

DO WE NEED TO MAKE A FEDERAL CASE OUT OF IT?
THE PREVENTING ANIMAL CRUELTY AND TORTURE ACT AS OVER-
FEDERALIZATION OF CRIMINAL LAW

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INTRODUCTION

“Our national government is one of delegated powers alone. Under our federal system, the administration of justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.”¹ The notion that we should “be mindful of th[is] tradition”² seems outdated, even quaint, in twenty-first century America. While this may have been true for the century following the ratification of the Constitution,³ the modern federal government has become significantly involved in criminal law. Today, there are over 4,500 federal crimes⁴ and even this number, based on a 2008 Heritage Foundation report, is surely outdated.⁵ Federal criminal law has expanded to huge proportions, making everything from carjacking⁶ to possession of a handgun in a school zone⁷ a federal crime.

Many of these crimes duplicate existing state law offenses,⁸ and simply add a jurisdictional hook to bring prosecution within the reach of

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¹ *Screws v. United States*, 325 U.S. 91, 109 (1945).

² *Jerome v. United States*, 318 U.S. 101, 105 (1943).

³ For the first century after ratification, the federal criminal code covered less than two hundred crimes. See Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 702–03 (2017).

⁴ Many scholars have commented on the difficulty of accurately assessing the total number of criminal laws, partially due to the difficulties of deciding what actually counts as a particular criminal law. See, e.g., Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation’s Federal Criminal Laws*, WALL ST. J. (July 23, 2011), <https://www.wsj.com/articles/SB10001424052702304319804576389601079728920>.

⁵ JOHN S. BAKER, JR., HERITAGE FOUND., REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 1, 1 (2008).

⁶ See 18 U.S.C. § 2119 (2018).

⁷ See 18 U.S.C. § 922(q) (2018).

⁸ See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 997–98 (1999) (“Dual federal-state criminal jurisdiction is now the rule rather than the exception. . . . In many instances, federal law overlaps completely with state law, as is the case with drug offenses.”).

federal power.⁹ And indeed, many of these jurisdictional links are highly tenuous and fail to limit federal jurisdiction at all.¹⁰

This has led many academics to delve deeper into the purpose and consequences of over-federalization of criminal law. Critics have asserted that over-federalization of crimes has led to a wide variety of negative consequences: the development of a federal police state,¹¹ disparate impacts on similarly situated defendants,¹² significant burdens on the federal courts,¹³ the increased power of federal prosecutors,¹⁴ increased harshness in sentencing,¹⁵ constitutional concerns about duplicative trials under the Double Jeopardy Clause,¹⁶ and a serious undermining of the division of authority between federal and state governments.¹⁷

Nowhere are these flaws more evident than in the passage of the Preventing Animal Cruelty and Torture Act (“PACT Act”). This legislation, signed into law by President Donald J. Trump on November 25, 2019, makes extreme acts of animal cruelty federal crimes, punishable by severe fines and up to seven years in prison.¹⁸

The PACT Act certainly has great emotional appeal. Violence against animals is shocking to the conscience, and something that almost everyone in the nation can unite against. The fact that this law actually passed through the 116th Congress—which has been described as a

⁹ See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1162 n.154 (1995) (“The federal carjacking statute uses interstate commerce as its jurisdictional base. The statute applies to the armed taking of a motor vehicle that has been transported, shipped, or received in interstate commerce (virtually all motor vehicles) by force of violence. Thus, the statute applies to purely intrastate crimes and expands federal jurisdiction beyond where it is needed.”) (internal citations omitted).

¹⁰ See *id.*

¹¹ See Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 6–7 (1997).

¹² See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 647 (1997).

¹³ See Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 471 (1994) (“For a number of reasons, the growing criminal docket is turning federal courts into police courts.”).

¹⁴ See Hopwood, *supra* note 3, at 699.

¹⁵ See Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 908 (2005).

¹⁶ See Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. KY. L. REV. 173, 173 (2011) (“Because the dual sovereignty doctrine permits multiple prosecutions of an individual by state and federal governments for essentially the same conduct, the increasing federalization of criminal law has marginalized much of the double jeopardy protection afforded by the Constitution.”).

¹⁷ See Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 968 (1995) (“[C]ritics believe that some of the recently enacted federal crimes inappropriately infringe on federalism interests by taking matters traditionally of local concern out of the hands of local officials.”).

¹⁸ See Mihir Zaveri, *President Trump Signs Federal Animal Cruelty Bill into Law*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/us/politics/trump-animal-cruelty-bill.html>.

