

# Putting the Illegal Wildlife Trade in the Crosshairs: How the Global Conservation Crisis Demonstrates the Need for Lacey Act Enforcement of Foreign Laws

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# PUTTING THE ILLEGAL WILDLIFE TRADE IN THE CROSSHAIRS: HOW THE GLOBAL CONSERVATION CRISIS DEMONSTRATES THE NEED FOR LACEY ACT ENFORCEMENT OF FOREIGN LAWS

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## INTRODUCTION

Amidst the widespread outcry<sup>1</sup> over the death of Cecil the Lion, the subject of an Oxford University lion study, at the hands of now decried dentist, Walter Palmer,<sup>2</sup> many onlookers on social media and in the press failed to report on the larger conservation crisis within their sights. While Cecil served as a momentary beacon of light to illuminate one critical instance of conservation failure,<sup>3</sup> other similar instances of poaching

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<sup>1</sup> See Christina Capecchi & Katie Rogers, *Killer of Cecil the Lion Finds Out That He Is a Target Now*, of *Internet Vigilantism*, N.Y. TIMES (July 29, 2015), [http://www.nytimes.com/2015/07/30/us/cecil-the-lion-walter-palmer.html?\\_r=0](http://www.nytimes.com/2015/07/30/us/cecil-the-lion-walter-palmer.html?_r=0) [<https://perma.cc/HLZ5-XKHX>]; see also Todd Melby, *U.S. Dentist Who Killed Zimbabwean Lion Cecil Returns to Work*, REUTERS (Sept. 8, 2015), <http://www.msn.com/en-us/news/us/us-dentist-who-killed-zimbabwean-lion-cecil-returns-to-work/ar-AAe3tZx> [<https://perma.cc/NHU6-2DLC>].

<sup>2</sup> See Marc Dorian et al., *What Happened in the Harrowing Hours Before Cecil the Lion Was Killed*, ABC NEWS (Aug. 13, 2015), <http://abcnews.go.com/International/happened-harrowing-hours-cecil-lion-killed/story?id=33044279> [<https://perma.cc/2NUF-JA9S>]; see also Michael E. Miller, *Zimbabwe Charges Farmer Over Killing of Cecil the Lion, but not American Dentist*, THE WASHINGTON POST (Aug. 19, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/08/19/zimbabwe-charges-farmer-over-killing-of-cecil-the-lion-but-not-american-dentist/> [<https://perma.cc/NJL8-L473>]; Smita Nordwall, *American Faces Poaching Charge in Popular Zimbabwe Lion's Death*, VOICE OF AMERICA (July 28, 2015), <http://www.voanews.com/content/american-faces-poaching-charge-zimbabwe-lion-death/2882703.html> [<https://perma.cc/RH2Q-RX3T>]; *Bringing Justice for Cecil the Lion*, ANIMAL LEGAL DEFENSE FUND, <http://aldf.org/cases-campaigns/features/bringing-justice-for-cecil-the-lion/> [<https://perma.cc/AP23-2NVY>] (last visited Oct. 24, 2016).

<sup>3</sup> Cecil's death inspired Senator Bob Menendez (D. N.J.) to introduce legislation to protect species that U.S. Fish & Wildlife Service considers listing under the Endangered Species Act. See S. 1918, 114th Cong. (2015).

rarely received media attention. Since 2009, both Tanzania and Mozambique have witnessed the disappearance of over half of their elephant populations due to illegal poaching resulting from recent spikes in foreign ivory demand.<sup>4</sup> Similarly, poachers took the lives of an estimated 1,215 southern white rhinoceroses in 2014, which equates to a 9,000% increase in poaching activity since 2007.<sup>5</sup> While increased ivory demand from Asia has driven the rise in poaching, many poachers come from the United States, and U.S. demand for products of the illegal wildlife trade remains strong.<sup>6</sup> In fact, the United States ranks second globally in consumption of products derived from the illegal wildlife trade.<sup>7</sup>

Fortunately, the United States imposes a stringent legal regime designed to punish U.S. citizens for engaging in illegal poaching activities abroad under the Lacey Act, the lesser-known cousin of the Endangered Species Act.<sup>8</sup> The Lacey Act promulgates civil and criminal penalties for the transportation in interstate commerce of species or by-products of animals taken in violation of foreign conservation laws.<sup>9</sup> For example, Walter Palmer's slaying of Cecil the Lion in violation of Zimbabwean law could potentially lead to prosecution under the Lacey Act if he had planned to bring part of the lion back as a trophy.<sup>10</sup> Additionally, federal prosecutors have successfully utilized conspiracy charges to enforce the Lacey Act, and conspiracy appears to occupy an important role within prosecutors'

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<sup>4</sup> Omar Mohammed, *A New Census Reveals the Poaching Crisis in Africa Is Worse Than We Thought*, QUARTZ AFRICA (June 3, 2015), <http://qz.com/418923/the-poaching-crisis-is-worsening-in-some-african-countries-to-meet-chinese-demand-for-ivory/> [<https://perma.cc/5NJS-GP4P>].

<sup>5</sup> Karl Mathiesen, *Can Anything Stop the Rhino Poaching Crisis?*, THE GUARDIAN (Jan. 23, 2015), <http://www.theguardian.com/environment/2015/jan/23/can-anything-stop-the-rhino-poaching-crisis> [<https://perma.cc/ZB9Z-YK7T>].

<sup>6</sup> *Poaching American Security: Impacts of the Illegal Wildlife Trade: Hearing Before the H. Comm. on Natural Resources*, 110th Cong. 64 (2008) (statement of Steven R. Galster, Director of Field Operations, Wildlife Alliance).

<sup>7</sup> Alejandra Goyenechea & Rosa Indenbaum, *Deadly Traffic: The U.S. Plays an Unwitting Role in Illegal Wildlife Trade*, DEFENDERS OF WILDLIFE (Mar. 3, 2015), <http://www.defendersblog.org/2015/03/deadly-traffic-u-s-plays-unwitting-role-illegal-wildlife-trade/> [<https://perma.cc/98K4-YPWY>].

<sup>8</sup> 16 U.S.C. § 3372 (2015).

<sup>9</sup> *Id.*

<sup>10</sup> See Ayesha Rascoe & Julia Edwards, *Cecil the Lion Case Charts New Territory for U.S. Wildlife Law*, REUTERS (Aug. 4, 2015 3:35 PM), <http://www.reuters.com/article/2015/08/04/us-zimbabwe-wildlife-lion-usa-idUSKCN0Q924Z20150804> [<https://perma.cc/2XEY-82RT>]; see also Christine Fisher, *Conspiring to Violate the Lacey Act*, 32 ENVTL. L. 475 (2002) (providing a theoretical analysis of conspiracy charges under the Lacey Act).

Lacey Act toolboxes, including in high profile poaching cases.<sup>11</sup> Thus, the Lacey Act serves a critical role within the broader scope of U.S. conservation policy by expanding the ability of federal prosecutors to challenge the actions of U.S. citizens abroad that threaten foreign conservation efforts.

While the Endangered Species Act embodies the United States' chief species conservation priorities, the U.S. Fish & Wildlife Service ("Fish & Wildlife") lists new species under the Endangered Species Act only in reaction to conservation crises.<sup>12</sup> This "emergency-room mentality" results in stabilizing a species in crisis, but fails to provide preventative treatment to stave off endangerment in the first place.<sup>13</sup> In this regard, the environmental laws of foreign governments (both national and local jurisdictions) play a crucial role because they incorporate local knowledge about trends in conservation and help prevent ecological crises before they occur, which Congress recognized as a justification for the incorporation of foreign conservation laws under the Lacey Act.<sup>14</sup> But if American citizens abroad can evade punishment under those foreign laws due to gaps in enforcement, then the benefit to environmental protection evaporates.<sup>15</sup> Similarly, foreign governments lack the capability to exercise jurisdiction over American consumers of products derived from the illegal wildlife trade.<sup>16</sup> The Lacey Act protects the proactive conservation efforts of other nations by deterring American citizens abroad from breaking foreign conservation laws, and it forces Americans to educate themselves about those laws prior to adventuring abroad or purchasing illegally taken products.<sup>17</sup> This holds especially true in the context of a multibillion

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<sup>11</sup> See *U.S. v. Bengis*, 611 F. App'x. 5 (2d Cir. 2015) (upholding order requiring defendant to pay restitution for conspiracy to illegally harvest South African rock lobsters); *U.S. v. Delph*, 371 F. App'x 63 (11th Cir. 2010) (upholding conviction for conspiracy to violate the Lacey Act in harvesting an illegally large number of spiny lobsters); see also *Indictment, U.S. v. Groenewald*, Criminal No. 214-CR-508-WKW (M.D. Ala. Oct. 16, 2014) (charging an African safari company with conspiracy to violate the Lacey Act by arranging an illegal hunt for an African white rhinoceros).

<sup>12</sup> Kristin Carden, *Bridging the Divide: The Role of Science in Species Conservation Law*, 30 HARV. ENVTL. L. REV. 165, 204 (2006).

<sup>13</sup> *Id.*

<sup>14</sup> H.Rep. 71-7 at 181-82 (1929).

<sup>15</sup> C. Parks Gilbert, III, *The Lacey Act: A Vintage Conservation Tool Still Vital in Today's Global Economy*, 29-WTR NAT. RESOURCES & ENV'T 3 (2003).

<sup>16</sup> See Julia C. Shepard, *The Lacey Act: Extraterritorial Application Based on an Antitrust Paradigm*, 29 SAN DIEGO L. REV. 67, 84 (1992).

