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The FOCUS Act and Environmentalism

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Abstract

With regard to the Lacey Act, The Heritage Foundation and the Union of Concerned Scientists (UCS) can agree on one point: The act should be enforced through the civil justice system or the administrative process. In a recent paper, however, the UCS has emerged as a vocal advocate for criminal enforcement of the Lacey Act, an untenable position that, given Heritage's staunch opposition to overcriminalization, demands a response. The Foundation's position is clear: Not only would criminal enforcement of the Lacey Act result in miscarriages of justice, but such enforcement is unnecessary. Before wielding the big stick of a criminal prosecution against its citizens, America must answer several critical questions concerning the Lacey Act.

Last month, the Union of Concerned Scientists (UCS) published a consultant's paper entitled "Logging and the Law."¹ By urging continued criminal enforcement of the Lacey Act, the UCS paper implicitly criticizes the FOCUS Act, which would amend the Lacey Act to make it enforceable only through the civil process. Because The Heritage Foundation has long expressed concerns about overcriminalization committed in the name of the Lacey Act, it is necessary to comment on the UCS paper.²

The bulk of the UCS paper is devoted to the argument that enforcement of the Lacey Act will benefit the global environment and the domestic economy. Insofar as the UCS maintains that the Lacey Act should be enforced through the civil process, Heritage has no objection. Indeed, Heritage believes that the law should be enforced through the civil justice system or the administrative process—a point made in a recent Heritage Foundation Legal Memorandum.³

The UCS paper, however, also supports continued criminal enforcement of the Lacey Act.⁴ There, Heritage and UCS part company for two primary reasons: (1) criminal enforcement of the Lacey Act leads to

TALKING POINTS

- The Union of Concerned Scientists has published a paper that, by urging continued criminal enforcement of the Lacey Act, implicitly criticizes the FOCUS Act, which would amend the Lacey Act to make it enforceable only through the civil process.
- Criminal enforcement of the Lacey Act leads to miscarriages of justice.
- Criminal enforcement of the Lacey Act is unnecessary.
- Take away the practical ability to understand the criminal law and you take away the moral justification for using it to punish offenders.
- The burden of the UCS's argument seems to be that no other nation has a law like the Lacey Act, but America is going to show the world that it knows better. In other contexts, the proposition that "America Knows Best" would be condemned as chauvinistic, jingoistic, and racist. Here, by contrast, it is deemed a virtue.

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miscarriages of justice, and (2) criminal enforcement of the Lacey Act is unnecessary.

**Reason #1:
Criminal enforcement
of the Lacey Act leads to
miscarriages of justice.**

Oliver Wendell Holmes once said that “[t]he life of the law has not been logic: it has been experience.”⁵ Consider the case of Abner Schoenwetter.⁶ He was prosecuted for violating the Lacey Act and spent five-plus years in federal prison for “heinous” crimes such as importing lobsters into the United States that, under a void Honduran law, were too small to be taken and that should have been packed in boxes rather than in clear plastic bags. The investigation and prosecution of Abner Schoenwetter provides a clear example of the dangers posed by the Lacey Act.

As Heritage has explained, it is grossly unfair to hold anyone

criminally accountable for an error of foreign law, especially if the only thing at issue is an honest mistake.⁷ For centuries, Anglo-American criminal law has relied on the proposition that “Ignorance of the law is no excuse.” That proposition made sense 300 years ago when the criminal law was limited to what today would be known as “street crimes”—e.g., murder, robbery, rape—that were crimes against both God and the King. That concept, however, makes little, if any, sense today: There are more than 4,500 federal criminal laws that do not correspond with any contemporary moral code. No one—including lawyers and judges—knows or could know all of them.

Accordingly, it is nonsense to claim that an American is knowledgeable about foreign law—law that can have intricacies that match America’s own, that might not be readily accessible, and that might not even be written in English. And that proposition is not limited to

any one nation’s foreign law; rather, it requires Americans to know the criminal laws of every nation. Just to state that proposition is to show that it is ridiculous.

The UCS does not address any of these points or even acknowledge their existence. What the UCS paper does say, however, supports Heritage’s argument: The Lacey Act should be enforced through the civil justice system or the administrative process.