“legislative wasteland”¹⁹ and “at a partisan impasse on most topics important to the American people”²⁰—speaks to the PACT Act’s appeal. When signing the bill into law, President Trump questioned “[w]hy hasn’t . . . this . . . happened a long time ago?”²¹

This contribution offers an answer to President Trump’s question: there was, and is, no need for the PACT Act because this kind of conduct is traditionally regulated by the states, not the federal government. Supporters of the PACT Act would argue that the Act fills gaps in law enforcement that allow animal abusers to escape justice. This contribution will question that argument and, more generally, discuss whether making animal abuse a federal crime is actually a step backwards for our criminal justice system.

Given the novelty of this legislation, there appears to be little, if any, legal scholarship on the PACT Act. Accordingly, Part I of this contribution will first examine how criminal law, and specifically *federal* criminal law, dealt with the issue of animal abuse prior to the passage of the PACT Act. Part II will discuss the PACT Act, including the specific conduct it prohibits and the punishments violators can face. Part III will discuss the main arguments advanced by the law’s supporters: (1) the PACT ACT fills jurisdictional gaps in the enforcement of animal cruelty laws and (2) it is an important symbolic victory for the animal rights community. This piece concludes that these arguments are flawed and do not provide sufficient support for making animal abuse a federal crime. Finally, Part IV will discuss how the PACT Act bears all the hallmarks of problematic “over-federalization” legislation and why it will have unjust consequences on criminal defendants and our federalist system.

I. LEGISLATIVE LANDSCAPE BEFORE THE PACT ACT

Prior to the PACT Act, all fifty states made animal cruelty a felony.²² While penalties for these crimes differ from state to state,²³ as does the appetite for animal welfare regulation,²⁴ severe animal abuse was

¹⁹ Alexander Bolton, *Key Republicans Say Biden Can Break Washington Gridlock*, THE HILL (Nov. 19, 2019), <https://thehill.com/homenews/senate/471013-key-republicans-say-biden-can-break-washington-gridlock>.

²⁰ Moshe Hill, *Who’s to Blame for the ‘Do-Nothing’ Congress?*, THE DAILY WIRE (Dec. 3, 2019), <https://www.dailywire.com/news/hill-whos-to-blame-for-the-do-nothing-congress>.

²¹ Anthony Man, *Florida Lawmakers Behind New Federal Law Banning Animal Cruelty*, SO. FL. SUN-SENTINEL (Dec. 2, 2019), <https://www.sun-sentinel.com/news/politics/fl-ne-federal-law-now-bans-animal-cruelty-20191202-zftrlvfcvabhdknr5kcdmorqm-story.html>.

²² See Zaveri, *supra* note 18.

²³ Compare TEX. PENAL CODE ANN. § 42.092(c-1) (West 2017) (making animal cruelty and torture a felony of the third degree), with MISS. CODE ANN. § 97-41-1 (2018) (making animal cruelty and torture a misdemeanor).

²⁴ See 2019 U.S. Animal Protection Laws State Rankings, ANIMAL LEGAL DEF. FUND, <https://aldf.org/project/us-state-rankings/> (last visited Apr. 30, 2020).

undoubtedly a criminal act in every jurisdiction before the passage of the PACT Act.

The federal landscape is much different. Traditionally, no federal legislation criminalized acts of animal abuse.²⁵ There have, however, been some exceptions. First, certain provisions of the Animal Welfare Act²⁶ prohibit specific types of animal abuse, such as slaughtering cats and dogs for human consumption,²⁷ or exhibiting animals in “animal fighting venture[s],” including dogfights.²⁸ The Animal Welfare Act, however, does not criminalize acts of animal abuse that occur outside of these narrow circumstances.²⁹

Second, and particularly relevant to the history and passage of the PACT Act, was the criminalization of “animal crush” videos. Animal crush videos “feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters[,]” often for the purposes of appealing to a “sexual fetish.”³⁰ In 1999, Congress enacted 18 U.S.C. § 48 to target the interstate market for crush videos.³¹ It specifically provided a criminal penalty for anyone who “knowingly ‘creates, sells, or possesses a depiction of animal cruelty,’ if done ‘for commercial gain’ in interstate or foreign commerce.”³² By its terms, the statute did “not address underlying acts harmful to animals, but only portrayals of such conduct.”³³

The Supreme Court ultimately invalidated § 48 because it violated the First Amendment.³⁴ In response, Congress redrafted the statute to regulate only the creation, sale, or possession of animal crush videos, not animal abuse videos generally.³⁵ This legislation has been subsequently upheld against First Amendment challenges.³⁶ However, the statute still did not criminalize the underlying abusive conduct. In conclusion, federal criminal laws relating to animal abuse before the passage of the PACT Act, including 18 U.S.C. § 48, did not criminalize general acts of animal abuse; that type of regulation was primary left to the states.

