

## SYMPOSIUM ARTICLES

### PAVED WITH GOOD INTENTIONS: THE FATE OF STRICT LIABILITY UNDER THE MIGRATORY BIRD TREATY ACT

BY

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*The Migratory Bird Treaty Act (MBTA) contains a very broad ban on harming migratory birds, as well as a strict liability standard for misdemeanor violations. Without further limitation, the MBTA would theoretically apply to countless ordinary life activities, such as driving a car or having windows on one's home. Naturally, there are due process concerns with such a scenario, so Congress expressly left it to the Department of the Interior to draft more detailed implementing regulations. Unfortunately, the existing regulations fail to adequately address the potential overbreadth of the MBTA's misdemeanor application, forcing the courts to do so on an ad hoc basis. Such individualized legal analyses create the risk of developing bad law as a result of less-than-ideal test cases. This is exactly what took place in United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010), the only appellate case dealing with the MBTA's strict liability standard in the context of industrial harms—the current trend for enforcement—in several decades. In that case, the Tenth Circuit applied a “knew or should have known” standard to an industrial actor causing bird deaths, holding that criminal liability only attaches after the United States Fish and Wildlife Service has directly notified the defendant in writing of the danger his equipment presents to birds. This is a terrible case, as it completely writes the strict liability standard out of the*

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*statute. This Article argues that regulations—or even a written enforcement policy—that create prosecutorial limitations to avoid violating due process will prevent courts from struggling to cope with the MBTA’s theoretically broad reach, which can result in bad law. It sorts through the historical development of strict liability, especially in the public welfare offense context, and proposes that those engaged in activities where regulation should be foreseen—such as operating oil rigs, as in Apollo Energies—should be held to a higher standard than others. This is in line with the Supreme Court case law justifying strict liability in the face of due process challenges. Ultimately, the Article concludes that such across-the-board line drawing for the MBTA’s strict liability provisions would have prevented the Tenth Circuit from deciding Apollo Energies as it did.*

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## I. INTRODUCTION

Hemisphere solidarity is new among statesmen, but not among the feathered navies of the sky.—Aldo Leopold<sup>1</sup>

I realized that if I had to choose, I would rather have birds than airplanes.—Charles A. Lindbergh<sup>2</sup>

Birds should be saved because of utilitarian reasons; and, moreover, they should be saved because of reasons unconnected with any return in dollars and cents. . . . [T]o lose the chance to see frigate-birds soaring in circles above the storm, or a file of pelicans winging their way homeward across the crimson afterglow of the sunset, or a myriad terns flashing in the bright light of midday as they hover in a shifting maze above the beach—why, the loss is

<sup>1</sup> ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 35 (1949).

<sup>2</sup> Alden Whitman, *Lindbergh Traveling Widely as Conservationist*, N.Y. TIMES, June 23, 1969, at 1, 26 (quoting Lindbergh).

like the loss of a gallery of the masterpieces of the artists of old time.  
—Theodore Roosevelt<sup>3</sup>

There is a constant tension in all areas of wildlife regulation. On the one hand is the somewhat understandable prioritization of a modern lifestyle and comforts over the protection of creatures we barely understand. On the other hand we have our highly disciplined legislative choices made long ago, at a time when the political climate and economic needs were somewhat different than they are today. Why should a little fish nobody previously knew existed halt completion of a major dam project on which millions of dollars have already been spent?<sup>4</sup> Who really cares about some irritating fly when there are so many people crammed into southern California and desperate for more living space?<sup>5</sup> Thankfully, with the development of the relatively new scientific field of conservation biology, we are beginning to understand the importance of keeping every cog in the wheel, but because not everyone is onboard, strict protective laws remain essential.

The focus of this symposium is on migratory birds in particular, so the policy question is narrower. To what lengths must we go to avoid harming migratory birds, and how much must be sacrificed for each handful of bird deaths prevented? Further, and of particular relevance to this Article: *How much research must we do, individually and proactively, on the potential risks we create for migratory birds?* How much can we be expected to anticipate? Are some of us burdened with a greater responsibility than others to learn about migratory birds and their habits? My answer, which this Article endeavors to support, is that *those who present a greater risk than that posed by the average member of the public should be held to a higher duty.* When it comes to commercial activity, regulation is to be expected. The strict liability offenses found in the Migratory Bird Treaty Act (MBTA)<sup>6</sup> should be enforced with the purest form of strict liability when dealing with industrial harms.

Part II of this Article will establish, as a preliminary matter, that there is no remaining question that the misdemeanor offenses in the MBTA are to be enforced with strict liability. Part III will review strict liability itself in an effort to determine how it is to be applied, both as a policy matter and in preserving due process. This Part will follow the progression of the standard from its roots into the modern realm of environmental offenses, an area in which it arguably fits best. Part IV focuses on a particularly disconcerting

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<sup>3</sup> THEODORE ROOSEVELT, A BOOK-LOVER'S HOLIDAYS IN THE OPEN 316–17 (1916).

<sup>4</sup> See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 159, 171–73 (1978) (prohibiting completion of a dam that would have eradicated the snail darter, an endangered species, or destroyed its critical habitat).

<sup>5</sup> See *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1043 (D.C. Cir. 1997) (affirming the lower court's application of section 9(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2010), to the Delhi Sands Flower-Loving Fly (*Rhaphiomidas terminatus abdominalis*); section 9(a)(1) is at 16 U.S.C. § 1538(a)(1) (2006)).

<sup>6</sup> 16 U.S.C. §§ 703–712 (2006 & Supp. IV 2010). Strict liability is addressed in 16 U.S.C. § 707(a) (2006).

recent case out of the Tenth Circuit, *United States v. Apollo Energies, Inc.*<sup>7</sup> The criticism contained in the same Part is due both because the case creates bad law and because it has arguably taken over the position as the definitive authority on the application of the MBTA's strict liability standard. Finally, what we can glean from the state of case law in this area is that we absolutely must sort through the possible applications of the statute and derive a sensible and relatively uniform system to make it work as strongly as possible without offending due process. Part V proposes such a plan.

## II. STRICT LIABILITY IS FIRMLY ESTABLISHED FOR MBTA MISDEMEANORS

While the initial matter of establishing that the MBTA imposes strict liability for its misdemeanor offenses is an important one, it is also one that can be achieved quickly. There is little controversy on this issue. The MBTA began as a purely strict liability statute, but was later amended to add a mens rea requirement for its felony provisions.<sup>8</sup> It now distinguishes between misdemeanors and felonies in its penalty provisions as follows:

- (a) Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 or be imprisoned not more than six months, or both.
- (b) 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 not more than \$2,000 or imprisoned not more than two years, or both.<sup>9</sup>

In the 1986 amendments requiring mens rea for felony violations, Congress added the above-cited “knowingly” to section 707(b)<sup>10</sup> after a case found the felony provisions in the MBTA unconstitutional,<sup>11</sup> even though strict liability felonies had been upheld in other contexts.<sup>12</sup> In response to remaining concerns about strict liability in certain special circumstances, Congress further amended the MBTA to make it unlawful to hunt over baited

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<sup>7</sup> 611 F.3d 679 (10th Cir. 2010).

<sup>8</sup> *Id.* at 686.

<sup>9</sup> 16 U.S.C. § 707(a)–(b) (2006) (emphasis added).

<sup>10</sup> Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, § 501, 100 Stat. 3582, 3590 (codified at 16 U.S.C. § 707(b) (2006)) (providing that the knowledge requirement only goes to the fact that actions constitute sale, barter, or offer to sell migratory birds).

<sup>11</sup> *United States v. Wulff*, 758 F.2d 1121, 1122 (6th Cir. 1985).

<sup>12</sup> *See, e.g., United States v. Engler*, 806 F.2d 425, 433–36 (3d Cir. 1986).

fields where “the person knows or reasonably should know that” he or she is hunting over baited fields.<sup>13</sup>

Throughout the several occasions that Congress amended the mens rea requirements under the MBTA, and in spite of the clear trend of such amendments chipping away at strict liability, it repeatedly left general misdemeanor violations alone. When adding the term “knowingly” to section 707(b), Congress left section 707(a) without it.<sup>14</sup> This was no accident, as the legislative history of the amendment makes clear: “Nothing in this amendment 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.”<sup>15</sup> The vast majority of courts addressing the issue have upheld strict liability as the correct standard for MBTA misdemeanors.<sup>16</sup> What is less consistent, however, is how to *apply* this standard. That, of course, is the main concern of this Article.

### III. HISTORY, PHILOSOPHY, AND MODERN DEVELOPMENT OF STRICT LIABILITY

Before we can take a meaningful look at the methods courts are using in applying the strict liability standard under the MBTA, it is necessary to understand strict liability in general. It is my position that strict liability has recently been applied differently in the MBTA context—erroneously—so I must begin with a proper investigation into that from which it differs.

#### A. *Mens Rea*

##### *Actus non facit reum nisi mens sit rea.*<sup>17</sup>

The association between criminal liability and a guilty mind goes back many centuries—at least to the thirteenth century and possibly several earlier than that.<sup>18</sup> Blackstone commented that “to constitute a crime against human laws, there must be, first, a vi[c]ious will.”<sup>19</sup> Some would even say that the mental element has been relevant in criminal law from “time

<sup>13</sup> Migratory Bird Treaty Reform Act of 1998, Pub. L. No. 105-312, § 102, 112 Stat. 2956, 2956 (codified as amended at 16 U.S.C. § 704(b)(1) (2006)).

<sup>14</sup> 16 U.S.C. § 707(a)–(b) (2006).

<sup>15</sup> S. REP. NO. 99-445, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128.

