Liability Under the Migratory Bird Treaty Act

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While the Migratory Bird Treaty Act\(^1\) (MBTA) is essentially a wildlife conservation and protection statute, it can be an important environmental protection tool in cases where bird deaths or nest or egg destruction result from environmental degradation. Congress enacted the MBTA in 1918\(^2\) to implement the convention between the United States and Great Britain protecting certain birds which migrate between the United States and Canada.\(^3\) Migratory bird treaties subsequently were concluded with Mexico\(^4\) and Japan,\(^5\) and the Act was amended to bring these treaties within its provisions.\(^6\)

Most prosecutions under the Act are for violations of hunting regulations.\(^7\) However, two recent cases, United States \textit{v.} FMC\(^8\) and United States \textit{v.} Corbin Farm Service,\(^9\) extended prosecutions under the...
Act to situations where the birds were not target species of the defendants' activity. In affirming the conviction for bird deaths resulting from discharge of wastewater from a pesticide manufacturing process, the United States Court of Appeals for the Second Circuit held in *FMC* that intent to kill birds is not required for conviction under the MBTA. The District Court of the United States for the Eastern District of California reached the same holding under the facts present in *Corbin Farm Service*, where birds died after feeding in a field recently sprayed with insecticide. These decisions suggest that the MBTA provides a means of prosecuting degraders of the environment in situations where harm to birds is not intended but accompanies the degradation.

The unit of prosecution for MBTA violations was also at issue in *Corbin Farm Service*. The trial court dismissed all but one of ten counts charged, ruling that one spraying constituted only one MBTA violation without regard to the number of birds killed. This ruling was affirmed on appeal.

This Note first discusses generally the treaties and the Migratory Bird Treaty Act, and then focuses on the two cases and their key issues of mental element and unit of prosecution. A short discussion of the utility of the MBTA as an environmental protection tool follows, including discussion of factors mitigating the harshness of strict liability on the defendant.

I

THE TREATIES AND THEIR IMPLEMENTING STATUTE

"But for the treaty and the statute there soon might be no birds for any powers to deal with."  

The conventions between the United States and Great Britain, Mexico, and Japan are similar in structure and content. The convention with Great Britain can serve as an example. The preamble sets forth the convention's purposes, noting the value of birds as food and as controllers of insect damage to crops, forests, and public pasturage, and expresses the necessity of preventing the extermination of birds by

10. 572 F.2d at 908, 11 ERC at 1320.
11. 444 F. Supp. at 536, 12 ERC at 1275.
12. Unit of prosecution refers to the grouping which constitutes a particular count. That is, if a polluter destroys ten birds through one act of polluting, the unit of prosecution may be the act of polluting, in which case one count can be charged, or it may be the killing of the individual bird, in which case ten counts can be charged.
14. 578 F.2d 259, 12 ERC 1310. See note 9 *supra*.
16. See notes 3-5 *supra*. 
providing protection during migrations and nesting periods. It includes a resolution to adopt a uniform system of protection. The convention provides for closed seasons and prohibitions on exportation of protected species or products made from protected species.

The Migratory Bird Treaty Act implements the three conventions. The MBTA makes it "unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . any migratory bird, any part, nest, or egg of any such bird . . . included in the terms of the conventions . . . ." Violation of any provision of the Act or of the conventions is a misdemeanor punishable by a maximum $500 fine or six months imprisonment or both. Congress envisioned the MBTA as an important means of protecting the utilitarian and aesthetic value of birds and assuring the food supply of soldiers fighting in Europe.

The Act and the Treaties, along with regulations implementing each, together form a comprehensive program for the conservation of birds and their environment. This program prohibits not only hunting, but all forms of taking of birds, eggs, and nests, subject only to exceptions consistent with the conventions as determined by regulation.

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17. 39 Stat. 1702 (1916). See Convention with Mexico, supra note 4, at 1311; Convention with Japan, supra note 5, at 3329.

The treaties protect migratory game birds including waterfowl, cranes, rails, shorebirds and pigeons; migratory insectivorous birds; and migratory non-game birds including auks, gulls, grebes, and guillemots. For a detailed discussion of problems in interpreting the treaties in the light of more modern ornithological taxonomy than is used in the earlier treaties, see M. Bean, The Evolution of National Wildlife Law 71-73 (1977).

The other conventions contain similar statements of purpose. The Convention with Japan notes the aesthetic value of birds and explicitly recognizes the necessity of environmental protection to prevent extermination. Convention with Japan, supra note 5.


20. 16 U.S.C. § 703 (1976). The term "taking" is used in this Note to include pursuit, hunting, capturing, and killing.


22. See note 71 infra. For a more detailed discussion of the origin, coverage, and constitutionality of the MBTA, see M. Bean, supra note 17, at 24-25, 68, 71-75. See also J. Phillips, Migratory Bird Protection in North America, The History of Control by the United States Federal Government and a Sketch of the Treaty With Great Britain (Special Publication of the American Committee for International Wildlife Protection, No. 4, 1934).

23. These regulations are codified in 50 C.F.R. § 21 (1977).

24. Id. § 21.11.

25. Exceptions include activities such as scientific collecting, 50 C.F.R. § 21.23 (1977), and control of depredating birds, 50 C.F.R. § 21.41 (1977).
A. United States v. FMC

FMC operated a pesticide manufacturing plant in Middleport, New York. It pumped washwater from the production of carbofuran, an agricultural pesticide, into a sump for treatment to break down the pesticide residue prior to passage into a holding pond. The treated wastewater was not harmful to the birds which used the pond. At some point, FMC, due to extra caution, increased the frequency of washing work areas. Because of this, the volume of washwater exceeded the capacity of the sump, and untreated pesticide passed into the pond. FMC did not know that carbofuran was passing into the pond until sometime after birds began to die around the pond.

