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FOLLOWING GAME TRAILS: IDENTIFYING THE RIGHT PATH TO RESTITUTION FOR CONSPIRACY TO VIOLATE THE LACEY ACT

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"There were innumerable game trails leading hither and thither, and, after the fashion of game trials, usually fading out after a few hundred yards. But there were certain trails which did not fade out. These were the ones which led to water. One such we followed."
—Theodore Roosevelt[1]

I. INTRODUCTION

Under the Lacey Act, it is a federal crime to poach wildlife in violation of state or foreign law and transport the wildlife across state or international borders.[2] Conspiring to violate the Lacey Act also constitutes a violation of federal law,[3] conviction for which subjects the perpetrator to paying restitution to his or her victim.[4] Circuit courts have consistently found that the nation or state from which the wildlife was unlawfully taken is the victim of the conspiracy to violate the Lacey Act and is thus entitled to restitution.[5] However, to use an analogy

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[1] THEODORE ROOSEVELT, AFRICAN GAME TRAILS: AN ACCOUNT OF THE AFRICAN WANDERINGS OF AN AMERICAN HUNTER-NATURALIST 356 (Syndicate Publishing Co. 1910).

[2] *See infra* notes 15–41 and accompanying text (summarizing the Lacey Act).

[3] *See infra* notes 42–53 and accompanying text (discussing conspiracy and the Lacey Act).

[4] *See infra* notes 54–80 and accompanying text (describing various victim restitution statutes).

[5] *See infra* note 157 and accompanying text (highlighting cases in which states were found to be victims of conspiracy to violate the Lacey Act).

with which President Theodore Roosevelt would have been familiar, the circuits have followed different game trails to the same water source. In other words, the circuits are split regarding why states are entitled to restitution; specifically, the circuits identify different state interests that are damaged by the Lacey Act conspiracy. The Second and Fourth Circuits granted restitution for harm to a foreign nations' and States' interests, respectively, in lost revenue, which they acquired only after the wildlife had been poached.[6] The Tenth Circuit ordered restitution by equating sovereign ownership with a proprietary interest in living wildlife.[7] The Sixth Circuit ruled on this issue, but its rationale was unclear and categorizing it is difficult, however, it is most likely consistent with the Tenth Circuit.[8]

Part II of this Article discusses the Lacey Act and conspiracy to violate it.[9] Part III highlights some important victim restitution statutes.[10] Part IV outlines the distinct concepts of property and ownership used by courts in restitution decisions.[11] Part V discuses cases involving restitution for conspiracy to violate the Lacey Act and the split that has formed in the circuits.[12] In Part V, I argue that there are two trails that circuits follow to restitution for victims of conspiracy to violate the Lacey Act but, like the intrepid Roosevelt, courts must follow only one.[13] The right trail to restitution in these cases was forged by the Second and Fourth Circuits.[14] Courts should follow the Second and Fourth Circuits because these decisions are grounded in Supreme Court authority, comport with the principles of sovereign ownership, and more efficiently meet the statutory requirements of an oft-utilized restitution statute.

II. THE LACEY ACT

Known as the United States' "oldest wildlife conservation statute,"[15] the Lacey Act[16] was introduced in 1900 by Representative John Lacey.[17] Prior to the

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[6] United States v. Oceanpro Industries Ltd., 674 F.3d 323 (4th Cir. 2012); United States v. Bengis, 631 F.3d 33, 41 (2d Cir. 2011).

[7] United States v. Butler, 694 F.3d 1177 (10th Cir. 2012).

[8] United States v. Bruce, 437 F. App'x 357 (6th Cir. 2011).

[9] *See infra* notes 15–53 and accompanying text.

[10] *See infra* notes 54–80 and accompanying text.

[11] *See infra* notes 81–156 and accompanying text.

[12] *See infra* notes 157–249 and accompanying text.

[13] *Id.*

[14] *Id.*

[15] Victor J. Rocco, *Wildlife Conservation Under the Lacey Act: International Cooperation or Legal Imperialism?*, 80 MAY N.Y. ST. B.J. 10, 11 n.1 (2008).

[16] 16 U.S.C. §§ 3371–3378 (2012).

[17] Rocco, *supra* note 15, at 12 (citing H.R. Rep. No. 56-474, at 1–2 (1900)).

passage of the Lacey Act, a scofflaw could poach wildlife in one state and travel to another state to sell it.[18] This would render the perpetrator virtually immune from prosecution because each state would lack jurisdiction to bring a case.[19] The Lacey Act supplemented the states' laws that proved ineffective in protecting wildlife by authorizing the federal government to prosecute those circumventing the jurisdiction of the several states.[20]

While the Lacey Act was created as a failsafe to supplement deficiencies in state law, today it stands out as the primary statute under which crimes against wildlife are prosecuted.[21] When appropriate, charging a defendant with conspiracy adds strength to the prosecution of wildlife crimes.[22]

A. A Brief Overview of the Lacey Act

The Lacey Act outlaws two types of actions associated with illicit trade in wildlife:[23] trafficking violations[24] and paperwork violations.[25] Trafficking violations occur when wildlife "has been illegally taken, possessed, transported, or sold."[26] Paperwork violations include circumstances in which a person has failed to mark game or falsified shipping documents.[27] The term "wildlife" is defined broadly, "encompass[ing] virtually all wild animals," and any parts thereof.[28]

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *See* Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 29 (1995).

[22] *See infra* notes 42–53 and accompanying text.

[23] Anderson, *supra* note 21, at 53.

[24] *See* 16 U.S.C. § 3372(a) (2012) (defining trafficking offenses as "[o]ffenses other than marking offenses"); Anderson, *supra* note 21, at 53.

[25] Although neither the Lacey Act nor Anderson use the term "paperwork offenses," this Article utilizes the phrase to avoid confusion. *See* 16 U.S.C. § 3372(b), (d).

[26] *E.g.*, United States v. Kaba, 495 F. App'x 197, 199 (2d Cir. 2012) (unpublished) (upholding a Lacey Act conviction for smuggling and selling elephant ivory); United States v. Santillan, 243 F.3d 1125, 1130 (9th Cir. 2001) (holding that the government presented sufficient evidence to support the Lacey Act conviction for illicitly transporting live parrots into the United States); Anderson, *supra* note 21, at 57–58 (citing 16 U.S.C. § 3372(a)).

[27] *E.g.*, United States v. Kapp, 419 F.3d 666, 676 (7th Cir. 2005) (upholding a Lacey Act conviction for knowingly creating false records for animals, and parts thereof, protected by the Endangered Species Act); United States v. Allemand, 34 F.3d 923, 926 (10th Cir. 1994) (affirming conviction of defendants who included false information on an export declaration when shipping animal hides from Canada); Anderson, *supra* note 21, at 53 (citing 16 U.S.C. § 3372(b), (d)).

[28] Anderson, *supra* note 21, at 54 ("The term 'fish or wildlife' means 'any wild animal, whether alive or dead, including without limitation any wild mammal, bird, reptile, amphibian, fish, mollusk, crustacean, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any part, product, egg, or offspring thereof.' (quoting 16 U.S.C. § 3371(a))).

1. Trafficking Violations

A successful trafficking prosecution requires proving two separate violations of law: a predicate violation and an overlying violation.[29] Each prong is distinct and must be established with separate acts.[30] First, the government must establish the predicate violation.[31] Proving the predicate violation means showing that the wildlife had been "taken, possessed, transported, or sold" in violation of any federal, state, or foreign law.[32] The law in question must have been enacted for the purpose of protecting wildlife.[33] Also, the predicate violation law does not need to be "prosecutable;" just a violation of law or regulation is required.[34] Additionally, the government must prove the overlying violation.[35] To prove the overlying violation, the government must establish that the defendant has "imported, exported, transported, [sold], received, acquired, or purchased" wildlife in a fashion proscribed by the Lacey Act.[36]

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[29] Anderson, *supra* note 21, at 58.

[30] *Id.* at 59–60 (citing United States v. Carpenter, 933 F.2d 748, 750 (9th Cir. 1991)). The Lacey Act also outlines specific civil and criminal penalties, with corresponding levels of mental culpability. 16 U.S.C. § 3373. However, that analysis is beyond the scope of this Article.

[31] Anderson, *supra* note 21, at 59. The government does not necessarily need to show that the predicate crime occurred before the overlying crime. *Id.* at 60 (citing United States v. Sylvester, 605 F.2d 474, 475 (9th Cir. 1979)).

[32] 16 U.S.C. § 3372(a) (including "any law, treaty, or regulation of the United States or . . . any Indian tribal law . . . [or] any law or regulation of any State or . . . any foreign law").

[33] Anderson, *supra* note 21, at 74–75.

[34] *See, e.g.*, United States v. McNab, 331 F.3d 1228, 1240–41 (11th Cir. 2003) (holding that a Honduran law which was violated by the defendant but subsequently overturned was a sufficient predicate crime because the law was valid when the defendant violated it); United States v. Borden, 10 F.3d 1058, 1062 (4th Cir. 1993) (explaining that the state law predicate was sufficient despite the fact the statute of limitations for prosecution had run).

[35] Anderson, *supra* note 21, at 58. When the predicate violation is an infraction of state or foreign law, the overlaying or "Lacey Act violation must involve interstate or foreign commerce." *Id.* (citing 16 U.S.C. § 3372(a)(2)).