<sup>16</sup> *See, e.g.*, *United States v. Morgan*, 311 F.3d 611, 614–16 (5th Cir. 2002); *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997); *United States v. Smith*, 29 F.3d 270, 273 (7th Cir. 1994); *Engler*, 806 F.2d at 431; *United States v. Chandler*, 753 F.2d 360, 363 (4th Cir. 1985); *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1984); *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978); *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966). *Cf.* *United States v. Wood*, 437 F.2d 91, 92 (9th Cir. 1971) (per curiam) (affirming the finding that “if scienter was an element, the flight of appellants supplied a basis for such an inference”).

<sup>17</sup> Bruce R. Bryan, *The Battle Between Mens Rea and the Public Welfare: United States v. Laughlin Finds a Middle Ground*, 6 FORDHAM ENVTL. L.J. 157, 159 n.11 (1995) (“[A]n act does not make a person guilty unless his mind is guilty[.]”).

<sup>18</sup> *See* Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 338 n.4 (1989).

<sup>19</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 21 (reprt. 1966).

immemorial.”<sup>20</sup> That said, many historians do not believe that there was always a mental element to criminal laws, but rather hold that it was the church that injected this form of morality into what had previously been merely about causing harm to society, arguing that the church’s addition was in part based on a theory of vengeance.<sup>21</sup> But from a utilitarian standpoint, which arguably is the societally stronger basis for policy, vengeance is of only little value, and only to the few who have directly suffered at the criminal’s hands.

What we need most, in order to be capable of living among so many millions of others who are not necessarily concerned with our best interests, is deterrence. Of course, there is a place for mens rea in this deterrent ideal. It is easiest to deter that which is done intentionally.<sup>22</sup> When an individual has a criminal plan or purpose, and assuming he is among those who are capable of weighing the costs and benefits of proceeding with their evil plans, it is quite easy for him to combine the variables of punishment and likelihood of capture to weigh against the achievement of the wrongful goal.<sup>23</sup> This cost benefit analysis is at the heart of the deterrent goal of criminal law, and is most accessible to those who know that what they are about to do is wrong.<sup>24</sup>

That said, and while we cannot have proper vengeance without mens rea, there will be times when certain, otherwise innocent, behaviors will need to be regulated, both to achieve uniformity where needed and to reduce the risks the behaviors may create. The question is: can deterrence be accomplished without mens rea? It is my position that it can, that some choices and involvements come with heightened duties of care, and that ignorance of the risks created is itself a behavior that can be deterred. Ignorance is the antithesis of mens rea, but where one is in a special position to prevent harm, ignorance of that harm can indeed be deterred. Sometimes harms ignorantly caused can be resolved in tort, and such has been the argument that criminal punishment should be reserved in this manner for the morally blameworthy.<sup>25</sup> There are nonetheless certain remaining circumstances that require regulation and do not fit neatly into the tort system,<sup>26</sup> suggesting that the rule of mens rea needs to admit some exceptions.

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<sup>20</sup> Gerhard O. W. Mueller, *Mens Rea and the Law Without It: Rationale and the West Virginia Rule*, 58 W. VA. L. REV. 34, 34–35 (1955).

<sup>21</sup> See Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 975 (1932).

<sup>22</sup> See Philip J. Cook, *Research in Criminal Deterrence: Laying the Groundwork for the Second Decade*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 211, 216–18 (1980).

<sup>23</sup> *Id.* at 216.

<sup>24</sup> See *id.* at 216–17.

<sup>25</sup> See Sayre, *supra* note 21, at 1003–04.

<sup>26</sup> See *id.*

*B. Strict Liability Fills Enforcement Gaps Left by Requirement of Mens Rea*

Many criminal statutes do not specify a mens rea element, but courts will presume it is there where the statute codifies a common law offense, as mens rea was so deeply engrained in the common law.<sup>27</sup> However, around the middle of the nineteenth century a new sort of criminal law began to develop, one which sought to regulate certain behaviors that may place the public welfare at risk, and to do so without regard to fault.<sup>28</sup> This “strict liability” has historically applied to those engaged in a dangerous activity that places them in a position of responsibility to the public, such as supplying goods or handling highly dangerous materials.<sup>29</sup> Such offenses are described as “public welfare” offenses, and the U.S. Supreme Court has suggested that so-described offenses are generally the only kind that can be criminalized without requiring proof of mens rea.<sup>30</sup>

Many scholars have battled strenuously against this trend, arguing that the criminalization of “morally neutral” actions “dilute[s] the value of the criminal sanction and diminish[es] its meaning.”<sup>31</sup> They suggest that proponents of strict liability for public welfare offenses are making a deal with the devil, trading the moral justification for criminal punishment for the convenience of deterring harmful acts that do not stem from a guilty conscience.<sup>32</sup> There is one glaring fallacy in this argument: where there can be deterrence, there is by definition some matter of choice, and therefore the existence of fault, even if too subliminal to meet a mens rea standard. Where there is choice there is fault, and without choice there is no potential for deterrence.<sup>33</sup> Just as traditional crimes come with a spectrum of mens rea levels—for instance, purposely, knowingly, recklessly, and negligently, as we

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<sup>27</sup> See *United States v. Balint*, 258 U.S. 250, 251–52 (1922) (“[T]he general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it . . .”); Colin Manchester, *The Origins of Strict Criminal Liability*, 6 *ANGLO-AM. L. REV.* 277, 277 (1977).

<sup>28</sup> Manchester, *supra* note 27, at 277–83 (tracing the emergence of strict liability “regulatory offenses” to the rise of the Industrial Revolution in the mid-1800s).

<sup>29</sup> See *Staples v. United States*, 511 U.S. 600, 607–09 (1994).

<sup>30</sup> *Id.* at 616–19.

<sup>31</sup> See Stuart P. Green, *Why It’s a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 *EMORY L.J.* 1533, 1535 (1997) (citing the thread of scholarly criticism addressing criminalization of regulatory offenses).

<sup>32</sup> See, e.g., Paul H. Robinson, *Moral Credibility and Crime*, *ATLANTIC MONTHLY*, Mar. 1995, at 72, 77 (“[C]riminal law is increasingly used against purely regulatory offenses, such as those involving the activities permitted in public parks, the maintenance procedures at warehouses, and the foodstuffs that may be imported into a state. The move is understandable: reformers seek to enlist the moral force implicit in criminal conviction for the sake of deterrence—a force that civil liability does not carry. But the use of criminal conviction in the absence of serious criminal harm that deserves moral condemnation weakens that very force. As the label ‘criminal’ is increasingly applied to minor violations of a merely civil nature, criminal liability will increasingly become indistinct from civil and will lose its particular stigma.”).

<sup>33</sup> See Green, *supra* note 31, at 1579, 1591–92 (noting that the choice to act in violation of any law may have “significant moral content,” indicating that mere illegality regardless of mens rea may have a deterrent effect).

see in the Model Penal Code<sup>34</sup>—so too does seemingly unintended harm, that which falls below the threshold for negligence. The choices at issue merely come earlier in the strict liability context.

We all make risk-preventative choices every day for ourselves and our families: child proofing our home when it houses a toddler, wearing a seatbelt though we have never been in an accident, and locking our front door when we know of no person ever having tried to open it uninvited. Most such choices are not required of us, but when our activities interplay with the outside world, when we are in a position to protect *others* from risk, we cannot always be counted on to be as naturally protective as we are of ourselves and our families. This is where strict liability public welfare offenses can step in to require us to proactively prevent harm—*even harm that we are not aware is taking place—because we alone are in a position to prevent it*. It is this special role of sole capability and responsibility, and not mens rea, which forms the justification for criminal sanctions when the prohibited and preventable harm takes place.

### C. Strict Liability Is Not Another Name for Negligence

The modern distillation of mens rea options tends to focus on the concepts of purposely, knowingly, recklessly, and negligently.<sup>35</sup> While there are other mens rea terms in use, these are the broad concepts they represent. Negligence is the lowest standard, and generally requires that a defendant fail to live up to a duty of which he should have been aware but was not.<sup>36</sup> When we call people negligent we are saying that they should have been more careful, more conscious, more proactive and on top of those things over which they have exercised some control, but we are not calling them consciously careless, as that would move toward the standard for recklessness.<sup>37</sup> Ultimately, negligence is a very low standard, and one that can easily apply to morally innocent people.

Strict liability, on the other hand, is the complete absence of any mens rea requirement at all.<sup>38</sup> Because it is not negligence, it is not necessary to consider what a reasonable person would have done, or known about.<sup>39</sup> We need not label the defendant careless or unconcerned. It is guilt without moral fault.<sup>40</sup> It is the person who drives over the speed limit not realizing that their speedometer was off by ten miles per hour, which person may well have been the most conservative, rule-following driver you have ever met. It is a rule the legislature has decided is essential that everyone follow universally and without fail, and often one in which there is difficulty in

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<sup>34</sup> MODEL PENAL CODE § 2.02(1) (Official Draft 1985).

<sup>35</sup> *See id.*

<sup>36</sup> *Id.* § 2.02(2)(d).

<sup>37</sup> DAVID CRUMP ET AL., CRIMINAL LAW: CASES, MATERIALS, AND LAWYERING STRATEGIES 188 (2d ed. 2010).

<sup>38</sup> *Id.* at 204.

<sup>39</sup> *See* MODEL PENAL CODE § 2.02(2)(d) (Official Draft 1985) (negligence standard).

<sup>40</sup> BLACK'S LAW DICTIONARY 998 (9th ed. 2009)

proving a mental state.<sup>41</sup> It is a kind of harm society has determined that you simply cannot cause, no matter how innocently. It is called “strict” for good reason.