<sup>17</sup> See *id.* (arguing that the Lacey Act provides a deterrent to the taking of wildlife abroad); see also Fisher, *supra* note 10, at 481 ("The [Lacey] Act is touted as the premier weapon in the fight against wildlife trafficking and the 'government's key mechanism for deterring crimes against wildlife'").

dollar illegal wildlife trafficking and poaching industry, which generates much of its profit from moving goods in international trade, a prerequisite for Lacey Act violations.<sup>18</sup>

Despite the Lacey Act's effective means of buttressing foreign conservation efforts, many critics seek to declaw the Lacey Act by stripping its foreign enforcement provisions.<sup>19</sup> While some recent cases<sup>20</sup> demonstrate the Lacey Act's potential for overcriminalization, the dramatic increase in overseas poaching activity reinforces the argument for the Lacey Act as a deterrence mechanism to ensure that American citizens, well-intentioned or not, abide by foreign conservation laws while abroad and refrain from purchasing items taken illegally.<sup>21</sup> Admittedly, the functional incorporation of every foreign conservation law can result in the prosecution of citizens ignorant of foreign laws.<sup>22</sup> Despite this possibility, the preservation of the global environment should drive U.S. policy in this instance. Environmental conservation has global repercussions, and as a result, preservation laws must continue to reach globally.<sup>23</sup> Congress should not weaken the Lacey Act's commitment to global conservation efforts by constraining its incorporation of foreign laws because it promulgates a comprehensive rather than piecemeal approach to conservation efforts, serves as an additional deterrent for the violation of

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<sup>18</sup> See Gilbert, *supra* note 15, at 5.

<sup>19</sup> See *infra* Section I.C. See generally C. Jarrett Dieterle, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 GEO. L.J. 1279 (2014) (arguing for restrictions on penalties under the Lacey Act including a reevaluation of the *mens rea* standards applied by the Act); Paul Larkin, *Defanging the Lacey Act: The Freedom from Over-Criminalization and Unjust Seizures Act of 2012*, THE HERITAGE FOUNDATION (Mar. 16, 2012), <http://www.heritage.org/research/reports/2012/03/defanging-the-lacey-act-the-freedom-from-over-criminalization-and-unjust-seizures-act-of-2012> [https://perma.cc/CY4R-UBEN] (advocating for passage of The Freedom from Over-Criminalization and Unjust Seizures Act of 2012).

<sup>20</sup> See *infra* Section I.C. for a discussion of the motivations behind proposed amendments to the Lacey Act.

<sup>21</sup> See Shepard, *supra* note 16, at 84. See also Fisher, *supra* note 10, at 481.

<sup>22</sup> See Dieterle, *supra* note 19; Larkin, *supra* note 19; Victor J. Rocco, *Wildlife Conservation Under the Lacey Act: International Cooperation or Legal Imperialism?*, 80 N.Y. ST. B.J. 10, 13–14 (2008).

<sup>23</sup> See Trevor Krost, *The World's Laws in American Justice: The Foreign Provisions of the 2008 Lacey Act Amendments*, 8 PITT. J. ENVTL. PUB. HEALTH L. 55, 77–78 (2013); Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 83 (1995); see also Anastasia Telesetsky, *Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime*, 41 ECOLOGY L.Q. 939, 986 (2014) (proposing that other nations adopt versions of the U.S. Lacey Act to create a unified, global strategy against wildlife trafficking).

foreign laws, and provides a more realistic possibility of prosecution of American citizens than in foreign jurisdictions.<sup>24</sup>

Section I of this Note provides a brief overview of the Lacey Act's history and an overview of the proposed amendments. Section II discusses the extent of the global conservation crisis from the perspective of U.S. and foreign laws. Section III evaluates the strength of the Lacey Act's deterrence mechanism, both with and without foreign law incorporation, and argues that the government can reasonably conduct prosecutions of foreign law violations. Finally, this Note concludes that the Lacey Act's incorporation of foreign laws remains necessary to global conservation governance despite the potential for overcriminalization.

## I. BRIEF OVERVIEW OF THE LACEY ACT AND ITS PROPOSED AMENDMENTS

Congress passed the Lacey Act in the hopes that it would accomplish three primary policy objectives: 1) the prevention of the spread of invasive species; 2) the conservation of species; and 3) the enforcement of domestic gaming laws.<sup>25</sup> While the scope of this Note does not extend to the Lacey Act's invasive species provisions, the development of the Lacey Act as a conservation tool and the history behind the Lacey Act's incorporation of foreign conservation laws demonstrate the importance of the Lacey Act to U.S. conservation policy as a whole.<sup>26</sup>

### A. *Congressman Lacey's Pot Hunting Bill*

Congressman John Lacey stewarded the passage of the Lacey Act in 1900 as the first mechanism to enforce interstate violations of state and local wildlife laws.<sup>27</sup> Many state and local governments had enacted conservation laws aimed at preserving their populations of common game birds; however, pot hunters<sup>28</sup> quickly learned that if they killed birds in one state and sold the skin and feathers in a neighboring state, they could avoid state and local enforcement, as well as federal enforcement

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<sup>24</sup> See Shepard, *supra* note 16, at 84; see also Fisher, *supra* note 10, at 481.

<sup>25</sup> Gilbert, *supra* note 15, at 3.

<sup>26</sup> A number of scholars have written more extensive histories of the Lacey Act; however, this Note will only touch on events relevant to the discussion of foreign law incorporation. See Dieterle, *supra* note 19; Anderson, *supra* note 23, at 83.

<sup>27</sup> See 33 CONG. REC. 4871–4872 (1900).

<sup>28</sup> See WEBSTER'S 1913 DICTIONARY, <http://www.webster-dictionary.org/definition/Pot%20hunter> (defining "pot hunter" as "a hunter who shoots game for the table or market").



due to a lack of jurisdiction.<sup>29</sup> Congressman Lacey recognized this jurisdictional problem and proposed to federally enforce local laws against pot hunters by using the sale of bird byproducts as an interstate commerce hook to provide federal jurisdiction.<sup>30</sup> Shortly after the Act's passage, appellate courts began to review the first Lacey Act prosecutions and agreed that the interstate commerce clause could grant federal jurisdiction over pot hunters selling bird parts in jurisdictions other than the state in which the hunter made the kill.<sup>31</sup>

*B. Incorporation of Foreign Laws*

Interest in protecting birds continued throughout the early twentieth century, and in 1916, the United States began negotiations with Great Britain on behalf of Canada for the protection of birds migrating between the two countries.<sup>32</sup> These negotiations culminated in an agreement between the United States and Great Britain,<sup>33</sup> and Congress passed the Migratory Bird Treaty Act of 1918.<sup>34</sup>

Subsequently, the Migratory Bird Hunting and Conservation Stamp Act of 1935 ("Duck Stamp Act") sought to extend the success of Congressman Lacey's enforcement strategy into the international arena.<sup>35</sup> Congress used the Duck Stamp Act to broaden the scope of the Lacey Act to incorporate foreign laws as predicates for Lacey Act violations.<sup>36</sup> In addition to the Duck Stamp Act's increased jurisdictional scope, Congress also granted authority to federal agents to directly enforce the Lacey Act, which aggrandized the scope of federal conservation efforts.<sup>37</sup> This broad

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* Congressman Lacey and other supporters of the Lacey Act decried the fact that one could illegally hunt birds in Iowa and Georgia and then sell the byproducts in Pennsylvania and Delaware without repercussions. *See also* H.R. REP. NO. 56-474 (1900).

<sup>31</sup> *See* *Rupert v. U.S.*, 181 F. 87 (8th Cir. 1910) (holding that the commerce clause validated the Lacey Act's grant of federal jurisdiction).

<sup>32</sup> George Cameron Coggins, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 169 (1979).

<sup>33</sup> Convention Between the United States and Great Britain for the Protection of Migratory Birds, Gr. Brit.-U.S., Aug. 16, 1916, 39 Stat. 1702. Note that Congress later incorporated other migratory bird conventions by statute including agreements with Mexico (1936), Japan (1972), and Russia (1976). 16 U.S.C. § 703 (2015).

<sup>34</sup> 16 U.S.C. §§ 703–712 (2015).

<sup>35</sup> 79 CONG. REC. 14,490 (1935) (proposing to extend the Lacey Act's jurisdiction to foreign commerce).

<sup>36</sup> *Id.*; *see also* Migratory Bird Hunting and Conservation Stamp Act, ch. 261, § 242, 49 Stat. 378 (1935).

<sup>37</sup> H.R. REP. NO. 886, 74th Cong., 1st Sess. 2 (1935).

enforcement strategy culminated in the 1969 and 1981 amendments, which expanded the Lacey Act to cover a larger number of species with the intention of utilizing both the Endangered Species Act and the Lacey Act to assist other countries in the enforcement of their conservation laws.<sup>38</sup>

C. *The 2008 Amendments and Proposed FOCUS Legislation*

In 2008, Congress again expanded the scope of the Lacey Act beyond the 1981 amendments by broadening the definition of “plant” to include “any wild member of the plant kingdom.”<sup>39</sup> Senator Wyden (D-OR), the sponsor of the amendment, wanted to curb international illegal logging activities, which he saw as both environmentally destructive and threatening to the domestic logging market.<sup>40</sup> A conglomerate of industry and environmental organizations from the National Hardwood Lumber Association to the Defenders of Wildlife and Sierra Club supported the amendments.<sup>41</sup>

Since passage of the 2008 amendments, Fish & Wildlife has demonstrated its determination to punish illegal logging practices abroad.<sup>42</sup> For example, the Virginia-based Lumber Liquidators, Inc. signed a plea agreement that will levy the single largest fine ever issued (\$13.18 million dollars) for illegal lumber trafficking and for the manipulation of permits to harvest wood from the habitat of endangered Siberian tigers in Russia.<sup>43</sup> While the Lacey Act has incorporated foreign laws since the 1930s, avid enforcement of the new illegal logging provisions has generated significant

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<sup>38</sup> See S. REP. NO. 91-526 (discussing the expansion of the Lacey Act as a companion policy to the proposed Endangered Species Act); see also Act of Nov. 16, 1981, Pub. L. No. 97-79, § 9(b), 95 Stat. 1073, 1079 (1981 Amendment providing protections for fish and plant life protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora).

