Denver Law Review

Volume 77 | Issue 2 Article 4

January 2021

Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting, Human Caused Bird Deaths

Larry Martin Corcoran

MIGRATORY BIRD TREATY ACT: STRICT CRIMINAL LIABILITY FOR NON-HUNTING, HUMAN CAUSED BIRD DEATHS

LARRY MARTIN CORCORAN*

PROLOGUE

You operate an electrical utility in remote, treeless areas of the American Southwest. Migratory birds find your electrical distribution poles convenient surrogates for trees. Unfortunately, 38 of the birds manage to electrocute themselves over the course of two and one-half years. You are convicted of a federal crime, violation of the Migratory Bird Treaty Act (MBTA),[1] on account of the birds' deaths.[2]

Over 5000 migratory birds are found dead at the base of your radio transmission towers in the middle of the Great Plains. The birds were attracted by lights on the towers. The birds died when they collided with the towers and tower guy wires which were obscured by fog and blowing snow.[3] You are not prosecuted, and some courts have expressed misgivings about any effort being made to prosecute you.

I. INTRODUCTION

Congress enacted the Migratory Bird Treaty Act in 1918 in order to protect and preserve populations of migratory birds.[4] No migratory bird may be killed

* Trial Attorney, Environmental Crimes Section, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.

The author thanks John T. Webb, Assistant Chief of the Wildlife and Marine Resources Section, whose advice, encouragement, guidance, and wisdom made this article possible; Elinor Colbourn, Senior Trial Attorney of the Wildlife and Marine Resources Section, whose review made this article more accurate and readable, and assured the parallel construction of compound statements including this one; and Albert M. Manville II, Ph.D., Wildlife Biologist, United States Fish and Wildlife Service, Office of Migratory Bird Management, whose guidance to sources of data also made this article possible. Any lingering deficiencies are entirely the responsibility of the author.

The views expressed in this article are solely those of the author and do not reflect the views of the Department of Justice or of any other agency.

1. 16 U.S.C. §§ 703-712 (1994 & Supp. IV 1998). *See also* Migratory Bird Conservation Act, 16 U.S.C. § 715(j) (1994 & Supp. IV 1998) (defining "migratory birds" for the MBTA); 50 C.F.R. § 10.13 (2000) (listing all species of migratory birds protected by the MBTA).

2. This situation arose in the case of the *Moon Lake Electrical Association* in Colorado. *See* United States v. Moon Lake Elec. Ass'n, 45 F. Supp.2d 1070, 1071 (D. Colo. 1999).

3. The described incident actually occurred on the night of January 22, 1998. *See* THE TOPEKA CAPITAL JOURNAL (Jan. 30, 1998), (revisited on Feb. 13, 2001) <http://www.cjponline.com/stories/013098/kan_birds.html>.

4. For a discussion of the origins of the MBTA and a detailed description of its requirements, see Larry Martin Corcoran & Elinor Colbourn, *Shocked, Crushed and Poisoned: Criminal*

unless authorized by the Secretary of the Interior.[5] Violations of the MBTA are criminal offenses;[6] most are strict liability misdemeanors.[7]

Pursuant to the MBTA, millions of migratory birds are lawfully killed annually by hunters[8] pursuant to regulations or permits issued by the United States Fish and Wildlife Service (FWS).[9] However, it is estimated that hundreds of millions of additional migratory birds are killed annually, without any legal authority.[10] Some of the causes of such deaths have been prosecuted, *e.g.*, deaths caused by illegal hunting, by ingestion of pesticides or poisons,[11] and by electrocution. However, other, more destructive causes of migratory bird deaths have not been prosecuted, *e.g.*, deaths caused by impacts with automobiles, airplanes, and towers. Some courts have even suggested that prosecution of such killings may not be brought under the MBTA.[12]

After a brief summary, in Part II, of the consistent judicial interpretation of the MBTA as a strict liability criminal statute, Part III discusses the meaning of strict criminal liability, and the ambiguities inherent in use of it or other conclusory terms to describe the scienter requirements of any criminal statute.

Enforcement In Non-Hunting Cases Under the Migratory Bird Treaties, 77 DENV. U. L. REV., 361, 361-79 (Parts I and II) (2000).

5. 16 U.S.C. § 703(a). Sections 704 and 712 of the MBTA authorize the Secretary of the Interior to promulgate regulations to implement the MBTA and its underlying conventions.

6. *See id.* § 707. As one federal judge stated, "My experience at the bar was that one jail sentence was worth 100 consent decrees and that fines are meaningless because the defendant in the end is always reimbursed by the proceeds of his wrongdoing or by his company down the line." Steven Zipperman, Comment, *The Park Doctrine – Application of Strict Criminal Liability to Corporate Individuals For Violation of Environmental Crimes*, 10 UCLA J. ENVTL. L. & POL'Y 123, 153 (1991) (citing Barry C. Groveman & John L. Segal, *Pollution Police Pursue Chemical Criminals*, 55 BUS. SOC'Y REV. 39, 42 (1985)).

7. *See* 16 U.S.C. § 707(a) & (c). Commercial violations and certain baiting violations are not strict liability offenses. *See id.* §§ 704(b) (baiting violations), 707(b) (commercial transactions). For cases holding the MBTA is a strict liability statute, see *infra* Part II (MBTA Misdemeanor's Held to Be Strict Liability Crimes).

8. Hunters killed an estimated 16.57 million ducks, 3.13 million geese, and 369,000 coots during the 1998 waterfowl season. ELWOOD M. MARTIN & PAUL I. PADDING, U. S. FISH AND WILDLIFE SERV., OFFICE OF MIGRATORY BIRD MANAGEMENT, ADMINISTRATIVE REPORT, Harvest Surveys Section (July, 1999). Ducks, geese, and coots are only some of the birds legally killed pursuant to permits. Those numbers reported by Martin and Padding are comparable to data reported by Banks for the late 1960s and early 1970s, at which time he estimated that hunting accounted for about 60 percent of total migratory bird mortality, while impacts with human constructions accounted for approximately 31.6 percent, and poison or pollution accounted for only 1.8 percent. *See* RICHARD. C. BANKS, HUMAN RELATED MORTALITY OF BIRDS IN THE UNITED STATES, U.S. FISH AND WILDLIFE SERV. SPECIAL SCIENTIFIC REPORT-WILDLIFE 215, 14, tbl. 10 (1979) (120,539,500 birds taken by hunting out of a total of 196,887,810 human caused fatalities). In light of more recent estimates of non-hunting bird fatalities, it appears the number of non-hunting fatalities is much higher and, consequently, a larger percentage of the total number of migratory bird deaths are caused by humans. *See infra* Part VII.A (Foreseeable bird deaths).

9. *See* Migratory Bird Hunting regulations, 50 C.F.R. Part 20 (2000). *See also* Migratory Bird Permits, 50 C.F.R. Part 21 (2000).

10. *See* BANKS, *supra* note 8, at 5; *infra* Part VII.A (Foreseeable bird deaths).

11. *See, e.g., infra* Part V (Judicial Uneasiness With Strict Criminal Liability). *See also* Corcoran & Colbourn, *supra* note 4, at 389-391 (Part III.B.1.).

12. *See, e.g., infra* Part V (Judicial Uneasiness With Strict Criminal Liability).

Part IV describes judicial acceptance of strict criminal liability, especially by the United States Supreme Court, even for felonies and even in its strictest form, that in which the defendant neither knows of nor intends the circumstances which make him or her criminally liable.

Part V describes the uneasiness often expressed when courts are called upon to enforce strict criminal liability, while Part VI describes various means courts have used to limit and ameliorate its effects. Part VI also discusses the limitations and deficiencies in the theories and defenses used by courts to limit strict criminal liability, including the theory of proximate causation put forward by recent court opinions. The theories generally incorporate requirements of foreseeability, avoidability, and voluntary assumption of risks.

Part VII presents data which demonstrates that the circumstances in which courts have expressed reluctance to apply strict criminal liability under the MBTA (*e.g.*, impacts with automobiles, aircraft, and fixed objects) are more foreseeable and avoidable than are many other forms of indirect migratory birds deaths caused by humans for which courts have imposed MBTA liability (*e.g.*, electrocution and poisoning by pesticides).[13]

Part VIII describes ongoing administrative initiatives under the authority of the MBTA to reduce foreseeable and avoidable deaths of migratory birds caused by impacts with human constructions.

The data and analysis in this article lead to a conclusion that the courts' efforts to limit strict liability, including the suggested use of proximate causation, is misguided policy-making that is based upon erroneous factual assumptions and that is better left to the democratic processes of legislation and regulation.

---

13. Birds are killed by other non-hunting trauma, including logging and farming. This article focuses on traumatic bird deaths for which data exists that can be compared with courts' expressions of concern about MBTA application. However, there is no reason to believe that, were data available, the conclusions of this article would not be equally applicable to other common sources of traumatic bird deaths. For a discussion of issues relating to bird deaths caused by timber harvesting, see Corcoran & Colbourn, *supra* note 4 at 319-393 (Part III.B.2 and 3).

II. MBTA MISDEMEANORS HELD TO BE STRICT LIABILITY CRIMES[14]

That the MBTA imposes strict criminal liability was first affirmed in 1939, in *United States v. Reese*.[15]

> There appears no sound basis here for an interpretation that the Congress intended to place upon the Government the extreme difficulty of proving guilty knowledge . . . on the part of persons violating the express language of the applicable regulations promulgated pursuant to the statute [MBTA]; but it is more reasonable to presume that Congress intended to require that hunters shall investigate at their peril conditions surrounding the fields in which they seek their quarry.[16]

Since 1939, the federal courts of appeal have almost uniformly held the misdemeanor provision of the MBTA, Section 707(a), to be a strict liability criminal statute.[17]

---

14. For policy arguments for and against strict liability under the MBTA, *compare* Steven Margolin, *Liability Under the Migratory Bird Treaty Act*, 7 ECOLOGY L. Q. 989, 996-999 (1979) (advocating strict liability), *with* M. Lanier Woodrum, *The Courts Take Flight: Scienter and the Migratory Bird Treaty Act*, 36 WASH. & LEE L. REV. 241, 243-48 (1979) (opposing a strict liability interpretation). Woodrum's premise, that Congress did not intend the MBTA to be a strict liability crime, has since been disproved by Congress in its statements in connection with amendments to the felony and the baiting provisions of the MBTA. *See* S. REP. NO. 99-445, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128 ("Nothing in this amendment [to the felony provision] is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. § 707(a), a standard which has been upheld in many Federal court decisions."); S. REP. NO. 105-366, at 1-2 (1998) ("General Statement and Background") (when Congress added the scienter requirement for MBTA felony offenses it "expressly reinforced the strict liability standard for misdemeanors . . . ."); S. REP. NO. 105-366, at 2-3 (1998) ("Summary and Objectives of the Legislation") ("The elimination of strict liability, however, applies only to hunting with bait or over baited areas, and is not intended in any way to reflect upon the general application of strict liability under the MBTA."). Nevertheless, the force of the policy arguments against imposing strict liability remain.

15. 27 F. Supp. 833 (W.D. Tenn. 1939).

16. *Reese*, 27 F. Supp. at 835.

17. *See, e.g.*, United States v. Corrow, 119 F.3d 796, 805 (10th Cir. 1997); United States v. Engler, 806 F.2d 425, 431 (3d Cir. 1986) ("Scienter is not an element of criminal liability under the Act's misdemeanor provisions."); United States v. Manning, 787 F.2d 431, 435 n.4 (8th Cir. 1986) ("[I]t is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge."); United States v. Chandler, 753 F.2d 360, 363 (4th Cir. 1985) ("[A] hunter is strictly liable for shooting on or over a baited area."); United States v. Catlett, 747 F.2d 1102, 1104-05 (6th Cir. 1984) (holding that scienter is not a required element for a conviction under the MBTA). Limited exceptions to the uniform affirmation of strict criminal liability under the MBTA were the Sixth Circuit's rejection of the original MBTA strict liability felony provision and the Fifth Circuit's rejection of strict liability for hunting over or with the aid of bait. *See* United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985); United States v. Delahoussaye, 573 F.2d 910, 912-13 (5th Cir. 1978). Although no other Circuit joined the Sixth or Fifth Circuits, in each instance Congress amended the MBTA to require scienter. *See* 16 U.S.C.A. § 704(b) (2000) (baiting provisions); 16 U.S.C.A. § 707(b) (felony provision) (2000).

III. MEANING OF STRICT LIABILITY

A. *Classic Description of Strict Liability*

> "Ordinarily, a criminal offense requires both a voluntary act (actus reus) and a culpable state of mind (mens rea)."[18]

The Supreme Court has observed that "[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[19]

However, for some crimes a culpable mental state, or mens rea, is not required for a conviction. One category of such crimes is known under the name of "strict liability." Examples of strict liability crimes include sales of alcohol to vulnerable groups, sales of impure or adulterated food or drugs, narcotics transactions, and child pornography.[20] In recent years, the list has expanded to include reporting violations.[21]

---

18. Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 402 (1993) (citing Gerhard O.W. Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1052 (1958)). *See also* Morissette v. United States, 342 U.S. 246, 251-52 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil."). *But see* Bryan v. United States, 524 U.S. 184, 193 (1998) ("[T]he background presumption that every citizen knows the law makes it unnecessary to adduce specific evidence to prove that 'an evil-meaning mind' directed the 'evil-doing hand.'"). "Primitive English law 'started from a basis bordering on absolute liability.'" Dennis Jenkins, *Criminal Prosecution and the Migratory Bird Treaty Act: An Analysis of the Constitution and Criminal Intent in an Environmental Context*, 24 B.C. ENVTL. AFF. L. REV. 595, 596 n.5 (1997) (quoting Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 977 (1932)). The need for an actus reas has a Constitutional foundation in the Cruel and Unusual Punishment Clause. *See* Powell v. Texas, 392 U.S. 514, 533 (1968) ("[C]riminal penalties may be inflicted only if the accused has committed some act, . . . has committed some actus reas") (interpreting Robinson v. California, 370 U.S. 660 (1962)).

19. Staples v. United States, 511 U.S. 600, 605 (1994) (quoting United States v. United States Gypsum Co., 438 U.S. 422, 436 (1978) (quoting Dennis v. United States, 341 U.S. 494, 500 (1951))).

> 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 persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette 342 U.S. at 250. *See also* Liparota v. United States, 471 U.S. 419, 426 (1985) ("[C]riminal offenses requiring no mens rea have a 'generally disfavored status.'") (quoting *United States Gypsum*, 438 U.S. at 438).

20. *See* Levenson, *supra* note 18, at 406, n.29. Much of Levenson's footnote is derived from a 1933 list of strict liability public welfare offenses by Francis B. Sayre. *See id. supra* note 18, at 406, n.29 (citing Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73 (1933)). *See also* Robert J. Jossen, *Strict Liability in Criminal Cases—The Present Day Implications of Dotterweich and Park*, *in* CRIMINAL LAW AND URBAN PROBLEMS 1985, at 33, 39-40 (PLI Litig. & Admin. Practice Course Handbook Series No. C4-4174, Dec. 16, 1985) (citing other examples of strict liability crimes including transportation of dangerous products, dumping of hazardous wastes, fishing in international waters, Occupational Health and Safety Act violations).

21. *See* Levenson, *supra* note 18, at 413 n.76 (citing the Tobacco Adjustment Act of 1984, 7 U.S.C. § 509 (Supp. II 1990) (imposing imprisonment up to five years for failure to comply with tobacco manufacturer's reporting requirements)). It has been said that felony murder is a form of strict criminal liability in that criminal liability is imposed regardless of whether or not deaths were a

Strict criminal liability means criminal prosecution without proof of mens rea, without proof of guilty knowledge or of evil or wrongful purpose—the defendant may not even know the facts that subject him or her to criminal liability.[22] Strict criminal liability has also been described as a no-fault crime, allowing conviction without proof of any fault on the part of the defendant.[23] In this sense, strict liability is absolute liability.[24] Absolute criminal liability can convict the morally blameless or "innocent"[25] and, perhaps, has been best described by the statement that, "If a principle is at work here, it is the principle of 'tough luck.'"[26]

B. *Ambiguities In Strict Criminal Liability Overlap with Other Mens Rea*

A more accurate description of strict criminal liability is that it removes the requirement of proof of the defendant's knowledge of one or more key or "mate

---

foreseeable consequence of the illegal crimes being committed. Levenson, *supra* note 18, at 423 n.113; *id.* at 425 n.125.

22. *See also* Zipperman, *supra* note 5, at 127 (strict criminal liability can hold one "liable, although he is not only not charged with moral wrongdoing, but has not even departed in any way from a reasonable standard of intent or care.") (quoting W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 75, at 536 (5th ed. 1984)). *See, e.g.*,United States v. Balint, 258 U.S. 250, 252-53 (1922); Jossen, *supra* note 20, at 35.

23. *See, e.g.*, United States v. Freed, 401 U.S. 601, 610 (1971) (quoting *Balint*, 342 U.S. at 254) (explaining that strict liability may expose those who are "innocent" actors to a criminal penalty).

24. *See* United States v. Ayo-Gonzalez, 536 F.2d 652, 660 (5th Cir. 1976); Levenson, *supra* note 18, at 417. "Absolute liability" means criminal liability without regard to the defendant's knowledge or intentions and may be a technically accurate description of a strict liability crime, but it probably is generally not an accurate description of what a prosecutor is willing to prosecute. *See id.* at 417 n.86 (suggesting "absolute liability" more precisely describes situations in commonwealth countries in which Parliament expressly states that no mens rea is required *and* that no defense based on mens rea will be permitted) (citing C.B. Cato, *Strict Liability and the Half-Way House*, 1981 N.Z. L.J. 294, 294 n.6 (1981)). *But see* Levenson, *supra* note 18, at 415 ("The prosecution proposed to hold Keating 'responsible for an offense which, no matter how careful, no matter how honest, no matter how decent and law abiding he may be, he could not by the most diligent effort know about.'") (quoting prosecution argument in Respondent's Brief at 18-20, People v. Keating, No. BA 025236 (Cal. Super. Ct. 1991)). Strict liability in tort is rarely absolute. *See* KEETON, *supra* note 22, § 79, at 559-60.

