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State v. Wingate: Fishing the Murky Waters of Louisiana's Strict Liability Crimes

I. INTRODUCTION

Defendant drove to Louisiana to pick up seafood orders made by his employer, a Georgia seafood company. He was stopped by Wildlife and Fisheries agents near the Louisiana-Mississippi border. The agents found that sixty-seven percent of the channel catfish were under the required size limits and that the accompanying receipts had inadequate information, both violations of state law. Defendant neither ordered the fish nor had he viewed the contents of the boxes loaded onto his truck by two Louisiana companies. He was convicted for possessing undersized catfish and failing to maintain records pursuant to Louisiana Revised Statutes 56:326(A)(7)(b)¹ and 56:306 respectively.² The trial court sentenced him to sixty days imprisonment and fined him \$400 for the

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1. La. R.S. 56:326 (1987) states in pertinent part:

A. The following are the legal size limits on commercial fish. No person shall take or possess these fish under the prescribed sizes for commercial purpose. Except as provided by R.S. 56:326(A)(4)(b), fish of the prescribed size or larger may be taken, had in possession, or sold in unlimited quantities, provided there is compliance with all other requirements of the law. Any commercial fish under the minimum prescribed size or over the maximum prescribed size shall be returned immediately to the waters from which taken without avoidable injury. Any commercial species upon which there is no specific size limit may be taken in any size or quantity. Notwithstanding any other provisions stated above, commercial fish under the legal size may be taken from privately owned ponds or impoundments or waters by the owner thereof or his authorized representative and may be sold to other persons for purposes of stocking private waters.

. . . (7) Large species of freshwater catfishes:

(a) The blue catfish, locally called Mississippi cat—12 inches minimum length with mouth closed; the flathead catfish locally called yellow cat, Opelousas cat, or goujon—14 inches minimum length with the mouth closed;

(b) The channel cat locally called the white, the eel cat, or the willow cat—11 inches minimum length with the mouth closed or nine inches with the collarbone off; however, the commission is authorized to suspend or reduce by resolution, the legal size limit on channel catfish in those areas of the state where biological data indicates that such a suspension or reduction in the size limit would not be detrimental to the resource.

(c) There is no size limit on any species of bullhead or small species of catfish, locally called pollywog or tadpole cat . . .

(B) . . . (3) Notwithstanding the provisions of Subsection B(1) of this Section, ten percent of the total number of channel catfish (*Ictalurus punctatus*), locally called the white cat, the eel cat, or the willow cat, in possession may be smaller than the legal limit.

2. La. R.S. 56:306.4 (1987) states in pertinent part: "A. Wholesale/retail dealers shall keep, in the English language: (1) Records of the quantity and species of fish acquired, the date the fish was acquired, and the name and license number of the commercial fisherman, the wholesale/retail dealer, or the out of state seller from whom the fish was acquired . . ."

For simplicity's sake, this paper will not discuss the records violation extensively.

possession conviction, and \$300 or sixty days for the records charge. The first circuit upheld the conviction. *Held*: The possession statute contains no intent requirement and the court will not read one into the statute. Thus, defendant was guilty of the crime.³

Only sixty days jail time and a small fine for a relatively insignificant crime—who cares? Defendant Edwin Wingate's conviction for possession of undersized catfish would be insignificant were it not for the lack of a mental element. Louisiana Revised Statutes 56:326(A)(7)(b) and 56:306 seem to require no proof of criminal intent. Therefore, the state only needs to prove that Wingate possessed the small catfish. Possession of undersized catfish is only one of numerous strict liability crimes enacted in all fifty states and under federal law.

Since legislatures began enacting strict liability crimes for limited purposes in the late nineteenth century, the number of such crimes has multiplied dramatically. Presently in Louisiana, as in other states, the state may convict a person for at least seventy crimes without proving scienter.⁴ Under present

3. *State v. Wingate*, 668 So. 2d 1324 (La. App. 1st Cir. 1996).

4. Hereinafter, "mental element" will be used synonymously with "scienter" and "mens rea."

See infra text accompanying note 12 for the traditional common law definition of criminal intent. La. R.S. 14:10 (1995) states:

Criminal intent may be specific or general:

(1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.

(2) General criminal intent is present whenever there is specific criminal intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.

Under present jurisprudential interpretation of legislative intent in Louisiana statutes, the state may hold a citizen strictly liable for the following violations: La. R.S. 14:32.1 (Supp. 1996) (vehicular homicide "whether or not offender had the intent to cause death or great bodily harm"); La. R.S. 68.1 (Supp. 1996) (unauthorized removal of a shopping cart from a store or its parking lot); La. R.S. 14:80 (Supp. 1996) (carnal knowledge of a juvenile); La. R.S. 14:91 (Supp. 1996) (unlawful sales of weapons to a minor); La. R.S. 14:93.11 (Supp. 1996) (unlawful sale of alcoholic beverage to a minor); La. R.S. 14:98 (Supp. 1996) (DWI); La. R.S. 26:90 (1989 & Supp. 1996) (lewd dancing, permitting underage workers, etc. in an establishment with a liquor license); La. R.S. 26:142 (1989) (selling of alcoholic beverages produced outside of the state without a permit); La. R.S. 26:143 (1989) (improper record keeping for alcohol manufacturers and wholesalers); La. R.S. 26:144 (1989) (presenting to the alcohol commission false invoices); La. R.S. 26:147 (1989) (selling alcoholic beverages in a dry area); La. R.S. 40:508 (1992) (filing false reports on income with any housing authority); La. R.S. 40:607 (1992) (adulterated foods); La. R.S. 40:608.3 (1992) (labeling foods that are not organic as "organic"); La. R.S. 40:616 (1992) (sale or manufacture of adulterated drugs); La. R.S. 40:627 (1992) (sale or manufacture of adulterated cosmetics); La. R.S. 40:787 (1992) (shortage of ingredients required in bread); La. R.S. 40:752 (1992) (lack of the vitamin content of oleomargarine); etc. In addition, there are at least fifty strict liability traffic violations; for example, *see* La. R.S. 32:51 (1963) (operation of a motor vehicle without a license); La. R.S. 32:61 (Supp. 1996) (exceeding the speed limit on a highway). In addition, under present jurisprudence, Title 56 at issue in *Wingate* contains numerous strict liability crimes including La. R.S. 56:326 (1987).

jurisprudence and constitutional law, there are few limitations on the promulgation of these statutes. For years, commentators have questioned the policies and dangers of these offenses, but until *State v. Wingate*, the full extent of Louisiana's tolerance for strict liability crimes had never fully been tested.

This paper will examine *Wingate* in light of past jurisprudence and the competing policies surrounding its validity. The first section outlines the purpose of criminal law and the United States Supreme Court and Louisiana decisions concerning strict liability offenses. The second section discusses the appellate court's decision in *Wingate*. The final section examines *Wingate* in light of past jurisprudence, the policy reasons for enacting strict liability statutes, and the alternatives to the use of strict liability crimes.

II. PRIOR JURISPRUDENCE

A. *The Purposes of Criminal Law*

In order to place the jurisprudence in the correct theoretical framework, the purposes and goals of criminal law must be discussed. Wayne LaFave and Austin W. Scott, Jr. stated that the main purpose of criminal law is to make people behave in a desirable way, as determined by society's standards.⁵ In order to make people do what society deems desirable, society punishes the undesirable.

There are generally six competing theories about the goals of punishment. Some believe that punishment aims to deter the criminal himself from committing further crimes ("prevention" theory), while others believe that society protects itself from dangerous elements by incarceration ("restraint" theory).⁶ Another theory, that of rehabilitation, suggests that the goal of punishment is to return the individual criminal to society reformed.⁷ A fourth theory, called "deterrence," suggests that the suffering of the criminal for the crime he has committed is supposed to deter others from committing the same crime.⁸ The "education" theory proposes that punishment educates the public as to distinctions between good and evil.⁹ The final theory, "retribution," is the oldest theory and suggests that punishment is society's retaliation for undesirable behavior.¹⁰

Until recently, rehabilitation was the prevailing goal of incarceration; however, recent recidivism rates have caused this to be less favored. Many scholars now believe that all of these goals are important, but differ as to their ranking.¹¹ It is questionable, however, whether any of these goals are furthered by the enactment of strict liability crimes.