²⁵ See, e.g., Zaveri *supra* note 18.

²⁶ 7 U.S.C. §§ 2131–2160 (2018).

²⁷ See 7 U.S.C. § 2160(a).

²⁸ See 7 U.S.C. § 2156 (2018) (“It shall be unlawful for any person to knowingly sponsor or exhibit an animal in an animal fighting venture.”); 18 U.S.C. § 49(a) (2018) (“Whoever violates . . . section 26 of the Animal Welfare Act shall be fined under this title, imprisoned for not more than 5 years, or both, for each violation.”).

²⁹ See 7 U.S.C. §§ 2131–2160.

³⁰ *United States v. Stevens*, 559 U.S. 460, 465–66 (2010).

³¹ *Id.*

³² *Id.* at 464–65 (quoting 18 U.S.C. § 48 (1999), *invalidated by* *United States v. Stevens*, 559 U.S. 460 (2010)).

³³ *Id.* at 464.

³⁴ In *United States v. Stevens*, the Court held that § 48 was “substantially overbroad” and thus failed strict scrutiny review. *Id.* at 482.

³⁵ See Bill Mears, *Obama Signs Law Banning ‘Crush Videos’ Depicting Animal Cruelty*, CNN (Dec. 10, 2010), <https://www.cnn.com/2010/POLITICS/12/10/animal.cruelty/index.html>.

³⁶ See *United States v. Richards*, 755 F.3d 269, 279 (5th Cir. 2014).

II. TERMS OF THE PACT ACT

The PACT Act amends § 48 to add a new offense to Title 18: the Act makes it unlawful for “any person to purposely engage in animal crushing in or affecting interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States,”³⁷ in addition to the existing prohibitions against creation or distribution of animal crush videos. For purposes of the Act, “animal crushing” is defined as “actual conduct in which one or more living non-human mammals, birds, reptiles, or amphibians is purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury.”³⁸

The Act exempts certain types of conduct from the criminalization of animal crushing, including normal veterinary practices,³⁹ the slaughter of animals for food,⁴⁰ sport hunting or fishing,⁴¹ medical or scientific research,⁴² conduct necessary to protect the life or property of a person,⁴³ or conduct performed as part of euthanizing an animal.⁴⁴ There is also a blanket exception for unintentional conduct⁴⁵ and for defendants who distribute animal crush videos for the purpose of furthering law enforcement goals.⁴⁶ Defendants found guilty of animal crushing, distribution of animal crush videos, or creation of the videos, may be fined or imprisoned for up to seven years.⁴⁷

III. ALLEGED JUSTIFICATIONS FOR MAKING ANIMAL ABUSE A FEDERAL CRIME

Criminal penalties for animal crushing and similar crimes already exist in all fifty states,⁴⁸ and the PACT Act explicitly does not preempt those existing state laws.⁴⁹ So why do we need a PACT Act? Supporters have offered two primary justifications. First, the PACT Act necessarily expands the jurisdiction of law enforcement because existing state law fails to reach all cases of animal cruelty and abuse.⁵⁰ Specifically, the

³⁷ 18 U.S.C. § 48(a)(1) (2020).

³⁸ *Id.* § 48(f)(1).

³⁹ *Id.* § 48(d)(1)(A).

⁴⁰ *Id.* § 48(d)(1)(B).

⁴¹ *Id.* § 48(d)(1)(C).

⁴² *Id.* § 48(d)(1)(D).

⁴³ *Id.* § 48(d)(1)(E).

⁴⁴ *Id.* § 48(d)(1)(F).

⁴⁵ *Id.* § 48(d)(3).

⁴⁶ *Id.* § 48(d)(2)(A)–(B).

⁴⁷ *See id.* § 48(c).

⁴⁸ *See Zaveri, supra* note 18.

⁴⁹ *See* 18 U.S.C. § 48(e).

⁵⁰ *See* Hannah Knowles & Katie Mettler, *Trump Signs a Sweeping Federal Ban on Animal Cruelty*, WASH. POST (Nov. 25, 2019),

PACT Act is necessary to regulate animal cruelty that occurs across state lines and is committed in areas under direct federal control, such as national parks and military bases.⁵¹ Second, the PACT Act is a “symbolic” step forward—a statement about how seriously the United States takes animal abuse.⁵² However, these explanations do not justify moving this wrongful conduct, however heinous, into the federal arena.