<sup>39</sup> 16 U.S.C. § 3371(f) (2012). The Lacey Act’s definition of plants does exclude certain categories of plants, such as plants intended for scientific use. 16 U.S.C. § 3371(f)(2) (2012).

<sup>40</sup> 153 CONG. REC. 22,089 (2007); see also S. 1930, 110th Cong. (2007). The Senate ultimately did not pass Wyden’s bill, but instead attached the Lacey Act Amendments to the 2008 Farm Bill. Pub. L. No. 110-234, 122 Stat. 923, 1291 (2008).

<sup>41</sup> 153 CONG. REC. 22,089 (2007).

<sup>42</sup> Caitlin Clarke & Adam Grant, *Gibson Guitar Logging Bust Demonstrates Lacey Act’s Effectiveness*, WORLD RES. INST. (Aug. 10, 2012), <http://wri.org/blog/2012/08/gibson-guitar-logging-bust-demonstrates-lacey-act%E2%80%99s-effectiveness> [<https://perma.cc/UE2A-N6YC>].

<sup>43</sup> *United States v. Lumber Liquidators, Inc.*, No. 15-cr-126, *plea agreement filed* (E.D. Va. Oct. 22, 2015); *Lumber Liquidators Inc. Pleads Guilty to Environmental Crimes and Agrees to Pay More Than \$13 Million in Fines, Forfeiture and Community Service Payments*, U.S. DEPT. OF JUSTICE, (Oct. 22, 2015), <http://www.justice.gov/opa/pr/lumber-liquidators-inc-pleads-guilty-environmental-crimes-and-agrees-pay-more-13-million> [<https://perma.cc/GW6Q-48XT>].



controversy over the extent of power provided to federal prosecutors and the potential for “overcriminalization” such power creates.<sup>44</sup> One major reason for this recent scrutiny of the Lacey Act’s foreign enforcement provisions may stem from the fact that the number of potential Lacey Act violations has substantially increased since the passage of the 2008 amendments.<sup>45</sup> The United States consumes more wood products than any other nation and, more significantly, imports large quantities of lumber from countries known to have problems with illegal logging activities.<sup>46</sup> A second reason comes from the decision of federal courts to expand the scope of the Lacey Act by interpreting the term “foreign law” to include “regulations and other such legally binding provisions that foreign governments may promulgate.”<sup>47</sup>

Much of this concern arose after the recent civil forfeiture action taken against Gibson Guitar Corporation,<sup>48</sup> which involved the importation of ebony wood in violation of the laws of Madagascar and India.<sup>49</sup> Fish & Wildlife claimed that a Gibson Guitar employee had informed the company that its imports from Madagascar may have resulted from illegal logging activities; however, Gibson Guitar took no action and continued to import wood from Madagascar.<sup>50</sup> On August 6, 2012, Gibson Guitar settled for \$300,000 to avoid further prosecution under the Lacey Act.<sup>51</sup> Gibson Guitar’s CEO and others have speculated that Fish & Wildlife aggressively prosecuted the case under pressure from environmental groups looking to make a dramatic example of a large corporation.<sup>52</sup> Regardless

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<sup>44</sup> See, e.g., Dieterle, *supra* note 19 (arguing for restrictions on penalties under the Lacey Act including a reevaluation of the *mens rea* standards applied by the Act); Larkin, *supra* note 19 (advocating for The Freedom from Over-Criminalization and Unjust Seizures Act of 2012).

<sup>45</sup> Rachel Saltzman, *Establishing a “Due Care” Standard Under the Lacey Act Amendments of 2008*, 109 MICH. L. REV. FIRST IMPRESSIONS 1, 2 (2010).

<sup>46</sup> *Id.*

<sup>47</sup> U.S. v. McNab, 331 F.3d 1228, 1239 (11th Cir. 2003).

<sup>48</sup> The government never filed formal charges against Gibson Guitar; however, the government subjected its stock to a civil forfeiture action. See Verified Complaint *in Rem*, United States v. 25 Bundles of Indian Ebony Wood, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011).

<sup>49</sup> Paul Larkin, *The FOCUS Act and Federal Law Enforcement*, THE HERITAGE FOUNDATION (May 7, 2012), [http://www.heritage.org/research/reports/2012/05/focus-act-overcriminalization-and-federal-law-enforcement#\\_edn3](http://www.heritage.org/research/reports/2012/05/focus-act-overcriminalization-and-federal-law-enforcement#_edn3) [https://perma.cc/BZ5S-2NNJ].

<sup>50</sup> Richard Black, *Gibson Settles Discord on Timber*, BBC NEWS (Aug. 6, 2012), <http://www.bbc.com/news/science-environment-19153588> [https://perma.cc/LH8T-BWCU].

<sup>51</sup> U.S. DEP’T OF JUSTICE, *Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations*, (Aug. 6, 2012), <http://www.justice.gov/opa/pr/gibson-guitar-corp-agrees-resolve-investigation-lacey-act-violations> [https://perma.cc/FT4L-GXE7].

<sup>52</sup> See Bill Frezza, *Lumber Union Protectionists Incited SWAT Raid On My Factory, Says Gibson Guitar CEO*, FORBES (May 26, 2014), <http://www.forbes.com/sites/billfrezza/2014>

of Fish & Wildlife's motivations for aggressive prosecution, the Gibson Guitar forfeiture action and subsequent settlement sent a clear signal that the federal government intended to fully prosecute violations of the 2008 amendments, which has sparked fear amongst even private owners of wooden instruments of questionable origins that the government may one day come for their guitars.<sup>53</sup>

Responding to these concerns, several lawmakers have introduced bills intended to limit the scope of the Lacey Act's foreign enforcement provisions.<sup>54</sup> The most recent attempt to amend the Lacey Act comes from Senator Rand Paul (R-KY), who has twice proposed an amendment to the Act known as the Freedom from Over-Criminalization and Unjust Seizures Act ("FOCUS Act"), which would remove the Act's foreign enforcement provisions.<sup>55</sup> Paul and other opponents of the Lacey Act's foreign enforcement provisions point to examples of prosecutorial overreach such as the Gibson Guitar civil forfeiture and settlement.<sup>56</sup> Opponents of foreign law incorporation also cite the case of *U.S. v. McNab*, in which federal prosecutors indicted fisherman for taking lobsters in violation of Honduran laws even though Honduran government representatives testified at trial that their government no longer enforced those restrictions.<sup>57</sup> These cases, however, should not incite Congress to overturn the Lacey Act's global vision for environmental conservation. The Gibson Guitar settlement and *McNab* merely provide a cautionary tale for prosecutors and should encourage less aggressive enforcement for innocent owners

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/05/26/lumber-union-protectionists-incited-swat-raid-on-my-factory-says-gibson-guitar-ceo/ [https://perma.cc/WY66-9R4D]; Black, *supra* note 50.

<sup>53</sup> See Eric Felton, *Guitar Frets: Environmental Enforcement Leaves Musicians in Fear*, THE WALL STREET JOURNAL (Aug. 26, 2011), <http://www.wsj.com/articles/SB10001424053111904787404576530520471223268> [https://perma.cc/ECC5-C5XA].

<sup>54</sup> See The Freedom from Over-Criminalization and Unjust Seizures (FOCUS) Act, S. 1019, 114th Cong. (2015) (proposing to strike all references within the Lacey Act to foreign laws); The Retailers and Entertainers Lacey Implementation and Enforcement Fairness (RELIEF) Act H.R. 3210, 112th Cong. (2011) (proposing to prevent retroactive application of the Lacey Act and limit the enforcement of foreign laws to laws purporting to protect conservation); see also Joseph Furlett, *The Insufficiency of the Musical Instrument Passport Program Under CITES and the Lacey Act: The Need for a Centralized Wood Title and Certification System for Manufactured Wood Products and Wooden Musical Instruments*, 48 J. MARSHALL L. REV. 495, 511–13 (2015) (describing the FOCUS and RELIEF Acts).

<sup>55</sup> S. 1019, 114th Cong. (2015); S. 2062, 112th Cong. (2011).

<sup>56</sup> See Daniel J. Dew, *Senator Rand Paul: Overcriminalization Champion*, THE HERITAGE FOUNDATION (Dec. 27, 2012), <http://www.heritage.org/research/reports/2012/12/senator-rand-paul-overcriminalization-champion> [https://perma.cc/42SC-EBDS].

<sup>57</sup> *McNab*, 331 F.3d at 1228, 1239.

and unintentional violators. Congressman Lacey realized over a century ago that government should act when the existence of a species comes under threat, and while he did not originally intend to father a comprehensive conservation scheme, the scope of the global conservation crisis today warrants global solutions.

## II. THE EXTENT OF THE GLOBAL CONSERVATION CRISIS AND SOLUTIONS UNDER CURRENT JURISPRUDENCE

Since the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") entered into force in 1975, the world has adopted a global understanding of the illicit trade in wildlife.<sup>58</sup> Unfortunately, systemic problems of governance and corruption often plague countries with large quantities of valuable natural resources.<sup>59</sup> Many international actors have attempted to curb the supply and identify the means of transport for illegal wildlife traffickers, but such efforts have often proved unsuccessful.<sup>60</sup> This section further elaborates on the global nature of this problem and discusses forward-thinking solutions currently under implementation.