First, consider that the UCS paper states that foreign nations may have “complex systems for legal timber extraction [that] motivate working around them,” and timber companies “operate in countries that often have conflicting and inconsistent laws * * *.”⁸ Those statements are tantamount to a confession that the Lacey Act should not—and cannot—be enforced via the criminal law.

A person cannot be convicted in this country for an alleged violation of “complex,” “conflicting[.]

1. PATRICIA ELIAS, LOGGING AND THE LAW: HOW THE U.S. LACEY ACT HELPS REDUCE ILLEGAL LOGGING IN THE TROPICS (APR. 2012), available at http://www.ucsusa.org/assets/documents/global_warming/illegal-logging-and-lacey-act.pdf.
2. Last month, the Federal Law Enforcement Officers Association (FLEOA) criticized the FOCUS Act on several grounds. The Heritage Foundation previously had published a Legal Memorandum commending Senator Rand Paul and Representative Paul Broun for introducing that bill. Paul J. Larkin, Jr., *Defanging the Lacey Act: The Freedom from Over-Criminalization and Unjust Seizures Act of 2012*, Heritage Foundation LEGAL MEMORANDUM No. 78 (MAR. 16, 2012), available at <http://www.heritage.org/research/reports/2012/03/defanging-the-lacey-act-the-freedom-from-over-criminalization-and-unjust-seizures-act-of-2012>. Heritage therefore commented on the FLEOA article in a blog posting. Paul J. Larkin, Jr., *The FOCUS Act and Federal Law Enforcement*, THE FOUNDRY (APR. 12, 2012), <http://blog.heritage.org/2012/04/12/the-focus-act-and-federal-law-enforcement/>. That blog posting is being republished as an Issue Brief along with this paper.
3. Larkin, *Defanging the Lacey Act*, *supra* note 2.
4. ELIAS, *supra* note 1, at 12 (“[T]he Lacey Act establishes penalties for violation of the terms of the law. These penalties include fines, forfeiture of goods and vessels, and potential jail time. * * * By completely closing a market to illegally sourced wood and creating criminal penalties for breaking the law, the Lacey Act both reduces financial incentives for illegal logging and associated trade and, if adequately enforced, actively creates a disincentive for participating in any part of the illegal wood trade.”). The UCS paper states that “[a] majority of the information” in the section on U.S. actions against illegal logging is from a 2008 report by “the Environmental Investigation Agency.” *Id.* at 12 n.* (Citing ENVIRONMENTAL INVESTIGATION AGENCY, THE U.S. LACEY ACT: FREQUENTLY ASKED QUESTIONS ABOUT THE WORLD’S FIRST BAN ON TRADE IN ILLEGAL WOOD (2008)). The Environmental Investigation Agency is a private organization. It is neither the federal Environmental Protection Agency nor is it a component of that agency, nor, despite its name, could it be. See 5 U.S.C. § 551(a) (“‘agency’ means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include [branches of the federal government such as Congress, the federal courts, etc.]”).
5. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (BELKNAP PRESS 2009) (1880).
6. See Heritage Foundation, *Excessive Criminal Laws Trap Honest American Businessman*, YOUTUBE (Aug. 8, 2011), http://www.youtube.com/watch?v=pHvJ6ld_Mic&nooredirect=1.
7. Larkin, *Defanging the Lacey Act*, *supra* note 2; and Larkin, *The Focus Act*, *supra* note 2.
8. ELIAS, *supra* note 1, at 5.

and inconsistent” laws in the U.S. Code. Two well-settled propositions of criminal and constitutional law explain why: The Rule of Lenity requires courts to construe an ambiguous criminal law in a defendant’s favor, and the Void-for-Vagueness Doctrine requires courts to hold invalid criminal laws that cannot be understood by the average person.⁹ Putting those defenses together creates an insurmountable parapet for any prosecutor. The Rule of Lenity requires that, when one or more laws are unclear, “the tie must go to the defendant,”¹⁰ while the Void-for-Vagueness Doctrine exists to invalidate any criminal law that “encourages arbitrary and erratic arrests and convictions.”¹¹ Q.E.D.

