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CRIMINAL PROSECUTION AND THE MIGRATORY BIRD TREATY ACT: AN ANALYSIS OF THE CONSTITUTION AND CRIMINAL INTENT IN AN ENVIRONMENTAL CONTEXT

*Dennis Jenkins**

I. Introduction

American criminal law today has numerous goals, including the deterrence of anti-social conduct, rehabilitation, incapacitation, as well as the creation of a sense of security in society.[1] Criminal laws, in their attempt to reach these goals, generally seek to punish only those who willfully offend the law[2] by requiring proof of mens rea or a guilty mind.[3] In fact, for various philosophical reasons, the defendant's moral culpability may be the most frequently cited justification for the criminal law's severe sanctions.[4] American criminal law has focused on the

* Solicitations Editor, Articles Editor, 1996—1997, Boston College Environmental Affairs Law Review.

[1] *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 401 (Summer 1958).

[2] *See id.*

[3] The term "mens rea" derives from the Latin maxim "*actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty)." Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 3.4, at 212 (2d ed. 1986). Frequently used synonyms of "mens rea" are "scienter" and "criminal intent." Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 Envtl. L. 1165, 1167 n.9 (1995). Although the maxim was important by the seventeenth and eighteenth centuries, the origin of the maxim is unknown. *Id.* "[M]ens rea is not a unitary concept, but may vary as to each element of a crime. . . . To determine the mental element required for conviction, each material element of the offense must be examined and the determination made what level of intent Congress intended the Government to prove . . . ." United States v. Freed, 401 U.S. 601, 613–14 (1971) (Brennan, J., concurring).

[4] Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Economic Evidence on Enforcement of Federal Environmental Statutes*, 82 J. Crim. L. &

morally culpable since the founding era of the United States.[5] English law, by the middle of the eighteenth century, also recognized that acts punishable as crimes generally required proof of mens rea or a guilty mind.[6] William Blackstone declared that "to constitute a crime against human laws, there must be, first, a vicious will."[7] Generally, when punishing criminal offenders, American common law has required the actor to have specific intent or knowledge of his or her actions and their consequences.[8]

CRIMINOLOGY 1054, 1058 (1992). The criminal law generally describes harms that society desires to prohibit by threat of criminal punishment, and it invokes some of society's harshest penalties, including the loss of liberty, death, and often a life-long moral stigma attached to conviction. *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 204 (6th ed. 1995); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2442–43 (1995). The power of government "to deprive an individual of liberty exists in uneasy tension with the ultimate importance that our system . . . places on the dignity and individual worth of each person." Bruce R. Grace, Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1393 (1986). One commentator argues that mens rea is essential to the proper functioning of a criminal justice system. Hart, *supra* note 1, at 412. Henry M. Hart, argues that for criminal law to work:

> (1) the primary addressee who is supposed to conform his conduct to the direction must know (a) of its existence, and (b) of its content in relevant respects; (2) he must know about the circumstances of the acts which make the abstract terms of the direction applicable in the particular instance; (3) he must be able to comply with it; and (4) he must be willing to do so. It seems inherently unfair to punish people for doing that which they did not know was wrong.

Id.

[5] This has not always been the case. Primitive English law "started from a basis bordering on absolute liability." Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 977 (1932). People were held responsible for their acts that hurt others, regardless of their intent. *Id.* During the twelfth and thirteenth centuries, however, with a renewed interest in Roman law and an increased influence of ecclesiastical courts, mens rea grew in importance in English criminal law. *Id.* at 977, 982–84; *see also* M. Diane Barber, *Fair Warning: The Deterioration of Scienter under Environmental Criminal Statutes*, 26 LOY. L.A. L. REV. 105, 108 (1992).

[6] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *21 (1765–69).

[7] *Id.* "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 v. United States, 342 U.S. 246, 250 (1952). Mens rea has traditionally existed when a free agent, "confronted with a choice between doing right and doing wrong, . . . [chooses] freely to do wrong." *Id.* at 250 n.4 (quoting POUND, INTRODUCTION TO SAYRE, CASES ON CRIMINAL LAW (1927)).

[8] *See* Sidney M. Wolf, *Finding an Environmental Felon under the Corporate Veil: The Responsible Corporate Officer Doctrine and RCRA*, 9 J. LAND USE & ENVTL. L. 1, 24 (1993). The traditional definition of mens rea focused on the defendant's state of mind, purpose, and knowledge, as well as defendant's conduct, its results, and the reasons for the defendant's behavior. Lazarus, *supra* note 4, at 2443–44. Much confusion exists over the precise meaning of mens rea today because "not all lawyers and judges assign the term . . . a normative meaning." Mandiberg, *supra* note 4, at 1167 n.10.

The common-law requirement of mens rea, however, has not been absolute.[9] In an attempt to maintain social control or a sense of security in society, the criminal justice system has punished the morally blameless.[10] 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.[11] Traditionally, denying a mistake of law defense was justified for two reasons. First, courts did not always consider knowledge of the law to be an element of the crime.[12] Second, the refusal to allow mistake of law as a defense was the consequence of a strong common-law presumption that every person knows the criminal law, that "the law is definite and knowable."[13]

As regulatory statutes in the United States, such as environmental protection statutes, began to include criminal sanctions, courts faced the question of whether or not the common-law requirement of spe-

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[9] *See* Hart, *supra* note 1, at 401.

[10] *See* Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1513 (1992). "Our criminal justice system need not and frequently does not make criminal liability dependent on some showing that the offender deserves moral blame for what he has done." *Id.*

[11] LAFAVE & SCOTT, *supra* note 4 § 5.1, at 406. "No area of the substantive criminal law has traditionally been surrounded by more confusion than that of ignorance or mistake of fact or law." *Id.* § 5.1, at 405.

[12] *See* MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 11 (1985).

> The proper arena for the principle that ignorance or mistake of law does not afford an excuse is thus with respect to the particular law that sets forth the definition of the crime in question. It is knowledge of *that* law that is normally not a part of the crime, and it is ignorance of mistake as to *that* law that is denied defensive significance by . . . the traditional common law approach to the issue.

Id. But see Morissette v. United States, 342 U.S. 246, 250 n.4 (1952) (suggesting that a basic premise of the criminal law is that punishment is justified only where an individual actively chooses to do wrong).

[13] Cheek v. United States, 498 U.S. 192, 199 (1991); *see also* HOLMES, THE COMMON LAW *41 (stating that law should correspond with actual feelings and demands of the community). The presumption was useful for two reasons: "first, without it a strong incentive not to know the law might be created; and second, proof of abstract, conceptual legal knowledge can be relatively difficult and, additionally, may be unnecessary where there is little likelihood that the defendant did not, in fact, know the law." Grace, *supra* note 4, at 1395–96 (footnote omitted). Today, commentators suggest that such a presumption is unrealistic, especially in the environmental law context. *See Cheek*, 498 U.S. at 199–200 (stating that the proliferation of statutes and regulations makes it difficult for the average citizen to understand the duties imposed by tax laws); *see also* Michael L. Travers, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301, 1301–02 (1995) (stating that federal courts have recently shifted away from the position that mistake of law is never a defense); Kevin A. Gaynor et al., *Environmental Criminal Prosecutions: Simple Fixes for a Flawed System*, 3 VILL. ENVTL. L.J. 1, 27 (1992) (suggesting that such a rule is not justified in the environmental law context where laws are more complex than tax laws and not generally understood by common citizens).

cific intent was a constitutionally protected requirement.[14] While the Constitution does not explicitly require mens rea as an element of a criminal offense, the Due Process Clause may limit legislative power to dispense with mens rea. Generally, legislatures have the power to define criminal acts without regard to the intent of an actor.[15] The United States Supreme Court has allowed legislatures to remove scienter requirements, creating strict liability in public welfare regulations.[16] Of course, this power cannot encroach upon constitutionally protected rights,[17] and the Supreme Court has indicated that there may exist situations where legislatures may not completely remove mens rea without violating due process.[18]

This Comment deals specifically with the constitutional status of specific intent in the context of environmental regulation. Federal circuit courts have treated environmental regulations as public welfare offenses, seriously eroding the traditional criminal law notion of mens rea.[19] Environmental crimes, however, differ from public welfare offenses in that they do impose a scienter requirement.[20] In fact, most

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[14] The question was whether mens rea had a constitutional status similar to the requirement of proof beyond a reasonable doubt. *See, e.g., In re* Winship, 397 U.S. 358, 364 (1970) (stating Constitution requires that prosecution prove beyond a reasonable doubt every element of the crime).