25. *See* Levenson, *supra* note 18, at 413 (listing convictions of persons without knowledge of their own wrongdoing, including a widow convicted of adultery after being erroneously informed that her husband was dead, Regina v. Tolson, 23 Q.B.D. 168 (1889), and also a farmer convicted of trespass after relying on faulty government survey report, State v. Gould, 40 Iowa 372 (1875)). *See generally* KEETON, *supra* note 22, § 75, at 535 (distinguishing the criminal law "fault" connotation of moral blame from tort law "fault" which means only a departure from a required standard of conduct even if innocent or beyond defendant's control).

26. Stanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 267 (1987). *See also* Mark Kelman, *Strict Liability: An Unorthodox View, in* 4 ENCYCLOPEDIA OF CRIME & JUST. 1512, 1515 (Standford H. Kadish ed., 1983) ("[T]here is no reason to believe that he is anything worse than unlucky, and no reason to single him out for disapproval.").

rial" elements of the crime.[27] The requirement for some knowledge distinguishes strict liability from absolute liability. Strict liability crimes are also kin to the related doctrines of vicarious criminal liability[28] and responsible corporate officer[29] which can impose a duty to ascertain relevant facts and to undertake action to prevent violations.[30]

Strict criminal liability is similar to negligent crimes in that negligent crimes do not require any particular state of mind on the part of the defendant[31] but,

---

27. *See* Levenson, *supra* note 18, at 418 n.90 (citing MODEL PENAL CODE §§ 2.02(4), 2.05 (1962)). In the course of rejecting a strict criminal liability interpretation of the National Firearms Act 26 U.S.C. §§ 5801-5872 (1994), the Supreme Court stated that "the term 'strict liability' is really a misnomer," and that, in interpreting public welfare offenses, it has generally "avoided construing criminal statutes to impose a rigorous form of strict liability." Staples v. United States, 511 U.S. 600, 607 n.3 (1994). In *Staples*, the Court stated expressly that "different elements of the same offense can require different mental states." *Id.* at 609. Courts have also interpreted a strict criminal liability provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)(2) (1994), to include a knowledge component. *See* Zipperman, *supra* note 5, at 159 n.257. Strict liability in tort also requires some amount of knowledge. Prosser and Keeton observe that, absent a contrary statutory provision:

> [S]trict liability will never be found unless the defendant is aware of the abnormally dangerous condition or activity, and has voluntarily engaged in or permitted it. Mere negligent failure to discover or prevent it is not enough, although it may, of course, be an independent basis of liability . . . . What is meant is that he is liable although (1) he did not intend an invasion on the basis of which liability could be imposed and (2) he was not negligent in proximately causing the harm.

27. KEETON, *supra* note 22, § 79, at 559 (footnote omitted).

28. *See* KEETON, *supra* note 22, § 81, at 582 (stating that "[v]icarious liability is now quite generally recognized as a form of strict liability" in torts.) (footnote omitted); Levenson, *supra* note 18, at 417 n.86 ("Vicarious liability refers to a respondeat superior notion that a supervising individual or corporation may be criminally liable for another's act without knowledge of the wrongful conduct of the responsible party.") (citations omitted).

29. *See Ayo-Gonzalez*, 536 F.2d at 661-62 (relying on responsible corporate officer analysis in United States v. Park, 421 U.S. 658, 676 (1975)).

30. *See infra* notes 53-57 and 66-67, and accompanying text (discussing Unites States v. Park, 421 U.S. 658 (1975), and United States v. Dotterweich, 320 U.S. 277 (1943)).

31. *See* Levenson, *supra* note 18, at 420 n.98. The negligent defendant may be totally unaware of risks created by his or her activities, but the law holds him or her responsible for his or her disregard of the rights of and risks to others. *See* Levenson, *supra* note 18, at 420 n.97.

> Again where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person *though he be ignorant of the noxious character of what he sells.*

United States v. Balint, 258 U.S. 250, 252-53 (1922) (emphasis added) (citation omitted) (affirming strict criminal liability for narcotics sale). In terms of the defendant's lack of knowledge, the negligence described by the *Balint* court is indistinguishable from a strict liability crime, but the burden of proof and the defenses available differ for strict criminal liability and for negligent crimes.

"*Park* established that the failure of a manager to act, when he or she had the authority and responsibility to act, will result in a violation. This description of duty and breach invites a standard negligence analysis." Zipperman, *supra* note 5, at 132 (citing *Park*, 421 U.S. at 671). Still, "[t]he *Park* doctrine contains an inherent ambiguity as to whether a corporate officer is strictly liable merely because he or she possesses the power to correct a violation, or whether the prosecution must show the violation of a negligence standard." Zipperman, *supra* note 5, at 133.

"Thus, any differences between the theories of negligence and strict liability are insignificant in practice." *Id.* at 134. "In practice, negligence statutes frequently become the

rather, only require a failure to meet a standard of conduct that is expected of the defendant regardless of his or her state of mind.[32]

In the end, the phrase "strict liability" is misleading and overused. Descriptive phrases such as "absolute liability," "strict liability," "negligence," "knowingly," "general intent," "wilfully" and "specific intent" give a mistaken impression that there are discrete levels of *mens rea* or criminal intent, analogous to physical quantum states, into which any given crime may be placed without overlapping adjacent, but separate, levels of *mens rea*. Instead, different levels of criminal *mens rea* are more numerous and, in practice, tend to merge into a continuum of mental states.[33] On one end of the continuum are crimes for which the prosecution must prove the defendant acted with knowledge that the results were prohibited by a statute of which the defendant knew and which he or she intended to violate.[34] At the other end of the continuum are crimes, much more common in theory than in practice, for which the defendant need only be proven to have caused a prohibited result, regardless of the defendant's knowledge, intention, ability to avoid the result, or even extraordinary efforts to prevent and avoid the result.

An example of the overlap in terminology, and consequential ambiguities, is in the use of "knowingly" and "willfully" to describe *mens rea*.[35] In different contexts, "willfully" means anything from an act simply done "voluntarily and intentionally" without any bad purpose or knowledge of illegality,[36] to an act

---

functional equivalent of strict liability statutes. When the public welfare is at stake, courts often apply strict liability, but call it negligence." Zipperman, *supra* note 5, at 148.

32. One authority has stated that the difference between strict criminal liability and negligent crimes "is that, as long as the crime is a non-strict liability crime [i.e., negligence], the issue is decided by a tribunal which both hears the evidence and sets the standard [of conduct] in the defendant's case." Levenson, *supra* note 18, at 420 n.102 (quoting Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571, 1584 (1978)). Apparently, the Supreme Court agrees. *See* United States v. Morissette, 342 U.S. 246, 263 (1952) ("The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction . . . and to circumscribe the freedom heretofore allowed juries.").

33. *See* United States v. Engler, 806 F.2d 425, 432 n.2 (3d Cir. 1986) (describing a "continuum of strict liability crimes"). The United States Sentencing Guidelines describe a portion of the continuum in the policy statement on regulatory offenses which describes four categories of technical recordkeeping offenses: failure to fill out a form intentionally but without knowledge or intent that substantive harm result; the same failure may carry a substantial likelihood of harm or make the harm more likely; the failure may have actually led to substantive harm; and the failure may have been intended to conceal harm that had occurred. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A4(f) (1999).

34. *See generally* United States v. Moskowitz, 883 F.2d 1142, 1149-50 (2d Cir. 1989) (finding that a willful violation of the Hazardous Materials Transportation Act, 49 U.S.C. § 1472(h)(2), required both knowing acts (voluntary and intentional and not accidental), and knowledge that the regulations prohibited the acts).

35. "Much confusion exists over the precise meaning of mens rea today because 'not all lawyers and judges assign the term . . . a normative meaning.'" Jenkins, *supra* note 18, at 596 n.8 (citing Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1167 n.10 (1995)).

36. 8TH CIR. CRIM. JURY INSTR. 7.02 cmt. (1996); 9TH CIR. CRIM. JURY INSTR. 5.5 cmt. (1997) ("willfulness" as a description of an "intentional mental state" connotes an act "done on purpose; it does not suggest the act was committed for a particular purpose, evil in nature") (quoting

done with knowledge of wrongfulness but not of illegality,[37] to an act done "voluntarily and intentionally with the purpose of violating a known legal duty," as in tax cases,[38] or even an act done knowing the actions were illegal.[39] Similarly, "knowingly" means anything from an act done without any bad purpose or knowledge of illegality,[40] to a possessory act done with knowledge of the nature of the material possessed (*e.g.*, the age of persons depicted in sexually explicit material) but not necessarily knowledge of its illegality,[41] to an act done knowing it was forbidden by law, albeit the defendant may not have known the particular law.[42] The Ninth Circuit has observed that "the difference [between willfully and knowingly] appears to be more one of semantics than actual substance."[43] Similarly, courts use the term "strict liability" to describe a continuum of mental states also described by the terms "absolute liability," "negligence,"[44] and "knowingly."[45]

Appellate courts' pattern jury instructions discourage use of ambiguous terminology such as "general intent," "specific intent," and "willfully."[46] Properly, a court should focus on the *mens rea* required for each individual element of the offense.[47] Nevertheless, courts continue to characterize statutes as a whole. Consequently, the degree of concern that a court may show for the imposition of

---

S. REP. NO. 95-605, at 58-59 (1977)). *See also* 9TH CIR. CRIM. JURY INSTR. 5.5 cmt. (1997) ("In many cases, . . . the concept of willfulness will be adequately explained in other instructions defining 'knowingly,' 'intentionally,' or 'deliberately.'"). "The word 'willful,' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." 9TH CIR. CRIM. JURY INSTR. 5.5 cmt. (1997) (quoting Judge Learned Hand in American Surety Co. v. Sullivan, 7 F.2d 605, 606 (2nd Cir. 1925)).

37. *See, e.g.*, Bryan v. United States, 524 U.S. 184, 192-93 (1998) (proof of knowledge of the law is not required because of the "background presumption that every citizen knows the law").

38. *See* 8TH CIR. CRIM. JURY INSTR. 7.02 cmt. (1996); 9th Cir. Crim. Jury Instr. 5.5 cmt. (1997).

39. *See* 9TH CIR. CRIM. JURY INSTR. 5.5 cmt. (1997) (in context of 31 U.S.C. § 5324 (1994)).

40. *See* 8TH CIR. CRIM. JURY INSTR. 7.03 cmt. (1996); 9th Cir. Crim. Jury Instr. 5.6 cmt. (1997).

41. *See* 8TH CIR. CRIM. JURY INSTR. 7.03 cmt. (1996) (citing United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)).

42. *See* 8TH CIR. CRIM. JURY INSTR. 7.03 cmt. (1996) (citing Liparota v. United States, 471 U.S. 419, 434 (1985)).

43. *See* 9TH CIR. CRIM. JURY INSTR. 5.5 cmt. (1997) (quoting United States v. Sirhan, 504 F.2d 818, 820 n.3 (9th Cir. 1974)).

44. *See, e.g.*, United States v. Balint, 258 U.S. 250, 252 (1922).

45. Courts uncomfortable with strict liability often adopt defenses and burdens of presenting evidence normally applicable to negligent crimes. *See infra* Part VI (Defenses, Limitations, and Ameliorations to Strict Liability).

46. 9TH CIR. CRIM. JURY INSTR. 5.4 cmt. (1997) ("recommends avoiding instructions that distinguish between 'specific intent' and 'general intent'"); *id.* at 5.5 (recommends no instruction defining willfully); *id.* at 5.6 (instruction may be appropriate but it is reversible error to give knowingly instruction in money laundering cases); 8TH CIR. CRIM. JURY INSTR. 7.01 cmt. (1996) (no specific intent instruction recommended), *id.* at 7.02 (no willfully instruction recommended except in tax cases and odometer fraud cases), *id.* at 7.03 (no knowingly instruction recommended).

47. *See, e.g.*, 9TH CIR. CRIM. JURY INSTR. 5.4 cmt. (1997) ("Accordingly, the judge should determine the requisite mental state as to each element of the charged offense and instruct thereon."); Staples v. United States, 511 U.S. 600, 607 n.3 (1994) (public welfare offenses eliminate the requirement of *mens rea* with respect to *an* element of a crime).

strict criminal liability depends on what form of "strict liability" it is imposing from the outset.

IV. JUDICIAL ACCEPTANCE OF STRICT CRIMINAL LIABILITY

Strict criminal liability has been upheld by courts,[48] including the United States Supreme Court, in even its strictest forms. Although the Supreme Court has described strict criminal liability as "generally disfavored,"[49] it does not "invariably offend constitutional requirements."[50]

The Supreme Court has endorsed the application of strict criminal liability in which absolutely no *mens rea* was required,[51] *i.e.*, absolute liability. At other times the Supreme Court has affirmed criminal liability under statutes that omitted the *mens rea* requirement for one or more elements of the offense but not for all the elements. It described some of those cases as "strict liability" offenses and others as "knowing" offenses but the results were similar for the defendants. The point of these cases is that Congress may Constitutionally omit the requirement for *mens rea* from criminal statutes, regardless of whether the offenses are or are not characterized as "strict liability" crimes. Cases in which the Supreme Court has upheld the omission of *mens rea* from criminal statutes include the following:[52]

> *United States v. Park*,[53] reinstated a misdemeanor[54] conviction of a "responsible corporate officer" for adulterated food stored in a contaminated warehouse. Although there was evidence that the defendant knew of the problem, the Supreme Court stated, without reservations, that the Act did not condition criminal liability upon the defendant's "awareness of some wrongdoing" or "conscious fraud."[55] The defendant need only have been in a position with responsibility and authority to pre-

---

48. *See, e.g.*, United States v. Ayo-Gonzalez, 536 F.2d 652, 657-58 (5th Cir. 1976); United States v. Engler, 806 F.2d 425, 435-36 (3d. Cir. 1986). *See also supra* Part II (MBTA Misdemeanors Held To Be Strict Liability Crimes).

49. United States v. United States Gypsum Co., 438 U.S. 422, 437-38 (1978).

50. United States Gypsum Co., 438 U.S. at 437.

51. *See, e.g.*, United States v. Balint, 258 U.S. 250, 252 (1922).

52. Except as otherwise noted, the maximum penalties described for the listed Supreme Court cases are taken from *Engler*, 806 F.2d at 435.

53. 421 U.S. 658 (1975). One commentator has argued that reliance on *Park* or *Dotterweich*, in the context of strict liability, as opposed to vicarious liability crimes, is misplaced since the question involved in those cases was extension of existing strict liability under the FDCA rather than the initial imposition of strict liability. *See* Woodrum, *supra* note 14, at 249 n.81 (describing *Park* and *Dotterwiech* as cases of vicarious liability in which the liability happened to be strict liability). However, one can also argue that, instead of being held vicariously liable for the violations of their subordinates, the corporate officers were being held strictly liable for failing to perform a statutory duty of their own, such as to prevent the violations. *See* Zipperman, *supra* note 6, at 129.

54. The maximum possible imprisonment for a federal misdemeanor conviction is one year, and it may be less. *See* 18 U.S.C. § 3559(a)(6)-(8) (1994) (classification of misdemeanor offenses); *id.* § 3581(b)(6)-(8) (maximum terms of imprisonment for misdemeanors).

55. United States v. Park, 421 U.S. 658, 672-73 (1975) (citing United States v. Dotterweich, 320 U.S. 277 (1943)).

vent or correct the violation and failed to do so.[56] The statute imposed "a positive duty to seek out and remedy violations . . . [and] a duty to implement measures that will insure that violations will not occur."[57]

United States v. International Minerals & Chemical Corp.,[58] reinstated an information which failed to charge a "'knowing violation' of the regulation"[59] that required hazardous materials to be listed on shipping papers. Relying on *Balint* and *Freed*, the Court stated that the probability of regulations is so great that anyone aware of his or her possession of hazardous materials "must be presumed to be aware of the regulation."[60] The Court also held that the defendant would not be guilty if, in good faith, the defendant thought it was shipping an innocuous substance such as distilled water.[61]

United States v. Freed,[62] reinstated an indictment, charging possession of an unregistered destructive device, specifically hand grenades, that had no allegation that the defendant knew them to be unregistered.[63] The maximum penalty was $10,000, ten years in prison, or both.

United States v. Wiesenfeld Warehouse Company,[64] reinstated an information charging the defendant with holding food under unsanitary conditions, the court observing that "[i]t is settled law in the area of food and drug regulation that a guilty intent is not always a prerequisite to the imposition of criminal sanctions."

---

56. *See, e.g.*, *Park*, 421 U.S. at 673-74. *Park* specified two requirements for criminal responsibility of persons not directly responsible for the criminal act: (1) the superior must occupy a position of "responsibility and authority" with regard to the act, and (2) must have had the power to prevent it through the exercise of the "highest standard of foresight and vigilance." *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 HARV. L. REV. 1243, 1262-63 (1979) (quoting *Park*, 421 U.S. at 672-674).

57. *Park*, 421 U.S. at 672.

58. 402 U.S. 558 (1971).

59. *International Minerals*, 402 U.S. at 559.

60. *Id.* at 565. The Supreme Court also recited the maxim that "ignorance of the law is no excuse." *Id.* at 562. The Supreme Court does not explain why, if ignorance of the law is truly no excuse, there is any need for a presumption of knowledge of regulations based on the knowing possession of "dangerous or deleterious devices or products . . . ." *Id.* at 565. *Cf.* Lambert v. California, 355 U.S. 225, 228 (1957) (finding a due process notice requirement is a precondition "where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case."). *International Minerals* illustrates the converse of the paradox described by Jenkins: "Although the criminal law generally sought to punish only the morally blameworthy, the law, in a confusing and ill-defined paradox, also generally held that ignorance of the law was no excuse from criminal liability." Jenkins, *supra* note 18, at 597.

61. *International Minerals*, 402 U.S. at 563-64. Although the Court expressly distinguished *International Minerals* and *Freed* from strict liability offenses, both the *International Minerals* and *Freed* decisions presumed knowledge of regulations, based upon the defendant's knowledge of the nature of the items possessed, and dispensed with any requirement to prove the defendant acted with a bad or guilty intent.

62. 401 U.S. 601 (1971).

