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Defanging the Lacey Act: The Freedom from Over-Criminalization and Unjust Seizures Act of 2012

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Abstract

Under the Lacey Act, it is a federal offense to import fish, wildlife, or plants "in violation of any foreign law." Such legislation violates one of the fundamental tenets of Anglo–American common law: that "men of common intelligence" must be able to understand what a law means. The recent explosion of federal criminal law has rendered this standard a mere fiction, a problem exacerbated by the fact that the Lacey Act makes it a crime to violate a foreign nation's law. Then the common law fiction becomes a contemporary fantasy that can lead to miscarriages of justice. Two bills recently introduced in Congress—each one called the FOCUS Act—promise to defang the Lacey Act and secure a victory for Americans opposed to overcriminalization.

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No one likes a perennial nay-sayer. Or an inveterate complainer. Or a killjoy. Critics of the Overcriminalization Project at The Heritage Foundation—a project that enjoys support from organizations across the political and policy spectrums, such as the National Association of Criminal Defense Lawyers and the Manhattan Institute—might say that its participants are just that. The project members complain about all the criminal laws that Congress passes, the argument would go, without ever giving Congress credit for other legislation in the criminal justice field.

Such criticism, however, can be headed off at the proverbial pass: Members of the Overcriminalization Project *do* believe in giving credit where credit is due in the policy arena. Senator Rand Paul (R–KY) and Representative Paul C. Broun (R–GA) are due credit for a recent policy judgment. Over the past month, each has introduced a bill entitled the Freedom from Over-Criminalization and Unjust Seizures Act of 2012 (FOCUS Act).[1] The FOCUS Act would amend the Lacey Act in several ways, one of which would make it enforceable only through the civil process.

Defanging the Lacey Act is good policy that would help

Talking Points

- The Lacey Act makes it a federal offense to import fish, wildlife, or plants "in violation of any foreign law."
- Given that there are more than 4,000 federal criminal statutes alone, it is a fiction to presume that anyone knows everything that the federal penal code outlaws—let alone foreign laws.
- As a result of this impossibility, people who do not engage in blameworthy conduct and who cannot afford to have attorneys at their beck and call to avoid overstepping a regulatory line face criminal liability and federal imprisonment.
- To prevent such miscarriages of justice, Senator Rand Paul (R-KY) and Representative Paul C. Broun (R-GA) have introduced the Freedom from Over-Criminalization and Unjust Seizures Act of 2012 (FOCUS Act).
- The FOCUS Act would defang the Lacey Act by eliminating its provisions defining a federal offense, authorizing federal criminal investigations, and establishing terms of federal imprisonment.

both to further the goals of the Overcriminalization Project and, ultimately to reduce the burden of overcriminalization that is borne, at least potentially, by all Americans. In order to explain why Senator Paul and Representative Broun deserve kudos for their idea, a summary of the Lacey Act is in order.

The Problem with Foreign Law

Congress passed the Lacey Act[2] in 1900 to protect states against poachers who fled with their goods to another state.[3] Over time, Congress expanded the reach of the act to include importation of wildlife or plants in violation of a foreign nation's law.[4] The rationale for the act is that foreign nations will help this country to protect its flora and fauna against unlawful export if the U.S. helps them to protect theirs.[5] To do so, the Lacey Act makes it a crime to take or import fish, wildlife, or plants "in violation of any foreign law."[6]

THE CRIMINAL LAW IS NOW USED NOT JUST TO EXPRESS SOCIETAL CONDEMNATION OF INHERENTLY NEFARIOUS ACTS, BUT ALSO TO REGULATE THE CONDUCT OF INDIVIDUALS AND CORPORATIONS BY MAKING IT A CRIME TO COMMIT A VARIETY OF ACTS THAT ARE UNLAWFUL ONLY BECAUSE CONGRESS SAID SO.

The Lacey Act would not raise concern if the only penalty were a civil fine,[7] but the law authorizes up to one year's imprisonment for every violation of the act.[8] A one-year term of confinement may not seem onerous (unless, of course, you have to serve it), but a combination of one-year sentences could add up quickly. For example, if each fish taken in violation of the act were to constitute a separate offense, a fisherman could wind up with a three- or four-figure term of imprisonment just by bringing aboard one net's worth of fish. That prospect alone justifies concern. But there is more, and it is worse.