A. Prosecuting Animal Abuse Across State Lines

Our federal government is a government of limited, enumerated powers, and all criminal laws must be promulgated pursuant to one of those enumerated powers.⁵³ For instance, the Supreme Court has upheld the Controlled Substances Act’s prohibition on intrastate possession of cannabis as a legitimate exercise of power pursuant to the federal government’s power to regulate interstate commerce.⁵⁴ However, states are traditionally considered to “possess primary authority for defining and enforcing the criminal law.”⁵⁵ In the context of animal abuse, all fifty states have accepted that invitation and criminalized animal cruelty and torture.⁵⁶ Therefore, it seems to tenuous to claim that animal abuse is an area of criminal law that is properly regulated by the federal government.

Proponents of the Act argue that the statute, which derives its authority from the Constitution’s Commerce Clause, can be used to reach crimes of animal cruelty that occur across state lines. For example, Chris Schindler, Vice President of Field Services at the Humane Rescue Alliance, has claimed that “[Humane Rescue Alliance] officers investigate thousands of animal cruelty cases each year, but we have been unable to truly bring justice for the animals in instances where the cruelty occurs across multiple jurisdictions.”⁵⁷ Supporters have also pointed to a special role for the Act in combatting animal abuse in the District of Columbia, where crimes of animal abuse often happen across jurisdictional boundaries.⁵⁸

<https://www.washingtonpost.com/science/2019/11/25/most-animal-cruelty-isnt-federal-crime-that-changes-monday-when-bipartisan-bill-becomes-law/>.

⁵¹ *See id.*

⁵² *See* Press Release, The Humane Society of the United States, 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>.

⁵³ *See* *Screws v. United States*, 325 U.S. 91, 109 (1945).

⁵⁴ *See* *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

⁵⁵ *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (internal quotation marks omitted).

⁵⁶ *See* Zaveri, *supra* note 18.

⁵⁷ Caitlin O’Kane, *Trump Signs Bill Making Animal Cruelty a Federal Felony*, CBS NEWS (Nov. 25, 2019), <https://www.cbsnews.com/news/animal-cruelty-felony-president-trump-signs-animal-cruelty-pact-act-bill-making-it-a-federal-felony-2019-11-25/>.

⁵⁸ *See* Knowles & Mettler, *supra* note 50.

However, it is doubtful that such an enforcement gap actually exists. There is nothing in the legislative history of the PACT Act to support the idea that perpetrators of animal abuse often evade justice by crossing state lines.⁵⁹ Because animal abuse is already criminalized in every state,⁶⁰ perpetrators could always face charges in the state where the animal abuse occurred, even if there are interstate consequences through the distribution of animal crush videos.

Furthermore, nothing suggests that the problem of people crossing state lines to avoid prosecution is unique to crimes of animal abuse. Therefore, an argument based on a perceived “gap” in jurisdiction is not really an argument for making animal abuse a federal crime—it is an argument for making *all crimes* federal crimes. This directly contravenes our federalist system, which vests the creation of criminal law primarily with states, not the federal government.⁶¹ This would also potentially subject criminal defendants to a harsher justice system.⁶²

B. *Prosecuting Animal Abuse Committed on Federal Lands*

Supporters also argue that the PACT Act is necessary to prosecute perpetrators of animal abuse when the conduct occurs on federal property. For example, Kitty Block, the President of the Humane Society of the United States, has argued that it can be difficult for state prosecutors to reach crimes of animal cruelty that occur in “places under federal purview,” such as airports, military bases,⁶³ national parks, and federal prisons.⁶⁴ The PACT Act would allow for the prosecution of animal abuse that occurs on federal property because that property is “within the special maritime and territorial jurisdiction of the United States.”⁶⁵ However, there is little support for this rationale. Though it is not inconceivable that a crime of animal abuse could occur on federal land (particularly in a national park), the legislative history does not raise any instances where this actually occurred.⁶⁶

More fundamentally, however, the idea that those who commit crimes on federal lands escape prosecution from state authorities is flawed. Some

⁵⁹ See 165 CONG. REC. H8355–57 (Oct. 22, 2019) (statements of Reps. Deutch, Reschenthaler, Axne, Fitzpatrick, Stevens, Blumenauer).

⁶⁰ See Zaveri, *supra* note 18.

⁶¹ See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (describing criminal law enforcement as an area “[w]here [s]tates historically have been sovereign”).

⁶² See *infra* Part IV.B.

⁶³ See Knowles & Mettler, *supra* note 50.

⁶⁴ See Kitty Block & Sara Amundson, *President Trump Signs PACT Act; Law Will Crack Down on Some of the Worst Animal Cruelty Crimes*, A HUMANE WORLD: KITTY BLOCK’S BLOG (Nov 25, 2019), https://blog.humanesociety.org/2019/11/breaking-news-president-trump-signs-pact-act-law-will-crack-down-on-some-of-the-worst-animal-cruelty-crimes.html?credit=blog_post_112519_id10971.