63. Only the manufacturer or importer could register. *Freed*, 401 U.S. at 603-604.

64. 376 U.S. 86, 91 (1964). The issue in *Wiesenfeld Warehouse* was whether the statute was vague and whether the District Court had correctly interpreted the statute. *See id* at 89-91. Consequently, the Supreme Court's discussion of the requisite intent was *dicta*.

Williams v. North Carolina,[65] affirmed a conviction for bigamy, with no proof that the defendants knew that North Carolina would not recognize their Nebraska divorces. The maximum penalty was ten years in prison.

United States v. Dotterweich,[66] reinstated a misdemeanor conviction for misbranded and adulterated drugs. The defendant's *mens rea* was not an issue in the Supreme Court but the Court described the statute under which he was convicted as being of a type that "dispenses with the conventional requirement for criminal conduct--awareness of some wrongdoing."[67]

United States v. Balint,[68] reinstated an indictment, charging selling of a derivative of opium, that had no allegation that the defendant knew it to be a prohibited drug. The maximum penalty was five years in prison.

Chicago, Burlington, & Quincy Ry. v. United States,[69] affirmed a penalty for failure to properly maintain rail car couplers and brakes, even though the defendant exercised reasonable care, had no knowledge the cars were out of repair, and had no intention to violate the law.[70] Although the case was a *civil* proceeding, the reasoning of the Supreme Court did not distinguish between civil and criminal proceedings.[71]

Shevlin-Carpenter Company v. Minnesota,[72] affirmed a conviction for trespass, in the form of timber cutting, even though the defendant "had reasonable ground for believing authority had been granted, and honestly acted on such belief."[73] The penalty for the corporate defendant

---

65. 325 U.S. 226 (1945).

66. 320 U.S. 277 (1943); *see also supra* note 53 (discussing whether *Park* and *Dotterweich* are appropriate precedents for interpreting strict criminal liability).

67. United States v. Dotterweich, 320 U.S. 277, 281 (1943).

68. 258 U.S. 250 (1922). *See also* United States v. Behrman, 258 U.S. 280, 288 (1922) (reinstating indictment for unlawful selling of narcotics by a physician writing prescriptions; "If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.").

69. 220 U.S. 559 (1911).

70. *See id.* at 569.

71. "The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned." *Chicago, Burlington & Quincy Ry.*, 220 U.S. at 578 (citations omitted). *See also id.* at 579.

72. 218 U.S. 57 (1910).

73. *Shelvin-Carpenter*, 218 U.S. at 64 (quoting State v. Shevlin-Carpenter Co., 102 Minn. 470, 479, 113 N.W. 634, 638 (1907)). In *Shevlin-Carpenter*, the Supreme Court articulated a conclusive argument that "innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse." *Id.* at 68. The problem in the *Shevlin-Carpenter* reasoning is that the defendant was reasonably mistaken as to the factual status of his permit, not the legal consequences of those facts. The Court did not rely on the reasoning of *Shevlin-Carpenter* in its *Balint* decision, in which it described potential "innocent" sellers of drugs, something impossible under the *Shevlin-Carpenter* reasoning that there can be no "innocent" law-breakers. *See Balint*, 258 U.S. at 254 (describing potential "innocent" sellers of drugs).

was double damages in the amount of $14,664.12[74] but the penalty for an individual could include up to two years in prison.[75]

Certain themes, not always consistent, can be derived from the Supreme Court cases. The offenses were often labeled as public welfare, safety, or morals statutes.[76] The Court was usually but not always of the opinion that the affected public either should have been aware that there would be laws or regulations that should be consulted,[77] or had knowingly assumed a risk.[78] The Court has

---

Note however that, today, environmental and wildlife permits are treated as an extension of regulatory law and, as such, their interpretation are matters of law and not of fact. *See, e.g.*, United States v. Weitzenhoff, 35 F.3d 1275, 1287 (9th Cir. 1993).

74. *Shelvin-Carpenter*, 218 U.S. at 64.

75. *See id.* at 62 n.1.

76. *See, e.g.*, United States v. Freed, 401 U.S. 601, 609 (1971) (public safety); Williams v. North Carolina, 325 U.S. 226, 238 (1945) ("public policy . . . bearing upon the integrity of family life . . . ."); United States v. Dotterweich, 320 U.S. 277, 280 (1943) ("phases of the lives and health of people which . . . are largely beyond self-protection"); *Balint*, 258 U.S. at 252-53 ("maintenance of a public policy" by police power to control a "noxious" substance); *Shevlin-Carpenter*, 218 U.S. at 68 ("the public welfare has made it necessary to declare a crime"). *See also* Staples v. United States, 511 U.S. 600, 607 (1994) (describing "public welfare offenses"); United States v. Ayo-Gonzalez, 536 F.2d 652, 660 (5th Cir. 1976) ("the Act is based on strong policy considerations").

77. *See, e.g.*, United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) ("[A]nyone who is aware that he is in possession of [dangerous materials] . . . must be presumed to be aware of the regulation."); *Freed*, 401 U.S. at 609 ("[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act."). *See also Balint*, 258 U.S. at 254 ("Doubtless considerations as to the opportunity of the seller to find out the fact" were included by Congress in its calculus in electing strict criminal liability); United States v. Engler, 806 F.2d 425, 435-36 (3d Cir. 1986) ("The capture and sale of species protected by the MBTA is not 'conduct that is wholly passive,' but more closely resembles conduct 'that one would hardly be surprised to learn . . . is not innocent.'") (quoting Missouri v. Holland, 252 U.S. 416, 435 (1920)); *Ayo-Gonzalez*, 536 F.2d at 660 ("[L]awmakers clearly thought it highly unlikely that purely innocent violations would occur."). *See also Staples*, 511 U.S. at 611 (possession of guns, even though arguably "dangerous," would not alert owners to likelihood of strict regulation). The Supreme Court has had a similar focus - on the likelihood that a defendant might know regulations exist - in its decisions that decline to interpret criminal statutes as imposing strict liability. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 432-33 (1985) (distinguishing a strict liability public welfare offense as one in which "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health and safety"); Lambert v. California, 355 U.S. 225, 227 (1957) (finding strict criminal liability violated due process "where no showing is made of the probability of such knowledge" that a felon must register if remaining in Los Angeles more than five days).

Recently, two Supreme Court justices have expressed a desire to limit the application of the public welfare doctrine to individual factual situations arising under the criminal statutes instead of to the statutes as a whole. *See* Hanousek v. United States, 528 U.S. 1102 (2000) (Justices Thomas and O'Connor dissenting from denial of certiorari). Justice Thomas authored the *Staples* opinion that declined to apply the public welfare doctrine to regulation of admittedly dangerous implements, such as guns, if the implements were in common use. *See Staples*, 511 U.S. at 611. Justice O'Connor authored a concurring opinion in *Sweet Home* that elaborated the use of proximate causation to limit strict criminal liability. *See* Babbit v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 708-714 (1995) (Justice O'Connor, concurring).

78. "The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them." United States v. Park, 421 U.S. 658, 672 (1975); *Balint*, 258 U.S. at 252-54 (defendant to act

consistently held that Congress may balance the possible injustice of subjecting an innocent actor to criminal liability against the evil of exposing innocent members of the public to the danger being regulated. "In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relationship to a public danger."[79] The same rationale supports omission of a *mens rea* requirement in other areas of government regulations, including environmental and wildlife regulation.[80]

The Supreme Court has also accepted the difficulty of proving scienter as an appropriate consideration in the calculus by Congress.[81] In general, the Court has not seen the role of courts to be protection of the innocent persons swept up in

---

(selling) and to ascertain facts "at his peril"); *Shevlin-Carpenter Co.*, 218 U.S. at 69 ("When the permit was issued, plaintiffs in error knew the limitations of it, and they took it at the risk and consequences of transgression"). The requirement that the defendant subject to strict liability voluntarily assume a position of responsibility for a foreseeable risk is also a foundation for strict liability in tort. *See* KEETON, *supra* note 22, § 79, at 559.
("It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries [caused by the prohibited conduct], and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard.").

See Morissette v. United States, 342 U.S. 246, 256 (1952) ("The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect . . . from one who assumed his responsibilities."). *But see Liparota*, 471 U.S. at 432-33 (describes most "public welfare offenses" as having "rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety"). The *Liparota* characterization may be difficult to square with *Williams*, 325 U.S. at 227, 239, which upheld a felony conviction for bigamous cohabitation in North Carolina following valid Nevada divorces.

79. United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 (1964) (quoting *Dotterweich*, 320 U.S. at 281). *See, e.g., Dotterweich*, 320 U.S. at 285 ("Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.").

Balint, 258 U.S. at 254 ("Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion."). *See also Chicago, Burlington, & Quincy Ry.*,, 220 U.S. at 575 ("its harshness is no concern to the courts").

Perhaps the reader's most intimate experience with strict criminal liability is with driving faster than the speed limit, inadvertently of course, for which it is particularly apt to say that the risks of the illegal conduct "include the possibility of physical or moral harm, and the possibility that a culpable defendant would escape punishment by feigning ignorance or mistake." Levenson, *supra* note 18, at 424.

80. *See Dotterweich*, 320 U.S. at 282-83 & n.2 (in the context of drug regulation, Congress has observed that, for regulations enforced only by fines, "[c]orporations carrying on an illicit trade would be subject only to . . . a 'license fee' for the conduct of an illegitimate business.") (citing H.Rep. No. 2139, 75th Cong., 3d Sess., p.4).

81. *See, e.g., Balint*, 258 U.S. at 254 ("Doubtless considerations as to the opportunity of the seller to find out the fact . . . " were weighed by Congress); *Shevlin-Carpenter Co.*, 218 U.S. at 69 ("[W]hether wilful, accidental, or involuntary [is] equally difficult to establish . . . ."). *See also Ayo-Gonzalez*, 536 F.2d at 660 ("Moreover, it is appropriate to note that prosecutions under section 1081 would be extremely difficult if the government had to prove willfulness or even negligence.").

the net that Congress cast.[82] Quite the contrary, the Court has emphasized the primacy of implementing the intent of Congress.[83]

The ripple, or perhaps the rapids, in the smooth flow of the Supreme Court's opinions was its decision in *United States v. Morissette*.[84] In *Morissette*, the Supreme Court reversed a conviction for taking $84 worth of spent shell casings from a posted artillery range.[85] Without contradiction, Morissette denied any criminal intent in taking the casings, which he believed to be abandoned.[86] The Supreme Court reversed the conviction.[87] In a frequently quoted passage, the Supreme Court described strict criminal liability cases as ones in which "penalties commonly are relatively small,"[88] a demonstratively inaccurate description

---

82. *But see infra* Part VI. (Defenses, Limitations and Ameliorations to Strict Liability).

83. *See, e.g., Balint*, 258 U.S. at 252-53 (whether scienter is an element of a statutory criminal offense "is a question of legislative intent to be construed by the court"). *See also Liparota*, 471 U.S. at 424 ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (citing to United States v. Hudson, 11 U.S. 32 (1812)); United States v. Engler, 806 F.2d 425, 431 (3d Cir. 1986) ("We agree with the district court that to supply an element of specific intent here would be impermissible 'judicial legislation.'"); Stepniewski v. Gagnon, 732 F.2d 567, 571 (7th Cir. 1984) ("A state's decisions regarding which actions or activities will give rise to strict criminal liability rest within that state's sound legislative discretion."); *Ayo-Gonzalez*, 536 F.2d at 658 ("The question, then, is primarily one of legislative intent, but the result must comport with fundamental constitutional standards.").

84. 342 U.S. 246 (1952).

85. *See Morissette*, 342 U.S. at 247, 276.

86. *See id.* at 248-49.

87. *See id.* at 276.

88. *Id.* at 256.

> The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms . . . . Traffic of velocities, volumes and variety unheard of came to subject the wayfarer to intolerable casualty risks . . . . Congestion of cities and crowding of quarters called for health and welfare regulations . . . . [W]ide distribution of goods became an instrument of wide distribution of harm . . . . Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

Id. at 253-254.

> [L]awmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions . . . aptly called 'public welfare offenses' . . . . Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize . . . . In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

Id. at 254-56. For examples of cases and authorities citing or quoting *Morissette*, see Levenson, *supra* note 18, at 419 n.93; United States v. Wulff, 758 F.2d 1121, 1123 (6th Cir. 1985); *Ayo-Gonzalez*, 536 F.2d at 657-58.

of the Supreme Court's own affirmations of strict criminal liability in the cases listed above.[89] In fact, the *Morissette* decision turned not on the magnitude of the criminal penalties, for Morissette was convicted of a misdemeanor violation,[90] but rather on statutory interpretation.[91] The Supreme Court treated the offense as one based on common law antecedents, for which the Court will not dispense with *mens rea* absent a clear intent by Congress to do so, rather than a public welfare offense.[92] Thus, properly interpreted, *Morissette* is an expression of courts' reluctance to interpret ambiguous criminal statutes as imposing strict liability; it is not an expression of a limit on the power of Congress to impose strict liability.

V. JUDICIAL UNEASINESS WITH STRICT CRIMINAL LIABILITY

The justification for strict criminal liability is that it shifts the risks of dangerous activity to those best able to prevent a mishap.[93] As Dean Roscoe Pound

---

Sometimes, the reliance on *Morissette* appears to be deliberately selective. For example, the Supreme Court in *Staples* cited and relied upon the *Morissette* description of commonly small penalities, and with citations to numerous state court cases, but ignored the many Supreme Court affirmations of strict criminal liability, with the exception of a single "but see" citation to *Balint*. *See* Staples v. United States, 511 U.S. 600, 616-619 (1994).

89. *See supra* Part IV (Judicial Acceptance of Strict Criminal Liability). *See also* Levenson, *supra* note 18, at 404 n.16 ("Furthermore, the Supreme Court has fostered a misperception that culpability is irrelevant because of the absence of severe penalties."); *id.* at n.17 (listing federal and state strict criminal liability felony cases in which maximum sentences could have been as much as five or ten years in prison for narcotics, pornography, securities fraud, bribery, bank loan, and criminal syndicalism offenses). Furthermore, as many have observed, even a misdemeanor conviction can have a significant effect upon one's reputation. *See* United States v. Engler, 806 F.2d 425, 434 (3rd Cir. 1986) ("The differences between the objective penalties of the misdemeanor and felony provisions of the Act is, for due process purposes, de minimus.").

90. *See Morissette*, 342 U.S. at 248. Morissette was sentenced to two months imprisonment or a fine of $200. *Id.* The maximum penalty provided by the statute was one year imprisonment or a fine of up to $1000. *See id.* n.2.

91. *See id.* at 263-73. *See also*, Jenkins, *supra* note 18, at 620 (stating that *Morissette* stands for the proposition that Congressional intent must be determined when criminal intent is omitted); Stepniewski v. Gagnon, 732 F.2d 567, 570 (7th Cir. 1984) (stating that the *Morissette* Court enunciated factors as general policy concerns which explain the historical development of strict liability crimes). *Morissette* established an interpretative presumption that crimes having their origin in the common law will not be construed as eliminating the element of a mens rea absent a clear intent by Congress to eliminate the element. *See* United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978). *See also Morissette*, 342 U.S. at 265 ("[I]t is significant that we have not found, nor has our attention been directed to, any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law.").

92. *See Morissette*, 342 U.S. at 252-53 ("However, the *Balint* and *Behrman* offenses belong to a category of another character, with very different antecedents and origins. The crimes there involved depend on no mental element but consist only of forbidden acts or omissions.").

93. This rationale for strict criminal liability parallels the rational for strict tort liability. The foundation for strict liability in tort is that the defendant has possession and power to control. *See* KEETON, *supra* note 22, at 541 (discussing strict liability for damages caused by trespassing livestock). In the case of strict liability in tort, the public policy at play is that the person who brought into the community an unusual, abnormal, or unnatural activity should bear the costs of misadventure regardless of fault. *See id.* § 75, at 536-537.

said: "'[Strict liability] statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals.'"[94] The Supreme Court has voiced a similar rationale:

> The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.[95]

It is frequently argued, with good cause, that sweeping up the innocent[96] with the guilty, as is the case for strict liability without defenses, does not serve the objective of shifting risks to those best able to prevent mishap, nor does it serve any other reasonable societal purpose.[97]

Whatever value strict criminal liability may have against those with the ability to prevent harm, there is no utility when all reasonable means and care have been taken *and* the activities are commonly accepted as necessary to modern society.[98] Therefore, "[s]trict liability laws are inefficient because they tend

---

Strict liability in tort is essentially a cost-shifting provision that does not depend upon the degree of care but simply on the defendant's choice to undertake the activity. *See id.* § 78, at 556 ("The point is that certain conditions and activities may be so hazardous to another or to the public generally and of such relative infrequent occurrence to justify allocating the risk of loss to the enterpriser engaging in such conduct as a cost of doing business."). Thus, even in the absence of culpability on the part of the defendant, a rational societal purpose is served. In contrast, strict criminal liability does not shift the burden of misadventure from the victim to the initiator of the activity. If there is also no means by which even the most careful defendant could have avoided misadventure, then strict criminal liability serves no purpose other than to frighten citizens into avoiding activities that are useful or even necessary to a modern society.

94. Levenson, *supra* note 18, at 419 n.95 (quoting ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 52 (1921)).

95. United States v. Park, 421 U.S. 658, 671 (1975) (quoting *Morissette*, 342 U.S. at 256).

96. For examples of "innocent" defendants in strict criminal liability cases, see Levenson, *supra* note 18, at 403 n.6 (citing cases concerning reliance on state licensed personnel, and long-standing practices and directions by a supervisor in the defendant's government office). Although beyond the scope of this article, corporate officers and supervisors without knowledge of their subordinates' wrongdoing are not "innocent." One of the most succinct explanations for why they are not innocent was given in an early English criminal case against corporate directors who were ignorant of illegal disposal of waste. "'[I]f persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants.'" Zipperman, *supra* note 6, at 125 (quoting Rex v. Medley, 172 Eng. Rep. 1246, 1250 (K.B. 1834)). *See also* United States v. Parfait Powder Puff Co., 163 F.2d 1008, 1010 (7th Cir. 1947) (a responsible party may not avoid criminal liability by delegating responsibility to a subordinate).

