL (Louisville, Ky.), Mar. 2, 2004, at 1A. Further discussion of ALEC follows *infra* in Part I.E.

31. Although § 3(A)(2)(e) prohibits “obstructing or impeding the use of an animal facility or the use of a natural resource without the effective consent of the owner by: entering an animal facility to take pictures,” this includes lawful entry, such as that of an invitee, because the “consent” required goes to the obstruction or impeding, not to the entry itself.

32. The implications of these provisions for journalists are obvious. For example, when Tyke the elephant escaped from her confines in 1994, killing one of her Circus International handlers and injuring a dozen spectators, journalists arrived on the scene in time to record Tyke being shot over 100 times and finally killed by Honolulu police officers on the street abutting the circus arena. A picture of Tyke being shot by Honolulu police appears at http://www.petatv.com/tvpopup/video.asp?video=circuselephants&Player=wm&speed=_med (last visited May 15, 2005). An elephant who escapes the circus is certainly still considered a part of the circus, rather than simply an unowned wild animal at large. Because the physical boundaries of the “animal facil-

defame, the Model Act turns the concept of defamation, which has its own demanding intent requirement, on its head.³³ Most importantly, defamation has always been a civil action that sounds in tort, not criminal law, "in light of the fundamental First Amendment interests involved."³⁴

The felony photography provision is no doubt designed to insulate the protected business interests from the damaging effects of undercover reporting. Such documentary efforts often capture unlawful activity, triggering long overdue enforcement actions.³⁵ Neither the Model Act nor its progeny in the state legislatures has a journalist exception to the felony photography provision, despite the fact that it proscribes conduct following lawful entry. In fact, Arizona Senate Bill 1081, which was passed by the legislature but ultimately vetoed by Governor Napolitano, did not contain an exception for law enforcement authorities either.³⁶

ity" are not defined, this image, which was published with the intent of deterring circus attendance, may violate the law proposed in H.B. 2550, which was filed on January 2, 2004 in the Hawai'i legislature.

33. Defamation is explored more fully in Part III.B.4 *infra*, in the context of the state agricultural disparagement statutes made famous by the cattle industry's 1996 lawsuit against Oprah Winfrey.

34. The Association of the Bar of the City of New York, Committee on Legal Issues Pertaining to Animals, REPORT ON LEGISLATION: A. 4884, S. 2996, at 4, *available at* <http://www.abcnyc.org/pdf/report/Animals%20-%20Terrorism.pdf> (last visited July 13, 2004) [hereinafter ABCNY].

35. For instance, in 1997, an undercover journalist from a British television station obtained employment at Huntingdon Life Sciences, an animal research facility, and secretly filmed animal technicians mistreating laboratory dogs in violation of animal welfare laws. The "most notorious sequence" caught on tape, which ultimately led to the researchers' convictions on criminal animal abuse charges, occurred when two researchers brutally and repeatedly punched a "terrified" four-month old beagle "because it dared to struggle as a test injection was being administered." Eamonn O'Neill, *Hounded Out?*, THE SCOTSMAN, Nov. 10, 2001, at 10. This exposé was the catalyst for a wave of enforcement actions by both British and American authorities, leading them to cite Huntingdon for thirty-two violations of the U.S. Animal Welfare Act and sixteen violations of the U.K. Good Laboratory Practice laws.

Such enforcement actions are rare, however. Given the enforcement agencies' admitted reluctance to pursue violations, *see* Animal and Plant Health Inspection Serv., U.S. Dep't of Agric., INNOVATIVE ENFORCEMENT: HOW USDA HAS USED NEW TOOLS AND TECHNIQUES TO IMPROVE ITS ADMINISTRATION OF THE ANIMAL WELFARE ACT, *available at* <http://www.aphis.usda.gov/ac/hammer.html> (Nov. 1998), the press and other private investigators play a pivotal and understated role in policing the unlawful activities of businesses on private property.

36. *See* S. 1081, 46th Leg., 2d Reg. Sess. (Ariz. 2004). This omission, which would have essentially precluded enforcement of the state's anti-cruelty laws against businesses, may have prompted the veto. Without a law enforcement exception, S. 1081 would have prohibited a designated humane society officer from entering the business premises to either investigate animal cruelty or impound injured or neglected animals.

Another controversial element of the bill is section 3(A)(3), the membership clause or institutional liability provision.³⁷ This provision would make it a felony to donate money to or in any way assist an organization that sponsors or conducts the prohibited deterring activity, regardless of whether the donor had any specific knowledge or intent. Perhaps most troubling, donors or members found guilty under the institutional liability provision would also be added to a "Terrorist Registry" along with those who actually participate in the deterring activity, and their names and photographs posted by the Attorney General on a state website for three years or more.³⁸

Indeed, the reach of this provision is so broad that a committee of the Association of the Bar of the City of New York warned that the definition of a terrorist organization could include the American Society for the Prevention of Cruelty to Animals, the Sierra Club, and even the committee itself.³⁹ In sum, without straining the literal language of the Model Act, anyone who gives money to a mainstream environmental or animal protection organization that in any way "deter[s]" a protected business activity could be incarcerated and deemed a terrorist. This is cause for great concern, as it brings within its reach a notable percentage of the American public.⁴⁰

C. The State Bills

As of the 2003-2004 session in state legislatures, versions or pieces of the Model Act have been introduced in at least thirteen states, and several are still being actively considered.⁴¹ In New

37. The text of section 3(A)(3) appears *infra* in the text accompanying note 46.

38. ALEC, *supra* note 6, § 5.

39. ABCNY, *supra* note 34, at 2.

40. The Humane Society of the United States, for example, is one of many mainstream organizations which could be said to "deter" certain animal enterprise because, among other things, it encourages members to use the legislative process to secure more humane treatment for animals. See Humane Society of the United States, *Legislation and Laws*, at http://www.hsus.org/legislation_laws (last visited Mar. 3, 2005). It has more than seven million members. Humane Society of the United States, *Member FAQ's- The HSUS*, at http://www.hsus.org/about_us/member_faqs/member_faqs_the_hsus/ (last visited Mar. 3, 2005).

41. See S. 993, 2003-04 Reg. Sess. (Cal. 2003) (signed into law); S. 584, 49th Sess. (Okla. 2003); H.R. 433, 78th Leg. (Tex. 2003); S. 6114, 58th Leg., 2d Sess. (Wash. 2003); S.B. 1081, 46th Leg., 2d Reg. Sess. (Ariz. 2004) (vetoed by Governor Napolitano); H.R. 3518, 72d Leg. Assem. (Or. 2003); A. 4884 / S. 2996, 226th Ann. Legis. Sess. (N.Y. 2003); H.R. 1176, 92d Gen. Assem., 2d Sess. (Mo. 2004) (died when the second session adjourned); S. 882, 92d Gen. Assem., 2d Sess. (Mo. 2004) (differs from H.R. 1176 in that it focuses on criminal penalties for undercover photography of

York, for example, Senate Bill 2996 mirrors the language of the Model Act almost verbatim, but with a subtle linguistic twist that confirms its drafters' intent to reach all types of conduct. It prohibits the obstruction, impeding, or deterrence of the protected business activity by criminalizing not only acts of "coercion," but also acts that deter the protected activity via any "other means."⁴² Accordingly, this bill proscribes an even broader range of speech activity than protests that, while non-violent, could nonetheless be described as deterring or coercive. Indeed, the term "other means," by its very nature, is limitless.

Although the Model Act has yet to be passed in its full form, several states have already passed parts of it into law. Oklahoma, for example, now forbids certain undefined activities that "disrupt" animal enterprises as a felony, punishable by a three year imprisonment and \$10,000 fine.⁴³ Indiana's "Agricultural terrorism" statute, in contrast, penalizes conduct that is traditionally, and more rationally, recognized as terrorism. It states simply:

A person who knowingly or intentionally: (1) possesses; (2) manufactures; (3) places; (4) disseminates; or (5) detonates; a weapon of mass destruction with the intent to damage, destroy, sicken or kill crops or livestock of another person without the consent of the other person commits agricultural terrorism, a Class C felony.⁴⁴

Unlike the Model Act, its aim is not to confer economic protection upon agribusiness *per se*. Rather, the Indiana statute protects public health and safety from true terrorists who use the agricultural infrastructure as a delivery mechanism for infectious pathogens and other harmful modalities. The Indiana statute more closely parallels the federal definition of terrorism⁴⁵ in that it addresses destructive acts of a large scale, which, unlike isolated

animal enterprises); H.R. 5128, 93d Gen. Assem. (Ill. 2004); H.R. 2550, 22d Legis. (Haw. 2004); S. 69, 2002 Leg. (Colo. 2002) (providing civil remedies for interference with agricultural products; signed into law by Governor Owens); H.R. 4439, 115th Leg. (S.C. 2003); S. 589, 2003 Sess. (Pa. 2003) (creating the crime of "environmental harassment").

42. A. 4884 / S. 2996, 226th Ann. Legis. Sess. § 1(J) (N.Y. 2003).

43. See S. 584, 49th Sess. (Okla. 2003), now codified at OKLA. STAT. ANN. tit. 2, §§ 5-105, 106 (West 2004).

44. IND. CODE ANN. § 35-47-12-2 (Michie 2003).

45. See 18 U.S.C. § 2331(5) (2000), discussed *infra* in the text accompanying note 53.

protest activities, could have the effect of intimidating the government or the civilian populace as a whole.

D. Using the USA Patriot Act as a Platform

In several ways, the Model Act functions as an industry-specific USA Patriot Act, by penalizing activity along all points of what its drafters consider a "terrorist" infrastructure. In deciding who is or is not a terrorist, for example, the Model Act employs mechanisms familiar from the USA Patriot Act. Its organizational liability provision parallels the USA Patriot Act's prohibitions on providing "material support" to alleged terrorists in various ways. The Model Act prohibits:

raising, soliciting, collecting or providing any person with material, financial support or other resources such as lodging, training, safe houses, false documentation or identification, communications, equipment or transportation that will be used in whole or in part, to encourage, plan, prepare, carry out, publicize, promote or aid an act of animal or ecological terrorism.⁴⁶

Likewise, section 805 of the USA Patriot Act prohibits individuals from giving "material support for terrorism,"⁴⁷ and section 806 authorizes the seizure of all assets held by terrorist organizations or alleged to be used for terrorist purposes.⁴⁸

As in the institutional liability provision of the USA Patriot Act, the Model Act also lacks a specific intent requirement that donors or members have *specific* knowledge that their actions contribute directly to "terrorism." Commentators also warn that the institutional liability provisions of the USA Patriot Act, like those of the Model Act, "could classify as domestic terrorism any activity [the government] found unpopular, including such legitimate activist actions as labor union strikes and protests concerning abortion rights, animal rights, civil rights, the environment, or the G-4."⁴⁹ The Model Act, however, goes one step further than the USA Patriot Act, by affirmatively making that classification.

Although the Model Act does not specifically call for the surrender of organizations' membership lists, one can safely assume that this would occur any time law enforcement authorities in-

46. ALEC, *supra* note 6, § 3(A)(3).

47. 18 U.S.C. § 2339(a).

48. 18 U.S.C. § 981(a).

49. Patricia Mell, *Big Brother At the Door: Balancing National Security With Privacy Under the USA Patriot Act*, 80 DENV. U. L. REV. 375, 410 (2002).

voked the organizational liability provision, in order to verify the alleged membership connection. The USA Patriot Act similarly invades citizens' personal and associational privacy, by authorizing wide ranging and deeply penetrating surveillance activities in order to ascertain an individual's association with certain organizations.⁵⁰

The impact of both laws upon freedoms of association is clear. As a matter of common sense, if citizens are aware that membership in or donating money to a cause puts them at risk for felony anti-terror prosecution, they are far less likely to form those associations. These concerns are far from speculative. As we have seen with the USA Patriot Act, law enforcement authorities have actively used their enhanced surveillance authority to cast a wide dragnet across the citizenry, snaring people with the most attenuated connections to groups alleged to have financially supported terrorist activity, regardless of their knowledge or intent.⁵¹ Those who support humane organizations therefore have every right to fear prosecution under the Model Act's institutional liability provision.

However, unlike the Model Act, not even the USA Patriot Act goes so far as to create a registry of those convicted as terrorists. It is also curious that the Model Act parades under the banner of anti-terrorism, while prohibiting only activities that are non-violent in nature, such as property damage, trespass, and theft.⁵² This departs from the long-standing federal definition of terror-

50. To this end, the USA Patriot Act amended the Fair Credit Reporting Act, the Financial Right to Privacy Act, the Electronic Communications Privacy Act, the Family Education Rights and Privacy Act, and other sections of the United States Code dealing with bank records, telephone communications, and library records. *See id.* at 393-95 (citing USA Patriot Act §§ 210, 504, 505(a)(2), 505(b), 505(c), 507).

51. For example, lawyer Brandon Mayfield, falsely accused by the federal government of plotting the recent bombing of a train in Madrid, recently filed a suit challenging the constitutionality of the USA Patriot Act. *See* Noelle Crombie, *Lawyer Sues U.S. For Arrest In Bombing*, THE OREGONIAN, Oct. 5, 2004, at B1. The complaint alleges that federal agents improperly searched his home under the USA Patriot Act's expanded "sneak and peek" provisions. *Id.* The FBI used this enhanced surveillance authority to collect evidence that Mayfield had once advertised his legal services in an Islamic community publication owned by a man "suspected to have links to terrorism," and that his wife had once called a "branch of an Islamic charity" alleged to have once received funds from another entity "suspected [of] terrorist ties." *Id.* The Mayfield case is a sobering example of how federal authorities have used the USA Patriot Act's surveillance provisions to build attenuated inferential chains by which nearly any targeted citizen could be deemed to have terrorist "ties."

52. Section 4(C) of the Model Act does include a sentence enhancement for crimes resulting in injury or death, but the prohibitions themselves are limited to non-violent activity. *See* ALEC, *supra* note 6.

ism, as used in the USA Patriot Act, which is limited to activities that:

- (A) *involve acts dangerous to human life* that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended— (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a *government* by intimidation or coercion; or (iii) to affect the conduct of a *government* by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.⁵³

As demonstrated in Parts I.A and B, the Model Act prohibits a wide range of conduct, none of which can be remotely described as either dangerous to human life or designed to intimidate the government or the civilian populace as a whole.⁵⁴ Nor must the prohibited conduct involve violent activities such as mass destruction, assassination, or kidnapping.⁵⁵ Rather, many of the activists targeted by the Model Act only seek an audience with consumers and policymakers, as with any other special interest group.⁵⁶

Despite the overt similarities between the Model Act and the USA Patriot Act, communities in all but two of the thirteen states in which versions of the Model Act are pending have condemned the USA Patriot Act as a threat to civil liberties.⁵⁷ That a state legislature like Hawai'i's, which so passionately rebuked the USA Patriot Act, would then entertain these bills demonstrates that either the bills' supporters are misrepresenting their scope, or that the legislatures' renewed commitment to civil liberties is not as robust as it appears, but rather varies inversely with the strength of the favored industries' lobby.

Finally, the very use of the word "terrorism" in the Model Act to describe the prohibited activities owes much to the USA Patriot Act and other recent federal anti-terror laws,⁵⁸ which have in-

53. 18 U.S.C. § 2331(5) (emphasis added).

54. See *supra* Part I.A-B; see also ALEC, *supra* note 6, § 3.

55. See ALEC, *supra* note 6, § 3.

56. See *id.*

57. South Carolina and Oklahoma are the exceptions. See ACLU, *supra* note 3.

58. See, e.g., Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002); Public Health Security and Bioterrorism Preparedness and Response Act (the "Bioterror Act"), Pub. L. No. 107-188, 116 Stat. 594 (2002); Project Bioshield Act, Pub. L. No. 108-276, 118 Stat. 835 (2004). It should be noted that section 336 of the Bioterror Act has an "Animal Enterprise Terrorism" provision that prohibits "intentionally damag[ing] or caus[ing] the loss of any property (including animals or records) used

fused the term with a rhetorical potency unknown merely four years ago. The Model Act's drafters used the USA Patriot Act as a platform, by borrowing its legal framework and specific enforcement devices, but they also expanded its scope and severity to reach non-violent activities that are not in any way related to terrorism. In sum, while the USA Patriot Act clearly inspires and informs the Model Act, the proponent industries' custom-crafted versions of it are even more of a threat to civil liberties.

E. The Bill's Proponents

The Model Act was drafted by the American Legislative Exchange Council (ALEC), and was subsequently adopted and pushed by the U.S. Sportsmen's Alliance, a "front group" for firearms and ammunition manufacturers.⁵⁹ ALEC is a tax-exempt, Washington, D.C. based organization that brings together its 2,400 member state lawmakers in "task forces" to draft model legislation from a right-wing perspective on a host of issues.⁶⁰ It receives over \$5 million annually from its corporate members, including tobacco companies, agribusiness trade associations, private corrections facilities, pharmaceutical manufacturers, and even the National Rifle Association.⁶¹ Once ALEC's task forces complete a model law, its members introduce identical or similar bills directly into their state legislatures.⁶² ALEC retains its tax-exempt status by reporting lobbying expenditures of zero, since its "member" legislators introduce the bills themselves.⁶³ In essence, ALEC is little more than a matchmaker between corporate interests who "pay to play," and right-wing legislators eager to do their bidding, all cloaked under a "tax exempt facade."⁶⁴ Although ALEC's legislators are "members" in that they pay negligible dues

by the animal enterprise, or conspir[ing] to do so." Like the Model Act, the exact nature of the property interest is not defined by the Bioterror Act. Nonetheless, the Bioterror Act's proscription is much narrower, in that it does not reach activity that merely "deters" enjoyment of the property interest, but limits only "intentional damag[e]" to property.