Because strict liability applies regardless of knowledge, foreseeability of the harm itself<sup>42</sup> is not an appropriate concern, as that is a concept wedded to the notion of a guilty mind. Of course, some act, or omission where there was a duty to act, must still be present, as without an *actus reus* there would be nothing left of a crime. Wholly passive behavior cannot be criminalized.<sup>43</sup> Strict liability is generally the approach taken when a legislature wants to hold those who take on a special responsibility to a high standard of care, one that demands the search for information about hazards that goes beyond that which they already knew or even should have known.<sup>44</sup> It is not another term for negligence, but rather the complete absence of any mens rea at all: “Indeed, the premise of strict liability is that the defendant is held guilty no matter how careful and morally innocent he or she, or one for whose acts he or she is responsible, has been.”<sup>45</sup>

The landmark case defining strict criminal liability is *United States v. Balint*.<sup>46</sup> In that case the defendant was charged with selling narcotic drugs without a written order, in violation of the Narcotic Act of 1914.<sup>47</sup> Balint demurred to the indictment on the basis that it did not allege that he knew the drug he sold was a narcotic drug, and the district court quashed the indictment for this reason.<sup>48</sup> The Supreme Court held that there was no knowledge requirement in the statute, as well as no due process violation for its absence, and revived the indictment.<sup>49</sup> The Court pointed out that this trend of criminal statutes without mens rea was necessary to address matters in which enforcement may be impeded by such a requirement.<sup>50</sup> In the pursuit of social betterment, those who cause proscribed harm may be punished in spite of their complete ignorance as to the facts that caused the harm.<sup>51</sup> The *Balint* Court accepted the fact that sometimes innocent parties

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<sup>41</sup> CRUMP ET AL., *supra* note 37, at 206.

<sup>42</sup> As opposed to the actor’s general exposure to regulation based upon her involvement and authority. *See, e.g.*, *United States v. Dotterweich*, 320 U.S. 277, 284–85 (1943) (stating that regardless of an actor’s consciousness of wrongdoing, Congress has placed the burden of determining risk on those actors—such as the president of a company—who have an opportunity to inform themselves, rather than place the risk on the helpless public).

<sup>43</sup> *Lambert v. California*, 355 U.S. 225, 228–30 (1957).

<sup>44</sup> *See Singer, supra* note 18, at 389.

<sup>45</sup> *Id.* at 356.

<sup>46</sup> 258 U.S. 250 (1922).

<sup>47</sup> *Id.* at 251; Act of Dec. 17, 1914, ch. 1, 38 Stat. 785 (codified as amended at 26 U.S.C. §§ 1040–1054 (1934)).

<sup>48</sup> *Balint*, 258 U.S. at 251.

<sup>49</sup> *Id.* at 252, 254.

<sup>50</sup> *Id.* at 251–52.

<sup>51</sup> *Id.* at 252 (noting that the Court in *Shevlin-Carpenter Co. v. Minnesota* “held that in the prohibition or punishment of particular acts, the 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’” (quoting *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 69–70 (1910))).

would be convicted, noting that Congress had weighed that concern against the harm to be avoided by the statute, factoring in the difficulty involved in proving knowledge under the relevant circumstances.<sup>52</sup>

The classic example used to teach the concept of strict criminal liability is statutory rape, which is virtually always a strict liability offense.<sup>53</sup> Where, for instance, a state legislature has set the age of consent for sexual intercourse at sixteen, if a defendant of sufficient age under the statute has sex with a fifteen-year-old, he is guilty of the offense regardless of his knowledge of her age.<sup>54</sup> He is guilty in spite of a reasonable belief that she was eighteen. Such belief may be based on her own statements, her appearance, even her enrollment in college—it would not matter how great the reasons for the belief—he is still guilty of the offense.<sup>55</sup> He is given the duty to ascertain without fail that the person with whom he engages in sexual activity is old enough to consent to that activity.<sup>56</sup> This is because the protection of youthful innocence has outweighed, as a policy matter, his entitlement to act in ignorance. The most famous case supporting this long tradition is *Regina v. Prince*,<sup>57</sup> from the nineteenth century. This area of strict criminal liability likely set the stage for the proliferation of such offenses throughout the twentieth century.

Another classic case demonstrating just how far courts are willing to go in punishing without mens rea is *State v. Lindberg*.<sup>58</sup> The banking statute at issue in that case provided that “[e]very director and officer of any bank . . . who shall borrow . . . any of its funds in an excessive amount . . . shall . . . be guilty of a felony.”<sup>59</sup> The defendant argued that he could not be charged with the offense because not only did he not know the money came from his bank, but he had even been assured by the bank official processing the loan that the money came from a different bank.<sup>60</sup> However, the court held that the reasonableness of the defendant’s mistake was not a defense because the statute did not require proof of mens rea.<sup>61</sup> The act of borrowing money

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<sup>52</sup> *Id.* at 254.

<sup>53</sup> See Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim’s Age as Defense to Statutory Rape*, 46 A.L.R. 5TH 499, 508 (1997).

<sup>54</sup> See, e.g., MISS. CODE ANN. § 97-3-65 (West 2011); see also Campbell, *supra* note 53, at 510–13 (listing states that follow the strict liability rule).

<sup>55</sup> See, e.g., Garnett v. State, 632 A.2d 797, 798–99, 803–04 (Md. 1993) (affirming the exclusion of evidence that a mentally retarded man had a reasonable belief that the age difference between the victim and himself was within the statutory limit).

<sup>56</sup> See, e.g., *id.* at 802–05 (noting that although two-fifths of the states allow a defense of reasonable mistake as to the victim’s age, the statutes of the majority of states impose strict liability in cases of statutory rape, placing the risk of mistake as to the victim’s age solely on the defendant).

<sup>57</sup> [1875] 13 App. Cas. 138 (H.L.) 144–45 (A.C.) (appeal taken from Eng.) (holding that a defendant’s bona fide and reasonable belief that a girl is older than 16 is not a defense against an indictment for unlawfully taking an unmarried girl under the age of 16 from her father).

<sup>58</sup> 215 P. 41 (Wash. 1923).

<sup>59</sup> WASH. REV. STAT. ANN. § 3259 (Remington 1932) (codified as amended at WASH. REV. CODE §§ 30.12.060–30.12.070 (2010)).

<sup>60</sup> *Lindberg*, 215 P. at 44–45.

<sup>61</sup> *Id.* at 45, 47.

that in fact came from his own bank was a violation of the statute without regard to his lack of knowledge of the key facts making it so.<sup>62</sup>

If there is no need for culpability, where does guilt come from in the context of strict criminal liability? It is sufficient to have authority over the conditions which led to the proscribed harm.<sup>63</sup> Such responsibility encourages one to seek out every possible necessity for care, not just those which he knows about or even should have known about—the latter being the standard for negligence.<sup>64</sup> This is not to say that it is simply a higher standard of care, beyond the reasonable to the extraordinary, as this would still fall within the concept of mens rea.<sup>65</sup> Rather, it is entirely irrelevant whether the defendant should have known, or even should have discovered with great effort, that the risk was there. It is sufficient that the defendant had authority over the conditions creating the risk—and ultimately causing the harm—and that avoidance of the harm was possible.<sup>66</sup> While acting with due care to avoid proscribed harms is not sufficient to defend against a strict liability charge, it is certainly the sort of behavior such a statute encourages, thereby going beyond negligence.

#### *D. Strict Liability Does Have Limits*

Of course, the leeway to create criminal sanctions without regard to fault is not unfettered. There are, as there must be, due process limitations to such a development. In *United States v. International Minerals & Chemical Corp. (International Minerals)*,<sup>67</sup> the Supreme Court tied the concept of strict criminal liability to the involvement in activities one might expect to be regulated, such as when shipping dangerous substances—as was at issue in that case<sup>68</sup>—or selling drugs—as in *Balint*.<sup>69</sup> The Court noted that while “[p]encils, dental floss, [and] paper clips may also be regulated,” doing so would raise serious due process concerns absent a mens rea requirement.<sup>70</sup> It is this concept that forms the foundation of my ultimate proposals for directing MBTA enforcement.<sup>71</sup>

In *Staples v. United States*<sup>72</sup> the Court was not directly focused on a due process violation, but rather construed a firearms regulation as having a mens rea requirement in spite of its silence on the matter.<sup>73</sup> However, the

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<sup>62</sup> *Id.*

<sup>63</sup> *United States v. Park*, 421 U.S. 658, 670–71 (1975).

<sup>64</sup> *See, e.g., id.* at 672.

<sup>65</sup> *See* Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1131–33 (1997) (arguing that strict liability does not entail a duty to use “extraordinary care”).

<sup>66</sup> *See, e.g., Park*, 421 U.S. at 671–72, 674.

<sup>67</sup> 402 U.S. 558 (1971).

<sup>68</sup> *Id.* at 563–65.

<sup>69</sup> *Balint*, 258 U.S. 250, 254 (1922).

<sup>70</sup> *International Minerals*, 402 U.S. at 564–65.

<sup>71</sup> *See* discussion *infra* Part V.

<sup>72</sup> 511 U.S. 600 (1994).

<sup>73</sup> *Id.* at 619.

Court did so in an apparent attempt to avoid a due process problem<sup>74</sup> because the Court focused on two ways of limiting the potential for strict criminal liability. First, it considered the *International Minerals* characterization of strict liability regulatory or public welfare offenses as being those in which the defendant is engaged in some sort of potentially harmful or injurious activity.<sup>75</sup> Although the statute at issue in *Staples* regulated automatic weapons, the Court held—but with only five justices agreeing on this point—that because gun ownership is so extremely common, an automatic weapon could not qualify as a dangerous item one might expect to be regulated.<sup>76</sup> This position is, not surprisingly, highly controversial.<sup>77</sup> The second basis for the Court's requirement of mens rea added a limitation on the extent of punishment that may be available under a strict liability statute.<sup>78</sup> While not ruling out strict liability for felonies—*Balint* involved a felony with imprisonment of up to five years and was not overruled in *Staples*—the Court held that the ten-year imprisonment potential upon conviction under the National Firearms Act<sup>79</sup> was too severe a punishment for those convicted without proof of mens rea—treating this as an indication of legislative intent to require mens rea, rather than as a due process violation, so the statute was not invalidated.<sup>80</sup>

These limiting cases are about determining whether strict liability is permissible, and *not* how it is applied once it is determined to be the

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<sup>74</sup> See *International Minerals*, 402 U.S. at 564–65 (noting possible due process questions raised if Congress were to regulate products that are not “dangerous or deleterious” or “obnoxious waste materials” without requiring a mens rea element); see also Alex Arensberg, Note, *Are Migratory Birds Extending Environmental Criminal Liability?*, 38 *ECOLOGY L.Q.* 427, 429–30 (2011) (explaining possible due process consequences of strict criminal liability, but noting that public welfare offenses do not necessarily need mens rea to satisfy constitutional due process concerns because regulation of those offenses is foreseeable).

