

Animals Too Ugly to Protect? The PACT Act Needs an Update

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ABSTRACT

This Article examines the Preventing Animal Cruelty and Torture (PACT) Act.¹ The PACT Act criminalizes (1) the intentional crushing of nonhuman animals, (2) the creation of animal crush videos,² and (3) the selling, distributing, marketing, exchanging, or advertising of animal crush videos in interstate or foreign commerce.³ The Act defines “animal crushing” to include conduct in which “living non-human mammals, birds, reptiles, or amphibians [are] purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury.”⁴ The PACT Act passed unanimously through the Senate on November 5, 2019.⁵ The PACT Act excludes low-value, sentient animals—like fish and insects—from its protection, despite the fact that these animals are some of the most abused animals in animal crush videos.⁶ Therefore, the PACT Act should be amended to include them.

Section I of this Article introduces the phenomenon of animal crushing and studies previous legislative initiatives to regulate animal crushing. Section II examines the plain text of the PACT Act and discusses animals excluded from its protection. This section presents the concept of animal hierarchies to explain what constitutes low- and high-value animals and why all animals should receive the same legal protections against cruelty. Finally, recommendations are made in section III to (1) amend the PACT Act and (2) take future actions to fill holes in the animal legislative scheme. This Article argues that the definition of animal crushing should include the torture of low-value animals. Because the PACT Act presents a legitimate governmental interest in preventing animal cruelty, this interest could extend to low-value animals in other federal animal welfare law.

DOI: <https://doi.org/10.15779/Z38WW7714F>

1. Animal Crushing, 18 U.S.C. § 48.
2. “Animal crush video” includes “photograph[s], motion-picture film, video or digital recording, or electronic image” that depicts animal crushing and is obscene. *Id.* § 48(f)(2).
3. *Id.* § 48(a).
4. *Id.* § 48(f)(1).
5. H.R. 724, 116 Cong. (2019).
6. Jeremy Biles, *I, Insect, or Bataille and the Crush Freaks*, 7 JANUS HEAD 115, 116 n.4 (2004).

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I. INTRODUCTION

A. *Animal Crush Videos*

Animal crush videos are created and consumed by people participating in a fringe kink market profiting off crush fetishes. Crushing is a paraphilia⁷ where the viewer obtains sexual arousal from observing objects being crushed.⁸ Some people with this fetish insert themselves into the position of the object being crushed.⁹ Objects vary from inanimate items (referred to as “soft crush”) to the injurious and often fatal crushing of animals (referred to as “animal crush”).¹⁰ Animal crush videos can be further delineated into two categories: (1) the crushing of small bugs, invertebrates, crustaceans, and worms and (2) the crushing of vertebrates, such as “‘pinkies’ (baby mice), goldfish, frogs, and larger animals.”¹¹ The first category is more popular,¹² but the crushing of mice is particularly popular with around 30 percent of the community.¹³ Animal crush videos often depict a woman’s high-heeled shoe or bare foot stomping on a small animal.¹⁴

7. M. Jenny Edwards, *Arrest and Prosecution of Animal Sex Abuse (Bestiality) Offenders in the United States, 1975-2015*, 47 J. AM. ACAD. PSYCHIATRY L. 1, 3 (2019), <https://jaapl.org/content/jaapl/early/2019/05/16/JAAPL.003836-19.full.pdf> (defining “paraphilia” as an “atypical sexual interest”).

8. Virginia Pelley, *The People Who Get Off to Crush Porn*, VICE (May 7, 2015, 11:50 AM), <https://www.vice.com/en/article/z4m5kx/the-people-who-get-off-to-animals-being-trampled>.

9. HUGH RAFFLES, *THE ILLUSTRATED INSECTOPEdia* (Vintage Books 1st ed. 2010), <https://publicism.info/nature/insectopedia/20.html>.

10. *Id.*

11. Biles, *supra* note 6, at 116, 128 n.4 (clarifying that the crushing of vertebrates is “relatively rare.”).

12. *Id.*

13. RAFFLES, *supra* note 9.

14. *Crush Videos*, ANIMAL WELFARE INST., <https://awionline.org/content/crush-videos>, (last visited Oct. 9, 2022).

Animal crush videos are not a new phenomenon. The availability of home-recording video technology in the 1960s marked the beginning of the creation of animal crush videos.¹⁵ Perhaps the first “popular” animal crush video was created by Jeff “The Bug” Vilencia in 1993.¹⁶ The film, entitled *Smush*, has an eight-minute run time and depicts an actress crushing hundreds of earthworms.¹⁷ *Smush* is not just some fringe film; it was shown to audiences at a Toronto International Film Festival.¹⁸ In addition to *Smush*, Vilencia also produced a fifty-six-film-long series titled the *Squish Playhouse* series, which was sold via mail order and rarely advertised outside of pornographic magazines or word-of-mouth.¹⁹ Vilencia’s film also led to him creating *The American Journal of the Crush-Freaks*.²⁰ The Journal reportedly had upwards of 500 subscribers, selling 200 copies for twenty dollars each between January and December of 1993.²¹ While the animal crush community may be small, it has a cult following.