[15] United States v. Balint, 258 U.S. 250, 251–52 (1922) (stating that common-law requirement of mens rea not necessary where purpose of statute would be obstructed).

[16] *See, e.g.*, United States v. Dotterweich, 320 U.S. 277, 285 (1943); *Balint*, 258 U.S. at 252.

[17] *See* Smith v. California, 361 U.S. 147, 155 (1959).

[18] *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564 (1971); Lambert v. California, 355 U.S. 225, 228 (1957).

[19] *See generally* Ruth Ann Weidel et al., *The Erosion of Mens Rea in Environmental Criminal Prosecutions*, 21 SETON HALL L. REV. 1100, 1100 (1991) (arguing that "the traditional common law definitions of mens rea, such as 'willfully,' 'purposely and' 'knowingly' have been significantly eroded by environmental enforcement statutes").

[20] The Department of Justice focuses on prosecution of five federal statutes: The Clean Water Act, Clean Air Act, Toxic Substances Control Act, Resource Conservation and Recovery Act, the Comprehensive Environmental Response Compensation and Liability Act, and the Federal Insecticide, Fungicide and Rodenticide Act. Wolf, *supra* note 8, at 11 n.61. Numerous provisions in these statutes contain scienter requirements. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1319(c)(2) (1994) (applying criminal penalties to anyone who "knowingly" violates particular source standards or permit limitations); 33 U.S.C. § 1319(c)(4) (applying criminal penalties to anyone who "knowingly" makes false statements or reports); 33 U.S.C. § 1319(c)(3) (applying criminal penalties to anyone who "knowingly" endangers another through a violation); The Clean Air Act, 42 U.S.C. § 7413(c)(1) (1994) (applying criminal penalties to anyone who "knowingly" violates regulatory standards); 42 U.S.C. § 7413(c)(3) (applying criminal penalties to anyone who "knowingly" makes false statements or reports or tampers with a monitoring device); The Toxic Substances Control Act, 15 U.S.C. § 2615(b) (1994) (applying criminal penalties to anyone who "knowingly" violates provisions of Act); The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 1361(b) (1994) (applying criminal penalties to anyone who "knowingly" violates

federal environmental statutes require that a defendant "knowingly" violate the law.[21] Arguably, the more a regulation approximates a public welfare regulation, the stronger is the argument that mens rea is not required. Nevertheless, this Comment argues that, even for regulations which do not criminalize traditional public welfare offenses, legislatures may dispense with specific intent without violating due process. This Comment charts the due process arguments associated with removing mens rea in environmental criminal law and the development of the public welfare offense doctrine, concluding that legislatures have expansive, almost absolute, power to eliminate mens rea from environmental criminal statutes. The Comment first explores the theoretical underpinnings of due process protections involving criminal statutes. The Comment then examines the reasoning underlying the public welfare offense doctrine and outlines a series of Supreme Court cases which define the doctrine. Lastly, the Comment analyzes the Migratory Bird Treaty Act's (MBTA) criminal penalties[22] in an effort to reveal that legislatures may dispense with traditional mens rea notions of criminal intent without violating due process in most if not all environmental crimes.

II. A Background of Due Process and Public Welfare Offenses

A. *Introduction to Due Process and Mens Rea*

The Due Process Clause of the United States Constitution states: "No person shall be . . . deprived of life, liberty, or property, without due process of law."[23] Although the United States Supreme Court has never precisely defined these words,[24] the Court has stated, generally, that the Due Process Clause protects citizens from the arbitrary

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Act's regulations); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9603(b) (1994) (applying criminal penalties to anyone who "knowingly" fails to report a hazardous substance release); 42 U.S.C. § 9603(d)(2) (applying criminal penalties to anyone who "knowingly" destroys, falsifies or makes unavailable records required to be maintained); 42 U.S.C. § 9612(b)(1) (1994) (applying criminal penalties to anyone who "knowingly" submits false claims for CERCLA response costs); Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d) (1994) (applying criminal penalties to anyone who "knowingly" transports, stores, or treats various hazardous wastes).

[21] Gaynor, *supra* note 13, at 11–12.

[22] Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 707(b)(2) (1994).

[23] U.S. Const. amend. V. The Fourteenth Amendment applies the same standard to state governments. U.S. Const. amend. XIV.

[24] 16A Am. Jur. 2d *Constitutional Law* § 807 (2d ed. 1979).

exercise of governmental power.[25] In its broadest sense due process means: "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."[26]

The Due Process Clause itself places no precise limit on a legislature's ability to dispense with mens rea in defining criminal acts.[27] The United States Supreme Court, which "has never articulated a general constitutional doctrine of mens rea,"[28] has stated that legislatures have expansive powers to declare an act criminal irrespective of scienter,[29] suggesting, in at least one case, that there exists no judicial power to require the inclusion of elements of knowledge.[30] In the 1996 case of *Montana v. Egelhoff*, the Supreme Court, quoting language from *Powell v. Texas*, reiterated:

> 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.[31]

According to the Supreme Court, however, the Constitution does not empower legislatures to dispense with specific intent whenever and however they choose.[32] The Due Process Clause contains basically four requirements for criminal statutes.[33] Due process: (1) prohibits

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[25] Minder v. Georgia, 183 U.S. 559, 562 (1902).

[26] 16A AM. JUR. 2D *Constitutional Law* § 808.

[27] *See* U.S. CONST. amend. V.

[28] Powell v. Texas, 392 U.S. 514, 535 (1968) (plurality opinion).

[29] *See* Medina v. California, 505 U.S. 437, 445–46 (1992) (stating that Court should not construe Constitution lightly to intrude on state administration of justice); Lambert v. California, 355 U.S. 225, 228 (1957) (stating that "[t]here is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition"); Chicago, Burlington & Quincy Ry. Co. v. United States, 220 U.S. 559, 578 (1911) (stating that "[t]he 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").

[30] *Chicago, Burlington & Quincy*, 220 U.S. at 578; *see also* McMillan v. Pennsylvania, 477 U.S. 479, 485–86 (1986) (stating that crime prevention is business of states).

[31] Montana v. Egelhoff, 116 S. Ct. 2013, 2023–24 (1996) (quoting *Powell*, 392 U.S. at 535–36).

[32] *Lambert*, 355 U.S. at 228. *Cf.* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (stating that states' policy judgments in criminal law will generally not be second-guessed under due process standards unless they offend "the very essence of a scheme of ordered liberty").

[33] *See* Stepniewski v. Gagnon, 732 F.2d 567, 571 (7th Cir. 1984). The due process standard is basically one of fundamental fairness and rationality. *See* Schad v. Arizona, 501 U.S. 624, 640–43 (1991). The Supreme Court often looks to common-law history and the practices of various jurisdictions as concrete indicators of what fundamental fairness and rationality require. *Id.* The

statutes from shifting burdens of proof onto defendants;[34] (2) prohibits the punishment of wholly passive conduct;[35] (3) protects against vague and overbroad statutes;[36] and (4) requires that statutes give fair warning of prohibited conduct.[37] "The due process clause imposes little other restraint on the state's power to define criminal acts."[38] In the area of mens rea, due process would therefore require that penal statutes give citizens fair warning or notice of which actions the law prohibits.[39] "Fair warning" has no precise definition; rather, as an analysis of Supreme Court caselaw will demonstrate, "fair warning" exists along a continuum.[40] For example, fair warning does not exist where a statute prohibits totally passive conduct.[41] Furthermore, the more common or mundane the action or regulated item is, the more likely due process will require knowledge of the law.[42] Conversely, where a statute regulates materials or conduct which are obviously dangerous, people may be presumed to be warned of the regulation.[43] 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 element of the crime.