<sup>75</sup> *Staples*, 511 U.S. at 607.

<sup>76</sup> *Id.* at 611–14, 622, 624. In addition to holding that guns are not dangerous enough to anticipate their regulation, the Court surprisingly suggested that cars could be termed “dangerous” devices. *Id.* at 614. While a car is every bit as deadly as an automatic weapon, a car is not designed for the *purpose* of causing harm. More to the point, the reason that guns were deemed not to trigger the expectation of regulation was in large part because they are so common, though certainly they are far less common than cars. *Id.* at 613–14 (“Roughly 50 percent of American homes contain at least one firearm of some sort . . . .”); Robin Chase, *You Asked: Does Everyone in America Own a Car*, AMERICA.GOV ARCHIVE, Mar. 19, 2010, <http://www.america.gov/st/peopleplace-english/2010/March/20100316154329fsyelkaew0.8109356.html> (last visited Apr. 7, 2012) (stating that 95% of households own a car).

<sup>77</sup> See, e.g., *Staples*, 511 U.S. at 624, 631 (Stevens, J., dissenting) (finding guns dangerous and noting surprise at the Court's likening of guns more to food stamps than to hand grenades); Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 *ENVTL. L.* 1165, 1202–03 (1995) (referring to the Court's reasoning as “a radical departure from prior cases”); Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting “Apparent Innocence” in the Criminal Law*, 33 *AM. CRIM. L. REV.* 1, 4, 25–26 (1995) (noting the contextual nature of innocuousness, the differing views of the Justices on the innocence of guns, and the general controversy regarding the “social significance of gun ownership”).

<sup>78</sup> *Staples*, 511 U.S. at 617–19.

<sup>79</sup> 26 U.S.C. §§ 5841–5849 (2006).

<sup>80</sup> *Staples*, 511 U.S. at 615–16, 618–19, 635 n.20.

standard. Thus, they cease to be relevant once courts have agreed that a statute does, in fact, apply strict liability. Once it has been determined that the *context* is appropriate for strict liability, that the seriousness of punishment is acceptable, and that strict criminal liability was the intent of the legislature, all that remains is the case-by-case question of whether the harm was within the control of the defendant.

*E. Foreseeability Has Limited Application to Strict Liability*

Strict criminal liability is not limited to harms that were foreseeable. Indeed, it is quite common among scholars, when arguing that a particular law does *not* impose strict liability, to use as evidence of this point the fact that it hinges on foreseeability of the relevant harm.<sup>81</sup> This foreseeability requirement before imposing guilt is what distinguishes the given law from those imposing strict criminal liability. When we call something foreseeable, we are saying that it could or should have been foreseen, which is logically indistinguishable from the “should have known” standard, which is the test for negligence.<sup>82</sup> Instead, “the premise of strict liability is that the defendant is held guilty no matter how careful and morally innocent he or she . . . has been.”<sup>83</sup>

Some courts have erroneously taken foreseeability into account in the context of strict liability by couching it in terms of proximate causation.<sup>84</sup> While lack of proximate causation can indeed be a defense to strict liability, this is so only to the extent that it negates the *actus reus*.<sup>85</sup> It is a fallacy to view it as an aspect of the mens rea, such that foreseeability considerations are broadly permissible, as there is no mens rea in strict liability crimes. The manner in which lack of foreseeability can eliminate proximate causation and aid in a criminal defendant’s case is where there is some superseding

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<sup>81</sup> See, e.g., Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 109, 116 (2007) (noting that the fallibility of determining foreseeability can lead to a circumstance of strict liability); Peter J. Saghir, *Home Is Where the No-Fault Eviction Is: The Impact of the Drug War on Families in Public Housing*, 12 J.L. & POL’Y 369, 394 (2003) (noting strict liability was employed when a court allowed an eviction despite the lack of foreseeability for events that violated relevant requirements); Kelley Elaine Lockman, Note, *Who Brought the Kid?: United States v. McClain and the Application of Sentencing Enhancements When Use of a Minor in a Concerted Criminal Activity Was Foreseeable*, 36 GA. L. REV. 863, 893 (2002) (explaining that under the *Pinkerton* rule of liability for acts of a co-conspirator, the requirement of foreseeability avoids making it a rule of strict liability).

<sup>82</sup> 1 RESTATEMENT (THIRD) OF TORTS § 3 cmt. g (2010) (“Foreseeability often relates to practical considerations concerning the actor’s ability to anticipate future events or to understand dangerous conditions that already exist. In such cases, what is foreseeable concerns what the actor ‘should have known.’”).

<sup>83</sup> Singer, *supra* note 18, at 356.

<sup>84</sup> See *infra* Part IV.

<sup>85</sup> Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 430–32 (1993).

intervening cause of the harm,<sup>86</sup> such as when the defendant displayed the required document on his car and it was removed by another in his absence,<sup>87</sup> or where some malicious criminal has tampered with the end product on its way to consumers.<sup>88</sup> The proximate causation defense, however, “has limited use for strict liability crimes. If a defendant is directly involved in the prohibited action, the defense is unavailable.”<sup>89</sup>

While foreseeability issues can arise in determining proximate causation, they have traditionally been limited in scope. Proximate causation is largely the absence of a *superseding* intervening cause.<sup>90</sup> Not all intervening causes are superseding causes, and only the latter break the proximate causation.<sup>91</sup> First, we look to whether the intervening cause is responsive—in that it was brought on by the defendant’s actions—or purely coincidental.<sup>92</sup> If the former, that is generally the end of the inquiry—absent very unusual circumstances—it is not a superseding cause and the defendant has proximately caused the end result.<sup>93</sup> If it is purely coincidental, then and only then do we begin to consider foreseeability of the intervening cause to determine whether it is a superseding cause relieving the defendant of responsibility for the resulting harm.<sup>94</sup> As discussed in *People v. Rideout*:<sup>95</sup>

For a defendant’s conduct to be regarded as a proximate cause, the victim’s injury must be a “direct and natural result” of the defendant’s actions. In making this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant’s conduct such that the causal link between the defendant’s conduct and the victim’s injury was broken. If an intervening cause did indeed *supersede* the defendant’s act as a legally

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<sup>86</sup> See *Blaize v. United States*, 21 A.3d 78, 81 (D.C. 2011) (“Our cases establish that ‘[a]n intervening cause will be considered a superseding legal cause that exonerates the original actor if it was so unforeseeable that the actor’s . . . conduct, though still a substantial causative factor, should not result in the actor’s liability.’” (quoting *Butts v. United States*, 822 A.2d 407, 418 (D.C. 2003)) (alteration in original)).

<sup>87</sup> See *Kilbride v Lake* [1962] NZLR 590 (SC) 590, 593 (presenting such a quintessential example that, even though a New Zealand case, it is commonly taught and cited in the United States and elsewhere).

<sup>88</sup> For example, pain relievers have been tampered with on multiple occasions. See, e.g., U.S. Dep’t of Def., *Crisis Communication Strategies: Analysis: Case Study: The Johnson & Johnson Tylenol Crisis*, <http://www.ou.edu/deptcomm/dodjcc/groups/02C2/Johnson%20%20Johnson.htm> (last visited Apr. 7, 2012).

<sup>89</sup> Levenson, *supra* note 85, at 432.

<sup>90</sup> See 2 RESTATEMENT (SECOND) OF TORTS §§ 440–441 (1965).

<sup>91</sup> See *id.*

<sup>92</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 204–05 (4th ed. 2006)

<sup>93</sup> *Id.* at 204 (“Generally speaking, a responsive intervening cause does *not* relieve the initial wrongdoer of criminal responsibility, unless the response was not only unforeseeable, but highly abnormal or bizarre.”).

<sup>94</sup> *Id.* at 206.

<sup>95</sup> 727 N.W.2d 630 (Mich. Ct. App. 2006), *rev’d in part*, 728 N.W.2d 459 (Mich. 2007).

significant causal factor, then the defendant's conduct will not be deemed a proximate cause of the victim's injury.<sup>96</sup>

According to Professor Dressler's treatise, a *responsive* intervening cause will typically not relieve the defendant of liability, while a *coincidental* intervening cause will typically relieve the defendant of liability unless foreseeability of the intervention can be established.<sup>97</sup> In discussing responsive intervening causes, Professor Dressler suggests two examples: first, a boat passenger drowning while attempting to swim to shore after the boat capsizes, and second, a victim, wounded by a defendant, who dies after being treated negligently by medical professionals.<sup>98</sup> In cases of responsive intervening causes, the harm at issue comes from actions taken in response to the defendant's conduct.<sup>99</sup> A coincidental intervening cause, on the other hand, might be as little as the defendant putting the victim "in the wrong place at the wrong time," such as if the wounded victim in Professor Dressler's example above is attacked by a "knife-wielding maniac" while waiting in the emergency room for treatment.<sup>100</sup>

In the end, proximate causation "is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural. Thus, a proximate cause is simply a factual cause of which the law will take cognizance."<sup>101</sup> Relieving defendants of liability for lack of proximate causation is thus reserved for truly special circumstances, in which what has occurred is highly unusual, not logically related to the defendant's actions, and not likely to occur again if the defendant continues with the same behavior.

