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The Courts Take Flight: Scienter And The Migratory Bird Treaty Act

THE COURTS TAKE FLIGHT: SCIENTER AND THE MIGRATORY BIRD TREATY ACT

For sixty years the federal courts have had a continuing problem construing the lack of an explicit scienter[1] requirement in the Migratory Bird Treaty Act (MBTA).[2] The difficulty stems from determining what degree of intent, if any, the government must prove in order to secure a conviction for a violation of the MBTA.[3] Enacted to give effect to a treaty between the United States and Britain,[4] the MBTA was the earliest effective American animal conservation statute.[5] Aimed specifically at protecting certain bird populations from decimation by unrestricted hunting, the Act provides for federal regulation of hunting methods and seasons.[6] The majority of the cases involving the construction of the scienter requirement

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[1] The concept of scienter is formulated in various ways. Generally, the term is used to denote the mental culpability or evil purpose of one acting in violation of the law. Morissette v. United States, 342 U.S. 246, 252 (1952). The MODEL PENAL CODE defines the four degrees of scienter with which a person might act as purposefully, knowingly, recklessly, and negligently. MODEL PENAL CODE § 2.02 (Proposed Official Draft, 1962); *see* MODEL PENAL CODE § 2.02, Comment (Tent. Draft No. 4, 1955). At common law, scienter was a necessary element of a crime. 342 U.S. at 251-52. Certain statutory laws omits intent or scienter as an element of an offense. *Id.* at 252-55. In certain cases the courts have construed a statutory omission of a scienter requirement to mean that a defendant is strictly liable for any violation. *See* text accompanying notes 14-15 *infra*. Thus, the defendant is liable because of the result of his act. His intent or state of mind is of no bearing in determining his guilt. *See* text accompanying note 15 *infra*.

[2] 16 U.S.C. §§ 703-711 (1976). The Migratory Bird Treaty Act (MBTA) specifies that "[u]nless and except as permitted . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill" protected migratory birds. *Id.* at § 703; *see* text accompanying notes 4-6 *infra*.

[3] *See* text accompanying notes 7-10 *infra*.

[4] Convention for the Protection of Migratory Birds, United States—Great Britain, 39 Stat. 1702, T.S. No. 608 (August 16, 1916). The MBTA was subsequently amended to incorporate treaties with Mexico, Convention for the Protection of Migratory Birds and Game Mammals, United States—Mexico, 50 Stat. 1311, T.S. No. 1912 (February 7, 1936), and Japan, Convention for the Protection of Birds and Their Environment, United States—Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990 (March 4, 1972).

[5] Conservation legislation was not a new concept in 1918 when the MBTA was enacted. *See* ch. 128, 40 Stat. 755 (1918). As early as 1872 Congress had enacted the Yellowstone National Park Act, 16 U.S.C. §§ 21-40 (1976) setting aside acreage for a national park. Congress's prior attempts at developing conservation legislation covering animals, however, had not been successful. In 1913, Congress attempted to restrict the hunting methods employed in taking migratory game birds. *See* Appropriations Act of the Department of Agriculture, ch. 145, 37 Stat. 828, 847-48 (1913). This legislation was held invalid as an unpermitted federal encroachment on powers reserved to the states by the tenth amendment to the United States Constitution. United States v. Shauver, 214 F.154, 157 (E.D. Ark. 1914), *appeal dismissed,* 248 U.S. 594 (1919); *see* U.S. CONST. amend. X. But in Missouri v. Holland, 252 U.S. 416 (1920), the Supreme Court upheld the constitutionality of the MBTA. The *Holland* Court held that the MBTA was a necessary and proper means under Article I, § 8 of the United States Constitution to give effect to a valid treaty. *Id.* at 432; *see* U.S. CONST. art. 1, § 8.

[6] 16 U.S.C. §§ 701, 704; *see* note 8 *infra*.

of the MBTA are cases[7] concerning hunters who were apprehended while hunting in or near baited areas in violation of the regulations issued pursuant to the MBTA.[8] The defendants in these cases asserted that the government was required to prove that they were intentionally hunting in or near baited areas, thus requiring the courts to determine whether scienter was a necessary element of an MBTA violation.[9] In two recent cases the courts applied the MBTA to activities to which the Act had previously not been applied.[10] In so doing, the courts found little precedential value in the hunting case decisions and were required to make completely new constructions of the MBTA's scienter requirements.[11]

In interpreting the MBTA's silence as to scienter, courts are faced with the fact that scienter, as an element of criminal behavior, is a fundamental concept of Anglo-American law.[12] Thus, absent an express statutory provision concerning the requisite criminal intent, an initial presumption of scienter is raised.[13] In certain circumstances, however, the Supreme Court has found this presumption rebutted when the omission of scienter was intentional, and necessary and appropriate to protect the public welfare.[14] Where a court finds the presumption of scienter so rebutted, the statute gives rise to strict liability.[15] However, more than the mere omission of scienter from the statutory language is required to rebut the presumption

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[7] *See, e.g.*, United States v. Delahoussaye, 573 F.2d 910 (5th Cir. 1978); Allen v. Merovka, 382 F.2d 589 (10th Cir. 1967); United States v. Schultze, 28 F. Supp. 234 (W.D. Ky. 1939); *see* text accompanying notes 21, 49-52 & 62 *infra*.

[8] *See, e.g.*, cases cited in note 7 *supra;* United States Fish & Wildlife Serv. Hunting Methods, 50 C.F.R. § 20 (1977). The regulations specify among other things prohibited methods of hunting, hunting seasons, times and bag limits. The majority of the cases in which the question of the scienter requirement of the MBTA is involved arise out of alleged violations of hunting methods. Section 20.21(i) prohibits the taking of migratory game birds "[b]y the aid of baiting or on or over any baited area." 50 C.F.R. § 20.21(i) (1977). This section also defines baiting as the artificial use of natural feed grains to lure migratory game birds. *Id.* Thus, hunting with the aid of bait would be using feed grains to attract birds into the area in which one is hunting. Hunting on or over bait would be hunting in the specific area where one has placed the bait.

[9] *See, e.g.*, cases cited in note 7 *supra*.

[10] *See* United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (MBTA violated by birds deaths resulting from inadvertent waste discharge); United States v. Corbin Farm Service, 444 F. Supp. 510 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (MBTA violation resulting from misuse of pesticide); text accompanying notes 75-118 *infra*.

[11] *See* text accompanying note 74 *infra*.

[12] United States v. United States Gypsum Co., 98 S. Ct. 2864, 2873 (1978); United States v. Freed, 401 U.S. 601, 613 (1971) (Brennan, J., concurring); Smith v. California, 361 U.S. 147, 150 (1959); Dennis v. United States, 341 U.S. 494, 500 (1951).

[13] United States v. United States Gypsum Co., 98 S. Ct. 2864, 2873-74 (1978).