⁶⁵ 18 U.S.C. § 48(a)(1) (2019).

⁶⁶ See 165 CONG. REC. H8355–57 (Oct. 22, 2019) (statements of Reps. Deutch, Reschenthaler, Axne, Fitzpatrick, Stevens, Blumenauer).

state courts have upheld the application of state anti-animal cruelty criminal laws to acts committed on federal property. For instance, the Pennsylvania Superior Court has applied state law to a military service member who committed animal cruelty on a federal military base.⁶⁷ Other states have passed animal cruelty laws that can apply on federally-owned lands.⁶⁸

Additionally, the Assimilative Crimes Act⁶⁹ allows for the application of state criminal laws on federal lands that are located within the geographic boundaries of the state.⁷⁰ As the Third Circuit has stated, the Assimilative Crimes Act “fills gaps in the law applicable to federal enclaves [and] ensures uniformity between criminal prohibitions applicable within the federal enclave and within the surrounding state.”⁷¹ Nowhere in the Assimilative Crimes Act does it suggest that it would not apply to state crimes of animal cruelty.⁷² Therefore, the Assimilative Crimes Act has already filled the gap that the PACT Act professes to fill.

It is even possible that the PACT Act itself has *decreased* state authority to prosecute crimes of animal abuse committed on federal lands. The Assimilative Crimes Act does not apply to incorporate state laws to federal land when the federal government has already taken legislative action to criminalize the same wrongful conduct.⁷³ Therefore, it is possible that the passage of the PACT Act means that the Assimilative Crimes Act can no longer be applied to extend state jurisdiction over crimes of animal abuse committed on federal lands.⁷⁴

⁶⁷ See *Commonwealth v. Arcelay*, 190 A.3d 609, 615–16 (Pa. Super. Ct. 2018); see also *United States v. Chamness*, No. 511-CR-00054-R, 2012 WL 3109494, at *1 (W.D. Ky. 2012) (discussing state law prosecution of wife of federal armed services member for acts of animal cruelty committed at on-base residence).

⁶⁸ See *State v. Bonnewell*, 2 P.3d 682, 683 (Ariz. Ct. App. 1999) (allowing prosecution under animal cruelty criminal law that prohibited the use of leghold traps on state or federal public lands).

⁶⁹ 18 U.S.C. § 13(a) (2018).

⁷⁰ See *id.*; see also *United States v. Sharpnack*, 355 U.S. 286, 294 (1958) (applying the Assimilative Crimes Act to allow prosecution for violations of the Texas Penal Code for offenses committed on a federal air force base).

⁷¹ *United States v. Hall*, 979 F.2d 320, 322 (3d Cir. 1992).

⁷² See 18 U.S.C. § 13(a).

⁷³ See *Hall*, 979 F.2d at 322.

⁷⁴ See *United States v. Eades*, 615 F.2d 617, 623–24 (4th Cir. 1980) (finding that the Assimilative Crimes Act did not make a Maryland law prohibiting sexual offenses applicable to a federal military installation because “there is a federal statute which punishes the precise conduct proscribed by Maryland law”), *rev’d*, *United States v. Eades*, 633 F.2d 1075, 1077–78 (4th Cir. 1980) (en banc) (reversing the panel’s holding because the Court found “no congressional intention to preempt the prosecution under the Assimilative Crimes Act and [the state law] of Eades for the sexual conduct in which he engaged, which is not proscribed by . . . federal statute”); see also *United States v. Brooks*, 64 M.J. 587, 593 (A. Ct. Crim. App. 2006) (finding that state law reckless driving offenses were improperly assimilated because the state laws were preempted by the Uniform Code of Military Justice).

Accordingly, between state laws and the Assimilative Crimes Act, no gap remains to be filled by the PACT Act with regard to acts of animal cruelty committed on federal lands.