97. *See* Levenson, *supra* note 18, at 425 ("Opponents of the strict liability doctrine argue that its justifications are inconsistent with both utilitarian and retributivist theories of punishment."). The statement assumes that retribution remains an acceptable basis for punishment. In *Morissette*, discussing the historical requirement for scienter, the Supreme Court quoted its previous observation that: "'Retribution is no longer the dominate objective of the criminal law . . . . We also there referred to a prevalent modern philosophy of penology that the punishment should fit the offenders and not merely the crime." *Morissette*, 342 U.S. at 251 n.5 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

98. Levenson observed: "If the defendant crosses those limits, intentionally or unintentionally, society will seek to punish the defendant's behavior. The strict liability doctrine thereby serves an important function of setting firm limits on conduct that society is loath to tolerate." Levenson, *supra* note 18, at 424. That may be true in the instance Levenson gives as an example, felony

to over-deter individuals' behavior."[99] In addition, strict criminal liability reverses the classic principle of the common law that "it is better that ten guilty persons escape than one innocent person suffer."[100] For these reasons, many courts have expressed misgivings about the application of strict criminal liability,[101] including under the MBTA.[102] Perhaps most frequently cited concerning the extent of MBTA strict liability are the Second Circuit decision in *United States v. FMC Corp.*,[103] and two federal district court cases.[104]

In *FMC Corp.*, the court affirmed MBTA misdemeanor convictions for bird deaths resulting from FMC's discharge of wastewater, from pesticide manufacturing, into a pond that attracted migratory birds.[105] After migratory birds were found dead at the pond, FMC attempted various measures to scare the birds

---

murder, but for felony murder, the defendant normally undertakes to commit some felony requiring a wrongful intent. In other cases, the quoted rationale misses the point that, in the course of seeking to brand conduct society is loath to tolerate, Congress may also punish activity that is useful and necessary to a modern society that may inevitably kill some birds regardless of the degree of care and attention exercised by those undertaking the activity.

99. Levenson, *supra* note 18, at 426, 427 n.137 (quoting Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109). While it may be true that strict criminal liability may overdeter, the objection does not address the question of whether it is for Congress to make the policy judgment or for the courts.

100. Levenson, *supra* note 18, at 427 (quoting WILLIAM BLACKSTON, OXFORD DICTIONARY OF QUOTATIONS 73 (2d ed. 1972)); *see* Zipperman, *supra* note 6, at 140-41 (same).

101. *See Morissette*, 342 U.S. at 256 (Courts have construed public welfare statutes that are silent as to intent as dispensing with the intent requirement but "[t]his has not, however, been without expressions of misgiving.").

102. For example, the Seventh Circuit, in *United States v. Van Fossan*, affirmed a conviction for poisoning pigeons that the city authorities had ordered the defendant to remove. *See* United States v. Van Fossan, 899 F.2d 636 (7th Cir. 1990). The Court observed that:

> People who assault federal officers commit a federal crime without knowing that the victim is a federal officer . . . perhaps those who assault birds need not know the victims are migratory. On the other hand, an attack on a person is presumptively criminal, and the offender has no compelling interest in which body of law supplies the penalty.

Van Fossan, 899 F.2d at 639 (citation omitted). The Sixth Circuit, in the course of affirming a conviction for hunting on a baited field, observed that strict liability is a harsh rule, which can ensnare the subjectively innocent, but that it is for Congress and the Secretary of the Interior to change it. *See* United States v. Catlett, 747 F.2d 1102, 1105 (6th Cir. 1984) ("We concede that [strict liability] is a harsh rule and trust that prosecution will take place in the exercise of sound discretion only."). *See also* United States v. Brandt, 717 F.2d 955, 958 (6th Cir. 1983) ("The hunter is therefore placed in a precarious position. He must determine the intent of the individual who seeded the area before undertaking the hunt and, if he errs in that determination, he is criminally responsible. A subjectively 'innocent' person can unwittingly run afoul of the regulation.").

103. 572 F.2d 902 (2nd Cir. 1978). For discussions of *United States v. FMC Corp.*, see George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 188-89, 191-92, 196 (1979), Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L. J. 1, 17 nn.72-73, 18 nn.75-76 (1996), and Benjamin Means, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 825 nn.11-13 (1998).

104. *See* United States v. Rollins, 706 F. Supp. 742, 744 (D. Idaho 1989); United States v. Corbin Farm Serv., 444 F. Supp. 510, 536 (E.D. Cal.), *aff'd*, 578 F.2d 259 (9th Cir. 1978). For discussions of *Corbin Farm*, see Coggins & Patti, *supra* note 103, at 185-87, 191-92; Finet, *supra* note 103, at 16 n.69, 18 n.75, and Means, *supra* note 103, at 825 nn.11-12.

105. *See FMC Corp.*, 572 F.2d at 905, 908.

away from the pond, including Styrofoam floats, loud cannon explosions, and guards.[106] Neighbors complained of the noise, and the guards fell asleep and neglected their duties.[107] "FMC argue[d] that it had no intention to kill birds, that it took no affirmative act to do so, possessed no scienter, and thus should not be held liable under the Act."[108]

The Second Circuit rejected FMC's arguments, quoting from *Morissette* that, "[t]he criminal law may punish 'neglect where the law requires care, or inaction where it imposes a duty.'"[109] Analogizing to strict liability in tort, the court noted that FMC was engaged in the manufacture of a dangerous pesticide and, therefore, Congress in the MBTA reasonably held such persons strictly accountable for unforeseeable consequences of this extra-hazardous activity.[110] Nonetheless, the court was careful to note that "[i]mposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party."[111] The court also noted that "[c]ertainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, [or] plate glass modern office buildings . . . would offend reason and common sense."[112] The court noted that, in any event, "'(a)n innocent technical violation . . . can be taken care of by the

---

106. *See id.* at 905.

107. *See id.*

108. *Id.* at 906.

109. *Id.* at 907 (quoting United States v. Morissette, 342 U.S. 246, 255 (1952)).

110. *See FMC Corp.*, 572 F.2d at 907-08. The Supreme Court's opinion in *Staples v. United States* described "'deleterious devices or products or obnoxious waste materials' [as things that] put their owners on notice that they stand 'in responsible relation to a public danger.'" Staples v. United States, 511 U.S. 600, 610-11 (1994) (quoting United States v. International Minerals & Chem. Group, 402 U.S. 558, 565 (1971) and United States v. Dotterweich, 320 U.S. 277, 281 (1943)). However, dangerousness alone is not sufficient to assume that Congress intended to impose strict liability. The appropriateness of the things to their neighborhood is also important to strict liability analysis because, as the Supreme Court stated, "[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." *Id.* at 611. Curiously, in light of the MBTA's strict criminal liability for hunting violations, the Supreme Court held that the destructive potential of guns does not put their owners on notice of potential regulations. *See id.* at 610-11.

The real meaning of *Staples* is that guns will not be treated as drugs were treated in *Balint*, no matter how destructive they may be. A defendant need not know the nature of drugs he or she possesses but he or she must know the nature of any firearm in order to be criminally liable for violating any regulations applicable to the type of firearm. *Compare Staples*, 511 U.S. at 611, *with Balint*, 258 U.S. at 254 ("[The Narcotic Act's] manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him."). The logic of the distinction may be lost on a generation that grew up with widespread use of both drugs and guns, and with frequent debates over whether to increase or loosen the regulation of each, as it would have been lost on those who grew up in an era (not long before the Court issued its decision in *Balint*) devoid of any regulation of drugs.

111. *FMC Corp.*, 572 F.2d at 908.

112. *See id.* at 905. Expressions of concern over the complexity of the law, prosecutorial discretion, and *mens rea* or scienter requirements are a frequent theme in environmental criminal law. The relationship of the myths to empirical reality has recently been examined by Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115 (1998).

imposition of a small or nominal fine' [and] [s]uch situations properly can be left to the sound discretion of prosecutors and the courts."[113]

Commentators have observed that the Second Circuit relied upon the ultra hazardous nature of pesticide manufacture, and that in future MBTA cases the Second Circuit may not deem criminal seemingly less-hazardous activities that result in unintended deaths of migratory birds.[114] However, as noted by at least one authority, the Second Circuit's list of presumably non-hazardous activities itself is subject to question. For example, "a motor vehicle is a dangerous instrumentality and its operation is a task demanding constant alertness; if the motorist's attention wanders, the death of a bird or other living thing is not a bizarre occurrence."[115]

In *United States v. Rollins*,[116] Rollins had sprayed a field of alfalfa using a registered pesticide, Furadan, which he had used before without problem.[117] Unfortunately, on the instance at issue, geese ingested alfalfa and pesticide and died.[118] The District Court focused on the reasonableness of Rollin's actions and the foreseeability of the outcome.[119] The court concluded that the MBTA was vague and failed to give Rollins fair notice that poisoning migratory birds by pesticide, used in accordance with label instructions, is a crime.[120] *Rollins* clearly turned on the court's view that the outcome of the defendant's actions was not foreseeable rather than whether the outcome of "dead birds" was a violation of the MBTA.

In *United States v. Corbin Farm Service*,[121] the United States charged a pesticide dealer, his employee, an aerial spray operator, and the owner of the field sprayed, with 10 counts for bird deaths resulting from the single application of pesticides to an alfalfa field.[122] In considering pretrial motions to dismiss, the court held that:

---

113. *FMC Corp.*, 572 F.2d at 905 (quoting United States v. Schultze, 28 F. Supp. 234, 236 (W. D. Ky. 1939)).

114. *See, e.g.*, MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 76-78 (3d ed. 1997); Coggins & Patti, *supra* note 103, at 190-92; Margolin, *supra* note 14, at 992-6, 999-1001; Betsy Vencil, *The Migratory Bird Treaty Act—Protecting Wildlife on Our National Refuges—California's Kesterson Reservoir, a Case in Point*, 26 NAT. RESOURCES J. 609, 616-25 (1986); Woodrum, *supra* note 14, at 248-52.

115. Coggins & Patti, *supra* note 103, at 192. *See also infra* Part VII (Bird Deaths Caused By Instrumentalities of Modern Civilization Are Foreseeable and Avoidable). Lower courts are not alone in their solicitude to automobile drivers. In *Staples*, the Supreme Court suggested that it would not accept strict criminal liability for automobile emission control violations absent a clear expression of Congressional intent. *See Staples*, 511 U.S. at 614. The Court's suggestion in *Staples* is inconsistent with the prevalence of strict criminal liability for speeding violations and with the Court's decision in *Chicago, B., & Q. Ry. v. United States*, in which it held that the defendant's reasonable care and ignorance of deficiencies in train car repairs was no defense to an enforcement action. *See* Chicago, Burlington, & Quincy Ry. v. United States, 220 U.S. 559, 568-70, 579 (1911).

116. 706 F. Supp. 742 (D. Idaho 1989).

117. *See Rollins*, 706 F. Supp. at 743.

118. *See id.*

119. *See id.* at 743-44

120. *See id.* at 744-45.

121. 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

122. *See* Corbin Farm Serv., 444 F. Supp. at 515.

> The instant case is one in which the guilty act alone is sufficient to make out the crime. When dealing with pesticides, the public is put on notice that it should exercise care to prevent injury to the environment and to other persons; a requirement of reasonable care under the circumstances of this case does not offend the Constitution. If defendants acted with reasonable care or if they were powerless to prevent the violation, then a very different question would be presented.[123]

Thus, the District Court in *Corbin Farm* based its decision on the known hazards of pesticides and the foreseeable consequences, as had the Second Circuit in *FMC Corp.* It made explicit the reasonable care standard implicit in *Rollins*, thereby raising the possibility of a due care defense.[124]

VI. DEFENSES, LIMITATIONS, AND AMELIORATIONS TO STRICT LIABILITY

In an effort to ameliorate the harsh effects of strict criminal liability with respect to the "innocent," courts have relied upon a number of theories and defenses, including reinterpretation of the statute,[125] due process, proximate causation,[126] minimal punishment, good faith, due care, impossibility, and relying on prosecutorial discretion.[127] Often courts use defenses to obtain "justice" in indi-

---

123. *Id.* at 536 (citing United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91-92 (1964)).

124. *See* BEAN, *supra* note 114, at 76-78; Coggins & Patti, *supra* note 103, at 186-87; Margolin, *supra* note 14, at 994-96, 999-1001; Woodrum, *supra* note 14, at 252-53.

125. *See* Levenson, *supra* note 18, at 429 & n.148 (citing examples of cases reading an intent requirement in statutory crimes).

126. *See infra* Part VI.C (Proximate Causation).

127. *See* Levenson, *supra* note 18, at 432-33. Arguably, still other defenses could be raised. For example, the Cruel and Unusual Punishment Clause might be invoked to bar particularly severe punishment of a defendant the court views as innocent of wrongdoing. *See, e.g.*, Stepniewski v. Gagnon, 732 F.2d 567, 571 n.3 (1984) (the Cruel and Unusual Clause "proscribes punishment grossly disproportionate to the severity of the crime . . . .") (quoting Ingraham v. Wright, 430 U.S. 651, 667 (1977)). The ambiguity of the terms "severe punishment" and "innocence" leave a great deal of room for creativity. *See, e.g.*, Lambert v. California, 355 U.S. 225, 227, 229 (1957) (describing a $250 fine and three years probation as "heavy criminal penalties").

In at least two situations, the Supreme Court has observed that a number of related theories have been used independently and together to adjust the balance between protecting the innocent and convicting the corrupt.

> The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Montana v. Egelhoff, 518 U.S. 37, 56 (1996) (quoting Powell v. State of Texas, 392 U.S. 514, 535-36 (1968)). One might add good faith to the list.

An additional defense to strict liability in tort is performance of a public duty. *See* KEETON, *supra* note 22, § 79, at 567. An analogous issue under the MBTA remains undecided, that being whether government contractors share the federal government's immunity from prosecution. *See* Sierra Club v. Martin, 110 F.3d 1551, 1555 (11th Cir. 1997) ("It [the MBTA] does not apply to the federal government."); Newton County Wildlife Ass'n v. United States Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) ("MBTA does not appear to apply to the activities of federal government agencies."); Curry v. United States Forest Serv., 988 F. Supp. 541, 548 (W.D. Pa. 1997) ("The MBTA, by its plain language, does not subject the federal government to its prohibitions").

vidual cases while still upholding a strict liability interpretation of the criminal statute.[128]

A. *Reinterpretation*

Although most courts have consistently held the MBTA criminal provisions to be strict liability crimes, some courts have struggled with whether to read an intent requirement into the MBTA criminal provisions.

In the course of rejecting a due process challenge to the MBTA, the Third Circuit held that, if there were a due process problem, it would be "impermissible 'judicial legislation'" to correct the statute by adding an intent element to the MBTA felony provision.[129] On the other hand, in reviewing a misdemeanor conviction for violation of baiting regulations, the Fifth Circuit chose to part company with every other Circuit Court of Appeals and to interpret MBTA regulations as requiring elements of intent.[130] Significantly, in both instances in which a federal circuit court expressed objections to the absence of scienter in a MBTA prosecution, Congress has amended the statute, even when the weight of judicial authority supported strict criminal liability under the MBTA.[131]

However, in a recent decision, the Court of Appeals for the District of Columbia held that the MBTA does apply to federal government officials, at least in some instances. *See* Humane Soc'y of the United States v. Glickman, 217 F.3d 882 (D.C. Cir. 2000) (MBTA prohibitions against harming birds apply to the federal government but the criminal sanctions do not).

128. Apparently even the most ardent supporters of the MBTA among environmentalists are not prepared to argue for strict criminal liability in all instances. For example, environmentalists have challenged the FWS for not restricting loggers but has not argued for an elimination of bird mortality, instead arguing for a significant reduction. *See, e.g.*, Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation, submitted by Alliance for the Rockies, *et al.*, November 17, 1999, Section 6, page 17 (ID: SEM-99-002) ("FWS has the flexibility to craft regulations that implement and enforce the MBTA in a way that significantly reduces the impacts of logging operations on migratory birds while allowing logging, an activity that the Submitting Parties recognize as an economically valuable use of forests."), <http://www.cec.org/citizen/guides_registry/registrytext.efm?%varlan=english&documentid=220>.

129. United States v. Engler, 806 F.2d 425, 431 (3d Cir. 1986) (quoting United States v. Engler, 627 F. Supp. 196, 199 (M. D. Pa. 1985).

130. *See* United States v. Delahoussaye, 572 F.2d 910, 912 (5th Cir. 1978). The Fifth Circuit's decision was based in part on a desire not to see judges as defendants in MBTA prosecutions. *See Delahoussaye*, 573 F.2d at 912-13 ("Any other interpretation would simply render criminal conviction an unavoidable occasional consequence of duck hunting and deny the sport to those such as, say, judges who might find such a consequence unacceptable."). At least one court has also read an intent requirement into the MBTA in instances of indirect action modifying habitat, such as, logging. *See* Mahler v. United States Forest Serv., 927 F. Supp. 1559, 1579 (S.D. Ind. 1996) ("The MBTA does not apply to other activities [other than those intended to harm birds] that result in unintended deaths of migratory birds."). However, other courts addressing logging have not relied upon the defendant's intention, but, instead, rely solely on the purported indirect nature of the harm to birds. *See, e.g.*, Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 303 (9th Cir.1991) ("[Precedent does] not suggest that habitat destruction, leading indirectly to bird deaths, amounts to the 'taking' of migratory birds within the meaning of the Migratory Bird Treaty Act.").

131. *Compare* Emergency Wetlands Resources Act of 1986, Section 501, Pub. L. No. 99-645, 100 Stat. 3582, 3590 (1986) (amending 16 U.S.C. § 707(b) felony provision to include requirement for knowledge), *with supra* note 17 (cases affirming strict MBTA criminal liability).

B. *Due Process*

> The Due Process Clause contains basically four requirements for criminal statutes. Due process: (1) prohibits statutes from shifting burdens of proof onto defendants; (2) prohibits the punishment of wholly passive conduct; (3) protects against vague and overbroad statutes; and (4) requires that statutes give fair warnings of prohibited conduct. 'The due process clause imposes little other restraint on the state's power to define criminal acts.' . . . Essentially, the more a regulation prohibits what an average citizen would consider wholly innocent behavior, the more likely a legislature must require knowledge of the law as an element of the crime.[132]

Due process challenges to strict criminal liability have focused on the second (punishment of passive conduct) and fourth (fair warning) requirements of due process.