[36] *Id.* at 59. "[I]n most cases, this second step must have involved a sale or purchase." *Id.* at 59 n.223. Anderson describes this prong as "prohibiting trade in 'tainted wildlife.'" *Id.* at 57 (noting, however, that the word "tainted" is not found in the Lacey Act). The Lacey Act defines "sale" of wildlife to include situations in which "a person for money or other consideration . . . offer[s] or provide[s] . . . guiding, outfitting, or other services; or . . . a hunting or fishing license or permit; . . . for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife." 16 U.S.C. § 3372(c). Similarly, "purchase" of wildlife includes "obtain[ing] for money or other consideration . . . guiding, outfitting, or other services; or . . . a hunting or fishing license or permit; for the illegal taking, acquiring, receiving, transporting, or possessing of fight or wildlife." *Id.*

2. *Paperwork Violations*

Paperwork violations deal with documents associated with transporting wildlife and can be broken down into two separate crimes: false labeling offenses[37] and marking offenses.[38] The Lacey Act's false labeling provision addresses wildlife that "has been, or is intended to be . . . imported, exported, transported, sold, purchased, or received from any foreign country; or transported in interstate or foreign commerce."[39] Specifically, "[i]t is unlawful for any person to make or submit any false record, account, or label for, or any false identification of" such wildlife.[40] The Lacey Act's marking offense provision makes it "unlawful for any person to import, export, or transport in interstate commerce any container or package containing any . . . wildlife unless the container or package has previously been plainly marked, labeled, or tagged in accordance" with federal law.[41]

B. *Conspiracy and the Lacey Act*

In addition to prosecuting Lacey Act violations, federal prosecutors can bring a case for conspiracy to violate the Lacey Act, when warranted.[42] The crime of conspiracy is committed when "two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy."[43] The independent crime of conspiracy requires proving an overt act and the requisite mental state.[44] Upon conviction, each conspirator faces up to five years imprisonment.[45]

Prosecution for conspiracy to violate the Lacey Act requires establishing the elements of conspiracy as well as elements of the Lacey Act.[46] Conspiracy

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[37] 16 U.S.C. § 3372(d).

[38] *Id.* § 3372(b).

[39] *Id.* § 3372(d).

[40] *Id.*

[41] *Id.* § 3372(b).

[42] Anderson, *supra* note 21, at 36.

[43] 18 U.S.C. § 371 (2012).

[44] Christine Fisher, Comment, *Conspiring to Violate the Lacey Act*, 32 ENVTL. L. 475, 500 (2002).

[45] 18 U.S.C. § 371.

[46] Fisher, *supra* note 44, at 499 ("The charge of conspiracy to illegally traffic wildlife combines section 3372(a) of the Lacey Act with the federal conspiracy statute."). As the scope of this Article is confined to post-conviction restitution, further discussion of the requirements of prosecution is unnecessary.

is an important tool in prosecuting wildlife crimes.[47] Prosecuting a defendant for conspiracy has both evidentiary advantages[48] and sentencing advantages.[49] Moreover, and central for the purposes of this Article, conspiracy is a crime codified in Title 18 of the United States Code,[50] while the Lacey Act is enshrined in Title 16.[51] As discussed below, some restitution statutes apply only to Title 18 offenses and are therefore not applicable for violations of the Lacey Act alone.[52] Upon conviction for conspiracy to violate the Lacey Act, a defendant is subject to restitution under statutes limited to Title 18 offenses.[53]

The Lacey Act has proven to be the preeminent statute in the fight against wildlife trafficking. While it has been on the books for over a hundred years, it is still used to prosecute those who engage in wildlife crime. Including the charge of conspiracy adds muscle to the prosecution and, as a Title 18 offense, has the additional advantage of empowering courts to order victim restitution under certain statutes.

III. VICTIM RESTITUTION STATUTES: THE VICTIM AND WITNESS PROTECTION ACT AND THE MANDATORY VICTIM RESTITUTION ACT

Victims' restitution is a way to make victims of crime whole from the loss they suffered because of another's unlawful action.[54] Once a defendant has been convicted of a federal crime, the government may move for a court order directing the offender to compensate victims for the damage caused by his or her

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[47] *Id.* at 477.

[48] *Id.* at 501–05 (including the ability to try defendants together; allowing statements that would otherwise be considered hearsay into trial as evidence against co-conspirators; and that the government must merely prove an agreement and an overt act to gain a conviction for conspiracy (citations omitted)).

[49] *Id.* at 505–07 (including sentencing for two separate federal crimes as well as potentially harsher sentences from district court judges who may view the crime of conspiracy in a different light than "merely" a Lacey Act violation (citations omitted)).

[50] 18 U.S.C. § 371 (2012).

[51] 16 U.S.C. §§ 3371–3378 (2012).

[52] *See infra* notes 54–80 and accompanying text (discussing restitution statutes' limited scope).

[53] *See* Marcus A. Asner & Gillian L. Thompson, *Restitution from the Victim's Perspective—Recent Developments and Future Trends*, 26 FED. SENT'G. REP. 59, 60 (2013) ("That means a federal conspiracy charge may well lead to a court ordering restitution 'even when it could not be awarded for the underlying predicates.'" (quoting United States v. Cummings, 189 F. Supp. 2d 67, 73 (S.D.N.Y. 2002))).

[54] *E.g.*, United States v. Gordon, 393 F.3d 1044, 1048 (9th Cir. 2004).

criminal conduct.[55] However, federal courts require statutory authority to order victim restitution.[56]

Victims' restitution statutes were enacted in response to a push for victims' rights which began in the 1970s.[57] Crime victims felt that the courts put greater emphasis on protecting the rights of criminals than protecting the crime victims' interests.[58] In 1982, President Ronald Reagan, recognizing the need for expanded rights for crime victims, created the Task Force on Victims of Crime.[59] Motivated to address issues highlighted by the victims' rights movement,[60] Congress passed the Victim and Witness Protection Act of 1982 (VWPA),[61] the nation's first federal statute dedicated to victims' rights.[62] Over a decade later, Congress further exhibited its commitment to victims' issues by enacting the Mandatory Victim Restitution Act (MVRA).[63]

The VWPA and the MVRA have elements in common. Both the VWPA and MVRA only allow restitution for injury caused by a Title 18 offense.[64] Also, each statute defines victim as "a person directly and proximately harmed as a result of the commission of an offense."[65] Courts have broadly interpreted the term person to include federal, state, and local governments, their agencies,[66] as well as foreign

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[55] Crime Victims' Rights Act (CVRA) 18 U.S.C. § 3771 (2012). The CVRA charges the court with ensuring that victims are afforded the rights enumerated within the CVRA, including the "right to full and timely restitution as provided by law." *Id.* § 3771(a)(6), (b)(1). The CVRA also allows "the attorney for the Government [to] assert the" victims' rights. *Id.* § 3771(d)(1).

[56] *E.g.*, United States v. Barton, 366 F.3d 1160, 1165 (10th Cir. 2004); United States v. Helmsley, 941 F.2d 71, 101 (2d Cir. 1991).

[57] David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 626 (2008).

[58] Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims in the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865 (2007).

[59] *Id.*

[60] Kenneth B. Meyer, Note, *Restitution and the Lacey Act: New Solutions, Old Remedies*, 93 CORNELL L. REV. 849, 857 (2002).

[61] 18 U.S.C. §§ 1512–1515, 3663–3664 (2012).

[62] Cassell, *supra* note 58, at 866.

[63] 18 U.S.C. §§ 3613A, 3663A (2012).

[64] *Id.* §§ 3663(a)(1)(A), 3663A(c)(1)(A). Restitution has been ordered for victims of crimes which span the entire spectrum of Title 18 offenses. *See, e.g.*, United States vs. Salas-Fernández, 620 F.3d 45, 46, 50 (1st Cir. 2010) (armed robbery of a bank truck); United States vs. Simmonds, 235 F.3d 826, 828, 831 (3d Cir. 2000) (arson); United States vs. Amato, 540 F.3d 153, 158, 162–63 (2d Cir. 2008) (mail and wire fraud).

[65] 18 U.S.C. §§ 3663A(a)(2), 3663(a)(2) (2012).

[66] *E.g.*, United States v. Gibbens, 25 F.3d 28, 32 (1st Cir. 1994).

nations.[67] The VWPA and MVRA also specify that when the "offense . . . involves as an element a scheme, conspiracy, or pattern of criminal activity, [victim status is extended to] any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern."[68]

Despite the uniform elements, the statutes are not identical. As its name indicates, the MVRA makes restitution mandatory in certain circumstances.[69] Courts must order restitution when sentencing a defendant who is guilty of an offence that meets two requirements: First, the offense must fall under a category listed in section 3663A(c)(1)(A), including an offense against property under Title 18.[70] Under this category, courts may need to establish that the victim is the owner of the property.[71] Second, the offense must be one "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss."[72] When ordering restitution for property damage, courts must require the defendant to "return the property to the owner."[73] If, however, returning the property is "impossible, impracticable, or inadequate" courts must order the defendant to pay "the greater of the value of the property on the date of the damage, loss, or destruction; or the value of the property on the date of sentencing."[74]

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[67] *E.g.*, United States v. Bengis, 631 F.3d 33, 41 (2d Cir. 2011).