C. *Symbolic Value*

There is perhaps a simpler explanation for the passage of the PACT Act: it has important symbolic value for people who consider animal rights and protection a priority. Kitty Block explained that

PACT makes a statement about American values. Animals are deserving of protection at the highest level. . . . The approval of this measure by Congress and the president marks a new era in the codification of kindness to animals within federal law. For decades, a national anti-cruelty law was a dream for animal protectionists. Today, it is a reality.⁷⁵

Though not all proponents of the Act supported it for reasons solely related to animal welfare,⁷⁶ there is a broad consensus among supporters that the protection of animals is an issue that can bind together the whole country.⁷⁷ This is particularly prevalent in the statute's legislative history, as is the argument that the passage of the PACT Act would increase the total number of resources dedicated to combatting crimes of animal abuse.⁷⁸

This piece does not question the value of a unified, national front on the issue of animal cruelty and protection. However, it questions whether making animal abuse a *federal crime* is the best way to speak with uniformity on the issue. Indeed, many scholars have questioned the efficacy of federal criminal laws that regulate entirely local conduct, when local and state law enforcement agencies might be better equipped to handle the issue.⁷⁹ There are other ways to combat animal abuse at the

⁷⁵ Press Release, The Humane Society of the United States, 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>.

⁷⁶ For example, the National Sheriffs' Association and the Fraternal Order of Police supported the legislation because abuse of animals is a strong predictor of violence against people. See Knowles & Mettler, *supra* note 50. For more on this topic, see generally Ashley Kunz, *Skinning the Cat: How Mandatory Psychiatric Evaluations for Animal Cruelty Offenders Can Prevent Future Violence*, 21 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 167 (2019).

⁷⁷ See Knowles & Mettler, *supra* note 50 (quoting members of the House of Representatives, the Senate, and animal rights groups' support for the legislation).

⁷⁸ See 165 CONG. REC. H8355–57 (Oct. 22, 2019) (statements of Reps. Deutch, Reschenthaler, Axne, Fitzpatrick, Stevens, Blumenauer).

⁷⁹ See, e.g., Brickey, *supra* note 9, at 1159–60.

national level without putting perpetrators in federal prison or contravening important principles of federalism. For example, Congress could provide federal funds to increase resources for *state* law enforcement to combat animal abuse crimes.

Additionally, it is doubtful whether making animal abuse a federal crime will actually increase deterrence. With more than four thousand federal crimes in existence, it is doubtful that potential perpetrators would actually know that animal abuse is a federal crime.⁸⁰ Scholars have doubted that the act of making something a federal crime actually increases deterrence any more than making it a state crime, especially because federal prosecutions for laws that overlap with state criminal laws will likely be too infrequent to send an effective deterrent message.⁸¹

IV. THE PACT ACT AS OVER-FEDERALIZATION OF CRIMINAL LAW

It is unlikely that the PACT Act actually fills any meaningful enforcement gaps or deters potential perpetrators of animal abuse. Further, the PACT Act is not just unnecessary; it is a troubling example of the over-federalization of criminal law that may have significant consequences for criminal defendants and the federal system.

A. *Negative Impacts on our Federalist System*

Over-federalization refers to the recent growth of substantive federal criminal law to unwieldy, intrusive, and unjust proportions.⁸² Though federal criminal laws have existed since the Founding, only in the last fifty years has the portfolio of federal crimes grown to immense proportions. For example, an American Bar Association Task Force concluded that over forty percent of the federal criminal provisions passed between the Civil War and the year 1998 were codified between 1970 and 1998.⁸³ This has also held true into the twenty-first century: from 2000 to 2007 alone, Congress created 452 new federal crimes.⁸⁴ One of the most remarkable features of modern federal crimes is how much they overlap with existing

⁸⁰ See Hopwood, *supra* note 3, at 731 (“People who commit crimes . . . generally do not consult the [U.S.] Code because, in many cases, they have no idea that their acts break one of the over-4500 federal laws. Part of the reason . . . is that the federal Code has become so sprawling and regulates so much conduct that no one person could have actual notice of all the conduct that is prohibited.”).

⁸¹ See *id.*; Christine DeMaso, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker*, 106 COLUM. L. REV. 2095, 2119 (2006) (“It is possible to argue that these occasional federal prosecutions improve deterrence because defendants fear they will receive the unlucky lottery ticket to federal court, but it is more likely that such prosecutions are too infrequent to create serious deterrence.”).

⁸² See Clymer, *supra* note 12, at 647.

⁸³ See Hopwood, *supra* note 3, at 703 (citing JAMES A. STRAZZELLA, AM. BAR ASS’N, *THE FEDERALIZATION OF CRIMINAL LAW* 7 (1998)).