[14] *See, e.g.*, United States v. Park, 421 U.S. 658 (1975) (shipment of adulterated food); United States v. Freed, 401 U.S. 601 (1971) (possession of hand grenades); United States v. Dotterweich, 320 U.S. 277 (1943) (shipment of adulterated food); United States v. Balint, 258 U.S. 250 (1922) (sale of narcotics); United States v. Behrman, 258 U.S. 280 (1922) (sale of narcotics).

[15] W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 31 (1972) [hereinafter cited as LAFAVE & SCOTT]. Where conviction without fault or scienter is possible under a statute, the statute is said to impose strict liability. *Id.*

of scienter.[16] A court must look at a number of other factors in order to determine whether the absence of a scienter requirement indicates that strict liability should be imposed. The factors to be considered are the legislative history of the act, the severity of the possible punishment, the magnitude of potential public harm from a violation, the defendant's ability to acquire knowledge of the true facts, and the number of potential prosecutions.[17]

These factors were virtually ignored by courts construing the MBTA in the early hunting cases.[18] In *United States v. Schultze*[19] and *United States v. Reese,*[20] the courts were required, for the first time, to consider the absence of an express scienter requirement in the MBTA. In *Schultze,* the defendants were apprehended while hunting in a field which, although not baited, was in close proximity to a baited area.[21] The facts in *Reese* are not set out in the court's opinion. While both courts noted the common law requirement of scienter,[22] they nevertheless interpreted the omission of a scienter requirement from the MBTA as raising a presumption of strict liability.[23] Thus, while both *Schultze* and *Reese* mentioned a presumption of scienter they actually presumed the opposite.[24] A majority of the

[16] United States v. United States Gypsum Co., 98 S. Ct. 2864, 2873 (1978).

[17] LAFAVE & SCOTT, *supra* note 15, at § 31.

[18] *See* text accompanying notes 127-40 *infra.*

[19] 28 F. Supp. 234 (W.D. Ky. 1939).

[20] 27 F. Supp. 833 (W.D. Tenn. 1939).

[21] 28 F. Supp. at 235.

[22] United States v. Schultze, 28 F. Supp. 234, 235 (W.D. Ky. 1939); United States v. Reese, 27 F. Supp. 833, 835 (W.D. Tenn. 1939).

[23] 28 F. Supp. at 235-36; 27 F. Supp. at 835. *But see* text accompanying notes 13-16 *supra.* In *Schultze,* the defendant argued that the government had failed to charge or prove scienter and that scienter was an essential element of an MBTA violation. The court disposed of this argument, holding:

> In view of the broad wording of the act, and the evident purpose behind the treaty and the act, this Court is of the opinion that it was not the intention of Congress to require any guilty knowledge or intent to complete the commission of the offense, and that accordingly scienter is not necessary.

28 F. Supp. at 236.

Faced with a similar defense argument in *Reese,* the court stressed the difficulty of proof of scienter, and held that "[i]t would seem unreasonable to presume that the omission of a qualifying scienter to constitute guilt was an inadvertence of the lawmakers. The deduction is plain that Congress deliberately omitted scienter . . . . " 27 F. Supp. at 835. The focus thus taken by the courts in *Reese* and *Schultze* would seem to be contrary to the presumption of scienter required by Anglo-American jurisprudence. *See* text accompanying notes 12-13 *supra.* As the Supreme Court noted in United States v. United States Gypsum Co., 98 S. Ct. 2864 (1978), "[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *Id.* at 2874.

[24] The *Reese* and *Schultze* courts noted the common law rule of a presumption of scienter. *See* text accompanying note 22 *supra.* The courts stated, however, that the common law rule had been modified where the purpose of the statute would be obstructed by requiring scienter. 28 F. Supp. at 235; 27 F. Supp. at 835. In stating this modification, the courts relied on United States v. Balint, 258 U.S. 250 (1922). In *Balint,* the Supreme Court had ruled that scienter was not a required element of a violation of the Harrison Narcotic Act, ch. 1, § 2, 38

subsequent decisions interpreting the MBTA have followed the reasoning of these two cases.[25]

In the early hunting cases, the courts found no clear indication of legislative intent other than the wording of the MBTA, which on its face appeared to impose strict liabilty.[26] In 1940, Congress enacted the Bald and Golden Eagle Protection Act (BGEPA),[27] modeling it on the MBTA.[28] The BGEPA specifies as a necessary element for a criminal violation, a scienter requirement of a knowing act or an act committed with wanton disregard for its consequences.[29] The Endangered Species Act (ESA),[30] enacted in 1973,[31] also deals with human predation of animals, and specifies a scienter

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Stat. 785, 786 (1914). The Harrison Narcotic Act prohibited the sale of narcotics without a proper prescription and the *Balint* Court had relied heavily on the statutory language of that Act as an indication of a congressional intent to eliminate scienter for a violation. 258 U.S. at 253-54. The *Balint* Court stated that, where the legislature had intended to eliminate scienter because scienter would obstruct the purpose of the statute, the common law rule had been modified. *Id.* at 251-52. Inasmuch as neither the *Reese* nor *Schultze* courts examined the congressional intent behind the MBTA, they apparently defined the purpose of the scienter omission to be obtaining conviction of a defendant without proof of intent. As noted in Morissette v. United States, 342 U.S. 246 (1952), such a literal reading of *Balint* is inappropriate. *Id.* at 259. The *Morissette* Court stated that the purpose of every federal statute would be more easily effectuated by the elimination of scienter. *Id.* What the courts should focus on is the peculiar nature and quality of the offense in relation to the public welfare. *Id.* at 259-60; *see* text accompanying notes 138-39 *infra*.

In addition, the *Reese* and *Schultze* courts failed to note an important difference in the statutory language of the MBTA and the Harrison Narcotic Act on which the *Balint* Court had based its decision. The Narcotic Act had no provisions for an attempted violation. Under the MBTA, attempts are violations carrying penalties equal to those of completed offenses. *See* note 2 *supra*. Intent or scienter is generally an essential element of and is required for an attempt. LAFAVE & SCOTT, *supra* note 15, § 59 at 428. Given the fact that a lesser included offense requiring scienter carries equal penalties under the MBTA, the *Reese* and *Schultze* courts, basing their approach on that of *Balint*, could have drawn at least an equal if not greater inference that scienter was a required element of a violation.

[25] *See, e.g.*, United States v. Green, 571 F.2d 1, 2 (6th Cir. 1977); United States v. Jarman, 491 F.2d 764, 766-67 (4th Cir. 1974); United States v. Ireland, 493 F.2d 1208, 1209 (4th Cir. 1973); United States v. Ardoin, 431 F. Supp. 493, 495 (W.D. La. 1977); United States v. Tarmon, 227 F. Supp. 480, 482 (D. Md. 1967).

[26] *See* H.R. REP. No. 243, 65th Cong., 2d Sess. (1918); S. REP. No. 27, 65th Cong., 1st Sess. (1917); note 2 *supra*. These congressional reports, which reported the MBTA out of committee, shed no light on the congressional intent to establish or eliminate a scienter requirement. *But see* note 24 *supra*.