### A. *An Overview of the Global Nature of the Conservation Fight: Why the Solution Must Include Global Enforcement Efforts*

While some conservation issues remain localized, such as the destruction of the habitat of a single rare species because of development or deforestation, the international trade in illegal wildlife represents a substantial threat to global conservation efforts.<sup>61</sup> Due to the growing likelihood of the extinction or near extinction of several species that criminal enterprises commonly target, such as sharks (for fins) and rhinoceroses (for tusks), fragile ecosystems could come under severe strain due to the loss of biodiversity.<sup>62</sup> Additionally, illegal logging activities contribute to

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<sup>58</sup> Convention on International Trade in Endangered Species, U.S. FISH & WILDLIFE SERVICE, (Apr. 2014), <https://www.fws.gov/international/pdf/factsheet-cites-overview-2014.pdf> [https://perma.cc/VN6Y-44XQ].

<sup>59</sup> Katherine Lawson & Alex Vines, *Global Impacts of the Illegal Wildlife Trade: The Costs of Crime, Insecurity, and Institutional Erosion*, CHATHAM HOUSE, 9–10 (Feb. 2014), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0214Wildlife.pdf> [https://perma.cc/94CQ-M2PB].

<sup>60</sup> *Id.* at 8–9.

<sup>61</sup> See Anderson, *supra* note 23, at 31–33.

<sup>62</sup> TANYA WYATT, WILDLIFE TRAFFICKING: A DECONSTRUCTION OF THE CRIME, THE VICTIMS AND THE OFFENDERS, 39–40 (Diane Westerhuis et al. eds., 2013).

deforestation, reducing the ability of forests to serve as heat sinks for rising CO<sub>2</sub> levels, speeding the slow but inevitable march of climate change.<sup>63</sup>

The illegal wildlife trade also raises national security concerns.<sup>64</sup> Transnational criminal enterprises reap enormous profits from the illegal wildlife trade, and their profits rival drug trafficking revenues to the tune of \$8–10 billion annually.<sup>65</sup> Additionally, illegal fishing and illegal logging activities generate, respectively, anywhere between \$10–23 billion annually and \$30–100 billion annually.<sup>66</sup> The average rhinoceros horn can generate even higher revenue than the sale of gold or platinum by weight.<sup>67</sup> Given the incredibly lucrative global market and lack of strong enforcement mechanisms, no one should wonder why organized criminal organizations, including paramilitary and terrorist groups, engage in these activities.<sup>68</sup> For example, a captive taken by the Lord's Resistance Army, a Central African militant group recently regaled in the press for its widespread use of child soldiers, recounted several instances in which members of the group poached wild elephants and traded food for ivory.<sup>69</sup> The UN Security Council has also discussed this threat, and analysts warn that terrorist organizations could utilize the trade in illegal wildlife as a vector for the transmission of zoonotic diseases in a bioterrorist attack.<sup>70</sup>

As a result of these numerous threats to conservation efforts, any scheme of environmental protection should include a comprehensive framework that provides sufficient flexibility to incorporate a wide variety of scenarios. For example, illegal poaching operations could co-opt trophy hunting expeditions, or poachers could disguise an illegal hunt as a legitimate safari.<sup>71</sup> While observers should not conflate well-intentioned

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<sup>63</sup> *Id.* at 41.

<sup>64</sup> See Lawson & Vines, *supra* note 59, at viii (discussing the position of former Secretary of State, Hillary Clinton).

<sup>65</sup> M. Brooke Darby, *The Escalating International Wildlife Trafficking Crisis: Ecological, Economic, and National Security Issues*, U.S. DEP'T OF STATE (May 21, 2014), <http://www.state.gov/j/inl/rls/rm/2014/226421.htm> [<https://perma.cc/HTW2-BGFX>]; see also Lorraine Elliot, *Fighting Transnational Environmental Crime*, 66 J. INT'L AFF. 88 (2012) (estimating that the annual value of transnational environmental crime ranges from \$31–\$40 billion).

<sup>66</sup> Liana Sun Wyler & Pervaze A. Sheikh, *International Illegal Trade in Wildlife: Threats and U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE (July 23, 2013), <https://www.fas.org/sgp/crs/misc/RL34395.pdf> [<https://perma.cc/C6M2-UHQ3>].

<sup>67</sup> See Lawson & Vines, *supra* note 59, at viii.

<sup>68</sup> Darby, *supra* note 65.

<sup>69</sup> Wyatt, *supra* note 62, at 56–57.

<sup>70</sup> *Id.* at 57.

<sup>71</sup> This scenario is not farfetched. The U.S. Department of Justice filed an indictment against the owners of Out of Africa Adventures, a safari company, with violations of the

trophy hunting with illegal poaching operations, a disproportionate number of trophy hunters originate in the United States,<sup>72</sup> and situations like the killing of Cecil the Lion by the American dentist, Walter Palmer, indicate a need to consider the connection. Palmer paid \$55,000 to hunt Cecil the Lion.<sup>73</sup> Given the end result of Palmer's hunt, he clearly did not take care to confirm that he conducted his hunt under legal circumstances.<sup>74</sup> Had Palmer inadvertently saddled up with a bogus safari company intent on conducting illegal hunts, that money could have ended up in the hands of any number of groups with nefarious motives. Similarly, as mentioned above, the United States consumes substantial quantities of plant products that distributors may have illegally acquired in violation of the Lacey Act.<sup>75</sup> American consumers also regularly enjoy seafood potentially overfished under international quotas.<sup>76</sup> The Lacey Act's foreign laws incorporation provisions protect against each of these scenarios,<sup>77</sup> and without the foreign enforcement provisions, the United States would assume a leading role in funding illegal activities occurring abroad.<sup>78</sup>

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Lacey Act, claiming that the company was a front for poachers who would lure American trophy hunters to Africa on the premise of providing a legal rhinoceros hunt, allow the hunter to pose with the rhinoceros for pictures, leave with the hunter, and then later return to the carcass to strip the horn for sale on the black market. As a result, the poachers not only received the fee for the hunt, but also the value of the horn. *Owners of Safari Company Indicted for Illegal Rhino Hunts*, U.S. DEP'T OF JUSTICE (Oct. 23, 2014), <http://www.justice.gov/opa/pr/owners-safari-company-indicted-illegal-rhino-hunts> [<https://perma.cc/TWA6-HPRB>]; Indictment, U.S. v. Groenewald, No. 2:14-cr-00508-WKW-SRW, 2014 WL 11256817 (M.D. Ala. Oct. 16, 2014).

<sup>72</sup> Ann M. Simmons & Christina Littlefield, *Cecil the Lion's Killer Is Not Alone: Trophy Hunters Disproportionately Americans*, L.A. TIMES (July 28, 2015), <http://www.latimes.com/world/africa/la-fg-lion-killing-20150728-story.html> [<https://perma.cc/X8XE-9ZK9>].

<sup>73</sup> *Id.*

<sup>74</sup> See Nordwall, *supra* note 2 (Zimbabwean officials claim that Palmer failed to acquire authorization to hunt Cecil the Lion). *But see* Matt DeLong, *Read the Full Statement From Walter Palmer on Killing of Cecil the Lion*, STAR TRIBUNE (July 29, 2015), <http://www.startribune.com/read-the-full-statement-from-walter-palmer/318947551/#1> [<https://perma.cc/Z5BF-SKTJ>] (Palmer claims that he believed that he had purchased a legal lion hunt).

<sup>75</sup> Saltzman, *supra* note 45, at 2.

<sup>76</sup> See, e.g., Ashley Lillian Erickson, *Out of Stock: Strengthening International Fishery Regulations to Achieve a Healthier Ocean*, 34 N.C.J. INT'L L. & COM. REG. 281, 308 (2008) (the United States is the world's second largest consumer of tuna).

<sup>77</sup> See Gilbert, *supra* note 15, at 5–6.

<sup>78</sup> *Why Should Americans Have to Comply with the Laws of Foreign Nations: Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans, and Insular Affairs*, 113th Cong. 103 (2013) (statement of Alexander von Bismarck, Executive Director, Environmental Investigation Agency).



*B. Relying on Local Jurisprudence Alone to Prosecute Poachers Cannot Succeed*

While local officials have seen extraordinary successes in bringing poachers and others who perpetrate wildlife crimes to justice,<sup>79</sup> many factors contribute to the failure of local law enforcement to stem the rising rates of illegal activity. From local governance problems to economic factors, many illegal actions go unpunished,<sup>80</sup> and even diplomatic concerns can prevent poachers from facing prosecution in the country in which the illegal act occurred.<sup>81</sup>

1. Weak Governance

While proper enforcement of local criminal laws punishing the taking of wildlife would represent the best proactive response to the global conservation crisis, corruption and an epidemic of institutional weakness prevent the enforcement of those laws.<sup>82</sup> Where poachers face prosecution by foreign governments, widespread corruption, mismanagement of local engines of justice, and weak penalties for wildlife crimes cause many perpetrators to either go free or face minimal sentences.<sup>83</sup> Many scholars and policy analysts have written extensively about governance problems facing many third world nations where poaching occurs, but none can agree on a solution to these problems.<sup>84</sup> As a result, onlookers simply should not

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<sup>79</sup> See generally Alexandra Gibbs, *Could This Tech Kill Off Wildlife Poaching?*, CNBC (July 28, 2015), <http://www.cnbc.com/2015/07/23/could-this-technology-kill-off-wildlife-poaching.html> (South Africa is experimenting with high tech approaches to prevent rhinoceros poaching); *Elephant Poachers Caught Red-handed in Indonesia*, WORLD WILDLIFE FUND GLOBAL (Feb. 26, 2015), [http://wwf.panda.org/who\\_we\\_are/wwf\\_offices/indonesia/?240094/Elephant-poachers-caught-red-handed-in-Indonesia](http://wwf.panda.org/who_we_are/wwf_offices/indonesia/?240094/Elephant-poachers-caught-red-handed-in-Indonesia) [<https://perma.cc/3TRE-F44F>] (Riau police break Indonesian poaching ring); *In Kenya, Justice Catches Up with Elephant Poacher*, NATIONAL GEOGRAPHIC (Nov. 18, 2014), <http://voices.nationalgeographic.com/2014/11/18/in-kenya-justice-catches-up-with-elephant-poacher/> [<https://perma.cc/EDG8-Q46A>] (Kenya Wildlife Service staff impressively utilize law enforcement surveillance strategies to track escaped elephant poacher); Arwa Damon & Brent Swails, *Poachers Are the Prey in a Park in the Republic of Congo*, CNN (Jan. 6, 2014), <http://www.cnn.com/2014/01/06/world/africa/congo-poacher-camp-bust/> [<https://perma.cc/P3VV-NHUA>] (Congoese eco-guards regularly disrupt poaching activities in the Republic of Congo).