B. Legislative Background.

In 1999, *People v. Thomason*²² thrust animal crush videos into the limelight. Defendant Gary Thomason was the subject of an undercover sting where investigators learned about Thomason’s production of animal crush videos.²³ Thomason’s videos depicted rats, mice, and “pinkies” being crushed by an actress.²⁴ His home was searched, and approximately forty videos were found.²⁵ Thomason was arrested under California Penal Code section 597(a), which provided that “every person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of an offence [sic] punishable by imprisonment in the state prison”²⁶ Thomason was convicted of three felony counts of cruelty to animals.²⁷

The then-Ventura County District Attorney, Michael Bradbury, held a press conference with Doris Day Animal League representatives by his side.²⁸ This conference attracted national attention. Bradbury showed the nation graphic

15. Biles, *supra* note 6, at 119.

16. *Id.*

17. *Smush*, IMDB, <https://www.imdb.com/title/tt0136536/>, (last visited Nov. 3, 2022).

18. David Mills, *The Lady is a Trampler*, THE WASHINGTON POST (Dec. 11, 1993), <https://www.washingtonpost.com/archive/lifestyle/1993/12/11/the-lady-is-a-trampler/c62528d0-3a45-44ca-8ffb-b7cc5b40fd85/>.

19. *Id.*

20. Biles, *supra* note 6, at 119.

21. Neil Rocklin, *Bizarre Behavior & Culture-Bound Syndromes: Crush Fetish*, NOOZHAWK (Oct. 10, 2009, 5:15 PM), https://www.noozhawk.com/article/101009_bizarre_behavior_culture-bound_syndromes_crush_fetish; Mills, *supra* note 18.

22. *People v. Thomason*, 101 Cal.Rptr.2d 247 (Cal. Ct. App. 2000).

23. *Id.* at 249.

24. *Id.*

25. *Id.*

26. CAL. PENAL § 597(a).

27. *Thomason*, 101 Cal.Rptr.2d at 248.

28. RAFFLES, *supra* note 9.

pictures of insects, kittens, and mice being crushed under women's feet for sexual gratification.²⁹ Bradbury called upon Congress to act after expressing how difficult it is to prosecute animal crush crimes under state law.³⁰ Bradbury identified four problems: (1) the difficulty identifying the individual featured in the video, (2) the difficulty proving that the act featured in the video occurred in the state and within the statute of limitations, (3) local animal cruelty laws do not prohibit the production, sale, or possession of the video, and (4) there are no federal laws that could be used to prosecute these crimes.³¹

California Representative Elton Gallegly took up the mantle, sponsoring House Bill 1887.³² Gallegly further mobilized the nation by tying animal cruelty to violence against humans³³ and by pointing to the availability of crush videos on the internet, which children could find.³⁴ The bill amended 18 U.S.C. § 48 to criminalize the creation, sale, or possession of depictions of animal cruelty.³⁵ The House Judiciary Committee explained that when interpreting this statute, the term "animal" should be given its common, rather than scientific, meaning.³⁶ This excluded insects, invertebrates, crustaceans, and fish.³⁷

In 2010, the Supreme Court considered § 48 in *United States v. Stevens*.³⁸ Defendant Robert Stevens was indicted under § 48 for selling films depicting dogfighting.³⁹ Stevens argued that § 48 was substantially overbroad because (1) Stevens' actions were not contemplated as a "crush video," and (2) depictions of ordinary or lawful activities could be subject to § 48.⁴⁰ Stevens argued that § 48 defined "animal cruelty" to include wounded or killed animals, which does not necessarily imply the animal was treated cruelly.⁴¹ Stevens also argued that § 48 created absurd results, such as criminalizing depictions of lawful conduct, if the video was distributed across state lines into a state where the conduct is illegal.⁴² The Court held that § 48 was unconstitutionally overbroad and constituted a content-based restriction on freedom of speech.⁴³

29. *Id.*

30. 145 CONG. REC. E1067 (May 24, 1999) (statement of Rep. Elton Gallegly).

31. *Id.*

32. H.R. 1887, 106th Cong. (1999).

33. Violence against animals has been identified as a predictor of future violence against humans. Cynthia Hodges, *The Link: Cruelty to Animals and Violence Towards People*, ANIMAL LEGAL & HIST. CTR. (2008), <https://www.animallaw.info/article/link-cruelty-animals-and-violence-towards-people>.

34. Elton Gallegly, *Children Need Protection from Crush Videos*, SANTA PAULA TIMES (Oct. 15, 1999), http://santapaulatimes.com/news/archivestory.php/aid/305/Children_need_protection_from_crush_videos.html.

35. Animal Crushing, 48 U.S.C. § 48(c)(1) (1999); *see also* 106 CONG. REC. 25311, 25893–25900 (Oct. 14, 1999) (providing the testimony of congresspeople surrounding the proposed bill).

36. H.R. Rep. No. 106-397, at 7 (1999).

37. *Id.*

38. *United States v. Stevens*, 559 U.S. 460 (2010).