[27] 16 U.S.C. §§ 668-668d (1976).

[28] United States v. Corbin Farm Services, 444 F. Supp. 510, 532 (E.D. Cal. 1978).

[29] The Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. §§ 668-668d (1976), prohibits the taking or sale of bald or golden eagles. *Id.* at § 668. "Taking" under the BGEPA is defined as pursuing, hunting, shooting, capturing, collecting or killing or attempting to do those acts. *Id.* at § 668(c). Whoever knowingly or with wanton disregard for the consequences of his act takes or kills a protected eagle is subject to maximum criminal penalties of a $5,000 fine or one year of imprisonment, or both. *Id.* at § 668(a). The Act also has civil penalties which are punishment by a maximum fine of $5,000 and which do not require any element of scienter. *Id.* at 668(b).

[30] 16 U.S.C. §§ 1531-1543 (1976).

[31] Pub. L. No. 93-205, 87 Stat. 884 (1973).

requirement of willful action.[32] The ESA is based on the same treaties which were incorporated into the MBTA subsequent to its enactment.[33] The BGEPA is aimed at protecting certain species of eagles from human destruction,[34] and the ESA is designed to similarly protect certain animal species which are in danger of extinction.[35] Together with the MBTA, these acts represent a continuing course of legislation directed toward the protection of animals from excessive depletion or annihilation. Where there is a doubtful meaning in a statute, a court may look to the express language of subsequent statutes dealing with similar things or relationships in order to resolve that doubt.[36] In the cases decided subsequent to 1940, the courts could have looked to the BGEPA and in cases decided since 1973 to both the BGEPA and ESA to determine congressional policy regarding the requirement of scienter for violations of animal conservation statutes. Yet, the courts which followed the reasoning of *Reese*[37] and *Schultze*,[38] in deciding hunting cases subsequent to 1940,[39] failed to look beyond the MBTA to later similar legislation for an indication of congressional policy toward a scienter requirement.[40] Given the prescriptive presumption of scienter,[41] and the lack of evidence of specific legislative intent concerning a scienter requirement under the MBTA, the courts should have reviewed the more current legislation to determine congressional policy toward requiring scienter as a prerequisite to criminal violations of the conservation statutes.[42] The BGEPA and ESA manifest a clear intent to create a scienter requirement for conservation act violations.[43] Thus, by requiring scienter for the MBTA, the courts would have effectuated the congressional policy

[32] The Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1543 (1976), prohibits a large number of activities, including importing, possessing, selling and taking endangered species. 16 U.S.C. § 1538(a). The Secretary of Interior is empowered to designate a species as endangered on the basis of various criteria. *Id.* at § 1533. Whoever willfully violates the provisions of the Act is generally subject to maximum criminal penalties of a fine of $10,000 or imprisonment for six months, or both. *Id.* at § 1540(b). The Act also provides for civil sanctions which require no element of scienter and impose a maximum penalty of $1,000. *Id.* at § 1540(a).

[33] *Id.* at § 1531(a)(4)(A), (B); *see* note 4 *supra.*

[34] *See* note 29 *supra.*

[35] *See* note 32 *supra.*

[36] 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, 346 (C. Sands ed. 1943) [hereinafter cited as SUTHERLAND]. In the MBTA, the omission of a scienter requirement introduces doubt as to the intent or policy of Congress. The omission of scienter cannot be construed as indicative of a congressional intent to eliminate scienter as a requirement for a violation of a statute. *See* text accompanying notes 12-17 *supra.* Where the intent of Congress is unclear, as in the MBTA's scienter requirement, the court may look at subsequent legislation and transpose the intent found therein to the proper legislation. SUTHERLAND, *supra* at 346. Such a transposition not only gives effect to the probable intent of the legislature but also facilitates the establishment of a more uniform and logical system of laws. *Id.*

[37] United States v. Reese, 27 F. Supp. 833 (W.D. Tenn. 1939).

[38] United States v. Schultze, 28 F. Supp. 234 (W.D. Ky. 1939).

[39] *See* note 25 *supra.*

[40] *See* text accompanying notes 27-35 *supra.*

[41] *See* text accompanying notes 12-16 *supra.*

[42] *See* text accompanying note 36 *supra.*

[43] *See* text accompanying notes 27-35 *supra.*

evidenced in the BGEPA and ESA and would have established a more uniform and logical system of conservation law.[44]

In decisions subsequent to *Reese*[45] and *Schultze*,[46] several courts approached the scienter question under the MBTA in a different manner than the earlier two courts, further confusing uniform application of the MBTA.[47] In *Allen v. Merovka*,[48] the Tenth Circuit found that the MBTA and the regulations issued pursuant to it required scienter for a violation of the MBTA.[49] In *Merovka*, the plaintiff hunters brought an action for injunctive relief and damages against federal officers.[50] The federal officers had placed signs on the plaintiffs' property indicating that the property was situated in a baited area and that hunting was forbidden thereon.[51] The federal officers maintained that they had a right or duty to interefere with the plaintiffs' efforts to hunt on their own land because the property was adjacent to a state reserve where feed grains were distributed to attract migratory game birds.[52] Thus, the government reasoned that anyone hunting on the plaintiffs' land was hunting with the aid of bait, a method prohibited by the MBTA.[53] Specifically rejecting the rationale of *Schultze*,[54] the *Merovka* court noted that both the Act and the regulations were aimed at restricting hunting methods.[55] The court reasoned that for a hunter to engage in the prohibited method of hunting with the aid of bait, he necessarily must have some direct or indirect part in placing the bait.[56] Thus, the *Merovka* court held that a hunter could not be found to have violated the MBTA on the basis of the independent, unrelated acts of others.[57] The *Merovka* court's construction of the MBTA and the regula-

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[44] *See* text accompanying note 36 *supra*.

[45] 27 F. Supp. 833 (W.D. Tenn. 1939).

[46] 28 F. Supp. 234 (W.D. Ky. 1939).

[47] *See* United States v. Delahoussaye, 573 F.2d 910 (5th Cir. 1978); Allen v. Merovka, 382 F.2d 589 (10th Cir. 1967); United States v. Bryson, 414 F. Supp. 1068 (D. Del. 1976).

[48] 382 F.2d 589 (10th Cir. 1967).

[49] *Id.* at 590; *see* note 8 *supra*.

[50] 382 F.2d at 590.

[51] *Id.*

[52] *Id.*

[53] *Id.; see* note 8 *supra*.

[54] 382 F.2d at 591. The *Merovka* opinion notes that the *Schultze* court had relied on the court's discretionary ability to adjust the penalty to take care of innocent violations. *Id.* Thus, a court could impose a minimal fine for an inadvertent violation. The *Merovka* court stated that this was an inappropriate basis for handling such violations. *Id.; see* text accompanying notes 125-31 *infra*. Although the *Merovka* court never explicitly stated what is the appropriate means for handling inadvertent violations of the MBTA, the implication of the court's holding is that inadvertent violations should be dismissed because the defendant lacked scienter. *See* text accompanying note 57 *infra*.