[68] 18 U.S.C. §§ 3663A(a)(2), 3663(a)(2).

[69] *Id.* § 3663A(a)(1) ("Notwithstanding any other provision of law, when sentencing a defendant . . . the court *shall order* . . . that the defendant make restitution to the victim of the offense . . . ." (emphasis added)).

[70] *Id.* § 3663A(c)(1)(A)(ii) (offenses against property include those "committed by fraud or deceit"). This Article discusses what constitutes property for the purposes of the MVRA in more depth below.

[71] *Bengis*, 631 F.3d at 39 ("[T]he threshold question is whether [the potential victim] has a property interest in the [damaged property]."). Courts seem to use the terms "property" and "proprietary" interchangeably when referring to a victim's interest in the damaged property. *See generally* United States v. Oceanpro Indus. Ltd., 674 F.3d 323 (4th Cir. 2012); *Bengis*, 631 F.3d at 39. This Article uses the terms interchangeably in this context. *Compare Proprietary Interest*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "proprietary interest" as "[a] property right; specif., the interest held by a property owner together with all appurtenant rights"), *with Property*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "property" as "[t]he right to possess, use, and the right to transfer); the right of ownership . . . [a]lso termed *bundle of rights*") *and Proprietary*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "proprietary" as "[o]f, relating to, or holding as property").

[72] 18 U.S.C. § 3663A(c)(1)(B). The MVRA does not require that a court grant restitution if the court finds that "the number of identifiable victims is so large as to make restitution impracticable." *Id.* § 3663A(c)(3). Also, if the court decides that "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong sentencing" such that "the need to provide restitution to any victim is outweighed by the burden on the sentencing process" the court need not order restitution. *Id.*; *see, e.g.*, United States v. Farrell, 115 F. Supp. 3d 746, 757 (S.D. Va. 2015). These circumstances are outside the scope of this Article.

[73] 18 U.S.C. § 3663A(b)(1).

[74] *Id.* The VWPA has similar language, however while courts may grant restitution under both statutes, ordering restitution pursuant to either statute, individually, is sufficient. *E.g.*, *Oceanpro*, 674 F.3d at 331; *Bengis*, 631 F.3d at 40.

Unlike the MVRA, the VWPA leaves restitution to the discretion of the district court.[75] The VWPA's scope has been described as a "broad" one that merely requires "the victim to have some interest that was harmed."[76] To warrant VWPA restitution, the victim need not have suffered harm to a proprietary interest.[77] Nor is there a requirement that the victim suffer pecuniary loss.[78]

Despite their differences, courts often grant restitution pursuant to both the VWPA and the MVRA. However, using both statutes does not affect the amount of restitution that a victim recovers.[79] While courts can predicate their orders of restitution on multiple statutes in the same case, the criteria for each statute must be met in those circumstances.[80]

IV. DIFFERENT TRAILS MADE BY DIFFERENT BEASTS: ILLUSTRATING DISTINCT CONCEPTS OF PROPERTY AND OWNERSHIP

The related concepts of property and ownership play an important role in determining whether a crime victim is entitled to restitution. Whether property was damaged by criminal activity, and the level of interest held by the victim in that property, can effect which statute a court may use to grant restitution. As will be discussed below, courts have followed two trails to victim restitution for conspiracy to violate the Lacey Act, each based on distinct concepts of property and ownership. This Part will focus on illuminating the origins of the separate lines of precedent. Section A will discuss a line of cases in which the Supreme Court determined what is, and what is not, property for the purpose of federal criminal statutes. Section B will discuss the concept of state sovereign ownership of wildlife.

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[75] 18 U.S.C. § 3663(a)(1)(A) (stating "[t]he court, when sentencing a defendant . . . *may order* . . . that the defendant make restitution to any victim of such offense" (emphasis added)).

[76] *Oceanpro*, 674 F.3d at 331(internal quotations omitted); *see also* Anser & Thompson, *supra* note 53, at 60 ("[T]he VWPA is broader [than the MVRA]—in theory at least—because it technically authorizes restitution in any Title 18 case.").

[77] *Oceanpro*, 674 F.3d at 331 (finding that harm to a "legitimate and substantial interest" was sufficient for VWPA restitution).

[78] *See* 18 U.S.C. §§ 1512–1515, 3663–3664 (2012).

[79] *See, e.g.*, United States v. Donaghy, 570 F. Supp. 2d 411, 424 (E.D.N.Y. 2008) *aff'n sub nom.* United States v. Battista, 575 F.3d 226 (2d Cir. 2009) ("Pursuant to . . . both [VWPA and MVRA] restitution statutes, the Court may award restitution, in the cases of an offense against property, in the amount of the victim's loss."); United States v. Reifler, 446 F.3d 65, 118–120 (2d Cir. 2006) (discussing that restitution under both statutes does not violate Sixth Amendment provision)

[80] *Oceanpro*, 674 F.3d at 330–32.

A. Property, Predicate, and Prosecution of Federal Crimes: Cleveland and Pasquantino

In two cases involving statutory predicates to criminal prosecution, the Supreme Court distinguished a state's regulatory interest from a state's property interest.

1. Cleveland v. United States

In *Cleveland v. United States*, the Court was faced with whether unissued licenses constituted state property within the meaning of the federal mail fraud statute.[81] The defendant made misrepresentations on an application and subsequent renewal applications to obtain a Louisiana state license to operate video poker machines.[82] After uncovering evidence that the defendant had bribed state lawmakers, the U.S. Government (the Government) charged the defendant with money laundering, racketeering, and conspiracy.[83] To successfully prosecute the defendant for money laundering and racketeering, the Government had to establish that the defendant committed the predicate offense of mail fraud.[84] To prove mail fraud, the Government had to show that the defendant (1) used the mail; (2) to obtain "money or property"; (3) "by means of false or fraudulent pretenses, representations, or promises."[85] The Government met the first and third elements, asserting that the defendant used the mail to send a licensing application on which he made misrepresentations.[86] To meet the second prong, the Government argued that the defendant mailed the application to increase his chances of getting a state license, and the license was property for the purposes of the mail fraud statute.[87] The district court agreed and the defendant was convicted of mail fraud, money laundering, and racketeering.[88] The Fifth Circuit affirmed.[89]

On appeal, the Government argued that the licenses were property of the State because the State received money from fees relating to the licenses and a percentage of the "revenue from each video poker device."[90] The Supreme Court

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[81] Cleveland v. United States, 531 U.S. 12, 15, 17–18 (2000).

[82] *Id.* at 15–16.

[83] *Id.* at 16 (charging a co-defendant as well).

[84] *Id.* at 25 ("[M]ail fraud is a predicate offense under RICO and the money laundering statute." (citations omitted)).

[85] *Id.* at 16 n.1 (citing 18 U.S.C. § 1341).

[86] *Id.* at 17. "To qualify for a license, an application must meet suitability requirements designed to ensure that licensees have good character and fiscal integrity." *Id.* at 15.

[87] *Id.* at 17–18. As noted in *Cleveland*, the Court had previously held that the mail fraud statute at issue is limited to protecting property rights. *See* Carpenter v. United States, 484 U.S. 19, 25 (1987); McNally v. United States, 483 U.S. 350, 360 (1987).

[88] *Cleveland*, 531 U.S. at 18.

[89] *Id.*

[90] *Id.* at 21–22.

was unpersuaded and unanimously held that unissued licenses were not property of the State.[91] The Court reasoned that the State's video poker licensing scheme was "a typical regulatory program" in which the State "licenses, subject to certain conditions, engagement in pursuits that private actors may not undertake without official authorization."[92] The Court noted that the State "received the lion's share of its expected revenue not while the licenses remain in its own hands, but only *after* they have been issued to licensees."[93] Prior to issuance, the licenses generate no "ongoing stream of revenue": they "merely entitled the State to collect a processing fee from applicants of new licenses."[94] Indeed, the Government did not assert that the defendant "defrauded the State of any money to which the State was entitled by law."[95] In fact, there was no dispute that the defendant paid Louisiana all money that it was lawfully due.[96] The Court concluded that the mail fraud statute "requires the object of the fraud to be 'property' in the victim's hands and that a Louisiana video poker license in the State's hands is not 'property' under [that statute]."[97]

2. Pasquantino v. United States

Five years later, the Supreme Court distinguished *Cleveland* in *Pasquantino v. United States*.[98] In *Pasquantino*, the Court had to decide whether Canada's right to receive tax revenue was property within the meaning of the federal wire fraud statute.[99] The defendants were convicted of wire fraud for ordering liquor from another state via telephone and unlawfully smuggling the liquor into Canada without paying the requisite excise taxes.[100] The federal "wire fraud statute prohibits the use of interstate wires to effect any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[101] Defendants argued, in pertinent part, that the "object of [their alleged] fraud [was not] money or property in the victim's hands."[102]

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[91] *Id.* at 27.

[92] *Id.* at 21. The Court continued, "In this regard, it resembles other licensing schemes characterized by this Court as exercises of state police power" such as licenses to "transport alcoholic beverages," "sell corporate stock," "sell liquor" or operate a ferry. *Id.* (citations omitted).