39. *Id.* at 466.

40. *Id.* at 467.

41. *Id.* at 474.

42. *Id.* at 475-76.

43. *Id.* at 482.

In response to *Stevens*, the 111th Congress passed the Animal Crush Video Prohibition (ACVP) Act of 2010.⁴⁴ The ACVP Act amended § 48, tailoring the prohibition from “depictions of animal cruelty” to “animal crush videos.”⁴⁵ The ACVP expressly recognized that “[t]he Federal Government and the States have a compelling interest in preventing intentional acts of extreme animal cruelty.”⁴⁶ Unfortunately, the ACVP Act failed to address the identified overbreadth problems, and 18 U.S.C. § 48 was amended again in 2019 by the PACT Act.⁴⁷ The PACT Act passed unanimously through the Senate on November 5, 2019, and was signed into law.⁴⁸

The PACT Act, paired with the popular Netflix docuseries, *Don’t F**k With Cats: Hunting an Internet Killer*,⁴⁹ pulled animal crush videos back into national attention. *Don’t F**k With Cats* highlighted some of the same issues with animal crush prosecution as described in 1999 by Michael Bradbury, the Ventura County district attorney at the time.⁵⁰ These include how difficult it can be to identify the person who made the video and that videos can be created and distributed across jurisdictions, aiding the creator in evading law enforcement.⁵¹ Despite the passage of the PACT Act, work remains to be done to further protect animals from animal crushing under the law.

II. THE PACT ACT

A. Plain Text of the Statute

The PACT Act criminalizes (1) the intentional crushing of nonhuman animals, (2) the creation of animal crush videos, and (3) the selling, distributing, marketing, exchanging, or advertising of animal crush videos in interstate or foreign commerce.⁵² The Act defines “animal crushing” to include conduct in which “living non-human [animals are] purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury.”⁵³ The PACT Act prohibits animal crush videos of “living non-human mammals, birds, reptiles, or amphibians.”⁵⁴ The PACT Act’s definition of animal excludes the

44. Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177.

45. 18 U.S.C. § 48 (2010).

46. *Id.* note sec. 2(4).

47. *Id.*

48. H.R. 724, *supra* note 5.

49. DON’T F**K WITH CATS (Netflix 2019); *see also* Haven Orecchio-Egresitz, *The Availability of ‘Animal Crush’ Content has Created a Cat-and-Mouse Subculture of Attention Seeking Animal Abusers and the Web Sleuths Who Suss Them Out*, INSIDER (Jul. 29, 2020), <https://www.insider.com/making-animal-crush-torture-videos-serial-killer-warning-sign-2020-7>.

50. 145 CONG. REC. E1067 (May 24, 1999) (statement of Rep. Elton Gallegly).

51. *Id.*

52. 18 U.S.C. § 48(a).

53. *Id.* § 48(f)(1).

54. *Id.*

most popular species in crush videos (small bugs, invertebrates, and crustaceans), as well as fish.⁵⁵

Why would legislation aimed at eliminating animal crush videos fail to protect the most commonly crushed animals? As the sponsor, Representative Ted Deutch, explained, the PACT Act received bipartisan support because “Americans care about animal welfare. We form deep relationships with our *companion animals* and are rightfully outraged by cases of animal abuse.”⁵⁶ Multiple other representatives expressly linked their support of the PACT Act to the importance of protecting companion animals and the documented connection between animal cruelty and violence against humans.⁵⁷ Companion animals—*i.e.*, domesticated animals—were specifically considered rather than all animals. Moreover, the motivation to stop animal cruelty was not enough justification to pass the proposed bill; concern for human safety and interests—as referenced by the connection between human abusers practicing animal cruelty and repeated discussion of companion animals—dominated the conversation.

B. *Low-Value Animals Excluded from Protection*

Accepted notions of anthropocentric negative animal hierarchies have informed American animal cruelty legislation. These hierarchies create low- and high-value animals from human notions of moral value.⁵⁸ The PACT Act does not protect low-value animals like small bugs, invertebrates, crustaceans, and fish. These low-value animals are also excluded from protection under the law in other contexts.⁵⁹ This is due to their perceived lack of utility, repulsiveness, or otherwise harmful nature. Low-value animals should be afforded the same protections under the theory of sentience. The categories of animals excluded from the PACT Act are due dignity protections under the law.

i. *Introduction to Animal Hierarchies*

Negative animal hierarchies create low- and high-value animals. The negative animal hierarchy is the notion that some animals receive more moral value based on their role in society.⁶⁰ Human socialization creates animal hierarchies. Both (1) the personal interactions people have with animals and (2)

55. Biles, *supra* note 6, at 116 n.4.

56. 165 CONG. REC. H8356 (Oct. 22, 2019) (emphasis added).

57. *Id.* at H8356-57 (statements of Rep. Guy Reschenthaler, Rep. Cindy Axne, & Rep. Earl Blumenauer).

58. This article discusses primarily western notions of moral values. Indigenous and eastern cultures have different notions of low- and high-value animals informed by their differing philosophies. See E. Szűcs et al., *Animal welfare in Different Human Cultures, Traditions, and Religious Faiths*, 25 ASIAN-AUSTRALASIAN J. ANIMAL SCI. 1499 (2012).