[55] 382 F.2d at 591; *see* note 8 *supra*.

[56] *Id.* The *Merovka* court requires a finding that the defendant actively baited an area before liability can be imposed. For example, if a hunter placed or requested someone else to place bait so that it attracted birds over his hunting position, he would be engaging in a prohibited hunting method. But if the hunter had had no direct or indirect part in placing the bait, he would not be engaging in a prohibited hunting method in so far as the MBTA was concerned.

[57] *Id.* Although it is obvious from the case that the *Merovka* defendants were aware of

tions issued thereunder as indicating a scienter requirement eliminated the necessity of having to make an extended analysis beginning with a presumption of scienter.[58]

In another recent hunting case dealing with scienter, *United States v. Delahoussaye,*[59] the Fifth Circuit was unable to find a scienter requirement to be explicit in the Act and regulations as had the *Merovka* court.[60] Beginning with a presumption that a minimum degree of mental culpability was required, the *Delahoussaye* court concluded that a scienter requirement was an integral element of an MBTA offense.[61] In *Delahoussaye,* the defendant had been apprehended while hunting within 300 yards of bait and live decoys.[62] Delahoussaye maintained that the government had to prove that he knew that the bait and callers were located in the area.[63] The trial court, however, reasoned that the appropriate scienter requirement was that he knew or should have known of the baiting.[64] Since the defendant had passed piles of cracked corn on the way to his hunting position, the district court found that the defendant should have known that he was using a prohibited hunting method and that the scienter requirement had been met.[65] The Fifth Circuit began its analysis with a presumption that scienter is a requisite element of an MBTA violation.[66] The court noted that a defendant's ability to detect possible violations is often limited.[67] However, the court posited that requiring proof of actual knowledge for a violation would eliminate any incentive for hunters to take reasonably available precautions to avoid violations.[68] In addition, the circuit court found that an actual knowledge standard would make enforcement of the regulations difficult, thereby impairing their effectiveness.[69] The court balanced the factors of presumption of scienter, the ability of the defendant to acquire

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the officials' placing of feed, the court found the regulations were not applicable to them. *Id.* At least one other court has followed the Tenth Circuit's approach in *Merovka* and has come to the same conclusion that scienter is a required element of an MBTA violation. *See* United States v. Bryson, 414 F. Supp. 1068, 1072-73 (D. Del. 1976).

[58] *See* text accompanying notes 13 & 16-17 *supra.*

[59] 573 F.2d 910 (5th Cir. 1978).

[60] *See* text accompanying notes 56-58 *supra.*

[61] 573 F.2d at 912.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* The *Delahoussaye* court, in the interest of justice, refused to impute an intention to punish innocent violations of the Act to the MBTA regulations. *Id.* By implication, the court refused to impute such an intent to the statute itself. Such a refusal, in the absence of a clearly expressed congressional intent, would seem to be in accord with the traditions of Anglo-American jurisprudence requiring a scienter presumption. *See* text accompanying notes 12-13 *supra.*

[67] 573 F.2d at 912. A defendant might be unable to investigate adjacent areas for bait because he was prohibited from entering them. Similarly, a defendant might be in a position over which game birds were being attracted by bait located so far away that he reasonably would not have checked for it or suspected its presence.

[68] *Id.* at 913.

[69] *Id.* at 912.

knowledge, and the effectiveness of the regulations in holding that a scienter of known or should have known was required under the MBTA.[70] Accordingly, the court held that a hunter would be in violation of the Act only if the prohibited activities could have been discovered by a reasonable investigation of his hunting area.[71]

Thus, in the hunting cases the courts have addressed the scienter requirement for MBTA violations by defendants who were attempting to kill birds intentionally by illegal methods. The two most recent prosecutions for violations of the MBTA, however, required the courts to construe the scienter requirement of the MBTA when applied to unintentional bird kills resulting from the accidental discharge of toxic waste[72] and the negligent use of pesticide.[73] The courts in these cases recognized the limited precedential value of the earlier decisions which construed the MBTA's omission of a scienter requirement.[74]

In *United States v. FMC Corp.*,[75] the Second Circuit held that scienter was not a necessary element of a violation of the MBTA.[76] FMC inadvertently had released a highly toxic pesticide into its holding pond.[77] A number of migratory game birds, attracted to the pond, were poisoned by the pesticide, and FMC was charged with violating the MBTA.[78] FMC contended that the government must prove the corporation's intent to harm the birds as an essential element of the MBTA violation.[79] Nevertheless, FMC was found guilty of a violation of the Act because birds had been killed by a fortuitous discharge of toxic waste from its plant.[80]

In attempting to establish a basis for its determination that scientier was not a required element of the offense, the court examined the *FMC* facts in the light of two different strict liability doctrines, strict criminal liability for public welfare offense,[81] and strict liability based on extraha-

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[70] *Id.* at 913.

[71] *Id.* at 912; *see* note 8 *supra.* The Fifth Circuit affirmed Delahoussaye's conviction. 573 F.2d at 913.

[72] United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

[73] United States v. Corbin Farm Services, 444 F. Supp. 510 (E.D. Cal.), *aff'd on other grounds,* 578 F.2d 259 (9th Cir. 1978).

[74] 572 F.2d 902, 905 (2d Cir. 1978); 444 F. Supp. 510, 533 (E.D. Cal. 1978).

[75] 572 F.2d 902 (2d Cir. 1978).

[76] *Id.* at 908.

[77] *Id.* at 906.

[78] *Id.* at 905. FMC cooperated fully with the state and federal government agencies in attempting to determine the cause of the birds' deaths. *Id.* at 906. In addition, FMC instituted extensive measures to deter birds from using the pond. *Id.* at 905-06.

[79] *Id.* at 906.

[80] *Id.* at 908.

[81] *Id.* at 906-07; *see* note 15 *supra.* The court based its analysis of the FMC facts as a situation which might be subject to strict liability for public welfare offenses on two cases. 572 F.2d at 906; *see* United States v. Park, 421 U.S. 658 (1975); United States v. Dotterweich, 320 U.S. 277 (1943). Both of these cases dealt with violations of the Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. §§ 301-392 (1970). In *Dotterweich,* the defendant, a corporate president, and his corporation, had been charged with shipment of misbranded drugs and adulterated drugs in violation of the FDCA: 320 U.S. at 278; *see* 21 U.S.C. § 331. In ruling on an appellate court's reversal of the defendant's jury conviction, the *Dotterweich* Court held that,

zardous activity.[82] In reviewing these two doctrines, the court attempted

under the FDCA, a corporate officer could be held vicariously liable for a violation of the FDCA where the corporation had committed a prohibited act without the officer's active involvement. *Id.* at 284-85. The *Dotterweich* Court based its imposition of vicarious liability on the fact that, as a responsible corporate officer, the president could be found to be accountable for the acts of his corporation. *Id.* at 285. In *Park*, the defendant, again the president of a corporation, was charged with a violation of the FDCA because food handled by the corporation had been stored in unsanitary conditions. 421 U.S. at 660-63. The *Park* Court held that the government need not prove that the defendant had taken some wrongful action as an element of the FDCA violation. *Id.* at 673. Emphasizing the president's responsible position in the corporation, the *Park* Court reasoned that since the defendant had the power to prevent an FDCA violation this was sufficient to impose liability on him for a violation. *Id.* at 674.