Even where foreseeability does become relevant, it does not necessarily mean foreseeable to the ordinary person. Given that the trend toward strict liability offenses has primarily been in the context of public welfare concerns brought on by the Industrial Revolution,<sup>102</sup> there must certainly be a subjective component to the objective question. In other words, while the ordinary person may not foresee that tightly sealed drums containing toxic waste might degrade and leach the waste into the ground, a person in the business of creating or storing such waste should find this foreseeable. If we were to inject a foreseeable-to-all requirement into public welfare strict liability offenses, there would be no such thing as strict liability. The entire point of the existence of public welfare strict liability offenses is that the defendants are in a special position to prevent a harm that the average person would know nothing about.

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<sup>96</sup> *Id.* at 633 (quoting *People v. Schaefer*, 703 N.W.2d 774, 785 (Mich. 2005)).

<sup>97</sup> DRESSLER, *supra* note 92, at 204, 206.

<sup>98</sup> *Id.* at 204.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 205–06.

<sup>101</sup> *Rideout*, 727 N.W.2d at 632 (quoting *People v. Schaefer*, 703 N.W.2d 774, 785 (Mich. 2005)) (internal quotation omitted).

<sup>102</sup> See Levenson, *supra* note 85, at 419; see also Manchester, *supra* note 27, at 279–80, 282.

*F. Strict Liability in the Environmental Context*

Although strict liability always requires less culpability than negligence, regardless of context, it is generally especially strict and fault-free in the environmental context. Some scholars have suggested that, just as there are gradations of mens rea, there are also gradations, or at least one split-point, to strict liability.<sup>103</sup> One example of this is the distinction between “pure” and “impure” strict liability.<sup>104</sup> As Professor Simons describes it, pure strict liability requires absolutely no culpability as to any material element of the offense, whereas impure strict liability requires culpability as to at least one material element but does not require culpability as to at least one other element, at least in the sense of some intentional act.<sup>105</sup> The examples he chose for each are useful. Statutory rape is an example of impure strict liability, in that one must intentionally engage in sexual intercourse, though it is not necessary to be aware of—or even negligent as to—the other participant’s age.<sup>106</sup> The example he chose as the quintessential pure strict liability category of crime was environmental crime, “inasmuch as the offender need only cause defined forms of environmental risks or harms (such as exposing the public to certain pollutants or toxins in excess of a specified level), and it is irrelevant that she lacked negligence, knowledge, or any other culpability in causing those risks or harms.”<sup>107</sup>

Environmental crime follows in the footsteps of a long line of strict liability crimes applicable to corporate officers.<sup>108</sup> Generally referred to as “public welfare offenses,” this line of strict liability crimes developed in response to concerns regarding the dangers brought about by the Industrial Revolution.<sup>109</sup> Progress has a dark side, in that it leads to activities, such as those directed at harnessing natural resources or those enabling mass production and distribution of products, that intrude on the natural state of being and create previously nonexistent dangers. These dangers may be directly to human beings, or to wildlife, or indirectly to both by harming the environment we share. These concerns are so great, and the decision to involve oneself in such enterprises so forward, that strict liability has been

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<sup>103</sup> A common example is to divide strict liability into public welfare offenses and morality offenses. *See, e.g.,* Levenson, *supra* note 85, at 418. Environmental crimes, of course, fall into the former category. *See* Andrew J. Turner, *Mens Rea in Environmental Crime Prosecutions: Ignorantia Juris and the White Collar Criminal*, 23 COLUM. J. ENVTL. L. 217, 220–21 (1998) (noting federal appellate courts’ treatment of violations under several environmental statutes as constituting public welfare offenses).

<sup>104</sup> Simons, *supra* note 65, at 1081.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1081–82.

<sup>107</sup> *Id.* at 1082.

<sup>108</sup> *See, e.g.,* United States v. Dotterweich, 320 U.S. 277, 278, 280–85 (1943) (applying a strict liability standard to the conviction of a corporate officer for shipping adulterated and misbranded drugs in violation of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399 (2006)).

<sup>109</sup> *See* Levenson, *supra* note 85, at 419.

morally and constitutionally accepted in such contexts.<sup>110</sup> The development of these strict liability public welfare offenses reflected a “shift of emphasis from the protection of individual interests” to the “protection of public and social interests.”<sup>111</sup> The use of strict liability in these contexts places full responsibility for dangers—whether known or unknown, foreseen or unforeseen—in the hands of the only people in a position to prevent the harm.<sup>112</sup>

Of course, the use of a negligence standard generally shifts responsibility for risks to those in authority as well, but

[O]nly under strict liability are individuals imprisoned even if they take all possible precautions to act reasonably. The sole question for the trier of fact is whether the defendant committed the proscribed act. The jury may not decide whether the defendant could have done anything else to prevent the unlawful act.<sup>113</sup>

One good reason for this method of placing risk responsibility on the shoulders of those in control of major industrial activities is that it would be extremely difficult for jurors—or even courts—to properly assess what should qualify as reasonable care in such complex or extraordinary circumstances.<sup>114</sup> Not only might jurors attempting to apply a negligence standard lead to “inconsistent, unpredictable, and biased” verdicts in these contexts, but there is also a significant risk that commonly shared views on appropriate standards of care may vary from one community to the next.<sup>115</sup>

Strict liability in these contexts also has nearly the same moral force as a negligence standard would.<sup>116</sup> Underlying the standard is a presumption that nearly all who are convicted thereby were in fact negligent, but proof of such negligence is difficult and unreliable.<sup>117</sup> To the extent that a few wholly

<sup>110</sup> See, e.g., Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259, 281–82 (1976); *infra* notes 111–20 and accompanying text.

<sup>111</sup> Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 67 (1933).

<sup>112</sup> See Levenson, *supra* note 85, at 419.

<sup>113</sup> *Id.* at 420 (footnotes omitted).

<sup>114</sup> See *id.* at 421.

<sup>115</sup> Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1512, 1517 (Sanford H. Kadish ed., 1983); see also Levenson, *supra* note 85, at 421.

<sup>116</sup> The California Supreme Court stated the need for strict liability offenses as follows:

There are many acts that are so destructive of the social order, or where the ability of the state to establish the element of criminal intent would be so extremely difficult if not impossible of proof, that in the interest of justice the legislature has provided that the doing of the act constitutes a crime, regardless of knowledge or criminal intent on the part of the defendant.

In these cases it is the duty of the defendant to know what the facts are.

*Ex parte Marley*, 175 P.2d 832, 835 (Cal. 1946) (en banc) (quoting *State v. Weisberg*, 55 N.E.2d 870, 872 (Ohio Ct. App. 1943)).

<sup>117</sup> See, e.g., Levenson, *supra* note 85, at 421 (“A [] justification often offered for the strict liability doctrine is that it eases the burden on the prosecution to prove intent in difficult cases. . . . As with most irrebuttable presumptions, the legislature believes individual inquiries are unnecessary because the overwhelming majority of cases will show that the defendant

innocent defendants are punished, this result is deemed outweighed by the significant harms such offenses generally are targeted to avoid, also taking into account the typically light punishments in the balance.<sup>118</sup> In this sense, choosing to impose strict liability is a legislature's way of expressing that this is a danger we take very seriously and wish to avoid at all costs.<sup>119</sup> Beware to those who engage in large-scale or otherwise risky activities.

Ultimately, when it comes to public welfare offenses, we are simply willing to take the risk of punishing some *nonnegligent* actors in order to ensure the greatest possible avoidance of a particularly disconcerting danger.

The rationale of the doctrine of strict criminal liability is that, although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction, and that the interest of enforcement for the public health and safety requires the risk that an occasional non-offender may be punished in order to prevent the escape of a greater number of culpable offenders.<sup>120</sup>

This, of course, is the opposite of the usual philosophy of American criminal law, that we should allow many guilty people to go free before convicting even one innocent person, and which philosophy forms the basis for the "proof beyond a reasonable doubt" standard.<sup>121</sup> But that is what distinguishes strict criminal liability offenses: they deal with matters so great, and impose punishment so minimal,<sup>122</sup> that the balance has been shifted the other way.

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acted at least negligently." (footnotes omitted)); Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 173–74 (1969) (discussing the burden of introducing evidence imposed by presumptions).

<sup>118</sup> *Morrisette v. United States*, 342 U.S. 246, 256 (1952) (noting that penalties for public welfare offenses "commonly are relatively small"); see, e.g., Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 597, 600–01 (1993) (recognizing that CERCLA's strict liability provisions impose liability on "factually responsible" parties as a matter of fairness—even where the charged parties are blameless—in order to deter harmful conduct).

<sup>119</sup>

By labeling an offense as strict liability, the legislature can claim to provide the utmost protection from certain public harms. By affording no leniency for defendants causing harm, the legislature affirms society's interest in being protected from certain conduct. In this sense, strict liability expresses emphatically that such conduct will not be tolerated regardless of the actor's intent.

Levenson, *supra* note 85, at 422.

<sup>120</sup> *People v. Travers*, 124 Cal. Rptr. 728, 730 (Cal. Ct. App. 1975).

<sup>121</sup> See *In re Winship*, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause requires proof beyond a reasonable doubt in criminal cases because, *inter alia*, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned")

<sup>122</sup> This, of course, is debatable given that strict liability has been upheld for felonies with potential sentences of up to five years—though judicial discretion in sentencing generally protects nonculpable actors falling prey to strict liability statutes from their full penal force. See *Balint*, 258 U.S. 250, 252–53 (1922) ("[W]here one deals with other and his mere negligence may be dangerous to them . . . the policy of the law may, in order to stimulate proper care, require

It is essential to note that, especially in the critical but not always universally appreciated area of environmental protection, strict criminal liability may indeed be the *only* means of getting corporate executives to take all possible precautions.<sup>123</sup> The argument is that, given the corporate priority of profit maximization, mere corporate fines may simply be rolled into the cost of doing business, often being well worth the financial benefits derived from environmental sloppiness, such that corporate officers will not have adequate incentive to take every possible precaution.<sup>124</sup> Thus, exposing the corporate officers to criminal convictions, and the resulting punishments, is the only way to achieve complete vigilance.