5. Wayne R. LaFave & Austin W. Scott Jr., *Criminal Law* 22 (2d ed. 1986).

6. *Id.* at 23.

7. *Id.* at 24.

8. *Id.* at 25.

9. *Id.* at 27.

10. *Id.*

11. *Id.*

B. History of Strict Liability Crimes

William Blackstone stated in the late eighteenth century that all crimes require a vicious will.¹² Traditionally, that has been the case, and the vast body of common law crimes require some sort of mental element.¹³ In contrast, strict liability crimes do not require proof of criminal intent.

Strict liability offenses are a relatively new trend, first developing in the mid-nineteenth century.¹⁴ The Industrial Revolution instigated their use; society became so complex that legislators imposed a heightened duty on citizens in order to insure public safety and accountability in ever-expanding cities.¹⁵ In the United States, strict liability first developed in Connecticut and Massachusetts in response to problems with prosecuting alcohol violations.¹⁶ Gradually, use of these laws spread to regulation of milk, adulterated foods, and eventually wildlife provisions, as evidenced by *Wingate*.¹⁷

C. Federal Case Law Addresses the Constitutionality of Strict Liability Crimes

Although Massachusetts, Connecticut, and other states began enacting strict liability crimes in the late nineteenth century, the United States Supreme Court did not significantly address their constitutionality until *United States v. Balint*, decided in 1922.¹⁸ The government convicted the *Balint* defendants of selling opium and cocaine under the Anti-Narcotic Act of 1914.¹⁹ The statute did not require

12. 4 William Blackstone, Commentaries 21. Although the U.S. Supreme Court in *Lambert v. California*, 355 U.S. 225, 228, 78 S. Ct. 240, 242 (1957) explicitly denied Blackstone's proposition, his has been the traditional view of crimes.

13. Common law crimes include first degree murder, theft, battery, and assault among others. Louisiana's "common law" crimes are enacted in Title 14 of Louisiana Revised Statutes.

14. Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 67 (1933); Richard Singer, *Strict Criminal Liability: Alabama State Courts Lead the Way into the Twenty-First Century*, 46 Ala. L. Rev. 47 (1994).

15. The Supreme Court, in *Morissette v. United States*, 342 U.S. 246, 254, 72 S. Ct. 240, 245 (1952), accepted the Industrial Revolution theory.

16. Sayre, *supra* note 14, at 64; *Morissette*, 342 U.S. at 256, 72 S. Ct. at 246.

17. La. R.S. 40:607 (1992) defines "adulteration" as food in an unsanitary condition or with partially decomposed or diseased particles. A common example would be the sale of rotted meat.

18. 258 U.S. 250, 42 S. Ct. 301 (1922). The Supreme Court did mention "public welfare" offenses in *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68, 30 S. Ct. 663, 666 (1910). In that case, the plaintiffs argued that a statute which made unintentional trespassers liable for a felony was unconstitutional. In dicta, the court recognized the state legislature's ability to enact such a crime under the police power and stated that a defendant "will not be heard to plead in defense good faith or ignorance." It relied on the state supreme court's decision that this crime fell under the police power and went no further. *Id.*

19. Actually, the defendant was found in possession of cocoa, the plant from which cocaine is derived. *Balint*, 258 U.S. at 252, 42 S. Ct. at 302. Section 2 of the Narcotic Act (38 Stat. 786) read in pertinent part: "[I]t shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered"

knowledge of possession of the drugs, and the defendants challenged its constitutionality on due process grounds. The Court stated that it must look at the legislative intent to determine if Congress intended the crime to include strict liability.²⁰ Congress intended to closely supervise the trafficking of dangerous drugs through the use of criminal penalties. Thus, stated the Court, a person dealing with dangerous drugs must "ascertain at his peril whether that which he sells comes within the inhibition of the statute."²¹ Under *Balint*, the only expressed limitation to the constitutionality of strict liability crimes was legislative intent in enacting a statute.²²

Almost thirty years after *Balint*, the Supreme Court in *Morissette v. United States* demonstrated that there were limits to Congress' ability to promulgate strict liability offenses.²³ *Morissette* was convicted of knowingly converting to his use a thing of value of the United States.²⁴ After a failed hunting trip on a government bombing range, *Morissette* loaded three tons of shell casings into his pickup truck, intending to sell them for scrap metal.²⁵ When arrested, *Morissette* stated that he thought the shell casings were abandoned.²⁶ The government argued that he knowingly converted the shell casings to his own use and that the possession statute required no felonious intent.²⁷ In other words, the government argued that *Morissette* need not know that the government owned the casings in order to be guilty; it was sufficient that he intended to convert them to his own use.

The Court disagreed with the government's argument. By referring to the common law crime of stealing in the statute, Congress incorporated all of its traditional elements.²⁸ Thus, the prosecution must prove felonious intent in order to convict under the statute and the Court overturned the conviction.²⁹ In his much quoted opinion, Justice Jackson wrote:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and

20. *Balint*, 258 U.S. at 252, 42 S. Ct. at 302.

21. *Id.* at 254, 42 S. Ct. at 303.

22. The *Balint* Court relied heavily on *Shevlin-Carpenter* for this proposition and did not seem to analyze the statute under the due process clause. *Balint*, 258 U.S. at 252, 42 S. Ct. at 302. This reliance may have been misplaced because the *Shevlin* Court stated that there may be due process limitations to public welfare crimes. *Shevlin-Carpenter*, 218 U.S. at 68, 30 S. Ct. at 666. See *supra* note 18. Nonetheless, this misplaced reliance on *Shevlin* has never been challenged. Also, the *Balint* court in dicta reaffirmed the states' ability to enact such crimes.

23. 342 U.S. 246, 72 S. Ct. 240 (1951).

24. *Id.* (citing 18 U.S.C. § 641).

25. *Id.* at 247, 72 S. Ct. at 242. This land was untilled and uninhabited in Michigan. According to the court the bombing range was well-known as "good deer country." Upon learning that the government was looking for the shell casings, *Morissette* promptly went to the authorities.

26. *Id.* The shells that *Morissette* took were rusted and dumped into heaps; some had been there for more than four years.

27. *Id.* at 248, 72 S. Ct. at 242.

28. *Id.* at 263, 72 S. Ct. at 250.

29. *Id.* at 259, 72 S. Ct. 247-48.

persistent in mature systems of law as belief in freedom of the human will and consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.³⁰

Justice Jackson distinguished the crime in *Balint* from that in *Morrisette* based on the history of the statute.³¹ Starting with *Morrisette*, the Court began reviewing criminal statutes more closely to see if they should require intent.

Up to the 1970s, the Court continued to restrict the use of strict liability crimes.³² Specifically, *United States v. Freed*³³ further defined the due process limits of strict liability crimes. In *Freed*, the government convicted the defendant for possessing unregistered hand grenades under a federal statute that did not require scienter.³⁴ The Court held that this statute was constitutional because the activity it sought to regulate was extremely dangerous.³⁵ The Court noted that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act."³⁶ There are some items so dangerous that owners should know the probability of regulation, and they have a duty to inquire about any such regulations. Under these circumstances, stated the Court, strict liability offenses comport with due process requirements.³⁷

Justice Brennan, in his concurrence, stated that all the majority held was that a person is not required to know that hand grenades need to be registered; however, the person must know that the weapons are hand grenades.³⁸ In a footnote,³⁹ Justice Brennan approved a test for the constitutionality of strict

30. *Id.* at 250, 72 S. Ct. at 243.

31. *Id.* at 252, 72 S. Ct. at 244. By history, the court meant incorporation of all of the elements of theft, a common law crime, into the statute.

32. The Court recognized that even strict liability crimes cannot criminalize wholly passive behavior in *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240 (1957). Los Angeles enacted a registration ordinance that required felons to register if the felon was going to be present in the city for a period of five days or more or if traveling into the city more than five times in a thirty day period. Appellant was convicted under this statute after an arrest on suspicion of another crime. The Court held that this ordinance violated due process by failing to give notice to citizens that their otherwise innocent behavior constituted an offense. *Id.* at 228, 78 S. Ct. at 243.

33. 401 U.S. 601, 91 S. Ct. 1112 (1971).

34. *Id.* at 607, 91 S. Ct. at 1117 (citing 26 U.S.C. § 5861 which made it unlawful for any person "to receive or possess a firearm which is not registered to him").