59. See Tom Pelton, *Hunters, Activists Have Many States In Cross Hairs: Md. Animal-Rights Groups Join in National Fight*, BALT. SUN, Oct. 24, 2004, at 1B.

60. Michael Satchell, Humane Society of the United States, *Legal Concerns: ALEC Looks to Turn Animal Activists into Domestic Terrorists*, at <http://www.hsus.org/ace/20465> (last visited Mar. 30, 2005).

61. See Defenders of Wildlife, *supra* note 30, at 20-25. The authors of the report describe ALEC as a "corrosive, secretive, and highly influential power in state capitals around the nation." *Id.* at 1.

62. See *id.* at 5.

63. See *id.* at 4; Satchell, *supra* note 60.

64. See Defenders of Wildlife, *supra* note 30, at 1, 7, 9.

each year, they can expect handsome returns in the form of paid trips to task force meetings in desirable destinations, among other things, all financed by corporate contributions to ALEC.⁶⁵ This matchmaking structure, unmediated by third-party lobbyists, allows corporate members to get around conflict of interest and lobbying disclosure laws, which are weak in many states.⁶⁶

With corporate members like the National Pork Producers Association and ExxonMobil,⁶⁷ it is no surprise that ALEC would be the font for model legislation criminalizing animal and environmental protection activists. Despite this conspicuous connection to industries that derive naked economic protectionism from the bill, its proponents nonetheless offer the feeble pretext that the bills are necessary to protect Americans from "eco-terrorism."⁶⁸ Puzzlingly, they argue that the USA Patriot Act, with its broad expansion of law enforcement authority to combat and prevent violence, is inadequate "because the federal definition of terrorism requires the death of or harm to people, an element not characteristic of eco-terrorists."⁶⁹ Given that the non-violent crimes to which the proponents point are already criminalized, as noted above, it seems unlikely that the bills' proponents genuinely seek to further the protection of public safety. Rather, the sponsor industries clearly recognize and seek to take advantage of the political expediency of the current anti-terror fervor, in order to secure lasting economic protectionism for themselves.

65. *Id.* at 5-6. In fiscal year 2000, lawmakers' dues amounted to less than 1 percent of ALEC's annual revenue. *Id.* at 18.

66. *Id.* at 4. For a summary of applicable state lobbying and disclosure laws and loopholes, see *id.* at Appendix.

67. *Id.* at 23, 25.

68. ALEC, *supra* note 6, at 15.

69. Indeed, neither the government itself, nor peddlers of the eco-terrorism rhetoric can offer concrete proof that the targeted movements have ever injured or killed any Americans. A 1993 Department of Justice report surveying the activities of the animal rights movement did not attribute to it any violence or deaths. In fact, it stated, "none of the extremist animal rights-related activities analyzed for this report is known to have resulted in the injury or death of another individual." U.S. DEPARTMENT OF JUSTICE, REPORT TO CONGRESS ON THE EXTENT AND EFFECTS OF DOMESTIC AND INTERNATIONAL TERRORISM ON ANIMAL ENTERPRISES 16 (1993) [hereinafter U.S. DEPARTMENT OF JUSTICE]. To the contrary, the Animal Liberation Front Guidelines require acts carried out in ALF's name "to take all necessary precautions against harming any animal, human and nonhuman." See Animal Liberation Front, *The Credo / Guidelines of the Animal Liberation Front*, at http://www.animalliberation-front.us/ALFront/alf_credo.htm (last visited Mar. 30, 2005). See also TERRORISTS OR FREEDOM FIGHTERS? REFLECTIONS ON THE LIBERATION OF ANIMALS 8 (Steven Best & Anthony J. Nocella II eds., 2004).

II. THE MODEL ACT'S CONSTITUTIONAL INFIRMITIES

Regardless of which term is used to describe the prohibited interference – whether “obstruct” in the Model Act, “deter” in the New York bill, or “disrupt” in the Oklahoma law – the indefinite nature of the term gives the Model Act a broad sweep across conduct and speech acts of almost any character. The imprecision with which these operative terms are employed, perhaps deliberately, proves to be the Model Act’s primary constitutional flaw. By restricting both protected and unprotected speech acts in the same sweep, the Model Act is vulnerable to invalidation on First Amendment grounds. Not only is the Model Act impermissibly content-based, as explained in this Part, it is also vague and overbroad, and is not amenable to a curative construction. This Part also argues that the recent invalidation of a similar state law in Utah,⁷⁰ which was much less vague and overbroad, is predictive of the fate of the Model Act.

A. The Model Act is a Content-Based Speech Regulation, Without a Sufficiently Compelling State Interest

The legal standard by which a restraint on speech is analyzed for its lawfulness depends on whether the restraint abridges speech based on its content. A content-based restraint is presumptively invalid unless the regulated speech is “unprotected,” such as libel, obscenity or incitement to violence, or unless the government justifies it by advancing a “compelling” state interest that is “narrowly drawn.”⁷¹ If, on the other hand, the regulation is content-neutral, and regulates speech activities instead by their manner, timing, or location, courts adopt a more deferential “intermediate scrutiny” standard.⁷² While legislatures retain the right to regulate genuine breaches of the peace, such as the ob-

70. Domestic Terrorism of Commercial Enterprises, H.B. 322, Gen. Sess. (Utah 2001) (codified at UTAH CODE ANN. §§ 76-6-110, 76-10-2401 (2002)).

71. See, e.g., *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117-18 (1991).

72. See, e.g., *Watchtower Bible & Tract Soc’y, Inc. v. Stratton*, 536 U.S. 150, 159 (2002) (stating the rule). Under the intermediate scrutiny standard for content-neutral constraints, regulation of speech is allowed “if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.*

struction of a public sidewalk or street,⁷³ the Model Act is not such a "time, place, and manner" regulation.⁷⁴ It does not differentiate between protest acts that physically and fully obstruct ingress to businesses, and those that "obstruct" businesses by persuading consumers not to enter based on the content of their message.⁷⁵ Indeed, the Model Act reaches activity that "deters" business even if the action does not take place anywhere near the business premises.⁷⁶

Rather, the Model Act is unmistakably content-based. It does not restrict speech that is favorable to the protected business enterprises, nor does it bar all speech on the subject. Only speech that has a detrimental economic effect is punished. It goes without saying that speech favorable to or made by the favored business interests would not cause them economic harm. Generally, the Court treats this type of "restriction of the expression of a particular point of view as the paradigm violation of the First Amendment."⁷⁷ In *R.A.V. v. City of St. Paul*, for example, the Supreme Court invalidated a local ordinance on the grounds of viewpoint discrimination, finding that it forbade the hate speech of one group but would not have addressed similar speech acts of competing groups.⁷⁸ A similar dynamic is at work in the Model Act. As in the *St. Paul* ordinance, the two sides of the debate must play by different rules. Nothing in the Model Act limits speech activities that similarly "deter" or "obstruct" the efforts of the protected businesses' critics. This type of asymmetrical viewpoint-based restriction has not been tolerated by the Court.

Even if the Model Act could somehow be portrayed as content-neutral, despite its overt favoritism toward certain viewpoints, its use of the listener's subjective "fear" as a basis for regulation would in and of itself render the Model Act content-based. As noted above, the Model Act prohibits "[d]epriving the owner of an

73. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965).

74. An example of an acceptable "time, place, and manner" restriction is the thirty-six foot "speech-free buffer zone" upheld against anti-abortion protesters by the Supreme Court. See *Madsen v. Women's Health Center*, 512 U.S. 753, 768-71 (1994). The Model Act, by contrast, has no physical proximity requirements, but is based instead solely upon the economic effect of the targeted protest activity. See ALEC, *supra* note 6, § 3(A).

75. ALEC, *supra* note 6, § 3.

76. *Id.*

77. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 193 (1st ed. 1999) [hereinafter SULLIVAN & GUNTHER].

78. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992).

animal or natural resource . . . by way of . . . fear”⁷⁹ As commentators have noted, constraints on speech “that is deemed likely to cause a certain response in the audience based on its content are typically viewed skeptically as direct content restrictions.”⁸⁰ A similar response-driven standard was invalidated in *Forsyth County v. Nationalist Movement* as a content-based restriction insufficiently justified by the city.⁸¹ There, the Supreme Court struck down an ordinance that allowed officials to exact variable parade permit fees based on the audience’s response to the speech.⁸² The county enacted the ordinance after a peaceful civil rights march drew thousands of violent Ku Klux Klan counter-demonstrators, which in turn required the city to expend additional resources on police.⁸³ The ordinance would have required subsequent parade organizers to pay additional fees if the parade was pre-determined to arouse certain reactions in listeners – such as fear – and hence require additional police presence.⁸⁴ In striking down the ordinance, the court held that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.”⁸⁵ Like the ordinance in *Forsyth County*, enforcement of the Model Act depends on the listener’s response or subjective state of mind, because the prohibition includes loss of business by way of “fear,” among other things.⁸⁶

Having established that the Model Act is content-based, the inquiry now turns to the whether the interests advanced by the government in support of the regulation are sufficiently compelling. As a preliminary matter, we must ascertain what the government interest truly is. The Model Act’s proponents assert that

79. See ALEC, *supra* note 6, § 3(A)(1).

80. SULLIVAN & GUNTHER, *supra* note 77, at 197. It is important to distinguish between “fear” caused by the speech itself, and “fear” that derives from violent activities *incited* by the speech, or from threats communicated by the speech. The incitement and extortion cases are inapposite here, because the Model Act, on its face, criminalizes pure speech that any listener finds subjectively fearful, even in the absence of incitement or extortion. Again, the drafters chose not to limit the Model Act’s prohibitions to inciting or extortionate speech.

81. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-37 (1992).

82. See *id.*

83. See *id.* at 125-26.

84. See *id.* at 126-27.

85. *Id.* at 134 (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

86. ALEC, *supra* note 6, § 3(A)(1). Although the listener’s or victim’s subjective reaction is an element of certain crimes, such as lack of consent in sexual assault or harassment cases, or certain defenses, such as self-defense, it is not tolerated in the First Amendment context as a basis for constraining speech. See, e.g., *Forsyth County*, 505 U.S. at 134-35.

it is needed to protect Americans from “eco-terrorism.”⁸⁷ However, the following four reasons, some of which are explored in further detail elsewhere in this Article, reveal the public safety rationale to be a mere pretext.

First, the truly destructive and extortionate activity that is prohibited by the Model Act is already criminalized.⁸⁸ Second, the proponents themselves, along with other anti-terrorism advocates and even the government, admit that the targeted activists are non-violent by definition.⁸⁹ Third, if the Model Act were truly premised on public safety or threats to the populace as a whole, it would read more like Indiana’s agricultural terrorism statute, discussed *supra* in Part I, which addresses physical attacks on the food supply with “weapons of mass destruction.”⁹⁰ Finally, the Model Act’s industry-specific character, which is even narrower than the agricultural disparagement statutes discussed below, does not benefit the entire agriculture sector, but only a small group of certain types of businesses.

The public safety pretext having been stripped away, the state’s true interest is revealed to be naked economic protectionism for a limited class of beneficiaries. Strict scrutiny is “almost always fatal,”⁹¹ but state interests premised solely on economic motives are especially vulnerable. In *NAACP v. Claiborne Hardware*, discussed further in Part III, the Court held that even broad-based economic fluctuations with the potential to wipe out entire markets were not a sufficiently compelling state interest.⁹² In the drafters’ report accompanying the Model Act, not even this level of economic perturbation is alleged, as it was during passage of the agricultural disparagement statutes.⁹³ Of the few content-based speech restraints to survive the Court’s strict scrutiny analysis, the interests advanced by the respective states were discrete

87. ALEC, *supra* note 6, at 4.

88. See *supra* text accompanying notes 26-28. Although duplicity is not indicative of pretext in and of itself, it serves to illustrate that the drafters were not, at best, acting with singularity of purpose.

89. See U.S. DEPARTMENT OF JUSTICE, *supra* note 69; see also Matthew E. Dunham, *Eliminating the Domestic Terrorist Threat In the United States: A Case Study On the Eradication of the Red Brigades*, 107 DICK. L. REV. 151, 169 (noting that direct actions by the Earth Liberation Front and the Animal Liberation Front in the United States “have not caused direct physical injury to people”).

90. IND. CODE ANN. § 35-47-12-2 (Michie 2005).

91. SULLIVAN & GUNTHER, *supra* note 77, at 196.

92. See *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982).

93. See ALEC, *supra* note 6, at 15.

in nature and truly compelling, such as the right to vote.⁹⁴ Compared to the right to vote, economic favoritism hardly appears compelling.

Nor can the restraint be justified on the unverified assumption, inherent in the Model Act's focus on one particular type of activism, as opposed to any anti-business activity, that debate as to a particular subject matter is inherently "more prone to produce violence."⁹⁵ Rather, "[p]redictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications."⁹⁶ Here, an individualized judgment would reveal exactly the opposite: that the targeted movements are inherently and by definition non-violent, and have in fact endured more violent attacks than they have propagated.⁹⁷ All in all, the state interest behind the Model Act is no more than a pretext, and is thus insufficiently compelling to justify its content-based restriction on speech, rendering its constitutionality suspect.

B. The Model Act is Unconstitutionally Overbroad

A restraint on speech is overbroad, and hence unconstitutional, if, as here, it reaches conduct or non-protected speech such as fighting words, along with protected speech. In *Gooding v. Wilson*, for example, the Supreme Court reversed the conviction of an anti-war protester under a state breach-of-peace law that forbade the utterance of "opprobrious words or abusive language, tending to cause a breach of the peace."⁹⁸ The Court struck the statute down on its face, because it swept within its breadth both fighting

94. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

95. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 100 (1972).

96. *Id.* at 101.

97. Examples of violence against activists abound, but none has ever been labeled "terrorism." In 1985, for instance, Dian Fossey was murdered by the gorilla poachers she worked against. See Steven Best & Anthony J. Nocella, *Behind the Mask: Uncovering the Animal Liberation Front*, in *TERRORISTS OR FREEDOM FIGHTERS? REFLECTIONS ON THE LIBERATION OF ANIMALS* 61 n.31 (Steven Best & Anthony J. Nocella II eds., 2004). The same year, French authorities killed a photographer who was documenting whale hunts. See *id.* In 1988, activist Chico Mendes was allegedly assassinated by cattle ranchers. See *id.* Logging companies have purposely felled trees containing tree-sitters, including one incident that killed anti-logging activist David Gypsy Chain. See *id.* In 1990, Judi Bari and Darryl Cherney were nearly killed by a bomb that detonated their car following their high-profile anti-logging activism. See *id.* By way of contrast, animal and environmental protection activists have not been convicted of any violent or fatal attacks in the United States. See U.S. DEPARTMENT OF JUSTICE, *supra* note 69.

98. *Gooding v. Wilson*, 405 U.S. 518, 519 (1972).

words and otherwise lawful speech. "The separation of legitimate from illegitimate speech," Justice Brennan admonished, "calls for more sensitive tools than Georgia has supplied."⁹⁹

Likewise, in *Machesky v. Bizzell*, the Fifth Circuit Court of Appeals found a Mississippi state court's protest injunction unconstitutional overbroad because it "lumps the protected with the unprotected in such a way as to abridge important public interests in the full dissemination of public expression on public issues."¹⁰⁰ The injunction invalidated in *Machesky* bears a remarkable resemblance to parts of the Model Act. It prohibited:

1. Picketing or marching, or persuading or inducing any other person or persons to picket or march, in any organized form whatsoever [in the vicinity of plaintiff business owners];
2. Loitering or congregating . . . for the purpose of doing anything whatsoever, directly or indirectly, to *induce, persuade, or coerce* any person or persons not to trade or do other business with the [complainants]; . . .
6. Threatening, intimidating, coercing, or using force or violence upon any person or persons so as to dissuade such person or persons from entering or trading [with complainants].¹⁰¹

Note the use of similar operative terms such as "coerce," which is paired here with "induce" and "persuade." Both the injunction and the Model Act expressly forbid speech that is designed to dissuade patrons from transacting with certain business interests, without differentiating between protected and non-protected speech acts. Moreover, the injunction in *Machesky* was invalidated despite the fact that the targeted boycott and protest activities were intermingled with acts of violence, as in *Claiborne Hardware*.¹⁰²

The Model Act, like the Georgia statute in *Gooding* and the injunction in *Machesky*, is not a sensitive instrument, but one of unfathomable breadth and bluntness. For instance, the New York bill prohibits the "supporting [of] any politically motivated activity through intimidation, coercion, fear, or *other means* that is intended to obstruct, impede or deter [the favored business activity]."¹⁰³ In this provision, the term "other means" functions as the

99. *Id.* at 528 (internal citations omitted).

100. *Machesky v. Bizzell*, 414 F.2d 283, 291 (5th Cir. 1969).