Perhaps the leading case for the due process defense to strict criminal liability was *Lambert v. California*.[133] Lambert was a resident of Los Angeles for over seven years and, during that time, she was convicted of forgery, a felony.[134] The Los Angeles Municipal Code made it unlawful for any felon to stay in Los Angeles for more than five days without registering,[135] which Lambert failed to do.[136] She was convicted of failing to register, fined $250, and placed on probation for three years.[137] The Supreme Court characterized Lambert's conduct as "wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed."[138] Stating that a requirement of notice is engrained in the concept of due process, the Court held that the registration requirement violated due process, in the absence of either proof that the defendant had actual knowledge of the requirement or that she had an opportunity to register and avoid criminal penalties once she learned of the ordinance.[139] One might ask whether the result would

---

132. Jenkins, *supra* note 18, at 600-01 (internal citations omitted); *accord Stepniewski*, 732 F.2d at 571. *But see* United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985) (MBTA felony provision was a strict liability crime but, as such, it violated due process because the penalty was not "relatively small" and a conviction might "gravely besmirch" the defendant's reputation). Taking exception to the Sixth Circuit's conclusions, the Third Circuit found no due process problem with strict criminal liability. *See Engler*, 806 F.2d at 433. Significantly, affirming the strict criminal liability, the Third Circuit rejected the prosecution's concession that the absence of a scienter requirement in the MBTA felony provision violated due process. *See id.*

133. 355 U.S. 225 (1957).

134. *Lambert*, 355 U.S. at 226.

135. *See id.*

136. *See id.*

137. *See id.* at 227.

138. *Id.* at 228.

139. *See id.* at 228-29. In a subsequent opinion, the Supreme Court described its *Lambert* decision as holding "that a person could not be punished for a 'crime' of omission, if that person did not know, and the State had taken no reasonable steps to inform him, of his duty to act and of the criminal penalty for failure to do so." Powell v. Texas, 392 U.S. 514, 535 n.27 (1968). Although not mentioned by the Court in the quoted passage, in *Lambert*, the Court's concern that the defendant, upon learning of the registration requirement, was unable to register without risking a criminal penalty suggests Fifth Amendment self-incrimination issues were coupled with the due process

have been the same if Lambert had moved into Los Angeles (active conduct) after conviction of a felony, or if her felony conviction had been for child molesting.[140]

In *United States v. Engler*,[141] the Third Circuit reviewed a conviction under the original, strict liability felony provision of the MBTA, for sale of bird parts. In a very thoroughly reasoned opinion, the Third Circuit observed that the Supreme Court has repeatedly affirmed felony convictions in strict liability criminal prosecutions.[142] From its review of the Supreme Court cases, the Third Circuit discerned criteria for distinguishing permissible and impermissible use of strict liability in criminal cases, particularly in light of *United States v. Freed.*

> There [in *Freed*], the Court distinguished two types of strict liability crimes. Strict liability for omissions which are not "per se blameworthy" may violate due process because such derelictions are "'unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed.'" By contrast, due process is not violated by the imposition of strict liability as part of "a regulatory measure in the interest of public safety, which may well be premised on the theory that one would hardly be surprised to learn that [the prohibited conduct] is not an innocent act."[143]

In *Lambert* terms, Engler's conduct was active and such that Engler should have known there would be regulations governing his trade.

C. *Proximate Causation*

The Supreme Court has observed that:

> In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'[144]

---

notice problem. *See Lambert*, 355 U.S. at 229 ("this appellant . . . was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent.").

140. *See* 42 U.S.C.A. § 14072(i) (Supp. 2000) (knowing failure of certain sexual offenders to register with the FBI is punishable by up to one year in prison and, for second offenses, by up to 10 years). Justice Frankfurter, writing in dissent in *Lambert*, said "I feel confident that the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law." *Lambert*, 355 U.S. at 232 (Frankfurter, J., dissenting).

141. 806 F.2d 425 (3d Cir. 1986).

142. *See Engler*, 806 F.2d at 433-36 (citing United States v. Freed, 401 U.S. 601 (1971) (possession of unregistered firearm); Williams v. North Carolina, 325 U.S. 226 (1945) (bigamous cohabitation); United States v. Dotterweich, 320 U.S. 277 (1943) (shipment of misbranded or adulterated drugs; felony for subsequent offenses); United States v. Balint, 258 U.S. 250 (1922) (unlawful drug sale); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) (cutting timber on state lands)).

143. *Engler*, 806 F.2d at 435 (quoting United States v. Freed, 401 U.S. 601, 608, 609 (1971)) (internal citations omitted).

144. Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 266 n.10 (1992) (quoting KEETON, *supra* note 22, § 41, at 264 (quoting North v. Johnson, 58 Minn. 242, 245, 59 N.W. 1012 (1894))).

Proximate causation is a tool courts use to "limit a person's responsibility for the consequences of that person's own acts."[145]

In *Babbitt v. Sweet Home*,[146] an Endangered Species Act (ESA)[147] case, proponents of logging challenged ESA regulations which expanded the statutory definition of harm to include significant "habitat modification or degradation where it actually kills or injures wildlife."[148] In responding to the dissent's contention that the ESA provisions could encompass remote and unforeseeable consequences, the majority of the Supreme Court suggested that proximate causation would be required.[149]

> We do not agree with the dissent that the regulation covers results that are not "even foreseeable . . . no matter how long the chain of causality between modification and injury." Respondents have suggested no reason why either the "knowingly violates" or the "otherwise violates" provision of the statute — or the "harm" regulation itself — should not be read to incorporate ordinary requirements of proximate causation and foreseeability.[150]

---

145. *Holmes*, 503 U.S. at 268. *Holmes* listed three reasons for requiring proximate causation in civil cases, two of which also have application to criminal case: "First, the less direct the injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors . . . . And, finally, the need to grapple with these problems [of remote causation] is unjustified by the general interest in deterring injurious conduct . . . ." *Holmes*, 503 U.S. at 269.

146. 515 U.S. 687 (1995). For discussion of the *Sweet Home* decision and its implications, *see generally* Tara L. Mueller, *Babbitt v. Sweet Home Chapter of Communities: When Is Habitat Modification A Take?*, 3 HASTINGS W.N.W. J. ENVTL. L. & POL'Y 333 (1996).

147. Endangered Species Act, 16 U.S.C. §§ 1531- 1544 (1994). The ESA includes a general intent crime requiring knowing conduct. *See Sweet Home*, 515 U.S. at 696 n.9 (citing 16 U.S.C. §§ 1540(a)(1), (b)(1)). The ESA also includes a strict liability civil penalty provision applicable to "any person who otherwise violates" the Act. *See Sweet Home*, 515 U.S. at 696 n.9 (citing 16 U.S.C. § 1540(a)(1)).

148. *Sweet Home*, 515 U.S. at 691-92.

149. *See id.* at 696 n.9. The foreseeability (and avoidability) analysis introduced by proximate cause analysis relates to outcomes of actions and is distinct from the foreseeability of the existence of regulations by one possessing or using deleterious materials. *See supra* Part IV (Judicial Acceptance of Strict Criminal Liability) (discussing rationales used by courts affirming strict criminal liability).

150. *Sweet Home*, 515 U.S. at 696 n.9. *See also id.* at 700, n.13 (the regulation is subject to "ordinary requirements of proximate causation and foreseeability"). Justice O'Connor, in a concurring opinion, agreed that criminal liability is limited by proximate causation. *See id.* at 709 (O'Connor, J., concurring) ("the regulation's application is limited by ordinary principles of proximate causation, which introduce notions of foreseeability."). Writing in dissent, Justice Scalia, joined by two others, agreed that criminal liability is limited by proximate causation under the ESA but he differed as to the meaning of proximate cause. *See id.* at 732 (Scalia, J., dissenting) ("In fact 'proximate' causation simply means 'direct' causation.") (citing BLACK'S LAW DICTIONARY 1103 (5th ed. 1979)).

Additional insight into the thinking of the Supreme Court on proximate cause can be gotten by examining its decision in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Company*, 513 U.S. 527 (1995), an admiralty tort case. Justice O'Connor authored the *Grubart* opinion. She also wrote a concurring opinion in *Sweet Home* that discussed proximate causation at length. *See Sweet Home*, 515 U.S. at 708-14 (O'Connor, J., concurring). The Court did not explain the limits imposed by proximate causation but, in *Grubart*, it did describe those limits as being *less*

Recently, in *United States v. Moon Lake Electrical Ass'n.*,[151] an MBTA case involving arguably unintended bird deaths, a district court invoked proximate causation. Moon Lake was charged with electrocution of migratory birds, caused by Moon Lake's failure to install inexpensive protective devices on 2,450 power poles.[152] Although the court affirmed that the MBTA imposes strict liability, the court went on to state "the government must prove that Moon Lake's power lines constitute the cause in fact, as well as the proximate cause, of death."[153]

> [T]he government must prove proximate causation, also known as "legal causation," beyond a reasonable doubt. In this context, "proximate cause" is generally defined as "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act."[154]

Application of proximate causation (foreseeability) to MBTA offenses is an avenue courts may use to solve the dilemma of "absurd and unintended results"[155] that may "offend reason and common sense."[156] For the traditional direct harm cases, such as hunting, poaching, and trapping, harm is intended and, therefore, extremely foreseeable. For the indirect harm cases, proximate causation analysis provides a method for distinguishing foreseeable harms, for which defendants may reasonably be held accountable, from unforeseeably remote harms, for which some courts do not believe persons may reasonably be held accountable.[157]

---

stringent than those proposed by Grubart which were that the harm be close in time and space to the activity that caused it: that it must occur "reasonably contemporaneously" with the negligent conduct and within reach of the device causing the harm. *Grubart*, 513 U.S. at 536.

151. 45 F. Supp. 2d 1070 (D. Colo. 1999).

152. *See Moon Lake*, 45 F. Supp. 2d at 1071.

153. *Id.* at 1077.

154. *Id.* at 1085 (quoting BLACK'S LAW DICTIONARY 1225 (6th Ed. 1990)). The court in *Moon Lake* relied upon the Supreme Court's decision in *Sweet Home*. *See id.* at 1077 (citing *Sweet Home*, 515 U.S. at 692).

155. *Moon Lake*, 45 F. Supp. 2d at 1085.

156. United States v. FMC, 572 F.2d 902, 905 (1978). Related to proximate cause is the absence of the actus reas, as when the defendant acted involuntarily. *See* Levenson, *supra* note 18, at 431 (giving as an example an epileptic's actions during a seizure). Levenson states that British courts have used the absence of an actus reas to avoid strict liability for serious crimes, for example when another slips narcotics into the defendant's bag without the defendant's knowledge). *See* Levenson, *supra* note 18, at 431 n.156 (citing Regina v. Warner, [1968] 2 W.L.R. 1303, 1345 (Eng.)). *See also* KEETON, *supra* note 22, § 79, at 563-64 (defendant is not strictly liable in tort for forces of nature and independent actions of third persons or animals not reasonably foreseeable).

157. Notwithstanding that MBTA crimes have no requirement for scienter, a proximate causation requirement introduces an element of knowledge. A person's knowledge or opportunities for knowledge become very relevant to the ability to foresee and avoid bird mortality. The following are some examples of evidence that might be available to prove a defendant's knowledge and opportunities for knowledge: government, educational, or industry training programs; announcements and articles in publications and trade journals; prior experience and reports, including accident and incident reports; discussions or inquiries with regulatory authorities; and permits and permit applications.

The court in *Moon Lake* indicated that it would observe the same limits on the MBTA as the Second Circuit in *FMC Corp.*, albeit under the different theory of proximate causation.

> Because the death of a protected bird is generally not a probable consequence of driving an automobile, piloting an airplane, maintaining an office building, or living in a residential dwelling with a picture window, such activities would not normally result in liability under § 707(a), even if such activities would cause the death of protected birds. Proper application of the law to an MBTA prosecution, therefore, should not lead to absurd results.[158]

To the extent that proximate cause limits criminal liability to reasonably foreseeable and avoidable consequences,[159] it adds nothing to the many alternative theories for limiting strict criminal liability, *e.g.*, due process, due care, etc. The theory offers no new criteria for distinguishing reasonably foreseeable migratory bird deaths caused by cars, planes, and towers from unexpected bird deaths caused by other less predictable causes such as the pesticides used by the defendant in *FMC*. Fundamentally, proximate causation is "in the eye of the beholder."[160] After all is said and done, proximate cause is as much a policy decision to cut off the chain of causation as it is a determination of "proximate" as opposed to "remote" causes.[161] As a policy decision, proximate causation en-

---

158. *Moon Lake*, 45 F. Supp. 2d at 1085. *See* Margolin, *supra* note 14, at 1007 (endorsing "the Model Penal Code proposal that the actual result be a 'probable consequence of the actor's conduct'"). *See also infra* note 201 (probability of bird death or injury was only 0.0064 per pole per year).

159. For a description of different proximate cause tests, see Stephen Scallan, *Proximate Cause Under RICO*, 20 S. ILL. U. L.J. 455, 458-59 (1996) (analyzing "last human wrongdoer test," "cause and condition test," "justly attachable test," and *Palsgraf* foreseeability analysis).

Judge Andrews' dissent in *Palsgraf* argued that one owes a duty not to individual foreseeable victims, but to the public at large:

> Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone . . . . Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. . . . Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.

Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 102-03 (1928) (Andrews, J., dissenting).

160. Mueller, *supra* note 146, at 338-39 (observing that proximate causation is especially in the eye of the beholder when framed in terms of "foreseeability" rather than "duty" or "remote" cause, and that the close connection between the erosion and the death of fish in the *Sweet Home* case would have been obvious to anyone with a minimal understanding of basic ecology). For a mind-bending essay on how dependent criminal liability is upon perception, or what the author calls "path-dependence," see Leo Katz, *Proximate Cause in Michael Moore's Act and Crime*, 142 U. PA. L. REV. 1513 (1994). Among other things, Mr. Katz describes the dramatically different treatment we accord deaths caused by "ducking" and deaths caused by "shielding." *See id.* at 1516-17 (describing and quoting Christopher Boorse & Roy A. Sorensen, *Ducking Harm*, 85 J. PHIL. 115 (1988)). An example is the different treatment accorded death caused by a bear capturing a camper left by her faster companion and death caused by a camper throwing his companion to the bear in order to save himself. *Id.* (citing Boorse & Sorensen at 115-16).

161. *See* Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992) ("At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'") (quoting KEETON, *supra* note 22, § 41, at 264)). Although *Holmes* was a civil case, its description of proximate cause is equally applicable to strict criminal liability. "[T]he

croaches on the prerogative of Congress to make national policy[162] or the discretion of the prosecutor to enforce the law.

D. *Minimal Punishment*

One way to mitigate the injustice of strict criminal liability, in the absence of defenses to weed out the "innocent," would be to exercise discretion in sentencing. Such an approach has been recommended by several commentators[163] although even minimal punishment is cold consolation for the defendant who could not reasonably foresee the criminal liability or was powerless to prevent it.[164]

The reliance on light punishment, or prosecutorial discretion, is often invoked by courts, *United States v. FMC Corp.*,[165] and by Congress but it has not been universally persuasive. In *United States v. Rollins*,[166] the United States District Court for Idaho expressly rejected the reasoning of the Second Circuit in *FMC Corp.* with the observation that, "[w]ith deference to the respected tradition of the Second Circuit, a violation of due process cannot be cured by light punishment."[167]

The definition of minimum and severe criminal penalties is highly subjective. For example, in *Lambert*, the U.S. Supreme Court described a $250 fine and three-year probation as "heavy criminal penalties."[168] In order to eliminate the subjectiveness and the disparity in sentences, Congress enacted the United States Sentencing Guidelines.[169] The Guidelines attempt to foreclose sentencing discretion for most federal crimes,[170] albeit not for MBTA strict liability offenses,[171] in part because the Guidelines understandably assume that those awaiting sentencing after conviction are *not* innocent.[172]

---

proximate cause inquiry is based on an unpredictable . . . policy analysis, performed on a case-by-case basis. Relying on such a policy-based analysis to limit liability for harm is inappropriate when Congress has already made the hard policy choice . . . ." Mueller, *supra* note 146, at 341. As used in torts, proximate cause is also ordinarily a policy limitation. *See* KEETON, *supra* note 22, § 79, at 560.

162. *See* Mueller, *supra* note 146, at 340-41 (in the context of the ESA and the *Sweet Home* decision, but equally applicable to the judicial limits on MBTA strict liability: "Congress has already made the hard policy choice . . . it is improper for the courts to arrogate to themselves the authority to limit an individual's liability . . . .").

163. *See* Levenson, *supra* note 18, at 433 n.168.

164. *Cf.* Robinson v. California, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

165. 572 F.2d 902 (2d Cir. 1978). For a discussion of *FMC*, *see supra* notes 103-115 and accompanying text.

166. 706 F. Supp. 742 (D. Idaho 1989).

167. *Rollins*, 706 F. Supp. at 745.

168. Lambert v. California, 355 U.S. 225, 229 (1957).

169. United States Sentencing Commission, *Guidelines Manual* (Nov. 1998).

170. *See* U.S.S.G. § 1A3 (1998).

171. MBTA strict liability offenses are petty offenses to which the Guidelines do not apply. *Compare* Migratory Bird Treaty Act, 16 U.S.C. § 707(a) (1994 & Supp. IV 1998) (maximum sentence for MBTA strict liability misdemeanors is 6 months), *with* 18 U.S.C. § 3559(a)(7) (1994) (defining as Class B misdemeanors offenses for which the maximum sentence is 6 months) *and* U.S.S.G. § 1B.1.9 (Guidelines are not applicable to Class B misdemeanors).