[93] *Id.* at 22 (emphasis in original).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 26–27.

[98] Pasquantino v. United States, 544 U.S. 349 (2005).

[99] *Id.* at 353–55.

[100] *Id.* at 353.

[101] *Id.* (internal quotation marks omitted) (citing 18 U.S.C. § 1343).

[102] *Id.* at 355 (internal quotation marks omitted) (citing *Cleveland*, 531 U.S. at 26).

Unpersuaded by the defendants' argument, the Court found that "Canada's right to uncollected excise taxes on the liquor [that the defendants] imported into Canada [was] property in its hands."[103] The Court reasoned that the right to be paid money was a right to property.[104] If the defendants had properly imported the liquor into Canada, they would have paid the Canadian government money in the form of taxes.[105] By smuggling the liquor into Canada, and thereby evading their tax obligations, the defendants "deprived Canada of that money, inflicting an economic injury no less than had they embezzled funds from the Canadian treasury."[106]

In rendering its decision, the Court expressly distinguished *Cleveland*: unlike the states' purely regulatory interest in determining who gets a license, "Canada's entitlement to tax revenue is a straightforward 'economic' interest."[107] Moreover, in *Cleveland* there was no indication that defendants attempted to deprive the State of money; to the contrary, it was undisputed that defendants paid the State all money that it was due under the licenses.[108] In *Pasquantino*, however, the defendants aimed to deprive Canada of money to which it was legally due.[109] Thus, *Cleveland* was consistent with the Court's determination that entitlement to tax revenue was "property" for the purposes of the wire fraud statute.[110]

In *Cleveland* and *Pasquantino*, the Supreme Court made clear distinctions between regulatory and economic interests. Harming a state's regulatory interest did not harm state property, but depriving a nation of money to which it was lawfully entitled was an economic harm that constituted harm to state property.

B. State Sovereign Ownership of Wildlife

The modern concept of sovereign ownership of wildlife is nearly as old as the American republic, with roots dating back to ancient Rome.[111] The monarchs of medieval England had control over the wildlife within their kingdom:[112] they

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[103] *Id.*

[104] *Id.* at 356. The Court explained that unpaid taxes were property under the common meaning of property and in the historical context. *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at 357.

[108] *Id.* (citing Cleveland v. United States, 531 U.S. 12, 22 (2000)).

[109] *Id.*

[110] *Id.*

[111] David S. Favre, *Wildlife Rights: The Ever-Widening Circle*, 9 ENVTL. L. 241, 244–45 (1979).

[112] *See* Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23, 33–34 (2000) ("[T]he English common law disliked 'ownerless' things. Therefore, the 'ownership' of public resources was placed in the king.").

determined who could hunt wild game and who was precluded from doing so.[113] The major systemic mechanism utilized by the crown for exerting control over resources, including wildlife, was the feudal system.[114] Under the feudal system, the sovereign divvied up his or her territory into multiple fiefdoms, which were entrusted to a select few vassals.[115] The vassal, or lord, enjoyed nearly unfettered control over the people, crops, and wildlife on the land; however, the lord's control was subordinate to, and exercised at the discretion of the crown.[116] "Early English common law did not distinguish between proprietary and sovereign powers, since both were lodged in the Crown."[117] The combination of sovereign and proprietary power was known as the "royal prerogative."[118]

Eventually, however, the monarch's power began to wane.[119] English courts started to distinguish sovereign ownership of wildlife, described as the crown's obligation "to manage wildlife for the benefit of all the people of [the] kingdom rather than his own individual interest," from proprietary ownership, described as "belonging to individuals, including the king."[120] These principles traversed the Atlantic with English colonists.[121]

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[113] Favre, *supra* note 111, at 245; *see* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1454 (2013) ("As head of the government, the king held the sovereign power to regulate wildlife harvests.").

[114] *See* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 8 (3d ed. 1997) (noting that feudalism was constructed so that the crown could effectively maintain control over the people). Monarchs utilized other methods to regulate their subjects' use of wildlife, including establishing "royal forests" and bestowing hunting rights to a number of "royal grantees." Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 679 (2005).

[115] S.E. Thorne, *English Feudalism and Estates in Land*, 17 CAMBRIDGE L.J. 193, 196 (1959).

[116] Blumm & Ritchie, *supra* note 114, at 679; *see* Thorn, *supra* note 115, at 200 (explaining that, in the feudal system, "all men were tenants except the king"). With a royal land grant came hunting privileges. Favre, *supra* note 111, at 246. However, there were some "royal animals" that only the monarch, or someone with the monarch's express permission, could hunt. *Id.* (highlighting the whale as an example of wildlife designated a "royal animal").

[117] Blumm & Paulsen, *supra* note 113, at 1454.

[118] *Id.*

[119] *Id.* The decline in royal powers has been attributed "to transfers to landholders and the rise of parliamentary authority." *Id.* at 1454–55.

[120] *Id.* at 1454.

[121] Elise C. Pautler, Comment, *Defending Florida's Marine Treasures: An Argument to Expand the Public Trust Doctrine and Reinforce Florida's Role in Coral Reef Protection*, 43 STETSON L. REV. 151, 171 (2013); *see also* Blumm & Paulsen, *supra* note 113, at 1455 ("By the American Revolution, sovereignty and proprietorship were understood to be separate forms of power.").

Hunting in the early United States was a means of survival for many.[122] As the wildlife began to dwindle, many states instituted laws that regulated hunting wild game,[123] however, their authority to do so was not firmly established.[124] The laws were challenged in court,[125] but "several state courts upheld legislation to stop overharvesting by looking to English law."[126] The courts utilized the principles underlying royal prerogative to "[fashion] a uniquely American justification for regulation: the state 'ownership' doctrine,"[127] wherein the states gained sovereign ownership of the non-proprietary aspects of what was once the crown's royal prerogative.[128] State sovereign ownership was established law by the end of the nineteenth century.[129]

The Supreme Court discussed sovereign ownership in *Geer v. Connecticut*.[130] At issue in *Geer* was whether a Connecticut statute that prevented legally hunted game from being transported to another state violated the Commerce Clause of the United States Constitution.[131] The Court explained that the State's authority

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[122] Blumm & Paulsen, *supra* note 113, at 1456.

[123] *Id.* at 1456–57.

[124] Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 693 (2005) ("[State] power to curb the rule of capture remained questionable.").

[125] Blumm & Paulsen, *supra* note 113, at 1457 ("Inevitably, some of those convicted under statutory restrictions on taking wild animals challenged states' right to oversee harvest.").

[126] Blumm & Ritchie, *supra* note 124, at 693.

[127] *Id.* (referring to this doctrine by an alternative description, "the wildlife trust"); *cf.* DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW, CASE AND MATERIALS 294 (2002) ("[T]he doctrine of royal prerogative ownership of submerged lands thus was transformed in the transition from monarchy to republic into the doctrine of state sovereign ownership in which the state held the lands as trustee for the real sovereign, the people."); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970) ("[C]ertain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs.").

[128] *See* Blumm & Ritchie, *supra* note 124, at 694 n.137 ("[T]he rise of the public trust cannot be separated from the demise of the crown and thus the need to divide up the various powers that the crown possessed. . . . [L]awmakers in America necessarily had to decide what the king owned personally and what property he held in a sovereign capacity (since the king's counselors largely used the term property to cover everything). . . . In England, the general practice was the navigable waterways were owned by the king in a sovereign capacity (though the term was not used) which meant, critically, that the public had rights to fish. . . . If the king had owned the waterways in a proprietary capacity, then the public would not have had rights to fish." (quoting E-mail from Eric Freyfogle, Max L. Rowe Professor of Law, University of Illinois College of Law to Michael C. Blumm, Professor of Law, Lewis & Clark Law School (Oct. 12, 2005))).

[129] Dale D. Goble, *Three Cases/Four Tales: Commons, Capture, The Public Trust, and Property in Land*, 35 ENVTL. L. 807, 839 n.162 (2005) (citations omitted).

[130] Geer v. Connecticut, 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979).

[131] *Id.* at 522.

to confine game within its borders stemmed from the State's "ownership . . . in its sovereign capacity."[132] As part of the State's sovereign ownership, the State could declare its wildlife inalienable.[133] Accordingly, the Court found that the statute did not violate the Commerce Clause because game was not "the subject-matter of interstate commerce."[134]

While *Geer* "confirmed state sovereign ownership of wildlife," states used *Geer* to maintain that they "actually owned" the wildlife within their borders.[135] However, the Supreme Court later "eroded that proposition."[136] In *Missouri v. Holland*, the Court entertained Missouri's challenge to the Migratory Bird Treaty Act ("MBTA").[137] The MBTA was enacted subsequent to a 1916 treaty with Great Britain to protect birds that migrated across North America.[138] The State argued that the MBTA, and regulations on bird hunting promulgated pursuant thereto, violated the Tenth Amendment.[139] Missouri predicated its argument upon notions of state sovereign ownership including a pecuniary interest in birds.[140] Finding that the states are subordinate to laws enacted under valid treaties, the Court began assaulting *Geer*'s ownership rationale by noting that "[t]o put the claim of the State upon title is to lean upon a slender reed."[141]

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[132] *Id.* at 529. This authority was described as "common ownership" of wildlife by the State's citizens. *Id.* The Court opined that the people's common ownership of wildlife mandated that the State act "as a trust for the benefit of the people." *Id.* Further, the Court explained "that the ownership of the sovereign authority is in trust for all the people of the [S]tate; [thus,] it is the [legislature's] duty . . . to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the [S]tate." *Id.* at 534 (quoting Magner v. People, 97 Ill. 320, 334 (Ill. 1881)).