The *FMC* court in relying on *Dotterweich* and *Park*, stressed the fact that those two cases held that an overt act was not necessary for a violation of the FDCA. 572 F.2d 906-07. Stressing the *Park* Court's discussion of the defendant's position of responsibility, the *FMC* court apparently reasoned that FMC was in a similar position of responsibilty to the extent that FMC could have prevented the escape of the toxic waste which had killed the birds. *Id.* at 907. The *FMC* court's reliance on *Park* and *Dotterweich* resulted from a misinterpretation of what these decisions held. The *Park* and *Dotterweich* Courts were dealing with violations of the FDCA, a strict liability offense. *See* United States v. Balint, 258 U.S. 250 (1922); United States v. Greenbaum, 138 F.2d 437, 438 (3d Cir. 1943); text accompanying notes 14-15 *supra*. Thus, the question in *Dotterweich* and subsequently in *Park* was whether the existent strict liability could be vicariously imposed under the FDCA. The *Dotterweich* and *Park* Courts held that existing strict liability could be vicariously extended to the corporate officers because of their position of responsibility within the corporation. Thus, reliance on *Dotterweich* and *Park* by the *FMC* court is inappropriate since the question involved in those two cases was extension of existing strict liability under the FDCA rather than the initial imposition of strict liability.

Similarly, the *FMC* court's reliance is inappropriate because the relationship dealt with in *Dotterweich* and *Park* was that of the officer to the corporation, rather than that of the officer to the public welfare. The *FMC* court incorrectly read these decisions as saying that strict liability could be imposed because of the officers' position of responsibility to the public welfare.

Aside from the question of the *FMC* court's interpretation of *Dotterweich* and *Park*, *FMC*'s reliance on those cases is questionable because of other aspects. The FDCA and MBTA differ radically in purpose. The magnitude of harm which might flow from a violation of the FDCA is not comparable to that which flows from the MBTA. *See* text accompanying notes 138-39 *infra*. Thus, the rules of interpretation and application developed under the FDCA would not be applicable to the MBTA.

[82] 572 F.2d at 907. The *FMC* court reasoned that the manufacture of toxic pesticide was an affirmative act, presumably extrahazardous, and that FMC had failed to prevent it from entering the pond where it had killed the birds. *Id.* The *FMC* court found these facts analogous to situations in which strict tort liability might be imposed on a defendant whose extrahazardous activity causes injury to another. *Id.* In making this analogy, the court relied on the strict tort liability doctrines as developed in Rylands v. Fletcher, 3 Hurl. & C 774 (1865), L.R. 1 Ex. 265 (1866), L.R. 2 H.L. (1868) (defendant held strictly liable for water escaping from his impoundment and damaging the plaintiff's mine), and the RESTATEMENT (SECOND) OF TORTS § 519(1), (2) (Tent. Draft No. 10, 1964) [hereinafter cited as RESTATEMENT]. 572 F.2d at 907. As the RESTATEMENT notes, whether an activity is extrahazardous depends on the consideration of a number of factors including whether the activity creates a high degree of risk of harm to people or their possessions, whether the potential magnitude of injury is large, whether reasonable care might not eliminate the risk, whether the activity is common and appropriate to the area in which it is conducted, and whether it

to establish the fact that strict liability is a well-accepted concept of American jurisprudence.[83] Basing its decision specifically on the facts that Congress had stated a public policy of protecting birds and had omitted a scienter requirement from the MBTA, the *FMC* court held that because FMC had allowed the toxic substance to escape into the pond and kill the birds and would be subjected to relatively minor fines if found to be in violation of the MBTA, there were sufficient reasons for the imposition of strict liability.[84] In its construction of strict liability under the MBTA, the *FMC* court never considered the presumption of scienter required in the absence of statutorily mandated scienter.[85] While strict liability is becoming more prevalent in tort law, strict liability in criminal law is still generally inappropriate.[86] As the Supreme Court recently noted in *United States v. United States Gypsum Co.*,[87] "[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."[88] Consequently, the *FMC* court's strict liability ruling can rest only on two of its original three grounds, the congressional recognition of public policy behind protecting birds and the fact that FMC would be subject to relatively minor fines.[89]

While Congress did intend to protect birds by enacting the MBTA,[90] there is no indication, other than the absence of a scienter requirement in

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is of value to the community. RESTATEMENT, *supra* at § 520. Thus, where the degree of risk and potential for great injury is high, the activity is abnormal and inappropriate to the locale, and the activity is of little or no value to the community, the courts are more likely to impose strict liability regardless of the care exercised by the defendant. *Id. See generally* W. PROSSER, THE LAW OF TORTS § 78 at 508-14 (4th ed. 1971) [hereinafter cited as PROSSER].

The *FMC* court's reliance on the strict tort liability doctrine based on extrahazardous activity is questionable. While criminal law and tort law are related branches of the law, the purposes of the two are different. LAFAVE & SCOTT, *supra* note 15, § 3 at 11. Tort law, with the exception of punitive damage concepts, is intended only to compensate an injured party with an emphasis on adjusting conflicting interests to achieve desirable results. PROSSER, *supra* § 3 at 15-16. Only in exceptional circumstances is the punitive damage concept of tort law used to punish the wrongdoer and deter other potential wrongdoers. *Id.* at 9-10. Alternatively, criminal law is intended to protect the public from harm by punishing harmful conduct or acts. LAFAVE & SCOTT, *supra* note 15, § 3 at 11. The imposition of a fine and a jail sentence under the MBTA are criminal sanctions serving to deter violations and punish the violator. These sanctions do not appear intended to serve the purpose of tort law by adjusting any conflicting interests.

[83] 572 F.2d at 907. The *FMC* court's implication that strict liability is an accepted principal of American jurisprudence is correct where tort law is concerned. PROSSER, *supra* note 82, § 75 at 494-96. There is a strong and growing tendency in tort law to create liability where there has been no fault. *Id.* at 494. However, as the Supreme Court noted in United States v. United States Gypsum Co., 98 S. Ct. 2864 (1978), strict liability is used in criminal law only in limited circumstances and is generally disfavored. 98 S. Ct. at 2873-74. Thus, strict liability is the exception rather than the rule in criminal law.

[84] 572 F.2d at 908.