172. The Sentencing Commission treated technical and administrative regulatory offenses as being of four types, beginning with failure to comply without knowledge or intent, and progressing

E. *Good Faith, Due Care, and Impossibility*

Good faith is not generally recognized as a defense to strict criminal liability.[173] Although not used as a defense in MBTA cases, good faith or due care has been suggested as a defense in *dicta*.[174] Introduction of a good faith defense shifts strict criminal liability in the direction of negligence because it makes the reasonableness of the defendant's actions and omissions an issue.[175]

An extreme form of a "due care" defense is impossibility. The U.S. Supreme Court implicitly recognized a "powerless to protect against" defense to strict criminal liability in *United States v. Wiesenfeld Warehouse Co.*[176] The Court did not discuss or rule on the possible defense other than to state that "it involves factual proof to be raised defensively at a trial on the merits"[177] and, therefore, was not before the court.

In *United States v. Park*,[178] the U.S. Supreme Court expressly recognized an affirmative defense of objective impossibility.

---

to violations with knowledge or intent of consequences. *See* U.S.S.G. § 1A4(f) (Regulatory Offenses). The Guidelines make no reference to inadvertent offenses or offenses that occurred notwithstanding the exercise of due care or even extreme care by the defendant.

For environmental offenses, the Sentencing Guidelines expressly assume knowing conduct and, for misdemeanors, allow an unlimited reduction of the sentence in cases involving negligent conduct. *See id.* § 2Q1.3, comment (n.3). There is not a similar provision for wildlife offenses or environmental felonies. *See id.* §§ 2Q1 (Environment), 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).

173. *See, e.g.*, United States v. White Fuel Corp., 498 F.2d 619, 622-23 (1st Cir. 1974) (looking at the Refuse Act, 33 U.S.C. § 407, prosecution: "we reject the existence of any generalized 'due care' defense that would allow a polluter to avoid conviction on the ground that he took precautions conforming to industry-wide or commonly accepted standards"); Levenson, *supra* note 18, at 417 (stating that because liability is imposed irrespective of the defendant's knowledge or intentions, "the strict liability doctrine traditionally rejects even a reasonable mistake of a fact or circumstance material to a finding of guilt"). Arguably, one could distinguish *White Fuel* in a future case in which a defendant exceeded commonly accepted standards and took all reasonable steps to use extraordinary care.

For a case in which good faith was recognized as a defense to strict criminal liability, *see* United States v. United States Dist. Court, 858 F.2d 534 (9th Cir. 1988) (*Kantor*). *Kantor* was a child pornography case and was unique in that the absence of a good faith defense raised serious First Amendment issues. *Id.* at 540-42. The Ninth Circuit observed that the case involved an actress who "allegedly engaged in a deliberate and successful effort to deceive the entire industry . . . ." *Id.* at 543. For a thorough discussion of Kantor and of a proposal for application of a good faith defense to strict liability crimes, *see* generally Levenson, *supra* note 18.

174. *See, e.g.*, United States v. Corbin Farm Serv., 444 F. Supp. 510, 519 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978). *See* discussion of *Corbin Farm*, *supra* notes 121-124 and accompanying text.

175. *See* Levenson, *supra* note 18, at 405 n.22 ("The good faith defense essentially transforms a strict liability crime into a negligence offense, in which the defendant must prove reasonable conduct under the circumstances."). Strict criminal liability with a good faith defense would differ from a negligence offense in that the defendant would bear the burden of presenting evidence of his or her good faith even in the absence of any prosecution evidence of negligence while, for a negligence offense, the prosecution must present a *prima facie* case of negligence that necessarily denies the defendant's good faith. *Id.* at 405-06.

176. 376 U.S. 86, 91 (1964).

177. *Id.*

178. *See* United States v. Park, 421 U.S. 658 (1975).

> The theory upon which responsible corporate agents are held criminally accountable for "causing" violations of the Act permits a claim that a defendant was "powerless" to prevent or correct the violation to "be raised defensively at a trial on the merits." [But] the defendant has the burden of coming forward with evidence . . . .[179]

A few lower court decisions have considered and rejected the impossibility defense in opinions elaborating the high hurdle a defendant must clear to present the defense.[180] In *United States v. Gel Spice Co., Inc.*[181] the court noted that "impossibility is an affirmative defense,"[182] available only to individuals and not to corporations,[183] and that: "To establish the impossibility defense the corporate officer must introduce evidence that he exercised extraordinary care, but was nevertheless unable to prevent violations of the Act."[184]

In a pair of 1976 cases,[185] the Ninth Circuit accepted the concept of an affirmative defense of impossibility[186] but held that the defendants had failed to present sufficient evidence to submit the defense to the fact finder.[187] In *United States v. Y. Hata*, the court held that (1) "the duty . . . to 'remedy violations when they occur' includes the duty to consider and experiment'" with commonplace devices "long before" government inspections uncover violations,[188] and (2) the defendants failed to offer proof that "they planned and attempted to install" corrections or that those plans and attempts were frustrated by their inability to obtain materials.[189] In other words, the "defendant could have attempted to prevent the injury earlier."[190]

In *United States v. Starr*, the court held that the "duty of 'foresight and vigilance' requires the defendant to foresee and prepare" for natural and artificial occurrences.[191] For example, an infestation of mice fleeing freshly plowed fields could be anticipated with "a minimum of foresight," and, consequently,

179. *Park*, 421 U.S. at 673 (quoting *Wiesenfeld Warehouse Co.*, 376 U.S. at 91). *Park* described the impossibility defense as resting on the responsible corporate officer theory. The theory for criminal liability for responsible corporate officers is essentially the same as the rationale for strict criminal liability of individuals. *See supra* note 29 and accompanying text. Consequently, the impossibility defense should be available to individuals who are not corporate officers.

180. *See, e.g.*, United States v. Gel Spice Co., 601 F. Supp. 1205 (E.D.N.Y. 1984).

181. 601 F. Supp. at 1207 (involving the prosecution of company, its president, and its vice-president for rodent contamination of warehoused food).

182. *Gel Spice*, 601 F. Supp. at 1213 n.7.

183. *Id.* at 1212-13.

184. *Id.* at 1213.

185. United States v. Y. Hata & Co., 535 F.2d 508 (9th Cir. 1976) (affirming conviction related to bird infestation in food warehouse); United States v. Starr, 535 F.2d 512 (9th Cir. 1976) (affirming conviction for mice infestation and contamination in warehoused food caused when plowing of adjacent field drove out mice).

186. *See Hata*, 535 F.2d at 510 (requiring "sufficient appropriate facts" before allowing the defense of "objective impossibility"); *Starr*, 535 F.2d at 515 (placing an additional burden on government only if defendant offers to prove impossibility).

187. *See Hata*, 535 F.2d at 511; *Starr*, 535 F.2d at 515.

188. *Hata*, 535 F.2d at 511 (citation omitted) (finding a large wire mesh enclosure is a common device) (quoting United States v. Park, 421 U.S. 658, 672 (1975)).

189. *Id.* at 511-512.

190. Jossen, *supra* note 20, at 41.

191. *Starr*, 535 F.2d at 515 (quoting *Park*, 421 U.S. at 673).

preventing the infestation was not objectively impossible.[192] Responding to the defendant's complaint that he was the victim of a janitor's failure to carry out the defendant's instructions, the court stated, "The standard of 'foresight and vigilance' encompasses a duty to anticipate and counteract the shortcomings of delegees."[193]

It has been said that, as applied to indirect actors such as corporate supervisors, the impossibility defense converts strict criminal liability into a "standard of extraordinary care."[194]

F. *Prosecutorial Discretion*

Courts have expressly relied upon prosecutorial discretion to ameliorate the harsh results that might result from rigid application of strict criminal liability. "In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on 'conscience and circumspection in prosecuting officers.'"[195]

Reliance on prosecutorial discretion is often invoked by courts and Congress, but it has not been universally persuasive nor accepted without misgivings.[196] That courts have, in some cases, rejected strict criminal liability is evi-

---

192. *Id.* at 515. For a case that recognized the possibility of a defense based on intervening acts of third parties, arguably a form of an impossibility defense, see United States v. White Fuel Corp., 498 F.2d 619, 623-24 (1st Cir. 1974) (rejecting due care as a defense to Refuse Act, 33 U.S.C. § 407, strict criminal liability but, in *dicta,* recognizing defenses based on intervening acts of third parties as a defense).

193. *Starr*, 535 F.2d at 515-16.

194. *See Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 HARV. L. REV. 1243, 1264-65 (April 1979). Some commentators have argued that *Park* creates a standard of negligence which must be shown before the defendant can be prosecuted under strict liability theory. *See Park*, 421 U.S. at 678-79 (Stewart, J., dissenting); Jossen, *supra* note 20, at 41-42 (citing Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 670-71 (1984)). However, the impossibility defense is an affirmative defense. Then again, if *Park* introduces a standard of negligence, the burden of coming forward with the evidence of due care or impossibility is on the defendant. *See Park*, 421 U.S. at 673.

195. United States v. Dotterweich, 320 U.S. 277, 285 (1943) (quoting Nash v. United States, 299 U.S. 373, 378 (1913)). *See also* United States v. FMC Corp., 572 F.2d 902, 905 (2d Cir. 1978) (stating that innocent technical violations can be handled through prosecutorial and court discretion).

> The propriety of eliminating scienter or mens rea in statutes designed to serve a regulatory purpose has again been recognized by the Supreme Court . . . . An expansive statute under which the prosecution encounters such reduced obstacles imposes a heavy responsibility upon the prosecutor. Many are his potential targets and few are the standards by which the exercise of his discretion can be measured. . . . Whatever his decision, it is likely to be one in keeping with the political realities within which he functions. This is a part of the price that this type of statute compels us to pay.

Zipperman, *supra* note 6, at 135 (quoting United States v. Charnay, 537 F.2d 341, 357 (9th Cir.) (Sneed, J., concurring), *cert. denied*, Davis v. United States, 429 U.S. 1000 (1976)).

196. *See, e.g.*, United States v. Moon Lake Elec. Ass'n, 45 F. Supp.2d 1070, 1084 (D. Colo. 1999) ("While prosecutors necessarily enjoy much discretion, proper construction of a criminal statute cannot depend upon the good will of those who must enforce it."). For other factors limiting unreasonable prosecutions, *see* Margolin, *supra* note 14, at 1006-1009 (allocation of burden of proof, causation, judicial and prosecutorial discretion, jury nullification).

dence that they could not and did not rely on prosecutorial discretion.[197] However, whatever may be the validity of the misgivings, it must be recognized that, to date, prosecutorial discretion alone has prevented the bringing of prosecutions for the very situations that have given courts the most pause under the MBTA, *i.e.*, migratory birds killed by automobiles, aircraft, and towers.

VII. BIRD DEATHS CAUSED BY INSTRUMENTALITIES OF MODERN CIVILIZATION ARE FORESEEABLE AND AVOIDABLE

Whatever theories the more *restrictive* courts use to limit strict criminal liability, be they due process, proximate cause, due care, impossibility, etc., the underlying requirements to imposition of strict criminal liability are that (1) the consequences of the acts for which a defendant is to be held criminally liable must (a) be foreseeable, and (b) be avoidable, and (2) the defendant must have voluntarily assumed the risk of the consequences by volitional act or omission. Objective data indicates that these criteria *are met* for human-caused non-hunting migratory bird deaths, including those as to which courts have expressed reservations concerning MBTA liability.

A. *Foreseeable*

Empirical data does not support statements that migratory bird deaths are not a probable or foreseeable consequence of operating an automobile, an airplane

197. Levenson observes that "[m]uch of strict liability law, including the *Kantor* case, has evolved from unrestrained prosecutorial discretion." Levenson, *supra* note 18, at 432. Levenson attributes lapses in the quality of prosecutorial discretion to intense public scrutiny and to the desire of prosecutors for a favorable "conviction box score." *Id.* at 433. While such factors may influence prosecutors to make decisions they would not otherwise make, it is just as likely that those factors will deter difficult or unpopular prosecutions of serious wrongs. Any effort to limit discretion will harm those who are presently protected by exercise of that discretion. Consider, for example, the widespread dissatisfaction of federal judges with the limits imposed on their discretion by the United States Sentencing Guidelines. *See, e.g.*, John M. Dick, *Allowing Sentence Bargains to Fall Outside of the Guidelines Without Valid Departures: It Is Time For the Commission To Act*, 48 HASTINGS L.J. 1017, 1034 (1997); Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 L. & SOC. INQUIRY 823, 827, 833, 841 (1998) (stating that "judicial dismay with current policy is widespread and sincere[;]" that judicial criticism is based on the limitation of judicial discretion, the inducement to circumvent, the privacy of key decisions, and disparate and harsh results; and that a 1996 Federal Judicial Center survey found over two-thirds of judges said the mandatory guidelines were unnecessary); Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 365, 366 (1992) (stating that "[o]ne would think that most Americans, judges and legislators as well as members of the Sentencing Commission, would be embarrassed by this implacable urge to incarcerate, by the overwhelming desire to ignore the good that people have done and probably will do" and that "use of the guidelines does tend to deaden the sense that a judge must treat each defendant as a unique human being").

The author's experience is that prosecutorial discretion is most often exercised to require more than the minimum required proof, *e.g.*, proof of knowledge of the facts for a MBTA strict liability offense, and proof of knowledge of the legal requirements for "knowing" offenses such as ESA offenses or most environmental crimes. *See* U.S. DEP'T OF JUSTICE, U. S. ATTORNEY'S MANUAL, § 9-27.220 cmt (2000) (Principles of Federal Prosecution—Grounds for Commencing or Declining Prosecution) (Federal prosecutors are not to initiate a prosecution unless they believe that "admissible evidence probably will be sufficient to obtain and sustain a conviction" but that "does not mean that he/she necessarily should initiate or recommend prosecution.").

or a tower.[198] Empirical data shows such bird deaths are foreseeable, and that some are more numerous[199] than are bird deaths from causes for which courts have imposed MBTA strict liability, *e.g.*, pesticide applications[200] and power lines.[201] The following are conservative or even very conservative estimates of bird mortality from different causes other than habitat degradation and destruction.[202]

> Domestic and feral cats: 100's millions per year. A four year study by the University of Wisconsin found that domestic cats killed between 7.8 and 219 million birds each year in just the rural areas of that State.[203]

---

198. In addition, bird fatalities caused by modern instrumentalities other than firearms are not only foreseeable, they are also a significant concern to regulatory authorities charged with protecting migratory bird species.

"Regarding the big picture, we are most concerned about the cumulative impacts of all towers on birds, combined with all the other things that kill them: habitat degradation and loss, pesticides, glass windows, domestic cats, power lines, wind generators, cars, aircraft, oil spills, and such." Dr. Albert M. Manville II, quoted by Chris Tollefson, *Service to Host Workshop on Fatal Bird Collisions with Communications Towers* (revisited on Feb. 13, 2001) <http://www.fws.gov/r9extaff/pr9951.html>.

199. That something is a foreseeable consequence of action does not mean that it is a probable outcome. When courts speak of probable consequences and probable cause, they are applying a value judgment. In terms of scientific risk analysis, probability is a statistical measure of the number of times an outcome will occur for a given number of times a causative action takes place. *See generally.*, ROBERT E. MEGILL, AN INTRODUCTION TO RISK ANALYSIS, Penn Well Books, Tulsa, Oklahoma (2d ed. 1984) (defining probability and distinguishing outcomes with discrete distributions from continuous or nondiscrete distributions such as occur in instances of bird collisions). For example, a jet engine failure may occur once in every 20,000 hours of operation or an auto accident may occur once in every 40,000 miles of operation. A given, objective, statistical probability of an outcome may be subjectively "probable" to one court but unlikely to another.

The bird kills from different causes listed in the subsequent text of this article represent totals and not probabilities. Nevertheless, they illustrate the relative magnitude of the threat presented by different causes of bird deaths. The objective of the MBTA was to preserve bird populations. For some probability calculations, *see infra* note 201 (probability of bird death or injury upon which criminal liability was established in *Moon Lake* was 0.0064 birds per pole per year) and note 230 (probability of fatal bird collision with a communication tower is 82 birds per tower per year).

200. *See* United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

201. *See* United States v. Moon Lake, 45 F. Supp.2d 1070 (D. Colo. 1999). The *Moon Lake* case is unique in providing sufficient information to calculate the probability of bird death or injury. The prosecution was based on the death or injury of 38 birds by 2450 unprotected poles during 29 months. *See id.* at 1071. Consequently, the probability of a bird being killed or injured by any one pole in any year was only 0.0064, or about two-thirds of one percent. That is an understatement of the probability, inasmuch as the prosecution was limited to bird deaths or injuries that could be conclusively proven, but it is the probability relied upon by the court. *See, e.g.*, Ted Williams, *Zapped!*, AUDUBON MAGAZINE, Jan./Feb. 2000, at 32, 34 (reporting at least 170 raptor carcasses were recovered under Moon Lake lines over an unspecified period). Data to be developed as part of the plea agreement will allow a more accurate calculation of a presumably higher probability. *See infra* notes 262-63 and accompanying text (describing *Moon Lake* plea agreement and MOU).

202. Most of the data in the text of this section were located by Albert M. Manville II, Ph.D, and John Trapp, Wildlife Biologists, United States Fish and Wildlife Service, whose assistance the author gratefully acknowledges.

203. *See* John S. Coleman and Stanley A. Temple, *On the Prowl*, Wisconsin Natural Resources Magazine (Dec. 1996) (revisited Feb. 14, 2001) <http://www.wnrmag.com/stories/1996/dec96/cats.htm> (intermediate estimate was that cats kill 38.7 million birds per year in rural Wisconsin).