35. *Id.* at 609, 91 S. Ct. at 1118.

36. *Id.* Like *Freed*, in *U.S. v. International Minerals & Chemical Corp.*, 402 U.S. 558, 91 S. Ct. 1697 (1971), the Court held that a person carrying sulfuric acid did not have to know that he violated the law because the substance is so dangerous that the violator should be on notice.

37. *Freed*, 401 U.S. at 614, 91 S. Ct. at 1118.

38. *Id.* at 614, 91 S. Ct. at 1120.

39. *Id.* at n.4.

liability crimes formulated by Justice Blackmun, while a circuit judge, in *Holdridge v. United States*.⁴⁰ In order to comport with due process, a statute must meet seven requirements: 1) omits the mention of intent; 2) involves basically a policy matter; 3) imposes a reasonable standard which adherence may be expected; 4) imposes a relatively small penalty; 5) does not greatly besmirch one's reputation to be convicted; 6) is not taken from common law; and 7) supports the congressional purpose. The hand grenade statute met all of these requirements. Although no majority opinion has ever explicitly incorporated this test, the Fifth Circuit, in *United States v. Ayo-Gonzalez*, advocated its use when it held that fishing in a contiguous zone was a strict liability crime.⁴¹

The references to "dangerousness" in *Freed* seemed to make the use of strict liability offenses almost limitless. However, the Court qualified the term in *Staples v. United States*.⁴² The defendant Staples was convicted of possessing an unregistered machine gun despite his inability to determine it was a machine gun and despite the fact that he never used it as a machine gun. The Court held that guns do not fall within the same category of dangerous weapons as do hand grenades.⁴³ It stated that "[e]ven dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation."⁴⁴ Unlike hand grenades, guns have a long tradition of being lawful such that the prosecution must prove scienter—that the defendant knew that the gun contained characteristics that made it a machine gun—in order to convict.⁴⁵

On the same day that the Court decided *Staples*, it decided another strict liability case, *Posters 'N' Things, Ltd. v. United States*.⁴⁶ Defendant owned a store that sold "Coke Kits," "Free Base kits," pipes, bongos, and drug dilutants.⁴⁷

40. 282 F.2d 302, 310 (8th Cir. 1960).

41. 536 F.2d 652, 658 (5th Cir. 1976). See *infra* text accompanying note 95. In *Ayo-Gonzalez*, the court upheld the constitutionality of a federal statute which made fishing illegal in the contiguous zone of the U.S. *Id.* at 662. Defendant, a ship captain, did not possess radar and relied on the guidance of another vessel. *Id.* at 653. There was indication that the crews of both ships did not know of their violation because of the presence of St. Joseph Island off the coast of Texas, thus making their calculation of distance from the shore inaccurate. *Id.* at 654 n.7. The court used the *Holdridge* test in finding the ship captain strictly liable, stating that ship captains of modern ships should know their location at all times.

A test similar to the *Holdridge* test was discussed by Lee Hargrave, *Strict Liability Offenses*, 42 La. L. Rev. 541 (1982).

42. 511 U.S. 600, 114 S. Ct. 1793 (1994).

43. *Id.* at 611, 114 S. Ct. at 1800.

44. *Id.*

45. Although the Court never states such, this decision may have to do with the right to bear arms. In *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215 (1959), the Court explicitly stated that scienter is required when another constitutional right is implicated. *Smith* involved the possession of obscene books and the knowledge that the material was obscene, thus implicating the First Amendment.

46. 511 U.S. 513, 114 S. Ct. 1747 (1994).

47. *Id.* at 515, 114 S. Ct. at 1748.

After a search of her establishment, the government arrested defendant for selling drug paraphernalia in interstate commerce.⁴⁸ The statute itself did not mention an intent element. The Court said that more than omission of the proper words is needed to make a statute strict liability and that even strict liability crimes "generally require proof that the defendant had knowledge of sufficient facts to alert him to the probability of regulation."⁴⁹ Thus, the defendant in *Posters 'N' Things* must have acted knowingly under the statute—that the defendant "be aware that customers in general are likely to use the merchandise with drugs." Defendant's packaging and advertising of the items convinced the Court to affirm her conviction.⁵⁰

In summary, the Supreme Court has put some limitations on what both Congress and the state legislatures may enact as strict liability crimes. If strict liability possession is in question, the item possessed must be dangerous, and thus not an ordinary, everyday item, such that the possessor is put on notice that the item may be regulated. For example, the Court stated in *United States v. International Minerals & Chemicals Corp.*⁵¹ that "[p]encils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions." In other words, items such as pencils, dental floss, paper clips, or the *Staples* gun, are not sufficiently dangerous to put a possessor on notice that their possession would be unlawful. Thus, the legislature could never hold the possessor of these items strictly liable.

If the legislature is attempting to criminalize activity without the requisite criminal intent, the activity must not be passive or innocent and must not be based on a common law crime. All of these factors are abstractly incorporated into the *Holdridge* test discussed above. Within these broad parameters, legislatures may enact strict liability crimes without violating the due process clause.

D. Louisiana Jurisprudence

Like the federal judiciary, Louisiana courts have struggled with the recent enactment of numerous strict liability crimes. The Louisiana Supreme Court first expressly dealt with the proliferation of strict liability offenses in *State v. Terrell*,

48. *Id.* at 516, 114 S. Ct. at 1749-50 (citing 21 U.S.C. § 857(a)(1) which states: "It is unlawful for any person to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia." Section 857(b) provides for imprisonment for not more than three years and a fine of not more than \$100,000. The statute itself does not contain an intent requirement but the definition of "drug paraphernalia" included "any equipment . . . which is primarily intended or designed for use in . . . injecting . . . inhaling . . ." (emphasis added)). *Id.* at 518, 114 S. Ct. at 1750 (citing 21 U.S.C. § 857(d)). The Court read this language as requiring an objective intent—that the objects are usually used in drug use.

49. *Id.*

50. *Id.* at 526, 114 S. Ct. at 1755.

51. 402 U.S. 558, 564-65, 91 S. Ct. 1697, 1701 (1971).

decided in 1977.⁵² Terrell failed to file his income tax returns with the Department of Revenue in violation of a state law that made no mention of scienter.⁵³ Defendant, arguing that the legislature could not create a crime where the criminal consequences are independent of any intent, challenged the legislature's ability to enact strict liability crimes. The court upheld defendant's conviction relying on Louisiana Revised Statutes 14:8,⁵⁴ which recognized the legislature's ability to enact such laws. The court did not discuss the scope or limitations of the legislature's power but merely refuted defendant's sweeping assertion.⁵⁵

The court began to define the limits of the legislature's power in *State v. Brown*.⁵⁶ Brown was charged with the possession of the narcotic pentazocine, or "Talwin," under a statute that criminalized "unknowing," as well as intentional, possession of certain drugs.⁵⁷ Brown filed a motion to quash the bill of information, challenging the constitutionality of the word "unknowing" in the statute. As the United States Supreme Court did in *Morissette*, the Louisiana Supreme Court again recognized the propriety of strict liability crimes but stated that there are due process limits to their use.⁵⁸ Quoting *Freed*, the court established a version of the "dangerous" requirement but qualified its use by demanding that the accused be aware of the "nature of the instrumentality they possessed."⁵⁹ The *Brown* court expressed concern about the possibility of someone handing an unknowing third party a controlled substance.⁶⁰ Even in *Freed*, stated the court, the party knew that he possessed a hand grenade although he did not know of its registration requirements. Thus, the court found that the prosecutor must prove scienter for drug possession violations.⁶¹ The

52. 352 So. 2d 220 (La. 1977). Actually, the first case that dealt with a statute that did not mention scienter was *State v. Birdsell*, 235 La. 396, 104 So. 2d 148 (1958), but the case did not expressly phrase it as a strict liability issue. See *infra* text accompanying note 105.

53. *Terrell*, 325 So. 2d at 221. La. R.S. 47:103(A) and 107 (1990) stated in pertinent part: "Returns shall be made and filed on or before the 15th day of the fifth month . . . Failure to file a return with the Department of Revenue in accordance with the requirements of this Sub-part . . . shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months."