[85] *See* text accompanying notes 13 & 16 *supra.*

[86] *See* note 83 *supra.*

[87] 98 S. Ct. 2864 (1978); *see* note 83 *supra.*

[88] *Id.* at 2874; *see* text accompanying notes 16-17 *supra.*

[89] *See* text accompanying note 84 *supra.*

[90] *See* text accompanying note 6 *supra.*

the MBTA, that Congress intended to accomplish this through the imposition of strict liability.[91] Indeed, had the *FMC* court more carefully investigated the history of the MBTA in light of the presumption of scienter, the *FMC* court should have found sufficient evidence that Congress intended scienter to be a requisite element of an MBTA violation.[92] The three treaties on which the MBTA is based focus specifically on the intentional depletion of animal populations by unrestricted hunting.[93] Since all the treaties are concerned primarily with the conservation of animals, the Act arguably can be extended to cover bird kills which are not the result of hunting. However, since the treaties on which the Act is based specifically mention only intentional acts, there is a strong inference that a scienter requirement was implicitly intended by those Congresses which enacted the original Act and incorporated the subsequent treaties into the Act.[94] This implicit intent, when combined with the presumption of scienter, is an adequate basis for finding that scienter is a necessary element of an MBTA violation. In addition, although the *FMC* court stated that there is a strong public policy behind the congressional protection of migratory birds, the court failed to note the equally strong, if not countervailing, congressional policy of requiring scienter for violations of animal conservation statutes as evidenced by the BGEPA and ESA.[95] Thus, the congressional policy of protection on which the *FMC* court relied is not sufficiently strong to overcome the policy of requiring scienter. Such a conclusion is based not only on the fact that the treaties on which the MBTA is based mention only acts which require scienter,[96] but also on the fact that Congress reaffirmed that policy in subsequent legislative enactments.[97]

The *FMC* court's reliance on the relatively inconsequential penalty which would be imposed on FMC for violating the MBTA is an unnecessarily narrow basis for its decision construing the MBTA to impose strict liability. In establishing a precedent of strict liability for the MBTA, the *FMC* court failed to consider the fact that the possible penalties under the Act include imprisonment.[98] Since strict liability is generally considered inappropriate in a statute which includes imprisonment as a possible penalty, consideration of this factor should have influenced the *FMC* court to

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[91] *See* text accompanying notes 13-17 *supra;* note 24 *supra.*

[92] The *FMC* court stated that the legislative history was of little help. 572 F.2d at 905; *see* text accompanying notes 13, 16 & 17 *supra.*

[93] *See* Convention for the Protection of Birds and Their Environment, United States—Japan, art. III, 25 U.S.T. 3329, T.I.A.S. No. 7990 (March 4, 1972); Convention for the Protection of Migratory Birds and Game Mammals, United States—Mexico, art II, 50 Stat. 1311, T.S. No. 1912 (February 7, 1936); Convention for the Protection of Migratory Birds, United States—Great Britain, arts. II-V, 39 Stat. 1702, T.S. No. 608 (August 16, 1918); text accompanying note 4 *supra.*

[94] *See* note 4 *supra.*

[95] *See* text accompanying notes 42-43 *supra.*

[96] *See* text accompanying note 94 *supra.*

[97] *See* text accompanying note 95 *supra.*

[98] *See* 16 U.S.C. § 707(a) (1976). This section provides that for violation of the MBTA, a maximum fine of $500, or maximum imprisonment for six months, or both can be imposed.

have required scienter as an element of an MBTA violation.[99] While the fines may be of relatively little consequence to a large corporation, the fine, coupled with the possibility of a jail sentence with its attendant social stigma, would not be inconsequential to an individual.[100]

In the other recent non-hunting case construing the scienter requirement of the MBTA, *United States v. Corbin Farm Services,*[101] a federal district court, facing circumstances which were somewhat similar to those confronting the *FMC* court, found that a degree of scienter was a necessary element of an MBTA violation.[102] The *Corbin Farm Services* defendants were charged with MBTA violations after a bird kill had resulted from their misuse of pesticide in violation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[103] The defendants moved for dismissal of the MBTA charges on the ground that the Act was inapplicable to unintentional bird kills.[104] Buttressing their motion with two arguments, the defendants first asserted that since the BGEPA had been modeled on the MBTA, a violation of the MBTA required a knowing or wantonly negligent misuse of the pesticide, as does the BGEPA.[105] The defendants also argued that the imposition of strict liability, if extended to its logical limits, could result in the finding of an MBTA violation by a motorist who accidentally struck and killed a migratory game bird.[106] Responding to the defendants' first argument, the court found that the more severe criminal sanctions and the differing scheme of regulation of the BGEPA indicated that the MBTA and the BGEPA were not analogous.[107] The court then observed

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[99] *See* note 84 *supra;* text accompanying notes 130-33 *infra.*

[100] *See* note 132 *infra.*

[101] 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd on other grounds,* 578 F.2d 259 (9th Cir. 1978).

[102] *Id.* at 535-36.

[103] *Id.* at 514-15. The defendants in *Corbin Farm Services,* in addition to the MBTA charges, were charged with violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1976). 444 F. Supp. at 514 (E.D. Cal. 1978). The defendants had killed a number of migratory birds by applying pesticide to some fields where the birds normally fed. *Id.* at 517. FIFRA makes it unlawful to use any registered pesticide in a manner inconsistent with its labeling. 7 U.S.C. § 136(a)(2)(G) (1976). The label had warned against use on fields where waterfowl were known to repeatedly feed. 444 F. Supp. at 515 (E.D. Cal. 1978). Thus the court found that under FIFRA if the defendants knew or should have known that the birds fed in the sprayed fields, they were guilty of an unlawful use. *Id.* at 519-21. The court noted that it was incumbent on the defendants to use reasonable care to determine whether birds did regularly feed in the fields. *Id.* at 521.

[104] *Id.* at 534.

[105] *Id.; see* text accompanying notes 27-29 *supra.*

[106] 444 F. Supp. at 535. The government admitted that the defendants had no intent to kill birds. *Id.* at 532. They asserted, however, that the MBTA required no awareness of wrongdoing or intention to violate the law. *Id.* at 532-33. The defendants had applied the pesticide and that application had killed the birds. *Id.* at 533. This, the government maintained, was sufficient to find the defendants guilty of an MBTA violation. *Id.*

[107] *Id.* at 535; *see* note 114 *infra.* In rejecting the defendants' analogy of the BGEPA to the MBTA, the *Corbin Farm Services* court partly relied on United States v. Hetzel, 385 F. Supp. 1311 (W.D. Mo. 1974). *See* 444 F. Supp. at 535 n.11. *Hetzel* dealt with the prosecution of a scout leader who, after finding a dead eagle, had removed its talons for use by his troop members. 385 F. Supp. at 1320. The government prosecuted Hetzel under the BGEPA for removal of the talons (*see* 17 U.S.C. § 668(a) (1976)) and contended that, by analogy to

that the defendants were not in a position similar to that of the hypothesized motorist.[108] The court reasoned that such a motorist would be unable to foresee and prevent the bird's death while the defendants in the instant case, through the exercise of reasonable care, could have avoided the kills.[109] Thus in spite of the fact that the court denied the defendants' motion to dismiss,[110] and in spite of dictum to the contrary,[111] the *Corbin Farm Services* court implied that there is a scienter requirement of reasonable care in the MBTA.