Building window impacts: 97 million to 970 million per year at a rate of one to ten per building per year.[204] "[B]irds do not recognize glass as a barrier."[205]

Pesticide ingestion: 67 million per year.[206]

Cars and trucks: 57 million in the contiguous United States, or one per car every three years.[207]

Communication tower impacts: 4-5 million per year.[208] This estimate may be low by an order of magnitude, *i.e.*, the actual fatalities may be 40 to 50 million birds each year.[209]

Coleman and Temple estimated that there are between 1.4 and 2.0 million feral cats in rural Wisconsin alone. *See id. See also* John .S. Coleman et al., *Cats and Wildlife: A Conservation Dilemma* (revisited on Feb. 14, 2001) <http://wildlife.wisc.edu/extension/catfly3.htm> ("Worldwide, cats may have been involved in the extinction of more bird species than any other cause, except habitat destruction."). Coleman and Temple identified a number of advantages enjoyed by domestic cats and some feral cats, especially that supplemental feeding by humans means cat populations and predation will not fall as bird prey are exterminated. *See id.* Cats also harm predatory animals by reducing the number of their prey, *i.e.*, reducing their food supply. *See id.*

204. Daniel Klem, Jr., *Collisions Between Birds and Windows: Mortality and Prevention*, 61 J. FIELD ORNITHOL., Winter 1990, at 120, 123-25 (reporting that at least one-half of all bird strikes against windows are fatal to the birds, regardless of size) [hereinafter *Collisions*]. *See also* T. O. Connell, *Glass Windows and Bird Deaths*, Proceedings N. Am. Ornithological Conference, St. Louis, Missouri. (Apr. 8, 1998) (describes study consistent with Klem's results and gives reasons why his own results may have under-reported actual bird deaths) (on file with author); Erica H. Dunn, *Bird Mortality from Striking Residential Windows in Winter*, 64 J. FIELD ORNITHOL., Summer 1993, at 302, 308 (estimates a range of window kills per home per year between 0.65 and 7.70, suggesting Klem's range of 1 to 10 birds per building per year is realistic); Daniel Klem, Jr., *Bird-Window Collisions*, 101 THE WILSON BULLETIN, December 1989, at 606, 620 (describing factors contributing to birds' collisions with windows) [hereinafter *Bird-Window Collisions*].

205. *See* Klem, *Collisions*, *supra* note 204, at 124.

206. David Pimentel *et al.*, *Environmental and Economic Costs of Pesticide Use*, 42 BIOSCIENCE 750, 757 (Nov. 1992).

207. *See* BANKS, *supra* note 8, at 10 (between 2.7 and 96.25 birds are killed per mile of road per year, with an estimated median value of 15.1, on 3,786,713 miles of road in 1972); Federal Highway Administration, Office of Highway Policy Administration, *1996 Highway Statistics* (revisited Feb. 14, 2001) <http://www.fhwa.dot.gov/ohim/1996/section5.html> (Tables HM-10, 12 and 20 state that there were 3,933,985 miles of road in 1996, and Table VM-1 states that there were 210,236,393 registered vehicles with an average of 11,807 miles per year driven by each vehicle). The calculation assumes that the incidence of bird strikes and kills by cars was the same in 1996 as Banks found in 1972.

More recently, Al Manville has received anecdotal reports of thousands of Cedar Waxwings killed in the East and Northeast, purportedly because of an attraction to fruiting exotic plants (e.g., Autumn olive) planted on highway median strips. Interviews with Albert M. Manville II, Ph.D, Wildlife Biologist, at FWS, Migratory Bird Office (Dec. 21, 1999, Jan. 21, 2000).

208. W.R. Evans and A.M. Manville II (eds.), 2000, *Avian Mortality at Communications Towers*, Transcripts of Proceedings of the Workshop on Avian Mortality at Communication Towers, August 11, 1999, Cornell University, Ithaca, NY, (revisited Feb. 14, 2001) <http://migratorybirds.fws.gov/issues/towers/agenda.html>. *See also USA Towerkill Summary* (revisited Feb. 14, 2001) <http://www.towerkill.com/issues/consum.html> ("it is not hard to imagine that annual bird mortality at communications towers could be over five million birds a year," but the scarcity of long-term studies, the total absence of studies at shorter towers, and scavengers removing kills before discovery means "the annual mortality could be much larger").

Oil spills and other industrial accidents: variable. Taking the *Exxon Valdez* oil spill as an example, more than 36,000 birds representing at least 90 species were retrieved and stored in the morgue in Valdez following the spill.[210] Retrieved specimens probably represented only 10 to 30 percent of the actual bird mortality,[211] meaning a total of 120,000 to 360,000 were killed.[212] Richard Banks estimated, in 1972, that such "large" spills occur only semi-annually, and result in only tens of thousands of birds killed, but that oil sumps or waste pits kill an estimated 1.5 million birds per year.[213]

Fishing bycatch: hundreds of thousands of seabirds are conservatively estimated to die each year by drowning, strangulation, or injury from fishing hooks and longlines.[214] Illegal use of gill nets adds to the toll.[215] Members of 61 different bird species have been killed, of which 25 species (41 percent) have been classified as "threatened" by the World Conservation Union.[216] Some species will not survive if the situation continues, *e.g.*, the Southern Albatross.[217] "Governments, non-governmental organizations, and commercial fishery associations are petitioning for measures to reduce the mortality of seabirds in longline fisheries in which seabirds are incidentally taken."[218]

---

209. Interview with Albert M. Manville II, Ph.D., Wildlife Biologist, at FWS, Migratory Bird Office (Dec. 21, 1999).

210. Albert M. Manville, II, *Cleaning Up an Oil Spill: Some Biological Tools in the Chest of Cleanup Options*, 1 J. CLEAN TECH. AND ENVTL. SCI. 123, 124 (1991) (in September 1989 alone, FWS retrieved 36,470 dead birds representing 90 species).

211. John F. Piatt et al., Immediate Impact of the "Exxon Valdez" Oil Spill on Marine Birds, 107 THE AUK 387, 395 (Apr. 1990).

212. *See id.* (estimating total Exxon Valdez bird kill at 100,000 to 300,000, and that it would have been greater if it had occurred in summer or autumn); Manville, *supra* note 210, at 124-25 (subsequent government studies indicated that 350,000 to 390,000 birds died and Manville believed the cumulative total would exceed 500,000.).

213. BANKS, *supra* note 8, at 12.

214. Interview with Albert M. Manville II, Ph.D., Wildlife Biologist, at FWS, Migratory Bird Office, (Feb. 10, 2000) (referencing Constituent Briefing). A single commercial longliner may deploy as many as 35,000 hooks each day. NIGEL P. BROTHERS *ET AL.*, THE INCIDENTAL CATCH OF SEABIRDS BY LONGLINE FISHERIES: WORLDWIDE REVIEW AND TECHNICAL GUIDELINES FOR MITIGATION, FOOD AND AGRICULTURE ORGANIZATION, FISHERIES CIRCULAR, NO. 937, 1, 1 (1999). Note that the estimated bird loses due to fishing bycatch are global, unlike the losses from other causes listed in the text which are in the United States.

215. Manville, *supra* note 214.

216. Manville, *supra* note 214.

217. Manville, *supra* note 214; BROTHERS *ET AL.*, *supra* note 214, at 26 ("Based on evidence to hand . . . populations of several species of albatrosses, giant petrels and Whitechinned Petrels, were not sustainable . . . .").

218. United Nations Food and Agriculture Organization (FOA), Fisheries Department, *The International Plan of Action for the Reduction of Incidental Catch of Seabirds in Longline Fisheries*, Introduction, paragraph 1, *republished in*, National Marine Fisheries Service, *Draft National Plan of Action for the Reduction of Incidental Catch of Seabirds in Longline Fisheries*, Appendix I (revisited Feb. 14, 2001) <http://www.fakr.noaa.gov/protectedresources/draftnpa.htm>. *See also* 64 Fed.Reg. 73017 (Dec. 29, 1999) (announcing availability of National Plan of Action and inviting comments).

Electrocutions[219] and power line impacts: thousands to tens of thousands per year.[220] The electric power industry has been aware, for over a century, of the danger posed to birds by its power lines and, for the last 25 years, has promulgated voluminous suggested practices to minimize bird fatalities.[221]

Wind generator impacts: several thousand per year[222] but the potential for more kills increases as the industry grows.[223]

The Federal Aviation Administration and the National Wildlife Research Center have documented an average of over 2500 bird strikes by civilian aircraft each year in the United States and estimate that the actual number is five

219. Bird electrocutions occur on electric distribution lines that carry 34,500 volts or less, and not on larger transmission towers, because wires are close enough to each other or to conductors for the birds to short circuit the lines. *See* Williams, *supra* note 201, at 32, 34. There are presently 116,532, 289 distribution poles in the United States. *See id.* at 36. The introduction of steel poles in place of present wooden poles is expected to aggravate the problem. *See id.* at 38.

Power distribution poles are not the only cause of bird electrocutions. For example, California installed high-voltage fences around its prisons to reduce staffing costs but, as a result, executed more than 3000 birds in the first five years. *See* Jack Fischer, *Prison Fence Nets Ensure No Birds Are Executed*, San Jose Mercury News, April 8, 1998, at 1A, available through <http://www.newslibrary.com>. California officials had not considered the impact of the fences on birds. Pursuant to an agreement with FWS, California agreed to protect the fences and the birds with netting. *See id.* The nets were described as 90 percent effective. *See id.* Although the nets would cost $3.4 million, the fences were estimated to save California $40 million annually in staff salaries. *See id.*

220. *Briefing Statement* by A.M. Manville II, Jan. 10, 2000 (file name WPFILES:birddeat.bri.wpd) (on file with author). *See also* John L. Trapp, *Bird Kills at Towers And Other Human-Made Structures: An Annotated Partial Bibliography (1960-1998)* (revisited Feb. 14, 2001) <http://migratorybirds.fws.gov/issues/tower.html>.

221. *See* R.R. Olendorff *et al.*, SUGGESTED PRACTICES FOR RAPTOR PROTECTION ON POWER LINES: THE STATE OF THE ART IN 1996, AVIAN POWER LINE INTERACTION COMM. AND EDISON ELEC. INST., 1 (1996) (citing investigations of electrocution of eagles in 1970s and subsequently, "[o]ver the last 25 years, those efforts have led to a detailed understanding of the biological factors that attract raptors to power lines, and those harmful interactions that lead to electrocution."); W.M. Brown *et al.*, MITIGATING BIRD COLLISIONS WITH POWER LINES: THE STATE OF THE ART IN 1994, AVIAN POWER LINE INTERACTION COMM. AND EDISON ELECTRIC INST., at 1 (1994) (describing studies of dead birds under telegraph wires as early as 1876, and birds killed by impacts with power lines as early as 1904).

222. Interview with Albert M. Manville, Ph.D., Wildlife Biologist, at FWS, Migratory Bird Office (Feb. 23, 2000) (extrapolation based, in part, on NATIONAL RENEWABLE ENERGY LABORATORY, A PILOT GOLDEN EAGLE POPULATION STUDY IN THE ALTAMONT PASS WIND RESOURCE AREA, CALIFORNIA, NREL/TP-441-7821, U.S. DEPT. ENERGY (1995)). *See also* Lisa Vonderbrueggen, *Agencies Say Windmill Firms Should Pay for Bird Habitat Protection*, CONTRA COSTA TIMES, Oct. 29, 1998, (from 1992 through January of 1998, 1,025 birds were killed at Altamont Pass by windmill blades or electrocution; proposal to replace existing wind generators with 85 percent fewer generators of a more efficient and bird friendly design).

223. *Briefing Statement, supra* note 220. *See also Enron Agrees to Move LA Windmills Away From Condors' Flight Path*, SEATTLE-DAILY J. COM., Nov. 5, 1999 (revisited Feb. 14, 2001) <http://www.djc.com/news/enviro/10060302.html> (in response to National Audubon Society objections that 200 foot high windmills threatened the 49 remaining wild condors, Enron dropped plans to build 53 windmills north of Los Angeles in exchange for a lease on land about 20 miles away).

times greater, *i.e.*, over 12,500 per year.[224] Some impacts involve many birds.[225] In addition, the Air Force reports its aircraft average an additional 2,600 birds strikes each year.[226]

Communication towers have been an especially foreseeable problem, having first been documented in the late 1940s.[227] Bird kills at lighthouses had been noted for centuries and bird kills at tall television towers began to be documented as soon as they began to be constructed in the 1940s.[228] In the 1970s, the FWS estimated bird kills at communications towers to be 1.4 million per year based on the 1,100 towers then in existence.[229] Today, with nearly 49,000 towers taller than 200 feet, scientists estimate that more than 4 million birds die in impacts with communications towers in North America.[230] The industry estimates that

224. NWRC-Ohio Field Station, FAA Wildlife Strikes to Civil Aircraft in the United States (revisited Feb 14, 2001) <http://www.lrbcg.com/nwrcsandusky/strike.html>. *See* also Edward C. Cleary et al., Wildlife Strikes to Civil Aircraft in the United States 1991-1997. FAA Wildl. Aircraft Strike Database Ser. Rep. 4 (Sept. 1998), at 1-3 (2,421 strikes/year) (revisited Feb. 14, 2001) <http://www.faa.gov/arp/pdf/strkrpt.pdf>.

225. *See, e.g.*, Transport Canada Transport, *Near-Crashes* (revisited Feb. 14, 2001) <http://www.tc.gc.ca/aviation/aerodrme/wildlife/d/d3.htm>.

Transport Canada has documented over 100 fatal airplane crashes caused by impacts with aircraft and other crashes for which bird strikes are suspected. *See Aircraft Crashes and Loss of Life* (revisited Feb. 14, 2001) <http://www.tc.gc.ca/aviation/aerodrme/birdstke/wildlife/ d/d2.htm>. Obviously, there are many other bird strikes fatal only to the birds.

226. *See* Tamar A. Mehuron, *Bird Strike!*, 81 AIR FORCE MAG. 6 (June 1998) (revisited Feb. 14, 2001) <http://www.afa.org/magazine/chart/0698chart.html>.

227. *See* Towerkill.com, *Brief Historical Overview* (revisited Feb. 14, 2001) <http://www.towerkill.com/issues/intro.html>. *See also* Trapp, *supra* note 220.

228. Albert M. Manville II, Ph.D., *The ABC's of Avoiding Bird Collisions At Communication Towers: The Next Steps*, Introduction, presented at the Electric Research Institute's Avian Interactions Workshop, Dec. 2, 1999, Charleston, S.C. (currently in press) published on the internet at (revisited Feb. 14, 2001) <http://migratorybirds.fws.gov/issues/towers/abcs.html>; Towerkill.com, *Brief Historical Overview* (revisited Feb. 14, 2001) <http://www.towerkill.com/issues/intro.html>.

229. Chris Tolleson, *Service To Host Workshop On Fatal Bird Collisions With Communications Towers*, FWS August 2, 1999 News Release announcing August 11, 1999 Workshop at Cornell University (revisited Feb. 14, 2001) <http://www.fws.gov/r9extaff/pr9951.html>. *See also* BANKS, *supra* note 8, at 10, 11 (stating that three studies between 1967 and 1973 found estimated annual mortalities per tower between 2,121 and 2,843; the author rounded the number to 2,500 but assumed only one-half of the towers resulted in bird kills). One million, four hundred thousand bird deaths from 1,100 towers per year works out to a mortality rate of 1,273 bird deaths for each tower each year.

230. FWS August 2, 1999 News Release announcing August 11, 1999 Workshop at Cornell University (revisited Feb. 14, 2001) <http://www.fws.gov/r9extaff/pr9951.html>. *See also* discussion *supra* notes 208-209 and accompanying text (estimating birds killed by impacts with communications towers); Towerkill.com, *USA Towerkill Summary* (revisited Feb. 14, 2001) <http://www.towerkill.com/issues/consum.html> (Federal Aviation Administration Digital Obstacle File lists 39,530 towers over 200 feet but some towers close together get counted as one). Four million bird deaths from 49,100 towers per year works out to a mortality rate of 82 bird deaths for each tower each year. *Compare with supra* note 201 (probability of bird death or injury in *Moon Lake* was only 0.0064 per pole per year).

It is unknown whether linear extrapolation of mortality figures is appropriate. Dr. Charles Kemper speculates that a recently documented drop in bird mortality at towers may be due to the dispersal of a fixed population of birds among a greater number of towers. *See* Wendy K. Weisensel,

> there will be as many as 100,000 *new* towers in the next decade. Because of Federal Communication Commission mandates to digitalize all television stations by 2003, at least 1,000 of the new towers will be over 1000 feet high.[231] Taller towers create a greater threat to birds because they require more lights and guy wires, increasing the probability of fatal bird impacts.[232] Federal Aviation Administration requirements for red pilot warning lights on all towers taller than 200 feet increase the risk because red pulsating lights attract birds more than do white stobes.[233]

Of growing concern are not only the impacts of individual mortality factors on birds (*e.g.*, tower collisions), but the combined or cumulative impacts of all mortality factors on bird populations. Currently, more than 200 species of migratory birds (of our 836) are in trouble, 90 listed under ESA (75 endangered, 15 threatened), and 124 on the Service's [FWS] list of non-game species of management concern. Some populations are declining precipitously.[234]

B. *Avoidable*

In addition to being foreseeable, migratory bird deaths caused by impacts with human constructions, and other "unintended" causes of bird deaths, are avoidable.

Cat predation on birds can be reduced by keeping cats indoors.[235] Even when cats must be allowed outdoors as, for example, on farms to control rodents, the cats can be kept neutered and well fed, bird feeders and other bird attractions can be kept away, food sources for strays can be eliminated, and unwanted cats can be disposed of, rather than being released.[236]

Numerous measures are available to reduce or virtually eliminate bird strikes against windows, including: interior covering with translucent material;[237] removal of attractants such as feeders, watering areas, and nutritious and aesthetic vegetation in front of windows;[238] placing netting in front of windows;[239]

Battered by the Airwaves?, WIS. NAT. RESOURCES MAG. (February 2000) (revisited Feb. 14, 2001) <http://www.wnrmag.com/stories/2000/feb00/birdtower.htm>. On the other hand, Dr. Kemper observes that scavenging by predators is an alternative explanation for the absence of bird carcasses at towers. *See id.*

231. FWS August 2, 1999 News Release, *supra* note 229.

232. *Id. See also USA Towerkill Summary*, *supra* note 230.

233. FWS August 2, 1999 News Release, *supra* note 229.

234. *Briefing Statement* (by A.M. Manville), *supra* note 220.

235. *See, e.g.*, Coleman, *Cats and Wildlife*, *supra* note 203 (section titled "What you can do").

236. *See* Coleman, *Cats and Wildlife*, *supra* note 203 (section titled "What you can do").

237. *See* Klem, *Collisions*, *supra* note 204, at 123. Although not discussed in the literature, one might expect tinted glass to protect birds by making the glass visible.