The quintessential discussion of the philosophy and moral justification for strict criminal liability is found in *Morissette v. United States*.<sup>125</sup> The moral support for the strict liability standard comes from its development in relation to public welfare offenses—out of concern for the dangers created by the many new trades that sprung from the Industrial Revolution:

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. . . . 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.<sup>126</sup>

For this reason the Court held that, while it supported strict criminal liability in this regulatory context, it would not apply it to traditional common law crimes based on moral culpability—larceny, in that case.<sup>127</sup> Environmental crimes are the direct descendants of the original development of regulatory public welfare offenses. Environmental harm is generally caused, whether knowingly or not, by those who are “in a position to prevent it with no more care than society might reasonably expect and no

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the punishment of the negligent person though he be ignorant . . . .”); see also Phillip E. Johnson, *Strict Liability: The Prevalent View*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 115, at 1518, 1520 (suggesting judges use discretion in sentencing by noting that “the criminal penalties provided in these [strict liability] statutes are rarely imposed,” and providing an example of a reduced sentence). That said, the MBTA, which is the subject of this Article, already abolished strict liability for its felonies, leaving only strict liability misdemeanors. See *supra* text accompanying notes 8–9.

<sup>123</sup> See, e.g., Steven Zipperman, *The Park Doctrine—Application of Strict Criminal Liability to Corporate Individuals for Violation of Environmental Crimes*, 10 UCLA J. ENVTL. L. & POL’Y 123, 123 (1991) (suggesting that criminal sanctions are one way to curtail corporate unlawful disposal of hazardous waste).

<sup>124</sup> See *id.* at 167.

<sup>125</sup> 342 U.S. 246 (1952).

<sup>126</sup> *Id.* at 253–56.

<sup>127</sup> *Id.* at 260, 262.

more exertion than it might reasonably exact from one who assumed his responsibilities.”<sup>128</sup>

#### IV. THE LATEST APPELLATE CASE TO ADDRESS MBTA LIABILITY

The Supreme Court has yet to address the standard for criminal liability under the MBTA. Indeed, a Westlaw search reveals that the Court has only so much as mentioned the statute a handful of times. Thus, advocates have been forced to develop the area in lower courts, mostly at the trial court level. Of the handful of appellate cases discussing the application of the strict liability standard under the MBTA, only two deal with the most essential modern area of enforcement: *an industrial setting resulting in indirect harm*—as opposed to the hunting context, which is not the focus of this Article. The first is *United States v. FMC Corp.*,<sup>129</sup> a well-known case for upholding strict liability under the MBTA as against a defendant who was *not aware* of the “lethal-to-birds quality” of his runoff ponds.<sup>130</sup> The *FMC* Court handled the issue of the MBTA’s theoretically broad reach by entrusting it to disciplined use of prosecutorial discretion.<sup>131</sup> While this case has been highly regarded and often cited—after all, until last year it was the only appellate case on the matter—it is also well over three decades old, and now we have a new appellate case to reckon with in this context. As the only appellate case since *FMC* to address the application of strict MBTA liability to industrial actors, or even to indirect harm in general, this latest case out of the Tenth Circuit requires some attention.

*United States v. Apollo Energies, Inc.*<sup>132</sup> involved two defendants, Apollo and Walker, both owners of oil drilling operations.<sup>133</sup> These operations used numerous heater-treaters, devices with exhaust pipes that frequently entrap birds absent a simple protective screen, which was lacking in both defendants’ heater-treaters.<sup>134</sup> After finding several hundred dead birds trapped in heater-treaters in the region—southeast Kansas—the U.S. Fish and Wildlife Service (FWS) engaged in a public awareness campaign in the area regarding the heater-treater problem, sending letters to individual oil companies in the area, including Apollo, but not Walker.<sup>135</sup> The campaign included posters, industry presentations, TV news stories, and an Associated Press story.<sup>136</sup> As a matter of prosecutorial discretion, FWS chose not to recommend prosecution for the MBTA violations pre-dating the campaign—for the dead birds that prompted the campaign.<sup>137</sup>

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<sup>128</sup> *Id.* at 256 (discussing public welfare offenses generally).

<sup>129</sup> 572 F. Supp. 2d 902 (2d Cir. 1978).

<sup>130</sup> *Id.* at 903, 908.

<sup>131</sup> *Id.* at 905.

<sup>132</sup> 611 F.3d 679 (10th Cir. 2010).

<sup>133</sup> *Id.* at 682.

<sup>134</sup> *Id.* at 682, 685, 691 (noting both Apollo and Walker failed to bird-proof their heater-treaters).

<sup>135</sup> *Id.* at 682, 683 & n.2.

<sup>136</sup> *Id.* at 683.

<sup>137</sup> *Id.*

Apollo's violation took place after it was directly notified of the issue by FWS during its campaign.<sup>138</sup> Walker's violations both took place after the informational campaign, but he did not receive a direct FWS letter until after his first violation—after which he still did nothing to screen his heater-treaters; the second violation was a year after the first and its corresponding letter.<sup>139</sup> The lower court convicted on all counts, based on the applicable strict liability standard, as the unscreened heater-treaters were within the defendants' control.<sup>140</sup> The Tenth Circuit upheld strict liability as the standard for liability, but held that strict liability only satisfies due process if the defendants proximately caused the proscribed harm.<sup>141</sup> The convictions for both Apollo and Walker for the violations that took place after receipt of the letter were affirmed, but Walker's conviction for the violation that took place well after the campaign but before his own letter—which was prompted by this violation—was reversed for lack of proximate causation.<sup>142</sup>

In spite of the court's stated approval of strict liability for MBTA misdemeanors, Walker's testimony that he did not *know* about the heater-treater problem prior to his first violation<sup>143</sup> was the basis for the court's reversal of that count.<sup>144</sup> The district court had found proximate causation to be proven beyond a reasonable doubt because trapped birds were a direct consequence of failing to screen the access holes to the heater-treater.<sup>145</sup> The defendant's lack of knowledge was not part of the equation in the lower court, as it was applying a strict liability standard.<sup>146</sup>

The Tenth Circuit, however, based its determination of whether the defendants proximately caused the bird deaths on “what knowledge the defendants had or should have had of birds potentially dying in their heater-treaters.”<sup>147</sup> This language evokes a “knew or should have known” standard,

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 682, 683 & n.2, 685, 691 (noting that Walker had been urged by the FWS to secure his heater-treaters, but had failed to do so).

<sup>140</sup> *See id.* at 682.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 691.

<sup>143</sup> *Id.* This is a somewhat dubious allegation, given that a full year after the first violation and corresponding FWS letter he still had not fixed the problem and had another violation for another bird death. *Id.* at 683 & n.2. I see no reason to believe that the first violation, about six months after the huge campaign, would have been prevented had he only heard of the campaign. If he is not going to act on a warning directed to him personally, he certainly will not do so in response to a news campaign. I doubt he missed it, as it targeted industry members and their equipment suppliers. *Id.* at 682–83. That said, for the sake of this analysis, I will assume the facts are as he says, both to view the facts in a light most favorable to him—I would not argue with the factual findings of the lower court—and because his lack of knowledge should not relieve his guilt under a strict liability analysis anyway—as it did not in the lower court.

<sup>144</sup> *Id.* at 691.

<sup>145</sup> *United States v. Apollo Energies, Inc.*, Nos. 08-10111-KMH, 2008 WL 4369300, at \*7, \*9 n.16 (D. Kan. Sept. 23, 2008), *aff'd*, No. 08-10111-01-JTM, 2009 WL 211580 (D. Kan. Jan. 28, 2009), *aff'd in part*, 611 F.3d 679 (10th Cir. 2010).

<sup>146</sup> *See id.* at \*7–8.

<sup>147</sup> *Apollo Energies*, 611 F.3d at 690 n.5.

which is not appropriate in a strict liability context.<sup>148</sup> If such knowledge—that a defendant had or should have had—were required, the standard would be one of at least negligence. To make matters worse, the lower court made findings of fact that “birds trapped in heater/treaters [were] relatively common in the industry,” and that “oil operators have been aware for some time that bird remains are frequently found in heater/treaters.”<sup>149</sup> The Tenth Circuit simply disagreed with the lower court on these findings of fact.<sup>150</sup> Given that dead birds were found in both defendants’ heater-treaters on every FWS inspection,<sup>151</sup> it is hard to believe that the concept of bird attraction to these devices was entirely new to them. Nevertheless, in the context of strict liability public welfare offenses, the fact that the bird deaths were common should not have mattered. Where the commonality of the problem is relevant, however, is in the sense that it completely rules out the notion that it was such an absurd result as to wipe out proximate causation.<sup>152</sup> Indeed, there was not even any intervening cause at all, neither responsive nor coincidental—the defendants’ actions *directly* caused the harm.

The *Apollo Energies* court apparently derived its foreseeability analysis, requiring knowledge of the dangers posed by heater-treaters, from the due process concept of “notice” requirements.<sup>153</sup> It placed great focus on *Lambert v. California*,<sup>154</sup> in which the Supreme Court held that due process required notice “where a person, wholly passive and unaware of any wrongdoing,” fails to affirmatively act as the law requires, and is criminally liable for that failure.<sup>155</sup> *Lambert* involved a requirement to register as a felon if present in the state, where such presence was not an activity likely to trigger an expectation of regulation absent notice, which the Supreme Court expressly distinguished from other public welfare offenses where people are involved

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<sup>148</sup> See *United States v. Garrett*, 984 F.2d 1402, 1406 (5th Cir. 1993) (interpreting the standard for a different statute and rejecting both proffered extremes—one being actual knowledge and the other being strict liability—in favor of a compromise of “should have known”).