[133] *Geer*, 161 U.S. at 530 ("The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose.").

[134] *Id.* at 530.

[135] David Willms & Anne Alexander, *The North American Model of Wildlife Conservation in Wyoming: Understanding it, Preserving it, and Funding its Future*, 14 WYO. L. REV. 659, 666–67 (2014).

[136] *Id.*

[137] Missouri v. Holland, 252 U.S. 416, 430–31 (1920).

[138] *Id.* at 431 ("[The treaty] recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection.").

[139] *Id.* at 430–31.

[140] *Id.* at 434 ("The State as we have intimated, founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute."); *id.* at 431 ("The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State.").

[141] *Id.* at 434–35. "No doubt it is true that, as between a State and its inhabitants, the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers." *Id.* at 434. In *Hughes v. Oklahoma*, 441 U.S. 322, 332 (1979), the Court noted that this language was a comment on *Geer*'s rationale.

Nearly thirty years later, the Supreme Court expressly dispelled *Geer*'s ownership rationale.[142] In *Toomer v. Witsell*, fishermen from Georgia argued that South Carolina's regulations violated the Privileges and Immunities Clause by treating citizens of South Carolina different than citizens of other states.[143] The South Carolina officials made a number of arguments centered on the State's sovereign ownership of the shrimp in its waters.[144] In ruling that the laws were unconstitutional, the Court explained that "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[145]

After *Toomer*, the Court embraced the new understanding of state sovereign ownership.[146] In *Douglas v. Seacoast Products, Inc.*, Seacoast Products argued, *inter alia*, that Virginia laws restricting the ability of nonresidents to catch fish in the Commonwealth's waters were preempted by a federal licensing statute.[147] Virginia argued that as the "owners" of the fish, pursuant to the Submerged Lands Act, it could "exclude federal licensees."[148] The Court found this argument unpersuasive, and reiterated *Toomer*'s "legal fiction" rationale.[149] Further, the Court explained that

> A State does not stand in the same position as the owner of a private game preserve, and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.[150]

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[142] Toomer v. Witsell, 334 U.S. 385 (1948).

[143] *Id.* at 387–91.

[144] *Id.* at 399–400 (arguing, *inter alia*, "that fish and game are the common property of all citizens of the governmental unit and that the government, as a sort of trustee, exercises this 'ownership' for the benefit of its citizens. In the case of fish, it has also been considered that each government 'owned' both the beds of its lakes, streams, and tidewaters and the waters themselves; hence it must also 'own' the fish within those waters").

[145] *Id.* at 402–03.

[146] Douglas v. Seacoast Prod., Inc., 431 U.S. 265 (1977).

[147] *Id.* at 267, 271.

[148] *Id.* at 283.

[149] *Id.* at 284 ("'[O]wnership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" (quoting *Toomer*, 334 U.S. at 402)).

[150] *Id.* (citing Missouri v. Holland, 334 U.S. 385, 434 (1948); Geer v Connecticut, 161 U.S. 519, 539–40 (1896) (Field, J., dissenting)). *Douglas* made clear that title to living wildlife was not held by the states or the federal government. In so doing, *Douglas* held true to the principles which catalyzed the shift from "royal prerogative" to state sovereign ownership: the people, not the states or federal government, hold a proprietary interest in living wildlife.

After weakening *Geer*'s ownership rationale, the Court overturned it in *Hughes v. Oklahoma*.[151] The *Hughes* Court found that an Oklahoma law that restricted the interstate transportation of wildlife violated the Commerce Clause.[152] Further, to the extent that *Geer* can be read as affirming that states hold title to wildlife, *Hughes* abandoned it.[153] In so doing, the Court, again, explained that state sovereign ownership of wildlife as an antiquated "legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'"[154]

The Supreme Court has consistently articulated that state sovereign ownership merely describes the state's authority to regulate, and an interest in protecting, wildlife on the people's behalf.[155] Sovereign ownership is not a proprietary interest in wildlife.[156]

The two concepts outlined above represent different trails that circuits have followed when ordering restitution for conspiracy to violate the Lacey Act. First, in *Cleveland* and *Pasquantino* the Court distinguished between a regulatory and economic interest and explained that an economic loss is a loss of potential and actual property interest. Second, regarding state sovereign ownership, the Court articulated that state sovereign ownership of wildlife is a legal shorthand for a state's interest in protecting wildlife on its citizens' behalf. Importantly, sovereign ownership of wildlife is not a proprietary interest in the wildlife.

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[151] Hughes v. Oklahoma, 441 U.S. 322 (1979).

[152] *Id.* at 323–36.

[153] *Id.* at 334–36. Although *Hughes* clarified that the states did not own wildlife, the decision did not disturb the principle in *Geer* that the states act as trustees of the wildlife for the benefit of the citizens. *See* Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 707 n.224 (2005) (highlighting numerous scholarly works arguing this point) (citations omitted).

[154] *Hughes*, 441 U.S. at 335 (quoting Toomer v. Witsell, 334 U.S. 385, 402 (1948)). However, in a recent decision, *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), the Supreme Court discussed a pre-*Toomer* case from the Maryland Court of Appeals which referenced Maryland's sovereign ownership of oysters in its waters. *Id.* at 2431 (citing Leonard v. Earle, 141 A. 714, 716–17 (1928)).

[155] *E.g.*, *Hughes*, 441 U.S. at 335 (citations omitted); *Douglas*, 431 U.S. at 284; *Toomer*, 334 U.S. at 402; *see, e.g.*, Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371, 392 (1978) (Burger, CJ, concurring) ("A State does not 'own' wild birds and animals in the same way that it may own other natural resources such as land, oil, or timber. But . . . the doctrine is not completely obsolete. It manifests the State's special interest in regulating and preserving wildlife for the benefit of its citizens. . . . Whether we describe this interest as proprietary or otherwise is not significant." (citations omitted)); *see also Holland*, 334 U.S. at 434 ("To put the claim of the State upon title is to lean upon a slender reed.").

[156] *Douglas*, 431 U.S. at 284; *see also* Deborah G. Musiker, Tom France & Lisa A. Hallenbeck, *The Public Trust and* Parens Patriae *Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 106 (1995) ("[T]he state's sovereign ownership of its wildlife is not a proprietary form of ownership.").

V. RESTITUTION FOR CONSPIRACY TO VIOLATE THE LACEY ACT

Circuits generally agree that states are the victims of conspiracies to violate the Lacey Act.[157] Yet, circuits split regarding why states are entitled to victims' status for this crime and, thus, restitution. Following one trail, the Second and Fourth Circuits relied on *Pasquantino*'s revenue-based rationale to grant restitution for Lacey Act conspiracies.[158] Following another trail, the Tenth Circuit, and likely the Sixth Circuit, equated sovereign ownership with proprietary ownership and ordered conspirators to pay restitution to the States for damaging state property, the wildlife.[159] Federal courts ordering restitution for conspiracy to violate the Lacey Act should follow the trail blazed by the Second and Fourth Circuits because it comports with Supreme Court precedent, settled notions of state sovereign ownership, and judicial efficiency. Section A discusses decisions of the Second and Fourth Circuits that granted restitution for damage to an interest other than a proprietary interest in living wildlife. Section B discusses decisions of the Tenth and Sixth Circuits that treated state sovereign ownership of wildlife as a proprietary interest in wildlife.

A. Restitution for Damage to Interests Other Than Proprietary Interest in Living Wildlife

Adopting *Pasquantino*'s revenue-based rationale, the Second and Fourth Circuits determined that a foreign nation and two states, respectively, obtained a proprietary interest in wildlife sufficient to trigger MVRA restitution only after the wildlife had been poached.[160] The Fourth Circuit also recognized that the States held a non-property interest in protecting live wildlife which entitled the States to VWPA restitution when the protection interest was harmed by a conspiracy to violate the Lacey Act.[161]

1. United States v. Bengis*: Defining the Interest of a Nation*

In *United States v. Bengis*, the Second Circuit was faced with whether the nation of South Africa had a property interest in poached lobster.[162] Defendant,

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[157] United States v. Oceanpro Industries Ltd., 674 F.3d 323, 331 (4th Cir. 2012); United States v. Butler, 694 F.3d 1177, 1183–84 (10th Cir. 2012); United States v. Bruce, 437 F. App'x 357, 367 (6th Cir. 2011); United States v. Bengis, 631 F.3d 33, 41 (2d Cir. 2011).

[158] *Bengis*, 631 F.3d at 39–42; *see Oceanpro*, 674 F.3d at 331–32 (adopting *Bengis*' rationale (citing *Bengis*, 631 F.3d at 39–42)).

[159] *Bruce*, 437 F. App'x at 367; *Butler*, 694 F.3d at 1183–84.