The UCS nonetheless wants to hold a person criminally liable for violating complex, conflicting, and inconsistent law in a foreign code. The UCS paper does not explain why Americans should be subject to a lower threshold of criminal liability for violating a foreign law than a domestic law, and no sound explanation leaps to mind.

The criminal law is not a game of “gotcha” in which the goal is to set traps that no reasonable person can understand, that could catch everyone, and that allow the government to pick and choose which chicken to fry. A vague law is tantamount to no law at all. In fact, the concept that the public should be able to understand the criminal law is the moral foundation for the proposition that “Ignorance of the law is no excuse.”

Take away the practical ability to understand the criminal law and you take away the moral justification for using it to punish offenders.

But put the Constitution aside for a minute: Why would the United States *want* to bring a criminal prosecution for violation of a foreign nation’s complex, conflicting, and inconsistent laws? The criminal law should be society’s last defense against harmful or dangerous conduct. Family, friends, neighbors, community, church, administrative orders, civil lawsuits—many or all of those social organizations and tools should be used before society trucks out the criminal law.

The purpose of the criminal law should be to separate evil-minded and evil-doing offenders from people who are at worst negligent and at best morally blameless. In most cases, the law is clear, but the facts are in dispute. If you add complex, conflicting, and inconsistent foreign laws to the mix, both the facts and the law are in dispute. There is no way to separate the morally blameworthy from the morally blameless in a stew like that.

Furthermore, the foreign “law” allegedly violated need not be a criminal law. The UCS argues throughout its paper that there are many instances of “illegal” logging and that timber is being harvested “illegally” in other countries and being imported “illegally” into the United States.¹² But it is not by any means clear that the “illegality” repeatedly mentioned in the UCS paper refers to the taking of foreign timber in violation of a

foreign *criminal* law. The terms “illegal” and “unlawful” often are used interchangeably without specifying whether what is meant is a violation of a criminal statute, the civil law, or even an administrative regulation. The foreign “law” therefore could be a civil law, not a criminal law.

In fact, there is a sizeable list of laws and regulations under which whatever foreign “law” is in question might not fall. For instance, the foreign “law” might not be an environmental law: Perhaps the foreign nation does not mind clear-cutting every tree within its borders as long as foreign nationals do the cutting. That is, developers can turn a rain forest into the Sahara as long as the locals get their cut of the profits. In that event, the foreign “law” could be a labor law.

Or, alternatively, perhaps the foreign “law” requires the same mountain of paperwork demanded by U.S. law. In that event, the foreign “law” could be just another instance of the mind-numbing bureaucratic hurdles that a party must overcome in order to run a lawful business.

The foreign “law” may not even be a law as that term is used in this country. Perhaps it is an interpretation of a regulation, an opinion letter, or a range of other forms that foreign law may take. Different nations may have different forms of law, perhaps without counterpart in this country. Then there is the problem of distinguishing the law on the books from the law as it is applied—and that is no small feat. After all, the former

9. See, e.g., *Moskal v. United States*, 498 U.S. 103 (1990) (the Rule of Lenity); *Chicago v. Morales*, 527 U.S. 41 (1999) (the Void-for-Vagueness Doctrine).

10. *United States v. Santos*, 553 U.S. 507, 514 (2008); *id.* (“This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.”).

11. *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972).

12. E.g., *ELIAS*, *supra* note 1, at 1, 2, 4, 5, 6, etc.

Soviet Union had a written constitution that guaranteed plenty of rights to its citizens, and look how well that system worked.

But, ultimately, under the Lacey Act, no guesswork is required as to what law is applicable. The UCS paper states quite clearly that any violation of any law of any foreign nation applicable to any wood product should trigger the Lacey Act's criminal provision:

[T]he Lacey Act prohibits all trade in plant products that are illegally sourced from any U.S. state or foreign country; illegally sourced plant products are defined as furniture, paper, lumber, and other products logged, manufactured, and/or traded in violation of any country's law. Illegally sourced plant products include those that have been stolen, logged from protected areas, logged without authorization, or for which appropriate taxes, fees, and transport regulations have not been paid or met.¹³

If an item has wood, it's covered. If somebody makes a legal

mistake, he's guilty. What is more, timber must traverse "a long global supply chain,"¹⁴ and the Lacey Act "demand[s] that *all* parts of the supply chain be legal * * *."¹⁵ So if there is any mistake of any complex, conflicting, and inconsistent foreign law anywhere along a global supply chain that might extend halfway around the world, a party can be held criminally liable.