Bird deaths began in April of 1975. A United States Fish and Wildlife Service agent aided the investigation of the bird deaths and counseled FMC on measures to keep birds off the pond. FMC tried various procedures, but all proved ineffective or disruptive to the neighbors. FMC filled the lagoon during July of 1975.

The indictment charged FMC with violations of the MBTA for deaths occurring between April 23 and June 24, 1975. This encompassed the period during which FMC sought to discover the cause of the deaths and tried to prevent further deaths. Thirty-six counts were charged, combining deaths of all individuals of the same species on the same day into one count.

The court charged the jury that "the awareness of wrongdoing and the specific intent to violate the law" were not elements of the offense. This was stressed with the further instruction that "good will and good intention and measures taken to prevent the killing of the birds are not a defense. Therefore if you find that the birds were killed by the products emitted from the FMC plant, then you must return a verdict of guilty."

The Second Circuit panel affirmed the district court, imposing strict criminal liability partly because the case seemed to lend itself to a

26. Carbofuran is a synonym for 2,3-dihydro-2,2-dimethyl-7-benzofuranyl methylcarbamate. D. PIMENTEL, ECOLOGICAL EFFECTS OF PESTICIDES ON NON-TARGET SPECIES 191 (1971).
27. Shorebirds, migrating waterfowl, and songbirds were attracted to the bank, open water, and bordering vegetation of the lagoon. Brief for Appellee at 3, United States v. FMC, 572 F.2d 902, 11 ERC 1316 (2d Cir. 1978).
29. Included among the attempts at scaring off the birds were floating objects, propane cannons, shotgun-carrying guards, avalarms which simulate avian distress calls, and netting over the lagoon. Brief for Appellee, supra note 27, at 6-10.
30. 572 F.2d at 904, 11 ERC at 1317-18.
31. Id.
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The FMC court relied on the dangerous nature of FMC's pesticide manufacturing activity and analogized the situation to cases applying the *Rylands v. Fletcher* concept of strict liability in tort for ultrahazardous activities. As noted by the court, this concept has become a firmly established facet of tort liability.

B. *United States v. Corbin Farm Service*

This case involved the death of approximately 1100 American Widgeon as a result of spraying a pesticide, FURADAN, on an alfalfa field. Defendants were Corbin Farm Service, an employee of Corbin Farm Service who recommended pesticides for use by farmers, the owner of the alfalfa field to which the pesticide was applied, and the aerial operator who sprayed the field. The government charged ten counts, each for the death of one widgeon. The case was in a pre-trial posture at the time of the published opinion, with the court ruling on motions by the various defendants.

The trial court, denying a motion to dismiss the MBTA counts for failure to allege any intent to kill birds, declared that "[a]t this point in the case, it is sufficient to declare that the MBTA can constitutionally be applied to impose criminal penalties on those who did not intend to

32. In its summary the court justifies the strict liability imposed on the combination of minor fines, a congressional recognition of public policy, the dangerous nature of the activity, and a failure to keep the poison safely contained. 572 F.2d at 908, 11 ERC at 1320.

33. L.R. 3 H.L. 330 (1868).

34. 572 F.2d at 907, 11 ERC at 1319.

35. *Id.*


39. Furadan 4 is one of several names for carbofuran pesticide preparations. Coincidentally, the pesticide responsible for the bird deaths in FMC was also a carbofuran. *See note 26 supra.*

40. The label on the Furadan 4 pesticide warns that "[f]or waterfowl protection" the pesticide should not be applied "on fields where water fowl are known to repeatedly feed." 444 F. Supp. at 510, 12 ERC at 1258.

41. Corbin Farm Service is a dealer in pesticides and was not charged in any of the ten counts of MBTA violations. It was charged with various violations of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136(y) (1976).

42. The issue of the personal liability of the aerial operator spraying under the instructions of the owner of the field is beyond the scope of this Note.

43. It is unclear why only ten counts were charged.

44. Brief for Appellant at 3-7, United States v. Corbin Farm Serv., 578 F.2d 259, 12 ERC 1310 (9th Cir. 1978).
kill migratory birds." The court dismissed all but one of the MBTA violation counts on defendants' motions that the indictment was multiplicitous. It ruled that one violative "transaction" constituted only one offense in the absence of any clear congressional intent to create multiple offenses. Upon appeal by the government, the United States Court of Appeals for the Ninth Circuit affirmed this ruling.

III
THE KEY ISSUES: MENTAL ELEMENT AND UNIT OF PROSECUTION

A. The Mental Element of an MBTA Offense

The FMC and Corbin I courts concluded that no intent to kill birds need be shown for prosecution under the MBTA. Because the concept of intent as perceived by the two courts is unclear due to the manner in which the courts analyzed the facts and the law, the statement that no intent is required is not particularly enlightening. This section first summarizes the analyses of the FMC and Corbin I courts on the issue of mental element, then discusses the policy considerations involved in the holdings that the offense is one of strict liability, and lastly sets forth the ways in which the two courts qualified their holdings.

1. The Courts' Reasoning

The analysis in both cases is one of statutory construction. Neither court found any prior decisions sufficiently apposite to control the case at bar, nor was legislative history of any aid. Both courts discussed decisions which construed the MBTA as dispensing with the requirements of intent and scienter in the prosecution of hunting reg-