B. *The Development of the Public Welfare Offense*

The United States Supreme Court has stated clearly that certain public welfare regulations may dispense with mens rea without vio-

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Court has noted that this is not a helpful yardstick with modern statutory offenses lacking common-law roots. *Id.* at n.7.

[34] *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 702 (1975).

[35] *See, e.g.*, *Lambert*, 355 U.S. at 228–29.

[36] *See, e.g.*, Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982).

[37] *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347, 351 (1964).

[38] *Stepniewski*, 732 F.2d at 571.

[39] *Lambert*, 355 U.S. at 228 (stating that "[e]ngrained in our concept of due process is the requirement of notice"); *cf.* Raley v. Ohio, 360 U.S. 423, 438 (1959) (stating that a "state may not issue commands to its citizens, under criminal sanctions, in language so vague and indefinite as to afford no fair warning"). The "void for vagueness" doctrine requires only that a criminal statute give a person of ordinary intelligence fair notice that his or her conduct is prohibited by law. 16A Am. Jur. 2d *Constitutional Law* § 818 (2d ed. 1979).

> Lack of precision in a criminal statute is not itself offensive to the requirement of due process; the Constitution does not require impossible standards, and all that is necessary is that the language convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .

Id.

[40] *See infra* notes 117–40 and accompanying text.

[41] *Lambert*, 355 U.S. at 228.

[42] United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564 (1971).

[43] *Id.* at 565.

lating due process.[44] The history of public welfare regulation and the Supreme Court's caselaw in this area demarcate a class of regulations which constitutionally do not require mens rea.[45] Public welfare regulations appeared in the United States during the mid-nineteenth century.[46] Beginning with a case in 1861, the Massachusetts Supreme Judicial Court held certain statutory regulations did not require mens rea, particularly those regulating the sale of liquor and adulterated milk.[47] In the seminal case of *Commonwealth v. Boynton*, the defendant was convicted of selling intoxicating liquor even though he did not know the libation was intoxicating.[48] The Supreme Judicial Court upheld the conviction, stating that it was unnecessary to "allege or prove that the person charged with the offence knew the illegal character of his act."[49] The court reasoned that "[i]f the defendant purposely sold the liquor, which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article which he sold."[50]

By the end of the nineteenth century punishing offenses regardless of criminal intent became widely recognized and established in other states.[51] Public welfare statutes, which generally did not impose severe criminal sanctions such as imprisonment,[52] were aimed at regulating liquor sales, adulterated foods and drugs, criminal nuisances, and other areas deemed necessary to protect public health and safety.[53]

The erosion of traditional mens rea requirements in public welfare regulations corresponded with the growth of an increasingly complex and powerful society following the industrial revolution.[54] This new industrial society required regulations heightening the duties of those

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[44] *See, e.g.*, United States v. Dotterweich, 320 U.S. 277, 285 (1943); United States v. Balint, 258 U.S. 250, 252 (1922).

[45] *See generally* Sayre, *supra* note 5, at 56–70 (discussing development of public welfare regulation).

[46] *Id.* at 56. The first such case in the United States was probably a Connecticut case where a tavern keeper was convicted for selling liquor to a drunkard even though he did not know the buyer to be such. Morissette v. United States, 342 U.S. 246, 256 (1951) (citing Barnes v. State, 19 Conn. 398 (1849)).

[47] *See* Commonwealth v. Waite, 93 Mass. 264, 265 (1865) (sale of milk); Commonwealth v. Nichols, 92 Mass. 199, 199–200 (1865) (sale of milk); Commonwealth v. Farren, 91 Mass. 489, 491 (1864) (sale of milk); Commonwealth v. Boynton, 84 Mass. 160, 160 (1861) (sale of liquor).

[48] *Boynton*, 84 Mass. at 160.

[49] *Id.*

[50] *Id.*; *see also* Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 69–70 (1910) (Supreme Court recognizing that individuals act at their own peril and are estopped to plead ignorance of the law).

[51] See Sayre, *supra* note 5, at 66 n.43 for various state holdings.

[52] *Id.* at 72.

[53] *See id.* at 72–73.

[54] *See* Morissette v. United States, 342 U.S. 246, 253–60 (1951).

in control of particular industries, trades, and property affecting the public health and safety.[55] Francis Sayre suggests that a diminished mens rea in public welfare offenses resulted from twentieth-century changes in the administration of criminal law:

> (1) the shift of emphasis from the protection of individual interests which marked nineteenth century criminal administration to the protection of public and social interests, and
> (2) the growing utilization of the criminal law machinery to enforce, not only the true crimes of the classic law, but also a new type of twentieth century regulatory measure involving no moral delinquency.[56]

The United States Supreme Court has long permitted state and federal legislatures to treat defendants charged with public welfare offenses more harshly by removing mistake of law and fact as viable excuses.[57] In the 1910 case of *Shevlin-Carpenter Co. v. Minnesota* the Supreme Court first held that public welfare statutes which were punishable as misdemeanors and which removed the mens rea requirement did not violate due process.[58] Various justifications warranted eliminating the requirement of mens rea—specifically knowledge of the law—where there was no moral delinquency but where issues of public health and safety were involved.[59] First, regulatory offenses were regarded as offenses against the authority of the state, "for their occurrence impair[ed] the efficiency of controls deemed essential to the social order . . . ."[60] This rationale focused not on the intent of the actor but on the result of his or her actions, because the actor was in the best position to prevent the harm "with no more care than society might reasonably expect."[61] Second, dispensing with a mens rea requirement was justified because the penalties of welfare offenses were generally small, and the convictions did not gravely besmirch the offender's reputation.[62] It is important to note that these

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[55] *Id.*

[56] Sayre, *supra* note 5, at 67.

[57] Gaynor, *supra* note 13, at 12 (stating that departure from the traditional mens rea requirement in the environmental context flows from the public welfare offense doctrine and from a line of cases holding that ignorance of the law is no excuse).

[58] Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 62–63, 67–70 (1910). In *Shevlin* the defendant corporation was convicted of violating a statute prohibiting the removal of timber from state lands without a permit. *Id.* at 62–63.

[59] *See* Sayre, *supra* note 5, at 67–70.

[60] *Morissette*, 342 U.S. at 256.

[61] *See id.*

[62] *Id.* at 256. Thus, public welfare offenses generally avoided felony sanctions. Sayre, *supra* note 5, at 72; *see also Morissette*, 342 U.S. at 260 (citing POLLOK & MAITLAND, HISTORY OF

are reasons to dispense with a common-law rule, and therefore should not be equated with constitutional limits on dispensing with criminal intent.[63]

The United States Supreme Court followed this reasoning in *United States v. Balint*.[64] Balint was convicted for unlawfully selling opium and coca leaves in violation of the Narcotic Act of 1914, which was silent on mens rea requirements.[65] Balint argued that the indictment against him had failed to charge him with selling the "inhibited drugs, knowing them to be such" and thereby violated due process of law.[66] The Supreme Court rejected this argument,[67] holding that a "State may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.'"[68] Hence, with *Shevlin* and *Balint* the Supreme Court dispensed with traditional mens rea notions where certain activities threatened the greater public, creating strict liability for defendants handling items that posed a public risk.[69] More importantly, the *Balint* Court implied that eliminating criminal intent in public welfare offenses did not violate due process.[70]

ENGLISH LAW, 465) ("[I]nfamy is that of a felony, which, says, Maitland, is '. . . as bad a word as you can give to man or thing.'"). With respect to the stiffness of the penalties, Sayre states:

> if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind. To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent.

Sayre, *supra* note 5, at 72. It is important to note that courts have not delineated a precise line defining small penalties or those which do not gravely besmirch the reputation of the offender. *See Morissette*, 342 U.S. at 260.

[63] *See Morissette*, 342 U.S. at 260 (indicating that no constitutional standard for mens rea exists).

[64] 258 U.S. 250, 252, 254 (1922).

[65] *Id.* at 251.

[66] *Id.* at 251–52.

[67] The Supreme Court noted that the general common law rule requiring scienter even where a statute was silent had been modified such that scienter was not a necessary element of crimes where the purpose of the statute would be obstructed by such a requirement. *Id.* at 251–52.