<sup>80</sup> Iain Douglas-Hamilton, *Time Running Out to Save Elephants from Ivory Trade*, NATIONAL GEOGRAPHIC (Jan. 31, 2013), <http://voices.nationalgeographic.com/2013/01/31/time-running-out-to-save-elephants-from-ivory-trade/> [<https://perma.cc/SC95-7D64>].

<sup>81</sup> See *infra* Section II.B.3.

<sup>82</sup> Lawson & Vines, *supra* note 59, at 9.

<sup>83</sup> Douglas-Hamilton, *supra* note 80.

<sup>84</sup> JOHN HANKS, OPERATION LOCK AND THE WAR ON RHINO POACHING, 204–06 (Sean Fraser, ed., Penguin Books 2015).



feel surprised when weaker foreign governments cannot protect local wildlife from predatory actors.

In some extreme circumstances, the governments tasked with protecting wildlife actually participate in the poaching.<sup>85</sup> In Sudan and South Sudan, for example, analysts reported that Sudanese, Congolese, and Ugandan troops have all taken advantage of the weakness of these post-civil war nations and gone on safaris.<sup>86</sup> One may hope that the profits from those expeditions will find their way into the wildlife enforcement budgets of those states, but this seems unlikely.

## 2. Disincentive to Local Prosecution and Enforcement of Local Environmental Laws

Unfortunately, economic factors also incentivize the illegal wildlife trade in many countries.<sup>87</sup> Many nations that suffer the most from the illegal wildlife trade also lack strong economies and opportunities for their citizens to earn a fair living; thus, many people turn to the illegal wildlife trade to acquire items that middle and upper class people in other countries purchase.<sup>88</sup> Moreover, the trade in illegal wildlife itself generates substantial wealth for some poachers.<sup>89</sup> While some subsistence poachers illegally kill and sell wildlife merely to survive, the low-risk and high-reward nature of poaching attracts opportunists searching for easy money.<sup>90</sup>

Additionally, even where foreign governments may want to stop the illegal ivory trade, they may lack the necessary resources to wage a real campaign against an organized poaching operation.<sup>91</sup> In many countries across Africa, for example, elites view wildlife conservation policies as luxuries rather than necessities.<sup>92</sup> Because governments view these policies as providing relatively little immediate benefit compared to immediate cost, conservation policies often take a backseat to other policies such as education and health infrastructure.<sup>93</sup> As noted previously, products of the illegal wildlife trade generate massive profits for its perpetrators,

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<sup>85</sup> *See id.* at 197 (describing the participation of game guards at Kruger National Park in poaching operations).

<sup>86</sup> *See* Lawson & Vines, *supra* note 59, at 9–10.

<sup>87</sup> WYATT, *supra* note 62, at 36.

<sup>88</sup> *Id.*

<sup>89</sup> Lawson & Vines, *supra* note 59, at 18.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 9–10.

<sup>92</sup> *See* HANKS, *supra* note 84, at 223.

<sup>93</sup> *Id.*

and as a result, organizations engaged in poaching have an incredible source of potential funding.<sup>94</sup> Even in South Africa, where the government has begun to use its military to enforce wildlife conservation laws by providing logistical aid to park rangers and helicopter support, poachers still make off with substantial catches.<sup>95</sup> In many cases, foreign governments simply cannot compete on the same level as well-financed poachers.<sup>96</sup>

### 3. The Problem with Extradition

Some legal scholars have noted that the extradition of U.S. citizens who have violated foreign laws could serve as an alternative to the prosecution of U.S. citizens under the Lacey Act,<sup>97</sup> but extradition alone cannot substitute for the Lacey Act's incorporation of foreign laws because of the diplomatic and practical restrictions of the extradition process. Many countries have signed extradition treaties which would require the extradition of U.S. citizens violating foreign environmental laws.<sup>98</sup> Certainly, extradition treaties facilitate the punishment of illegal wildlife dealers,<sup>99</sup> but extradition treaties likely cannot directly impact demand for illegal wildlife as effectively as the Lacey Act's broad provisions allow.<sup>100</sup> Due to the dual criminality requirement for extradition, officials in other countries normally cannot drag U.S. consumers abroad simply because the consumer purchased illegally taken ivory, especially where the transaction occurred online.<sup>101</sup> Additionally, practical problems exist because the requesting

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<sup>94</sup> See *supra* Section II.A.

<sup>95</sup> HANKS, *supra* note 84, at 223–24.

<sup>96</sup> Lawson & Vines, *supra* note 59, at 9–10.

<sup>97</sup> Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y 337, 435 (2015).

<sup>98</sup> Jim Rubin, *DOJ's Role in Implementing Multilateral Environmental Agreements*, 18 NAT. RES. & ENV'T 39, 40–41 (2004).

<sup>99</sup> *Id.* at 41 (discussing how international cooperation during the extradition of Anson Wong resulted in the punishment of a prolific dealer in illegal wildlife).

<sup>100</sup> *Id.* at 39–40.

<sup>101</sup> See Arin Greenwood, *Dentist Who Killed Cecil the Lion Could Be Extradited to Zimbabwe*, THE WORLD POST (July 29, 2015), [http://www.huffingtonpost.com/entry/walter-palmer-extradition\\_us\\_55b8ce10e4b0a13f9d1ad47d?jhalwhfr=\[https://perma.cc/M6C8-VA8G\]](http://www.huffingtonpost.com/entry/walter-palmer-extradition_us_55b8ce10e4b0a13f9d1ad47d?jhalwhfr=[https://perma.cc/M6C8-VA8G]) (extradition requires that the commission of the crime occurred in the requesting country and necessitates “dual criminality,” meaning the act must incur criminal penalties in both countries); see also Jessica B. Izzo, *PC Pets for a Price: Combatting Online and Traditional Wildlife Crime Through International Harmonization and Authoritative Policies*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 965, 992–93 (2010) (noting that the international extradition process under CITES for wildlife crime remains outdated in an internet age).

country normally pays the costs of extradition,<sup>102</sup> and foreign nations may not believe that punishing certain petty offenders justifies the cost.<sup>103</sup>

Extradition treaties do maintain relevance in high-profile poaching cases, such as Walter Palmer's, where the alleged poacher has left the country prior to the filing of formal charges.<sup>104</sup> Since the killing of Cecil the Lion, Zimbabwe has charged two men, including one of Palmer's local guides, for hunting Cecil without the required permits.<sup>105</sup> Zimbabwe also expressed interest in extraditing Palmer, but U.S. officials have not received a formal extradition request.<sup>106</sup> As a result, prosecution in Zimbabwe appears unlikely.<sup>107</sup> In deciding whether to request Palmer's extradition, Zimbabwean officials (and officials in other nations under similar circumstances) must weigh a number of factors, including not only the likelihood of conviction and cost of a trial, but also whether the United States would comply with an extradition request in the first place.<sup>108</sup> The United States may have chosen not to extradite Palmer because of Zimbabwe's poor human rights record.<sup>109</sup> If a country doubts whether it can convince another nation to comply with an extradition request, it may not even ask, if only to avoid embarrassment.<sup>110</sup> While extradition can serve as an effective tool to ensure justice for poachers who cross national borders, the diplomatic and practical realities of extradition appear to limit its benefits.<sup>111</sup>

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<sup>102</sup> Marian Nash Leich, *Extradition*, 76 AM. U. J. INT'L L. 154, 157 (1982).

<sup>103</sup> Valerie Epps, *The Development of the Conceptual Framework Supporting International Extradition*, 25 LOY. L.A. INT'L & COMP. L. REV. 369, 374 (2002).

<sup>104</sup> Arin Greenwood, *U.S. Government to Lion-Killing Dentist: Hey, Can You Give Us a Call?*, HUFFINGTON POST (July 30, 2015, 3:52 PM), [http://www.huffingtonpost.com/entry/walter-palmer-fish-and-wildlife-service\\_55ba7055e4b0b8499b18ba97](http://www.huffingtonpost.com/entry/walter-palmer-fish-and-wildlife-service_55ba7055e4b0b8499b18ba97) [<https://perma.cc/49V3-EWR7>].

<sup>105</sup> Miller, *supra* note 2.

<sup>106</sup> Greenwood, *supra* note 101.

<sup>107</sup> *Id.*

<sup>108</sup> See Danny Cevallos, *Can Zimbabwe Have Lion's Killer Extradited?*, CNN (Aug. 1, 2015), <http://www.cnn.com/2015/08/01/opinions/cevallos-can-dentist-be-extradited/> [<https://perma.cc/DQ69-8K82>] (aside from the fact that the United States may have obligations under an extradition treaty, Zimbabwe surely recognizes that it cannot enforce the extradition treaty if the United States declines to extradite Palmer for any reason).