101. *Id.* at 285-86 (emphasis added).

102. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

103. *See ABCNY*, *supra* note 34, at 2. (emphasis added).

phrase "anything whatsoever" did in the *Machesky* ordinance. Its very indefiniteness signals that speech acts will not be differentiated based on their protected status.¹⁰⁴ Forbidden acts could include anything from firebombing to a bake sale to raise funds for the industries' political opponents. Even without the term "other means," the Model Act is still stunningly overbroad, as the undefined prohibitions on "detering," "impeding," or "disrupting" business could be construed to include both lawful protest activity and unlawful extortion.¹⁰⁵

Broadening its scope further still, the Model Act also criminalizes actors who donate money to or in any way assist the targeted organizations, regardless of the donors' knowledge or intent, so long as the organization "deter[s]" the protected business activity.¹⁰⁶ In *Aptheker v. Secretary of State*, the Supreme Court struck down a similar membership clause in the Subversive Activities Control Act (SACA) as unconstitutionally overbroad.¹⁰⁷ There, as here, "the [regulation] is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe,"¹⁰⁸ which is in turn irreconcilably vague.

In striking down the membership clause of SACA, the *Aptheker* Court held that without a specific intent requirement, the Act "sweeps within its prohibition both knowing and unknowing members,"¹⁰⁹ thereby impermissibly "invad[ing] the area of protected freedoms."¹¹⁰ The Model Act similarly fails to distinguish between active members and passive donors. In sum, the Model Act is overbroad not only in its ill-defined operative terms, but also in its indifferent treatment of an organization's constitu-

104. Even if the Model Act could be said to regulate only conduct, which, as explained above, would be an imaginative interpretation, its overbreadth is nonetheless "substantial" enough to meet the standard necessary for a facial invalidation as set forth in *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). Its limitless terms and subjective, listener-defined standards also evade curative construction, as discussed *infra* Part II.E.

105. See *supra* Part I.A.; See also ALEC, *supra* note 6, § 3(A)(3).

106. See ALEC, *supra* note 6, §§ 2(D), 3(A)(3). Although the Model Act does not use the word "membership," this provision should nonetheless be viewed as a membership clause, since almost every large special interest group now considers its donors "members," regardless of their actual participation level.

107. See *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964).

108. See *id.*

109. See *id.* at 510. (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

110. *Id.* at 508.

ency. Either flaw, on its own, renders the Model Act unconstitutional.

C. The Model Act is Also Unconstitutionally Vague

A criminal statute such as the Model Act must provide citizens with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."¹¹¹ This requirement is premised on the procedural due process right to notice.¹¹² Simply put, adequate notice of what activity is criminalized allows the governed to know that enforcement derives from a legitimate source of legislative authority, and is not in fact pure fiat. In this sense, vagueness also implicates the non-delegation doctrine: "[t]he failure to provide adequate standards . . . reflects Congress' failure to have made a 'legislative judgment.'"¹¹³ The need for such a legislative judgment is "especially acute" when fundamental freedoms such as free speech are involved.¹¹⁴ Without meaningful standards as to what conduct is criminalized, the executive or enforcement authority thus becomes legislative in character, substituting its own standards as it goes.

The Model Act and its state bills make just such an impermissible delegation of discretion to law enforcement authorities, by flatly prohibiting all conduct that has the effect of "detering" the commercial activity of the protected businesses. As this Article has demonstrated, the acts leave operative terms like "deter" undefined. Any successful attempt to influence consumers not to support controversial business practices has the effect of deterring commerce, or at least re-routing it to other businesses. Conceivably, one law enforcement agent might view anything short of, or perhaps even including, civil disobedience as not having a deterrent effect, while another would view wearing a certain button or a t-shirt as a deterrent modality.

This uncertainty is compounded by the fact that the Model Act's prohibitions depend on the outcome or effect of the regulated speech activity. For instance, the Model Act's criminal sanctions

111. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citing, *inter alia*, *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982)).

112. See SULLIVAN & GUNTHER, *supra* note 77, at 332.

113. See *United States v. Robel*, 389 U.S. 258, 274-75 (1967) (Brennan, J., concurring) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)).

114. See *id.* at 277.

vary based on the dollar amount by which the protected business was affected, as measured after the fact.¹¹⁵ The speaker cannot know in advance whether her efforts to persuade consumers and hence deter business will be successful, although she hopes they will, and has a constitutionally protected right to try.¹¹⁶ Nor can she guess whether she will ultimately persuade consumers to withhold \$500 as opposed to \$501 worth of business on any given occasion, thus triggering the felony provision. Accordingly, because persons “of common intelligence must necessarily guess at its meaning and differ as to its application,”¹¹⁷ the Model Act is unconstitutionally vague. Moreover, when the regulation “invokes criminal sanctions and potentially affects fundamental rights . . . the area of permissible indefiniteness narrows.”¹¹⁸

Perhaps more troubling, the Model Act may even have the effect of delegating enforcement to the protected entities themselves, by regulating speech activities based on the listener’s subjective state of mind. As discussed earlier in this Part, liability attaches under the Model Act if the protected business interest is deterred by way of “fear.”¹¹⁹ Fear is a necessarily subjective human response that varies greatly among people even when subjected to the same stimulus. Since the complainant’s fear becomes an element of the offense, speakers potentially affected by the Model Act have no way to determine how to conduct themselves, or how they should alter the content of their speech so that sensitive listeners will not find it fearful. Also unanswered is what the listener must “fear” – since the Model Act prohibits speech that negatively impacts the protected businesses’ revenue, as explained above, it follows that speech is outlawed under the Model Act when it causes the listener to “fear,” among other things, even a drop in sales.

In *Coates v. City of Cincinnati*, the Supreme Court struck down as unconstitutionally vague and overbroad a city ordinance,

115. See ALEC, *supra* note 6, § 4(A), (B). Also unspecified is the complainant’s burden of proof as to what she must show to prove economic harm. Without a clear standard, simply saying she was harmed may make it so. Such a regime would, at best, provide insufficient notice, and at worse, be susceptible to arbitrary and capricious enforcement. In effect, it would convert public law enforcement officers into the favored business entities’ private security force.

116. See *Claiborne Hardware*, 458 U.S. at 910-11.

117. *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

118. *Robel*, 389 U.S. at 275 (Brennan, J., concurring).

119. See ALEC, *supra* note 6, § 3(A)(1).

that, like the Model Act, was predicated on the listener's subjective response to the message.¹²⁰ The Court reasoned:

[c]onduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.¹²¹

Similarly, there is no real standard of conduct within the Model Act. In sum, the Model Act is not only overbroad, but also impermissibly vague. It offers courts and law enforcement agents few clues as to the outer boundaries of its scope, and affords potentially affected speakers no notice as to whether the content of their speech will subject them to incarceration.

D. A Preview: Utah's Short-Lived Commercial Terrorism Statute

In Utah, the same alignment of business interests behind the Model Act attempted to silence the speech of their political opponents using a slightly different technique, which was struck down as unconstitutional before it even went into effect. In 2001, the Utah legislature passed a "Domestic Terrorism of Commercial Enterprises" bill by which an individual would be guilty of terrorism if "he enters . . . a building of any business with the intent to interfere with the employees, customers, personnel, or operation of a business."¹²² Notably, the definition of "enter" included "the intrusion of any physical object, sound wave, light ray, electronic signal or other means."¹²³ Like the Model Act, the bill singled out activity that intended to "interfere" with an "animal enterprise."¹²⁴

Before the law went into effect, the American Civil Liberties Union (ACLU) of Utah filed an action for declaratory judgment and a preliminary injunction on behalf of the Utah Animal Rights Coalition, whose members feared they would be criminally prose-

120. *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 616 (1971).

121. *Id.* at 614.

122. H.B. 322, § 4, 2001 Gen. Sess. (Utah 2001) (codified at UTAH CODE ANN. §§ 76-6-110, 76-10-2401 (2002)); See American Civil Liberties Union of Utah, *Court Declares Utah's "Commercial Terrorism" Statute Unconstitutional*, at <http://www.acluutah.org/pr101001.htm> (Oct. 10, 2001) [hereinafter ACLU of Utah].

123. H.B. 322, § 3; ACLU of Utah, *supra* note 122.

124. See H.B. 322, § 1.

cuted for engaging in peaceful picketing activities.¹²⁵ The law would have treated protesters as though they maintained a physical presence inside the business premises, and hence guilty of criminal trespass and commercial terrorism, if their chants could be heard inside the building, or if their signs could be seen from inside the building.¹²⁶ This metaphysical feat was accomplished by treating a “light ray” or “sound wave” as the physical embodiment of a person. Not even the strictest of abortion access laws and injunctions upheld by the courts went so far.¹²⁷

The plaintiffs argued that the commercial terrorism statute was unconstitutionally overbroad because it failed to distinguish between harmful conduct and protected, expressive speech acts. For example, as the plaintiffs noted:

[n]owhere do defendants explain why the definition [of light ray] necessarily excludes expressive use of light, such as plaintiffs’ use of candles, nor do they offer any evidence to support their assertion that the statute only targets potentially harmful uses such as shining a bright light into the eye of a person or animal.¹²⁸

The plaintiffs also argued that the law was vague in that a reasonable person could not be certain what was meant by its prohibitions on “light rays” and “sound waves.”¹²⁹

Moreover, based on their personal experiences with Utah law enforcement officers, the plaintiffs feared that the law would yield arbitrary or “more severe and overzealous” enforcement against them as individuals.¹³⁰ The plaintiffs also argued that the regula-

125. See ACLU of Utah, *supra* note 122.

126. See *id.*

127. Note the similarities between the Utah “light ray” restriction and the “images observable” provision of a Florida injunction against anti-abortion protesters that the Supreme Court struck down in *Madsen*, 512 U.S. 753, 773 (1994). The *Madsen* injunction, like the Utah statute, prohibited protesters from using signs and placards that were observable inside the affected clinics. In striking down this provision, the *Madsen* Court noted that if the clinic found the protesters’ signs disturbing, all it had to do was close the curtains or look away. *Id.* For a cogent summary and analysis of *Madsen* and the seminal abortion protest cases, see Christopher P. Keleher, *Double Standards: The Suppression of Abortion Protesters’ Free Speech Rights*, 51 DEPAUL L. REV. 825, 851-58 (2002).

128. Memorandum In Support of Plaintiffs’ Motion for Summary Judgment at 11, *Utah Animal Rights Coalition v. State of Utah* (D. Utah 2001) (No. 2:01-CV-0221 J).

129. *Id.* at 7.

130. *Id.* at 8 (citing affidavits regarding a police officer who kept a copy of the bill on his person, and used it to threaten and intimidate activists into thinking it was already the law).

tion was not content-neutral, based on the defendants' admission that the statute was targeted at speech "against fur farmers, trappers . . . zoos, circuses, rodeos [and other animal enterprises]," but would not prohibit speech in favor of these interests.¹³¹ Finally, the plaintiffs asserted that if they were forced to relocate out of the sight and hearing of potential consumers, their otherwise lawful protest activity would lose all meaning.

The court sided unequivocally with the plaintiffs. U.S. District Judge Bruce Jenkins temporarily enjoined enforcement of the law and later struck it down on its face as overbroad.¹³² In its preliminary injunction opposition brief, and at oral argument, the State attempted unpersuasively to argue that the terms "light ray" and "sound wave" were intended to prohibit only the offensive use of light and sound, such as "ultra sonic sound waves, blaring noises, and intrusive light rays," including the use of a laser pointer.¹³³ Judge Jenkins, noting that the statute did not so delimit the terms, then asked the state: "Can you speak without using a sound wave? Can you see without the use of a light ray?"¹³⁴

Judge Jenkins rejected the argument that the *Kovacs v. Cooper* line of noise regulation cases controlled.¹³⁵ Rather, he found instead that the statute was content-based, and that the "sound waves" and "light rays" prohibitions were void of any meaningful standard.¹³⁶ Nor would Judge Jenkins bestow a curative construction upon the otherwise facially overbroad statute,¹³⁷ because, as the plaintiffs argued, the resulting statute would be little more than a repetition of existing criminal trespass laws, and "it is not clear the Legislature would have passed [such a]

131. *Id.* at 16.

132. See Order at 2, *Utah Animal Rights Coalition* (Oct. 25, 2001) (No. 2:01-CV-0221 J). Although the court did not rule on vagueness in its final order, the court found, in the order granting the motion for a preliminary injunction, that the plaintiffs had demonstrated a substantial likelihood of showing that the statute was both overbroad and vague. See Order Granting Plaintiffs' Motion for Preliminary Injunction at 4, *Utah Animal Rights Coalition* (May 16, 2002) (No. 2:02-CV-0221 J).

133. See Reply Memorandum In Support of Motion for Summary Judgment at 6, *Utah Animal Rights Coalition* (No. 2:01-CV-0221 J).

134. Associated Press, *Federal Court Blocks Utah 'Commercial Terrorism' Law*, May 7, 2001, available at <http://freedomforum.org/templates/document.asp?documentID=13881>.

135. 336 U.S. 77, 87-88 (1949) (upholding ordinance prohibiting all "loud and raucous noises").

136. See Order Granting Plaintiffs' Motion for Preliminary Injunction at 4, *Utah Animal Rights Coalition* (May 16, 2001) (No. 2:01-CV-0221 J).

137. *Id.*

statute if its intent was . . . to create an *additional* tool to combat 'eco-terrorism.'"¹³⁸

A similar fate awaits the Model Act. At least the commercial terrorism statute attempted to specify what is meant by "interference" with a business interest, although terms like "sound wave" ultimately generated more confusion than clarity. The Model Act is vaguer still, leaving operative terms such as "deter" to the wide-ranging interpretation of law enforcement officers, or worse yet, to the complainants themselves.¹³⁹ It is also fatally overbroad, because, like the Utah statute, it criminalizes speech along with other conduct that is already proscribed by the state's criminal code. Accordingly, as with the Utah statute, "[i]t is not possible to limit the [Model Act] to acts of 'eco-terrorism' alone, as the [state] would have the Court believe."¹⁴⁰ "Annoyance at ideas," the Supreme Court warned almost sixty years ago, "can be cloaked in annoyance at sound."¹⁴¹ A similar pretext is at work in the Utah commercial terrorism statute and the Model Act – two attempts by the same lobby, using a slightly different technique, to keep consumers from hearing the message of their political opponents.

Perhaps most importantly, throughout the proceedings, the plaintiffs stressed, and the court accepted, that the affected parties' concerns are not hypothetical – "[n]ot wanting to be arrested, plaintiffs would likely remain silent rather than risk arrest and/or criminal charges."¹⁴² Certainly, criminalization is the most chilling state action of all, short of brute force. Indeed, myriad evidence of chilling mounted after passage of the agricultural disparagement laws, even though the disparagement laws were all civil constraints save one.¹⁴³ The chilling argument is equally hard to overstate with respect to the Model Act.

138. Reply Memorandum In Support of Motion for Summary Judgment at 6, *Utah Animal Rights Coalition* (No. 2:01-CV-0221 J) (emphasis added). Further discussion of why the Model Act is not worthy of curative construction follows *infra* Part II.E.

139. See *supra* text accompanying note 115.

140. Memorandum In Support of Plaintiffs' Motion for Summary Judgment at 20, *Utah Animal Rights Coalition* (No. 2:01-CV-0221 J).

141. *Saia v. People of New York*, 334 U.S. 558, 562 (1948).

142. Memorandum In Support of Plaintiffs' Motion for Summary Judgment at 6, *Utah Animal Rights Coalition* (No. 2:01-CV-0221 J).

143. See *infra* Part III. For instance, the publisher of a food safety book cancelled its printing after Monsanto threatened to sue it under the agricultural disparagement laws. See Eileen Gay Jones, *Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws*, 66 BROOK. L. REV. 823, 857-58 (2001). Another publisher reported that she received calls from the Pet Food Institute regarding a pending book about the use of dead companion animals in pet food. The caller verbally threatened the publisher and also suggested that a legal

E. The Model Act Cannot be Saved by a Curative Construction

If the Utah statute was not amenable to a curative construction, the Model Act certainly will not be, as its flaws are greater in both severity and number. Although a court "will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it."¹⁴⁴ To rescue the Model Act from constitutional invalidation would require nothing less than a judicial re-write of nearly every provision, which the court is neither expected nor allowed to do.

For instance, the Model Act's operative terms "coerce" and "deter," as we have seen, proscribe both criminal activities and protected speech acts. In the First Amendment context, the term "coerce" cannot be given a limiting construction without replacing it entirely, since, as a matter of law, coercion is a permissible by-product of protected speech acts.¹⁴⁵ Moreover, if the court circumscribes the term "deter" to include only violent or destructive actions, little will remain of the Model Act that cannot be found elsewhere in the criminal code.

A similar flaw plagued Utah's "commercial terrorism" law, which the court declined to cure.¹⁴⁶ The *Utah* plaintiffs argued, and the court accepted, that a limiting construction would distill the law down to existing criminal provisions.¹⁴⁷ There, as here, such a limitation would, in turn, contravene the plain meaning of the statute, since merely restating the law does nothing to confer *additional* protection, which is the stated aim of the Model Act. If the Model Act's drafters truly intended to reach only violent or extortionate conduct, they could have used more precise terminology. Indeed, they needed to look only to existing criminal laws to find such text. In these circumstances, it is not the job of the court to redraft a statute's operative terms in a manner that will limit its effect — that task must be left to the legislature.

action under the disparagement law was imminent. See *id.* at 858. Ironically, under the Model Act, the publishing of such material would be criminalized, but not the trade association's menacing, extortionate behavior. In the context of food safety messages, which the Model Act would also no doubt reach, chilled speech could even have adverse public health consequences.