<sup>149</sup> *Apollo Energies*, 2008 WL 4369300, at \*7, \*9 n.15.

<sup>150</sup> *Apollo Energies*, 611 F.3d at 691.

<sup>151</sup> *Id.* at 682–83.

<sup>152</sup> See *id.* at 690 (“[P]roximate causation ‘normally eliminates the bizarre . . .’” (quoting *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 713 (1995) (O’Connor, J., concurring))).

<sup>153</sup> The court stated:

Questions abound regarding what types of predicate acts—acts which lead to the MBTA’s specifically prohibited acts—can constitute a crime. Conceptually, the constitutional challenge to the criminalization of these predicate acts can be placed under the rubric of notice or causation. The inquiries regarding whether a defendant was *on notice* that an innocuous predicate act would lead to a crime, and whether a defendant *caused* a crime in a legally meaningful sense, are analytically indistinct, and go to the heart of due process constraints on criminal statutes.

*Id.* at 689; see also *id.* at 691.

<sup>154</sup> 355 U.S. 225 (1957).

<sup>155</sup> *Id.* at 228.

in potentially harmful activities.<sup>156</sup> The *Apollo Energies* court analogized the need for notice in *Lambert* to the FWS notice of the heater-treater problem, such that only those who had received the FWS letters had adequate notice to support due process, which the court called an indistinguishable issue from that of proximate causation.<sup>157</sup>

This MBTA case bears absolutely no resemblance to *Lambert*. One cannot credibly define the operation of an oil rig as “wholly passive.”<sup>158</sup> As discussed in Part III.D, the Supreme Court has held that in the context of activities that a reasonable person would expect might be regulated, such as those with the potential to cause harm, strict criminal liability is constitutional.<sup>159</sup> The Court has spoken clearly regarding the importance of activities one might expect to be regulated, but has said nothing about the ability to predict the specific factual harm—as this suggests a “knew or should have known” standard and would not be strict liability. In a time and place where there are numerous environmental restrictions on industrial activities, in place for nearly four decades<sup>160</sup> at the times relevant to *Apollo Energies*, there can be no doubt that a reasonable person would expect regulation of the activity of operating an oil rig. To describe such a party as “wholly passive” and without notice of the potential for regulation offends

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<sup>156</sup> *Id.* at 226–29 (finding that violation of the registration ordinance, which simply involved being present in the city, was unlike other crimes whose acts would put one on notice for potential consequences).

<sup>157</sup> *Apollo Energies*, 611 F.3d at 689, 691.

<sup>158</sup> The lower court addressed this point head-on, although the Tenth Circuit ignored its comments:

[T]he court is not persuaded that defendants were “passive.” Defendants both owned and operated unshielded oil production equipment that trapped birds. Defendants were not “passive,” standing quietly on the sidelines. They both actively operated equipment for the production of oil. Accordingly, the court rejects defendants’ argument that they engaged in no affirmative acts or negligence and that they were merely passive actors.

*Apollo Energies*, 2008 WL 4369300, at \*7 (D. Kan. Sept. 23, 2008).

<sup>159</sup> See *International Minerals*, 402 U.S. 558, 564–65 (1971) (“[W]here . . . 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.”); *supra* Part III.D.

<sup>160</sup> For example, the Clean Water Act (CWA) alone imposes numerous restrictions upon both persons and industries in their use of United States waters. See Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006). For example, it is illegal under the CWA “for any owner or operator of any new source [of pollution] to operate . . . in violation of any [applicable] standard of performance” once promulgated by the Administrator. *Id.* § 1316(e). Additionally, the CWA spells out several categories of sources of pollution, such as paper and pulp mills, meat processing plants, and petroleum refining facilities, and authorizes the Administrator to revise the list of such sources from time to time. *Id.* § 1316(b)(1)(A), (B). Further, the CWA specifically authorizes the Administrator to “propose and publish regulations establishing Federal standards of performance for new sources” of pollution amongst those types listed in section 1316(b)(1)(A). *Id.* § 1316(b)(1)(B). In addition to the CWA and other environmental restrictions on industrial activities, the MBTA has been in place for nearly a century. 16 U.S.C. §§ 703–712 (2006) (indicating that the MBTA was codified in 1918).

reason.<sup>161</sup> Lambert lacked *actus reus*, but in the environmental context, the *actus reus* is the operation of the plant that causes the harm.<sup>162</sup> A requirement that the operator knows of the specific harm itself would be about *mens rea*, and thus would go beyond the mere *actus reus* requirement of a strict liability offense.<sup>163</sup>

The *Apollo Energies* court took the expectation that parties be on notice of the potential for regulation of their activities and twisted it into a requirement that the government provide individualized written notice of each particular risk of harm in order to hold the parties responsible for that harm.<sup>164</sup> In unprecedented fashion, the court suggests the government must track down every potential violator, in advance of their violation, and then affirmatively and individually warn them not to commit the violation—a requirement that would be impossible for agencies to meet.

This approach also counters decades of preceding cases. In addition to those already discussed above,<sup>165</sup> in the 1990s three district court cases found mine operators strictly liable under the MBTA for the deaths of migratory birds that were drawn to ponds of water laced with cyanide as a result of the leaching processes involved in mining for precious metals.<sup>166</sup> In these cases the miners had no idea these ponds were attracting and killing migratory birds, but much like Apollo's and Walker's heater-treaters (at least as the lower court held), they were responsible for the dangerous-to-birds attraction whether they knew birds were drawn to it or not. Around the same time, Exxon Corporation and Exxon Shipping Company were held strictly criminally liable for migratory bird deaths that resulted from an accidental oil spill that followed a shipping disaster.<sup>167</sup>

Arguably the most similar case to *Apollo Energies* is *United States v. Moon Lake Electric Ass'n (Moon Lake)*.<sup>168</sup> *Moon Lake* involved migratory

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<sup>161</sup> See, e.g., *International Minerals*, 402 U.S. at 564–65 (highlighting the fact that there is a presumption of awareness of regulation on the part of parties who are in possession of, or are dealing with, dangerous substances or waste materials). It is worth noting here that *Apollo Energies* was decided on June 30, 2010, just over two months after the horrific and infamous BP PLC (formerly British Petroleum) oil rig explosion and resulting long-term spill. *Apollo Energies*, 611 F.3d 679 (10th Cir. 2010); Ruwantissa Abeyratne, *The DEEPWATER HORIZON Disaster—Some Liability Issues*, 35 TUL. MAR. L.J. 125, 126–27 (2010) (noting that the release of oil into the gulf from the *Deepwater Horizon's* ruptured well began on April 20, 2010, and lasted for 87 days). Indeed, that spill was still ongoing at the time of the opinion. *Id.* To suggest that operators of oil rigs are not parties on notice of the potential for regulation is absurd.

<sup>162</sup> See, e.g., *United States v. Buckley*, 934 F.2d 84, 88–89 (6th Cir. 1991) (finding that an individual's possession or control of dangerous substances like asbestos puts those persons "on notice that criminal statutes probably regulate the handling and release of the substances" due to their very nature as hazardous materials).

<sup>163</sup> See, e.g., *id.*

<sup>164</sup> See *Apollo Energies*, 611 F.3d at 691.

<sup>165</sup> See discussion *supra* Part IV.F; *supra* text accompanying notes 129–31.

<sup>166</sup> See Larry Martin Corcoran & Elinor Colbourn, *Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the Migratory Bird Treaties*, 77 DENV. U. L. REV. 359, 388–89 & n.22 (1999).

<sup>167</sup> *Id.* at 389; Stephen Raucher, Comment, *Raising the Stakes for Environmental Polluters: The Exxon Valdez Criminal Prosecution*, 19 ECOLOGY L.Q. 147, 148, 164 (1992).

<sup>168</sup> 45 F. Supp. 2d 1070 (D. Colo. 1999).

bird deaths resulting from electrocution by the defendant's electric power poles.<sup>169</sup> Just as birds had always been drawn to heater-treaters and then trapped inside, birds had historically died from such pole and power line electrocutions.<sup>170</sup> Likewise, just as the heater-treater problem was easily resolved with screens, the electric poles could have been rendered safer via the installation of inexpensive equipment.<sup>171</sup> It was the failure to install such equipment that resulted in the defendant's charges in both *Moon Lake* and the lower court in *Apollo Energies*. The *Moon Lake* court based its analysis for finding proximate cause on differentiating the defendant's activities from those that everyday ordinary individuals engage in, which may at some point result in the death of a migratory bird.<sup>172</sup> The special operations involved had a probable consequence of resulting in bird deaths.<sup>173</sup> Ultimately, the Tenth Circuit opinion in *Apollo Energies* does not merely reverse the holding below, it runs counter to nearly all lower court opinions on this issue to date, as well as the only prior appellate opinion on the topic.<sup>174</sup>

Another line of cases, decided before the MBTA was amended to require mens rea, applied strict liability for the offense of hunting over bait; these cases nearly unanimously held that hunters did not have to know an area was baited to be held criminally liable.<sup>175</sup> Applying the reasoning of *Apollo Energies* to these cases would limit criminal liability to those who had been directly warned that an area was baited, a limitation no court previously required. One case that applied a "knew or should have known standard,"<sup>176</sup> was widely criticized<sup>177</sup> and was later indirectly overruled.<sup>178</sup> Of course, as a result of legislative amendment, "knew or should have known" is now the standard the MBTA expressly applies to hunting over bait.

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<sup>169</sup> *Id.* at 1071–72.

<sup>170</sup> *See id.* at 1086.

<sup>171</sup> *Id.* at 1071.

<sup>172</sup> *Id.* at 1085.

<sup>173</sup> *See id.* at 1085, 1088.