⁸⁴ See *id.* at 703.

state criminal laws. By the end of the 1990s, less than five percent of federal prosecutions involved federal statutes that did *not* duplicate state criminal laws.⁸⁵

Over-federalization is problematic because it subjects defendants to the harsh realities of the federal criminal justice system and opens to the door to multiple prosecutions.⁸⁶ Many scholars also contend that over-federalization of criminal law has deleterious impacts on the balance of power between federal and state governments.⁸⁷ The federal government has never had a general police power;⁸⁸ that kind of plenary power has always been reserved for the states.⁸⁹ However, allowing the federal government to play an ever-more important role in law enforcement erodes this balance and slowly creates a federal police force—at least in practice, if not in name.⁹⁰ This directly contravenes our federalist system, where criminal law is an area where “[s]tates historically have been sovereign.”⁹¹ Not all scholars agree that over-federalization of criminal law is a problem,⁹² but the increasing number of federal criminal statutes is undeniable.⁹³

The PACT Act fits neatly into the category of criminal law over-federalization. It does not fill any substantial gaps in enforcement and largely duplicates existing state statutes, with only a jurisdictional “hook” to tether it to the Constitution. Accordingly, we could view the bipartisan collaboration on the PACT Act in a more skeptical light. Professor John Baker has described over-federalization of criminal law as politically advantageous for federal office-seekers.⁹⁴ Professor Baker argued that the rise of “law and order” politics has led federal politicians to pass “feel-good” laws that actually do relatively little to fight crime.⁹⁵ Professor Julie O’Sullivan agrees with this characterization and has criticized the enactment of federal criminal laws as quintessentially “political” actions designed for popularity, not efficacy.⁹⁶

⁸⁵ See John S. Baker, *State Police Powers and the Federalization of Local Crime*, 72 *TEMPLE L. REV.* 673, 678 (1999).

⁸⁶ See discussion *infra* Part IV.B.

⁸⁷ See, e.g., Baker, *supra* note 85, at 673–74.

⁸⁸ See *Bond v. United States*, 572 U.S. 844, 854 (2014).

⁸⁹ See *id.*

⁹⁰ See Meese, *supra* note 11, at 6–7.

⁹¹ See *United States v. Lopez*, 514 U.S. 549, 564 (1995).

⁹² See Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 *EMORY L.J.* 1, 5 (2012).

⁹³ See Stephen F. Smith, *Federalization’s Folly*, 56 *SAN DIEGO L. REV.* 31, 35 (2019) (“Even defenders of the federalization of criminal law concede that its scope is ‘potentially infinite[.]’”).

⁹⁴ See Baker, *supra* note 85, at 679–80.

⁹⁵ *Id.*

⁹⁶ See Julie Rose O’Sullivan, *The Federal Criminal “Code”: Return of Overfederalization*, 37 *HARV. J.L. & PUB. POL’Y* 57, 60–61 (2014) (“Adding to the [federal criminal code] is an easy, politically expedient out[.]”).

That would certainly seem to fit the mold of the PACT Act: criminalizing animal abuse is something that most voters would support, even if the law itself does not accomplish anything new. Instead, the PACT Act brings the two classic problems of over-federalization: significant impacts on the balance of power between states and the federal government and dire consequences for criminal defendants.

B. *Significant Consequences for Criminal Defendants*

Making animal abuse a federal crime brings defendants into the harsh federal criminal justice system, which can have disparate and unjust impacts on criminal defendants.

First, given the overlapping nature of federal criminal laws, it can be relatively simple for federal prosecutors to “stack” charges that lead to extraordinarily harsh sentences.⁹⁷ Under the PACT Act, a defendant who engages in animal abuse, films the act, and then sells the video over the Internet could conceivably violate multiple provisions of 18 U.S.C. § 48(a), and the punishments may stack. For example, this hypothetical PACT ACT defendant would face twenty-one years in prison for violating 18 U.S.C. § 48(a)(1)–(3).⁹⁸ If the defendant created or sold multiple videos, those punishments would stack on top of the others. Even more consequential for criminal defendants, the Supreme Court has interpreted the dual sovereignty doctrine to allow a single defendant to be prosecuted under both state and federal law for the same offense.⁹⁹ Accordingly, with the passage of the PACT Act, defendants could be subject to “duplicative prosecutions for the same offenses” at both the state and federal levels.¹⁰⁰

Even if they are not charged with multiple crimes, criminal defendants “will often fare worse if prosecuted in federal court rather than state court.”¹⁰¹ There are many reasons why proceedings in federal court are less favorable for criminal defendants. For example, federal defendants

⁹⁷ See Hopwood, *supra* note 3, at 706–07 (“Congress had created so many substantive criminal laws that federal prosecutors have a smorgasbord of statutes with which to charge defendants, thereby multiplying the punishments. Stacking charges carrying mandatory-minimum penalties results in grossly disproportionate penalties, especially when defendants invoke the right to a jury trial.”). For example, Professor Hopwood highlights the case of Adam Clausen. *See id.* at 707. Clausen was involved in seven robberies in New Jersey and Pennsylvania, though no one was injured. *See id.* Clausen was convicted of violating the Hobbs Act as well as a separate crime of using firearms during a crime of violence. *See id.* The punishments stacked for each separate violation and Clausen was sentenced to 213 years in prison. *Id.*

⁹⁸ The hypothetical defendant would face seven years for abusing the animal, another seven years for creating the video, and another seven years for distributing the video in interstate commerce. *See* 18 U.S.C. § 48(a)(1)–(3), (c).