59. See, e.g., the Animal Welfare Act, 7 U.S.C. § 2132(g) (excluding birds, rats, and mice); Transportation of animals (the 28 Hour Law), 49 U.S.C. § 80502 (excluding birds); the Humane Methods of Slaughter Act, 21 U.S.C. § 601(j) (excluding birds).

60. Victoria C. Krings et al., *The Moral Divide Between High- and Low-Status Animals: The Role of Human Supremacy Beliefs*, 34 ANTHROZOÖS 787, 787 (2021).

the “purpose” an animal serves in human society informs how humans view different classifications of animals.⁶¹ Because of the negative animal hierarchy, people attribute different moral values to animals based on their species membership, regardless of whether animals have comparable traits.⁶² For example, dogs and pigs have comparable mental and emotional capacities. Yet, dogs and pigs are treated differently because of their moral status. Dogs are viewed as high-value companion animals, while pigs are viewed as low-value food animals.⁶³ High-value animals are “charismatic megafauna.” These are animals that exhibit positive traits—such as *rare* or *endangered*, *beautiful*, *cute*, *impressive*, or *dangerous*—and as such, they evoke an emotional response within humans.⁶⁴ The majority of high-value animals are “exotic, terrestrial mammals.”⁶⁵ Some animals have escaped their low-value status through positive publicity or ecotourism.⁶⁶ While mobility within animal hierarchies is possible, animals perceived as (1) harmful, (2) repulsive, and (3) dissimilar to humans are animals that remain low-value.⁶⁷

Studies have shown these animal hierarchies translate to a significant moral divide between which animals humans view to be worthy of protection under the law.⁶⁸ Moral consideration of another being is to say that being can be wronged.⁶⁹ When a being is capable of being wronged, they also can be protected from wrongs. The negative animal hierarchy creates levels of moral consideration. For example, humans tend to feel “more moral concern for [high-value] companion animals (*e.g.*, dogs and cats) and appealing wild animals (*e.g.*, dolphins and chimps) than [they do for low-value] food animals (*e.g.*, pigs and turkeys) and unappealing wild animals (*e.g.*, frogs and bats).”⁷⁰ As such, high-value animals receive more moral consideration and protection under the law, while low-value animals receive less.

61. *Id.* Additionally, low- and high-value animals vary culturally. In Australia, Chile, and Brazil, people ranked the welfare of dogs more important than humans; the welfare of koalas ranked especially high in Australia and Chile. Michelle Sinclair et al., *International Perceptions of Animals and the Importance of their Welfare*, 3 FRONTIERS IN ANIMAL SCI.: ANIMAL WELFARE & POL’Y (2022). Religion has a particular impact on cultural perceptions of animal hierarchies. *Id.*

62. Krings, *supra* note 60, at 788.

63. *Id.*

64. Céline Albert, et al., *The Twenty Most Charismatic Species*, PLOS ONE, 4 (July 9, 2018).

65. *Id.* at 9.

66. See Carlotta Mazzoldi et al., *From Sea Monsters to Charismatic Megafauna: Changes in Perception and Use of Large Marine Animals*, PLOS ONE (Dec 31, 2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0226810>.

67. Krings, *supra* note 60, at 799.

68. *Id.* at 787

69. *The Moral Status of Animals*, STANFORD ENCYCLOPEDIA OF PHIL. (2017), <https://plato.stanford.edu/entries/moral-animal/>.

70. Krings, *supra* note 60, at 787.

Notions of human supremacy⁷¹ and speciesism⁷² lead to low-value animals' exclusion from moral consideration. Those with human superiority and speciesism beliefs perceive more significant gaps between high- and low-value animals in terms of their moral values.⁷³ Both human supremacy and speciesism lead to anthropocentric⁷⁴ justifications for animal use. An anthropocentric position considers "animals and nature as merely instrumental for human flourishing."⁷⁵ Animal use—like animal factory farming, breeding animals, skin/leather farming, animal testing, and using animals for entertainment—is justified because it serves human needs.⁷⁶ Animals have value under the law through the interests of humans rather than intrinsically.⁷⁷ Therefore, human supremacy beliefs allow for animal use due to lower moral consideration of low-value animals.

The notions of human supremacy, speciesism, and anthropocentrism are all closely aligned. As discussed above, high-value animals provide companionship or beauty; they receive more moral value than animals that are pests, food, or harm humans. Thus, animal hierarchies are built upon human relationships with animals and how animals can augment human life. However, in deciding which animals to protect against "extreme animal cruelty," should human utility or appearances be the deciding factor?

ii. *Should "Low-Value" Animals be Afforded the Same Legal Protections?*

Historically, the lack of animal rights for low-value animals was due to the notions that (1) some animals are not sentient and (2) some animals cannot suffer.⁷⁸ Animal sentience and suffering are contested topics. There are multiple theories for and against animal sentience. One way to argue for animal sentience is through analogy. There are observable similarities between humans and

71. Human supremacy or exceptionalism is the notion that "there are distinctly human capacities and it is on the basis of these capacities that humans have moral status and other animals do not." STANFORD ENCYCLOPEDIA OF PHIL., *supra* note 69.