144. *Aptheker v. Sec'y of State*, 378 U.S. 500, 515 (citing *Scales v. United States*, 367 U.S. 203, 211 (1961)).

145. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1982).

146. See discussion *supra* Part II.D.

147. *Id.*

Another infirmity requiring judicial redrafting is the membership or organizational liability clause, by which the donors or members of any organization deemed to be a “terrorist” group, regardless of their knowledge or specific intent, are penalized in the same manner as those actually carrying out the prohibited activity.¹⁴⁸ As explained more fully in Part III.A.3, during the Red Scare, the Supreme Court obliged Congress and gave a curative construction to a similar membership clause, by reading a specific intent requirement into an anti-Communist law.¹⁴⁹ Such an effort would do little to rescue the Model Act, however, because the predicate activity aided by the would-be donor – namely, the “deter[ring]” of commerce — could be achieved by perfectly lawful means.¹⁵⁰ The government cannot forbid donors and members from aiding lawful protest activity, whether they specifically intend to help “deter” business or not.

All told, the First Amendment obstacles that lie in the path of the Model Act are many, and they are massive. If the Model Act somehow withstands First Amendment scrutiny, it will have the effect of “elevat[ing] private economic interests to the status of constitutional rights.”¹⁵¹ Not only are its content-based restrictions insufficiently justified by a compelling state interest, it is also impermissibly overbroad and vague. Most offensive, however, is the Model Act’s complete inversion of the elevated status afforded political speech and civic participation. The Model Act removes political speech from the core of First Amendment protections and instead makes it nothing less than an element of the offense,¹⁵² as though political motivation somehow renders the activity more odious or criminal in nature. Indeed, to characterize participation in the legislative process as terrorism is an act of extremism unto itself.

148. See ALEC, *supra* note 6, § 3(A)(3).

149. See *Scales v. United States*, 367 U.S. 203, 211 (1961).

150. Compare this to the predicate activity of the anti-Communist laws, which was the forcible overthrow of the federal government.

151. Note, *Labor Picketing and Commercial Speech: Free Enterprise Values In the Doctrine of Free Speech*, 91 YALE L.J. 938, 960 (1982) [hereinafter *Labor Picketing*].

152. See *supra* text accompanying note 19.

III. A DEPARTURE FROM HISTORICAL AND DOCTRINAL PATTERNS: IGNORING THE LESSONS OF TORTIOUS INTERFERENCE, SCHENCK, AND OPRAH WINFREY'S MAD COWS

The Model Act and its progeny are the latest refrain in a lengthy melodrama of historical constraints on lawful protest activity, many of which suffered from similar constitutional defects and were ultimately invalidated. Although certain speech acts, as explained below, have been criminalized in the name of national security, the Model Act represents the first attempt to criminalize pure speech in support of private economic interests. This is a profound and troubling departure from well-settled doctrine. Traditionally, criminal sanctions are reserved for speech activity only when the very existence of the State is somehow threatened. Conduct adverse to private business interests has only been criminalized when the conduct is violent, destructive, or extortionist in nature.¹⁵³ The Model Act blurs these two doctrines by affording protection to private business entities that was previously justified only by the gravest of national emergencies. Additionally, each time the Model Act borrows a legal standard from an individual historical constraint, it misappropriates it.

In arguing that the Model Act represents a true departure from precedent, this Part establishes a three-part categorization of historical speech restraints, based on: (1) the object of protection (either the State or private interests); (2) the nature of the constrained activity (either speech or violence/extortion); and (3) the type of sanction (either civil or criminal). Figure 1 displays each constraint as categorized according to these variables. Historical speech restraints to be compared include: federal laws against "subversive" wartime activity; the "tortious interference" doctrine; pre-First Amendment jurisprudence injunctions against

153. Federal criminal law already penalizes property damage to animal enterprises where the actor travels in interstate commerce or uses the mail system. See 18 U.S.C. § 43 (2000); see also Bioterror Act *supra* note 58, § 336. Unlike the Model Act, this federal law makes clear that its reach is limited to "physical disruption" resulting from intentional property damage, rather than undefined economic disruption. See *id.* (emphasis added). In 2001, Rep. George Nethercutt introduced a bill similar to the Model Act that would have amended 18 U.S.C. § 43 to penalize not just actions resulting in property damage, but also actions that cause a "loss of profits." H.R. 2795, 107th Cong. § 2 (2001). Notably, the bill would also have authorized the death penalty where the act resulted in bodily harm – not just death – to another person. See *id.* § 3. It was not referred out of the House Subcommittee on Crime.

labor picketing; Civil Rights-era restraints on political boycotts; and state agricultural disparagement laws.

Figure 1.

Category	Method of Abridgement	Object of Protection	Constrained Behavior	Type of Sanction
1	Federal and state laws against "subversive" activity	The State	Speech / association	Criminal
2	Tortious interference doctrine; injunctions against labor picketing	Private economic interests	Speech / association	Civil
	Injunctions against civil-rights era political boycotts	Private economic interests	Speech / association	Civil
	State agricultural disparagement statutes	Private economic interests	Speech / association	Civil (except Colorado, which has never been invoked)
3	Model Act and state bills	Private economic interests	Speech / association	Criminal

A. Criminal Prosecution of Speech in the Name of National Security

1. Subversive Advocacy Laws, 1798-1950

Efforts to insulate the American government from the effects of subversive speech date to the nation's formative years. The Sedition Act of 1798 authorized the incarceration of anyone who conspired to publish any "scandalous and malicious writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame . . . or bring them . . . into contempt or disre-

pute.”¹⁵⁴ Given the fragility of the fledgling State, such extreme measures, in retrospect, appear more forgivable than they would after the nation had better established itself. Yet even then, the Sedition Act had its detractors. The Jeffersonian Republicans decried the Act as a malleable and vague instrument used for partisan purposes.¹⁵⁵

The Act expired in 1801 with little fanfare. After its passing, the concept of using federal law to protect the state from the adverse effects of speech lay predominantly idle for 116 years, despite the intervention of both international and civil wars.¹⁵⁶ The Espionage Acts of 1917 and 1918 were similar in character to the Sedition Act of 1798, but focused on the nation’s vulnerability dur-

154. The Sedition Act of July 14, 1798, § 2, 1 Stat. 596-97 (expired 1801).

155. The Jeffersonians’ critiques were not merely academic; they and their newspapers were frequent enforcement targets of the reigning Federalists. Such enforcement abuses made the Act a “major factor” in the Jeffersonians’ defeat of the Federalists in the 1800 presidential election. SULLIVAN & GUNTHER, *supra* note 77, at 5 (citing Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109).

156. Although most scholars habitually accept Zechariah Chafee’s influential conclusion that the dawn of First Amendment jurisprudence arrived with *Schenck v. United States*, 249 U.S. 47 (1919), *see* Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919), other scholars point out that the vibrant struggle over free speech in fact began prior to *Schenk* in state courts. *See, e.g.*, David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 543 (1981) (describing efforts to suppress abolitionist literature); Alexis J. Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, 24 AM. J. LEGAL HIST. 56, 64 (1980) (recounting municipal exercises of police power as they affected the right to peaceably assemble).

The pre-*Schenck* cases, which were not litigated under the First Amendment, wrestled instead with the limits of municipal police power in the context of peaceable, yet sometimes disorderly, assembly. *See, e.g.*, *Commonwealth v. Plaisted*, 19 N.E. 224, 226 (Mass. 1889) (affirming police power to license parades); *In re Flaherty*, 38 P. 981, 983 (Cal. 1895) (rejecting habeas corpus petition following nuisance conviction for beating drum on public land in a daily ritual), cited in Anderson, *supra*, at 67-69. In practice, what was deemed disorderly often depended on the political views held by the assemblers. *See* Anderson, *supra*, at 71-72 (citing *Fitts v. City of Atlanta*, 49 S.E. 793, 794-95 (Ga. 1905) (deeming Socialist gathering to be a threat to public order); *State v. Sugarman*, 148 N.W. 466 (Minn. 1914)).

The issue of incitement to violence, to which the First Amendment doctrine would ultimately return, was first fully explored in the convictions of those thought to have catalyzed the Haymarket Riots. *See id.* (citing *Spies v. People*, 12 N.E. 865 (Ill. 1887)). Because very few if any of these cases involved what we would now recognize as pure speech acts fully protected by the First Amendment, they are not within the scope of this Article, which focuses on the Model Act’s implications for peaceful speech and protest activities. As Anderson explains, “the mixture of conduct with pure speech had fatally tainted [these] First Amendment claims.” *Id.* at 73. Many of the municipal ordinances at issue would be analyzed today under the deferential standard of review applied to time, place, and manner restrictions upon speech and public assembly.

ing times of war. The first of the Acts was made law on June 15, 1917, just two months after the United States declared war on Germany. It addressed activities traditionally recognized as espionage, such as stealing or copying defense blueprints, and making false reports designed to interfere with military operations.¹⁵⁷

The reach of the first Espionage Act was broadened substantially by the second Espionage Act, which amended Section 3 of the first Act. Whereas the first Espionage Act prohibited attempts to cause insubordination in the military by conveying false reports or false statements, the second expanded these prohibitions to include the utterance, printing, or publishing of "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution . . . or the military . . . or the flag . . . or the uniform of the Army or Navy."¹⁵⁸ The second Espionage Act also protected certain commerce activities from "curtailment," but the protections were limited to the production of "things . . . necessary or essential to the prosecution of the war,"¹⁵⁹ such as munitions.

Prosecutors tried hundreds of people under the Espionage Act, mostly Socialists or Communists who protested, in various ways, America's entry into World War I. The well-known trilogy of Supreme Court cases¹⁶⁰ that first interpreted the Espionage Act began to fashion a central First Amendment principle: in order to justify criminal restraints on pure speech, the speech must directly incite violence or pose a threat to the very existence of the State.

In *Schenck v. United States*, for instance, the Court held that regulation of speech activity is appropriate where the speech "create[s] a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent."¹⁶¹ In the context of war, the "substantive evils" referred to by Justice Holmes, although not specified in the opinion, undoubtedly refer to what we would now call threats to national security. Similarly, the Court in *Abrams v. United States* viewed the defendant's pamphleteering as a threat to national security because the pamphlets attempted to, in the eyes of the Court, "brin[g] upon the country

157. Espionage Act of June 15, 1917, Pub. L. No. 65-24, 40 Stat. 217, 219.

158. Espionage Act of May 16, 1918, Pub. L. No. 65-150, 40 Stat. 553-554.

159. *Id.*

160. *Schenck*, 249 U.S. at 52; *Debs v. United States*, 249 U.S. 211, 216-17 (1919); *Abrams v. United States*, 250 U.S. 616, 620-21 (1919).

161. *Schenck*, 249 U.S. at 52.

the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.”¹⁶² Dissenting in *Abrams*, Justice Holmes clarified what he had meant by the “clear and present danger” standard and said that the majority had misapplied it in affirming the defendant’s conviction. Rather, he suggested, speech must be tolerated unless it “so imminently threaten[s] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to *save the country*.”¹⁶³ Each of these pronouncements clearly ratifies the central principle by denoting the State, and its very existence, as the object of protection.

Nonetheless, the Court went on to affirm the conviction of each of the trilogy defendants anyway, even where his threat to the nation-state could be described as attenuated at best.¹⁶⁴ The Court accomplished this not by compromising on the principle, but by overstating the potency of the speech, and even at times distorting the speech itself. In *Abrams*, for instance, the defendant’s pamphlet described the capitalist American government as the “enemy” of workers – a phrase which the Court interpreted as, or transubstantiated into, an unmediated exhortation to “put down by force the government of the United States.”¹⁶⁵ By interpreting the Espionage Acts broadly, the Court appears not to have been insulated from the nation’s paranoia of Socialist upheaval. As Justice Holmes described the contagion of Socialism, even “a little breath would be enough to kindle a flame.”¹⁶⁶

This anti-radicalism fervor also penetrated state governments, many of which passed similar “criminal anarchy” or “criminal syndicalism” laws that penalized the advocacy of overthrowing organized government by force or violence. These laws withstood First Amendment challenges on the theory that freedom of speech “does not deprive a State of the primary and essential right of self preservation.”¹⁶⁷ As with the Espionage Acts, the purported object of protection was the State itself. The criminal anarchy laws, however, encompassed a narrower range of speech activities, at least in theory. Critiques of a mere “scurrilous” nature, prohibited by the Espionage Act, would not fall within the criminal anarchy

162. *Abrams*, 250 U.S. at 622.

163. *Id.* at 630 (Holmes, J., dissenting) (emphasis added).

164. *Id.* at 624.

165. *Id.* at 620.

166. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919).

167. *Gitlow v. New York*, 268 U.S. 652, 668 (1925).

laws, which penalized only language advocating the use of force or violence.

Nonetheless, Justices Holmes and Brandeis observed that the state laws were being applied in a fashion that confused advocacy with incitement.¹⁶⁸ The two Justices gradually distanced themselves from the majority in the criminal syndicalism cases, urging that the clear and present danger standard authored by Justice Holmes in *Schenck* had been dangerously weakened.¹⁶⁹ They would have reinvigorated the standard to be more speech-protective: "[i]n order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated."¹⁷⁰ The two Justices appeared willing to replace the "clear and present danger" standard entirely with a new trio of terms: "immediate serious violence." The dissenting Justices reiterated the principle that "the fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State."¹⁷¹

Gradually, the majority began to accept the Holmes/Brandeis view. In the late 1920s, the Court retreated from its position in the *Schenck* line of cases, overturning criminal advocacy convictions on the bases that the predicate speech acts did not in fact comprise incitement or pose a threat to the state.¹⁷² Soon thereafter, however, the Red Scare paranoia was revived, and federal criminal anarchy laws resurfaced in the form of the Smith Act of 1940.¹⁷³ Again, the object of protection was the existence of the State, and the proscribed activity was the advocacy of overthrowing the government by force or violence. Recognizing the similarity of the Smith Act to the state laws that had come before it in the *Gitlow* line of cases, the Court applied, or purported to apply, the

168. See e.g., *Whitney v. California*, 274 U.S. 357, 376 (1927), *overruled by Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). Justice Brandeis, concurring, noted that "even advocacy of violation [of the law], however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement."

169. See *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting).

170. See *Whitney*, 274 U.S. 376 (Brandeis, J., concurring).

171. *Id.* at 378.

172. See, e.g., *Fiske v. Kansas*, 274 U.S. 380, 386 (1927); *Herndon v. Lowry*, 301 U.S. 242, 263-64 (1937).

173. Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 (codified as amended at scattered sections of 8 U.S.C. and 18 U.S.C.). The official title of the Smith Act was the Alien Registration Act. Professors Sullivan and Gunther note that the Smith Act was strikingly similar to the criminal anarchy law at issue in *Gitlow*, 268 U.S. 652. See SULLIVAN & GUNTHER, *supra* note 77, at 40.

"clear and present danger" test in affirming the petitioners' convictions in *Dennis v. United States*.¹⁷⁴ In *Dennis*, the Court also upheld the constitutionality of the Smith Act, although later cases limited its reach by reading into it a specific intent requirement.¹⁷⁵

In each of the Smith Act convictions upheld by the Court, the majority found the defendants' efforts to be an attempt to forcibly overthrow the government, regardless of the negligible probability of success in each.¹⁷⁶ Other federal subversive advocacy laws of the time, such as the Subversive Activities Control Act of 1950, also focused on the threat of certain speech acts to the integrity of the State.¹⁷⁷ However, as the Court later made clear in *Brandenburg v. Ohio*, legislative presumptions that entire categories of speech acts comprise "an intolerable risk of serious harm" to the state are impermissible.¹⁷⁸ In sum, whether or not courts applied it correctly, the yardstick in each of the subversive advocacy laws was national security, if not the very edifice of democracy, and broad-based categorizations based largely on political viewpoint were disfavored.

2. Comparison to the Model Act

Like the subversive advocacy laws, the Model Act creates a legislative presumption that certain speech acts comprise "an intolerable risk of serious harm."¹⁷⁹ However, the "serious harm" sought to be prevented by the Model Act is not harm to the State,

174. *Dennis v. United States*, 341 U.S. 494, 516-17 (1951). Justices Black and Douglas dissented, arguing that the majority had not in fact applied the clear and present danger test, but made a mockery of it, as the facts did not support a finding that the defendants' speech acts presented a danger to the State. *See id.* at 580-83. They cautioned that the Smith Act should reach the teaching of terror tactics, but not the teaching of doctrine. *Id.*

175. *See Dennis*, 341 U.S. at 516; *Scales v. United States*, 367 U.S. 203, 220-21 (1961).

176. *See Dennis*, 341 U.S. at 509; *Scales*, 367 U.S. at 251.