45. 444 F. Supp. at 536, 12 ERC at 1276.
46. 444 F. Supp. at 531, 12 ERC at 1271-72.
47. 578 F.2d 259, 260, 12 ERC 1310, 1311 (9th Cir. 1978).
48. See note 9 supra for definition of Corbin I and Corbin II as used in this Note.
49. United States v. FMC, 572 F.2d 902, 905, 11 ERC 1316, 1318 (2d Cir. 1978).
51. 572 F.2d at 905.
52. The terms "intent" and "scienter" were both used. The Corbin I court used "scienter" generally to mean "mens rea", 444 F. Supp. at 533-36, 12 ERC at 1272-76, as well as more specifically to refer to guilty knowledge in the bait cases. 444 F. Supp. at 534, 12 ERC at 1274. In FMC, the court summarized the appellant's argument, 572 F.2d at 906, 11 ERC at 1318-19, and used both terms, noting that appellant argued it possessed neither "intent" nor "scienter". The latter is presumed to denote the concept of "guilty knowledge" while the
ulation violators,53 but did not find them on point except insofar as they balanced the public interest in bird protection against the reluctance to charge individuals with crimes they may not know they are committing.54 Both courts cited as precedent public welfare offense decisions of the United States Supreme Court holding that convictions under statutes dispensing with common law concepts of intent are constitutional. Responding to a claim by FMC that the corporation had not affirmatively acted to kill birds, the FMC court found authority in public welfare offense decisions55 for the imposition of criminal penalties where the defendant failed to prevent the violation when in a position to do so.56 The Corbin I court relied on the more venerable of the line of public welfare offense decisions57 to construe the MBTA to create a *malum prohibitum* offense in which “the guilty act alone makes out the crime.”58

This reasoning is persuasive. The imposition of strict liability when bird deaths result from an activity of the defendant is justified in furtherance of the MBTA and treaty conservation purpose and is in accord with orthodox principles of regulatory law. Those principles derive from the line of cases, including *United States v. Balint*59 and *United States v. Dotterweich*,60 upon which the FMC and Corbin I courts relied. Like the MBTA, the statutes in those cases involved Congressional creation of *malum prohibitum* offenses in order to enforce regulations in areas of public welfare policy. The defendant in *Dotterweich* was charged with misbranding drugs in violation of the former is broad enough to include both “knowledge” and “purpose”. See W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 27, 28 (1972).

53. Hunting regulations are codified in 50 C.F.R. §§ 20-21 (1977). United States v. Jarman, 491 F.2d 764 (4th Cir. 1974), and United States v. Schultz, 28 F. Supp. 234 (W.D. Ky. 1939), are typical of cases requiring neither intent to violate the law nor guilty knowledge that an area over which birds are taken is baited in order to convict defendants of the MBTA violation.

But see United States v. Delahoussaye, 573 F.2d 910, 11 ERC 1894 (5th Cir. 1978) where the court said that the bait or callers “must have been so situated that their presence could reasonable have been ascertained by a hunter properly wishing to check the area of his activity for illegal devices.” *Id.* at 912, 11 ERC at 1896.

For a discussion of the bait cases and a critique of the early precedent-setting decisions, see M. BEAN, *supra* note 17, at 81-83.

54. 572 F.2d at 905, 11 ERC at 1318; see 444 F. Supp. at 533-34, 12 ERC at 1274.
56. 572 F.2d at 906-07, 11 ERC at 1319.
59. 258 U.S. 250 (1922).
60. 320 U.S. 277 (1943).
Federal Food, Drug, and Cosmetic Act § 331, a prohibition that does not mention intent. *Balint* involved a prohibition of section 2 of the Narcotic Act of December 17, 1914 and the United States Supreme Court upheld a prosecution where the government had not charged that the defendants had knowledge of the prohibited nature of the transaction. The statutes in *Balint* and *Dotterweich* imposed much harsher penalties than does the MBTA. In each case, the “penalties serve as effective means of regulation.”

The courts, in construing the MBTA, faced the necessity of giving effect to the purposes of the Act without any real guidance from the legislative history. A construction placing on the prosecution the burden of showing that the defendant either desired to kill birds or acted with knowledge that bird deaths would likely ensue would have emasculated enforcement of the Act’s conservation goals. In only rare cases would the government be in a position to make the required showing. “The beneficial purpose of the treaty and the Act would be largely nullified if it was necessary on the part of the government to prove the existence of scienter on the part of defendants accused of violating the provisions of the Act.”

2. *Policy Justifications for Strict Liability Construction*

As discussed above, authority supports viewing the MBTA as a strict liability statute. The policies justifying strict liability, present here, further support such a view.

The taking of birds in violation of the conventions and the MBTA is a regulatory offense and not derived from the common law of crimes. The offense is not “criminal” or “penal” in any sense other...
than that criminal process and penalties are provided to enforce the statute's and conventions' prohibitions on interference with migratory birds.

Historically, strict liability offenses derive from a shift in the emphasis of the criminal law from protection of individuals to protection of society. Associated with this shift was the beginning of the now common practice of utilizing criminal procedure to enforce regulatory law. The MBTA fits both these historical purposes for strict liability. The MBTA is a conservation statute, protective not merely of birds, but also of public health and welfare. This was recognized early in the efforts to enact migratory bird protection legislation. The Act and the conventions were seen as having important utilitarian value for agricultural pest management in addition to preserving the aesthetic value of birds. The utilitarian value of migratory birds is easily discounted because of modern-day dependence upon pesticides coupled with demographic shifts removing most persons from any firsthand knowledge of agriculture or of the natural forces at work balancing animal populations. But experience with the unexpected effects of pesticides on non-target species, particularly birds, and a growing awareness of other shortcomings in chemical dependence is likely to reverse this trend. Birds must play an important role in agricultural pest management. Additionally, the conservation of migratory birds promotes ecosystem integrity and germplasm conservation. Thus, protection of birds re-