Finally, do not forget that a person—particularly an individual or small company that does not have a white-shoe law firm on speed dial—may not even know that timber has been harvested or exported in violation of some foreign law. A violation at some link in the food chain could be unknowable to someone farther down the line. This is not an instance where someone upstream slaps a BMW sticker on a Moskvitch and claims that it is the World's Greatest Driving Machine. Timber that is cut unlawfully probably looks just like timber that is cut lawfully.

Yes, the UCS paper notes that some American companies "offer services to help importers identify where their products are coming from,"¹⁶ and, in theory, that might

help large-scale companies reduce their risk of criminal liability. But the UCS paper notes that "[t]he Lacey Act does not accept any certification program as a proxy for compliance * * *,"¹⁷ which means that such a certification is not a "get-out-of-jail free" card.¹⁸

Moreover, none of those American certification companies—let alone their officers and directors—will go to jail instead of the hapless individual who gets left holding the timber when it crosses into the United States: He's on his own. *Thank you for playing the Lacey Act's version of trying to make a living by importing flora or fauna from overseas. Go directly to Jail. Do not pass Go. Do not collect \$200.* Is that how the criminal law should be used? To serve as a Chance or Community Chest card in a game of Monopoly?

Reason #2: Criminal enforcement of the Lacey Act is unnecessary.

Perhaps America's importers must suffer harm in the name of some surpassing interest, even though it means confinement for some poor bloke.¹⁹ In some extreme

13. *Id.* at 12.

14. *Id.* at 5; see also Environmental Investigation Agency, The U.S. Lacey Act: Frequently Asked Questions About the World's First Ban on Trade in Illegal Wood (2008) ("[T]he Lacey Act does not impose U.S. law on other countries. 'Illegally sourced' is defined by the content of sovereign nations' own laws."), available at <http://www.eia-global.org/PDF/EIA.LaceyReport.English.pdf> (last viewed Apr. 20, 2012).

15. ELIAS, *supra* note 1, AT 13 (EMPHASIS IN ORIGINAL).

16. *Id.*

17. *Id.*

18. The answer would be different if the federal government certified that timber lawfully could be imported. The government cannot engage in a bait-and-switch by prosecuting a defendant for engaging in the very conduct that the government has approved. See, e.g., *Raley v. Ohio*, 360 U.S. 423, 437-40 (1959); *Cox v. Louisiana*, 379 U.S. 559, 568-72 (1965); *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 670-75 (1973). The UCS paper does not argue that the federal government offers such certifications, and we are unaware of any such program or mechanism for obtaining one.

19. As Oliver Wendell Holmes once wrote: "If I were having a philosophical talk with a young man I was going to have hanged * * * I should say, I don't doubt that your act was inevitable for you, but to make it more avoidable by others we propose to sacrifice you for the common good. You may consider yourself a soldier dying for your country if you like. But the law must keep its promises." ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 108 (2000) (QUOTING 1 HOLMES-LASKI LETTERS 806 (M. HOWE ED. 1953)).

cases, such as quelling a riot, the need to protect the public welfare allows for detention of everyone involved, even innocent parties.²⁰

Criminal enforcement of the Lacey Act, however, does not seem necessary—at least not to the extent where it becomes requisite to cast aside one of the principal tenets of Anglo-American criminal law: that it is better for 10 guilty defendants to go free than for one innocent party to be convicted.²¹ That principle represents a deeply held moral belief as to the need for certainty before someone can be convicted and incarcerated, both as to the factual proof that a defendant engaged in prohibited conduct and as to the proper interpretation of the law charged against him. A reasonable doubt on the facts or the law entitles a defendant to an acquittal.²²

But even assuming for argument's sake that society is willing to imprison someone who unwittingly breaks a complex, confusing foreign law, questions remain: Is there an important public policy at stake? And what is worth that cost?