<sup>174</sup> *See* Arensberg, *supra* note 74, at 430–31, 438–40, 442, 444 (discussing how *Apollo Energies*' holding "raises the bar of strict liability" with the new requirement of a proximate cause analysis); Collette L. Adkins Giese, *Spreading Its Wings: Using the Migratory Bird Treaty Act to Protect Habitat*, 36 WM. MITCHELL L. REV. 1157, 1174 (2010) (asserting that only a few courts have analyzed causal liability in MBTA cases); *supra* notes 129–31 and accompanying text (discussing *FMC*, the appellate decision).

<sup>175</sup> *See, e.g.*, *United States v. Chandler*, 753 F.2d 360, 363 (4th Cir. 1985) (holding that "a hunter is strictly liable for shooting on or over a baited area"); *United States v. Brandt*, 717 F.2d 955, 958 (6th Cir. 1983) ("[S]cienter is not an element of an offense under the regulation."); *United States v. Atkinson*, 468 F. Supp. 834, 836 (E.D. Wis. 1979) ("[T]he regulation is constitutional despite its lack of an intent requirement.")

<sup>176</sup> *United States v. Delahoussaye*, 573 F.2d 910, 912 (5th Cir. 1978).

<sup>177</sup> *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997); *United States v. Boynton*, 63 F.3d 337, 343 (4th Cir. 1995); *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1984).

<sup>178</sup> *See* *United States v. Lee*, 217 F.3d 284, 290 (5th Cir. 2000) (Politz, J., dissenting) (asserting that the majority had abandoned the "guiding principle" of *Delahoussaye* by not implementing the "should have known" form of scienter as "a necessary element of the offense of hunting over a baited field").

Appellate courts that have previously addressed the constitutionality of the MBTA's strict liability provision have held that it does not offend the requirements of due process.<sup>179</sup> As the Seventh Circuit noted:

The late Justice Oliver Wendell Holmes once pointed out the distinction between criminal and non-criminal intent: "Even a dog distinguishes between being stumbled over and being kicked." In strict liability cases, like this one, both stumbling over and kicking a dog result in criminal liability.<sup>180</sup>

The point is clear: strict liability is liability *without fault*.

If the MBTA is to maintain its strict liability standard as it continues its progression into the world of environmental restrictions on industrial behavior, the reasoning of *Apollo Energies* simply cannot be accepted. Its current status as the latest and nearly exclusive appellate position on the issue renders it particularly dangerous. At some point the Supreme Court will need to weigh in on this issue. In the meantime, some proposals are offered in the next Part for restructuring our regulatory and enforcement scheme to create a morally defensible master plan. Not all courts are willing to place their trust in prosecutorial discretion where a statute has such sweeping potential to criminalize everyday living—having windows, non-negligent driving of a motor vehicle, etc.<sup>181</sup>—so prosecutorial policy must be expressed clearly in advance.

#### V. RECOMMENDATIONS FOR THE MBTA'S ENFORCEMENT FUTURE

It has been posited that "[t]he MBTA in many ways acts as a skeleton upon which the implementing regulations necessarily place the flesh."<sup>182</sup> The MBTA completely outlaws taking, killing, or possessing migratory birds "at any time, by any means or in any manner,"<sup>183</sup> applying strict criminal liability for misdemeanor violations,<sup>184</sup> but then states that the Secretary of the Interior is:

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<sup>179</sup> *United States v. Smith*, 29 F.3d 270, 273 (7th Cir. 1994); *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."); *Catlett*, 747 F.2d at 1104–05 (noting that scienter is not required for a conviction pursuant to MBTA); *United States v. Ireland*, 493 F.2d 1208, 1209 (4th Cir. 1973) (noting that scienter is not required for a conviction pursuant to MBTA).

<sup>180</sup> *Smith*, 29 F.3d at 273 n.1 (citation omitted) (internal quote originates from OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (32nd prtg. 1938)).

<sup>181</sup> *See, e.g.*, *United States v. Rollins*, 706 F. Supp. 742, 743–45 (D. Idaho 1989) ("[A] homeowner could be pursued under the MBTA if a flock of geese crashed into his plate-glass window and were killed. An airplane pilot could be prosecuted if geese were sucked into his jet engines. . . . These examples make one queasy about the reach of strict liability criminal statutes.").

<sup>182</sup> Corcoran & Colbourn, *supra* note 166, at 370.

<sup>183</sup> Migratory Bird Treaty Act, 16 U.S.C. § 703 (2006 & Supp. IV 2010).

<sup>184</sup> *See id.* § 707(a).

[A]uthorized and directed . . . to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same.<sup>185</sup>

In other words, Congress made a sweeping prohibition that would be unrealistic to enforce—a prohibition that could, at some point, touch nearly everyone’s activities—and then asked the Secretary to carve out an enforceable plan.

If the government hopes to escape the inappropriate and impractical limitation on strict liability imposed by *Apollo Energies*, it must develop limiting regulations or *written* enforcement policies that address the concerns courts have regarding the potential over-inclusiveness of the MBTA. By properly limiting its reach and protecting truly passive or ordinary individuals expressly, and not just with its own case-by-case prosecutorial discretion, the government—the Departments of the Interior and Justice—can prevent the kind of bad law created by *Apollo Energies*. Such an express policy might even obtain a supportive constitutional or interpretive holding in the highest court, should it take on the matter.

Even the *FMC* court, which upheld the application of strict liability to corporate actors in the industrial context, expressed some reservations:

Certainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense. . . . Such situations properly can be left to the sound discretion of prosecutors and the courts.<sup>186</sup>

This makes sense in relation to the due process justification for applying strict liability at all: the defendant is engaged in an activity that he might reasonably expect to be regulated in some way. He need not know precisely *how* his actions are regulated—ignorance of the law is no defense. Nor must he know of the *facts* that result in a violation of the law—as this would be a mens rea requirement, which is absent under strict liability. To incur liability, a defendant must simply know that he is engaged in a sort of activity—over which he has authority—that the government may wish to regulate.

My question is this: why limit our effort to focus MBTA application on such individuals to case-by-case prosecutorial discretion? Doing so risks generating opinions, like *Apollo Energies*, which create broadly applicable bad law in either an effort to disagree with the prosecutorial choice in that instance, or perhaps out of general distrust of prosecutorial discretion in the context of an unbridled criminal statute such as the MBTA. The prosecution has no face-saving regulation to point to, or even a fair and comprehensive

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<sup>185</sup> *Id.* § 704(a).

<sup>186</sup> *FMC*, 572 F.2d 902, 905 (2d Cir. 1978).

written prosecutorial policy. Providing some structure, where there currently is little, may well save the day.

We need limiting regulations that restrict the scope of MBTA prosecution to those engaged in industrial and commercial activity and those otherwise engaged in unusually hazardous—even if noncommercial—activities. This could then be bolstered by a prosecutorial policy that interprets the regulations to sufficiently limit the scope of potential defendants to those engaged in activities one might expect to be regulated, thus rendering a pure strict liability approach—without further foreseeability requirements—appropriate. Indeed, even if the Department of the Interior did only the latter, it could go a long way in achieving the goals I suggest, which are as follows:

1. Provide a uniform system to determine which cases to prosecute within the government's otherwise extremely broad authority;
2. Ensure clear communication of these prosecutorial priorities between the Departments of the Interior and Justice;
3. Create a written interpretation of the statute that saves it from potential constitutional weaknesses;
4. Assure the courts that the government is cognizant of due process concerns inherent in the Act's potential reach, perhaps preventing judges from feeling the need to carve out these limits via court opinions; and
5. Place industrial actors and others involved in potentially hazardous-to-birds activities on notice that they are the prosecutorial targets of the Act, rendering it more likely that they will engage in the necessary due diligence to avoid a violation in the first place.

If the Department of the Interior chooses to accomplish this task via regulation, it would be advantageous to frame it as an interpretation of the intended reach of the statute. There are two reasons for this. First, such an interpretation, in the context of rulemaking, would be entitled to *Chevron* deference if challenged.<sup>187</sup> Second, to the extent that Congress delegated the policy question of the criminal reach of the statute,<sup>188</sup> a party who disagrees with the policies expressed in the regulations may attempt a nondelegation challenge. That said, even without expressing the regulatory choices as statutory interpretation, such a challenge would be weak; nondelegation challenges rarely succeed<sup>189</sup> and issues with MBTA's reach are arguably more about prosecutorial discretion than legislative policy. An additional upside

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<sup>187</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984) (recognizing a long history of judicial deference to reasonable administrative interpretations of the meaning or reach of statutes that agencies administer).

<sup>188</sup> See *supra* text accompanying note 185.

<sup>189</sup> See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 438 (2001) (noting that the Supreme Court has not explicitly used the nondelegation doctrine as grounds to invalidate a statute since 1935 and that lower federal courts have only rarely invoked the doctrine).

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to addressing this issue via notice and comment regulations is that the administrative discussion process will ensure wider dissemination of the new policies than would be likely via written policy alone.

Should FWS choose not to address this issue through regulatory drafting and the corresponding full notice and comment rulemaking process, most of the goals I have listed can be accomplished—arguably all of them, albeit to a slightly diminished extent—via a written policy statement. Despite the fact that a policy statement would be entitled to a lower level of deference if challenged, I believe that a court would uphold the policies I propose as consistent with existing Supreme Court interpretations of the due process limits on strict liability in the environmental public welfare offense context. A discussion of this case law should be included in the written policy and presented as the basis for it. I would also recommend that the policy be drafted and issued jointly by the Department of the Interior—FWS—and the Department of Justice.

## VI. CONCLUSION

Given that the due process concerns associated with strict criminal liability are alleviated in the context of predictably regulated activities, and that such activities result in most of the MBTA violations of concern for prosecution, it is time for the Department of the Interior to express its target more clearly in regulations or a written policy. Such a self-imposed limitation would help prevent overreaching limitations imposed by misguided court decisions, which can be quite damaging. Not only would such a policy have left room for the prosecutions in *Apollo Energies*, but it may have prevented the resulting reversal and corresponding bad law that could impact many prosecutions to come.