[68] *Id.* at 252 (quoting Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 69–70 (1910)). The Court upheld Balint's conviction, reasoning that the intent of Congress was 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." *Id.* at 254.

[69] *See* United States v. Dotterweich, 320 U.S. 277, 284 (1943).

[70] *Balint*, 258 U.S. at 251–52.

Following the decision in *Balint* the Supreme Court expanded legislative power to dispense with mens rea, holding that new parties—corporate officials—could be held liable for public welfare offenses absent a showing of criminal intent.[71] In *United States v. Dotterweich*, the Supreme Court held that all persons who had "a responsible share in the furtherance of the transaction which the statute outlaws" could be found criminally liable, even if they were unaware of the specific facts that made their acts or omissions illegal.[72] More specifically, the Supreme Court held that Joseph Dotterweich, president of a corporation which purchased drugs from manufacturers and shipped them, repackaged under its own label, in interstate commerce,[73] could be criminally liable for a public welfare offense although he was unaware of wrongdoing.[74]

Dotterweich was convicted of shipping misbranded and adulterated drugs in violation of the Federal Food, Drug and Cosmetic Act of 1938.[75] The Supreme Court upheld a jury's guilty verdict finding that Dotterweich's ignorance of his company's having placed misbranded drugs into commerce did not relieve him of liability.[76] In so holding, the Court rejected the argument that only the corporation could be held liable, stating that "the only way in which a corporation can act is through the individuals who act on its behalf."[77] The Court also noted:

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.[78]

The Supreme Court further reasoned that Dotterweich's misdemeanor conviction was proper because, in promulgating the Act, Congress

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[71] *See Dotterweich*, 320 U.S. at 284.

[72] *Id.*

[73] *Id.* at 278.

[74] *Id.* at 281, 285.

[75] *Id.* The FDCA prohibits "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded." 21 U.S.C. § 331(a) (1994). At the time, it was a misdemeanor for "any person" to violate the Act. 21 U.S.C. § 333(a) (1940), *amended by* 21 U.S.C. § 333(a) (1994).

[76] *Dotterweich*, 320 U.S. at 278–81, 285.

[77] *Id.* at 281

[78] *Id.* at 280–81 (citing United States v. Balint, 258 U.S. 250, 251–52 (1921)).

extended "the range of its control over illicit and noxious articles and stiffened the penalties for disobedience" to provide protection in areas where people could not protect themselves.[79] Recognizing that criminal convictions imposed hardships on persons lacking consciousness of wrongdoing, the Court restricted this type of liability to those who have "a responsible share in the furtherance of the transaction which the statute outlaws . . . ."[80]

In 1975 the Supreme Court, relying on *Dotterweich*, expanded the "responsible share" doctrine to hold that, under public welfare statutes, corporate officials would be ultimately responsible for the actions of their subordinates.[81] In *United States v. Park*, a chief executive officer, who was convicted of violating the Federal Food, Drug, and Cosmetic Act by storing food in a building accessible to rodents and exposing the food to contamination by rodents, appealed his conviction to the Supreme Court.[82] The Supreme Court reviewed the lower court's instructions to the jury that an "individual is or could be liable under the statute, even if he did not consciously do wrong. . . . Though, he need not have personally participated in the situation, he must have had a responsible relationship to the issue."[83] The Supreme Court upheld the conviction, stating that the government established a prima facie case when it introduced "evidence sufficient to warrant a finding . . . that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent . . . or promptly to correct, the violation complained of, and that he failed to do so."[84] Although the Court recognized the harshness of such a holding, it reasoned that such a requirement was "no more stringent than the public had a right to expect of those who voluntarily assumed positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them."[85]

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[79] *Id.* at 280.

[80] *Id.* at 284.

[81] United States v. Park, 421 U.S. 658, 672–73 (1975).

[82] *Id.* at 660, 666.

[83] *Id.* at 665 n.9.

[84] *Id.* at 673–74. The Court emphasized that the jury did not "find guilt solely on the basis of [defendant's] position in the corporation." *Id.* at 674. It seems that the Supreme Court found that some level of blameworthiness could be inferred from the relationship. *See* Weidel, *supra* note 19, at 1104 (citing *Park*, 421 U.S. at 673).

[85] *Park*, 421 U.S. at 672. Although the *Park* decision does not explicitly discuss the constitutionality of eliminating specific intent, the Court implied that criminal liability without conscious fraud is permissible where the duty imposed under the criminal statute is not objectively impossible. *Id.* at 673. If the Court was implying that fair warning exists in a criminal statute

In both *Dotterweich* and *Park* the Supreme Court consciously dispensed with traditional mens rea requirements in the area of public welfare statutes.[86] Although *Shevlin*, *Balint*, *Dotterweich*, and *Park* do not set specific constitutional standards in relation to when a legislature may dispense with mens rea, these cases implicitly indicate that due process is not violated by strict liability statutes which regulate products or services which affect the health and well-being of the public.[87] Therefore, people who deal with products or services affecting public health and well being can be presumed to have fair warning or notice that their actions are regulated.[88]

III. "KNOWING" REQUIREMENTS AND ENVIRONMENTAL REGULATIONS

Environmental regulations, however, are not traditional public welfare offenses because they contain scienter requirements which force the government to establish that a defendant "knowingly violates" the applicable environmental standard.[89] In the case of environmental regulations courts must now determine whether a legislature may clearly dispense with a requirement that an actor have knowledge of the law without violating due process. The United States Supreme Court has not articulated precisely when eliminating mens rea in environmental statutes violates due process. A line of Supreme Court cases, however, indicates that legislatures may dispense with knowledge of the law whenever they choose, provided they do not criminalize what the average citizen would consider to be wholly innocent behavior, and in the case of laws regulating items which are not inherently dangerous, they articulate a clear intent to do so.[90]

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where the duty it imposes is not objectively impossible, then the Court was suggesting that the fair warning requirement is met by a very low standard. *See id.*

[86] *See id.* at 665; United States v. Dotterweich, 320 U.S. 277, 280–81 (1943).

[87] *See, e.g.*, *Park*, 421 U.S. at 670–73; *Dotterweich*, 320 U.S. at 280–81; United States v. Balint, 258 U.S. 250, 252–53 (1922); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 69–70 (1910); *see also* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (stating that "state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of public welfare").

[88] *See Park*, 421 U.S. at 672–73; *cf.* Bouie v. City of Columbia, 378 U.S. 347, 351 (1964).

[89] *See supra* notes 19–20 and accompanying text. The "knowing" violations of environmental crimes generally are not defined statutorily, and Congress "avoided addressing at all what it meant by the mens rea requirements it enacted." Lazarus, *supra* note 4, at 2454. Lazarus discusses the failure of Congress to appreciate the significance of mens rea requirements in environmental criminal law. *See id.* at 2454–66.

[90] *See infra* notes 75–123 and accompanying text.

The Supreme Court first approached the issue of eliminating criminal intent in a "knowing" requirement statute in *Morissette v. United States*.[91] In *Morissette v. United States*, Morissette, a junk dealer, openly entered an Air Force practice bombing range and took spent bomb casings which he honestly believed had been abandoned.[92] After flattening them out and selling them at a profit of eighty-four dollars,[93] he was indicted and convicted of violating 18 U.S.C. § 641, which made it a crime to "knowingly" convert government property.[94]

The Supreme Court reversed Morissette's conviction, holding that the omission from the statute of "any mention of intent will not be construed as eliminating that element from the crimes denounced."[95] Distinguishing Morissette's crime from the public welfare offense crime in *Balint*, the Court noted that embezzlement and theft were recognized as crimes which historically required proof of criminal intent.[96] The Court stated:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.[97]

The Court refused to dispense with the requirement of criminal intent because Morissette's crime was one which required mens rea at common law and Congress made no showing of intent to dispense with the requirement for this crime.[98] The Court warned that "such a

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[91] 342 U.S. 246, 260–63, 270–71 (1951).

[92] *Id.* at 247–48.

[93] *Id.*

[94] *Id.*; *see also* 18 U.S.C. § 641 (1994).