69. In debate over a Senate bill to protect migratory birds, Senator McLean stated that others had suggested that the bill could be based on congressional power to provide for the common defense. 49 CONG. REC. 1489 (1913). Cf. S. REP. No. 27, 65th Cong., 1st Sess. 1 (1917) ("vital necessity" of migratory bird conservation).
71. Protection of the food supply can also be an immediate national security interest. The House Report on the MBTA viewed passage of the Act as a patriotic duty. By preventing the indiscriminate slaughter of birds which destroy insects which feed upon our crops and damage hem [sic] to the extent of many millions of dollars, it will thus contribute immensely to enlarging and making more secure the crops so necessary to the support and maintenance of the brave men sent to the battlefield by this Republic, to preserve the honor of its flag, and to protect the lives of its citizens wherever engaged in lawful pursuits. H. REP. No. 243, 65th Cong., 2d Sess. 2 (1918).
72. This was recognized by the Congress in early attempts to adopt migratory bird conservation legislation. "Men who have had this subject at heart and in hand for many years assert that bird life is one of the most indispensable balancing forces of nature." 49 CONG. REC. 1485 (1913).
73. Germplasm conservation refers to the necessity of maintaining a large pool of genetic characters from diverse species for the purposes of providing variation for evolutionary change and adaptation. See NATIONAL ACADEMY OF SCIENCES, CONSERVATION OF GERMPLASM RESOURCES (1978).
mains significant and the MBTA protects societal interests through the regulatory enforcement role historically associated with strict liability crimes.

Strict liability may further be justified where, as here, imposition of penalties without proof of intent will aid in deterring either prohibited activities or activities tending to cause the prohibited result.\textsuperscript{74} Strict liability may benefit society by making people more careful.\textsuperscript{75} Similarly, awareness of the strict liability nature of the MBTA offense may keep some from engaging in activities tending to result in the prohibited harm to birds.\textsuperscript{76}

There are, of course, costs involved in construing the MBTA as a strict liability statute. First, its relatively broad sweep in making nearly all killing of protected species illegal\textsuperscript{77} may criminalize activities otherwise insignificant. However, prosecutorial discretion in seeking indictments may be expected to prevent wholesale prosecution.\textsuperscript{78} Second, there may be some chilling effect on otherwise desirable activities, but this cost is very difficult to anticipate or quantify. Finally, avoiding MBTA violations may result in increased costs for various activities. These, however, can be viewed not as the imposition on an individual of the cost of a good accruing to society in general, but rather as an internalization of the cost to society engendered by the harm to birds that would otherwise occur. All three of these costs were present in the public welfare cases, yet the Supreme Court has nevertheless upheld strict liability.\textsuperscript{79}

The benefits of a strict liability MBTA may not clearly outweigh the costs, but the balance ought to be struck in favor of the benefits. Underestimating the benefits, particularly those of ecosystem integrity and germplasm conservation, is potentially, even if only remotely, catastrophic.\textsuperscript{80} This is not intended as a rigorous cost-benefit analysis. The

\begin{footnotes}
\item 74. For an argument that difficulty of proof of intent does not justify strict liability, see J. Hall, General Principles of Criminal Law 348-51 (1960).
\item 75. Wasserstrom, supra note 66, at 736.
\item 76. Id. at 737. Several commentators have argued that strict liability statutes cannot be better deterrents than statutes requiring proof of mens rea. See, e.g., J. Hall, supra note 74, at 344, 345 (1960). But see Wasserstrom, supra note 66, at 736.
\item 77. The standard of causation can limit the sweep. See text accompanying notes 130-31 infra.
\item 78. See text accompanying note 134 infra.
\item 79. See, e.g., United States v. Dotterweich, 320 U.S. 277 (1943).
\item 80. The avoidance of catastrophe through the promotion of ecosystem integrity and germplasm conservation could be seen as a benefit of migratory bird conservation enforced by the strict liability MBTA. The weight of the catastrophe should be discounted for its improbability, but almost complete ignorance of the mechanisms involved makes estimation of probability of catastrophe practically impossible. See Page, A Generic View of Toxic Chemicals and Similar Risks, 7 Ecology L.Q. 207 (1978). But see Chalfant, Hartmann & Blakeboro, Recombinant DNA: A Case Study in Regulation of Scientific Research, 8 Ecology L.Q. ___ (1979) (to be published).
\end{footnotes}
balancing incorporates an aversion to risk that is both of great magnitude and of a highly personal nature.

3. Qualifying the Holdings: Due Care and Ultrahazardous Activity

Both the FMC and Corbin I courts qualified their holding that the MBTA is a strict liability statute. FMC presented a case of pesticide manufacturing error, and the court was greatly swayed by the inherent dangers of pesticide manufacture. Its reasoning differed from that of the later Corbin I case and created an analogy to strict liability in tort for ultrahazardous activity. In contrast, the Corbin I court was not working from a factual record in the pre-trial motion ruling and its only qualification of its holding was hypothetical. It left open the possibility of a due care defense, as its construction of the statute would not make criminal a taking of birds where the actor "is not reasonably in a position to prevent the bird's death."81

As to the qualification in FMC, there is no need to resort to the tort doctrine of strict liability for ultrahazardous activity in order to justify the outcome.82 It is possible to read the court's opinion in FMC to limit its holding to other situations falling within the tort concept of ultrahazardous activity. Such a limitation would restrict MBTA prosecutions to cases where no exercise of care would reduce the risk of harm and the activity is "not a matter of common usage,"83 thereby placing outside of the MBTA many types of environmental degradation which result in bird deaths. Such a narrowing of the MBTA reach is unwarranted in that it impedes the enforcement of its conservation provisions. Further, it would focus on the method of taking, contrary to the wording of MBTA § 703.84 The fact of death is the prohibited outcome and the Act explicitly makes the manner of death of the protected bird irrelevant.85 Thus, focusing on the nature of the defendant's activity for any purpose other than a determination of whether an act of the defendant resulted in bird deaths conflicts directly with section 703. Since the liability without intent outcome is supportable without tort doctrine,86 FMC need not be seen as such a limiting precedent.