The most serious problem with the Lacey Act is that it makes it a federal offense to import fish, wildlife, or plants *in violation of foreign law*. That is a novel proposition. The Anglo–American common law presumed that every person knows what the criminal code outlaws,[9] and that presumption still has traction today.[10] There are several rationales for that rule, such as the proposition that everyone knows the laws in the locale in which he resides,[11] as well as

1. The Senate bill is S. 2062; the House bill is H.R. 4171. The two bills are identical.
2. Act of May 25, 1900, Ch. 553, 31 Stat. 188 (codified as amended at 16 U.S.C. §§ 3371-78).
3. *See, e.g.,* United States v. McNabb, 331 F.3d 1228 (11th Cir. 2003); United States v. Todd, 735 F.2d 146, 149 (5th Cir. 1984); S. Rep. No. 97-123 (1981); S. Rep. No. 91-526 (1969).
4. *See, e.g.,* United States v. McNabb, 331 F.3d 1228; S. Rep. No. 91-526.
5. *See, e.g.,* United States v. Molt, 452 F. Supp. 1200 (E.D. Pa. 1978), *aff'd,* 599 F.2d 1217, 1218–20 (3d Cir. 1979); S. Rep. No. 91-526.
6. 16 U.S.C. § 3371(d), § 3372(a)(2)(A) & (B), § 3372(a)(3)(A), and § 3373(d). The foreign law provision has been the source of considerable litigation. *See, e.g.,* United States v. Lee, 937 F.2d 1388, 1393–94 (9th Cir. 1991) (collecting cases rejecting delegation challenges to the Lacey Act).
7. That is, unless a fine was so massive that it would be tantamount to a criminal penalty.
8. 16 U.S.C. § 3373(d).
9. *See, e.g.,* Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally * * *."); Oliver Wendell Holmes, The Common Law 40–41 (1881; Reprint 2009).
10. *See* Wayne R. LaFave, Criminal Law § 5.6, at 305–18 (5th ed. 2010).
11. *See, e.g., Cheek v.* United States, 498 U.S. 192, 199 (1991) (the rule that ignorance of the law is no defense is "[b]ased on the notion that the law is definite and knowable"). Whether that proposition is past its prime is another question. For an argument that a mistake of law defense should be recognized, see Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense,* 101 J. of Crim. L. & Criminology (2012) (forthcoming).

the fear that a contrary rule would eviscerate the ability of the law to police the public's conduct.[12]

That proposition made sense at common law, because then the criminal law reflected contemporary mores.[13] Today, however, it is a fiction.[14] Indeed, the criminal law is now used not just to express societal condemnation of inherently nefarious acts (e.g., murder), so-called *malum in se* offenses, but also to regulate the conduct of individuals and corporations by making it a crime to commit a variety of acts that are unlawful only because Congress said so, crimes known as *malum prohibitum* offenses.[15]

What is more, no one today could know everything that the law prohibits. There are more than 4,000 federal criminal statutes alone—so many that not even the Justice Department knows the actual number.[16] Regulations can be used to define terms in a federal criminal statute or to establish offenses on their own, so the number 4,000-plus could be multiplied to reach 300,000.[17] It is a fiction to presume that anyone knows everything that the federal penal code outlaws.

THE CRIMINAL LAW MUST BE CLEAR NOT TO THE AVERAGE LAWYER, BUT TO THE AVERAGE *PERSON*. EVEN IF THERE WERE LAWYERS WHO COULD READILY ANSWER INTRICATE QUESTIONS OF FOREIGN LAW—AND DO SO FOR FREE—THE CRIMINAL LAW IS HELD TO A HIGHER STANDARD.

This problem is then exacerbated by the fact that the Lacey Act makes it a crime to violate a foreign nation's law. In that regard, the common law fiction becomes a contemporary fantasy—a fantasy that can lead to miscarriages of justice.

Unknown Unknowns: The Perils of Caribbean Spiny Lobsters

Consider the case of *United States v. McNab*.[18] Abner Schoenwetter and several other individuals were convicted of several federal offenses in connection with their importation of Caribbean spiny lobsters from Honduras. The federal government charged Schoenwetter and the other parties with violating the Lacey Act by importing Honduran lobsters in violation of Honduran law: The lobsters were too small to be taken under Honduran law; some contained eggs and so could not be exported; and the lobsters were packed in boxes rather than in plastic as required by Honduran law.[19]

The jury convicted the defendants, and both the district court and the court of appeals upheld the convictions. The circuit court even refused to give any weight to the opinions of the Honduran courts

12. *See, e.g., Barlow*, 32 U.S. (7 Pet.) at 411 (the principle that mistake of law is not an excuse "results from the extreme difficulty of ascertaining what is, *bonâ fide,* the interpretation of the party * * *."). As Oliver Wendell Holmes explained: "The true explanation of the rule is the same as that which tends to account for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales." Oliver Wendell Holmes, *supra* note 9, at 41.