⁹⁹ *See* *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (holding that prosecution under federal and state law for the same offense does not violate the Double Jeopardy clause of the Constitution).

¹⁰⁰ *See id.* at 1980 n.1 (Thomas, J., concurring).

¹⁰¹ *See* Clymer, *supra* note 12, at 647.

are also more likely to be held in custody without bail pending trial than defendants in state court.¹⁰² Additionally, exclusion of evidence obtained as a result of constitutional violations may be more easily granted in a state court, whereas a federal court might seek to grant a different remedy.¹⁰³

Federal defendants will also fare worse than state defendants during sentencing, given the federal sentencing practices and near-unavailability of parole in the federal prison system.¹⁰⁴ As an example, Professor Sara Sun Beale described the case of James McFarland, who committed armed robberies in Texas.¹⁰⁵ Under Texas law, McFarland would have faced a sentence between a minimum of five years and a maximum of ninety-nine years, though McFarland would have been eligible for parole after thirty years.¹⁰⁶ However, McFarland was federally prosecuted for violating the Hobbs Act and sentenced to over ninety-seven years in federal prison with no provision for parole.¹⁰⁷ As Professor Beale, and the Fifth Circuit noted, “this is in reality a life sentence without the possibility of parole.”¹⁰⁸ Indeed, observers have noted that potential sentences in a federal prosecution are often up to “ten or even twenty times higher” than sentences for similar crimes under state law.¹⁰⁹

Finally, the broad nature of the PACT Act could also raise some concern. That PACT Act extends federal jurisdiction over, in part, “animal crushing in or affecting interstate or foreign commerce.”¹¹⁰ Jurisdictional elements relying on interstate commerce are notoriously flexible and “mean[] that Congress can continue to . . . reach almost anything it deems a social problem.”¹¹¹ For instance, in *United States v. Scarborough*, the Supreme Court found that the jurisdictional element of the felon-in-possession statute was satisfied by a showing that the firearm at issue had previously ever traveled across state lines.¹¹² Accordingly, a large proportion of animal cruelty crimes will likely be within federal jurisdiction. This will essentially give federal prosecutors discretion to determine which defendants to charge federally, which may lead to

¹⁰² See *id.* at 669–70.

¹⁰³ See *id.* at 671–72.

¹⁰⁴ See *id.* at 647–48.

¹⁰⁵ See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 761–62 (2005).

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 762.

¹⁰⁸ *Id.* (citing *United States v. McFarland*, 264 F.3d 557, 558 (5th Cir. 2001) (per curiam), *aff'd by an equally divided court*, *United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002) (per curiam)).

¹⁰⁹ See Beale, *supra* note 8, at 998.

¹¹⁰ 18 U.S.C. § 48(a)(1).

¹¹¹ See Diane McGimsey, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1706 (2002).

¹¹² See *Scarborough v. United States*, 431 U.S. 563, 566–67 (1977).

prosecution decisions made for discriminatory reasons¹¹³ or to draconian prosecutions intended to “send a message” to potential criminals.¹¹⁴

CONCLUSION

Sponsors of the PACT Act claim that it is a milestone for animal rights.¹¹⁵ However, this piece contends that it represents a different kind of milestone: a marker of the advancement of over-federalization of criminal law. Fifty states’ animal cruelty laws are now overlaid with a single overarching statute that could apply almost anywhere in the nation. Supporters of the law point to jurisdictional and enforcement gaps that this legislation fixed as a justification for “federalizing” animal abuse, but these gaps are likely minimal, if they exist at all. Hidden beneath the appealing veneer of prosecuting people who commit heinous crimes against innocent animals is something that should raise concern: yet another weapon added to the arsenal of federal prosecutors and federal law enforcement. Federalizing criminal law undermines the separation of powers that our nation was built upon. Additionally, the PACT Act subjects criminal defendants to multiple prosecutions and a draconian federal justice system. Even given the unsympathetic nature of PACT Act defendants, we should consider whether this largely symbolic victory is actually worth the price.

¹¹³ See Hopwood *supra* note 3, at 705.

¹¹⁴ See Beale, *supra* note 8, at 1000–01 (internal quotation marks omitted).

¹¹⁵ See Man, *supra* note 21.