[95] *Morissette*, 342 U.S. at 263.

[96] *Id.* at 260–61. The Court reaffirmed its holding in *Balint*, noting that the "conclusion . . . in *Balint* . . . has our approval and adherence for the circumstances to which it was there applied." *Id.* The Court also noted that stealing, larceny, and its variants and equivalents were traditional common law offenses. *Id.* at 260–61 n.19 (citing common law examples of cases involving stealing, larceny, and variants).

[97] *Id.* at 263.

[98] *See id.* at 260–62. The Court noted, however, that crimes, such as the crime in *Balint*, new to general law may dispense with mens rea:

> Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance . . . .

manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative."[99]

Six years later, in the 1957 case of *Lambert v. California*, the United States Supreme Court first established a minimum constitutional requirement for criminal intent.[100] In *Lambert*, the Court struck down a regulatory statute which provided criminal penalties for convicted felons who remained in Los Angeles for a period of more than five days without registering.[101] In finding the regulation unconstitutional the Court conceded that lawmakers had wide latitude in excluding elements of knowledge from the statutory definition.[102] The Court, however, held that the law violated due process and fairness because it provided the defendant no opportunity "to avoid the consequences of the law or to defend any prosecution brought under it."[103] The Court stated that "where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process."[104] Hence, *Lambert* established a guiding principle that wholly passive conduct cannot be subject to criminal penalties unless the actor is aware of the law making the passive conduct criminal.[105]

In both *Morissette* and *Lambert* the Supreme Court expressed concern with citizens having fair warning or notice of what actions carry criminal penalties.[106] The *Morissette* decision implies that a legislature could omit knowledge of the law in a common-law crime if it

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Id. at 262. The Court also expressed concern with avoiding the harsh results of dispensing with mens rea requirements for the mere sake of making conviction easier:

> The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.

Id. at 263.

[99] *Id.* at 263. Where knowing requirements in statutes have not been defined by a legislature, the Supreme Court has been reluctant to interpret the statutes as dispensing with knowledge of the law. *See* Liparota v. United States, 471 U.S. 419, 426 (1985).

[100] Lambert v. California, 355 U.S. 225, 229–30 (1957).

[101] *Id.* at 226–27, 229–30.

[102] *Id.* at 228.

[103] *Id.* at 229. Justice Frankfurter, in his dissent, noting that the law was "thick" with similar regulations, described the majority position as "an isolated deviation from the strong current of precedents—a derelict on the waters of law." *Id.* at 230, 232.

[104] *Id.* at 229–30.

[105] *Lambert*, 355 U.S. at 229–30.

[106] *Id.*; Morissette v. United States, 342 U.S. 246, 262 (1951).

did so explicitly in the act.[107] Hence, fair warning would exist for purposes of due process even if a common-law crime, which had traditionally required knowledge of the law, was codified by a legislature explicitly eliminating such requirement.[108] The *Lambert* court, however, indicated that fair warning did not exist where legislatures subjected wholly passive conduct to criminal penalties without criminal intent.[109] In dicta, the *Lambert* Court also implied that due process might be violated, and thereby fair warning denied, by a law which punished conduct which society considered to be wholly innocent.[110]

The Supreme Court did not state specifically that a criminal statute regulating behavior which the average citizen would consider innocent would violate due process until the 1970 case of *United States v. International Minerals & Chemical Corp.*[111] In *International Minerals* the Supreme Court construed a federal statutory provision making it a crime to "knowingly violate" a regulation applicable to shippers of hazardous material.[112] The defendant corporation was charged with shipping sulfuric and hydrofluosilicic acids in interstate commerce and knowingly failing to show on the shipping papers that the property was a corrosive liquid.[113] The Court held that the regulation in question required knowledge of the facts which make the action a violation, but not proof of knowledge of the law.[114]

The Court rejected the defendant's claim that in this case diminished mens rea violated due process, stating that "where, as here,

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[107] *Morissette*, 342 U.S. at 262. Although the *Morissette* Court did not state how specific Congress needs to be, courts could require Congress to provide an increasingly clear articulation of its intent to eliminate criminal intent as the severity of criminal penalties grows.

[108] *Id.* at 263.

[109] *Lambert*, 355 U.S. at 229–30.

[110] *Id.* at 229. The Supreme Court quoted Holmes who stated that "[a] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." *Id.* (quoting HOLMES, THE COMMON LAW *50).

[111] 402 U.S. 558, 564 (1971).

[112] *Id.* at 559 (citing Act of June 25, 1948, ch. 645, § 834(f), 62 Stat. 739 (repealed 1979)).

[113] *Id.*

[114] *See id.* at 563. One commentator has argued that the Court in *International Minerals* essentially created a presumption that the accused was aware of the existence of a regulation. Barber, *supra* note 5, at 124. Barber suggests:

> [T]hus, a public welfare statute in which the legislature inserted a knowledge element was held to require general intent. Public welfare statutes without a requirement of mens rea traditionally had been upheld on the basis that the nature of the goods was such that the actor must not presume regulation and ascertain the facts. The Court now suggested that this presumption of regulation carried forward in a public welfare statute, even where the legislature had inserted a mens rea element.

Id.

dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."[115] The Court recognized, however, that mens rea could be diminished so as to violate due process, stating that "substantial due process questions" would be raised if Congress did not require mens rea in the regulation of commonplace or harmless items such as "[p]encils, dental floss, [and] paper clips."[116]

Beyond pencils, dental floss, and paper clips, the Supreme Court has not delineated other items which legislatures could not regulate without including a requirement of criminal intent. The Supreme Court, however, has indicated that legislatures do not need to explicitly eliminate criminal intent in statutes regulating inherently dangerous items such as acids[117] and grenades.[118] In the case of acid, the *International Minerals* Court said people dealing with acid were presumed to have knowledge of the law regulating its use.[119] The Supreme Court came to a similar conclusion in *United States v. Freed.*[120] In *Freed* the government charged a defendant with illegally possessing hand grenades that were not properly registered under the National Firearms Act.[121] The Supreme Court upheld the statute which required "no specific intent or knowledge that the hand grenades were unregistered."[122] The Court noted:

> The present case is in the category neither of *Lambert* nor *Morissette*, but is closer to *Dotterweich*. This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly

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[115] *Id.* at 565.

[116] *See International Minerals*, 402 U.S. at 564.

[117] *Id.* at 565.

[118] United States v. Freed, 401 U.S. 601, 607 (1970).

[119] *International Minerals*, 402 U.S. at 565.

[120] *Freed*, 401 U.S. at 607.

[121] *Id.* at 603–04, 609–10.

[122] *Id.* at 607. In his concurring opinion, Justice Brennan explained:

> [T]o convict appellees of possession of unregistered hand grenades, the government had to prove three material elements: (1) that appellees possessed certain items; (2) that the items possessed were hand grenades; and (3) that the hand grenades were not registered. . . . [W]hile the Court does hold that no intent at all need be proved in regard to one element of the offense—the unregistered status of the grenades—knowledge must still be proved as to the other two elements.

Id. at 612.