[160] *Bengis*, 631 F.3d at 39–41; *see Oceanpro*, 674 F.3d at 331–32 (citing *Bengis*, 631 F.3d at 39–41).

[161] *Oceanpro*, 674 F.3d at 330–31.

[162] *Bengis*, 631 F.3d at 38.

Arnold Bengis, was the managing director of a South Africa based fishing and processing company through which he harvested rock lobsters in violation of South African law.[163] Bengis and his co-defendants were caught and eventually pleaded guilty to conspiracy to violate the Lacey Act.[164]

At sentencing, the Government moved for restitution under the VWPA and the MVRA; however, the district court denied both motions.[165] The court's order turned on its decision to follow *Cleveland* over *Pasquantino*: the district court determined that, like *Cleveland*, the defendants' fishing violations ran afoul of a purely regulatory interest of South Africa.[166] Therefore, there was no offense against property to trigger the MVRA.[167] Further, the district court denied VWPA restitution, determining that South Africa was not a victim under that statute.[168]

On appeal, the Second Circuit reversed.[169] Regarding the MVRA, the court found that *Pasquantino*, not *Cleveland*, controlled.[170] Under South African law, illegally harvested lobsters were property of South Africa.[171] "[T]he South African government [was] authorized to seize illegally harvested lobsters, sell them, and retain the proceeds" of the sale.[172] The court reasoned that since the defendants harvested lobsters in violation of South African law, "the moment a fisherman pull[ed] an illegally harvested lobster out of the sea, a property right to seize that lobster . . . vested in the government of South Africa."[173] Depriving South Africa of the right to seize and sell the poached lobster essentially deprived the nation of revenue (the proceeds of the sale) to which it was lawfully entitled.[174] Under *Pasquantino*, being lawfully entitled to revenue is a right to property in the form of money.[175] Thus, by depriving South Africa of its revenue, the defendants' actions constituted crime against property.[176] Accordingly, the *Bengis* court determined that South Africa had a sufficient interest in the poached lobster to warrant MVRA restitution.[177]

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[163] *Id.* at 35.

[164] *Id.* at 35–36.

[165] *Id.* at 37.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 38.

[169] *Id.* at 40.

[170] *Id.* at 39–40.

[171] *Id.* at 39.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* (citing Pasquantino v. United States, 544 U.S. 349, 355–56 (2005)).

[176] *Id.* at 40.

[177] *Id.* at 40–41.

With respect to the MVRA's pecuniary loss requirement, the *Bengis* court mentioned it in the statement of the law but did not address it directly in the opinion.[178] However, given the court's finding that the property lost by South Africa was money, in the form of uncollected revenue, addressing the pecuniary loss requirement was unnecessary because the property and pecuniary loss were one and the same.[179]

While the Second Circuit ultimately ruled in the Government's favor, the court did not accept all of the Government's arguments. Of note, the Government argued that South Africa was entitled to MVRA restitution because it had a proprietary interest in the *living* lobsters.[180] According to the Government, South Africa was the trustee of the lobsters on behalf of its citizens, and that public-trust relationship included an ownership interest in the wild crustaceans.[181] The Second Circuit declined to grant restitution to South Africa for the loss of living lobsters[182] which decision comported to principles of sovereign ownership of wildlife—namely, the state does not hold a proprietary interest in living wildlife.[183]

In addition to finding that South Africa was a victim under the MVRA, the *Bengis* court also determined that South Africa was a victim under the VWPA.[184] However, the court declined to grant restitution pursuant to the VWPA, reasoning "the MVRA govern[ed] the restitution award at issue."[185]

Bengis determined that *Pasquantino*, rather than *Cleveland* controlled cases in which a foreign nation was deprived of its right to seize and sell poached wildlife. The court found that the revenue South Africa would have received from the sale of the wildlife was property lost as a result of the conspiracy. Further, *Bengis* found that a foreign nation could be a victim for the purposes of the MVRA and the VWPA when wildlife within its borders was poached.

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[178] *Id.* at 38–39 (quoting 18 U.S.C. § 3663A(c)(1)(A)(ii)–(c)(1)(B)(2012)).

[179] *Id.* at 40.

[180] Brief for Appellant at 31, *United States v. Bengis*, 631 F.3d 33 (2d Cir. 2011) (No. 07-4895-cr) [hereinafter Government's *Bengis* Br.].

[181] *Id.* at 41–42.

[182] *Bengis*, 631 F.3d at 39–41.

[183] *See supra* note 156 and accompanying text.

[184] *Bengis*, 631 F.3d at 40–41. The court found that South Africa was "directly harmed" by the defendants' conspiracy so as to render the nation a victim under the MVRA and the VWPA because the defendants "facilitated the illegal harvesting of the lobsters by providing access to the United States market and enabled the poaching to go undetected by the South African government." *Id.* at 41.

[185] *Id.* at 41.

2. United States v. Oceanpro Industries Ltd.: *Defining the Interest of the States*

In *United States v. Oceanpro Industries Ltd.*, the Fourth Circuit had to determine whether Maryland and Virginia held sufficient interest in poached striped bass to make the States victims of the defendants' conspiracy to violate the Lacey Act.[186] Oceanpro Industries, Ltd. (hereinafter, "Oceanpro") was a seafood wholesaler in Washington, D.C. that was convicted of conspiracy to violate the Lacey Act for purchasing illegally-harvested fish.[187] The district court ordered Oceanpro, as well as two individual defendants, to pay restitution in the amount of $300,000 to Maryland and Virginia under the MVRA and the VWPA.[188] The defendants appealed the district court's orders of restitution.[189]

On appeal, the Fourth Circuit affirmed, holding that Maryland and Virginia had sufficient interest in the fish to be victims and were entitled to restitution under the MVRA and the VWPA.[190] Regarding the MVRA, the *Oceanpro* court based its decision primarily on *Bengis*.[191] The court reasoned that "[j]ust as South African law authorized the seizure and sale of the illegally harvested lobsters, Maryland and Virginia law authorize[d] the States' seizure and sale of illegally harvested striped bass."[192] Accordingly, the court determined that Maryland and Virginia had acquired a property interest in fish after they were poached, which entitled the States to MVRA restitution.[193]

The Government unsuccessfully argued that Maryland and Virginia were entitled to restitution under the MVRA because, pursuant to the Submerged Lands Act,[194] they held lawful title to the fish.[195] As titleholders, the Government

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[186] United States v. Oceanpro Indust. Ltd., 674 F.3d 323, 326 (4th Cir. 2012).

[187] *Id.* at 326–27.

[188] *Id.* at 327, 330. The court also addressed restitution ordered pursuant to other statutes but that is beyond the scope of this Article.

[189] *Id.* at 330.

[190] *Id.* at 331–32.

[191] *Id.*; The court also cited by analogy to *United States v. Newsome*, 322 F.3d 328, 340–42 (4th Cir. 2004) in which the court found "the federal government to be a victim under the MVRA and ordered restitution for illegally harvested black cherry trees in a national forest." *Id.* at 332.

[192] *Id.* at 332 (citations omitted).

[193] *Id.* Like *Bengis*, *Oceanpro* did not address the MVRA's pecuniary loss requirement, likely because the property lost by the states was money in the form of uncollected revenue. *See id.* (reasoning that *Bengis* and *Oceanpro* both "involved the illegal catch of fish (lobsters in *Bengis* and striped bass here), which became subject to seizure and sale by the state"); *see supra* notes 178–179 and accompanying text.

[194] 43 U.S.C. § 1311 (2012).

[195] Answering Brief for Plaintiff-Appellee at 31–32, United States v. Oceanpro Industries Ltd., 674 F.3d 323 (4th Cir. 2012) (Nos. 10–5239, 10–5284, 10–5285) (citing United States

contended, the states held a proprietary interest in the living fish; therefore, poaching the fish damaged the States' property for which the States were entitled to restitution under the MVRA.[196] Like *Bengis*, *Oceanpro* rejected this argument; however, *Oceanpro* did so expressly, opining that "the States were entitled to restitution, not based on the States' interests in the free swimming fish in their waters, but based on their proprietary interest in *illegally caught* fish obtained through the States' forfeiture laws."[197] By rejecting the Government's argument, *Oceanpro* conformed to principles of state sovereign ownership of wildlife.[198]

The *Oceanpro* court also awarded VWPA restitution to Maryland and Virginia.[199] *Oceanpro* reasoned that, although the States lacked a proprietary interest in the live fish, "they surely did possess a legitimate and substantial interest in protecting the fish in their waters as part of the natural resources of the State and its fishing industries."[200] The defendants "undoubtedly directly and proximately harmed" the States' interest by poaching the fish.[201] Accordingly, the *Oceanpro* court held that restitution "was proper under any of the restitution provisions advanced [including] the MVRA [and] the VWPA."[202]

Oceanpro described the States' interest in *living* wildlife in terms of protection, *not proprietary ownership*.[203] This protection-based interest in live fish comports with the historical concepts of sovereign ownership of wildlife.[204] As discussed above, sovereign ownership does not bestow upon states a property interest in wildlife;[205] rather, it allows states to regulate wildlife for the benefit of the people.[206]

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v. Bengis, 631 F.3d 33, 38–40 (2d Cir. 2011)) [hereinafter Government's *Oceanpro* Br.]. As part of this unsuccessful argument, the Government explained that the Submerged Lands Act (which vests in a state, title to natural resources found in state waters), reflects common law principles of sovereign ownership. *See id.* at 30 (noting that courts have long held that states own lands under their waters and wildlife in residing within boundaries).