The Corbin I court, in speaking of reasonable care, must have in-

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81. United States v. Corbin Farm Serv., 444 F. Supp. 510, 535, 12 ERC 1257, 1275 (E.D. Cal. 1978). However, the court continues that sentence to note that "a person applying pesticides might be able to foresee the danger and prevent it." Id. at 535, 12 ERC at 1275.
82. For discussion of the court's reliance on this doctrine, see text accompanying notes 32-36 supra.
84. See text accompanying note 20 supra.
85. "Unless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . any migratory bird" protected by the conventions. 16 U.S.C. § 703 (1970) (emphasis added).
86. See text accompanying notes 54-58, 67-75 supra.
tended to suggest a new affirmative defense to the charge of an MBTA violation. The language about reasonable care must refer to a due care defense rather than to a criminal negligence construction of the statute because the court could not have intended a construction inconsistent with the general strict liability construction it gives the Act earlier. Such an affirmative defense not mentioned in the statute has the effect of shifting the burden of proof from the government to the defendant and raises substantial issues of procedural due process.

Regarding the qualification in Corbin I, the hypothetical suggestion of allowing a defense of due care would require the trier of fact to consider the defendant's conduct in light of standards of behavior reasonable under the circumstance. There are several reasons why such a defense should not be allowed. First, the circumstances germane to MBTA prosecutions include the complex interactions and synergisms of avian environments. This is an area still little understood by ecologists and is a far cry from situations in which judges or juries should be deemed competent to decide issues of reasonable risk and due care. Unlike malpractice situations which also present a situation of extreme complexity, here there are no external professional care standards of conduct that can be explained to the trier of fact.

Secondly, a due care issue invites a judge or jury to apply local standards to the evaluation of risk and reasonableness. Since the MBTA is a conservation statute national in scope, standards for its enforcement ought not be highly variable depending on local views of bird life. The conventions and the Act were fashioned to prevent local destruction of what is stated to be a resource of international concern. Parochialism, one of the evils at which the national protection of this

87. See text accompanying note 81 supra.

88. The United States Supreme Court, in Mullaney v. Wilbur, 421 U.S. 684 (1974), reversed a conviction for felonious homicide under a state statute that shifted to the defendant the burden to prove facts sufficient to reduce the penalty from that provided for murder to that provided for manslaughter. Relieving the prosecution of the requirement of proving beyond a reasonable doubt all elements of the charged criminal offense violated the constitutional rights of the accused defendant.

In Patterson v. New York, 432 U.S. 197 (1977), however, the Court held that if the element of an affirmative defense was not an element of the crime, then such element could be placed upon the defense in order to mitigate his damage or liability. In the instant situation, however, the element to be proven would result in complete negation of liability, not mere mitigation. Thus, besides being factually distinguishable from Patterson, here the element does appear to be just an element of the prosecution's case which has been shifted to the defense. It is as if the standard is a negligence standard, but the burden is on the defense to prove the lack thereof. Such a view of the MBTA thus appears inconsistent with both Mullaney and Patterson. Hence, the trial court's discussion of a possible due diligence defense should be discounted.

89. 444 F. Supp. at 535, 12 ERC at 1275.

90. See W. LAFAVE & A. SCOTT, supra note 52, at § 30 (1972); W. PROSSER, TORTS §§ 31, 32 (4th ed. 1971).
migratory resource is aimed, would appear to be inevitable.

Thirdly, neither the statute nor its legislative history have due care language. There are no words such as "negligently" or "knowingly" or "recklessly" on which to base such a defense. The FMC court recognized this when it began its analysis of the liability standard with the statement that the words of the statute and its legislative history were not helpful in the statutory construction.

Finally, such a defense would frustrate the purposes of the Act by rendering its enforcement more difficult and by muddying the clear rule that all unauthorized killings are unlawful. The United States Supreme Court, in United States v. Balint, recognized that criminal statutes containing no language of intent could be construed to dispense with that common law requirement when the purposes of the statute would otherwise be obstructed. And since the Act is regulatory and enforces treaty rights, it should be construed to further the goals of the conventions. The stated goals include the adoption by the contracting parties of "adequate methods" to "effectively accomplish" the protection of migratory birds. Construction of the statute to allow a due care defense may conflict with the requisite broad reading of the treaty goals of adequate and effective protection. The MBTA should be viewed as a determination by Congress of a per se failure to meet the standard of reasonable care whenever the prohibited bird deaths occur. A defense of due care conflicts with such a conceptualization. The statute is result-oriented in its wording and is effective as a conservation measure when so construed.

B. The Unit of Prosecution

The MBTA enforcement provision, embodied in section 707, declares that any person, association, partnership, or corporation who shall violate

91. See J. Phillips, supra note 22, at 5, 6.
92. 572 F.2d at 905, 11 ERC at 1318.
93. The court stated that the 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. . . ., there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement.
94. Standard rules of treaty construction require broad reading to give effect to the intentions of the sovereign parties. Bacardi Corp. v. Domenech, 311 U.S. 150, 163 (1940); American Trust Co. v. Smyth, 247 F.2d 149, 152 (9th Cir. 1957).
95. Convention with Mexico, supra note 4, at art. I.
96. Convention with Great Britain, supra note 3, at preamble.
97. This notion of per se negligence is a way of viewing all strict liability statutes. Wasserstrom, supra note 66, at 744.
any provisions of said conventions or of sections 703 to 711 of this title, or who shall violate or fail to comply with any regulation made pursuant to said sections shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months or both.98

At issue in United States v. Corbin Farm Service (Corbin II)99 was the proper unit of prosecution when one aerial spraying killed more than one bird. The government argued it could charge one count for each bird killed and subject the defendants to $500 fines and six months imprisonment or both on each count. The court held that only one count could be charged for bird deaths resulting from only one “transaction.”100 This section evaluates the precedents and the rule of construction employed in Corbin II.101 Discussion of policy considerations involved in construction of the treaty-enforcing conservation statute follows.