177. International Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (1950) (codified at 50 U.S.C. § 785 (1988)), *repealed by* Friendship Act of 1993, Pub. L. No. 103-199, 107 Stat. 2317, Title VIII, § 803(1) (1993). Section 4, for instance, forbade the giving or receiving of information "affecting the security of the United States."

178. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); *see also* SULLIVAN & GUNTHER, *supra* note 77, at 55.

179. SULLIVAN & GUNTHER, *supra* note 77, at 38. However, as a panel of the D.C. Circuit Court of Appeals recently observed, "[e]ven the [Smith Act] cases manifestly stop short of allowing the kind of presumption," embodied here in Section 3(B) of the Model Act, that membership implies misconduct, or that the law may make "a presumption of misconduct from mere status." *See Taylor Flynn, Of Communism, Treason, and Addiction: An Evaluation of Novel Challenges to the Military's Anti-Gay*

nor to any level of organized government, but to the economic interests of one set of favored industries. Nowhere in the Model Act's text or preamble do its drafters explain how the protection of their enterprises from protest or criticism is necessary for the promotion of national security, or that the Model Act is limited to speech acts that incite imminent violence. By contrast, Section 3 of the Espionage Act prohibited disruption of certain manufacturing activities, but only in relation to the production of war materials.¹⁸⁰

Despite the important difference in their respective objects of protection, the Model Act and the subversive speech laws impose similar, severe criminal penalties. New York Senate Bill 2996, for example, provides criminal penalties up to a ten thousand dollar fine and a five year jail term for each violation.¹⁸¹ Similarly, the Espionage Act of 1918 provided for a ten thousand dollar fine and twenty year prison sentence.¹⁸² To place economic disadvantage to certain business interests on a par with threats to the very existence of the State in this manner is to grossly distort what Judge Learned Hand termed the "gravity of the evil"¹⁸³ at issue.

Another key difference is that speech acts prohibited by the Model Act need not advocate the use of force or violence, but merely have the intent to "deter" the business activity in question. Attempting to close an industry or to change its practices by influencing its consumers or the government, without advocacy of violence, is little more than an ideal. Entire industries come and go all the time as a result of socio-political change.¹⁸⁴ The marketplace, it has been said, "is a hazardous place for the faint of heart; this is part of the push and sell of a free market economy."¹⁸⁵ Not all injury to economic interests should be punishable or even com-

Policy, 80 IOWA L. REV. 979, 1013-14 (1995) (quoting *Steffan v. Aspin*, 8 F.3d 57, 67 (D.C. Cir. 1993)).

180. The Espionage Act of May 16, 1918, Pub. Law No. 65-150, 40 Stat. 553-54. Recall also Indiana's agricultural terrorism statute, discussed *supra* in the text accompanying note 44, which makes an explicit and more cogent connection between agricultural enterprise and national security, by treating agricultural infrastructures as the medium for terroristic threats of a truly violent and population-wide nature. See IND. CODE § 35-47-12-2.

181. S. 2996, 226th Ann. Legis. Sess. § 6 (N.Y. 2003).

182. The Espionage Act of May 16, 1918, ch. 75, 40 Stat. 553-54.

183. See *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

184. The recently enacted Do Not Call registry, for example, which allows consumers to forbid contacts by telemarketers, nearly put the whole telemarketing industry out of business.

185. Jones, *supra* note 143, at 847.

pensable. Some fluctuation is the result of exposure to the marketplace of competing ideas. Regardless, none of the activity prohibited by the Model Act comes close to posing a threat to national security.

3. The Membership Clause of the Model Act

Some of the subversive advocacy laws and the cases interpreting them also drew a distinction between those who actively delivered the allegedly inciting message, and those who passively maintained membership in affiliated organizations.¹⁸⁶ This active/passive membership distinction is not observed by the Model Act, which criminalizes membership activities both active and passive in nature, including the provision of "financial support or other resources."¹⁸⁷ Its drafters make no attempt to delineate between members who engage in already-criminalized activity, members who engage in protected speech, and members who simply give donations, as explained in Part II. Similarly, two sections of the Subversive Activities Control Act, in which Communist Party membership was an element, "swel[pt] indiscriminately across all types of association . . . without regard to the quality and degree of membership."¹⁸⁸ Although knowingly providing financial support to efforts to overthrow the state can be criminalized, the Supreme Court nonetheless invalidated both sections as facially unconstitutional because of their overbreadth.¹⁸⁹ The same flaw ails the Model Act's membership clause.¹⁹⁰

More importantly, the membership clause of the Model Act lacks a specific intent requirement such as that read into the Smith Act by the Court in *Scales v. United States* in order to save it from invalidation on First Amendment grounds.¹⁹¹ The Smith

186. See, e.g., *Scales v. United States*, 367 U.S. 203, 221 (1961); *United States v. Robel*, 389 U.S. 258, 265-66 (1967) (upholding facial overbreadth challenge to a provision of the Subversive Activities Control Act that barred Communist Party members from employment with a defense contractor); see also *Aptheker*, 378 U.S. at 514 (upholding facial overbreadth challenge to a provision of the Subversive Activities Control Act that forbade Communist Party members from applying for passports). In *Robel* and *Aptheker*, the Court invalidated, respectively, sections 5(a)(1)(D) and 6 of the Subversive Activities Control Act. *Robel*, 389 U.S. at 281-282; *Aptheker*, 378 U.S. at 517.

187. ALEC, *supra* note 6, § 3(A)(3).

188. *Robel*, 389 U.S. at 262.

189. See *id.*; see also *Aptheker*, 378 U.S. at 514.

190. Regarding the Model Act's vagueness and overbreadth, see *infra* Parts II.B and II.C.

191. *Scales v. United States*, 367 U.S. 203 (1961).

Act made it a felony to knowingly become a member of any organization that advocates the forcible overthrow of the government.¹⁹² Although the Smith Act contained no specific intent language, the Court nonetheless upheld the defendant's conviction, finding that he "*specifically intend[ed]* to accomplish [the organization's goals to overthrow the government] by resort to violence."¹⁹³

Without such a saving construction,¹⁹⁴ if a mainstream organization such as the Humane Society of the United States was deemed a terrorist organization by virtue of its attempts to "deter" people from patronizing certain businesses, all eight million of its donors would also be subject to prosecution, regardless of whether they intended to support or even knew about such activity.

Adding insult to injury, the criminal penalties that await the donors of law-abiding organizations that do not advocate illegal actions are identical to those that await the members of other groups that advocate the commission of acts that are already criminalized, such as property damage. Without resorting to hyperbole or acrobatic feats of construction, one can say that the Model Act puts humane society donors on a par with arsonists.¹⁹⁵ As with the sections of the Subversive Activities Control Act that were declared unconstitutional, the means chosen by the Model Act to affect its purpose "cut deeply into the right of associa-

192. See Alien Registration Act, Pub. L. No. 76-670, 54 Stat. 670, 671 (1940) (codified as amended at 18 U.S.C. § 2385 (1994)).

193. *Scales*, 367 U.S. 229, 254-55 (emphasis added) (quoting *Noto v. United States*, 367 U.S. 290, 299-300 (1961)).

194. For further discussion of the considerable judicial effort necessary to give the Model Act a saving construction, see *supra* Part II.E.

195. This parallelism is not incidental, given the protected industries' economic and ideological opposition to even the most altruistic aims of the humane movement. For instance, one organization that supports the Model Act, the National Animal Interest Alliance Trust, even opposes the tax-exempt status of animal shelters. See National Animal Interest Alliance Trust, *NAIA Calls on President Bush to Act Against Animal Extremists*, http://www.naiatrust.org/support_petition.htm (last visited Sept. 12, 2005). One technique by which these trade associations have begun to actively challenge the tax-exempt status of humane organizations is to slander them as terrorists by way of attenuated connection to PETA and similar groups that condone boycotts and other "economic terrorism." See *id.*; see *infra* note 315. In the views of this organization, as related to the author by one of its trustees, since PETA happens to also support spay and neuter programs, anyone else who supports spay and neuter programs is therefore guilty by association of "economic terrorism." See *id.* Their target is not just PETA, but the broader animal shelter movement, which detracts from the ability of dog breeders and puppy mills to maximize revenue. The Model Act serves the aims of such trade groups by negating the legal distinction between law abiding and non-law abiding animal protection advocates.

tion.”¹⁹⁶ Legal consequences aside, this overinclusive definition also has significant rhetorical import. The mere suggestion that environmental and animal protection is desirable thus becomes an emblem of terrorism, and, by association to the subversive advocacy laws,¹⁹⁷ perhaps even sedition. In short, the Model Act embodies the most fearful elements of the subversive advocacy doctrine, but without advancing the imminent national security interests that justified those laws at the time.

B. Civil Constraints on Speech in the Name of Private Business Interests

Unlike the subversive advocacy doctrine, pure speech has almost never been criminalized solely for the protection of private business interests.¹⁹⁸ Speech acts have, however, been subject to many civil constraints, ranging from damage awards in tort for inducing a party to break its contract, to federal labor laws prohibiting so-called “secondary” boycotts, to injunctions barring protest activity, to state statutes that lower the burdens of proof and persuasion in certain defamation actions. Like the criminal constraints, the civil constraints also date to the nineteenth century, and their interpretation by the courts was varied and unpredict-

196. See *Robel v. United States*, 389 U.S. 258, 264 (1967). The *Robel* Court recognized that the Subversive Activities Control Act criminalized certain actions, such as espionage, that were already criminalized under federal law. As discussed, the Model Act does the same. *Id.* at 268 n.18.

197. This Article suggests that the Model Act’s invocation of the subversive advocacy laws, deliberate or otherwise, is established not only by the borrowing of common themes and text, but by the very notion that non-violent speech activities should be subject to criminalization.

198. The sole exception to this pattern, as explained below, is Colorado’s agricultural disparagement statute, which provides criminal penalties for “knowingly . . . mak[ing] any materially false statement” about an agricultural product. See COLO. REV. STAT. § 35-31-101 (2004). It has never been applied. See *supra* note 9. In the nineteenth century, labor and civil rights activists who violated injunctions were met with criminal sanctions, but in each case the initial restraint was civil in nature. At that time, there were also attempts to criminalize labor organizing under various theories of conspiracy, but most dealt with speech activity that was of (or at least deemed to be of) extortionate character. The Massachusetts Supreme Judicial Court, in *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 119-20 (1842), however, drew the line, expressly permitting labor organizing activities that did not involve extortion or otherwise unlawful methods. In other jurisdictions, whether or not these early labor cases involved conduct that was truly intimidating or extortionate is another matter. See, e.g., *Franklin Union No. 4 v. People*, 77 N.E. 176 (Ill. 1906) (prohibiting picketing per se as intimidating and physically threatening). Either way, speech acts involving extortion or physical threats, which would not today be recognized as fully protected by the First Amendment, are significant historical events, but nonetheless beyond the scope of this Article, as explained *supra* note 18.

able. The Model Act leans heavily on these doctrines by implication to show that speech acts can be made subordinate to business interests in certain contexts. However, as this Part argues, the Model Act is little more than an attempt to get around the First Amendment problems that plagued several of these approaches, by using the trope of terrorism to cast a false urgency.

1. The Tortious Interference Doctrine

Prior to the 1850s, if a party to a contract was induced by another to breach the contract, as in an employment dispute, the other party could only obtain redress against the first party in contract.¹⁹⁹ Thereafter, when "contract theory developed into an abstract doctrine of property," contractual obligations came to be treated as vested property rights.²⁰⁰ Thus, courts began to recognize "interference by a third party with the performance of a contract . . . as an interference with property rather than as an attempt to prevent the performance of an obligation."²⁰¹ Most scholars recognize *Lumley v. Gye*²⁰² as the first case to develop the new tort action of contractual interference.²⁰³ In *Lumley*, the plaintiff theater operator sued his rival theater for inducing a well-known opera singer to breach her contract with the plaintiff and perform for him instead.²⁰⁴ In addition to the operator's breach of contract claim against the singer, the Court also entertained and upheld a cause of action against the rival theater operator in tort, as interference with the property rights that vested in the contract.²⁰⁵ As the doctrine evolved, however, its application was limited largely to the employer-employee relationship, rather than the activities of business rivals, which were treated instead as lawful competition.²⁰⁶

199. See Note, *Tortious Interference With Contractual Relations In the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510, 1511 (1980).

200. *Id.* at 1512.

201. *Id.* at 1513. This cause of action should not be confused with non-performance of contract obligations caused by a third party's fraud, defamation, or extortion, which were actionable in their own right prior to the arrival of the tortious interference doctrine.

202. *Lumley v. Gye*, 118 Eng. Rep. 749 (Q.B. 1853).

203. See Note, *supra* note 199, at 1510, 1522.

204. *Lumley*, 118 Eng. Rep. 749.

205. *Id.*

206. See Note, *supra* note 199, at 1530-31 (citing *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q.B.D. 598, 614 (1889)).

The Model Act borrows from the tortious interference doctrine in that it exposes the third party inducer to liability if the inducer's actions amount to a "deterrence" or "obstruction," as explained *supra* in Part I. However, the financial relationship addressed by the Model Act, such as that between the protected business interest and a dissuaded consumer, is not likely to be contractual. The consumer who is persuaded to adopt dogs from a shelter rather than buy dogs raised in inhumane puppy mills, for instance, has not broken a contractual relationship, but merely disappointed the producer's hope for additional profit. Nonetheless, when viewed in the context of the tortious interference doctrine, the Model Act proceeds to hold the third party inducer liable as though the relationship between the consumer and the puppy mill were contractual. Nothing in the Model Act supposes a limit to this inferential chain. Rather, open-ended terms such as "other means"²⁰⁷ suggest more of a dragnet approach to liability.

Perhaps more profoundly, just as the tortious interference doctrine buttressed the then-newly minted theory that contractual promises were property rights, so the Model Act suggests that businesses enjoy a vested property right to be free from any criticism that has a deterrent effect. Conferring such a property interest would not only radically expand the notion of property rights, it may even have anticompetitive effects.²⁰⁸ As one commentator observed of the tortious interference cases,

the means of enticement . . . employed – persuasion – was not inherently harmful. Unlike fraud or slander, *not all persuasion injures*. The theory of contractual property enabled the judges to determine that the persuasion in this instance was wrongful merely because the plaintiff lost his contractual expectations.²⁰⁹

Here, the Model Act protects not contractual expectations but merely the favored industries' own hopes for success, free from the effects of dissenters' persuasion of potential consumers. This is a gross affront to the marketplace of ideas, not to mention competition in the actual market of goods.²¹⁰

207. See A. 4884 / S. 2996, 226th Ann. Legis. Sess. § 1(J) (N.Y. 2003), and discussion *supra* text accompanying note 103.

208. In the tortious interference cases, for example, the "right" of competition" became an affirmative defense. See Note, *supra* note 199, at 1532.

209. *Id.* at 1526 (emphasis added).

210. Some of the business interests behind the Model Act have already displayed such anticompetitive proclivities, as illustrated by a lawsuit brought by Monsanto against a Maine dairy producer in 2003 alleging "interference with advantageous bus-

In sum, the Model Act harkens to, but perverts, the tortious interference doctrine. By restraining efforts to persuade consumers into changing their purchasing behavior, the Model Act expands the reach of the tortious interference concept to non-contractual relationships. This would do nothing short of vesting the protected business interests with a right to prevent adverse or critical messages from reaching would-be consumers. Such a profound threat to consumer autonomy and the natural flow of information in the marketplace should not be taken lightly.

2. Restraints on Labor Picketing

The tortious interference doctrine was not the only approach used by business interests in the late nineteenth and early twentieth centuries to obtain relief from competitors or organized labor who tried to induce third parties not to transact with those businesses. By the 1890's, businesses sought not contractual, but injunctive relief from such inducement activities. This was especially the case where the third party was induced to break a contract or withhold business by large groups of organized labor picketers, rather than simply individual actors, as was the case in most of the tortious interference cases. Accordingly, courts began to analyze these cases not under the tortious interference doctrine, but under the common law as acts of coercion and intimidation,²¹¹ at least until Congress drafted federal laws to uniformly address labor relations.²¹² Despite Congressional intervention,

ness relationships." See Complaint for an Injunction at 8, *Monsanto Co. v. Oakhurst Dairy, Inc.* (D. Mass. 2003) (No. 03-11273 RCL). Monsanto alleged that the dairy's use of the phrase "No Artificial Growth Hormones" on its packaging was an unfair business practice because it implied that Monsanto's growth hormone products were comparably unsafe. See *id.* at 5. The parties eventually settled the case when Oakhurst agreed to remove the phrase from its packaging. See Clarke Canfield, *Oakhurst, Monsanto Resolve Lawsuit Over Milk Labeling*, MIAMI HERALD, Dec. 24, 2003. The Model Act essentially codifies the common law causes of action relied upon by Monsanto with respect to speech acts that criticize the animal welfare or environmental effects of business practices. Indeed, the Model Act would have applied directly to the Monsanto controversy, as Oakhurst also represented to customers that it is more humane not to inject cows with growth hormone, see Complaint at 8-9, which often causes mastitis and other painful ailments.

211. See *Vegehlahn v. Guntner*, 44 N.E. 1077, 1078 (Mass. 1896) (upholding an injunction against a two-person labor picket on the grounds that other employees were subjected to threats of personal injury); cf. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 119-20 (1842) (permitting picketing where extortion and threats not used).