238. *See* Klem, *Collisions*, *supra* note 204, at 126; Alternatively, Klem suggests placing attractants within one foot of windows because birds are drawn first to the attractant and, when taking flight, have not built up sufficient momentum to sustain serious injury. *See* Klem, *Collisions*, *supra* note 204, Dunn, on the other hand, prefers moving attractants far from windows. *See* Dunn, *supra* note 204, at 309.

239. *See* Dunn, *supra* note 204, at 309 ("installation of plastic garden-protection netting about 25 cm from the window essentially solved . . . severe window-strike problems. . . . The mesh did not block views substantially.").

placement of vertical strips in front of windows;[240] and installation of windows at an angle to reflect solid objects, such as the ground, instead of surrounding habitat or sky.[241] These solutions and others are being promoted by the Canadian based Fatal Light Awareness Program (FLAP),[242] which is being actively promoted by the National Audubon Society, Cats Indoors!, and the American Bird Conservancy.[243]

Bird impacts with towers can be reduced by co-locating equipment on existing facilities, building towers without guy wires, and eliminating lighting or using lighting less attractive to birds.[244] Even a layperson can read the reports of bird strikes with communications towers and identify possible ways to reduce the carnage.[245] Elimination of guy wires and adjustment of lighting are obvious solutions.

Numerous measures have been suggested to reduce longline bycatch of seabirds in fisheries, including both technical measures (increase sink rate of bait, thaw bait, and use of line-setting machine, bait casting machine, below-water setting chute or funnel, bird-scaring devices, water cannon) and operational measures (reduce visibility of bait by night setting, reduce attractiveness of vessels to seabirds, and area and seasonal closures).[246] One can reasonably anticipate additional solutions as international efforts continue.[247]

---

240. *See* Klem *Collisions*, *supra* note 204, at 126.

241. *See* Klem *Collisions*, *supra* note 204, at 127.

242. FLAP, *How To Make Your Home, Cottage & School Safe For Birds* (revisited Feb. 14, 2001) <http://www.flap.org/how2.htm> (offering the suggestions to hang ribbons, hang silhouettes so they move, etch images onto exterior glass, use spider web decals). *See also* Weisenel, sidebar titled "Prevent bird collisions at home, " *supra* note 230.

243. *See* Audubon, *Cats Indoors!* (revisited Feb. 14, 2001) <http://www.audubon.org/bird/cat/>.

244. Tolleson, *supra* note 229 (quoting Albert M. Manville, Ph.D.). *See also* Weisensel, *supra* note 230 (section titled "Changing lights, heights and designs to make towers less of an attraction").

> Certainly, collisions of birds with tall, lighted buildings is of the greatest concern, with single buildings (*e.g.* skyscrapers) sometimes accounting for hundreds or thousands of bird mortalities/year.) Two different types of problems - birds in daylight disoriented by reflections of plate glass windows, nocturnal migrants disoriented by interior or exterior lighting of tall buildings, especially in foul weather; both result in collision with windows or building and death due to blunt trauma. Both types of mortality can be prevented or minimized.

Email communication from John Trapp, FWS, (Dec. 28, 1999) (on file with author). *See also* Towerkill.com, *Towerkill Mechanisms* (revisited Feb. 14, 2001) <http://www.towerkill.com/issues/mech.html>; Paul Kerlinger, Ph.D., *Avian Mortality At Communication Towers: A Review of Recent Literature, Research and Methodology*, March 2000, published on the internet at (visited Feb. 14, 2001) <http://migratorybirds.fws.gov/issues/tblcont.html>.

245. *See, e.g.*, The Topeka Capital Journal, *Thousands of Birds Fly To Their Deaths Around Radio Towers* (Jan. 30, 1998) <http:/www.cjonline.com/stories/013098/kan_birds.html> (reporting death of between 5,000 and 10,000 Lapland longspurs from crashing into guy wires, obscured in fog and snow, after being drawn by bright lights around radio transmission tower near Syracuse, Kansas on January 22, 1998).

246. United Nations Food and Agriculture Organization (FOA), Fisheries Department, *The International Plan of Action for the Reduction of Incidental Catch of Seabirds in Longline Fisheries*, Technical note on some optional technical and operational measures for reducing the incidential catch of seabirds, Section II (Technical measures), *republished in*, National Marine Fisheries Service, *Draft National Plan of Action for the Reduction of Incidental Catch of Seabirds in Longline Fisheries*, Appendix VI (Future Conferences and Events Related to Seabird-Fishery Interactions)

The *Moon Lake* decision was premised on the fact that the bird deaths could have been avoided. In 1996 the electric power industry said: "[E]lectrocution at power facilities remains a legitimate concern. Such mortalities *can* be addressed by a variety of mitigation measures, through design and retrofitting of existing lines."[248] The industry produced a 125 page publication of specific recommendations for siting of power lines and design of power poles to minimize the risk of electrocution to raptors, a migratory bird.[249] The industry also published a 78 page report containing detailed instructions to reduce deaths caused by migratory bird impacts.[250]

Existing windmills can be and are being replaced by more efficient and bird-friendly designs.[251] Bird strikes on highways can also often be prevented by adjustments in siting of the roads and bird attractions such as crossing, feeding and nesting sites.[252]

Finally, the causes and frequency of bird strikes with aircraft have been plotted and bird avoidance procedures developed.[253]

(visited Feb. 14, 2001) <http://www.fakr.noaa.gov/protectedresources/draftnpa.html>. *See also* 64 Fed.Reg. 73017 (Dec. 29, 1999) (announcing availability of National Plan of Action and inviting comments). For a technical note on some optional technical and operational measures for reducing the incidental take of seabirds, see Brothers, *supra* note 214, at 44-84.

247. A series of international meetings were scheduled. United Nations Food and Agriculture Organization (FOA), Fisheries Department, *The International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries*, Introduction, paragraph 1, *republished in*, National Marine Fisheries Service, *Draft National Plan of Action for the Reduction of Incidental Catch of Seabirds in Longline Fisheries*, Appendix I <http://www.fakr.noaa.gov/protectedresources/draftnpa.htm> (listing Wilhelmshaven, Germany on March 17-19, 2000; Darmouth, Nova Scotia, Canada in April 2000; Honolulu, Hawaii, USA, May 8-12, 2000).

248. R.R. OLENDORFF, *supra* note 221, at 6 (emphasis added).

249. *See* R.R. OLENDORFF, *supra* note 221.

250. *See* W.M. BROWN ET AL., *supra* note 221.

251. Vonderbrueggen, *supra* note 222 (bird friendly wind turbines have larger but slower turning blades, are placed on taller towers above the birds' hunting patterns, and have perching spots eliminated).

252. BANKS, *supra* note 8, at 9 (citing English studies showing "black spots" of high mortality associated with open gates, breaks in hedges or walls, and proximity of feeding and resting sites; and a Texas study showing one-third of all road deaths occurred between daybreak and 8 a.m.).

253. Transport Canada, *Aircraft Crashes And Loss Of Life* (revisited Feb. 14, 2001) <http://www.tc.gc.ca/aviation/aerodrme/birdstke/wildlife/d/d2.htm>; *Near Crashes, id.*, at <...d/d3.htm>; *Species Involved, id.* at <...d/d14.htm> (noting, among other facts, that birds of prey may attack aircraft while waterfowl generally avoid aircraft); *see also* Air Force News, *Whiteman Reduces Bird Strike Hazard* (Nov. 18, 1997) (revisited Feb. 14, 2001) <http://www.af.mil/news/Nov1997/n19971118_971462.html> (reporting successful efforts at Whiteman Air Force Base to avoid bird strikes between B-2 bombers and a flock of 125,000 Redwing Blackbirds); FAA Aeronautical Information Manual, Ch. 7, Sect. 4-2 (Reducing Bird Strike Risks) (Jan. 25, 2001) (revisited Feb. 14, 2001) <http://www.faa.gov/ATPubs/AIM>; Mehuron, *supra* note 226 (describing use of falcons to drive off large flocks and of remote-controlled model aircraft broadcasting bird of prey sounds to drive off big birds).

VIII. THE NEED FOR AN ADMINISTRATIVE SOLUTION

Court opinions have suggested that a distinction may exist between hunting and non-hunting human-caused bird deaths based on foreseeability, avoidability and the presence or absence of a volitional act or omission. Objective data indicates that the distinction does not exist and, especially, the distinction does not exist between non-hunting deaths for which courts have recognized MBTA criminal liability (*e.g.*, pollution, pesticides, and electrocution) and those for which courts have expressed reservations (*e.g.*, automobiles, airplanes, towers, and windows).[254] Consequently, an intellectually honest, and reasonably objective basis for distinguishing appurtenances of modern society cannot be found in any of the defenses and theories of criminal law commonly put forward as potential limitations on strict criminal liability, *i.e.*, a basis for distinction cannot be found in theories of proximate causation, impossibility, good faith or due care, etc. In addition, the efforts of the courts to fashion such a limitation is an undemocratic interference in the processes of representative government.

If the solution is not to be found in theories or defenses put forward by the courts, where is it to be found?[255] Three examples illustrate a range of democratic options.

One option is for FWS (the Secretary of the Interior to be precise) to issue regulations pursuant to the notice and comment, or alternative requirements of the Administrative Procedure Act,[256] just as the Secretary now authorizes killing of migratory birds.[257] By regulation, FWS may, with the collaboration of the

---

254. One reason courts may discount bird deaths caused by impacts is that the deaths are usually infrequent and few at any single location. Brothers, *et al.*, addressed this perceptual problem in the context of seabird bycatch by longline fishing.

> Prior to 1988 . . . [f]ishers had no concept (and many still do not) of bird populations and the consequences of catching a few individuals. After all, each fishing vessel may catch only one or two birds a day, sometimes none for many days and each day the impression is of just as many birds flying around the ship. It is understandable that fishers had no perception of a problem. Further, they have little understanding of the population biology of seabirds and why their practice threatens the survival of albatrosses. Concepts such as delayed maturity, year-long breeding cycles, biennial breeding and long life spans were not known.

BROTHERS, *ET AL.*, *supra* note 214, at 46.

255. Coggins & Patti, *supra* note 103, at 192, suggest criteria for strict criminal liability that build on and go beyond the decided cases: an act must (1) be purposeful (though not necessarily the consequences), (2) involve potentially lethal agents (poisons, chain saws, guns, power lines, fire, etc.), (3) involve some degree of "culpability," and (4) be a reasonably foreseeable cause of bird mortality in the event the operation goes astray, whether by negligence or by accident. The proposed criteria do not contribute to a solution. The element of "culpability" is undefined and makes the criteria rather circular. The other elements seem redundant.

256. 5 U.S.C. §§ 551-559 (1994 & Supp. IV 1998) (Administrative Procedure Act); 5 U.S.C. §§ 561-570 (1994 & Supp. IV 1998) (negotiated rulemaking procedure); 5 U.S.C. §§ 571-583 (1994 & Supp. IV 1998) (alternative means of dispute resolution in the administrative process).

257. *See* 16 U.S.C.A. §§ 704(c), 712 (Supp. 2000) (authorizing Secretary of the Interior to issue implementing regulations). The court in *Moon Lake* acknowledged the need for reasonable regulations. *See* United States v. Moon Lake Electric Ass'n, Inc., 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999) ("Reasonable regulation by the Secretary, in conjunction with proper application of the law, which includes requiring the prosecution to prove proximate cause beyond a reasonable doubt under § 702(a), can effectively avoid absurd and unintended results."). *But see* Alaska Fish & Wildlife Fed'n & Outdoor Council v. Dunkle, 829 F.2d 933, 940-41 (9th Cir. 1987) (stating that

affected public, define and distinguish those migratory bird deaths that are an unavoidable consequence of the instrumentalities of our modern society,[258] and those that are both foreseeable and reasonably avoidable. Similarly, permits can be obtained for many situations not anticipated in the regulations.[259] In the course of applying for such a permit a dialog can also take place. The reasonableness of any regulation or permit may be reviewed by the courts.[260] If there were such a regulatory scheme in place, anyone who chose to ignore the lawful regulatory alternatives would act at his or her own peril.

A second, more focused approach is discussion and negotiation with individual industries. As discussed in the preceding Part,[261] the electric power industry has been studying the problem and producing recommended practices in cooperation with FWS for over 25 years. Prosecution arose because Moon Lake chose not to use technology readily available to minimize bird deaths. Following the *Moon Lake* decision, the defendant entered a plea of guilty. As part of the plea agreement, a Memorandum of Understanding (MOU) was executed that obligated Moon Lake to develop and implement an "Avian-Protection Plan" to protect raptors from electrocution and to report and collect birds that might be electrocuted either during the Plan's implementation or notwithstanding the best efforts of the Plan.[262] The MOU states that so long as Moon Lake is in compliance with the agreement, neither it nor its officers or employees will be subject to administrative, civil, or criminal prosecution for migratory bird deaths ("unlawful takings of avian species") that may occur.[263] The Moon Lake MOU is

---

regulations must comport with the most restrictive provisions of the migratory bird conventions). Because the Canadian convention does not allow taking of game birds during closed seasons nor of insectivorous birds at any time, one might argue no permits can be issued for "incidental takings" caused by human constructions.

258. That the instrumentalities are necessary to modern society is implicit in the regulations of the FCC and FAA which necessitate tall towers with lights that attract birds. *See supra* notes 231-233 and accompanying text. The primary issue is not whether the instrumentalities are necessary, nor whether bird fatalities are foreseeable. Rather, the issue is the extent to which bird fatalities are avoidable and how many can be saved.

259. *See* 50 C.F.R. § 21.27 (2000) (Special Purpose Permits, usually for actions benefiting the species or research). Although permits can, arguably, be issued for situations not otherwise anticipated in migratory bird regulations, FWS does not issue permits for bird strike fatalities, relying instead on cooperation and discretionary enforcement. Interview with Susan Lawrence, FWS, (Jan. 24, 2000). *See also* Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

260. *See* 5 U.S.C. §§ 701-706 (1994) (judicial review of agency decisions). One hurdle that a regulatory solution must overcome is the Ninth Circuit decision in *Dunkle*. *See* sources and text cited *supra* note 257 (describing *Dunkle*).

261. *See* discussion *supra* Part VII.A (Foreseeable bird deaths) and, especially, notes 219-221 and accompanying text.

262. August 16, 1999 Memorandum of Understanding (MOU), Sections III and IV. The MOU also contains provisions relating to nests (Section V) and record-keeping (Section VI). In addition to monitoring compliance, record-keeping could be used for scientific purposes. *See* Klem, *supra* note 204, at 127 (describing recovered window-kills as a "valuable but largely neglected ornithological resource" for anatomical and plumage studies, and for study of geographic distributions and migration routes).

263. MOU at Section IV.A.2.

analogous to a permit although, strictly speaking, it is an exercise of agency enforcement discretion.

Similarly, for communication towers, the FWS is exploring with industry methods to reduce migratory bird deaths.[264] Although in early stages, the FWS anticipates a process of informal discussions, possible research into the problem and mitigating measures, and guidance memoranda.[265] Canada, which also administers the Migratory Bird Treaty of 1918, is also exploring solutions to "incidental" migratory bird deaths, perhaps analogous to Endangered Species Act Habitat Conservation Plans.[266]

A third alternative is for Congress to amend the MBTA. Ultimately, Congress may find it necessary to step in with statutory distinctions among different means of human-caused bird deaths, just as it did when it added requirements of knowledge to the MBTA baiting provisions. However, for now it has not, perhaps in recognition of the intensely technical nature of the issues and of the reasonableness of the present collaborative processes employed by FWS, which assure a thorough exchange of information *and* encourage full exploration of and experimentation in what is technically possible with still evolving technology.

IX. CONCLUSIONS

The uneasiness that courts and commentators have expressed with strict criminal liability generally is reasonable but courts often fail to distinguish the individual cases and crimes swept up in the single term. A different matter are the anticipatory concerns for MBTA enforcement against some forms of non-hunting, human-caused bird deaths, specifically, impacts with human constructions. There is substantial evidence of a serious threat to migratory birds which could be reduced by intelligent design, if only the affected industries would undertake to examine the problem and identify solutions.[267]

A substantial portion, perhaps the majority of all migratory bird deaths caused by people are caused by impacts with human constructions. Although a number of courts have expressed reservations about applying the MBTA to bird deaths resulting from impacts with human constructions, none of the courts has articulated any factual distinctions between deaths caused by impacts and deaths caused by pesticides, pollution, or electrocution. Court's conclusory statements that impact deaths are not foreseeable or proximately caused are inconsistent with available data.

Data demonstrate that migratory bird deaths caused by impacts are many times more common, foreseeable, and avoidable than are deaths caused by pesticides, pollution, or electrocution, each of which causes of bird deaths courts

264. *See, e.g.*, Tolleson, *supra* note 229; *Avian Mortality at Communications Towers*, Brochure announcing August 11, 1999 Workshop at Cornell University as part of the 117th Meeting of the American Ornithological Union <http://www.fws.gov/r9mbmo/aou_brochure.html>.

265. Interview with Jon Andrew, Chief, FWS Office of Migratory Bird Management (Dec. 17, 1999).

266. Interview with Steve Wendt, Canadian Wildlife Service (Nov. 9, 1999).

267. *See* discussion *supra* Part VII (Bird Deaths Caused by Instrumentalities of Modern Civilization Are Foreseeable and Avoidable).

have accepted as creating MBTA liability. Consequently, the theories put forward to limit strict criminal liability are inapplicable because the mistaken premise of each is that the resulting deaths were unforeseeable, unavoidable, or both. Furthermore, the theories put forward to limit strict criminal liability are inherently policy judgments which, in a democratic society, are properly made by the elected branches of government.

Administrative authorities are presently engaged in cooperative efforts to minimize migratory bird deaths caused by impacts with human constructions. Those efforts depend upon the sanction of criminal enforcement for those who refuse to prevent avoidable bird deaths.

That those responsible for migratory bird deaths may chose to ignore the problem is not a reasonable ground for courts to fashion theories or defenses that might bar prosecutions. That every last bird death may not be avoidable is not a reasonable ground to excuse a failure to reduce the number of avoidable bird deaths. Courts should have no reservations upholding MBTA strict criminal liability for traumatic migratory bird deaths which data shows are foreseeable and avoidable.