54. La. R.S. 14:8 (1989) reads: "Criminal conduct consists of: (1) An act or failure to act that produces criminal consequences, and which is combined with criminal intent; or (2) A mere act or failure to act that produces criminal consequences, where there is no requirement of criminal intent; or (3) Criminal negligence that produces criminal consequences." See *infra* text accompanying note 88 for criticism of this reliance in *Terrell* and *Wingate*.

55. *Terrell*, 352 So. 2d at 221.

56. 389 So. 2d 48 (La. 1980).

57. *Id.* at 49 (referring to La. R.S. 40:969(c)(49) (1989)).

58. *Id.* at 50.

59. *Brown*, 389 So. 2d at 50-51. This distinction was made in Justice Brennan's concurrence in *United States v. Freed*, 401 U.S. 601, 614, 91 S. Ct. 1112, 1118 (1971). See *supra* text accompanying note 38.

60. *Brown*, 389 So. 2d at 50-51.

61. *Id.*

court severed the word "unknowing" from the statute and remanded the case to the trial court for further proceedings.

Subsequent to *Brown*, Louisiana courts have never fully tested the logical extensions of these holdings. In most cases, the court could easily find scienter from the surrounding circumstances; so, although the court never expressly found that a defendant intended the crime in question, the court was never tested with an obviously unknowing defendant. For instance, in *State v. Taylor*, a wildlife agent found a fisherman gathering oysters from unleased government water bottoms.⁶² The agent explained the fisherman's possible criminal liability and allowed him to dump the oysters back into the water. Later, the agent returned to the same spot to find the same fisherman again gathering oysters. The agent charged him with unlawfully taking oysters from state water bottoms, a violation which omits the mention of scienter from its statutory language.⁶³ Defendant argued that the trial court erred in failing to instruct the jury on criminal intent. The appellate court held that "it appears that intent is not an element of the crime."⁶⁴ However, the court stated that defendant would have met the requirements of general criminal intent, and thus implied that they were not deciding the strict liability issue.⁶⁵

The possible exception to this line of cases is *State v. Larson*.⁶⁶ In *Larson*, a lounge owner in Morgan City was convicted of allowing prohibited acts to occur in an establishment that held a liquor license. The prohibited acts occurred when dancers in his club overly exposed themselves.⁶⁷ There was no evidence that the owner knew of the dancers' actions. The trial court found that the statute violated due process but the supreme court disagreed.⁶⁸ The supreme court stated that crimes dealing with alcohol and its distribution have long been among the crimes that do not require mens rea and have a long history of much regulation.⁶⁹ The court formulated a "dangerousness" argument with respect to alcohol much like that in *Brown*. In addition, it added that barrooms and exotic dancing "have the propensity to beget 'undesirable behavior.'"⁷⁰ Thus, because Larson submitted to the regulatory scheme surrounding the sale of alcohol, he had a duty to know the character of his establishment.⁷¹ Although this is much

62. *State v. Taylor*, 580 So. 2d 1102, 1103 (La. App. 4th Cir. 1991).

63. *Id.* (referring to La. R.S. 56:424(A)(1) (1989)). Title 56, containing the Wildlife and Fisheries Regulations, is the same title under which Wingate was charged.

64. *Taylor*, 580 So. 2d at 1104.

65. *Id.*

66. 653 So. 2d 1158 (La. 1995).

67. *Id.* at 1160. The prosecution charged him with a violation of La. R.S. 26:90(a)(13) (1989).

68. *Id.*

69. *Id.* at 1162.

70. *Id.*

71. *Id.* Because the statute is placed under the alcohol regulatory scheme, the court argues that this case is distinguishable from *State v. Rose*, 147 La. 243, 84 So. 643 (1920), in which a statute banning lewd dancing required mens rea. The *Rose* statute penalized the lewd dancing itself and thus implicated the First Amendment. However, the statute in question in *Larson* ties the sale of liquor

like the dangerousness argument in *Brown* and *Freed*, it was applied to a bar owner for whom no knowledge of the prohibited acts was proven.

Louisiana has incorporated much of the federal decisions into its jurisprudence and those that it explicitly has not may be applied through the Fourteenth Amendment's Due Process Clause. The courts have discussed the duty that results from possession of a dangerous item. Louisiana, even after *Staple's* limit on *Freed*, has decided that alcohol is more like a hand grenade than a gun and as such may be subject to strict criminal liability.⁷² Thus, the Louisiana definition of "dangerous" may be broader than that of the United States Supreme Court. However, most of the recent Louisiana cases involved defendants whose knowledge could be easily implied through their actions. The logical extension of strict liability—that unknowing or innocent defendants may be sent to jail—had not been fully tested in Louisiana courts until *State v. Wingate*.

III. THE WINGATE DECISION

Bennett's Seafood in Bainbridge, Georgia placed an order for catfish from two Louisiana seafood companies and sent Edwin Wingate, a truck driver, to pick up the orders.⁷³ As Wingate left Louisiana, Wildlife & Fisheries agents stopped him and found that approximately sixty-seven percent of the channel catfish in the shipment were undersized.⁷⁴ Wingate was charged and convicted for possessing undersized catfish in violation of Louisiana Revised Statutes 56:326.⁷⁵ In addition, the court found Wingate in violation of Louisiana Revised Statutes 56:306.4,⁷⁶ because the receipts he carried did not reflect all required information. The trial court sentenced him to \$400 and sixty days imprisonment for possession, and \$300, or sixty days to run concurrently, for the license violation.

to such expressions, making it not a First Amendment violation. *State v. Larson*, 653 So. 2d 1158, 1163 (La. 1995).

72. *Larson*, 653 So. 2d at 1162. The court emphasized the traditional nature of holding alcohol violations to be strict liability crimes. This is the reverse of the *Holdridge* factor of looking to see if a crime is common law. Now, Louisiana courts are willing to look at whether a crime has "traditionally" been strict. Under this test, "traditional" when referring to strict liability crimes can only mean since the late nineteenth century.

73. *State v. Wingate*, 668 So. 2d 1324, 1326 (La. App. 1st Cir. 1996). Like many truckers, Wingate owned a tractor truck that he attached on these runs to the trailer owned by Bennett's.

74. *Id.* Of the shipment from B & C Seafood, Inc. in Vacherie, Louisiana, 2,400 out of 4,213 channel catfish or 56.9% were undersized. B & C also sold Bennett's 357 blue catfish. From Cajun Catfish's shipment, 18,970 of the 25,480 channel catfish or 74.45% were undersized. *Id.* at 1326.

The Wildlife & Fisheries received an anonymous phone call that Bennett's Seafood was in Des Allemands, Louisiana (the location of Cajun Catfish) picking up undersized catfish. The agents placed the truck under surveillance for two days before stopping it. *Id.*

75. *See supra* note 1.

76. *See supra* note 2. The receipts did not reflect the species of fish nor the license number of the commercial fisherman who caught the fish. Wingate did possess all of his receipts, check stubs, and his wholesale dealer's license.

Wingate appealed his conviction, challenging these statutes on several grounds.⁷⁷ One of defendant's claims concerned the statutes' lack of an intent requirement. Regarding the licensing statute, Wingate argued that he was only an employee and thus should not be punished under this statute. The court quickly dismissed this claim stating that the statute required employees to carry licenses and that Wingate was required to know and comply with the records law.⁷⁸ For the possession statute, Wingate requested that the court read a scienter requirement into the statute. For the sake of argument, the court seemed to assume Wingate's statement that he "did not know what size catfish he picked up and was transporting and had no way of knowing except to rip open each sealed box and defrost the fish."⁷⁹ Despite this lack of knowledge, the court upheld Wingate's conviction, quoting the language of Louisiana Revised Statutes 15:444⁸⁰ and 14:8.⁸¹ The court stated that the legislature could have placed an intent requirement into the crime but failed to do so in order to promote prosecution. Further, the court stated:

While we are not unsympathetic to [Wingate's] argument that an unknowing and otherwise innocent person might be convicted of a violation of this statute simply by doing his job as a truck driver, we note that all persons (hunters, recreational fisherman, commercial fisherman, seafood dealers, etc.) must familiarize themselves with all applicable Wildlife and Fisheries law or risk prosecution for violation thereof.⁸²

The court was comforted by the fact that the statute did allow some leeway for ten percent legal possession of undersized fish. The court also advised future wholesalers to deal only with reputable companies.⁸³ The court remanded the case to the trial court for re-sentencing based on possible excessiveness when

77. *Wingate*, 668 So. 2d at 1327. First, he argued that the statute was unconstitutionally overbroad and vague because a person who initially possesses a legal shipment containing the acceptable ten percent of undersized channel catfish may suddenly violate the law by selling a portion of the load. The court acknowledged the creativity of this argument but stated that it was a far cry from what occurred in this case, so the defendant had no standing for such an argument.