212. See, e.g., Federal Anti-Injunction Act of Mar. 23, 1932, Pub. L. No. 72-65, 47 Stat. 70; Wagner Act, Pub. L. No. 74-198, 49 Stat. 449 (1935); Taft-Hartley Amendments, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 101

states and municipalities continued to regulate labor protest and picketing activity using their police powers.

In the post-*Schenck* era, such regulations were assessed for their congruence with picketers' First Amendment rights. By 1937, the Court had confirmed that businesses no longer enjoyed an unfettered right of "free enterprise" against interference, as they had during the tortious interference era.²¹³ Against this backdrop, the Court held in *Thornhill v. Alabama* that peaceful picketing was entitled to First Amendment protection even where the presence of protesters harmed the economic interests of the picketed business.²¹⁴

However, the Supreme Court soon excluded from the reach of *Thornhill* any picketing having an "illegal objective."²¹⁵ For example, the Court found picketing to have an "illegal objective," and hence not fall within the protections of the First Amendment, where the targeted entity was induced by picketers to break a state law, such as an antitrust law.²¹⁶ Over time, however, "illegal objectives" also came to include actions that were merely considered bad "policy," such as inducing a business to adopt non-discrimination hiring policies.²¹⁷ The uneven application of the "illegal objective" standard recalls a similar phenomenon in the subversive advocacy cases, where courts often construed as a "clear and present danger" speech activity that most observers would now recognize as harmless.

As it did with the subversive advocacy cases, the Model Act misapplies the legal standard at issue in the "illegal objective" picketing cases. The Model Act's prohibition on activity that "deter[s]" a protected business activity recalls the picketing cases because picketing is one method by which activists could attempt to deter business. However, unlike the labor picketing cases, the

et seq.). The laws are known as the Norris-LaGuardia Act, the National Labor Relations Act, and the Labor Management Relations Act respectively.

213. See, e.g., *Truax v. Corrigan*, 257 U.S. 312 (1921); *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937).

214. *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940) (striking down state anti-picketing law as unconstitutionally overbroad).

215. *Labor Picketing*, *supra* note 151, at 942.

216. See *id.* at 942 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 500-01 (1949) (affirming injunction against picketers where acceding to picketer's demands would force business to break state antitrust laws)).

217. *Id.* at 942-43 (citing *Hughes v. Super. Ct.*, 339 U.S. 460, 466 (1950) (upholding injunction against picketing of business that refused to hire African-Americans, on the grounds that urging the plaintiff to hire on the basis of race would "subvert" the state's "policy" of race-blind hiring)).

Model Act makes no attempt to distinguish between protest activity that is motivated by an "illegal objective," whereby the targeted business would be induced to break the law,²¹⁸ and that which involves no law-breaking on the part of either the picketer, the business, or the would-be consumer. Rather, the only motive the Model Act concerns itself with is whether the action is "politically motivated,"²¹⁹ which is included as an element of the crime, as though a certain ideology or belief system somehow makes the action more criminal. Ironically, the activists at whom the Model Act is targeted often attempt to persuade business interests to *comply with* the law, not break it.²²⁰

3. Civil Rights Era Boycott Injunctions

Some scholars draw a line between labor activity and so-called "political" boycotts, whose purpose is not to leverage economic power with regard to an employment arrangement, but for the benefit of some other political cause not directly related to the parties' relationship.²²¹ As with the tortious interference doctrine and the "illegal objective" standard from the labor picketing cases, the Model Act also misappropriates or violates the legal standard set forth in the political boycott cases, by criminalizing peaceful speech acts alongside violent or destructive actions.

As a preliminary matter, it can be shown that the Model Act functions as an anti-boycott law as well as an anti-picketing law. The civil damages provision of the Model Act provides that:

[a] person who has been damaged by a violation of the . . . Act may bring against the person who caused the damage an action . . . to recover (1) an amount equal to three times all economic

218. This is not to be confused with the Model Act's provisions pertaining to conduct that is already criminalized in its own right, as explained *supra* in the text accompanying note 27.

219. See ALEC, *supra* note 6, § 2(N). As explained *supra* in the text accompanying note 16, the "politically motivated" activities forbidden by the Model Act include not only classic political speech acts, which are at the core of First Amendment protection, but even democratic participation such as "influenc[ing] a unit of government to take a specific action."

220. See *supra* text accompanying note 35.

221. See, e.g., Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 660 (1978) [hereinafter *Political Boycott*]. Although picketing and boycott activities often overlap, this Article adopts the traditional definition of a boycott, which includes as its two elements "the withholding of an economic relationship and the inducement of others to do the same." *Id.* at 659.

damages to include the cost of lost or damaged property [and] . . . loss of profits or other consequential damages.²²²

Since the Model Act can be violated simply by convincing others not to support the protected business entity, as shown in Part I *supra*, it appears that an affected business can recover treble damages for "loss of profits" due to interference with business caused by a boycott, protest, or picket. Nor can the affected industries credibly dispute such a construction, as they have already used the term "economic eco-terrorism" to describe boycott activity, such as the Earth Island Institute's call for consumers to boycott tuna in order to protect dolphins.²²³

The Model Act's civil damages provision calls to mind the damage award sought unsuccessfully by the plaintiffs in *NAACP v. Claiborne Hardware*.²²⁴ There, the local branch of the National Association for the Advancement of Colored People (NAACP) organized a long-term boycott of white merchants who engaged in segregationist practices. Affected business owners sued the NAACP and over one hundred individual defendants for profits lost during the boycott and also sought injunctive relief.²²⁵ The state chancery court awarded over \$1.25 million to the business owners and permanently enjoined the boycott.²²⁶ The Mississippi Supreme Court reversed the chancellor on several issues, including the applicability of secondary boycott laws, but upheld the finding of liability.²²⁷

The U.S. Supreme Court reversed, holding that the business owners could not make out a claim for damages unless they could show that their financial losses were proximately caused by one of the isolated incidents of violence that accompanied the otherwise peaceable boycott.²²⁸ To allow the business owners to recover for the economic losses caused solely by the boycott itself, the Court reasoned, would displace the boycotters' First Amendment rights, since the boycott was staged by speeches and nonviolent picketing.²²⁹ In other words, "speech does not lose its protected charac-

222. ALEC, *supra* note 6, § 4(D) (emphasis added).

223. See Paul Watson, *ALF and ELF – Terrorism Is as Terrorism Does*, in *TERRORISTS OR FREEDOM FIGHTERS?*, *supra* note 97, at 283.

224. *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

225. *Id.* at 889-90.

226. *Id.* at 893.

227. *Id.* at 894.

228. *Id.* at 922-23.

229. *Id.* at 907.

ter” simply because a business profits suffer as a result.²³⁰ Even where the boycott activity disrupts the market as a whole, the Court held, a state’s police power to regulate economic activity must still defer to expression on public issues, which occupies the “highest rung of the hierarchy of First Amendment values.”²³¹

The Model Act transgresses this important principle by imposing civil and criminal liability upon those who “obstruct” business activity as a result of boycotts, nonviolent picketing, and other protected speech acts. Moreover, the Model Act also violates one of the key teachings of *Claiborne Hardware*: speech acts do not lose their protection simply because they are accompanied by episodes of violence.²³² The Model Act conflates speech with violent or destructive activity in two ways, regardless of whether they are actually intertwined in the same event.

First, the Model Act’s criminal penalties distinguish not by the nature of the predicate activity, but only by the dollar amount of adverse economic effects.²³³ Accordingly, a handbilling or boycott event that results in \$501 of lost business is punishable by the same felony sentence as an act of property damage that costs several million dollars. By contrast, a 1963 civil rights boycott in Birmingham, Alabama was estimated to have cost the targeted businesses more than \$750,000 a week.²³⁴

Second, the operative terms of the Model Act, as discussed in Part II *supra*, are so vague and overbroad as to encompass both destructive and peaceable activities.²³⁵ Specifically, the Model Act and its progeny forbid “obstructing” the favored business interest by way of “coercion,” “disruption,” or “impeding.”²³⁶ This interference, if “politically motivated,” occurs anytime the actor “influence[s] a unit of government to take a specific action or . . . persuades the public to take specific action, or . . . protest[s] the actions of a unit of government, corporation, organization or the

230. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 910 (1982).

231. *Id.* at 913 (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Regardless, the Model Act’s proponents do not argue that it is necessary to prevent broader-scale or economy-wide market disruptions. See *supra* text accompanying note 93.

232. See also *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969). *Machesky* is discussed *supra* in the text accompanying note 100.

233. The Model Act draws its felony/misdemeanor distinction where the protected business interest suffers \$500 worth of economic harm. See ALEC, *supra* note 6, § 4.

234. See *Political Boycott*, *supra* note 221, at 659 n.2.

235. See discussion *supra* Parts II.B and II.C.

236. ALEC, *supra* note 6, § 3(A).

public at large.”²³⁷ Obstruction as used in the Model Act can also be accomplished via theft, property damage, and extortion.²³⁸

In sum, the Model Act’s failure to differentiate between destructive and peaceable activities, while punishing both with a heavy hand, violates the rule of law established in *Claiborne Hardware*.²³⁹ It seeks to get around this limitation by classifying speech activity itself as terrorism. Moreover, the Model Act’s imposition of civil liability for the economic effects of boycott activity flatly contradicts the holding of *Claiborne Hardware* and the political boycott cases. Since the civil rights era, boycotts have become “an increasingly important and powerful tool for advocates of social change.”²⁴⁰ It becomes especially crucial, in an era of corporate deregulation and underenforcement,²⁴¹ for legislatures and courts to protect that avenue of influence.

4. Agricultural Disparagement Laws: Another Bite at the Apple

In 1989, the Natural Resources Defense Council (NRDC) published a report about the environmental and public health risks of pesticides and other agricultural chemicals called *Intolerable Risk: Pesticides In Our Children’s Food*.²⁴² The popular media, including the news program *60 Minutes*, hastily picked up on the report, largely because of the report’s conclusion that a chemical commonly used on apples was unsafe.²⁴³ Thereafter, sales of all apples noticeably declined, whether or not the apples had been

237. *Id.* § 2(N).

238. *See id.* § 3(A).

239. It has been suggested that *Claiborne Hardware* cannot be reconciled with *Madsen v. Women’s Health Center*, 512 U.S. 753 (1994), and other Supreme Court decisions upholding injunctions and statutory constraints against abortion protest activities. *See Keleher, supra* note 127, at 850-51. Generally, the abortion constraints in the *Madsen* line of decisions were in the nature of place restrictions such as “buffer zones” and injunctions against “blockades,” *see id.*, rather than the broad prescription against all boycott activity that was invalidated in *Claiborne Hardware* and now resurrected in the Model Act. The seemingly limitless scope of the Model Act makes it more akin to the boycott blackout. The Model Act in no way resembles either a time, place, and manner restriction, as discussed *supra* in Part II, or a narrowly-tailored injunction to a particular organization or location.

240. *Political Boycott, supra* note 221, at 659.

241. *See supra* text accompanying note 35.

242. Natural Resources Defense Council, *Intolerable Risk: Pesticides In Our Children’s Food* (1989).

243. *See Jones, supra* note 143, at 827 (citing Doug Haddix, *Alar as a Media Event*, 28 COLUM. JOURNALISM REV. 44, 44-45 (1990)).

treated with Alar, the chemical in question.²⁴⁴ At the same time, the Environmental Protection Agency (EPA) began proceedings to revoke Alar's pesticide registration,²⁴⁵ ultimately concluding that Alar is a "probable human carcinogen."²⁴⁶

Although the eventual de-certification of Alar was no doubt a boon to public health, the event was a sobering one for the food processing, chemical, and agriculture industries, which lost millions of dollars in revenue as a result of consumers' reaction to the report. Rather than amend their practices to be more protective of public health, however, the affected industries instead attempted to silence food safety advocates in the courts. Using the common law tort of trade disparagement, the apple growers who lost revenue after the Alar report sued CBS, three local CBS affiliates, NRDC, and NRDC's media relations company in federal court for lost profits.²⁴⁷

As the district judge pointed out, "[a]pples had not received such bad press since Genesis."²⁴⁸ Nonetheless, to make out a *prima facie* case for trade disparagement, the plaintiffs had to demonstrate, among other things, that the statements about the adverse effects of Alar were false.²⁴⁹ This element proved fatal to the plaintiffs' claims, as they could not prove that the report was

244. *See id.* at 828 (noting that NRDC claimed that only 10-11 percent of apples had actually been treated with Alar).

245. *See id.* at 827 (citing 54 Fed. Reg. 47493 (1989)).

246. *Id.* at 830 (citing ENVIRONMENTAL PROTECTION AGENCY, THIRD PEER REVIEW OF DAMINOZIDE AND ITS METABOLITE BREAKDOWN PRODUCT OF 1,1-DIMETHYHYDRAZIDE 24 (1991)).

247. *See Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 931 (E.D. Wash. 1992). The action was dismissed as to all but CBS, *see id.*; the District Court later granted CBS's motion for summary judgment, *see Auvil v. CBS 60 Minutes*, 836 F. Supp. 740 (E.D. Wash. 1993), which was ultimately upheld by the Ninth Circuit Court of Appeals, *see Auvil v. CBS 60 Minutes*, 67 F.3d 816 (9th Cir. 1995) (*Auvil II*). The trial court also determined that the class of plaintiff apple growers lacked standing to bring suit, in light of the report's "all-inclusive" treatment of apple growers. *See Auvil*, 800 F. Supp. at 941. As the apple growers had already received over \$250 million in subsidies from the federal government to offset the effects of the Alar scare, *see Auvil II*, 67 F.3d at 829, it is unlikely that the suit was brought simply to obtain compensation. More plausibly, the agriculture industry recognized the potential of this legal approach to counter environmentalists' increasing reliance upon scientific evidence of public health dangers.

248. *Auvil*, 800 F. Supp. at 942.

249. *See* RESTATEMENT (SECOND) OF TORTS § 623A (1977) ("Liability for Publication of Injurious Falsehood - General Principle. One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless

untrue, especially in light of the EPA's concurrent de-listing proceedings.²⁵⁰ The trial court in *Auvil*, drawing upon a well-settled body of First Amendment jurisprudence, held that the free speech interests involved mandated a high burden of proof to demonstrate falsity:

[a] news reporting service is not a scientific testing lab and these services should be able to rely on a scientific government report when they are relaying the report's results. The duty plaintiffs propose would so chill debate that the freedom of speech would be at risk.²⁵¹

Accordingly, the trial court granted defendants' motions to dismiss and for summary judgment, all of which were affirmed on appeal.²⁵²

i. Rewriting Disparagement Law by Statute

Finding the common law burden of proof to be inhospitable, agribusiness concerns, led by the American Feed Industry Association,²⁵³ then set out to lower their burden by statute. The result was a model law that creates custom legal standards for disparagement actions with respect to the agribusiness industry only.²⁵⁴ To date, a majority of state legislatures have considered agricul-

disregard of its truth or falsity"). See also RESTATEMENT (SECOND) OF TORTS § 651(1)(c) (1977).

250. See *Auvil II*, 67 F.3d at 821-22.

251. *Auvil*, 836 F. Supp. at 743 (see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

252. See *Auvil II*, 67 F.3d at 816. The procedural history of *Auvil* is discussed *supra* at note 247.

253. See Jones, *supra* note 143, at 832 (citing Libel Defense Resource Center, *Agricultural Disparagement Laws*, LDRC BULLETIN 91-93 (1998)).

254. See *id.* Typical is Alabama's statute, which is based on the model law and reads as follows:

§ 6-5-620. Legislative findings and intent. The Legislature hereby finds, determines, and declares that the production of agricultural and aquacultural food products and commodities constitute an important and significant portion of the state economy and that it is imperative to protect the vitality of the agricultural and aquacultural economy for the citizens of this state by providing a cause of action for producers to recover damages for the disparagement of any perishable product or commodity.

§ 6-5-621. Definitions. As used in this article, the following terms have the following meanings: (1) Disparagement. The dissemination to the public in any manner of false information that a perishable food product or commodity is not safe for human consumption. The information shall be deemed to be false if it is not based upon reasonable and reliable scientific inquiry, facts, or data. (2) Perishable food product or Commodity. Any agricultural or aquacultural food product which is sold or distributed

tural disparagement bills,²⁵⁵ and thirteen states have passed them.²⁵⁶ As scholars have pointed out, these laws modify the constitutional and common law elements of disparagement²⁵⁷ in

in a form that will perish or decay beyond marketability within a short period of time.

§ 6-5-622. Cause of action. Any person who produces, markets, or sells a perishable food product or commodity, and suffers damage as a result of another person's disparagement of perishable food products or commodities has a cause of action for damages and for any other relief a court of competent jurisdiction deems appropriate, including but not limited to, compensatory and punitive damages.

§ 6-5-623. Lack of knowledge or intent no defense. It is no defense under this article that the actor did not intend, or was unaware of, the act charged.

§ 6-5-624. Statute of limitations. Any civil action for damages for disparagement of perishable agricultural or aquacultural food products or commodities shall be commenced within one year after the cause of action accrues.

§ 6-5-625. Construction. This article shall be construed in pari materia with all laws relating to fraud, criminal mischief, criminal tampering with property, interruption of or impairing commerce and trade, unlawful trade practices, and property damage.