1. The Court’s Reasoning

The Corbin II decision rests on the fact that MBTA § 707, which does not address the multiplicity issue, when read in conjunction with the section 703 prohibition against taking “any bird”102 makes the death of only one bird a violation but does not explicitly declare that more deaths, resulting from the same course of conduct,103 constitute separate violations. Arguing that the MBTA and its history were ambiguous, the court invoked a “rule of lenity,” which is a common form of strict construction given criminal statutes. The court derived the rule from Bell v. United States,104 a Mann Act105 case where only one count was held proper for transporting two women across state lines, and United States v. Universal C.I.T. Credit Corp.,106 in which Fair Labor Standards Act107 offenses were held chargeable by only one count for each course of conduct. The 1960 amendment to the MBTA108 which

99. 578 F.2d 259, 12 ERC 1320 (9th Cir. 1978).
100. Id., 12 ERC 1320, aff’d 444 F. Supp. 510, 531, 12 ERC 1257, 1271 (E.D. Cal. 1978).
101. 572 F.2d at 908, 11 ERC at 1320. The FMC court did not explicitly discuss the issue of unit of prosecution but did allow conviction on multiple counts to stand.
102. See text accompanying note 20 supra.
103. The terms “transaction” and “course of conduct” are themselves ambiguous. The Corbin II opinion leaves it unclear whether, for instance, one day’s hunting out of season is one transaction or whether a case of long term pesticide exposure as in FMC is also only one transaction. 578 F.2d at 259, 12 ERC at 1310.
104. 349 U.S. 81 (1955). The rule of that case is that “if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses. . . .” Id. at 84.
106. 344 U.S. 218 (1952).
provides different penalties for commercial hunters is taken as further evidence that Congress did not intend multiple prosecutions for the same transaction.

The Corbin II court's precedents are questionable authority for its decision. Bell seems distinguishable on the facts. It involved congressional interest in preventing the use of commerce for immoral purposes, so that a unit of prosecution related to the use of commerce is logical. Thus, since the trafficking was one unit, it makes sense there that only one count was allowed. In Corbin II, however, wildlife conservation is the congressionally recognized interest and a transaction-based unit of prosecution does not seem logically related to conservation. Discussion of a rule of lenity in Universal C.I.T. was dictum since the rule presupposes ambiguity in legislative intent, but the court in that case agreed that the legislative history of the Fair Labor Standards Act was not ambiguous.

Even if the rule of lenity controls construction of all ambiguous statutes, a finding of ambiguity is necessary to invoke the rule. The MBTA does not appear to be very ambiguous about unit of prosecution. When the Act and conventions, so intimately related, are read together, it seems clear that the primary purpose of the whole is to prevent extermination of bird species. In this context, the wording "any bird" is not ambiguous. Avoiding the extermination of a species may turn on the preservation of small, perhaps isolated, populations of which each bird is an important component. Since Bell should be read to resolve ambiguity rather than foster it, the case should not control this case where the purposes of the treaties and the Act indicate an interest in the survival of each individual bird.

109. See Forrest v. United States, 363 F.2d 348 (5th Cir. 1966), cert. denied, 386 U.S. 995 (1967), which says that the purpose is to "prevent or minimize white slave traffic which utilizes interstate commerce as a means of procuring and distributing its victims, and to suppress traffic in women..." Id. at 349 (citing Mortensen v. United States, 322 U.S. 369 (1944) and Caminetti v. United States, 242 U.S. 470 (1917)) (emphasis added). But see Wyatt v. United States, 362 U.S. 525 (1960) where the court, in holding that the transported woman could be compelled to testify against her defendant husband despite the marital privilege in the law of evidence, stated that "[a] primary purpose of the Mann Act was to protect women who were weak from men who were bad." Id. at 530 (quoting Denning v. United States, 247 F. 463, 465 (1918)).

110. See Brief for Appellant, supra note 28, at 22-29.

111. 344 U.S. at 224.

112. Extermination is a theme common to all three conventions. The Convention with Great Britain, supra note 3, at 1702, notes that birds are "nevertheless in danger of extermination through lack of adequate protection." Article I, the "purposes" article of the Convention with Mexico, supra note 4, at 1312, begins with the words "In order that the species may not be exterminated..." The preamble of the Convention with Japan, supra note 5, at 3329, contains a similar sentiment.

113. In addition, determining whether the killings resulted from one transaction or several distinct acts focuses on the manner of killing. But as noted in text accompanying note 84 supra, this is contrary to the plain meaning of section 703.
2. Policies Justifying Multiple Counts

The goal of deterring the taking of birds is the strongest reason for using multiple counts. Multiple counts are probably more effective deterrents than the single count per transaction. A person or corporation may risk bird deaths if only $500 were at stake, whereas a per bird liability will induce greater caution and thus greater respect for the purposes of the Act and the conventions. A "licensing" of bird deaths for a single $500 fine is an ineffective means of enforcing the protections of the conventions. While it is true that a person probably regards six months imprisonment as a much higher price, if he does not consider imprisonment likely, then the added deterrence of possible multiple fines is still justifiable.

The apparent arbitrariness that the number of counts charged and hence the size of the potential fine may turn on the number of birds that happen to die is acceptable. This is so even though bird deaths may be unintentional. The MBTA, like statutes prohibiting homicides, is result oriented. This is reasonable when it is considered that the purpose of the conventions and the Act is the preservation of birds. Logically, it seems to follow that liability for large numbers of killings should be greater than for few. In a truly cataclysmic event such as an oil tanker spill, problems of proof relating to autopsies and problems of administration will work to limit the number of counts charged. Since the statute does not provide a minimum penalty, a judge may always impose a light sentence, regardless of the number of counts upon which defendant is convicted.