In *Corbin Farm Services,* the court, in its analysis of the defendants' FIFRA violations, emphasized the defendants' ability to acquire knowledge of the facts in establishing a scienter requirement of reasonable care.[112] Although the court is not completely clear as to its basis for construing a similar scienter requirement under the MBTA, the court apparently relied on the analysis of the scienter requirement it developed with regard to the FIFRA violations.[113] Thus, rather than construing the intent requirement of the MBTA as an independent piece of legislation, the court in effect applied the FIFRA requirement to the MBTA. This analysis of the MBTA's scienter requirement is less than adequate, since a proper analysis of the MBTA and its relationship to the BGEPA would have led the court to find that there is a degree of scienter required solely by the MBTA. The *Corbin Farm Services* court based its rejection of the BGEPA comparison on the apparent differences between the two acts in magnitude of penalties and schemes of regulation.[114] In dealing with subsequent conservation leg-

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the rules of decision developed under the MBTA, no proof of scienter was required. *Id.* at 1314. Reasoning that the wording of the statute and the congressional intent clearly required scienter as an element of a BGEPA violation, the *Hetzel* court rejected the government's analogy to the MBTA. *Id.* at 1314-15. Quoting the *Hetzel* court's rejection of the analogy between the MBTA and the BGEPA, the *Corbin Farm Services* court without further discussion stated that the MBTA was not analogous to the BGEPA. 444 F. Supp. at 535 n.11.

[108] *Id.* at 535.

[109] *Id.* The *Corbin Farm Services* court noted that the case at bar was not analogous to that of a motorist who accidentally struck and killed a bird. *Id.* In the situation confronting the court, the defendants had violated FIFRA by the misuse of a pesticide. *Id.; see* note 103 *supra.* The court pointed out that if the defendants had been unable to prevent the violation or had acted with reasonable care then a different situation would have been presented. 444 F. Supp. at 536.

[110] *Id.*

[111] The court at one point stated that the killing of the protected birds alone was sufficient to establish a violation. *Id.*

[112] *Id.* at 535; *see* note 103 *supra;* text accompanying note 17 *supra.*

[113] 444 F. Supp. at 535. In addition to developing the reasonable care standard in its discussion of the MBTA violation, the *Corbin Farm Services* court stated that the scienter requirement which it had developed in its analysis of the FIFRA charge was similar to that of the MBTA. *Id.* at 535-36; *see* note 103 *supra.*

[114] 444 F. Supp. at 534-35; *see* text accompanying note 107 *supra.* The penalty under the MBTA is a maximum fine of $500, or imprisonment for a maximum of six months, or both. 16 U.S.C. § 707(a) (1976); *see* note 98 *supra.* Under the BGEPA, the criminal penalty is a maximum of $5,000, or imprisonment for a maximum of one year, or both. 16 U.S.C. § 668(a) (1976). In addition, the BGEPA provides for civil penalties. 16 U.S.C. § 668(b) (1976) while the MBTA only has criminal sanctions. *Compare* 16 U.S.C. § 668(a), (b) (1976) *with* 16

islation as indicative of congressional policy, the appropriate focus is on the overall purpose and course of the legislation rather than on the specific penalties and schemes.[115] The *Corbin Farm Services* court only addressed the congressional intent evidenced in the treaties which underlie the MBTA in determining whether the Act was applicable to the poisoning of birds.[116] The court failed to recognize that the treaties themselves indicated that a scienter requirement was implicit in the MBTA.[117] Thus, rather than relying on the scienter requirement developed for an unrelated statute, FIFRA, the *Corbin Farm Services* court should have concluded that a degree of scienter was required by the MBTA itself. Beginning with a basic presumption of scienter, the court should have found that a degree of scienter was required by the MBTA through an appropriate analysis of the legislative intent evidenced in the treaties on which the MBTA is based, and the congressional policy indicated in subsequent acts.[118]

In reviewing the development of the judicial construction of the MBTA's scienter requirement, the majority of courts failed to start their analysis with the requisite presumption of scienter.[119] Both *Reese* and *Schultze* construed the omission of a scienter requirement to raise a false presumption of strict liability.[120] Courts following the stare decisis of *Reese* and *Schultze* perpetuated this error.[121] In making their construction without the aid of non-hunting precedent, the *Corbin Farm Services* and *FMC* courts also failed to make a presumption that scienter is a requisite element of the MBTA. Had those courts deciding post-1940 hunting cases

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U.S.C. § 707(a) (1976). The *Corbin Farm Services* court found these differences to be indicative of a differing scheme of regulation. 444 F. Supp. at 534-35.

[115] *See* text accompanying notes 34-36 *supra*. Although the *Corbin Farm Services* court found the difference between the MBTA's and BGEPA's scheme of regulation and magnitude of penalties persuasive evidence that the BGEPA's scienter requirement should not be imputed to the MBTA, another inference can be drawn from this difference. The BGEPA was enacted to protect bald and golden eagles which are not only of national symbolic significance but also are in relatively greater danger of extinction than are the majority of the birds protected by the MBTA. Thus, the harsher criminal penalties coupled with strict liability for civil penalties could easily be construed as a congressional determination that violations of the BGEPA represent a greater harm to the public than a violation of the MBTA. Indeed, the differing scheme of the BGEPA was the result of the 1972 amendment to that Act. *See* Pub. L. No. 92-535, 86 Stat. 1064 (1972). In addition, the 1972 amendment added the scienter requirement of willful or with wanton disregard for the consequences of one's acts. *Id.* As the Senate report noted, the 1972 amendment reflected grave concern over the depletion of the eagle population. S. REP. No. 92-1159, 92d Cong., 2d Sess. 2-3 (1972). The Senate noted that in order to deter violations of the BGEPA, the amendment was designed to increase the penalties and to reduce the knowledge required for a conviction. *Id.* at 1. The fact that an MBTA violation represents a public welfare harm of less magnitude, as indicated by a lighter congressionally imposed penalty, tends to indicate that scienter should be implied. *See* text accompanying note 17 *supra;* text accompanying notes 138-39 *infra*.

[116] 444 F. Supp. at 532. *See* text accompanying note 4 *supra*.

[117] *See* text accompanying notes 93-94 *supra*.

[118] *See* text accompanying notes 96-97 *supra*.

[119] *See* text accompanying notes 13 & 16 *supra*.

[120] 28 F. Supp. 234 (W.D. Ky. 1939); 27 F. Supp. 833 (W.D. Tenn. 1939); *see* text accompanying notes 22-24 *supra*.