72. Speciesism is the view that only humans should be morally considered. *Id.*

73. Krings, *supra* note 60, at 791.

74. Anthropocentrism, in environmental ethics, is "the belief that value is human-centered and that all other beings are means to human ends." Helen Kopnina, et al., *Anthropocentrism: More Than Just a Misunderstood Problem*, 31 J. AGRIC. & ENV'T ETHICS 109 (2018), https://digitalcommons.humboldt.edu/ije/vol3/iss1/4/?utm_source=digitalcommons.humboldt.edu%2Fije%2Fvol3%2Fiss1%2F4&utm_medium=PDF&utm_campaign=PDFCoverPages.

75. Zohar Legerman et al., *Stamping out Animal Culling: From Anthropocentrism to One Health Ethics*, 34 J. AGRIC. ENV'T. ETHICS 27 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8403469/>.

76. Krings, *supra* note 60, at 788; *see also* Kristof Dhont & Gordon Hodson, *Why do Right-Wing Adherents Engage in More Animal Exploitation and Meat Consumption?*, 64 PERSONALITY & INDIVIDUAL DIFFERENCES 12 (2014).

77. Intrinsic value describes the value that a being has in itself, for what it is. Ronald Sandler, *Intrinsic Value, Ecology and Conservation*, 3 NATURE EDUC. KNOWLEDGE (2012), <https://doi.org/10.1016/j.paid.2014.02.002>.

78. Siobhán M. Baggot, *Veterinarians as Advoc. for Animal Rights*, 229 J. AM. VETERINARY MED. ASS'N 350 (2006), <https://doi.org/10.2460/javma.229.3.350>.

nonhuman animals in behavior, physical structure, and relative positions on the evolutionary scale.⁷⁹ Humans and nonhuman animals (1) similarly respond to pain stimuli, (2) have “brains, nerves, neurons, endorphins, and other structures,” and (3) are evolutionarily close to each other.⁸⁰ These similarities support the theory of nonhuman animal sentience. If humans are sentient, why would animals not be? However, not all nonhuman animals share these similarities with humans. For example, many animals do not exhibit human responses to pain stimuli.⁸¹ So, sentience through analogy still excludes some classifications of animals.

Sentience can also be argued under the theory of an animal’s capability to experience awareness.⁸² Experiencing awareness can be “positive[e]” (characterized by “episodes of awareness [of] pleasure, joy, elation, and contentment”) or “negative[e]” (characterized by “episodes of awareness [of] pain, suffering, depression, and anxiety”).⁸³ The focus of animal sentience is often negative, due to pain and suffering being more morally relevant in the context of protections for animals under the law.⁸⁴ Philosopher Jeremy Bentham wrote, “[t]he question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?”⁸⁵ If an animal is capable of suffering, then it has sentience.⁸⁶ If a being is sentient, it has direct moral status.⁸⁷ Recognition of animal sentience leads to moral consideration for animals because they can be harmed or wronged.⁸⁸ As such, animal sentience leads to moral consideration, which allows for dignity protection under the law.

Many low-value animals were once believed not to experience pain because they do not exhibit the same pain reactions as humans.⁸⁹ Without visible pain

79. Scott D. Wilson, *Animal and Ethics*, INTERNET ENCYCLOPEDIA OF PHIL., <https://iep.utm.edu/animals-and-ethics/>.

80. *Id.*

81. Mia Rozenbaum, *Do Fish Feel Pain?*, UNDERSTANDING ANIMAL RSCH. (Feb. 11, 2021), https://www.understandinganimalresearch.org.uk/news/do-fish-feel-pain_ (explaining that before 2002, the scientific community did not believe fish had the necessary nerve endings to detect pain stimuli); Thang M. Khuong et al., *Nerve Injury Drives a Heightened State of Vigilance and Neuropathic Sensitization in Drosophila*, 5 SCI. ADVANCES (2019), <https://www.science.org/doi/10.1126/sciadv.aaw4099> (discussing chronic pain in insects); Robert W. Elwood & Laura Adams, *Electric Shock Causes Physiological Stress Responses in Shore Crabs, Consistent with Prediction of Pain*, BIOLOGY LETTERS (2015), <https://royalsocietypublishing.org/doi/10.1098/rsbl.2015.0800>.

82. Wilson, *supra* note 79.

83. *Id.*

84. *Id.*

85. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, 283 n.122 (1789).

86. Jacy Reese, *What Is Sentience?*, SENTIENCE INST. (June 21, 2018), <https://www.sentienceinstitute.org/blog/what-is-sentience>.