ALA. CODE §§ 6-5-620 to -625 (2004).

255. Over thirty other state legislatures have entertained such bills. *See* Jones, *supra* note 143, at 823 n.3 (citing H.B. 1938, 82d Reg. Sess. (Ark. 1999); S.B. 492, Reg. Sess. (Cal. 1995); A.B. 558, Reg. Sess. (Cal. 1995); H.B. 1176, 1st Reg. Sess. (Colo. 1991); S. 311, Leg. Sess. (Del. 1991); S. 234, 89th Gen. Assem., Reg. Sess. (Ill. 1995); H.R. 106, 76th Gen. Assem., Reg. Sess. (Iowa 1995); H.R. 389, 77th Gen. Assem., Reg. Sess. (Iowa 1997); S.B. 937, 1st Leg. Sess. (Me. 1997); S. 445, Leg. Sess. (Md. 1996); S. 34 (Md. 1997); S. 937, Leg. Sess. (Mass. 1997); H.R. 5808, 88th Leg., Reg. Sess. (Mich. 1995); H.R. 4660, 89th Leg., Reg. Sess. (Mich. 1997); H.R. 2804, 78th Leg., Reg. Sess. (Minn. 1994); H.R. 1720, 87th Leg., 2d Reg. Sess. (Mo. 1994); H.R. 923, 89th Leg., 2d Reg. Sess. (Mo. 1998); L.B. 367, 94th Leg., 1st Sess. (Neb. 1995); H.R. 175, 95th Leg., 1st Sess. (Neb. 1997); H.R. 1105, Leg. Sess. (N.H. 1997); H.R. 5159, 205th Leg., 1st Reg. Sess. (N.J. 1992); H.B. 1192, 54th Leg. Sess. (N.D. 1995); H.R. 949, 179th Gen. Assem., Reg. Sess. (Pa. 1995); H.R. 2731, 178th Gen. Assem. (Pa. 1993); S. 160, Statewide Sess. (S.C. 1995); H.R. 4706, Statewide Sess. (S.C. 1994); H.R. 735 Adjourned Reg. Sess. (Vt. 1996); H.R. 690, Leg., 65th Adjourned Sess. (Vt. 1997); H.R. 1098, 54th Leg. Sess. (Wash. 1995); A.B. 702, 92d Leg., Reg. Sess. (Wis. 1995); H.R. 308, 53d Leg., Gen. Sess. (Wyo. 1995), H.R. 127, 54th Leg., Gen. Sess. (Wyo. 1997)).

256. *See* Eric Jan Hansum, *Where's The Beef? A Reconciliation of Commercial Speech and Defamation Cases in the Context of Texas's Agricultural Disparagement Law*, 19 REV. LITIG. 261, 263 (2000) (citing ALA. CODE § 6-5-620 to -625 (Michie Supp. 1998); ARIZ. REV. STAT. ANN. § 3-113 (West Supp. 1998); COLO. REV. STAT. § 35-31-01 (Bradford Supp. 1995); FLA. STAT. § 865.065 (West 1999); GA. CODE ANN. § 2-16-1 to -4 (Michie Supp. 1998); IDAHO CODE § 6-2001 to -2003 (Michie 1998); LA. REV. STAT. ANN. § 3:4501-4504 (West Supp. 1999); MISS. CODE ANN. § 69-1-251 to -257 (West Supp. 1998); N.D. CENT. CODE § 33-44-01 to -04 (Michie Supp. 1997); OHIO REV. CODE ANN. § 2307.81 (Anderson Supp. 1998); OKLA. STAT. ANN. tit. 2, § 3010 -3012 (West Supp. 1999); S.D. CODIFIED LAWS § 20-10A-1 to -4 (Michie 1995); TEX. CIV. PRAC. & REM. CODE ANN. § 96.001-004 (Vernon 1997)).

257. Commentators warn that although the defamation standard established in *New York Times v. Sullivan* would appear to govern product and trade disparagement

three ways: (1) by lowering or removing the defendant's requisite intent; (2) by doing away with the "of and concerning" requirement; and (3) by lowering the plaintiff's burden of proof.²⁵⁸

First, several of the agricultural disparagement laws contravene the rule of *New York Times v. Sullivan* that a defamation plaintiff must show that the defendant made the statement with actual malicious intent.²⁵⁹ Without such a showing, the Supreme Court held, the defendant's "constitutional guarantees" of free speech are placed in harm's way.²⁶⁰ In other words, the defendant's statement must be made "with knowledge that it was false or with reckless disregard of whether it was false or not."²⁶¹ To the contrary, several of the disparagement laws require only that the defendant have acted negligently,²⁶² or they omit an intent

cases, the Supreme Court has not expressly addressed the issue. See Jones, *supra* note 143, at 838. Nonetheless, there remains "a strong argument for applying the criteria of defamation cases to food disparagement actions given the similarities between defamation and disparagement law." Hansum, *supra* note 256, at 267. Defamation, of course, addresses threats to one's reputation, while disparagement concerns one's economic interests. *Id.* at 268. If anything, disparagement law should embody a more speech-protective standard, given that "[i]t is not entirely clear that the U.S. Constitution should afford the same degree of protection to making a profit as it does to protecting a person's reputation." *Id.* at 269. Other commentators note that courts have begun to graft the legal standards for defamation onto disparagement suits, thus "constitutionalizing" them. See Margot S. Fell, Note, *Agricultural Disparagement Statutes: Tainted Beef, Tainted Speech, and Tainted Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 981, 1001-02 (1999) (citing *Bose Corp. v. Consumers Union of the United States, Inc.*, 692 F.2d 189, 195-97 (1st Cir. 1982), *aff'd* 466 U.S. 485, 513 (1984)). In sum, all of the constitutional protections established in *New York Times* have been applied to disparagement cases "in some capacity." *Id.* at 1007.

258. See, e.g., Jones, *supra* note 143; David J. Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135 (1997); Megan W. Semple, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L. J. 403 (1995).

259. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). Actual malice is required for speech involving matters of public concern, regardless of whether the plaintiff is a private citizen or a public figure, if the plaintiff seeks punitive damages. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). It goes without saying that food safety is a matter of public concern. Furthermore, it is possible that agricultural disparagement plaintiffs, such as Paul Engler, the lead plaintiff in *Texas Beef Group*, could be construed as at least "limited purpose" public figures. See Fell, *supra* note 257, at 1027.

260. *New York Times*, 376 U.S. at 279-80.

261. *Id.*

262. See Jones, *supra* note 143, at 838 (citing FLA. STAT. § 865.065 (West Supp. 1996); LA. REV. STAT. ANN. § 3:4502(1) (West Supp. 1996); OHIO REV. CODE ANN. § 2307.81 (West Supp. 1996); OKLA. STAT. ANN. tit. 2, § 3010 to -3012 (West Supp. 1996)).

requirement altogether.²⁶³ This relaxes the intent standard far below what is constitutionally required.

Second, the disparagement laws flout constitutional requirements that the statement at issue is about or somehow refers to the plaintiff. In *New York Times*, for instance, an Alabama police commissioner brought a defamation action regarding a political advertisement that did not mention him by name, but that, he asserted, implicated him nonetheless because of its references to police conduct.²⁶⁴ The Supreme Court held that the commissioner's claim was "constitutionally deficient" because the evidence failed to support the jury's finding that the advertisement was "of and concerning" the commissioner.²⁶⁵

The disparagement statutes manipulate the "of and concerning" requirement by explicitly conferring standing upon entities about whom the statement may not be "of and concerning." For instance, some state statutes include not only producers, but also marketers, sellers, shippers, and even trade associations.²⁶⁶ By contrast, in *Auvil*, the court found that even among a group of producers, many lacked standing because the statements about Alar were not "of and concerning" those growers who did not use Alar, but rather, were "wide-ranging" statements about the chemical generally.²⁶⁷ The disparagement laws, on the other hand, do not base the right of action on the relationship between the plaintiff and the statement, as constitutionally required, but instead require the party to show only that it belongs to one of the broad industry-based categories set forth in the statute.²⁶⁸ By creating per se categories of standing, the laws negate the "of and concerning" requirement, thereby violating the First Amendment protections set forth in *New York Times*.

Finally, some of the agricultural disparagement laws upset the burden of proof, which in defamation and product disparagement actions is traditionally placed upon the plaintiff.²⁶⁹ Louisiana's statute, for instance, creates a presumption of falsity unless

263. *Id.* (citing ALA. CODE §§ 6-5-625, 6-5-623 (1998)).

264. *New York Times*, 376 U.S. at 288-89.

265. *Id.* at 288.

266. Arizona, Florida, North Dakota, and Ohio extend standing to trade associations. See Hansum, *supra* note 256.

267. Nor could the growers premise standing on the fact that they were damaged by consumer perceptions about apples generally. See *Auvil*, 800 F. Supp. at 945.

268. See Hansum, *supra* note 256.

269. See Fell, *supra* note 257, at 990 (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)).

the defendant can show that the statement was "based upon reasonable and reliable scientific inquiry, facts, or data."²⁷⁰ Given the inherent subjectivity as to which data is "reasonable," potential defendants will not know in advance whether the science upon which their claims rest, even if it is peer-reviewed and objectively verifiable, is sufficient to insulate them from disparagement claims. This may pose due process problems as well,²⁷¹ and is a far cry from the "convincing clarity" standard of proof established in *New York Times*.²⁷²

Although courts have not yet explicitly deemed any of the agricultural disparagement laws unconstitutional, commentators "overwhelmingly" predict that the statutes would not survive an express constitutional challenge.²⁷³ The paucity of litigation may indicate that potential plaintiffs are aware of the laws' constitutional infirmities. In fact, plaintiff businesses and trade associations have invoked the agricultural disparagement laws only five times.²⁷⁴ The most well-known of these episodes occurred in 1996, when the Texas Beef Group and a class of others sued Oprah Winfrey and others under the Texas agricultural disparagement law.²⁷⁵

At issue was Ms. Winfrey's statement, made during a broadcast of her show, that information relayed by one of her guests about Mad Cow Disease and cattle ranching practices "has just stopped me cold from eating another burger."²⁷⁶ Rather than address the constitutionality of the state law, the District Court instead granted the defendants' summary judgment motion on the grounds that cows are not "perishable food products" within the meaning of the statute, and that Ms. Winfrey had not "knowingly" disparaged the plaintiffs.²⁷⁷ Although the *Texas Beef Group* court passed on the constitutional question, it nonetheless stated that courts "[have] expressly refused to recognize causes of action that

270. LA. REV. STAT. ANN. § 3:4502 (West 2005).

271. See Semple, *supra* note 258, at 440.

272. *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964).

273. Jones, *supra* note 143, at 833.

274. Of these, only two have been reported, according to commentators who have surveyed the case law. See *id.* at 842. Besides the Oprah Winfrey case, see also *Action for a Clean Env't. v. Georgia*, 457 S.E.2d 273 (Ga. 1995) (dismissing declaratory judgment action as to the statute's constitutionality for lack of ripeness).

275. See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998).

276. See Fell, *supra* note 257, at 1010 (citing Am. Compl., *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998)).

277. See *Texas Beef Group*, 11 F. Supp. 2d at 863, *aff'd* 201 F.3d 680, 689-90 (5th Cir. 2000).

merely duplicate the remedy of defamation and are creatively pled in an attempt to avoid the constitutional protections mandated by the First Amendment.”²⁷⁸

ii. Comparison to the Model Act

The agricultural disparagement laws’ attempts to shortcut the First Amendment, so roundly admonished by legal scholars as well as the *Texas Beef Group* court in dicta, surface again in the Model Act. First, with regard to the intent element, recall that the Model Act criminalizes the taking of photographs on the premises of an animal enterprise, even upon lawful entry, if the photographer has “the intent to . . . defame the facility or its owner.”²⁷⁹ By criminalizing the intent to defame itself, rather than establishing strict state of mind requirements, such as actual malice, the Model Act fundamentally uproots the entire concept of defamation. Defamation has never been premised on a vague and circular standard such as the “intent to defame.” As in some of the agricultural disparagement statutes, no real intent standard, such as actual malice, is established in the Model Act. That courts have construed the *mens rea* requirement in such an exacting fashion in the First Amendment context is no accident. Rather, the actual malice standard has been deliberately established as a high hurdle so as to be more speech-protective.²⁸⁰

Additionally, the Model Act manipulates the burden of proof, not by shifting it to the defendant per se, but rather by basing it upon the complainant’s or a third-party listener’s subjective perception of the prohibited activity’s effects. The Model Act’s primary operative passage prohibits “depriving” the business interest of certain economic interests “by way of . . . fear.”²⁸¹ Like many terms in the Model Act, “fear” is not defined. Nonetheless, criminal sanctions will be imposed on the speaker if the complainant alleges that the speech acts caused him “fear.”

278. *Id.* at 864.

279. ALEC, *supra* note 6, § 3(A)(2)(e).

280. Additionally, as with several of the agricultural disparagement laws, the Model Act provides for punitive damages in the defamation context without imposing the constitutionally required intent element of malice. See, e.g., Jones, *supra* note 143 (citing Bruce E.H. Johnson & Eric M. Stahl, *Food Disparagement: An Overview of the Constitutional Issues*, LDRC BULLETIN 34 (1998)). Recall also that *New York Times* heightened the intent standard for public figures above what was required at common law. See *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

281. ALEC, *supra* note 6, § 3(A)(1).

Fear, as explained in Part II.C, may be the most idiosyncratic and varied of all human responses. One person may find a handbiller, or even the very sound of someone's voice, to be fear-some, while another would not flinch even in the face of violent threats. The Model Act leaves it to the guesswork of the courts, and of potentially affected parties, to ascertain how a complainant would meet her burden of proving fear. Unlike self-defense, sexual harassment, sexual assault and other crimes and defenses that operate based on an actor's demonstrated fear, the predicate acts prohibited by the Model Act need not be criminal or injurious in nature. Without such a predicate criminal act, the legitimacy of allegations brought under the Model Act is harder for prosecutors and judges to verify. Finally, the Model Act's most conspicuous corruption of the defamation doctrine is that it brings defamation into the province of criminal law for the first time.

Not surprisingly, the agricultural disparagement statutes and eco-terror bills emanate from the same place. Both were premised on a Model Act drafted and circulated by the trade associations of affected industries. Some of the trade associations that advocated for the disparagement laws are the same entities now pushing the eco-terror bills. Here as there, "[s]ilencing critics of agricultural products is the primary goal."²⁸² The Model Act and the disparagement statutes both "creat[e] a new right – the right to produce a consumer good without public discourse"²⁸³ about either its safety, its environmental impacts, or its ethical considerations. Generally, the two approaches share a remarkable resemblance, except that the Model Act seeks to proscribe a broader range of speech and impose more severe penalties.

Critics of the agricultural disparagement laws ask why agriculture deserves favored treatment: "[i]f impact on the economy is the test for whether to pass protectionist legislation . . . Michigan could pass an Automobile Defamation Act or Louisiana could quash debate about petro-chemical industries."²⁸⁴ The Model Act is even more of an exercise in bald favoritism than the agricultural disparagement laws, which benefited any "agricultural product," animal or plant.²⁸⁵ Within the agricultural sector, the Model

282. Jones, *supra* note 143, at 856 (citing RONALD E. GOTS, *TOXIC RISKS: SCIENCE, REGULATION, AND PERCEPTION* 254 (1993)).

283. *Id.* at 845.

284. *Id.* at 846.

285. Also missing from the Model Act is the assertion, set forth in the preamble of many of the agricultural disparagement statutes, that protectionism for certain busi-

Act focuses on animal producers. In sum, it should be obvious that the Model Act targets many of the same actors as the agricultural disparagement laws. This time, its proponents use the specter of terrorism to justify a second, and larger, bite at the apple.

C. Criminal Prosecution of Speech in the Name of Private Business Interests

By criminalizing speech and associational acts solely for the protection of private business interests, the Model Act eludes categorization in any of the doctrines explored heretofore. Rather, the Model Act creates its own doctrinal category, hastily obscuring important historical and legal boundaries. Historically, the harsh criminal sanctions it authorizes have been reserved for threats to the very existence of the nation-state, and even those laws are some of the most “widely regretted”²⁸⁶ in our nation’s legal history. Moreover, to the extent that it borrows certain legal standards from the doctrines, such as third-party liability, the “illegal objective” test, and certain burdens of proof, it misuses them.

Is the perversion of such a hard-fought doctrine worth the payoff? It depends who you ask. Opportunistic business interests are certainly aware of their opponents’ limited financial ability to litigate or defend under any of the theories explored above. As one critic of the agricultural disparagement laws noted, “[m]any of the potential defendants under [the laws] are non-profit groups They do not have the budget to combat a claim brought by a powerful agricultural conglomerate.”²⁸⁷ Put another way, not everyone, or perhaps anyone, has the resources of Oprah Winfrey. The mere threat of liability, or even the cost of litigation, would certainly intimidate would-be speakers into self-censorship about important issues that deserve to be a matter of public discourse.

Advocacy groups of all stripes “rel[y] on the First Amendment to pursue [their] goals and survive.”²⁸⁸ In the modern pluralist political state, dominated by special interest groups, courts and legislatures must be alert not only of attempts by the government to abridge free speech, but also of the suppressive and constitu-

ness interests is crucial to the health of the state’s entire economy. See Jones, *supra* note 143, at 845-46 (citing ALA. CODE § 6-5-620 to -622).