[121] *See* text accompanying note 25 *supra*.

raised the presumption of scienter as required by the Supreme Court[122] and then examined subsequent legislation to determine congressional policy,[123] those courts would have found a congressional intent to require scienter for violations of animal conservation statutes.[124] The *FMC* and *Corbin Farm Services* courts also should have looked to the BGEPA and the ESA to determine congressional policy, as well as examining the treaties underlying the MBTA.[125] The wording of those treaties, specifying intentional acts, raises a strong inference that Congress intended scienter to be implicitly required in an MBTA violation.[126]

Having made a presumption of scienter and examined the history of the MBTA and subsequent congressional action, the courts should then have examined several other appropriate factors in order to determine whether strict liability is appropriate under the MBTA.[127] While a number of the courts finding an MBTA strict liability requirement did mention the penalties as a factor, the focus of their analsis seems to be inappropriate. Both *Reese* and *Schultze* stressed the discretionary ability of the trial judge to adjust the penalty to fit the degree of guilt.[128] The *FMC* court focused on the relative insignificance of the particular penalty as applied to the particular defendant.[129] The proper focus, however, should be on the potential severity of the penalty such as possible imprisonment.[130] The penalties for a violation of the MBTA are a maximum fine of $500, or a maximum of six months imprisonment, or both.[131] The expense of a fine at or near the maximum coupled with a jail sentence is a severe penalty.[132] Such a pen-

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[122] *See* text accompanying notes 12-13 *supra.*

[123] *See* text accompanying notes 27-44 *supra.*

[124] *See* text accompanying notes 41-44 *supra.*

[125] *See* text accompanying notes 34-36 & 93-94 *supra.*

[126] *See* text accompanying notes 93-94 *supra.*

[127] *See* text accompanying note 17 *supra.* One factor which courts consider in determining whether the legislature intended that strict liability should be applied under a statute omitting any scienter requirement is the number of potential prosecutions under the statute. The number of potential prosecutions under the MBTA appears to have played no part in any court's consideration of whether scienter is a required element of an MBTA offense. Given the large proportion of unreported misdemeanor cases, the number of prosecutions for MBTA violations is virtually impossible to determine.

[128] 28 F. Supp. 234, 236; 27 F. Supp. 833, 835; *see* note 54 *supra.*

[129] 572 F.2d at 908; *see* text accompanying notes 84 & 89 *supra.*

[130] Sayre, *Public Welfare Offenses,* 33 COLUM. L. REV. 55, 72 (1933). Where imprisonment is a possible penalty under the statute, this potential penalty should weigh heavily against eliminating a scienter requirement from the violation. *Id.* The MODEL PENAL CODE takes a similar position by requiring that a degree of scienter be an element of any offense for which the penalty includes imprisonment. MODEL PENAL CODE § 2.05, Comment (Tent. Draft No. 4, 1955).

[131] 16 U.S.C. § 707(a) (1976); *see* notes 98 & 114 *supra.*

[132] In United States v. Green, 571 F.2d 1 (6th Cir. 1977), the defendant was convicted of hunting doves over a baited area in violation of the MBTA. *Id.* at 1. Although there is no evidence that his offense was particularly egregious, he was fined $450 and sentenced to six months in jail, with all but 15 days suspended. *Id.* In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Supreme Court recognized that any criminal charge which carried with it a potential for imprisonment was sufficiently severe to warrant the right to counsel. *Id.* at 37. Justice Powell, in his concurring opinion, noted "[t]he consequences of a misdemeanor

alty would be especially severe if the violation is inadvertent.[133] Thus, the potential severity of the penalty for an MBTA violation would militate against strict liability for violations of the Act's provisions.

Another important factor addressed only by the *Corbin Farm Services* and *Delahoussaye* courts is the defendant's ability to acquire knowledge of the relevant facts enabling him to avoid a violation.[134] To the extent that a defendant can ascertain information which would allow him to avoid a violation of the MBTA, courts may tend to decrease the degree of scienter required.[135] Thus, as in *Delahoussaye* and *Corbin Farm Services,* courts construing the MBTA's scienter requirement should have decreased the presumptive scienter of a knowing act only to the extent that the defendant knew or should have known the relevant facts.[136]

None of the courts which found that strict liability was appropriate for MBTA violations addressed a third important element, the magnitude of potential harm to the public welfare.[137] Where substantial harm to the public welfare might result from a violation of a statute silent regarding scienter, courts are less likely to read in such a requirement.[138] In analyzing the potential harm to the public welfare of the inadvertent destruction of a relatively small number of migratory game birds, government sanctioned destruction by hunting of relatively large numbers of these birds must first be confronted. The congressional sanction of migratory game bird hunting raises an inference that Congress has not deemed the destruction of these birds so adverse to the public welfare that strict liability should be imposed under the MBTA for inadvertent violations.[139]

Given a presumption of scienter,[140] congressional intent and policy as evidenced by the underlying treaties[141] and subsequent legislation[142] indi-

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conviction whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.'" *Id.* at 47-48 (Powell, J., concurring); *see* note 130 *supra.*

[133] In United States v. Dotterweich, 320 U.S. 277 (1943), and United States v. Park, 421 U.S. 658 (1975), the Supreme Court held that a corporate officer might be held vicariously liable for the strict liability offense of his corporation. 421 U.S. at 677-78; 320 U.S. at 284-85; *see* note 81 *supra.* Thus, given the *FMC* court's interpretation of the MBTA as a strict liability statute, a corporate officer could be fined and imprisoned if a mechanical malfunction allowed a plant's waste to escape resulting in the deaths of migratory birds.

[134] *See* 573 F.2d at 912; 444 F. Supp. at 535; text accompanying notes 67-69 & 112-13 *supra.*

[135] *See* text accompanying note 17 *supra.*

[136] *See* text accompanying notes 67, 70-71 & 112 *supra.*

[137] *See* text accompanying notes 17 & 125 *supra.*

[138] *See* text accompanying notes 14-15 *supra.*

[139] *See* note 115 *supra.* The public welfare might be considered harmed if large or continuing bird kills resulted from accidental poisoning. Prosecution of this type of violation, however, would not be retarded by the requirement of a scienter of reasonable care. In the continuing kill situation, the government would have little difficulty in proving that the defendant knew or should have known that his actions were killing birds or that the defendant failed to exercise reasonable care to prevent the bird kills. *See* notes 109 & 112 *supra.*

[140] *See* text accompanying notes 13 & 16 *supra.*

[141] *See* text accompanying notes 93-94 *supra.*

cates a requirement of scienter in the MBTA. The fact that the defendant can usually apprise himself of the relevant facts, however, indicates that Congress could have intended to lessen the degree of scienter required.[143] Thus, a scienter requirement of reasonable care would satisfy the purposes of the MBTA, the intent of Congress, and the American judicial concept of a presumption of scienter.[144]

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[142] *See* text accompanying notes 34-36 *supra.*

[143] *See* text accompanying notes 135-36 *supra.*

[144] Reasonable care is a minimum form of scienter comparable acting without recklessness or negligence. *See* note 1 *supra.*.