When attempting to answer whether criminal enforcement of the Lacey Act is worth the attendant

risks of unjust incarceration, three considerations come to mind:

The first argument cited by proponents of criminal enforcement of the Lacey Act is the need to reduce global warming, as well as the need to make a visible step toward such reduction—a step that will encourage other nations to do likewise.

The second argument is that America's criminal enforcement is a necessary ingredient of an international compliance program—that is, foreign nations will use their criminal laws to help this country protect its flora and fauna against unlawful export only if the United States helps them protect theirs against unlawful import via U.S. criminal law.²³

Finally, the third argument posits that unlawful imports hurt domestic industries, and only the criminal law can protect them.

Consider the third argument first.

Criminal enforcement of the Lacey Act is necessary to protect

domestic industries. The UCS paper argues that illegal logging and processing of illegally cut timber into wood products has an adverse effect on the domestic timber and wood processing industries.²⁴ It is unclear, however, to what extent those illegal practices have injured domestic industries. On the one hand, as the UCS notes, “[t]he downturn of the U.S. hardwood industry cannot be fully attributed to illegally sourced wood.”²⁵ Something else is responsible, too, and some of that adverse effect is due to the recession that began in 2008.²⁶ On the other hand, the UCS argues that the downturn began in 1999.²⁷

If the supporting data are correct, the recent recession cannot be the sole cause of the timber and wood processing industries' economic misfortunes. It is impossible to know, therefore, the extent to which these unlawful practices have injured those industries. In addition, there is also no evidence that *only* criminal enforcement of the Lacey Act can save those industries. The UCS has offered no proof that civil enforcement would be insufficient and that, consequently, criminal enforcement

20. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987) (pretrial detention); *Addington v. Texas*, 441 U.S. 418 (1979) (detention of a mentally ill person found to be a danger to himself or others); *Jackson v. Indiana*, 406 U.S. 715 (1972) (detention of mentally ill defendant found incompetent to stand trial); *Moyer v. Peabody*, 212 U.S. 78 (1909) (detention of a person without probable cause by the governor in a time of insurrection).

21. See, e.g., *Coffin v. United States*, 156 U.S. 432, 456 (1895) (“[I]t is better that ten guilty persons escape than one innocent suffer”); 4 WILLIAM BLACKSTONE, COMMENTARIES *352; ALEXANDER VOLOKH, *GUILTY MEN*, 146 U. PA. L. REV. 173, 174 (1997).

22. See *Moskal*, 498 U.S. at 108 (a reasonable doubt on the law); *Jackson v. Virginia*, 443 U.S. 307, 318–20 (1979) (a reasonable doubt on the facts).

23. 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).

24. ELIAS, *supra* note 1, at 7–8; *id.* at 7 (“[B]etween 2004 and 2008, the average prices of Appalachian region red oak, poplar, cherry, and maple all dropped. During the same period, employment levels in the wood container, household furniture, kitchen cabinet/countertop, and millwork/flooring industries also decreased. In the wood household furniture industry alone, U.S. employment has declined approximately 60 percent since the late 1970s.”). The UCS paper also argues that those illegal activities adversely affect the economies of other nations. *Id.* at 10–11. That consideration, however, should be immaterial to the proper scope of the Lacey Act. “American antitrust laws do not regulate the competitive conditions of other nations’ economies.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). It therefore would be odd for the Lacey Act to be concerned with that subject.

25. *Id.* at 8.

26. “The U.S. furniture industry, in retreat since 1999, continued declining in 2010 as low-cost furniture imports and the global economic recession continued to erode the domestic industry market share.” *Id.* at 8.

27. *Id.* at 7.

is necessary in order to produce any domestic return.