<sup>109</sup> Peta Thornycroft, & Aislinn Laing, *Cecil the lion: Zimbabwe Requests Extradition of US Dentist Walter Palmer Over Killing*, THE TELEGRAPH (July 31, 2015), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/11775270/Cecil-the-lion-Zimbabwe-requesting-Walter-Palmers-extradition.html> [<https://perma.cc/CFL5-WL6V>].

<sup>110</sup> See Cevallos, *supra* note 108.

<sup>111</sup> *Id.* See also Epps, *supra* note 103, at 374 (noting that some countries may not believe that certain crimes justify the costs of extradition, and thus will not ask).

C. *The Benefits of Proactive Approaches to Conservation*

As noted previously, the global conservation crisis occurs in real time and reported incidents of poaching have spiked dramatically.<sup>112</sup> This increase in poaching has caused a decline in the population of many species not listed as endangered for the purposes of the Endangered Species Act, as was the case with the African lion.<sup>113</sup> While the U.S. Government recently placed the African lion on the listing of endangered species, at the time of Cecil the Lion's killing, the African lion was unprotected despite the rapidly declining lion population.<sup>114</sup> Some speculate that the United States lists lions now only due to the public outcry over Cecil's death; had Palmer not shot Cecil, the lion would probably have remained off the endangered species list.<sup>115</sup>

While the Endangered Species Act has succeeded immensely in protecting species from extinction,<sup>116</sup> it embodies an "emergency-room mentality."<sup>117</sup> The Endangered Species Act allowed for the rehabilitation of many species, such as sea otters and black-footed ferrets, and it has prevented endangered species from becoming extinct.<sup>118</sup> Despite these successes, however, only one percent of species ever made it off the list.<sup>119</sup> If environmentalists want to protect ecosystems from a loss of biodiversity, conservation efforts should focus on maintaining species in the wild in sustainable, if not vibrant, numbers, not just ensuring their survival in zoos and wildlife refuges.

Additional tangible benefits flow from protecting species in the wild. Maintaining large populations of animals and plants in the wild generates local commerce in foreign nations through ecotourism and provides

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<sup>112</sup> See *supra* Section II.A.

<sup>113</sup> Erica Goode, *After Cecil Furor, U.S. Aims to Protect Lions Through Endangered Species Act*, N.Y. TIMES (Dec. 20, 2015), [http://www.nytimes.com/2015/12/21/science/us-to-protect-african-lions-under-endangered-species-act.html?\\_r=0](http://www.nytimes.com/2015/12/21/science/us-to-protect-african-lions-under-endangered-species-act.html?_r=0) [https://perma.cc/5XZP-9Y9V].

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Endangered Species Act by the Numbers*, NATIONAL WILDLIFE FEDERATION (Feb. 1, 2006), <https://www.nwf.org/pdf/Wildlife/esabythenumbers.pdf> [https://perma.cc/2S4R-QUFM].

<sup>117</sup> *Carden, supra* note 12, at 204.

<sup>118</sup> *Id.* at 217.

<sup>119</sup> NATIONAL WILDLIFE FEDERATION, *supra* note 116. (Fish & Wildlife has only removed 37 domestic species from the U.S. Endangered Species List since the passage of the Endangered Species Act.) Louis Jacobson, *Only 1 Percent of Endangered Species List Have Been Taken off List, says Cynthia Lummis*, POLITIFACT (Sept. 3, 2013, 4:38 PM), <http://www.politifact.com/truth-o-meter/statements/2013/sep/03/cynthia-lummis/endangered-species-act-percent-taken-off-list/> [https://perma.cc/29JS-74XX].

recreational activities for the community.<sup>120</sup> If hunting, fishing, and wildlife recreational activities in the United States alone aggregated to form one unified corporation, it would draw the country's seventh largest corporate revenues, with \$108 billion per year.<sup>121</sup> Certainly, those businesses would not prosper without large numbers of flora and fauna living in diverse ecosystems. For example, when Yellowstone Park reintroduced large numbers of great wolves (then threatened with extinction) into the wild, revenues increased by \$10 million annually.<sup>122</sup> While the Endangered Species Act plays a major role in safeguarding fragile species, only proactive conservation policies will provide sufficient protection for species and the communities that benefit from naturally diverse ecosystems. While policymakers should take additional global action, the Lacey Act provides a powerful framework to stem the illegal wildlife trade by providing federal agents with a mandate to track the global supply of illegal wildlife products and prosecute violators.<sup>123</sup>

### III. WHY THE LACEY ACT WORKS

The international scope of wildlife trafficking and related activities, while providing a vast market for illegal goods, also creates a significant weakness: almost all illegal wildlife trade in today's globalized economy will involve moving illegal items through interstate or foreign commerce.<sup>124</sup> As a result, both sellers and buyers will fall under the Lacey Act's jurisdiction.<sup>125</sup> Even if the federal government discovers a violation of the Lacey Act after it has already occurred, the government can seize any illegal items such as ivory under the Act's civil forfeiture provision, which provides a substantial demand-side deterrent for purchasers.<sup>126</sup> While imperfect, the Lacey Act provides the requisite breadth to ensure that global conservation laws have teeth. This section will discuss the reason for the success of the Lacey Act's mechanics while also advocating against either splintering or repealing the Act's foreign law provisions.

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<sup>120</sup> NATIONAL WILDLIFE FEDERATION, *supra* note 116.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See Saltzman, *supra* note 45, at 5–8; Gilbert, *supra* note 15, at 5; see also H.R. REP. 71-7 at 181–82 (1929).

<sup>124</sup> Anderson, *supra* note 23, at 29–30.

<sup>125</sup> 16 U.S.C. § 3372(a) (2012).

<sup>126</sup> Anderson, *supra* note 23, at 72.

A. *Structural Reasons for the Efficacy of the Lacey Act*

While the importance of the Lacey Act to global conservation efforts derives from its substantive prohibitions contained in 16 U.S.C. § 3372,<sup>127</sup> the Act's true force results from its penalties. 16 U.S.C. § 3373 authorizes federal prosecutors to pursue sizeable criminal and civil penalties for Lacey Act violations, and multiple *mens rea* standards provide a degree of flexibility for prosecutors in determining how to charge defendants.<sup>128</sup>

1. Sizeable Criminal and Civil Penalties Deter Violators

Under the Lacey Act, violators can face an array of civil and criminal charges.<sup>129</sup> Additionally, the government can seize the proceeds and products from illegal trade under the Act's civil forfeiture provisions.<sup>130</sup> The Lacey Act's civil penalties provide a levy of potentially hefty fines, including a \$10,000 fine for each violation of the Lacey Act unless the value of the fish, wildlife, and plants amounts to less than \$350.<sup>131</sup> As a result, if a purchaser in the United States bought twelve rhinoceros horns illegally, the civil fines could reach \$120,000. A "due care" standard governs the levy of civil penalties, and it essentially equates to the reasonable person standard of care for negligence violations.<sup>132</sup>

Criminal violations of the Lacey Act take two different forms. First, knowingly violating the Lacey Act by disobeying an underlying predicate law can result in fines of \$20,000 per violation and not more than five years in prison.<sup>133</sup> In other words, a U.S. citizen who travels overseas and poaches twelve rhinoceros horns and tries to bring those horns through U.S. customs, when the citizen knows that the ivory was obtained illegally, could face \$240,000 in criminal fines and up to sixty years in a federal prison. Such strong penalties likely strike fear into the hearts of

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<sup>127</sup> 16 U.S.C. § 3372 (2015).

<sup>128</sup> *Id.* at § 3373.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at § 3374; *see also* U.S. v. Proceeds from Sale of Approximately 15,538 Panulirus Argus Lobster Tails, 834 F. Supp. 385, 390–91 (S.D. Fla. 1993) (the Lacey Act provides no innocent owner defense); Krost, *supra* note 23, at 63–64 (the civil forfeiture requirements impose strict liability and can result in seizure of illegal items under a preponderance of the evidence standard).

<sup>131</sup> 16 U.S.C. § 3373(a)(1) (2015).

<sup>132</sup> *Why Should Americans Have to Comply with the Laws of Foreign Nations: Hearing before the H. Subcomm. on Fisheries, Wildlife, Oceans, and Insular Affairs*, 113th Cong. 3 (2013) (statement of Marcus A. Asner, Arnold Porter, LLP); *see also infra* Section II.A.2.

<sup>133</sup> 16 U.S.C. § 3373(d)(1) (2015).



those actively participating in the illegal ivory trade. Second, the Lacey Act also imposes \$10,000 in criminal fines and no more than one year of imprisonment for violations of the Lacey Act by disobeying an underlying predicate law when the perpetrator should have known, with the exercise of due care, that the wildlife was taken illegally.<sup>134</sup> Here again, twelve illegal rhinoceros horns equates to \$120,000 in criminal fines and up to twelve years of imprisonment for violations of the due care standard.

## 2. The “Due Care” Standard for Civil and Criminal Violations

By encouraging compliance with predicate laws, the Lacey Act’s “due care” standard drains the demand for products of the illegal wildlife trade. For example, as the timber industry learns to adapt to new regulation under the Lacey Act, it will learn to develop best practices for compliance that will both lower costs for the industry and detract from the demand for illegal timber products.<sup>135</sup> As noted above, the “due care” standard most likely comports with a standard negligence formulation.<sup>136</sup> The Ninth Circuit’s model jury instructions corroborate this theory, stating that “due care means that degree of care which a reasonably prudent person would exercise under the same or similar circumstances.”<sup>137</sup> While courts have not shed much light on what must occur to satisfy the due care standard, businesses and individual buyers can likely satisfy the standard of care by following industry customs, complying with available legal information, and acting in good faith.<sup>138</sup> At least one court has indicated that more experienced businessmen may face higher burdens of due care because knowledge of the trade should have alerted the defendant to potential illegality.<sup>139</sup> Regardless of how courts define the due care standard, buyers should have sufficient motivation under the Lacey Act to avoid questionable sellers and investigate the origins of wildlife products.<sup>140</sup>

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<sup>134</sup> 16 U.S.C. § 3373(d)(2) (2015).