Second, Wingate argued that the statute unconstitutionally denied equal protection by treating the dealers possessing undersized crabs differently. Unlike catfish dealers, crab dealers can avoid prosecution by revealing the identity of the commercial fisherman. The court dismissed this argument stating that there are different enforcement problems for the different species and thus different laws are warranted. *Id.*

78. *Id.*

79. *Id.* at 1328.

80. La. R.S. 15:444 (1995) states: "If a statute has made it a crime to do a particular act, no further proof of intent is required that that accused voluntarily did the act; and any evidence that he did not know such an act to be forbidden by law is inadmissible." Like La. R.S. 14:8 (1996), this statute merely acknowledges the evidentiary ramifications of strict liability crimes. It does not aid in the determination of whether a particular statute is strict liability. *See infra* text accompanying note 88.

81. *See infra* note 88.

82. *Wingate*, 668 So. 2d at 1329.

83. *Id.*

considering Wingate's employment, previous record, and the surrounding circumstances.⁸⁴

IV. LOOKING MORE CLOSELY AT WINGATE

A. *The Court's Reasoning*

Both the United States and the Louisiana Supreme Courts have stated that requiring mens rea is the rule rather than the exception when drafting criminal statutes.⁸⁵ As recently as 1994, the United States Supreme Court stated that a statute's silence on intent does not equal a desire to dispense with the intent requirement.⁸⁶ Despite this, the appellate court in *Wingate* assumed that the legislature's silence meant that no intent was required.⁸⁷ Barely discussing the statute itself, the court relied on Louisiana Revised Statutes 14:8 which includes in the definition of criminal conduct "a mere act or failure to act that produces criminal consequences, where there is no requirement of criminal intent."⁸⁸ Louisiana Revised Statutes 14:8, by its definition, recognizes the legislature's ability to enact strict liability crimes but does nothing to indicate which crimes are strict liability. Louisiana Revised Statutes 14:8 does not aid the court in statutory construction of potential strict liability crimes. Thus, Louisiana Revised Statutes 14:8 does not support the reading of the undersized fish statutes as strict liability.

Also, the *Wingate* court had no clear precedent for holding Louisiana Revised Statutes 56:326 to be a strict liability crime. It relied on *State v. Alpaugh* for the proposition that the statute was strict.⁸⁹ In *Alpaugh*, the court upheld defendant's conviction of hunting turkey over a baited field, a Title 56 offense.⁹⁰ Relying on circumstantial evidence, the court found that the

84. The trial court re-sentenced Wingate to \$300 per offense and no jail time. As of November 1996, Wingate had yet to pay the fine and the court had attached his property for payment of the debt.

85. *Dennis v. U.S.*, 341 U.S. 494, 500, 71 S. Ct. 857, 862 (1951); *State v. Larson*, 653 So. 2d 1158, 1161 (La. 1995); *State v. Brown*, 389 So. 2d 48, 49 (La. 1980).

86. *Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct. 1793, 1797 (1994). See *supra* text accompanying note 42. The Court stated this when examining a federal statute concerning machine guns. Previously, the Court had assumed that silence meant strict liability, but the need to distinguish the machine gun statute from *Freed* may have prompted this statement.

Similarly, a Louisiana Law Review article has suggested that there is a strong maxim for statutes to include intent. Hargrave, *supra* note 41.

87. *Wingate*, 668 So. 2d at 1328.

88. La. R.S. 14:8 (1996). There is precedent in Louisiana for doing this; the court in *State v. Terrell* similarly relied only on La. R.S. 14:8 (1989) when upholding a conviction for failure to file tax returns. *State v. Terrell*, 352 So. 2d 220, 221 (La. 1972). However, *Terrell* was decided before *Staples*, 511 U.S. at 600, 114 S. Ct. at 1793.

89. *Wingate*, 668 So. 2d at 1329 n.4.

90. *State v. Alpaugh*, 568 So. 2d 1379 (La. App. 1st Cir. 1990). Title 56 contains only wildlife and fisheries regulations.

defendant knew he was standing atop corn while shooting turkeys so the court did not have to decide the strict liability issue.⁹¹ The *Alpaugh* court did compare Title 56 violations to the federal equivalent, 50 C.F.R. § 20.21(1), and noted that the majority of courts held the federal statute to be strict.⁹² This comparison is merely dicta in light of its earlier finding of actual intent. Like the court's reliance on Louisiana Revised Statutes 14:8, *Wingate's* citation of *Alpaugh* for this proposition does not adequately support its statutory interpretation. The only other case discussing a Title 56 violation was *McHugh*, which did not even raise the scienter question, and thus the court did not cite it.⁹³ Because the intent element of Title 56 has never been decided by any court and the statute itself is silent on the issue, the *Wingate* court should have given the statute a more thorough examination. The court should have submitted the statute to the *Holdridge* test.

B. The Holdridge Test

Justice Blackmun, while a circuit judge, formulated the *Holdridge* test in order to interpret legislative intent and to discern the constitutionality of a statute before the court.⁹⁴ The Fifth Circuit adopted this test in *Ayo-Gonzalez*,⁹⁵ and various Louisiana cases have adopted the factors as needed.⁹⁶ As stated above, the factors include: 1) omits the mention of intent; 2) involves basically a policy matter; 3) imposes a reasonable standard to which adherence may be expected; 4) imposes a relatively small penalty; 5) does not greatly besmirch one's reputation to be convicted; 6) is not taken from common law; and 7) supports the congressional purpose.⁹⁷ First, like any other statute, the court should look at legislative intent in order to see if the wildlife statutes are intentionally strict.⁹⁸ No comments were published with the promulgation of the statutes. In Title 56, the word "intent" is never used so it is not clear that the omission was intentional

91. *Alpaugh*, 568 So. 2d at 1383.

92. *Id.*

93. *State v. McHugh*, 630 So. 2d 1259 (La. 1994). The *Wingate* court cited it when discussing the purpose of Title 56, and again when discussing the reduction in prosecution if the court required intent to be proven. *Wingate*, 668 So. 2d at 1327-29.

94. *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960). See *supra* text accompanying note 40.

95. 536 F.2d 652, 658 (5th Cir. 1976). See *supra* note 41.

96. The different *Holdridge* factors were used in Louisiana cases, but not named as such. The silence on intent, policy consideration, common law, length of sentence, and stigma factors all came from *State v. Larson*, 653 So. 2d 1158, 1161-63 (La. 1995). All the Louisiana cases mentioned dealt with the reasonableness of holding the person to a strict liability standard.

97. This test was advocated not only in *Holdridge*, 282 F.2d at 310 and in the concurrence of Justice Brennan in *United States v. Freed*, 401 U.S. 601, 614 n.4, 91 S. Ct. 1112, 1120 n.4 (1971), but also by the Fifth Circuit in *United States v. Ayo-Gonzalez*, 536 F.2d 652, 658 (5th Cir. 1976). See also *Hargrave*, *supra* note 41, for an implicit advocating of this test.

98. See *United States v. Balint*, 258 U.S. 250, 252, 42 S. Ct. 301, 302 (1922); *Holdridge*, 282 F.2d at 310; *United States v. Wulff*, 758 F.2d 1121, 1122 (6th Cir. 1985).

because no comparison can be made to statutes in the same title with contrary wording.⁹⁹ The available legislative history makes no mention of the applicable mental element.

