

When the Constitution is No Obstacle to the FBI

Legal Lessons From the Green Scare

By BEN ROSENFELD and LAUREN REGAN

"Anna" the 19-year-old FBI informant bought the materials and worked to keep the group focused on targets and timeframes. When 28-year-old Eric McDavid and his two younger friends failed to muster sufficient enthusiasm for Anna's sabotage schemes, she would pout and cry and excoriate them for "dilly-dallying." Then they would pretend to re-dedicate themselves to her cause—especially McDavid, who had a crush on her, which she fed.

Two years earlier, the FBI had begun dressing Anna up as a medic and inserting her into activist gatherings to look for people to bust. It didn't matter that McDavid and company had no real interest in *Anna's* conspiracy, or that she had reported to her handlers that he was gentle and non-threatening. If you're an "environmental or animal rights extremist" in the post-9/11 USA, there are two ways to get on the government's bad side: (1) break the law, or (2) follow it. The FBI simply has no use for law-abiding activists when it's out to crucify people as examples to a movement it wants to destroy.

Following McDavid's 20-year sentence for conspiracy to commit arson (where the trial showed the group did not actually agree on, let alone do anything), his attorney Mark Reichel lamented, "We're at the point where the government can do *whatever* the fuck they want." (See "The Believers," *Elle Magazine*, May 2008.) Punishment and deterrence aside, "Green Scare" prosecutors and their coordinators in Washington are willing to destroy individual lives to score political points, and to trample their own rules in the process.

That's not to say eco-arson isn't a serious crime. The people who set fires in the names of ELF and ALF must have known they were facing serious time if they got caught. But surely not more time than rapists and some murderers, especially where the evidence shows they went out of their way to prevent injury. The reality, though, is they do get sentenced more harshly. Jeff "Free" Luers received 22 years (before reduction to 10); Eric McDavid got 20 years; and Marie Mason got 22. That's to say nothing of heavy sentences for actions like animal releases, or those which aren't crimes at all but veiled assaults by the government itself on the First Amendment, as in the SHAC 7 prosecution (up to six years for operating a website and a fax machine), or the prosecutions of Sherman Austin and Rod Coronado for casually explaining how to start a time-delayed fire (in Austin's case, by linking to someone else's website, and in Coronado's case, by answering a question put to him after a talk). Burn down a building to commit insurance fraud and you're looking at about five years; do it with passion and you face ten to thirty-five.

In the years since 9/11, and the FBI's declaration in 2005 that ELF and ALF represent the top domestic security threat (a claim which the Department of Homeland Security disavowed in its May 2008 "Ecoterrorism Threat Assessment" report), the rhetoric has been ratcheted up to a degree that it creates a distinctly hostile work environment for the Constitution. Freeing tortured animals is *terrorism*. Jugs filled with gasoline are *incendiary devices*, the mere possession of which nets you a mandatory 30-year sentence. Explaining your actions in a communiqué subjects you to a *terrorism sentencing enhancement* and imprisonment in the darkest U.S. dungeons, like the exquisitely barbaric Communications Management Unit at Marion, Illinois—a sensory deprivation chamber that would make Dostoyevsky blush—where Daniel McGowan resides. (See his excellent piece, "Tales from Inside the U.S. Gitmo," *Huffington Post*, June 8, 2009.) Earth First! is branded a *violent group*, lumped in with ELF and ALF, simply because some judge with a loose pen says so in drafting a defendant's terms of probation. Never mind that we spent 12 years in the Judi Bari case successfully debunking the lie that Earth First! is violent.

Furthermore, if arson equals terrorism, it leaves us all lexically challenged to think of alternative terms for both. How else are the victims of real terror, like Judi Bari and Darryl Cherney (whose car bombing the FBI never labeled terrorism, except while trying to frame *them* for it), or people who survive planes flown into skyscrapers, supposed to make sense of the horrors they endured? The naming of things matters. When the government names things, it shifts entire budgets and priorities and realigns the thinking of judges and juries who fail to exercise an independent conscience as a result.

Many law enforcement officials earnestly believe it is just a matter of time before environmental activists begin carrying out assassinations and bombings. And exaggerated utterances by some activists have stoked those fears. But a lot of the same officials direct none of their opprobrium at right-wing zealots who actually murder and maim people. Whether police and policymakers sincerely believe the environmental movement is turning violent, it serves their institutional objectives (and budgets and staffing) to pretend so. They troll for confirming evidence in print and online, and exploit it endlessly when they feel they've found it. The FBI also relies on biased consultants and phony think tanks, like the industry-sponsored Center for Consumer Freedom, who assign literal significance to every satirical statement and then ascribe it to the whole radical environmental movement. In so doing, the FBI gives its witch hunt pseudo-academic cover.

According to a cynical 1972 Supreme Court decision, *Laird v. Tatum*, police do not violate the Constitution simply by creating dossiers on people; their surveillance has to produce some actual harm before it ripens into a rights violation. Even then, the law insulates police if they can articulate any pretext for an investigation beyond pure political harassment. Supporters of Eric McDavid recently obtained documents under a FOIA request showing that the feds are logging the names of people who write to eco-prisoners. There is no question that such Stasi-like behavior by our national police chills free expression and civic participation. But the Constitution is no obstacle to the FBI when it is ideologically bent on "disrupt[ing] and dismantl[ing]" social movements, as

Director Robert Mueller admitted in a press release announcing the 2006 Oregon arrests. Arguably, such government intrusiveness is itself hardening the movement, terrifying some people into inaction, but driving others to organize underground.

Know-your-rights trainings, at least, are getting easier. “*Thanks for coming. You have none. Good night.*” In just a few years, Fourth Amendment protections have further unraveled to the point that in most jurisdictions, if police want to rummage the contents of your cell phone (presuming it is not password protected), they need only follow you until you commit a petty offense, like jaywalking, then arrest you and seize your phone. The simple fact is, it’s getting hard not to get caught. The original Oregon and Washington (“Operation Backfire”) defendants encrypted their computers, but entrusted their private keys to a person who ultimately traded them to the government for leniency.

It behooves the modern activist to ask: *What does it even mean to get away?* Friends and family are left holding the bag, and to deal with the visits, the raids, and the grand jury summons. As lawyers, our job includes comforting devastated parents who hope paradoxically that their hunted children both will and won’t get caught, so they can see them again, but not behind bars.

It is true that only a fraction of eco-saboteurs have been caught for crimes that have in some instances devastated entire industries, like fur farming and vivisection labs. The Department of Homeland Security catalogs numerous unsolved incidents—from fires which leveled multi-million dollar housing projects to a “stole[n] six rabbits and seven birds.” In a sense, authorities are like lions preying on a herd: some zebras are going to go down. But the environmental and animal rights communities do not give up loved ones lightly. They have spent incredible emotional, temporal, financial, and legal resources on prisoner support.

Far be it from a couple of lawyers to tell people what to think and do. But it is worth considering what an even more positive impact this creative and empathic community could have if it weren’t so drained trying to free loved ones from legal snares, let alone outfox the state on its own high tech turf. Global awareness about climate change and the excesses of capitalism are gaining momentum, and we could use more people to connect the two. In that sense, the competition for hearts and minds is still where some of the best direct action is. Subtract fire, and the rhetoric of violence, and strip the FBI of its biggest excuse for harassing environmentalists.

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