> dangerous offensive weapons, no less dangerous than the narcotics involved in *United States v. Balint* . . . .[123]

The Supreme Court has distinguished grenades and acid from food stamps[124] and automatic firing guns,[125] finding that food stamps and automatic firing guns are not in the same inherently dangerous class. In *Liparota v. United States* the defendant allegedly committed food stamp fraud by violating a statute that punished "whoever knowingly uses, transfers, acquires, alters, or possesses coupons . . . in any manner not authorized by [the statute] or the regulations."[126] Neither the regulation nor its legislative history clearly dispensed with knowledge of the law as an element of the crime.[127] The Supreme Court also found that food stamp fraud, unlike the firearms statute in *Freed,* did not regulate inherently dangerous conduct that a reasonable person should know is subject to public regulation.[128] Although the Court refused to interpret the law as dispensing with a vicious will,[129] it noted that its holding did not prevent Congress from removing such a requirement if it did so explicitly.[130]

The Supreme Court placed automatic guns into the same class as food stamps in the 1994 Supreme Court decision *Staples v. United States.*[131] In *Staples* the petitioner was charged with possession of an automatic machine gun in violation of the National Firearms Act.[132] The defendant testified that the rifle had never fired automatically while he possessed it and that he had been ignorant of any automatic firing capability.[133] The Court refused to interpret the statute's silence

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[123] *Id.* at 609 (footnote omitted) (citing United States v. Balint, 258 U.S. 250, 251 (1922)).
[124] Liparota v. United States, 471 U.S. 419, 424–25 (1984).
[125] Staples v. United States, 511 U.S. 600, 606 (1994).
[126] *Liparota,* 471 U.S. at 420 & n.1 (citing 7 U.S.C. § 2024(b)(1) (1994)).
[127] *Id.* at 424–25.
[128] *Id.* at 433.
[129] *Id.* at 425–27.
[130] *Id.* at 430. The court stated:

> Our point once again is not that Congress could not have chosen to enact a statute along these lines, for there are no doubt policy arguments on both sides of the question as to whether such a statute would have been desirable. Rather, we conclude that the policy underlying such a construction is neither so obvious nor so compelling that we must assume, in the absence of any discussion of this issue in the legislative history, that Congress *did* enact such a statute.

Id.
[131] Staples v. United States, 511 U.S. 600, 611–12 (1994).
[132] *Id.* at 602–03.
[133] *Id.* at 603.

on mens rea as dispensing with the requirement that defendant have knowledge that the gun was in fact converted into an automatic machine gun.[134] The Court reasoned that "[e]ven dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation."[135] The Court did not compare guns to pencils, dental floss and paper clips.[136] Rather, the Court simply stated that, in the face of congressional silence, the Court would not interpret the statute as eliminating a mens rea requirement.[137] The Court noted that Congress could eliminate mens rea in such a statute if it did so by explicitly eliminating the mens rea requirement.[138]

In summary, if a regulated item is inherently dangerous or, in other words, an item that one would expect to be regulated, a legislature need not state specifically that it intends to remove knowledge of the law as an element of the crime.[139] On the other hand, if the regulation is not inherently dangerous, thereby one of which the general population would be unaware, the legislature must clearly and explicitly state its intention to dispense with knowledge of the law as an element of the crime.[140]

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[134] *Id.* at 605–06.

[135] *Id.* at 610–11. The Court stated that "[g]uns in general are not 'deleterious devices or products or obnoxious waste materials,' that put their owners on notice that they stand 'in responsible relation to a public danger.'" *Id.* (citations omitted).

[136] *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564 (1971).

[137] *Staples*, 511 U.S. at 619–20. The Court stated:

> We note only that our holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect.

Id. at 620.

[138] *Id.* at 615 n.11; *cf.* United States v. Balint, 258 U.S. 250, 251–52 (1922) (stating that mens rea not necessary where purpose of statute would be obstructed).

[139] *See International Minerals*, 402 U.S. at 565.

[140] *Staples*, 511 U.S. at 605–06, 615 n.11. The Supreme Court described the processes of review thus: "[W]e essentially have relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional mens rea requirements." *Id.* at 607. The Supreme Court has held that statutes requiring willful violations evidence a Congressional intention to retain knowledge of the law. *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 146–47 (1994) (holding that Congress' use of the word "willfully," signified that the government must prove knowledge of illegality in prosecutions for currency structuring); Cheek v. United States, 498 U.S. 192, 200–01, 202–04 (1991) (holding good-faith belief that one is not violating the law negates willfulness in tax law violation).

IV. Criminal Prosecution and The Migratory Bird Treaty Act

The two United States circuit court opinions of *United States v. Wulff*[141] and *United States v. Engler*[142] explicitly analyze the constitutionality of removing criminal intent from an environmental statute. Both cases, although reaching conflicting results, focus on whether the United States Constitution requires proof of mens rea—specifically knowledge of the law.[143] These cases provide fertile ground for analysis in this area because their differing views have never been addressed directly by the United States Supreme Court, Congress has amended the statute analyzed in these cases, and there have been no reported criminal prosecutions since the cases were decided.[144]

On September 15, 1983, a federal grand jury returned a one-count indictment charging Robert Wulff with selling migratory bird parts in violation of the Migratory Bird Treaty Act (MBTA).[145] Section 707(b)(2) of the MBTA provided as follows:

> (b) Whoever, in violation of this subchapter, shall— . . . (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.[146]

Wulff sold a necklace made of red-tailed hawk and great-horned owl talons to a special agent of the United States Fish and Wildlife Service.[147] Both birds were protected species under the MBTA.[148]

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[141] 758 F.2d 1121, 1122 (6th Cir. 1985).

[142] United States v. Engler, 806 F.2d 425, 436 (3d Cir. 1986).

[143] *Id.* at 433–44; *Wulff*, 758 F.2d at 1125. These cases implicitly deal with the idea that if a criminal penalty is sought, all of the constitutional protections are required as a part of the proceeding. *See Engler*, 806 F.2d at 436; *Wulff*, 758 F.2d at 1125. *Cf.* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167–69 (1963).

[144] *See* Mandiberg, *supra* note 4, at 1176.

[145] *Wulff*, 758 F.2d at 1122.

[146] 16 U.S.C. § 707(b)(2) (1976) (current version at 16 U.S.C. § 707(b) (1994)). Any other violation was a misdemeanor with a maximum sentence of six months in prison and a $500 fine. *Id.* § 707(a). The MBTA prohibits a broad range of activities affecting migratory birds. The Act sets out prohibited activities in §§ 703 and 705. 16 U.S.C. §§ 703, 705 (1994). Both sections pertain to birds, their parts, nests, and eggs that are included in certain conventions between the United States and other countries. *Id.* Section 703 prohibits individuals from capturing, killing, possessing, and exchanging protected birds or their parts. *Id.* § 703. Section 705 prohibits individuals from shipping, transporting, or importing birds when capturing, killing, or transporting them is unlawful in their country of origin. *Id.* § 705. The Act does permit the National Fish & Wildlife Service to grant permits for some of these activities. *Id.* § 712.

[147] *Wulff*, 758 F.2d at 1122.

[148] *Id.*

On appeal the United States Court of Appeals for the Sixth Circuit held that the court could not read a scienter requirement into § 707(b) because "the crime is not one known to the common law."[149] The Sixth Circuit dismissed the government's arguments that Congress intended to omit a requirement of mens rea, stating that Congress probably omitted to require proof of scienter "due to oversight."[150] Most importantly, the court, relying on *Morissette v. United States*,[151] held that the absence of mens rea denied defendant his due process rights under the Fifth Amendment because the crime was not known to common law and because the felony penalty provision was severe and would result in irreparable damage to one's reputation.[152] The court stated that $2,000 was not a small penalty and that a felony conviction irreparably damages one's reputation, resulting in a loss in civil rights.[153] The court stated:

> We are of the opinion that in order for one to be convicted of a felony under the MBTA . . . Congress must require the prosecution to prove the defendant acted with some degree of scienter. Otherwise, a person acting with a completely innocent state of mind could be subjected to a severe penalty and grave damage to his reputation. This, in our opinion, the Constitution does not allow.[154]

One year later the United States Court of Appeals for the Third Circuit in a strikingly similar case held that the felony provision of the MBTA did not violate due process.[155] In September 1982 an undercover agent for the United States Fish and Wildlife Service met with Edward Engler at a "trapper's rendezvous" in Pennsylvania.[156]

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[149] *Id.* at 1124 (citing Morissette v. United States, 342 U.S. 246, 252, 262 (1951)).

[150] *Id.* at 1124 n.1.

[151] *See Morissette*, 342 U.S. at 260–62 (1951).

[152] *Wulff*, 758 F.2d at 1125. The Sixth Circuit based this holding on Justice Blackmun's opinion as a Judge on the Eighth Circuit in *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960). *Id.* Justice Blackmun wrote:

> [W]here a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Holdridge, 282 F.2d at 310.

[153] *Wulff*, 758 F.2d at 1125.

[154] *Id.*

[155] United States v. Engler, 806 F.2d 425, 436 (3d Cir. 1986).