[196] *Id.* at 31–32.

[197] *Oceanpro*, 674 F.3d at 331. The court also noted, "[t]o qualify as victims, Maryland and Virginia need not even have been 'owners' of the striped bass, although they were after the fish were illegally caught." *Id.* at 332.

[198] *See supra* notes 155–156 and accompanying text.

[199] *Oceanpro*, 674 F.3d at 331–32.

[200] *Id.* at 331. The court noted that Maryland asserted in its amicus brief, that it was a victim under the VWPA "by virtue of the *harm* to its interests as trustee of the striped bass within its waters." *Id.* at 330 (emphasis in original).

[201] *Id.* at 331 (internal quotation marks and emphasis omitted) (citing United States v. Gibbens, 25 F.3d 28, 32 (1st Cir. 1994)).

[202] *Id.* at 332.

[203] *Id.*

[204] *See supra* notes 155–156 and accompanying text.

[205] *Id.*

[206] *Id.*

The Fourth Circuit adhered to these principles by rejecting the Government's position that the States owned living fish and articulating a non-ownership, protection-based interest that the States had in the live fish.

When ordering MVRA restitution for conspiracy to violate the Lacey Act, courts should adopt the seize-and-sale rationale outlined in *Bengis* and *Oceanpro*. The *Bengis* and *Oceanpro* line is grounded squarely in *Pasquantino*'s revenue-based reasoning. Following *Bengis* and *Oceanpro* is judicially efficient because it simultaneously meets both the property damage and pecuniary loss elements of the MVRA.[207] Moreover, courts should follow *Oceanpro* and order restitution for conspiracy to violate the Lacey Act under the VWPA for harm to the states' interest in protecting wildlife within their borders. *Bengis* and *Oceanpro*'s rulings also conform to longstanding notions of state sovereign ownership by not conferring a proprietary interest in living wildlife onto the states.

B. Restitution Based on Proprietary Interest in Living Wildlife

Unlike the Second and Fourth Circuits, the Tenth Circuit upheld an order of MVRA restitution for conspiracy to violate the Lacey Act because it found that the State's sovereign ownership of wildlife was a proprietary interest in the living wildlife. Accordingly, the court had to establish that harm to the State's wildlife constituted a pecuniary loss to the state in order to meet the requirements of the MVRA. Additionally, while its rationale is less clear, the Sixth Circuit likely also found that the State had a proprietary interest in live wildlife.

1. United States v. Butler*: Resurrecting the Royal Prerogative*

In *United States v. Butler*, the Tenth Circuit had to determine whether Kansas was a victim of defendant's Lacey Act conspiracy.[208] Brothers James and Marlin Butler were professional hunting guides who took people on expeditions for deer.[209] On several occasions, the Butlers "encourage[d] their clients to hunt without a valid license, use illegal equipment, shoot more bucks than authorized, and fail to tag carcasses" in violation of the hunting laws of Kansas.[210] The Butlers pleaded guilty to conspiring to violate the Lacey Act.[211] At sentencing, the district court ordered the Butlers to pay $25,000 in restitution to Kansas, through its

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[207] 18 U.S.C. § 3663A(c)(1) (requiring the victim to suffer property damage and a pecuniary loss).

[208] United States v. Butler, 694 F.3d 1177, 1184 (10th Cir. 2012).

[209] *Id.* at 1178.

[210] *Id.* at 1179.

[211] *Id.*

wildlife agency, under the MVRA.[212] James Butler appealed the district court's restitution order.[213]

On appeal, the Tenth Circuit affirmed.[214] The court determined that conspiracy to violate the Lacey Act constituted a crime against property under the MVRA.[215] The court reasoned that a state owned the wildlife within its borders in its sovereign capacity.[216] Therefore, "committing harm against the wildlife in a state is tantamount to committing harm against that state's property for the purposes of the MVRA."[217] The court concluded that "[b]ecause wildlife is property of the state, and the state can be a victim under the MVRA, it follows that the district court properly designated Kansas as the victim of [the defendants'] poaching."[218]

Butler cited *Bengis* in support of its finding that "conspiracies to violate the Lacey Act qualify as offenses against property for the purposes of the MVRA."[219] However, *Butler* disregarded *Bengis*' seize-and-sell rationale and instead found that sovereign ownership gave Kansas a sufficient interest in wildlife for MVRA restitution.[220] This determination was antithetical to the concept of sovereign ownership of wildlife, which is not a proprietary interest.[221] As discussed above, the Supreme Court has noted that a state "does not stand in the same position as the owner of a private game preserve, and it is pure fantasy to talk of 'owning' wild

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[212] *Id.* at 1179–80. The VWPA was not at issue in *Butler*.

[213] *Id.* at 1180, 1183. Defendants also argued that they committed a victimless crime and that restitution should not be paid to the state. *Id.* at 1184; Defendant's Sentencing Memorandum at 15, *United States v. Butler*, 2011 WL 2516921 (D. Kan. June 23, 2011) (No. 10-10089-01-WEB). The defendants successfully challenged the district court's valuation of the deer for the purposes of a sentencing enhancement; however, this is beyond the scope of this Article. *Butler*, 694 F.3d at 1180–83.

[214] *Butler*, 694 F.3d at 1183–85.

[215] *Id.* at 1183 (citing United States v. Bruce, 437 F. App'x 357, 366–67 (6th Cir. 2011); United States v. Bengis, 631 F.3d 33, 38–41 (2d Cir. 2011).

[216] *Id.* (citing N.M. State Game Comm'n v. Udall, 410 F.2d 1197, 1200 (10th Cir. 1969)). The *Butler* court mused that "[i]t would be interesting to engage in the centuries-old inquiry into whether the taking of wildlife can best be regulated under the common law theories of res nullius, res communis, or res publica. But we will leave such philosophical debate to the academy and resort to the established precedent of our constituent states in the circuit." *Id.* at 1183 n.3.

[217] *Id.* at 1183–84.

[218] *Id.* at 1184.

[219] *Id.* at 1183 (citing *Bengis*, 631 F.3d at 38–41).

[220] *Id.* at 1183–84. The court could have adopted *Bengis*' seize-and-sell rationale since Kansas had the authority to seize-and-sell the unlawfully-taken deer. KAN. STAT. ANN. § 32-1047(a)(2) (2016) (empowering Kansas to seize and sell "any wildlife which is taken, possessed, sold or transported unlawfully").

[221] *See supra* note 156 and accompanying text.

fish, birds, or animals."[222] In fact, no state, "any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture."[223] Sovereign ownership merely describes a State's authority and responsibility to preserve wildlife on behalf of its citizens.[224] As Kansas lacked a property interest in the living wildlife, the MVRA did not authorize the court to order the defendants to pay restitution.

More fundamentally, equating state sovereign ownership of wildlife with proprietary ownership of wildlife essentially alters the relationship between the states and the citizens. We the People, not the state governments, are the true sovereigns of the United States and are thus the true owners of the wildlife therein.[225] State sovereign ownership accounts for this distinction by describing the state's interest in wildlife as an interest in regulating wildlife on the people's behalf.[226] Federal courts must not bestow onto states the royal prerogative once held by English monarchs by merging sovereign and proprietary ownership of wildlife.

That is not to say that *Butler*'s sovereign ownership reasoning was entirely unprecedented. Indeed, *Butler*'s MVRA reasoning seems similar to *Oceanpro*'s VWPA reasoning.[227] In both cases, the courts recognized the States' interests in protecting wildlife,[228] determined that the States' interests were harmed

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[222] Douglas v. Seacoast Prod., Inc., 431 U.S. 265, 284 (1977) (citations omitted).

[223] *Id.* (citations omitted).

[224] *See supra* notes 155 and accompanying text.

[225] *Cf.* DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW, CASE AND MATERIALS 294 (2002) ("[T]he doctrine of royal prerogative ownership of submerged lands thus was transformed in the transition from monarchy to republic into the doctrine of state sovereign ownership in which the state held the lands as trustee for the real sovereign, the people."); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970) ("[C]ertain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs.").

[226] *See supra* notes 112, 156 and accompanying text.

[227] As noted above, "sovereign ownership" is legal shorthand to describe "the State's special interest in regulating and preserving wildlife for the benefit of its citizens." Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 392 (1978) (Burger, CJ, concurring); *see* Hughes v. Oklahoma, 441 U.S. 322, 335 (1979); Douglas v. Seacoast Prod., Inc., 431 U.S. 265, 284 (1977); Toomer v. Witsell, 334 U.S. 385, 402 (1948).