<sup>135</sup> Saltzman, *supra* note 45, at 7–8.

<sup>136</sup> *Why Should Americans Have to Comply With the Laws of Foreign Nations: Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans, and Insular Affairs*, 113th Cong. 3 (2013) (statement of Marcus A. Asner, Arnold Porter, LLP).

<sup>137</sup> MODEL CRIM. JURY INSTR. 9TH CIR., § 9.13 (2010), <http://www.rid.uscourts.gov/menu/judges/jurycharges/OtherPJI/9th%20Circuit%20Model%20Criminal%20Jury%20Instructions.pdf> [<https://perma.cc/V8YR-W8W7>].

<sup>138</sup> Saltzman, *supra* note 45, at 5–8.

<sup>139</sup> *United States v. Proceeds from Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 392 (S.D. Fla. 1993).

<sup>140</sup> *See* Shepard, *supra* note 16, at 84.

Moreover, the “due care” standard provides an additional element of deterrence by adding another arrow in the quiver of prosecutors for Lacey Act violation prosecutions. If a prosecutor cannot prove that a defendant knowingly violated the Lacey Act, enough evidence may exist to prove that the defendant should have known of violations. Overall, the Lacey Act serves as a powerful deterrent to wildlife crimes. If the U.S. government adequately enforced the Lacey Act, demand for illegal products would drop substantially, which would critically weaken the illegal market as a whole.<sup>141</sup>

*B. A Piecemeal Approach to International Conservation Will Fail*

Without the Lacey Act’s broad incorporation of foreign laws, substantial enforcement gaps would exist.<sup>142</sup> In fact, Congressman Lacey initially proposed the Lacey Act to provide a mechanism for the uniform enforcement of the piecemeal conservation regimes that existed within the United States at the time.<sup>143</sup> Prior to the passage of the Lacey Act, a hunter could shoot a bird in one state, evade capture, and then successfully transport to, and sell the feathers in, some other state where the hunter would enjoy immunity from prosecution.<sup>144</sup> Lacey’s evasive pot hunter problem would exist contemporaneously on a much larger scale today in a world without the Lacey Act, but instead of pot hunters peddling feathers, today’s poachers move large quantities of illicit ivory, fish, and timber across international borders.<sup>145</sup> In this way, the Lacey Act’s international trade hook to incorporate foreign laws provides a superior method of attaining jurisdiction when compared to direct piecemeal regulation.

Any alternative to the Lacey Act’s admittedly vague foreign laws provision would need to entail the passage of direct penalties similar to the structure of the Endangered Species Act—a “codebook” for conservation violations abroad punishable under U.S. federal law.<sup>146</sup> If the codebook

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<sup>141</sup> Patricia Elias, *Logging and the Law: How the U.S. Lacey Act Helps Reduce Illegal Logging in the Tropics*, UNION OF CONCERNED SCIENTISTS, (Apr. 2012), [http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global\\_warming/illegal-logging-and-lacey-act.pdf](http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/illegal-logging-and-lacey-act.pdf) [<https://perma.cc/HJE9-UJRZ>].

<sup>142</sup> H.R. REP. NO. 56-474.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Gilbert, *supra* note 15, at 5–6.

<sup>146</sup> Wesley Ryan Shelley, *Setting the Tone: The Lacey Act’s Attempt to Combat the International Trade of Illegally Obtained Plant and Wildlife and Its Effect on Musical Instrument Manufacturing*, 42 ENVTL. L. 549, 570–71 (2012).

mimicked the effect of foreign law incorporation under the Lacey Act, then it would ultimately fail to simplify the current system. As commentators have noted, the number of foreign laws that the Lacey Act functionally incorporates literally boggles the mind; if courts considered only the conservation laws of Indonesia, over 9,000 foreign laws could potentially enter into American jurisprudence.<sup>147</sup> Even if Congress set out every foreign law regulating conservation in detail and in English within either the U.S. Code or the Code of Federal Regulations to allow for direct enforcement, the resulting morass would become so unwieldy as to make effective use impractical, if not impossible.<sup>148</sup> Additionally, the codebook would require updating each time a foreign law changed, creating a substantial burden of upkeep.

Presumably, however, if lawmakers did enact a piecemeal codebook, the drafters would not actually want to directly incorporate every foreign conservation law.<sup>149</sup> Washington lawmakers would inevitably disagree about which laws provided necessary environmental protections, which would spawn a political process where lobbyists and special interest groups could exercise a great deal of control.<sup>150</sup> The resulting conservation scheme would include both overinclusive and underinclusive regulation.<sup>151</sup> The reason that the Endangered Species Act's direct penalties work well stems from the objective criteria promulgated to include a species on the list, such as threat to habitat or overutilization.<sup>152</sup> The criteria reasonably confine the list to a manageable number of species that interested parties must track, and the Act has successfully protected all but ten of the roughly 1,400 species listed.<sup>153</sup> No such objective criteria could determine which foreign laws to incorporate; if such criteria did exist, the drafters of the Endangered Species Act probably would have already incorporated any additional protection into that law. Congress premised the Lacey

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<sup>147</sup> *Id.* at 564.

<sup>148</sup> *Why Should Americans Have to Comply With the Laws of Foreign Nations: Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans, and Insular Affairs*, 113th Cong. 119 (2013) (statement of Marcus A. Asner, Arnold Porter, LLP).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Listing a Species as Threatened or Endangered*, U.S. FISH & WILDLIFE SERVICE (Jan. 2015), <https://www.fws.gov/endangered/esa-library/pdf/listing.pdf> [<https://perma.cc/Y3BV-MTN7>].

<sup>153</sup> *The Endangered Species Act: A Wild Success*, CENTER FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/campaigns/esa\\_wild\\_success/](http://www.biologicaldiversity.org/campaigns/esa_wild_success/) [<https://perma.cc/7PTB-7YH7>] (last visited Oct. 24, 2016).

Act's incorporation of foreign conservation laws on the assumption that foreign countries understood their own conservation needs best.<sup>154</sup> Lawmakers likely could not craft a truly comprehensive codebook simply because they could never fully brief themselves on every conservation crisis occurring in every country.<sup>155</sup> Due to the pitfalls associated with direct piecemeal incorporation of foreign laws, Congress should not abandon the current comprehensive approach.

In fact, some legal scholars have gone so far as to suggest that other nations adopt their own versions of the Lacey Act.<sup>156</sup> Despite the fact that 181 countries have signed onto CITES,<sup>157</sup> many signatory nations have done little to nothing to implement broad conservation policies.<sup>158</sup> While many countries may never enact comprehensive conservation laws, those that enacted such laws have historically looked to the United States as a model for conservation governance.<sup>159</sup> For example, after Congress passed the 2008 amendments to the Lacey Act, China revised its policy on illegal timber imports.<sup>160</sup> Curtailing the Lacey Act's foreign law provisions now would send the wrong signal to the international community and imply that the United States does not care to ensure that international trade occurs responsibly.<sup>161</sup> If the United States turns back the clock on its conservation policy, other countries may follow suit and choose to

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<sup>154</sup> H.Rep. 71-7 at 181–82 (1929).

<sup>155</sup> *Id.*

<sup>156</sup> See generally Telesetsky, *supra* note 23, at 986 (“adopting legislation structured on the Lacey Act may prove one of the most effective international deterrents to transnational criminals”); Michelle Ann Peters, *The Convention on International Trade in Endangered Species: An Answer to the Call of the Wild?*, 10 CONN. J. INT’L L. 169, 190 (1994) (“The international community should be encouraged to adopt legislation similar to the United States’ Lacey Act, whose stringent civil and criminal penalties encourage traders to abide by international trade laws”).

<sup>157</sup> *Member Countries*, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, <https://www.cites.org/eng/disc/parties/index.php> [<https://perma.cc/SLV5-AX5W>] (last visited Oct. 24, 2016).

<sup>158</sup> Darby, *supra* note 65.

<sup>159</sup> *Why Should Americans Have to Comply With the Laws of Foreign Nations: Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans, and Insular Affairs*, 113th Cong. 113 (2013) (statement of Marcus A. Asner, Arnold Porter, LLP); Alicia M. Griffin, *Beyond “Harm”: Abandoning the Actual Injury Standard for Certain Prohibited Takings Under the Endangered Species Act by Giving Independent Meaning to Harassment*, 52 VAND. L. REV. 1831, 1836 (1999).

<sup>160</sup> *Why Should Americans Have to Comply With the Laws of Foreign Nations: Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans, and Insular Affairs*, 113th Cong. 107 (2013) (statement of Alexander von Bismarck, Exec. Dir., Ecnvl. Investigation Agency).