[156] *Id.* at 427.

The agent claimed to be a dealer in animal parts, such as bear claws and raccoon tails, and discussed the possibility of purchasing animal parts from Engler. Over the next several months, the agent and other Fish and Wildlife agents purchased animal and bird parts from Engler. Between May 15, 1983, and January 16, 1985, Engler sold the agents birds or bird parts that were protected under the MBTA.[157]

The Third Circuit held that the MBTA criminal penalties did not violate due process because "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.'"[158] The court stated that the MBTA clearly fell "within the continuum of strict liability crimes discussed in *Freed*."[159] The court stated: "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.' The prohibition of such sales furthers 'a national interest of very nearly the first magnitude.'"[160] The court also held that a $2,000 fine was relatively small and that a felony conviction did not "unconstitutionally tarnish" the accused's reputation.[161]

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[157] *Id.*

[158] *Id.* at 435 (quoting United States v. Freed, 401 U.S. 601, 609 (1971)). The Third Circuit, however, did state: "[s]trict liability for omissions which are not 'per se blameworthy' may violate due process . . . ." *Id.* (quoting Lambert v. California, 355 U.S. 225, 228 (1957)).

[159] *Id.* at 432. See *supra* notes 119–23 and accompanying text for discussion of *Freed v. United States*.

[160] *Engler*, 806 F.2d at 435–36 (quoting Missouri v. Holland, 252 U.S. 416, 435 (1920)).

[161] *Id.* at 434. The court specifically noted that "[t]he Supreme Court and the Fifth and Seventh Circuits have affirmed the constitutionality of strict liability crimes with equivalent or greater penalties." *Id.* at 435. The court provided the following examples:

> United States v. Freed, 401 U.S. 601 (1971) (possession of unregistered firearm; fines up to $10,000 and/or imprisonment up to ten years); Williams v. North Carolina, 325 U.S. 226 (1945) (bigamous cohabitation; up to ten years imprisonment); United States v. Dotterweich, 320 U.S. 277 (1943) (shipment of misbranded or adulterated drugs; fines up to $1,000 and/or imprisonment up to one year for first offense, $10,000 and/or three years for subsequent offense); United States v. Balint, 258 U.S. 250 (1922) (unlawful drug sale; imprisonment up to five years); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) (cutting timber on state land; fines up to $1,000 and/or imprisonment up to two years); Stepniewski v. Gagnon, 732 F.2d 567 (7th Cir. 1984) (home improvement trade practices violations; fines up to $5,000 and/or imprisonment up to one year); United States v. Ayo-Gonzalez, 536 F.2d 652 (5th Cir. 1976) (fishing in United States contiguous fishing zone; fines up to $100,000 and/or imprisonment up to one year), *cert. denied*, 429 U.S. 1072 (1977).

Id.

The Third Circuit specifically disagreed with the Sixth Circuit's decision in *Wulff* that when adding the felony provision to the MBTA "[i]t is quite likely that Congress omitted to require proof of scienter due to oversight."[162] The Third Circuit stated that the legislative history suggested that the statutory schema of the MBTA presented "two factual scenarios for imposing strict liability on those who hunt migratory birds—if the actor hunts for pleasure, it is a misdemeanor; if for commercial purposes, it is a felony."[163]

Judge Higginbotham of the Third Circuit concurred in the result but disagreed with the majority on the level of mens rea required to avoid due process concerns.[164] First, he suggested that because the evidence demonstrated that the defendant did indeed possess scienter, the constitutionality of the MBTA need not be considered.[165] Second, he disagreed with the majority's determination that a violation of the MBTA is a public welfare offense. He stated:

> Because I believe that there are serious, tangible, collateral consequences that attach to one's reputation as a convicted felon, I would require at least a minimal showing of intent before an accused is convicted under § 707(b)(2), which, I believe, proscribes neither a "public welfare offense" nor conduct that the ordinary citizen would recognize as wrong.[166]

In response to these conflicting opinions, Congress amended § 707(b) of the MBTA in an effort to resolve the difference of opinions.[167] Congress changed the language to require a knowing violation:

> Whoever, in violation of this subchapter, shall *knowingly*—
> (1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or
> (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined no more than $2,000 or imprisoned not more than two years, or both.[168]

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[162] *Id.* at 432 n.3 (quoting United States v. Wulff, 758 F.2d 1121, 1124 n.1 (6th Cir. 1985)).

[163] *Id.* at 431.

[164] *Id.* at 436.

[165] *Engler*, 806 F.2d at 438–39 (Higginbotham, Jr., J., concurring).

[166] *Id.* at 439 (Higginbotham, Jr., J., concurring).

[167] *See* Emergency Wetlands Resources Act of 1986, Pub. L. No. 99–645, 100 Stat. 3582 (codified as amended at 16 U.S.C. § 707(b) 1994)). The legislative history of the amendment indicates that Congress intended the amendment to cure the problems raised by the *Wulff* and *Engler* decisions. *See* S. REP. No. 445, 99th Cong., 2d Sess. 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128.

[168] 16 U.S.C. § 707(b) (emphasis added).

Interestingly, the Senate report states that proof is not required that the defendant know the taking, sale, barter or offer is in violation of the MBTA or that the bird is listed in the Act.[169] Thus, the addition of the word "knowingly" does not resolve the fundamental differences in the circuit court opinions. The language appears to require the same form of strict liability that *Wulff* defined as a violation of due process.[170]

Both the *Engler* and *Wulff* courts misunderstood the scope of the inquiry facing them.[171] The first and main issue that should have been before the courts was what Congress intended the "knowing" requirement to represent.[172] Because the meaning was unclear, the courts could have interpreted the statutes to avoid constitutional questions.[173] If the Sixth Circuit had limited its focus in this manner, the court could have held that the MBTA required knowledge of the law without determining if removing a vicious will in such a statute violates due process. For example, the Sixth Circuit could have found that the MBTA's regulations of taking or selling migratory birds or their parts is a regulation of which the general population is unaware.[174] If the court had done this, the court would not have needed to tackle the constitutional question of whether the regulation violated due process.[175] Because there was no expectation in the public to have such items regulated and because the statute and legislative history were unclear as to the intent of Congress, the Sixth Circuit could have decided to read in a scienter requirement as the United States Su-

[169] S. REP. NO. 445. The legislative history states that "[i]t is not intended that proof be required that the defendant knew the taking, sale, barter, or offer was a violation of the subchapter, nor that he know the particular bird was listed in the various international treaties implemented by this Act." *Id.*

[170] *See* United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985).

[171] The court in *Wulff* incorrectly assumed that the question for the court was "whether the absence of a requirement that the government prove some degree of scienter violates the defendant's right to due process." *Id.* at 1125.

[172] *See, e.g.*, Staples v. United States, 511 U.S. 600, 605, 614 (1994); Liparota v. United States, 471 U.S. 419, 430 (1984).

[173] *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)) (stating that it is a "'cardinal principle'" of statutory construction to "'first ascertain whether a construction of the statute is fairly possible by which [a constitutional] question may be avoided.'"); *see also* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499–501, 504 (1979); Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

[174] *See* Lambert v. California, 355 U.S. 225, 229–30 (1957); Morissette v. United States, 342 U.S. 246, 262 (1951).