Other factors are also at work here. One is that avoidance of criminal liability requires heightened compliance costs. Companies facing potential debarment and corporate officers facing potential imprisonment must incur additional compliance costs that could exceed any environmental benefits from compliance. It might be sensible to force companies and individuals to bear those risks and costs if criminal enforcement of the Lacey Act were indispensable to preventing an environmental catastrophe. But that seems quite unlikely. After all, the environmental harm that the UCS paper cites that is caused by (for example) unmanaged selective logging is the same regardless of whether that practice is illegal,²⁸ and not every foreign law triggering the Lacey Act is an environmental law.

Another factor is that although declining wood prices may impose

a burden on sellers and producers of timber or wood products, price decreases have a corresponding benefit for consumers. Lower prices benefit consumers even though they mean lower receipts for sellers. To be sure, the cost savings for each individual consumer may be far less than the comparable income loss suffered by each individual laid-off employee. But the total number of benefited consumers may greatly exceed the comparable number of adversely affected producers and employees, with the result being that the nation's overall economic and social welfare may increase by virtue of these illegal activities. That factor also must be considered in any reasonable cost-benefit analysis of the marginal utility of criminal enforcement of the Lacey Act.²⁹

That is not to say that the government should abandon laid-off employees. There are various government programs—unemployment insurance, for example—that exist to

help the unemployed until they get back on their feet. But it does mean that the benefit to the public of lower prices from the activities that the UCS criticizes has a legitimate place in the calculus of benefits and costs.³⁰

That also is not to suggest that the U.S. should allow the planet to be denuded of trees in order to lower furniture prices. But it does mean that the undeniable, considerable, additional systemic and individual costs of making a violation of the Lacey Act a federal offense—rather than just a civil or administrative violation—demand an equally heightened and proved benefit to the United States from using that remedy.

In any event, the UCS maintains that these harms result when timber is illegally logged overseas or illegally made into wood products and later imported into the United States.³¹ If so, the timber or wood must cross America's border, where, as the UCS paper notes, numerous federal

28. See *id.* at 8-9 (“Without planned sustainable management of the ecosystem, selective logging causes forest damage and ecosystem impoverishment, loss of biodiversity and carbon, changes in soil nutrients, and increased susceptibility to clearing.”); *id.* at 10 (“Unmanaged selective logging can also lead to forest degradation—and, ultimately, complete deforestation—even beyond the immediate area. Poor practices leave the ecosystem damaged for decades, reducing the land’s productive capacity. This causes logging activities to move into new areas of pristine forest, thus increasing degradation and deforestation. Furthermore, degraded forests are more likely to be completely lost to land use conversion; they dry up and are easier to burn and replace with fields, and logging creates roads into the areas. In the Brazilian Amazon, areas that have been selectively logged were four times more likely to be completely deforested than areas that were not disturbed (Asner et al. 2006).”).

29. The principal federal law governing competition is the Sherman Antitrust Act, 15 U.S.C. § 1, and the Supreme Court repeatedly has made it clear that, for purposes of that law, nonpredatory lower prices are a benefit for consumers. See, e.g., *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 319 (2007); *Brooke Group, Ltd v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-34 (1993); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) (“Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); ROBERT BORK, *THE ANTITRUST PARADOX* 66 (1978); FRANK EASTERBROOK, *THE LIMITS OF ANTITRUST*, 63 U. TEX. L. REV. 1, 34 (1984) (“Business rivals have an interest in higher prices, while consumers seek lower prices.”); *CF. BRUNSWICK CORP. V. PUEBLO BOWL-O-MAT, INC.*, 429 U.S. 477 (1977).

30. In fact, there is a great risk that the preferences of any particular organization or group will receive greater weight than the public interest in the political process. Public choice theory teaches that even a small-sized group has lower transaction costs from engaging in political activity but can have a greater effect than the general public in the political process if the group is unified around one or more particular interests or beliefs and engages in single-issue voting, especially when that purpose is announced in advance. Each small-group member therefore can receive greater benefits from a decision in its favor than any member of the public could receive. See, e.g., MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965).