However, the statute's placement may indicate legislative intent. Generally, Title 14 contains all of the common law crimes and general criminal provisions. By placing Louisiana Revised Statutes 56:326 in another section of the revised statutes and delegating the enforcement to a regulatory agency instead of the police, the legislature may have signified the statute's divergence from Title 14 crimes. Thus, the deletion of intent may have been intentional, and the Title 56 offenses may be strict liability.¹⁰⁰

The legislature, as they have since the original enactment in 1948,¹⁰¹ used the verbs "take" and "possess" with respect to undersized catfish.¹⁰² Title 56 defines "possess" as the "act of having in possession or control, keeping, detaining, retaining, or holding as owner, or agent."¹⁰³ This indicates an attempt on the part of the legislature to criminalize an act without intent. However, the Louisiana Supreme Court has questioned whether a person may possess at all without some form of a mental element.¹⁰⁴ The Louisiana Supreme Court's holding in *State v. Birdsell*¹⁰⁵ may indicate that possession includes some sort of mental element. The State convicted Birdsell of possessing a hypodermic needle without a physician's prescription in violation of the Uniform Narcotics Act.¹⁰⁶ In overturning the defendant's conviction, the court found that the State was required not only to prove defendant knew of the possession but also to give him an opportunity to prove the syringe was not meant for illegal use.¹⁰⁷ Thus, the word "possess" at least with respect to hypodermic needles, required some form of heightened scienter. Other cases under the Uniform Narcotics Act did not require that the prosecution prove illegal purpose, but these cases concerned narcotics, a more inherently dangerous product.¹⁰⁸ Whether narcotics or a syringe, the word "possess" at least

99. In *State v. Larson*, 653 So. 2d 1158, 1163 (La. 1995), the court compared the statute in question to other statutes in the Alcohol Beverage Control Law and found that the legislature intentionally failed to mention intent.

100. See *State v. Holt*, 672 P.2d 375 (Or. Ct. App. 1983).

101. 1948 La. Acts No. 386, § 13.

102. La. R.S. 56:326 (1987 and Supp. 1997).

103. La. R.S. 56:8(75) (1987). "Take" is similarly defined as "the attempt or act." Because Wingate was not charged with taking, this element will not be discussed, but much of the same arguments may apply.

104. See *State v. Birdsell*, 235 La. 396, 104 So. 2d 148 (1958); *State v. Brown*, 389 So. 2d 48 (La. 1980). See also William L. McLeod, Jr., Note, *Criminal Intent or Knowledge as an Element of Unlawful Possession Under the Narcotics Law*, 18 La. L. Rev. 340 (1958).

105. 235 La. 396, 104 So. 2d 148 (1958).

106. *Id.* (citing La. R.S. 40:962(B)).

107. *Id.* at 154.

108. See McLeod, *supra* note 104. It is interesting to note that the Louisiana Supreme Court seemed to draw the "dangerous" distinction before the United States Supreme Court fully expressed it in *Freed*. The *Birdsell* court stated:

encompassed knowledge of the possession. The later case of *Brown*¹⁰⁹ answered the question remaining after *Birdsell*—that the defendant must know the nature of the instrumentality possessed. Although *Birdsell* and *Brown* involved narcotics, the court's reasoning with respect to "possession" should apply *a fortiori* to undersized fish. Thus, the mere use by the legislature of the word "possess" may imply a mental element.

Second, the court should have discussed whether the statute is a matter of policy.¹¹⁰ Few would suggest that Title 56 offenses involve the same judgment of moral turpitude as Title 14 crimes, such as battery or rape. If the legislature is not solely judging moral turpitude in the game laws, then some other issue of policy must be at stake. Louisiana Constitution article 9, section 1 states:

[N]atural resources of the state, including air and water, and the healthful, scenic, historic, and an esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.¹¹¹

The express constitutional codification of this policy reflects its strength. The Louisiana Supreme Court in *McHugh* approved of this policy in an exceptional way: it upheld warrantless searches of hunters because "the state's interest in safeguarding the wildlife . . . is of paramount importance. . . ."¹¹² Therefore, Louisiana Revised Statutes 56:326¹¹³ may reflect a codified public policy which would justify making it strict liability.

Next, because it aids in determining legislative intent, the court should have considered the last *Holdridge* factor—that the statute support the legislative purpose. The purpose is to protect the environment, but other important, and perhaps competing, legislative goals include the promotion of commerce. The

[W]e are concerned here with an object that is not inherently dangerous, noxious or harmful. Rather, the article in question, as is well recognized, is widely used for numerous beneficial and helpful purposes. True, it may be employed in the illegal administering of narcotics with deleterious results; however, so may numerous other generally advantageous appliances be used for ulterior motives. For example, the blow torch is frequently resorted to by burglars in the opening of iron safes. Yet, certainly it would not be reasonable for the Legislature (as a means of suppressing safe robberies) to denounce as a crime the possessing of a blow torch without, at the same time, permitting an accused possessor to show (in his defense) that his possession was for a lawful purpose.

Birdsell, 235 La. at 411-12, 104 So. 2d at 153-54.

109. *State v. Brown*, 389 So. 2d 48 (La. 1980). See *supra* text accompanying note 56.

110. See *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960). All criminal enactments involve policy determinations, but the distinction that Blackmun may have been making is between the common law's traditional view that moral turpitude is not a policy decision, but less morally involved crimes, like traffic violations, do involve a different sort of policy.

111. La. Const. art. IX, § 1 (emphasis added).

112. *State v. McHugh*, 630 So. 2d 1259, 1264 (La. 1994).

113. See *supra* note 1.

court should have examined the effect that the statute would have on commerce if interpreted as strict liability. Forcing a truck driver to stop and inspect every single crate to prevent personal liability would burden commerce. If Wingate viewed every fish as it was boxed, either he would be terminated from his employment or the increased cost of transportation would be borne by Bennett's. Granted, as the *Wingate* court pointed out, Bennett's should have dealt with a more reputable dealer,¹¹⁴ but Wingate had little control over such decisions. The fishing industry and the export of these goods is important to the economy of Louisiana. If increased costs were assessed to out-of-state companies when they dealt with Louisiana seafood dealers, this could affect the state's ability to export seafood. Perhaps, when determining legislative intent, the court should have weighed the effects on commerce with the importance of protecting the environment.

An Ohio court made such a decision in *State v. Williams*.¹¹⁵ The Ohio court dealt with a situation much like that in *Wingate*. The defendant trucker was convicted for possessing numerous undersized fish. The court decided that the Ohio Legislature had in mind fisherman who caught the fish when promulgating the law. These fisherman could check the size of every fish as it was caught.¹¹⁶ The court found that with respect to commercial truckers, it was "unreasonable and impractical to require [them] to inspect the shipment."¹¹⁷ Thus, the court implicitly chose commerce over the environment when balancing two possible legislative objectives. The *Wingate* court should have dealt with this issue in deciding the reasonableness of the statute and its constitutionality.

Fourth, the court should have considered whether the standard imposed was reasonable and adherence thereto properly expected of a person.¹¹⁸ This portion of the analysis has much precedent and actually is the factor on which courts have concentrated.¹¹⁹ The dangerousness of the item has been much discussed in relation to whether the defendant was duty-bound to investigate. Where does the *Wingate* fish fit in the spectrum with the *Freed* hand grenade, the *Staples* machine gun, the *Brown* Talwin, and the *Posters 'N' Things* pipe?¹²⁰ Undersized fish are not even as dangerous as guns, which the *Staples*

114. *State v. Wingate*, 668 So. 2d 1324, 1329 (La. App. 1st Cir. 1996).

115. 115 N.E.2d 36 (Ohio Ct. App. 1952).

116. *Id.* at 41.

117. *Id.* at 258.

118. *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960).

119. See *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793 (1994); *United States v. Freed*, 401 U.S. 601, 91 S. Ct. 1112 (1971); *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240 (1957); *United States v. Ballint*, 258 U.S. 250, 42 S. Ct. 301 (1922); *State v. Brown*, 389 So. 2d 48 (La. 1980).

120. For a discussion of *Freed*, 401 U.S. 601, 91 S. Ct. 1112 (1971), see *supra* text accompanying notes 33-41. For a discussion of *Staples*, 511 U.S. 600, 114 S. Ct. 1793 (1994), see *supra* text accompanying notes 42-45. For a discussion of *Posters 'N' Things Ltd. v. United States*, 511 U.S. 513, 114 S. Ct. 1747 (1994), see *supra* text accompanying notes 46-50. For a discussion of *Brown*, 389 So. 2d 48 (La. 1980), see *supra* text accompanying notes 56-61.

court held could not be subject to strict liability. The consumption of undersized catfish may be dangerous to the environment, but it is not dangerous in the sense that the United States Supreme Court has used the term.¹²¹

As in *Staples*, Wingate could not easily discern the size of the fish. Such a determination would have amounted to not only opening every single crate, but also ascertaining the species of every fish and measuring all 50,000 fish.¹²² In *Staples*, the defendant would have had to investigate the inner workings of his gun and compare each part to the requirements of the gun statute in a manner similar to *Wingate*. The *Staples* court found such a requirement to be extreme in light of the history of guns in America. Likewise, the possession of fish has a long history of legality.¹²³ Thus, strict liability with respect to fish may also be extreme. Perhaps the United States Supreme Court, when a fish and game statute comes before the Court, will not deal with it as the Court has dealt with other "dangerous" items. Arguably, the items dealt with in the *Freed/Staples/Posters 'N' Things* line of cases were dangerous to individual human beings and not to the environment as a whole.