<sup>161</sup> *Id.* at 110.

not adopt globally relevant conservation laws. Due to the scope of global conservation crises, the United States should lead by maintaining the Lacey Act's global conservation protections.<sup>162</sup>

### C. *An Internal Solution to Overcriminalization*

As discussed above, the Lacey Act's incorporation of foreign laws provides the penalties necessary to preserve global conservation efforts.<sup>163</sup> Even so, the critics of the Lacey Act correctly point out that foreign law incorporation will "overcriminalize" some U.S. citizens who may not realize the illegality of certain activities conducted abroad.<sup>164</sup> That said, any proposed solution cannot simply eliminate foreign law incorporation as the FOCUS Act would.<sup>165</sup> Federal agencies tasked with enforcement of the Lacey Act can, and should, instead alleviate the overcriminalization problem internally through regulation of the enforcement process. For example, the Department of Agriculture's Animal and Plant Health Inspection Service has considered implementing a *de minimis* exception "for items containing minimal amounts of plant material."<sup>166</sup>

Precedent exists for promulgating this type of internal policy in the context of the Endangered Species Act.<sup>167</sup> In 1998, the Clinton administration issued a policy change limiting prosecutions under the Endangered Species Act by requiring federal prosecutors to demonstrate a knowing mental state prior to filing charges.<sup>168</sup> The so-called McKittrick Policy has resulted in litigation and criticism due to the substantial limitation it places on federal prosecutors in punishing those who take the lives of endangered species;<sup>169</sup> however, such a policy may make sense in the

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<sup>162</sup> Beth Allgood, Marina Redford, & Peter LaFontaine, *U.S. Ivory Trade: Can a Crackdown on Trafficking Save the Last Titan?*, 20 ANIMAL LAW 27, 42 (2013); Ian A. Bowles & Cyril F. Kormos, *The International Conservation Mandate of the United States Government*, 11 N.Y.U. ENVTL. L.J. 372, 412 (2003).

<sup>163</sup> See *supra* Section II.B.

<sup>164</sup> Dieterle, *supra* note 19.

<sup>165</sup> S. 1019, 114th Cong. (2015).

<sup>166</sup> Stephanie Eberhardt, *The Lacey Act Amendments and the United States' Policing of International Trade*, 35 HOUS. J. INT'L L. 397, 418 (2013).

<sup>167</sup> Deborah Schoch, *Policy Limits Endangered Species Act Prosecutions*, L.A. TIMES (June 22, 2003), <http://articles.latimes.com/2003/jun/22/nation/na-species22> [<https://perma.cc/5L56-Y3LC>].

<sup>168</sup> *Id.*

<sup>169</sup> Judy Calman, *Groups Sue U.S. for Failure to Prosecute Under the Endangered Species Act*, WILD EARTH GUARDIANS (July 23, 2015), [http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=8579&news\\_iv\\_ctrl=1194#.ViGgXvmrTWI](http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=8579&news_iv_ctrl=1194#.ViGgXvmrTWI) [<https://perma.cc/4WDS-CL24>]; Julie Cart, *U.S. Sued Over Policy on Killing Endangered Wildlife*, L.A.

context of the Lacey Act. The McKittrick Policy's problem results from the fact that would-be violators of the Endangered Species Act have easy access to information on the status of a species and can easily determine whether the federal government lists a species as endangered or threatened due to the federal government's publication of endangered species in the Federal Register.<sup>170</sup> This is not so under the Lacey Act.

The critics of the Lacey Act argue that the sheer number of foreign laws that qualify as predicate laws under the Act create an impossible burden for U.S. citizens traveling abroad to understand all possible foreign laws.<sup>171</sup> Similarly, the Lacey Act appears to place a large burden on U.S. consumers that import natural products of questionable origins.<sup>172</sup> To an extent, this concern seems justified, and while American hunters abroad probably should exercise substantial due diligence both in planning hunts and abiding by all foreign laws, mistakes happen.<sup>173</sup> By way of example, if Walter Palmer's statements disclaiming knowledge of the questionable nature of his hunt of Cecil the Lion accurately describe his state of mind before the hunt, then perhaps public policy would justify prosecutorial restraint.<sup>174</sup>

After all, no database of Zimbabwean laws currently exists online,<sup>175</sup> and no federal database exists that details all foreign activities made illegal under the Lacey Act.<sup>176</sup> As a result, American tourists understandably might rely on travel advice websites that briefly summarize local laws.<sup>177</sup> Additionally, foreign governments often do not write their

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TIMES (May 29, 2013), <http://articles.latimes.com/2013/may/29/local/la-me-0530-endangered-species-lawsuit-20130530> [<https://perma.cc/T8GK-STW8>].

<sup>170</sup> 16 U.S.C. § 1533 (2015). Additionally, the U.S. Fish & Wildlife Service maintains a comprehensive search engine for listed endangered species in the United States. *Find Endangered Species*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/endangered/> [<https://perma.cc/J264-8ZGJ>] (last visited Oct. 24, 2016).

<sup>171</sup> Larkin, *supra* note 19.

<sup>172</sup> See Furlett, *supra* note 54, at 524–25.

<sup>173</sup> See Shepard, *supra* note 16, at 84. See also Fisher, *supra* note 10, at 481.

<sup>174</sup> DeLong, *supra* note 74.

<sup>175</sup> In the process of writing this Note, the author was unable to locate a comprehensive online database containing access to Zimbabwean laws.

<sup>176</sup> *Lacey Act: Frequently Asked Questions*, U.S. DEP'T OF AGRIC. (Nov. 13, 2013), [https://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/faq.pdf](https://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf) [<https://perma.cc/78VL-VX7Y>].

<sup>177</sup> For example, this website advises travelers to avoid homosexual acts and political discussions in public. Phil Sylvester, *Be Aware of These Weird Laws in Zimbabwe*, WORLD NOMADS, <https://www.worldnomads.com/travel-safety/zimbabwe/Local-Laws-in-Zimbabwe> [<https://perma.cc/K8UG-K9V4>] (last visited Oct. 24, 2016).



laws in English or provide English translations.<sup>178</sup> Regardless of the numerous problems that arise when one tries to learn foreign law, case law interpreting the Lacey Act has long held that ignorance of foreign laws is still no excuse.<sup>179</sup> While Americans abroad necessarily risk prosecution in foreign countries for violating foreign laws, a policy limiting U.S. prosecution for violations of those laws may make practical sense. In the case of Cecil the Lion, Fish & Wildlife might want to consider not prosecuting Palmer's violation of Zimbabwean laws if the agency concludes that Palmer's guides assured him of the hunt's legality. Congress passed the Lacey Act to stop the illegal trade of wildlife, so if criminal penalties mean to deter wildlife crime, punishing truly innocent violators may not comport with the purposes of the law.<sup>180</sup> When one buys ivory, the buyer should have notice that illegal ivory commonly finds its way into the marketplace and should take precautions, but when buying guitars few will find reason to suspect that the guitar's wood came from an illegal harvest.<sup>181</sup> The Lacey Act cannot deter innocent buyers if the innocent buyers do not realize that they committed violations of foreign law.

#### CONCLUSION

The incorporation of foreign laws into the Lacey Act remains necessary to the deterrence and punishment of illegal wildlife crime around the globe. Billions of dollars of illegal products move through U.S. ports each year, and the Lacey Act helps to ensure that buyers of products that may come from that illegal supply check the origins of those items.<sup>182</sup> Due to the substantial price that defendants would pay from violations of the Lacey Act, strong mechanisms to ensure compliance exist under the current formulation of the Act.<sup>183</sup> The resulting benefits to global conservation efforts and biodiversity far outstrip the costs of enforcement.

Admittedly, Fish & Wildlife has utilized the Lacey Act to prosecute some absurd cases including an instance of lobster poaching in which the

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<sup>178</sup> See Larkin, *supra* note 97, at 387.

<sup>179</sup> U.S. v. Fifty-Three (53) Eclectus Parrots, 685 F.2d 1131, 1135 (9th Cir. 1982).

<sup>180</sup> See H.R. REP. NO. 886, 74th Cong., 1st Sess. 2 (1935) (Congress incorporated foreign laws under the Lacey Act to aid foreign nations in prohibiting the shipment in of wildlife killed in violation of their laws).

<sup>181</sup> See Furlett, *supra* note 54, at 524–25.

<sup>182</sup> Liana Sun Wyler & Pervaze A. Sheikh, *International Illegal Trade in Wildlife: Threats and U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE (July 23, 2013), <https://www.fas.org/sgp/crs/misc/RL34395.pdf> [<https://perma.cc/AR23-96CZ>].

<sup>183</sup> See *supra* Section III.A.

jurisdiction where the defendant committed the crime no longer recognized the predicate law, and the case of Gibson Guitar in which the government seized substantial quantities of illegal timber imports from a potentially innocent buyer.<sup>184</sup> While observers could describe those instances as examples of the Lacey Act's overcriminalization of American citizens,<sup>185</sup> those cases do not reflect the broader scope of the Lacey Act's enforcement. The Lacey Act also punishes violators for very serious offenses such as the illegal poaching of rhinoceroses overseas,<sup>186</sup> and while the Endangered Species Act may punish the perpetrators of those crimes in some cases, only the Lacey Act strikes at the heart of the demand for products of the illegal wildlife trade.<sup>187</sup> Congress should reject calls to strip foreign law incorporation from the Lacey Act in response to outlier cases, especially when the Lacey Act performs so much good. The solution to solve overcriminalization under the Lacey Act lies not with repeal of the act, but instead with restrictions on Fish & Wildlife's enforcement policies. Fish & Wildlife chose to prosecute Gibson Guitar even though prosecutors may have determined that the company did not intentionally break any laws. Cases of Lacey Act overcriminalization justify changes in internal policy, not repeal of a law that has proven invaluable in the fight to preserve the environment. The Lacey Act still plays a vital role in preserving species around the globe. Calls to limit its scope can only encourage the entire market for illegal wildlife products to redouble their nefarious efforts.

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<sup>184</sup> Dieterle, *supra* note 19.

<sup>185</sup> *Id.*

<sup>186</sup> See *Owners of Safari Company Indicted for Illegal Rhino Hunts*, *supra* note 71.

<sup>187</sup> See Saltzman, *supra* note 45, at 7–8; Anderson, *supra* note 23, at 72.