87. Wilson, *supra* note 79.

88. See discussion *infra* Section II(B)(i).

89. Matthew Chalmers, *Do Fish Feel Pain? The Science Behind Fish Sentience*, SENTIENT MEDIA (Apr. 16, 2021), <https://sentientmedia.org/do-fish-feel-pain/#:~:text=When%20fish%20experience%20nociception%20the,stress%20behaviors%20associated%20with%20pain>.

reactions, humans assumed these animals could not suffer, and moral consideration under the law was deemed unnecessary.⁹⁰ This assumption was false; studies have shown that fish, insects, invertebrates, and crustaceans experience pain. Research has shown that fish have pain receptors, react to pain stimuli, and can suffer.⁹¹ Insects experience pain, including chronic pain that persists long after the initial injury.⁹² Researchers found that invertebrates and crustaceans have the capacity for pain through criteria, including the possession of nociceptors, responses to stimuli, and associative learning.⁹³ These relatively new scientific findings on the capabilities of low-value animals to experience pain should open the door for further protections under the law.⁹⁴

In the case of some classifications of animals, particularly fish, there is a wealth of competing scientific research on sentience.⁹⁵ Regardless of a scientific consensus, even a likelihood of sentience should be enough to trigger protections. Under a precautionary principle,⁹⁶ if a chance exists that an animal experiences pain, an abundance of caution is necessary.⁹⁷ The precautionary reasoning is informed by a need to respond to serious threats, which is why a lower scientific burden of proof is allowed.⁹⁸ In the case of animal cruelty, the threat is actual bodily injury to animals. By failing to act until the scientific community comes to a “conclusive” decision, actual suffering continues. A lack of total scientific

90. *Id.*

91. V.A. Braithwaite & FA Huntingford, *Fish and Welfare: Do Fish have the Capacity for Pain Perception and Suffering?*, 13 UNIVS. FED’N FOR ANIMAL WELFARE S87 (2004), https://eeb.tamu.edu/files/2018/11/Braithwaite_2004.pdf; Ferris Jabr, *It’s Official: Fish Feel Pain*, SMITHSONIAN MAG. (Jan. 8, 2018), <https://www.smithsonianmag.com/science-nature/fish-feel-pain-180967764/>; Heather Murphy, *Fish Depression Is Not A Joke*, N.Y. TIMES (Oct. 16, 2017), <http://www.nytimes.com/2017/10/16/science/depressed-fish-html>.

92. Univ. of Sydney, *Insects Feel Persistent Pain After Injury, Evidence Suggests*, SCIENCEDAILY (Jul. 12, 2019), <https://www.sciencedaily.com/releases/2019/07/190712120244.htm>; Khuong, et al., *supra* note 81.

93. JONATHAN BIRCH ET AL., REVIEW OF THE EVIDENCE OF SENTIENCE IN CEPHALOPOD MOLLUSCS AND DECAPOD CRUSTACEANS 17 (London School of Econ. & Pol. Sci. 2021).

94. The modern animal welfare movement has been emphasizing animal sentience as a central component of welfare. Heather Browning & Walter Veit, *The Sentience Shift in Animal Research*, 28 THE NEW BIOETHICS 299, 300 (2022). Animal sentience has been recognized in international animal welfare legislation in the European Union, United Kingdom, Quebec, New Zealand, and parts of Australia. *Id.* at 299, 302.

95. See Brian Key, *Fish do not Feel Pain and its Implications for Understanding Phenomenal Consciousness*, 30 BIOLOGY & PHIL. 149 (2014); Brian Key, *Why Fish do not Feel Pain*, 3 ANIMAL SENTIENCE (2016), <https://www.wellbeingintlstudiesrepository.org/cgi/viewcontent.cgi?article=1011&context=animsent>. *Contra* Braithwaite & Huntingford, *supra* note 91; Robert W. Elwood, *Potential Pain in Fish and Decapods*, 8 FRONTIERS IN VETERINARY SCI. (2021), <https://doi.org/10.3389/fvets.2021.631151>.

96. The original precautionary principle explains that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent degradation.” U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, ¶ 15, U.N. Doc. A/CONF.151/26 (Vol. 1), annex I (Aug. 12, 1992). As applied to animal sentience, the precautionary principle

97. Jonathan Birch, *Animal Sentience and the Precautionary Principle*, 2 ANIMAL SENTIENCE 1, 1 (2017).

98. *Id.* at 4.

certainty should not be the reason to deny animals protection if there is a possibility that animals are suffering.⁹⁹ A precautionary principle for animal sentience as practically applied would mean that during the creation of animal legislation, if there is evidence of credible indicator(s) of sentience, that animal should be included within the scope of the animal protection legislation.¹⁰⁰

iii. *Policy Implications of Including Low-Value Animals Within the PACT Act*

Many regular human activities could be implicated by including insects, invertebrates, crustaceans, and fish in the definition of “animal” in the PACT Act. Again, animal crush videos include depictions of “living non-human [animals that are] purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury.”¹⁰¹ Activities such as fishing include impaling animals through baiting a fishhook and reeling in fish; many people subject bugs to being crushed and to serious bodily harm through pest control methods; cooking techniques of crustaceans include burning or drowning. But activities such as these are covered within the exceptions to animal crush within the PACT Act. If the video depicts “(b) the *slaughter of animals for food*; (c) hunting, trapping, *fishing*, a sporting activity not otherwise prohibited by Federal law, predator control, or *pest control*,” then the video is not “animal crushing.”¹⁰² Congress contemplated these activities as outside of the purview of the PACT Act, as these activities are legal ways that humans interact with animals.¹⁰³ Not every instance of killing or committing bodily harm against an animal is considered “cruel” under the federal animal law scheme, as reflected by the exceptions to the PACT Act.