Whether this makes a difference may be tested by a case concerning the Migratory Bird Treaty which criminalizes possessing and taking of migratory birds and hunting them over baited fields.¹²⁴ The Migratory Bird Treaty does not mention scienter. The majority of the circuit courts have held that it is a strict liability statute and a hunter may offer no defense.¹²⁵ Exceptionally, the Fifth Circuit has required a reasonableness standard that "the bait or caller must have been so situated that their presence could reasonably have been ascertained by a hunter properly wishing to check the area of his activity for illegal devices."¹²⁶ Under the Fifth Circuit's formulation, a hunter still has a duty to examine the surrounding area but is not required to break other laws, such as trespass, to do so.¹²⁷ Until the United States Supreme Court decides the issue, its other holdings on "dangerousness" will have to be used to test fish and game laws for a possible due process violation.

121. See, e.g., *Staples*, 511 U.S. at 600, 114 S. Ct. at 1793; *Freed*, 401 U.S. at 601, 91 S. Ct. at 1112.

122. The statute sets up a complicated measuring system for each species of fish such that a person would have to first know the species in order to know the proper measurements. See *supra* note 1.

123. Although perhaps it also has a history of not catching undersized fish such as a parent's admonishment to his/her child to "throw back the little ones."

124. Codified at 16 U.S.C. § 703 (1994). Section 703 states in pertinent part:

[I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment . . . any migratory bird, any part, nest, or egg of any such bird, or any product . . .

125. See *United States v. Hogan*, 89 F.3d 403 (7th Cir. 1996); *United States v. Boynton*, 63 F.3d 837 (4th Cir. 1995); *United States v. Engler*, 806 F.2d 425 (3d Cir. 1986); *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985); *United States v. Catlett*, 747 F.2d 1102 (6th Cir. 1984).

126. *United States v. Delahoussaye*, 573 F.2d 910, 912 (5th Cir. 1978).

127. *Id.*

In addition, the *Wingate* court did not even deal with *State v. Brown*,¹²⁸ the Louisiana case that held the conviction for unknowing possession of Talwin unconstitutional. The *Brown* court emphasized the offensive possibility of an unknowing person's conviction, stating "[such] a situation does indeed offend the conscious,"¹²⁹ despite the United States Supreme Court's previous holding that narcotics were dangerous and thus subject to strict liability. The *Brown* court distinguished its case from *Freed*, stating that at least the *Freed* defendant was aware of the nature of the instrumentality. The *Wingate* defendant knew he possessed catfish but did not know they were undersized, similar to the *Brown* defendant who knew he had a pill in his hand but did not know it was Talwin.¹³⁰ The *Wingate* court should have dealt with *Brown*,¹³¹ because it indicates that possession requires at least that *Wingate* know that the fish were undersized in order to maintain a conviction.

Next, the court should have asked if the statute was based on a common law crime. In his commentaries, William Blackstone noted that English game and fish laws regulated the king's forest; however, these offenses carried civil penalties and not a criminal penalty.¹³² Thus, game violations are not based on common law crimes, and so there is no history of requiring a mental element.¹³³

Last, the court should have asked if the penalty is small and does not greatly besmirch the person's reputation. The maximum penalty for this crime, which is a misdemeanor, is sixty days imprisonment, a fine, and forfeiture of the fish.¹³⁴ Traditionally, courts assume that misdemeanors are reasonably small punishments for strict liability crimes¹³⁵ and often treat both the besmirching and the penalty issues as the same.¹³⁶ Thus, under present jurisprudence, a misdemeanor by definition is reasonably small and does not affect one's reputation.¹³⁷

128. 389 So. 2d 48 (La. 1980). This discussion also implies *State v. Birdsell*, 235 La. 396, 104 So. 2d 148 (1958). See *supra* text accompanying note 105.

129. *Brown*, 389 So. 2d at 50.

130. Of course, measuring fish is easier for a lay person than field-testing pills.

131. *Brown*, 389 So. 2d at 48.

132. 2 William Blackstone, Commentaries 403.

133. Arguably, the state owns all wildlife but through Title 56 gives selective permission for its taking. When a citizen surpasses this permission, he is in effect stealing game. Theft is a common law crime, and thus all game laws require intent. This argument is one step further than the court's holding in *Morissette v. United States*, 342 U.S. 246, 260, 72 S. Ct. 240, 248 (1952), where the legislature specifically used the word "stealing" and thereby incorporated common law notions. See *supra* text accompanying note 23.

134. La. R.S. 56:326(G) (Supp. 1997); La. R.S. 56:33(1) (Supp. 1997).

135. *Staples v. United States*, 511 U.S. 600, 617-18, 114 S. Ct. 1793, 1800 (1994); *United States v. Catlett*, 747 F.2d 1102, 1103 (6th Cir. 1984).

136. See *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960); *United States v. Ayo-Gonzalez*, 536 F.2d 652, 658 (5th Cir. 1976).

137. See *infra* text accompanying note 143 for criticism of this assumption.

C. Are Strict Liability Crimes Necessary?

Under present jurisprudence, it is questionable whether the *Wingate* decision would have survived a close examination of the legislative intent or the reasonableness standard. Assuming that the court made the correct decision under present jurisprudence, the law itself must be examined.

Few would argue that there are certain situations where the cost to society of proving scienter is too great in comparison to the harm possibly caused to an individual. Speeding, for instance, does not require proof that the person knew they were driving ten miles over the limit. Law and society require that a person know their speed at all times and, practically speaking, most people, despite their protestations to the contrary, have a general idea of their speed and the limit. In addition, other people's rights and safety are at stake, perhaps warranting speeding's strict liability status. Another common example is statutory rape. Although it carries a hefty sentence, the prosecutor does not have to prove the defendant's knowledge of the victim's age; all that must be proven is the fact of the victim's age. The defendant cannot defend prosecution by stating that he did not know the victim's underage status.

However, taken to their logical conclusion, there are no defenses to any strict liability crimes. Perhaps a defendant should not be able to plead insanity, infancy, or compulsion to a crime in which intent is of no relevance.¹³⁸ Thus, a child hunting with a parent atop a baited field or occupying a truck holding a bucket of undersized catfish could face the same penalty as an adult—for possession of undersized catfish, the child could serve ninety days imprisonment. Most likely, a wildlife and fisheries agent would not arrest a child nor would an attorney prosecute or a judge sentence. Even so, the law should reflect this policy determination. If the notion of a child's possible prosecution is offensive, then it may be because there is something inherent in requiring a showing of scienter in criminal law. Louisiana allows insanity and compulsion as a defense for every crime, including strict liability.¹³⁹ If the state is truly criminalizing the act and not the evil intent, then even the insane and those acting under compulsion should also be prosecuted.

Some offenses, like those involving wildlife, may offend notions of criminal law's purpose, while others, like statutory rape, seem less offensive. The legislature needs to weigh competing social policies, but the proliferation of strict liability crimes makes such reflection doubtful. The policies surrounding the use of strict liability center on the idea of ease of prosecution. In fact, the first states to enact strict liability crimes did so to ease prosecution of liquor violations.¹⁴⁰ In an overcrowded judicial system, cases are moved through the system faster

138. Sayre, *supra* note 14, at 75.

139. La. R.S. 14:14 (insanity) (1986); 14:18(6) (compulsion) (1986). La. R.S. 14:13 (1986) provides a defense for infancy up to ten years of age.