31. The increase in the worldwide timber and wood products supply attributable to illegal logging and wood processing could affect the domestic price of imported timber and wood products by making it more attractive to sell those items elsewhere. The UCS report does not quantify the specific amount of that increase. A decrease in the quantity of those imported items could raise their domestic price to a point that makes domestically harvested timber and domestically manufactured wood products less expensive than their rival imports, which would offset the adverse effect of illegal activity overseas on the demand for domestic products and on employment in the relevant domestic industries. The UCS paper does not quantify those possibilities, and we are unaware of any actual figures.

agencies implement the Lacey Act and other laws: e.g., the Department of Homeland Security's Customs and Border Protection and Immigration and Customs Enforcement components, the Interior Department's U.S. Fish and Wildlife Service (FWS), the Agriculture Department's Animal and Plant Inspection Service, all of which are represented in court by the Justice Department.

One or more of those agencies can inspect imported timber and wood products, stop illegal imports from entering the United States, seize them from an importer in order to keep them from entering the stream of commerce, and institute forfeiture proceedings in court. As the UCS paper notes, the FWS "enforces the Lacey Act by requiring certain importers to declare the country of harvest, genus, and species of wood in imported products. This requirement, gradually being phased in, will ultimately help businesses ensure they know where their wood is coming from and protect the legal forestry industry in the United States."³² If so, criminal enforcement of the Lacey Act is never necessary to achieve the UCS's sought-after goals: Civil enforcement will take care of every case where an importer honestly discloses that wood products were unlawfully harvested.

Furthermore, decriminalizing the Lacey Act does not place illegal logging beyond the reach of American

criminal law. Some importers may lie about the source of their timber or about some other aspect of how it came to be in their cargo hold. Yet if an importer falsifies the source of his imported wood or some other material fact, the Justice Department can prosecute him for fibbing in violation of the False Statement Act, 18 U.S.C. § 1001. Criminal prosecution under the Lacey Act is unnecessary to keep illegally harvested or processed wood out of the United States; other laws can be used to accomplish the same goal.

It also might be argued that a false statement prosecution is an insufficient deterrent because it comes after the fact, it does not enforce the Lacey Act, and the penalty is inadequate. But those arguments are meritless. Every criminal prosecution comes after the fact because they are (and can be) brought only after a crime has been committed. The deterrent effect of the criminal law hinges on factors such as the likelihood of detection; the speed by which an offender is apprehended, prosecuted, and sentenced; the type and magnitude of the potential penalty; and the likelihood of that (or some other punishment) being imposed. The name of the statute never enters into the calculus. Finally, even if a potential, basic five-year term of imprisonment for a violation of 18 U.S.C. § 1001 were an insufficient deterrent—a proposition that would need to be proved,

not just asserted—the proper remedy is to increase that penalty, not to leave the criminal provisions of the Lacey Act in effect.

Criminal enforcement of the Lacey Act is necessary to encourage support for international compliance programs. The claim that criminal enforcement is indispensable to an international compliance program overstates the need for criminal enforcement. The UCS says that the problem of illegal logging is largely a problem in tropical nations. But while "U.S. imports of wood and wood products from Latin America, Asia, and Oceania have increased" over the past few decades, the UCS notes, "currently the majority of U.S. wood imports are not from the tropics."³³ That considerably reduces the importance of the problem to this nation.

It is a mistake to demean the ability of noncriminal sanctions to achieve public policy goals. According to the UCS, "[t]he most effective way to reduce illegal logging is to reduce its financial incentives,"³⁴ and, according to the Supreme Court, "all civil penalties have some deterrent effect."³⁵ Together, those statements mean that even civil fines can coerce compliance. Finally, add in (1) the possibility that a foreign nation will enforce its own criminal law for actions occurring in its own nation and (2) the ability of the federal government to use moral suasion to

32. *Id.* at 2.

33. ELIAS, *supra* note 1, at 12.

34. *Id.*; *see id.* at 18.

35. *Hudson v. United States*, 522 U.S. 93, 102 (1997).

convince or entice foreign countries to work toward an international goal, and the case for civil enforcement should be complete.³⁶

Criminal enforcement of the Lacey Act is necessary to reduce global warming. This paper is not the place to debate the manifold issues involved in understanding and addressing the subject of global warming.³⁷ But it is fair and important to point out that the UCS paper rests all of the burden on the United States—even though other countries are equally or more responsible for the existence of illegal logging practices and, accordingly, for the contribution that this conduct may add to global environmental degradation.