Additionally, only some depictions of animal crushing are prosecuted. Prosecutorial discretion is the privilege given to prosecutors to decide which cases to pursue.¹⁰⁴ Prosecutors often base their decision to prosecute in part on the “relative gravity of the offense.”¹⁰⁵ For example, in the wake of an amendment expanding the definition of animal in the PACT Act to include insects, a video depicting an individual crushing a single ant was circulated in the stream of commerce. It would be unlikely that a federal prosecutor would want to bring a case in such a scenario. Similarly, if a person took a magnifying glass and burned hundreds of ants, finding someone willing to prosecute would be difficult, if not impossible. Animal cruelty cases are already significantly less

99. *Id.*

100. *Id.* at 5.

101. 18 U.S.C. § 48(f)(1).

102. *Id.* § 48(d)(1)(b)-(c) (emphasis added).

103. H.R. Rep. No. 106-397, at 8 (1999).

104. *Prosecutorial Discretion*, BLACK’S LAW DICTIONARY (11th ed. 2019).

105. *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961).

vigorously prosecuted.¹⁰⁶ However, in the case of a film like Jeff “The Bug” Vilencia’s *Smush*,¹⁰⁷ some animal crush videos depict such extreme cruelty to insects that prosecutors would be likely to prosecute because of the obscene and sexual nature of the video. Like the infamous statement by Justice Potter Stewart about identifying pornography, animal crush videos are often a “know it when [you] see it” situation.¹⁰⁸ Thus, prosecutors do not have to prosecute every video; they can use their informed judgment to know whether actions rise to the level of activities meant to be prevented by the PACT Act.

Also, it is important to note that § 48 has rarely ever been used throughout its history. Animal cruelty is already a felony in all fifty states.¹⁰⁹ While the PACT Act and its predecessors were created as a jurisdictional gap-filling measure,¹¹⁰ the most critical function of the PACT Act is as a symbolic statement against animal cruelty. In general, longer prison time and more animal cruelty prosecution do not lead to greater animal rights or less animal cruelty.¹¹¹ The tough-on-crime rhetoric dominates the American animal cruelty legislative scheme, even though social problems rarely are solved through criminal law.¹¹² Nevertheless, as in the case of the PACT Act, a rarely used federal criminal statute may be a good starting point for expanded animal protections in other contexts. Because the PACT Act (1) provides evidence of important “public concern for animal welfare”¹¹³ and (2) recognizes the compelling governmental interest in preventing extreme animal cruelty, any amendments to the PACT Act could be applicable elsewhere.¹¹⁴ By starting with a lesser-known, lesser-used, more innocuous statute, like the PACT Act, greater animal protections could be folded into the federal animal legislative scheme incrementally. By expanding the definition of an animal within the PACT Act, other amendments to other statutes can follow suit.

III. RECOMMENDATIONS

The PACT Act represents an opportunity to fold low-value animals into the federal animal cruelty legislative scheme. Its purpose is to protect animals from

106. Studies have shown that even with a plethora of animal cruelty and neglect tips, prosecution rates of animal cruelty can be as low as two-to-three percent. Jennifer H. Rachstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 ANIMAL LAW 243, 246 (2003).

107. See discussion *infra* Section I.

108. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

109. L.S. Stegman, *Do We Need to Make a Federal Case out of it? The Preventing Animal Cruelty and Torture Act as Over-Federalization of Criminal Law*, 57 AM. CRIM. L. REV. ONLINE 135, 139 (2020).

110. *Id.*; see also discussion *infra* Section I. Additionally, there is little evidence that perpetrators of the PACT Act actually evade justice by crossing state lines. Stegman, *supra* note 109, at 141.

111. Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV. F. 250 (2021); see also Stegman, *supra* note 109.

112. Marceau, *supra* note 111.

113. Courtney G. Lee, *The PACT Act: A Step in the Right Direction on the Path to Animal Welfare*, JURIST (Dec. 1, 2019), <https://www.jurist.org/commentary/2019/12/courtney-lee-pact-act>.

114. 18 U.S.C. § 48.

extreme cruelty.¹¹⁵ When science has shown that low-value animals can suffer, they should be awarded the same protections against cruelty under the law.¹¹⁶ Thus, the PACT Act should be amended.

The definition of “animal crushing” should include the crushing of low-value animals. As stated by Congress, “[t]he Federal Government and the States have a compelling interest in preventing intentional acts of extreme animal cruelty.”¹¹⁷ Failing to extend that compelling interest to all animals is illogical. A suggested amendment to § 48(f)(1) could read: “the term ‘animal crushing’ means actual conduct in which one or more living nonhuman mammals, birds, reptiles, amphibians, *fish*, *crustaceans*, or *invertebrates*....” Another option for an amendment could be to add a new definition, replacing the current (f)(1) with a definition of “nonhuman animal” that includes all classifications of animals.