IV

MBTA AS AN ENVIRONMENTAL PROTECTION TOOL

The MBTA can be used as a tool for environmental protection. While it is possible that courts, under the FMC reasoning, will limit strict liability to certain dangerous activities, courts should instead adopt a construction that will draw more activities within the scope of

114. Quirks in the law may shield corporate managers from imprisonment. A person might also believe that judicial discretion to impose only a fine significantly decreases the likelihood of imprisonment.
115. See note 112 and accompanying text supra.
116. The fact that the history of the 1960 addition of higher penalties for market hunters suggests that Congress did not believe each bird to be the proper unit of prosecution should not be stressed. S. REP. NO. 1779, 86th Cong., 2d Sess., reprinted in [1960] U.S. CODE CONG. & AD. NEWS 3459. 444 F. Supp. at 531, 12 ERC at 1272. Since the penalty provision and section 703 that are at issue are part of the 1918 enactment, 1918 legislative history is what is on point and there is none. The 1960 amendment provides higher penalties for a class of violators deemed to possess a higher level of culpability.
117. See note 126 infra.
118. See note 133 infra.
strict liability. It is clear that the Act is not limited to regulating hunting. Thus, it is available to prosecutors to deal with individual’s behavior which damages the environment and leads to bird deaths or the taking of nests or eggs. Multiple counts could be charged, at least outside of the Ninth Circuit, providing a putative tool of deterrence. If the Corbin II single transaction-single count theory prevails, then the imposition of prison sentences on individual violators should be pursued with necessary diligence by prosecutors and courts. Recognizing that the use of the MBTA as an environmental protection tool must be tempered in some circumstances, consideration should be given to factors that will prevent prosecution and conviction in situations in which a strict liability MBTA might not be desirable.

A. Environmental Degradation as an MBTA Violation

While the provisions of the MBTA go beyond the 1916 convention in providing protections for migratory birds, the Act does not explicitly state that actions degrading the avian environment and causing deaths or nest or egg destruction are violations. The enumeration of prohibited actions in section 703 of the MBTA should be interpreted in light of the 1972 convention with Japan to include such acts of environmental degradation. Article VI of that convention binds each party to “take appropriate measures to preserve and enhance the environment of birds protected.” Special emphasis is given to preventing damage to habitats and ecosystems resulting from the introduction of exotic species.

Outright killing by pesticide spraying or water pollution are examples of MBTA violations caused by habitat degradation. If birds are harmed, cases of degradation from air pollution and land clearing for construction may be within the purview of the MBTA. Habitat destruction is the ultimate environmental degradation. Conceivably, channelization projects, construction, and forest clearing may all result in MBTA-prohibited taking of birds, nests, and eggs. The possibility of strict liability under the Act should induce those affecting bird habitats to consider carefully the environmental consequences of their activi-

119. See text accompanying notes 67-78 supra.
120. If only prohibitions on hunting were intended, then the verbs “pursue”, “take”, “capture”, and “kill” in section 703 would be surplusage. 16 U.S.C. § 703 (1976).
121. See M. Bean, supra note 17, at 74-75.
123. The trial court in FMC doubted that these activities were within the scope of the MBTA. 428 F. Supp. 615, 617 n.2 (W.D. N.Y. 1977). If the holding of FMC is limited to ultrahazardous activities, then these examples may not be within the Act. See text accompanying notes 83-84 supra.
ties.\textsuperscript{124}

**B. Factors Limiting the Sweep of the MBTA**

Several aspects of procedural and substantive law extraneous to the Act and conventions work to limit the sweep of the MBTA as a strict liability statute. Allocation of the burden of proof, the substantive law of causation, judicial and prosecutorial discretion, and jury nullification are factors which constrain the application of the Act and provide protections for the defendant. This section discusses these factors.

1. **Allocation of Burden of Proof**

   The allocation of burden of proof, fundamental to our system of justice, operates to prevent successful prosecution of those who harm migratory birds. At a minimum, the government must prove that birds of a species protected under the Act and treaties died of a given cause, and that the defendant is the responsible party.\textsuperscript{125}

   Identification of the responsible person may be the government's most difficult burden. For example, if exposure to toxic substances is the cause of death, then tracing the toxic substance, be it pesticide, fertilizer, or industrial effluent, to the defendant who released it into the environment may be a difficult task.\textsuperscript{126} Closely related is the problem of proof of causation. In most cases, demonstrating that the defendant's acts were the cause in fact of the bird's death will be essentially the same problem as identifying the killer.\textsuperscript{127}

2. **Causation**

   It is possible to imagine situations where actions may be a cause in fact of bird deaths, but the individual's connection with those deaths is so attenuated that imposition of liability seems unfair on its face. For example, the intervening negligent acts of a third party could insulate from liability a defendant whose acts were a "but for" cause of bird deaths.\textsuperscript{128} This suggests a need for a clarification of the requirement of


\textsuperscript{125} The required showing is analogous where nest or egg destruction is alleged.

\textsuperscript{126} Autopsies may be necessary to determine the cause of death. The jury in the FMC case apparently acquitted FMC on those counts for which the government had not shown by autopsy that the birds died from exposure to carbofuran. Telephone conversation with Kenneth A. Cohen, Assistant United States Attorney, Western District of New York (Aug. 14, 1978).

\textsuperscript{127} See W. LAFAVE & A. SCOTT, supra note 52, at § 35.

\textsuperscript{128} If FMC had loaded its effluent into tank trucks for transport to a resource recovery
causation so as to limit the sweep of strict liability. In order to impose a workable strict liability standard, courts should adopt the Model Penal Code proposal that the actual result be "a probable consequence of the actor's conduct" in place of the usual standard of but-for causation in criminal cases. This probable consequence standard of causation balances the interests of society in the protection of birds against the need to protect individual liberty. It is a limiting standard that deals adequately with the difficult cases of thoroughly unforeseeable harms and outcomes attributable to third party intervention.