286. Flynn, *supra* note 179, at 1018.

287. Fell, *supra* note 257, at 1022 (noting that the financial concern is not reciprocal because the statutes are constructed in such a way to allow plaintiffs to share legal costs among a broad class of affected business entities).

288. Keleher, *supra* note 127, at 83.

tionally suspect efforts of rival interests.²⁸⁹ As the Supreme Court stated forcefully in *Thornhill v. Alabama*, “the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.”²⁹⁰

IV. THE BROADER IMPLICATIONS OF AN INDUSTRY-SPECIFIC USA PATRIOT ACT

Its flaunting of legal orthodoxies aside, the Model Act, if successful, will also have profound policy implications that reach far beyond the extremists it purports to focus on. By expanding anti-terror laws into venues where even the drafters admit there is no violence or “terror,” the Model Act exploits the rhetoric behind the USA Patriot Act to catalyze fear where no real threat exists. In so doing, its proponents manage only to distract and detract from true terrorism prevention. Notwithstanding this serious side effect, other industries with vocal political opponents are no doubt also watching the Model Act closely, in the event that they choose to follow suit with custom-tailored legislation of their own. Finally, the Model Act’s chilling effects upon journalists, as well as activists of all causes, merit serious reflection.

A. Exploiting and Expanding the Rhetoric of the USA Patriot Act

Given the wide-ranging and extreme consequences of the Model Act, it seems fair to ask why legislators, including those aligned with ALEC, would give it serious consideration. In the wake of the September 11 attacks, the terrorism trope virtually guarantees that these laws will get further in the legislative process than they would otherwise, or than they deserve to. Those who dare to question the effectiveness or constitutionality of these laws, or anything labeled anti-terrorism are derided as anti-patriots and even terrorist-sympathizers.²⁹¹ Although many states and cities, as explained above, have retrospectively expressed con-

289. *See id.*

290. *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940).

291. Indeed, some members of Congress hastily jumped to the conclusion that animal rights activists were responsible for the September 11th attacks. *See* Denise R. Case, *The USA Patriot Act: Adding Bite to the Fight Against Animal Rights Terrorism?* 34 *RUTGERS L. J.* 187, 218 (2002) (noting the remarks of Congressman Don Young).

cern about laws like the USA Patriot Act, these were highly unpopular sentiments at the time of the law's passage, and have not yet resulted in any legislative rollback.

However, as we have seen, the Model Act actually has very little if anything to do with "terrorism," and is better understood as an economic protectionism law. Its appropriation of the term terrorism is not made with genuine concern about the safety of the "civilian populace,"²⁹² but to guarantee minimal resistance to a law with substantial First Amendment problems. Other anti-terror laws, by contrast, are based not solely on the content of the message, but also on the *means* by which the actor targets the populace or the state.²⁹³ That the rhetoric and legal devices of the USA Patriot Act have begun to surface in venues far removed from the actual war on terror demonstrates that the USA Patriot Act is no longer viewed, if it ever was, as merely an emergency response to an unthinkable tragedy. Rather, measures like the Model Act may help the USA Patriot Act and the oppressive regime it supports to acquire normalcy, even permanency, in our modern imagination.

B. Distracting from Efforts to Bring True Terrorists to Justice

Given the breadth and variety of actual terrorist threats to human health and safety, it is foolish to deploy anti-terror resources and rhetoric against a movement with no violent acts to its credit and a strict non-violent code.²⁹⁴ Many domestic groups with a lengthy history of violent terrorist behavior remain at large, but none have been made the express object of a particular statute the way the Model Act focuses on environmental activists. Extremist factions of the anti-abortion movement, for example, are responsible for at least seven murders and hundreds of violent

292. 18 U.S.C. § 1331(5). Under the traditional definition of terror, the terrorist must target the civilian populace as a whole, or have evil designs upon the very workings of government. *See id.*

293. *See* NTSTER AM. JUR. 2D *Terrorism* § 15 (2004).

294. *See* U.S. DEPARTMENT OF JUSTICE, *supra* note 69. Although proponents of the bills argue that "eco-terror" is a growing problem, it bears noting that the chief of domestic terrorism analysis for the FBI stated that "we have not seen a dramatic increase in the numbers of [eco-related property damage] incidents . . . maybe four or five" in as many years, "nothing widespread." Bob Ortega, *Media Go to Him for Analysis of Environmental Violence the FBI Hasn't Spotted*, WALL ST. J., Mar. 2, 1999, at A1. Moreover, the National Association of Attorneys General stated that "the issue of eco-terrorism 'hasn't come up.'" *Id.*

attacks on clinic workers and volunteers in North America.²⁹⁵ One can only speculate why legislatures have not appropriated the word “terrorism” to describe these lethal crimes, or why Congress has convened hearings on the specter of animal rights “terrorism,” but not on the far more violent anti-abortion movement. In a single year, for example, anti-abortion extremists were responsible for 483 lethal or violent incidents against abortion providers in the U.S. alone.²⁹⁶

Militant anti-choice activists are not the only domestic terrorist threat. In a recent *New York Times* column, Paul Krugman reminds us of the ever-present danger of well-armed, clandestine right-wing militias, many with white supremacist ties.²⁹⁷ In April, 2003, Krugman recounts, federal agents stumbled across “what appears to have been a horrifying terrorist plot” in the Texas home of a white supremacist – a seemingly limitless cache of weapons including fully automatic firearms, remote-controlled explosives, and a cyanide bomb big enough to detonate a large building.²⁹⁸ Although accused terrorist Jose Padilla possessed no such bomb-making material, “Mr. Ashcroft put him on front pages around the world.”²⁹⁹ The Texas event, meanwhile, made no headlines, perhaps because Ashcroft wanted “to bury news about terrorists who don’t fit his preferred story line . . . it’s hard to believe that [the Texas would-be bomber] wouldn’t have been a household name if he had been a Muslim, or even a leftist.”³⁰⁰ Even after the Texas incident, the Bush administration persisted in its view that eco-activists were still the “country’s leading domestic terrorist threat.”³⁰¹ Laws like the Model Act clearly “neglect[] real threats to the public because of . . . ideological biases.”³⁰²

A final anecdote illustrates the need for a more nuanced concept of what truly comprises “terrorism.” Over twenty years ago, in central Oregon, followers of the Rajneeshee cult planted salmo-

295. See Keleher, *supra* note 127 at 844-45; see also National Abortion Federation, *NAF Violence and Disruption Statistics*, at <http://www.prochoice.org> (last visited Jan. 31, 2004).

296. National Abortion Federation, *History of Violence / Extreme Violence*, at http://www.prochoice.org/about-abortion/violence/history_extreme.asp (last visited Mar. 30, 2005).

297. Paul Krugman, *Noonday in the Shade*, N.Y. TIMES, June 22, 2004, at A19.

298. See *id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

nella bacteria in a restaurant salad bar, in an effort to skew the town election in favor of their leader, by making town citizens too sick to vote the following day.³⁰³ A district attorney also became ill “after leaving a cup of coffee unattended while Rajneeshees lurked around the courthouse.”³⁰⁴ Overall, forty-five people were sickened. This unlikely plot, almost humorous in its bizarre and relatively modest origins, actually stands as the largest “bioterror attack” on U.S. soil to date. In the days since Rajneeshees “lurked” around salad bars in Oregon, the term “terrorism” has become an all-purpose epithet. It has been so diluted and misused that it has little function left, other than to arouse fear and suspicion. The Model Act contributes to this dilution by labeling non-violent speech acts as terror, which in turn impairs the ability of adjudicators to ascertain what is truly terrorism. By diverting law enforcement resources to non-violent actors, the Model Act ultimately hinders violence prevention.

C. Testing a Model Corporate Strategy for Other Industries

The Model Act has sobering implications for activists of all causes that scrutinize the actions of private business entities. Its framework can be quickly borrowed by other industries that seek protection from the effects of public criticism, including enterprises with controversial labor practices such as sweatshops, companies that outsource jobs, the biotechnology sector, defense contractors, nuclear plants, tobacco companies, weapons manufacturers, the fast food industry, and a host of others — perhaps even the financial sector, in the wake of the corporate accountability backlash.

Many of these industries are sponsors of ALEC, the Model Act’s drafter.³⁰⁵ With publicly-unaccountable structures like ALEC in place to serve as the unregulated mediator between affected business interests and eager right-wing legislators, the concept could spread quickly. Commentators also predicted a similar spillover effect with regard to the agricultural disparagement laws. One scholar warned that if “other industries demand[ed]

303. John Cramer, *Oregon Suffered Largest Bioterrorist Attack in U.S. History, 20 Years Ago*, THE BULL. (Bend, Or.), Oct. 14, 2001.

304. *Id.*

305. See Defenders of Wildlife, *supra* note 30.

similar protection," it would "severely undercut the ability of any news agency to point out a calamity waiting to happen."³⁰⁶

Even if other businesses with controversial practices do not actively seek such legal protection from public scrutiny, the Model Act itself has the potential to reach activists of other causes. Its prohibitions include interference with not only those activities that would traditionally be recognized as objectionable by animal protectionists, such as hunting, but also those that may or may not involve the use of animals, such as "clothing or garment manufacturing."³⁰⁷ The Model Act even prohibits interference with activities that do not appear to be related to animal use whatsoever, such as "camping" and "traveling."³⁰⁸ If the proponents' objectives are truly to stop so-called "eco-terror," this sweeping list of protected activities is wildly overinclusive.

D. Effects on Journalism, Activism, and the Very Concept of the Social Movement

As we have seen, the law implicates not only the ski-mask-wearing animal liberator, but also every American who sends the ASPCA or the Sierra Club a ten dollar check, and hence provides "material support" to a terrorist organization. Proponents of the bills can no longer credibly state that they are not going after law-abiding activists. Every mainstream animal and environmental protection organization in this country has cause to worry about the Model Act's wide-ranging institutional liability provision. Indeed, many organizations have already begun to worry, and are working to defeat the bills,³⁰⁹ so that they may carry on with their non-violent advocacy activities without fear of prosecution.

Journalists, as it happens, will also be hit hard by the Model Act, especially under the felony photography provision.³¹⁰ The *Auvil* and *Texas Beef Group* agricultural disparagement cases hint at what is to come for journalists under the Model Act – expensive, protracted litigation, and now, possibly even criminal liability.

306. Hansum, *supra* note 256, at 270.

307. ALEC, *supra* note 6, § 2(B). See also ABCNY, *supra* note 34, at 1.

308. ALEC, *supra* note 6, § 2(B). See also ABCNY, *supra* note 34, at 1-2.

309. Wayne Pacelle, chief executive officer of the Humane Society of the United States, said of the Model Act: "We agree with the criticisms of those who resort to violence in the name of animal protection. But we don't want to allow political opponents of animal and environmental protection to leverage legitimate societal concerns about terrorism in order to institute indefensible restrictions on non-violent and long-permissible forms of dissent." Satchell, *supra* note 60, at 1.

310. See *supra* Part I.B.

The lack of a journalist exception in the felony photography provision is no accident. An undercover report can have devastating economic effects, regardless of whether it is motivated by ideology or ratings. But these economic interests, as this Article has illustrated, are insufficiently compelling to justify the state's restriction on this type of journalistic activity. In fact, society as a whole often benefits from the meaningful and often overdue legislative reforms triggered by undercover media reports.³¹¹

By silencing both activists and journalists, the Model Act grossly distorts the important public policy debate surrounding human interactions with animals and the environment. Its overreaching prohibitions leave animal and environmental protectionists with very few if any means to communicate their message without fear of prosecution. Restraints of this breadth truly do have the potential to render entire movements ineffective. Where one side of the debate is so profoundly hindered, the debate effectively ends. In the vacuum of meaningful public discourse and vibrant exchange of views, the affected business interests substitute their viewpoint as a foregone conclusion. Through its deliberate refusal to distinguish between destructive and peaceful activity, the Model Act has the rhetorical effect of characterizing what is actually a majority-held opinion³¹² not only as a minority view-

311. Examples of such benefits are too numerous to list. However, a recent event illustrates the point. On July 20, 2004, undercover investigators released videos of employees at Kentucky Fried Chicken's contract growers "tearing beaks off, ripping a bird's head off to write graffiti in blood, spitting tobacco juice into birds' mouths, plucking feathers to 'make it snow,' suffocating a chicken by tying a latex glove over its head, and squeezing birds like water balloons to spray feces over other birds." Donald J. McNeil, Jr., *KFC Supplier Accused of Animal Cruelty*, N.Y. TIMES, July 20, 2004, at C2. This media event is notable in that it has sparked an effort in Congress to amend the Humane Methods of Slaughter Act to include birds. See, e.g., The Humane Soc'y of the United States, *Petition for Poultry*, at https://community.hsus.org/campaign/petition_for_poultry (last visited Apr. 26, 2005). Prior to this media scrutiny, most people were unaware that Federal law does not require birds to be slaughtered humanely. Yet the Model Act would have criminalized the taking and release of those videos as a felony.

312. Independent polls of a nationwide scope repeatedly and unequivocally show that most Americans favor better treatment of animals and stronger protection for the environment. See, e.g., S. Plous, *Attitudes Toward the Use of Animals: In Psychological Research and Education: Results From a National Survey of Psychologists*, 51 AM. PSYCHOL. 1167-80 (1996) (noting that even among researchers, support for animal research declined between 81 and 53 percent, depending on the species, when the research involved confinement, pain, or death); Lake Snell Perry Mermin & Associates, AMERICANS FOR THE ENVIRONMENT: A NATIONWIDE SURVEY OF 1,000 REGISTERED VOTERS (Washington, D.C., Mar. 23, 1999) (finding that 77 percent of American citizens are troubled by the inhumane treatment of animals killed for food); Yale Univ. School of Forestry & Env't, THE ENVIRONMENTAL DEFICIT: SURVEY ON AMERICAN

point, but as the radical propaganda of a violent minority. However, as Justice Stevens warned in *Claiborne Hardware*, using a metaphor that suits the present debate, “[a] court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees.”³¹³

Nor should the effects of debate distortion on the listener go unvalued. By pre-empting a message that the listener may ultimately choose to act upon, the Model Act, at best, undervalues the listener’s intellectual autonomy, and at worst, interferes with her control over her own analytical processes.³¹⁴ One wonders why the affected business interests would resort to re-contouring the First Amendment rather than answering critics with their own speech. Without persuasive counterarguments, however, it helps to have the entire debate floor to one’s self.³¹⁵

Lost in all of the paranoia about terrorism is the boundless irony that the law would ever recognize as “eco-terrorists” those who endeavor to *protect* the ecosystem. In the shadow of the Model Act, the real victims of “intimidation, coercion, [and] fear” are the vast number of Americans who value the protection of animals and the environment, and who express those values in any fashion other than keeping that thought to themselves. Each time

ATTITUDES ON THE ENVIRONMENT (2004) (finding that 67 percent of Americans believe that the U.S. government does not do enough to address environmental degradation), available at http://www.yale.edu/forestry/downloads/yale_poll_globalwarming.pdf.

313. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 934 (1982).

314. See Strauss, *supra* note 20, at 334.

315. This technique – slandering the messenger as a terrorist rather than rebutting the substance of her message – was on vivid display during the February 20, 2004 episode of *Dateline*. There, Veronica Atkins, the widow of the man who invented the Atkins diet, compared a pro-vegetarian public health advocacy group directly to the Taliban. The “terrorist” activity to which she objected was the lawful obtaining and then publicizing of a report indicating that Dr. Atkins weighed 258 pounds at the time of his death. See Patrick Whittle, *Vegetarians Chew the Fat Over the Atkins Diet*, *HERALD-TRIB.* (Sarasota, Fla.), Feb. 23, 2004.

This approach is relatively new, as evinced by the recent public outcry over cruel acts propagated at KFC contractors’ factory farms, see *supra* note 311. After the media exposé, a spokesperson from KFC stated that PETA’s use of billboards condemning the conditions and urging a boycott constituted “corporate terrorist activities” that “won’t be tolerated.” Carol Beggy & Mark Shanahan, *A Fond Memory of Fay Wray; A Not-So-Fond Charge by Pam Anderson*, *BOSTON GLOBE*, Aug. 10, 2004, at D2. Clearly, affected industries and their supporters are turning up the heat. Just two years ago, one commentator cited PETA’s use of a billboard as a “a good example of animal rights activists’ methods of using the First Amendment.” See Case, *supra* note 291, at 227. First, they point to billboards as a constructive outlet for disapproving sentiment, then they decry the use of billboards as terrorism. Purveyors of the “eco-terror” phantasm cannot have it both ways.

an American cuts a check to a mainstream environmental organization, or writes her congressperson, or attends a meeting, or passes out flyers, she will do so knowing that the only things keeping her out of jail and off the public terrorist registry are chance, and the present mood of her local law enforcement agents. Such repressive governance has not been seen since the Espionage Acts and the Red Scare, and even then, it was thought that the repressed actors posed a threat to the very nation-state itself. Among these shameful moments in our legal history, the Model Act truly symbolizes the “worst of times.”³¹⁶

316. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 513 (1985).