Expanding the definition of an animal under the PACT Act could lead to additional amendments elsewhere in the federal animal legislative scheme. By expanding the coverage of the PACT Act to all animals, Congress would be recognizing the extension of the legitimate governmental interest in protecting even low-value animals against cruelty. This recognition would help lobby for future protections for low-value animals in other animal welfare statutes.

Animal classification exclusions are not unique to the PACT Act. The Animal Welfare Act defines “animal” narrowly.¹¹⁸ It includes “live or dead . . . warm-blooded animal[s],” but expressly excludes birds, rats, and mice bred for research purposes, and horses.¹¹⁹ The “28 Hour Law” (which regulates the transfer of animals for slaughter) exempts birds, such as chickens and turkeys.¹²⁰ The Humane Methods of Slaughter Act also excludes birds from its protection.¹²¹ Agriculturally farmed birds are some of the most-farmed animals in the United States.¹²² Nevertheless, they are excluded from protection, while other more charismatic animals are protected. The federal animal legislative scheme is full of holes that reflect the negative animal hierarchy and allow many animals to suffer needlessly. All these federal animal welfare statutes could benefit from similar expansions of the definition of animal to include low-value animals. As discussed above, where animals have sentience, they can suffer and should be protected from suffering under the law.¹²³ The expansion of the definition of animal in the PACT Act to include low-value animals could be pointed to as a rationale for amendments to other federal animal welfare statutes.

Guidance to law enforcement agencies should accompany any amendments to the PACT Act to provide more information about the PACT Act’s

115. *Id.*

116. *See* discussion *infra* Section II(B)(ii).

117. Animal Crush Video Prohibition Act of 2010, sec 2(2), Pub. L. No. 111-294, 124 Stat. 3177.

118. 7 U.S.C. § 2132(g).

119. *Id.*

120. 49 U.S.C. § 80502.

121. 21 U.S.C. § 601(j).

122. USDA, OVERVIEW OF U.S. LIVESTOCK, POULTRY, AND AQUACULTURE PRODUCTION 8-10 (2017).

123. *See* discussion *infra* Section II(B)(ii).

applicability. The Department of Justice (DOJ) creates guidance documents to explain its interpretations of binding statutes.¹²⁴ DOJ guidance documents function to “advise the public’ of how [DOJ] understands and is likely to apply” the statute in question.¹²⁵ Any PACT Act amendment-specific guidance should include (1) clarity about what animals are now covered under the PACT Act and (2) advice for identifying what videos rise to the level of obscene and prosecutable animal crush videos. This guidance would help solve some potential prosecutorial confusion about including low-value animals.

After an amendment to the PACT Act, a corresponding executive order (E.O.) to federal agencies that administer and enforce animal welfare statutes would aid in the movement toward a more inclusive animal legislative scheme. E.O.s must be founded in existing law.¹²⁶ So, for example, an E.O. cannot call for agencies to start interpreting the Animal Welfare Act as inclusive to birds. However, an E.O. can encourage agencies to interpret their enabling statutes broadly to allow for more protection for animals.¹²⁷ A potential E.O. could (1) plainly announce it is the policy of the United States to protect animals against cruelty, (2) direct the relevant agencies to update their guidance documents and regulations to reflect more inclusive notions of sentience wherever possible, (3) call for additional studies and reports into animal sentience, and (4) facilitate data collection about the gaps present within the animal legislative scheme. Such an E.O. would support further administrative actions protecting animals and act in the interim before future amendments to other statutes are implemented.

IV. CONCLUSION

As lauded by some animal rights activists, the “PACT [Act] makes a statement about American values.”¹²⁸ However, the statement is one of exclusionary animal rights, where certain animals are denied protection under the law. By expanding the definition of animal, the most common victims of animal crushing—insects and invertebrates—and fish and crustaceans will be awarded the same protections from extreme animal cruelty. The PACT Act represents a largely symbolic stand against animal cruelty in America.¹²⁹ But by recognizing that even low-value animals are worthy of dignity protections under the law, the PACT Act can get the ball rolling on further protections in the federal animal legislative scheme.

124. Memorandum from Merrick Garland, Attorney General, to Heads of All Department Components, on the Issuance and Use of Guidance Documents by the Department of Justice (July 1, 2021).

125. *Id.* (citing *Kisor v. Wilkie*, 139 S.Ct. 2400, 2420 (2019)).

126. *Executive Orders: An Introduction*, Cong. Rsch. Serv. (Mar. 29, 2021), <https://crsreports.congress.gov/product/pdf/R/R46738>.

127. *Id.*

128. Press Release, *Humane Soc’y of the U.S., Extreme Animal Cruelty Can Now Be Prosecuted as a Federal Crime* (Nov. 25, 2019), <https://www.humanesociety.org/news/extreme-animal-cruelty-can-now-be-prosecuted-federal-crime>.

129. Lee, *supra* note 113.