It is noteworthy that adoption of the Model Penal Code standard would not expose the Act to the problems which accompany the due care defense. The trier of fact is not asked to evaluate the behavior of the defendant in regard to the risks of his acts. Rather, only the probability of the prohibited consequence ensuing from the defendant's act is in issue.

Applying this standard of causation in the FMC and Corbin Farm Service cases would not change the outcome of either case. In FMC, contamination of the outdoor pond, an obvious bird haven, is a probable consequence of an increase in washwater volume through the wastewater system since it might result in insufficient breakdown of the poison. The insecticide sprayed in Corbin Farm Service came with a warning that it could be harmful to birds; therefore harm to the birds was a probable consequence.

There is nothing unreasonable about construing the 1918 Act so as to include this more recent concept of causation. The Act must implement the obligation of the treaties and must be molded to meet the challenge. It should not be a static statute, but one that has a contemporary interpretation to deal effectively with a 1972 treaty that embodies environmental concerns.

3. Judicial and Prosecutorial Discretion

Prosecutorial and judicial discretion are two factors which could mitigate the harshness of a strict liability interpretation of the MBTA. Technical violations of the MBTA can be handled judicially by the

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129. Model Penal Code § 2.03(4). See LaFave & Scott, supra note 52, at § 35.
130. LaFave & Scott, supra note 52, at § 35.
131. Such a case would have been presented if, in Corbin, the pesticide label had said, "This is an herbicide and will not harm birds." A simple but-for causation standard would make the defendant guilty on these facts.
132. 444 F. Supp. at 515, 12 ERC at 1313.
imposition of only minimal penalties. Similarly, since the statute prescribes no minimum sentence, the judge in a given case has broad discretion in meting out punishment for proven violations. An even greater discretion would seem to be vested in the prosecutor. The prosecutor chooses which cases to prosecute, making decisions on such considerations as administrative efficiency, likelihood of success on the merits, and the *de minimis* status of violators. Further, he may limit the number of counts charged, as seen in *Corbin Farm Service*, where the government charged only ten counts of the approximately 1100 possible. Thus, by allocating the resources of his office as he sees fit, he may enforce the Act against some violators and not others.

4. **Jury Nullification**

The government's case against a person accused of an MBTA violation may be tried before a jury; this warrants a consideration of the role of the jury in the enforcement of the MBTA. Although a jury does not have the authority to reject the law upon which it is instructed by the court to base its verdict, the jury always has the power to acquit.

A study of the tendency of juries to acquit when the trial judge would have convicted the defendant shows a number of distinct situations where juries may "take the law into their own hands." First, where a law is unpopular, the jury may refuse to return a guilty verdict otherwise appropriate. This is likely when the jurors believe that the violation of the particular statute is widely tolerated, the jurors themselves are involved in activity within the purview of the statute, or they simply dislike the law. Hunting violations are typical examples. Additionally, two closely related factors may also account for jury acquittals against the court's view of the evidence. These are juror notions...
that the sentence likely to be imposed is disproportionate to the per-
ceived blameworthiness of the offense and the similar notion that the
violation is *de minimis.*\textsuperscript{141} Finally, where negligence is the applicable
*mens rea* concept, a jury may believe that the defendant’s action was
inadvertent, though legally negligent.\textsuperscript{142}

In MBTA cases, at least the first three factors may come into play
and a complete disregard of instructions not to consider the negligence
or intentions of the defendant may involve the fourth factor in the
jury’s decision. The disproportionate sentence notion will be more in-
fluential when the defendant is an individual rather than a corporation.
The more likely that the jurors themselves could have committed the
offense, that is, if the defendant’s actions involved an act as simple as
clearing land of nesting trees rather than one involving a higher degree
of technology such as the wastewater detoxification system in *FMC,* the
greater will be sentiments against the statute. Again, corporate defend-
ants charged with external effects of their manufacturing processes may
find the jury less sympathetic.

**CONCLUSION**

The *FMC* and *Corbin Farm Service* cases demonstrate the vitality
of the Migratory Bird Treaty Act as an environmental safeguard. But
the reach of the Act is hardly unlimited, and difficult questions remain
to be answered in subsequent cases.

Many projects of individuals that cause environmental damage
and harm to birds will be undertaken after issuance of government per-
mits. The effect such permits will have on prosecution for MBTA viola-
tions arising out of the permitted activity is unknown. Particularly
difficult to predict are situations where the environmental effects of the
activity have been anticipated and considered in the permit decision
pursuant to the mandates of NEPA\textsuperscript{143} or an equivalent state statute.\textsuperscript{144}
A similar unresolved question involves the liability of government con-
tractors under the MBTA.

It is possible that the Secretary of the Interior, who has authority
to permit by regulation the taking of birds, will more frequently allow
activities otherwise prohibited which lead to harm to birds.\textsuperscript{145} That au-
thority is circumscribed by section 704 of the Act. Any deviations from

\textsuperscript{141} Id. at 258-85.
\textsuperscript{142} Id. at 324-28.
\textsuperscript{144} An example of a state statute requiring the preparation of reports much like the
NEPA-mandated environmental impact statements is the California Environmental Quality
\textsuperscript{145} The authority to grant permission to take birds is vested in the Secretary of the
the general prohibition of taking must be "subject to the provisions and in order to carry out the purposes of the conventions."\textsuperscript{146} Should the Secretary of the Interior begin to use section 704 to exempt large numbers of projects from the provisions of the Act, it will be necessary to clarify the restrictions imposed by the conventions.

Despite recent evidence of public hostility to conservation of species in conflict with human enterprise,\textsuperscript{147} the renewed vigor of the Migratory Bird Treaty Act may instill greater care in those whose endeavors generate adverse environmental consequences.


\textsuperscript{147} The recent furor over the court-ordered halt to construction of the Tellico Dam (see TVA v. Hill, 98 S. Ct. 2279 (1978)) is exemplary of public attitude toward what are seen as useless creatures.