140. See *supra* text accompanying note 16.

if prosecutors do not have to prove intent. In most cases, as in traffic violations, the defendants do possess the requisite criminal intent. In other situations, a person should be duty-bound to inquire about the situation in which he places himself, such as in the case of statutory rape. In a few situations, as with prosecution of some corporate entities, it is virtually impossible to prove intent and violators would remain unpunished. As a result, our justice system has shifted from an emphasis on individual moral delinquency to the prevention of crimes and social danger.¹⁴¹ Thus, society as a whole is more concerned with their safety and less so with the proof of moral turpitude. However, intent is relatively easy to prove.¹⁴² The Title 56 cases and the amount of time it took this issue to come before the court reflect the ease with which the court can infer, and thus the prosecution can prove, a defendant's intent in wildlife violations. The ease of prosecution alone is not enough to support the vast quantity of strict liability crimes.

There are other policies that make strict liability crimes a less attractive option. Traditionally, jail time has carried a social stigma that may play an important role in deterrence. Regardless of the goal of punishment,¹⁴³ whether it be deterrence, prevention, or retaliation, the social stigma a convict feels plays a significant role in the effectiveness of his punishment. Because strict liability crimes now include possible imprisonment, people who never intended their offense are potentially stigmatized in the same way as a person who steals a car. The result is that unintentional wrongdoers are subjected to a social stigma that not only affects their life, family, and career, but possibly also society. Allowing jail time for strict liability crimes may protect a social interest, the ease of prosecution, but its continued use may also gradually belittle the stigma that should surround a criminal conviction.¹⁴⁴ If a person can answer a prospective employer with, for instance, "Oh, I just went to jail for killing a turkey while accidentally standing on some corn," and they can laugh and disregard the crime, then the stigma is diminished. This is reflected by the ease with which many modern courts assume that a misdemeanor carries no social stigma when using the *Holdridge* test.¹⁴⁵ In effect, the perpetuation of this attitude lessens the social and psychological impact of incarceration.

In addition, our prisons are already overcrowded without adding to their numbers people who unintentionally or unknowingly violate the law. Most importantly, in reality, strict liability crimes have no deterrent effect. Sure, Wingate may be more careful when carrying fish through Louisiana, but how does his conviction deter others who may not know and cannot know they are violating the law? Will future truckers check all 50,000 fish with measuring tape to make sure they are in compliance with the law?

141. Sayre, *supra* note 14, at 68.

142. La. R.S. 15:444 (1992). See Hargrave, *supra* note 41, at 543.

143. See *supra* text accompanying notes 6-12.

144. Sayre, *supra* note 14, at 8.

145. See *supra* text accompanying note 135.

D. Alternatives to the Present Use of Strict Liability Violations

With respect to wildlife laws, there is a growing trend against the use of strict liability.¹⁴⁶ At the federal level, the trend began with the 1978 Fifth Circuit decision in *United States v. Delahoussaye*.¹⁴⁷ The Fifth Circuit held that the hunting-over-a-baited field provision of the Migratory Bird Act required at least that the defendant "should have known" of his violation.¹⁴⁸ This decision contradicted many other circuits' opinions. This trend is also reflected in a recent decision from Alaska, *State v. Rice*.¹⁴⁹ *Rice* used the same sort of minimum reasonable man standard as did *Delahoussaye* when construing a moose possession statute much like Louisiana Revised Statutes 56:326.¹⁵⁰ The Alaska statute did not even mention intent. Now, to be prosecuted in Alaska, a person must intentionally possess regulated items.

There are other ways to punish and deter those who violate laws like the wildlife provisions at question in *Wingate*, *Rice*, and *Delahoussaye*. The first alternative would be to allow a sort of affirmative defense for many strict liability crimes. In order to promote judicial efficiency, the prosecution still would not have to prove intent. Instead, after the prosecution proved its case, the defendant could prove that he did not possess criminal intent.¹⁵¹ Edwin Wingate, for instance, would have the opportunity to prove that he did not know the catfish were undersized.

Alternatively, the legislature could create a two-tier prosecutorial system much like Alaska and Ohio.¹⁵² For every strict liability crime, the legislature enacts two choices for the prosecution. If the state proves intent, the possibility of imprisonment will remain along with other present punishments. If the prosecution does not prove intent, then the defendant may only be charged with a violation, which by definition may not include jail time. Thus, the stigmatization is less, but the defendant will still be subject to fines, forfeiture, and loss of his hunting license. This two-tier provision is already in place in the Oil and Gas Regulations, Louisiana Revised Statutes 30:18; thus, the Louisiana Legislature is willing and able to enact such a system when motivated.¹⁵³

Neither of these solutions aids the courts in deciding which offenses are strict and which are common law crimes, but both provide greater opportunity for avoiding the possible problems with the system in place now. A third

146. William A. Tilleman, II, *It's a Crime: Public Interest Laws (Fish & Game Statutes) Ignore Mens Rea Offenses Toward a New Classification Scheme*, 16 Am. J. Crim L. 279, 291-99 (1989).

147. 573 F.2d 910 (5th Cir. 1978).

148. *Id.* at 912.

149. 626 P. 2d 104, 107 (Alaska 1981).

150. *Id.* See also Tilleman, *supra* note 146, at 290-92. For the text of the statute, see *supra* note 1.

151. *State v. Birdsell*, 235 La. 396, 104 So. 2d 148 (1958).

152. *State v. Holt*, 672 P.2d 375, 376 (Or. Ct. App. 1983); *Buran v. State*, 705 P.2d 1280, 1283 (Alaska Ct. App. 1985).

153. La. R.S. 30:18 (Supp. 1997).

solution may aid in the court's determination of whether a particular statute is strict liability. Canada has successfully used a tripartite system to classify its laws for the last ten years.¹⁵⁴ The Canadian system divides all offenses into three categories: mens rea, strict liability, and absolute liability. The mens rea category encompasses common law crimes like battery and murder. Under the Canadian system, the legislature indicates the use of this category with words like "knowingly" and "intentionally," much like Louisiana's Title 14 crimes. For these crimes, the prosecution bears the traditional burden of proving all elements of the offense including intent.

The second category, strict liability, is not like the United States' strict liability.¹⁵⁵ It is more similar to the alternative discussed above, that of an affirmative defense. The prosecution does not have to prove intent; instead in order to prove a prima facie case, all the prosecution has to prove is the act. The burden then shifts and the defendant may prove the reasonableness of his actions. The absolute liability category is like the United States' version of strict liability.¹⁵⁶ The prosecution need only prove the act and the defendant has no defense. The legislature indicates this category explicitly.

In Canada, most wildlife violations were delegated to category two, and their prosecution has been successful. Crimes like traffic violations remain strict liability (Canada's absolute liability), while crimes like battery still require mens rea. The effect of such a system is to give the courts clear guidance as to legislative intent.

In the United States, the crimes delegated to absolute liability would still be subject to due process analysis but another alternative, the tripartite strict liability offense, would provide relief for defendants like Edwin Wingate. Proper enactment of the tripartite system would require a major statutory revision, but would also promote the policies of deterrence, crime prevention, criminal stigmatization, and fairness.

V. CONCLUSION

More than a passing examination of a statute is required when sending a person like Edwin Wingate to prison. Although the *Holdridge* test is broad, it at least insures a thoughtful examination of an unclear statute. With such deliberative analysis, the *Wingate* court may well have found that the statute indeed required intent or that it was unreasonable in not requiring it. Even if the court correctly decided *Wingate* under present jurisprudence, none of the goals of criminal law are served by strict liability. First, society hardly needs to be protected from a man who transports undersized catfish. Second, retribution is not effectively achieved if the stigma of the punishment is diminished by its

154. Tilleman, *supra* note 146, at 316.

155. *Id.*

156. *Id.*

enforcement. Most importantly, a future defendant, or Wingate himself, will never be deterred by Wingate's conviction. Such convictions are not publicized, and even if they were, the future prevention of personal liability is impractical in that it would overburden commerce.

To alleviate these problems, the legislature should seriously consider a major statutory revision. The easier, faster, and perhaps equally effective solution would be to allow all defendants under such questionable laws to affirmatively defend their behavior by proving a lack of criminal intent. When imprisonment is at issue, the defendant is entitled to a trial. In reality, the few defendants who would be able to defend their actions would not significantly clog the courts' dockets. A few extra moments of a court's time will be cheaper in the long run than imprisoning a person for upwards of sixty days. Most importantly, such a system would prevent unjust results as seen in *Wingate*.

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