[175] *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564 (1971).

preme Court did in *Morissette v. United States*.[176] In the face of uncertainty as to Congressional intent, the court could have cited *Liparota v. United States* for the proposition that "'far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement,' and . . . criminal offenses requiring no *mens rea* have a 'generally disfavored status.'"[177]

Similarly, the Third Circuit in *Engler* could have avoided a due process analysis of dispensing with mens rea in the MBTA. In *Engler* the "indictment charged Engler with 'knowingly' violating the statute and the court charged the jury accordingly."[178] In the concurring opinion Judge Higginbotham noted: "if the evidence in fact established 'knowledge,' as the government contends, all that due process requires was met in this case. We need not reach the question whether as a matter of constitutional law scienter is a required element of a felony offense under the MBTA."[179] Nevertheless, the Sixth Circuit found that the MBTA was a regulatory measure similar to those in *United States v. Freed* and *United States v. Dotterweich* which regulated in the interest of the public safety.[180] By analogy the court could have found that the MBTA was in the class of regulatory measures which the Supreme Court specifically had stated did not require proof of a vicious will.[181]

Both courts, apparently drawing on language in *Morissette*,[182] also considered the severity of the MBTA's criminal penalties as dispositive constitutional factors.[183] The Sixth Circuit, holding that the MBTA penalty violated due process, reasoned that the Constitution would not allow a person to be subjected to a penalty of $2,000 and the

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[176] The Sixth Circuit did not do this because it incorrectly interpreted *Morissette* as holding that a court could read in a scienter requirement "*only* where the crime is one borrowed from the common law." *Wulff*, 758 F.2d at 1124 (emphasis added); see also notes 91–99 and accompanying text for discussion of Supreme Court's holding in *Morissette*.

[177] Liparota v. United States, 471 U.S. 419, 426 (1984) (quoting United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978)).

[178] *United States v. Engler*, 806 F.2d 425, 437 (3d Cir. 1986) (Higginbotham, Jr., J., concurring).

[179] *Id.*

[180] *Id.* at 438.

[181] *See, e.g.*, Staples v. United States, 511 U.S. 600, 605 (1994); *Liparota*, 471 U.S. at 424–25; United States v. Freed, 401 U.S. 601, 607 (1971).

[182] *See* Morissette v. United States, 342 U.S. 246, 256 (1951). The Supreme Court in *Morissette* suggested that courts had dispensed with mens rea in public welfare offenses because the penalties were commonly relatively small and no grave damage occurred to an offenders reputation. *Id.* The Court in *Engler* interpreted the reasoning in *Morissette* as establishing a due process limit on dispensing with specific intent. *Engler*, 806 F.2d at 432–33.

[183] *See Engler*, 806 F.2d at 434–35; United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985).

resulting damage to his reputation without criminal intent.[184] Conversely, the Third Circuit, finding that the MBTA penalty did not violate due process, reasoned that the penalty did not "unconstitutionally tarnish" the accused's reputation.[185] Both courts improperly interpreted the meaning of *Morissette*. *Morissette* stands for the simple proposition that mere omission of criminal intent, especially in crimes similar to those at common law, will not be construed as eliminating that element from the crime.[186] The Supreme Court did not intend to delineate constitutional requirements for mens rea.[187] If anything, the reference to the severity of criminal penalties in *Morissette* indicates that where statutes and legislative history fail to define the mens rea of a particular offense, courts may consider the severity of penalties in determining the intent of Congress.[188] Hence, the *Engler* and *Wulff* courts should have looked to the severity of the penalties only as an indication of congressional intent.[189]

Although there have been no felony prosecutions under the MBTA since its amendment,[190] it seems clear that due process would not require proof of a vicious will under the amended MBTA. First, the MBTA is dissimilar to the statutes at issue in *Morissette*, *Freed*, *Liparota*, and *Staples*.[191] The statutes at issue in those cases did not dispense specifically with knowledge of the law and the legislative history was either unclear or silent on the issue.[192] Although the MBTA does not require or eliminate specifically a vicious will, the legislative record clearly indicates that Congress intended to dispense with the requirement of a vicious will.[193] Thus, in a future felony

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[184] *Wulff*, 758 F.2d at 1125.

[185] *Engler*, 806 F.2d at 434.

[186] *Morissette*, 342 U.S. at 263.

[187] *Id.* at 260. The Court stated:

> Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static.

Id.

[188] *See id.* at 263.

[189] *See id.* at 261–63.

[190] Mandiberg, *supra* note 3, at 1176.

[191] Staples v. United States, 511 U.S. 600, 605 (1994); Liparota v. United States, 471 U.S. 419, 424–25 (1985); United States v. Freed, 401 U.S. 601, 607 (1971); *Morissette*, 342 U.S. at 261–62.

[192] *See Staples*, 511 U.S. at 605 (stating Congress omitted express prescription of criminal intent); *Liparota*, 471 U.S. at 424–25 (same); *Morissette*, 342 U.S. at 261–62 (same); *see also Freed*, 401 U.S. at 607 (stating that Act requires no specific intent or knowledge).

[193] *See supra* notes 167–69 and accompanying text.

prosecution under the MBTA and in light of the legislative history, a court would not be interpreting whether the word "knowingly" contained an element of a vicious will.[194] Rather, the court would be faced with the question of whether Congress may so dispense with a vicious will without violating due process.

The dispositive issue then becomes whether the MBTA regulates wholly innocent behavior or items akin to "[p]encils, dental floss, [and] paper clips."[195] The MBTA, which prohibits individuals from capturing, killing, possessing, and exchanging protected birds or their parts,[196] appears on its face to regulate behavior and items which the general public should be aware are regulated.[197] The United States Supreme Court has long held that government may regulate the public property rights in wildlife.[198] Today most people should be aware of laws regulating wildlife. Every state has regulations regarding its wildlife,[199] as does the federal government.[200] In 1990 seven percent of the American population bought hunting licenses, spending millions in the process.[201] In light of the large amount of existing wildlife regulation, all Americans should have fair warning that capturing, killing, possessing, or exchanging animals and their parts is regulated activity. Hence, equating the MBTA with the regulation of papers clips seems

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[194] The legislative history to the MBTA seems be clear. *See* S. REP. NO. 445, 99th Cong., 2d Sess. 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128. If the MBTA required extremely severe penalties, however, the Supreme Court could find that mention of the required mens rea in legislative materials rather than the statute itself is not a sufficiently clear indication of legislative intent. The Court could require greater specificity as penalties become more severe.

[195] *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564 (1971).

[196] 16 U.S.C. § 703 (1994).

[197] *See generally* Congressman Toby Roth & Stephen S. Boynton, *Some Reflection on the Development of National Wildlife Law and Policy and the Consumptive Use of Renewable Wildlife Resources*, 77 MARQ. L. REV. 71, 72 (1993) (discussing wildlife regulation in the United States).

[198] *See* Greer v. Connecticut, 161 U.S. 519, 528–29 (1896) (stating that states have power "to control and regulate the common property in game . . . as a trust for the benefit of the people"); *see also* Martin v. Waddell, 41 U.S. (16 Pet.) 345, 349 (1842) (finding that King held dominion and property in navigable waters as public trust).

[199] *See, e.g.*, COLO. REV. STAT. ANN. § 33–4–102(1) (West 1994) (Division of Wildlife can issue licenses and collect fees); DEL. CODE ANN. tit. 7, § 102(c) (1991) (Department of Natural Resources and Environmental Control must prescribe the form of licenses and collect fees); N.J. STAT. ANN. § 23:3–1a (West 1994) (Fish and Game Council can determine hunting license fees). *See generally* RUTH S. MUSTGRAVE & MARY ANNE STEIN, STATE WILDLIFE LAWS HANDBOOK (1993).

[200] *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531–43 (1994); Lacey Act, Ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 701, 3371–3378 (1994) and 18 U.S.C. § 42 (1994)).

[201] Michael Satchell, *The American Hunter Under Fire*, U.S. NEWS & WORLD REP., Feb. 5, 1990, at 30.

illogical. Although the MBTA may not fall into the inherently dangerous class of regulations, such as those involving acid and grenades, it seems likely that the Supreme Court would find the MBTA similar to the regulation of automatic guns and food stamps.

V. Conclusion

Prosecutors should not fear a constitutional challenge to criminal prosecution of violators of the MBTA. Congress has indicated clearly that criminal intent is not required for a violation of the MBTA. Further, there is little, if any, merit to a contention that the MBTA violates due process because it criminalizes wholly innocent behavior. The Supreme Court is unlikely to infringe upon the legislature's ability to eliminate criminal intent in the MBTA, as well as other environmental regulations, so long as the legislature specifically eliminates criminal intent and has not criminalized totally innocent behavior. The due process requirement of fair warning demands very little from legislatures when they define criminal acts. Whatever the wisdom in criminalizing the violation of environmental regulations without proof of a vicious will, the Constitution appears to give that discretion to legislatures.