[228] The similarity becomes clearer if the term "sovereign ownership" in *Butler* is replaced with the Supreme Court's definition of sovereign ownership. *Compare Butler*, 694 F.3d at 1183 ("In reaching this conclusion, we rely on the fact that the several states [have a 'special interest in regulating and preserving wildlife for the benefit of its citizens']." (bracketed language quoting *Baldwin*, 436 U.S. at 392 (Burger, CJ, concurring))), *with* United States v. Oceanpro Indust. Ltd., 674 F.3d 323, 331 (4th Cir. 2012) ("[S]urely [the States] did possess a legitimate and substantial interest in protecting the fish in their waters as part of the natural resources of the State and its fishing industries.").

by unlawful taking of wildlife,[229] and awarded restitution to the States for the harm to their interests.[230] The obvious distinction between these cases is that the MVRA required *Butler* to find that the State had a proprietary interest in the living wildlife, while the VWPA did not require *Oceanpro* to make such a finding. *Butler*'s reasoning, although sound if applied to VWPA restitution, was inappropriately applied to award restitution under the MVRA.

Moreover, establishing that Kansas had a proprietary interest in the property (the deer) that was damaged by the defendants' conspiracy was insufficient for mandatory restitution since the MVRA also requires the victim to have suffered pecuniary loss.[231] The court seems to have addressed this point by explaining that the loss suffered by Kansas stemmed from the defendants' failure to properly tag their query, which "prevent[ed] Kansas from accurately managing its deer population and [could have led] to overharvesting."[232] Without further explanation, the *Butler* court determined that the district court did not commit clear error by finding this to be a "cognizable injury [which] constituted a pecuniary loss to Kansas."[233]

Here too, *Butler*'s deficiencies are highlighted through a comparison to the *Bengis*/*Oceanpro* line of cases. *Bengis* and *Oceanpro* found that the foreign nation and States, respectively, were entitled to revenue lost as a result of the defendants' conspiracies,[234] and thus pecuniary loss was inherent in the decisions.[235] *Butler* was not grounded in a revenue-based rationale, so it had to meet the second element of the MVRA by highlighting the potential for inaccurate wildlife management and overharvesting of wildlife. While one can imagine a number of ways in

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[229] *Compare* United States v. Butler, 694 F.3d 1177, 1183 (10th Cir. 2012) ("We further hold that the district court properly concluded that Kansas suffered a loss. The PSR and evidence submitted by the government indicated that deer were not tagged immediately or not tagged at all during James' guided hunts. Such failures prevent Kansas from accurately managing its deer population and can lead to overharvesting. In concluding that this was a cognizable injury and constituted pecuniary loss to Kansas, the district court did not commit clear error."), *with Oceanpro*, 674 F.3d at 331 ("[T]he States' interests in protecting the fish were undoubtedly 'directly and proximately *harmed*' as a result of the illegal harvesting of the striped bass." (emphasis in original) (citations omitted)).

[230] *Oceanpro*, 674 F.3d at 331–32; *Butler*, 694 F.3d at 1184–85.

[231] 18 U.S.C. § 3663A(c)(1)(B) (2012). *But see* Melanie Pierson & Meghan N. Dilges, Restitution in Wildlife Cases, 63 U.S Attorneys' Bull., no. 3, May 2015, at 82, 86 (describing the *Butler* court's finding, that Kansas suffered a cognizable injury and a pecuniary loss, as an alternative basis for granting MVRA restitution).

[232] *Butler*, 694 F.3d at 1184.

[233] *Id.*

[234] *Oceanpro*, 674 F.3d at 331–32; United States v. Bengis, 631 F.3d 33, 40–41 (2d Cir. 2011).

[235] *See supra* notes 179, 200 and accompanying text.

which inaccurate management and potential overharvesting can cost the state money, none were articulated by the court. Thus, this appears to be a rougher trail to follow.

By predicating MVRA restitution on sovereign ownership, *Butler* created a trail distinct from *Bengis* and *Oceanpro*.[236] *Butler* should not be followed because it contravenes the concept of state sovereign ownership of wildlife as outlined by the Supreme Court, by equating sovereign ownership with proprietary ownership. Adhering to *Butler*'s reasoning would also require a court to take the additional step of defining the state's pecuniary loss, so as to entitle the state to MVRA restitution.

2. United States v. Bruce*: Muddy-Water Restitution*

In *United States v. Bruce*, the court was faced with whether Alabama and Tennessee constituted victims for the purposes of MVRA restitution.[237] The defendants were convicted of, or pleaded guilty to, conspiracy to violate the Lacey Act for buying and selling undersized mussels, illegally harvested from the waters of Alabama and Tennessee.[238] The defendants were sentenced to prison and ordered to pay $50,000 in restitution[239] to the States through their respective wildlife agencies.[240] One of the defendants, William Salyers, challenged the district court's restitution order.[241]

The Sixth Circuit upheld the district court's order of restitution,[242] holding that the States could be victims under the MVRA.[243] Further, the court reasoned that the States, through their agencies, were entitled to restitution because the undersized mussels were unlawfully taken from the States' waters.[244] "[The mussels] were not the property of the possessors, but rather the [S]tates from whose waters they were taken. Thus, the [S]tates have a property interest in the mussel shells and are entitled to compensation for their loss."[245]

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[236] *But see* Peirson & Dilges, *supra* note 232, at 86 (describing *Butler* as part of the *Bengis*/*Oceanpro* line of precedent).

[237] United States v. Bruce, 437 F. App'x 357, 366–67 (6th Cir. 2011). The VWPA was not at issue in *Bruce*.

[238] *Id.* at 359–60. Bruce and Pamela Salyers were convicted at trial and William Salyers subsequently pleaded guilty to all counts. *Id.* at 360.

[239] *Id.* at 360.

[240] *Id.* at 366–67.

[241] *Id.* at 366.

[242] *Id.* at 368.

[243] *Id.* at 367.

[244] *Id.*

[245] *Id.*

The decision in *Bruce* can be interpreted in two ways. First, *Bruce* can be read as the court finding that Alabama and Tennessee were entitled to restitution based on their ownership of the living mussels. Under this interpretation, the *Bruce* court held that the States had proprietary interests in the mussels within their borders.[246] The defendants' conspiracy damaged the mussels, and the States were entitled to restitution for damage to state property.[247] The plain language of *Bruce* supports this interpretation. Accordingly, property-based restitution for damage to live wildlife is the best interpretation of *Bruce*. This reading puts *Bruce* in line with *Butler*.

An alternative reading of *Bruce* places it in the *Bengis/Oceanpro* line of cases. Under this interpretation, the court based its decision not on wildlife as state property but on the States' lost revenue from their right to seize and sell the poached mussels. Once the mussels were illegally taken from state waters "[t]hey were not the property of the possessors, but the [S]tates from whose waters they were taken."[248] In other words, the proprietary interest in the illegally poached mussels vested in the States once the mussels were removed from the water. As Alabama and Tennessee held a proprietary interest in the illegally removed mussels, the States were entitled to restitution for the revenue they would have gained from seizing and selling the mussels. Further, *Bruce* does not address the MVRA's pecuniary loss requirement which would have been unnecessary if the court was granting restitution for lost revenue.

However, two missing elements from *Bruce* make this "seize-and-sell" interpretation implausible. First, despite having very similar facts to, and (under this reading) using the same rationale as, *Bengis*, the *Bruce* court did not cite to *Bengis* as authority.[249] Omitting any citation to *Bengis* points to the Sixth Circuit not relying on *Bengis*' rationale. Second, if the *Bruce* court had ordered restitution based on lost revenue from the inability to seize and sell the illegally harvested mussels, one would expect the court to have mentioned "seizure and sale" in the opinion, but it did not. Therefore, it seems unlikely that the *Bruce* court was awarding Alabama and Tennessee restitution for their interests in the revenue they would have gained from the seizure and sale of the poached mussels.

Bruce and *Butler* diverge from the *Bengis/Oceanpro* line of cases. *Butler* clearly identified state sovereign ownership of wildlife as sufficient interest in live wildlife to warrant MVRA restitution. It thereby deemed sovereign ownership to be proprietary ownership. It also identified the harm to state management of wildlife (the potential for overharvesting of deer) as a pecuniary injury. *Bruce* offered less

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[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Bengis* was decided four months before *Bruce*.

in the way of reasoning and authority, making it more difficult to categorize. Given that *Bruce* did not mention seizure and sale, nor did it cite to *Bengis*, *Bruce* likely falls in line with *Butler*, basing MVRA restitution on the States' proprietary ownership of living wildlife.

VI. CONCLUSION

Circuits agree that states can be victims of conspiracies to violate the Lacey Act. However, in these cases, Circuits are split regarding the state's interest in wildlife that entitles the state to victim's status. In other words, as Roosevelt might have said, courts have arrived at the same water source, but they followed different game trails to get there. *Oceanpro*, adopting the reasoning of *Bengis*, held that the States' right to seize and sell the poached wildlife was an economic harm which entitled the States to restitution for their lost revenue. District courts should follow *Bengis* and *Oceanpro* because this line of cases is grounded in Supreme Court precedent, comports with the concept of sovereign ownership, and adheres to principles of judicial efficiency by clearly satisfying the MVRA's pecuniary loss requirement. Additionally, courts should follow *Oceanpro* and award VWPA restitution to states for harm to the state interest in protecting wildlife. *Butler*, and, in all likelihood, *Bruce*, based MVRA restitution on a finding that the States' sovereign ownership of wildlife was proprietary. This reasoning is not founded on Supreme Court authority, contravenes the long held concept of sovereign ownership in wildlife, and requires an extra step to establish the MVRA's pecuniary loss requirement.