13. *See* Livingston Hall & Selig J. Seligman*, Mistake of Law and Mens Rea,* 8 U. Chi. L. Rev. 641, 644 (1940–1941) ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'"). As John Salmond put it: "The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right." John Salmond, Jurisprudence 426 (8th ed. 1930).

14. Jerome Hall, *Ignorance and Mistake in Criminal Law,* 33 Ind. L. Rev. 1, 14 (1957).

15. *See* Wayne R. LaFave, *supra* note 10, § 1.3(f), at 14–15 (defining *malum in se* and *malum prohibitum* offenses*).*

16. *See, e.g.*, John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (June 16, 2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes; Paul Rosenzweig & Brian W. Walsh, eds., One Nation, Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty 131 (2010) (hereafter One Nation, Under Arrest); George Terwilliger, *Under-Breaded Shrimp and Other High Crimes—Addressing the Over-Criminalization of Commercial Regulation*, 44 Am. Crim. L. Rev. 1417, 1418 (2007).

17. One Nation, Under Arrest, *supra* note 16, at xv–xvi, 218.

18. 331 F.3d 1228 (11th Cir. 2003). The *McNab* case is discussed in detail in One Nation, Under Arrest, *supra* note 16, at 3–11.

19. *Id*. at 1233.

and the Honduran Attorney General that the regulations were invalid under Honduran law and could not serve as a predicate violation under the Lacey Act.[20] The result was that Schoenwetter was sentenced to eight years in a federal prison—a term longer than what some violent criminals could spend in lockup—for domestic regulatory offenses that did not even violate foreign law.

The *McNab* case illustrates why no one should be held accountable under this nation's law for violating a foreign nation's law. Laws come in all forms (e.g., statutes vs. regulations); in all shapes and sizes (e.g., the Sherman Act vs. the Clean Air Act); and in all degrees of comprehensibility (e.g., the law of homicide vs. the Resource Conservation and Recovery Act). Different bodies have authority to promulgate laws (e.g., legislatures, courts, and agencies); to interpret them (e.g., the President or an agency's general counsel); and to enforce them (e.g., city, state, and federal law enforcement officers and prosecutors). And that is just in America.

Foreign nations may have very different allocations of governmental power, bureaucracies, and enforcement personnel. Some will speak and write in English; some will not. Some will make their decisions public; some will not. Some will have one entity that can speak authoritatively about its own laws; some will not. And different components of foreign governments may change their interpretations of their own laws over time, perhaps nullifying the effect of a prior interpretation, or perhaps not.

It is sheer lunacy to assume that the average citizen can keep track of such laws, let alone do so by him- or herself without a supporting cast of lawyers—that is, assuming that the average citizen could find a lawyer knowledgeable about the intricacies of a particular foreign nation's law. Domestic lawyers and judges are not even familiar with foreign law, let alone qualified as experts.

In any event, the relevant standard is not whether the average lawyer knows the criminal law. The criminal law must be clear not to the average lawyer, but to the average *person*. Even if there were lawyers who could readily answer intricate questions of foreign law—and do so for free—the criminal law is held to a higher standard. Unless "men of common intelligence" can understand what a law means,[21] the law might as well not exist, and no one should be convicted for violating it.

The simple answer to this problem—the only answer to this problem—is this: No one should be forced to run the risk of conviction and imprisonment for making a mistake under foreign law.

The FOCUS Act: Protecting the Average Citizen

Senator Paul and Representative Broun apparently believe in that principle. The FOCUS Act (among other things) would make the Lacey Act enforceable only through civil process. It would eliminate the provisions in the Lacey Act defining a federal offense, authorizing federal criminal investigations, and establishing terms of federal imprisonment.

Eliminating the risk of criminal liability and imprisonment for persons like Abner Schoenwetter—average people who do not engage in blameworthy conduct and who cannot afford to have attorneys at their beck and call to avoid overstepping a regulatory line—is a major goal of the overcriminalization movement and a major part of the message that the coalition has been trying to convey. It is nice to see that someone is listening.

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20. *Id.* at 1239–47.
21. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).