The UCS paper states that “[i]llegal logging and the associated trade of illegally sourced products is a clandestine industry * * *,” attributable to “[w]eak governance and poor policies,” “government collusion and corruption, * * * a general lack of support for legal community forest use,” “government instability, inadequate enforcement, and lack of resources, * * * [and] local and regional conflicts.”³⁸ In other words, the foreign nations from whence imported wood originates have inadequate resources to police lumbering in their own lands; are incompetent and corrupt, making adequate resources a waste of time;

and do not give a hoot about timber, logging, or forests in any event.

Think about the implication of that proposition for a minute: Americans are being—and should be—forced to bear the burden of the world’s illegal activities. Deforestation may be a global problem, and the world is populated with scallywags, but the United States alone will punish its own citizens for conduct occurring beyond its shores that is illegal, not under U.S. law, but under some other nation’s law, regardless of the reasonableness of their actions.

Even the UCS recognizes the unique burden that the Lacey Act places on Americans, because its paper states that “[t]he [2008] Lacey Act Amendments marked the world’s *first-ever law* prohibiting trade of illegally logged wood products.”³⁹ No other nation has a law like the Lacey Act, but, by God, America is going to show the world that it knows better. In other contexts, the proposition that “America Knows Best” would be condemned as chauvinistic, jingoistic, and racist. Here, by contrast, it is deemed a virtue.

Unanswered Questions

With regard to the Lacey Act, several questions remain unresolved. For example, why should America

spend scarce resources—investigative, prosecutorial, judicial, and correctional—on a matter that does not occur in the United States and that does not injure or threaten an American, the U.S. government, or a vital national policy? Why should the U.S. prosecute people for conduct that occurs in a foreign land that the host nation itself does not prosecute under a law that it does not enforce, perhaps because that law conflicts with a different law—or perhaps because the host nation deems that law relatively unimportant in the overall scheme of things? And if that is true, who are Americans to lecture a foreign nation on the importance of one of its own laws—criminal, environmental, labor, or whatever—that has no direct effect on this country?

Those are the sorts of questions that should be answered before America wields the big stick of a criminal prosecution against its citizens. And yet, so far, no one but Heritage, Senator Rand Paul (R-KY), and Representative Paul Broun (R-GA) is even asking such questions.

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36. The UCS paper recognizes the value of those efforts. See Elias, *supra* note 1, at 12, at 18 (“Any strategy aimed at addressing the problem of illegal activities needs to be holistic and include a wide range of policy, legal, institutional and technical options in order to discourage illegal activities and facilitate legal behavior. * * * * Illegal loggers and wood traders will only stop their activities if they are assured that illegal activities are less profitable than legal ones * * *. Therefore, policy changes that affect the incentives for illegal logging, rather than simply addressing the symptoms (such as bribery), will ultimately be the most effective * * *. By creating strict and expensive fines, the Lacey Act is working toward this end. The U.S. government should also encourage producing, processing, and consuming nations to create policies that make it easier to identify and catch illegal loggers and wood traders, and to impose expensive fines on them.”).

37. For some Heritage Foundation publications on global warming, see Nicolas D. Loris, *New EPA Inspector General Report: One More Reason to Reject Climate-Change Regulation*, Heritage Foundation BACKGROUNDER No. 2623 (Nov. 10, 2011), available at http://thf_media.s3.amazonaws.com/2011/pdf/bg2623.pdf; Ben Lieberman, *The Economics of Global Warming Policy*, Heritage Foundation LECTURES No. 1156 (June 16, 2010), available at http://thf_media.s3.amazonaws.com/2010/pdf/hl1156.pdf; Nicolas D. Loris, *The EPA’s Global Warming Regulation Plans*, Heritage Foundation WebMemo No. 2768 (January 20, 2010), available at http://thf_media.s3.amazonaws.com/2010/pdf/wm_2768.pdf.

38. ELIAS, *supra* note 1, at 2.

39. *Id.* at 2 (emphasis added); *id.* at 12 (the 2008 Lacey Act amendments were “the world’s first ban on the trade of illegally sourced wood products”).