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United States v. Boynton: A *Bona Fide* Reason For Applying A Subjective Standard to the Exceptions of the Anti-Baiting Regulation

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I. Introduction

In August of 1995, the Fourth Circuit upheld the convictions of three defendants in *United States v. Boynton*¹ for hunting migratory birds over a baited area in violation of the anti-baiting regulation.² The court, disagreeing with the Sixth Circuit,³ held that misdemeanor violations of the Migratory Bird Treaty Act (MBTA),⁴ including hunting over a baited area, are strict liability crimes and, therefore, an objective standard should be used to determine the applicability of the "bona fide agricultural operations or procedures" exception to the anti-baiting regulation.⁵ The court held that requiring proof of a farmer's subjective intent in scattering grain would be contrary to the strict liability nature of the offense.⁶

This holding demonstrates the difficulty that courts confront when deciding whether to apply an objective standard or a subjective standard to the exceptions of the anti-baiting

* The author would like to thank his mother, father, and brothers for all their endless love and support.

1. 63 F.3d 337 (4th Cir. 1995).

2. See 50 C.F.R. § 20.21(i) (1994).

3. See, e.g., *United States v. Brandt*, 717 F.2d 955, 958 (6th Cir. 1983) (holding that "the crucial inquiry with respect to the exceptions" to the anti-baiting regulation is determining "the intent of the person seeding the field," and this is "simply a fact that has to be proven as in any trial involving intent as an element of the offense").

4. See 16 U.S.C. §§ 703-712 (1994).

5. See *Boynton*, 63 F.3d at 337.

6. See *id.* at 343.

regulation,⁷ as promulgated by the Secretary of the Interior pursuant to the MBTA.⁸ This difficulty has led to a division between the federal circuits in determining which standard is more in accordance with congressional intent.⁹ The circuits are also divided on other key aspects of the anti-baiting provision due to its inherent interpretative difficulties.¹⁰ These differences among the circuits should be resolved for the anti-baiting regulation "is a national one, founded on a treaty, and [it] should not mean one thing in one state and another elsewhere."¹¹

This Case Note suggests that the better interpretation of the anti-baiting regulation is requiring proof of the intent of the person who seeded the field, as is exemplified in the Sixth Circuit's analysis, as opposed to the technical inquiry used in *Boynton* to determine the confines of accepted farming practices in the community. If the Sixth Circuit's reasoning was to be followed, the intent would just be "a fact [that has] to be proven as in any trial involving intent as an element of the

7. See 50 C.F.R. § 20.21(i) (1994).

8. See 16 U.S.C. § 704 (Pursuant to the MBTA, the Secretary of the Interior is authorized to adopt suitable regulations determining when, and to what extent, it is compatible with the conventions to allow for the hunting of migratory birds).

9. See *Boynton*, 63 F.3d 337 (holding that an objective standard is used to determine the applicability of the "bona fide agricultural operations or procedures" exception to the anti-baiting regulation). *But see* *United States v. Brandt*, 717 F.2d 955 (holding that the crucial inquiry is a subjective measure of the grain scatterer's intent as to determine whether the planting or operation is "bona fide").

10. See Arthur E. Schmalz, *The Anti-Baiting Regulation Pursuant to the Migratory Bird Treaty Act: Have the Federal Courts Flown the Coop, or is the Regulation for the Birds?* 14 GEO. MASON REV. 407 (1992). See, e.g., *United States v. Schultze*, 28 F. Supp. 234 (W.D. Ky. 1939) ("scienter is not a necessary element" for obtaining a conviction under the anti-baiting regulation); *United States v. Jarman*, 491 F.2d 764, 767-68 (4th Cir. 1974) (the words "on or over a baited area" should be construed very broadly and there is no implied spatial limitation to the extent of the baited area); *compare with*, *United States v. Delahoussaye*, 573 F.2d 910, 912 (5th Cir. 1978) (a "minimum form of scienter" is a necessary element for a conviction under the anti-baiting regulation); *United States v. Bryson*, 414 F. Supp. 1068, 1074 n.10 (D. Del. 1976) (the words "on or over a baited area" should be "given their literal meaning" and read very narrowly and a spatial limitation is implied to the extent of the baited area).

11. *United States v. Catlett*, 471 U.S. 1074, 1075 (1985) (White, J., dissenting) (quoting *United States v. Delahoussaye*, 573 F.2d at 913).

offense.”¹² This interpretation is in accordance with the intent of the Secretary of the Interior who was not trying to distinguish “between orthodox and unorthodox farming practices,”¹³ but to distinguish between areas to which birds are allured as a result of legitimate farming practices and areas effected by baiting.¹⁴

This interpretation would simply require that a hunter ascertain the intent of the person who seeded the area being hunted before beginning the hunt, and if the hunter was mistaken in his conclusion, he would be criminally responsible.¹⁵ A person lacking criminal intent could still unwittingly violate the anti-baiting regulation, but this “is inherent in all so called ‘public welfare offenses’ wherein scienter is not an element of the offense.”¹⁶

Part II of this Case Note discusses the history of the MBTA in general, and then specifically focuses on the legislative and statutory authority of the anti-baiting regulation, and the case-law pursuant to it. In particular, this Case Note highlights *United States v. Brandt*,¹⁷ the only other reported case which discusses the “bona fide agricultural operations or procedures” exception to the anti-baiting regulation that states whether the court was relying on an objective or subjective measure to determine whether the practice was “bona fide.” Part III of this Case Note explains the factual and procedural history of *United States v. Boynton*.¹⁸ Part IV discusses the current division between the circuits in determining the standard to be used to decide the applicability of the exceptions to the anti-baiting regulation, and suggests a much needed solution to this problem. Part V contains a brief synopsis and several concluding remarks.

12. *Brandt*, 717 F.2d at 958.

13. *Id.*

14. *See id.*

15. *See id.*

16. *Id.* *See, e.g.*, *United States v. Balint*, 258 U.S. 250 (1922) (holding that scienter as an element of a statutory offense is a question of legislative intent).

17. *Brandt*, 717 F.2d at 955.

18. *Boynton*, 63 F.3d 337.

II. Background

The general views toward migratory birds and wildlife in early America were quite different from the views in the 1990's.¹⁹ Wildlife was historically viewed by society as an inexhaustible source of food and clothing.²⁰ This was due to the fact that the vast number of wild animals seemed astonishing, which fostered "a belief that controls on their destruction were unnecessary."²¹ The result of this perception was that many game species quickly began to decline in number, if not completely disappear.²² As a result of this often wanton destruction, it became apparent that some form of regulation was necessary to prevent the destruction of wildlife.²³ However, it was unclear as to whether this responsibility should remain with the states' governments or the federal government.²⁴

Finally, in 1894, the federal government circuitously gave rights to wildlife with the establishment of Yosemite and Yellowstone National Parks.²⁵ Shortly after these parks were established, Congress enacted legislation that protected wildlife within park boundaries.²⁶ Then in 1900, Congress

19. See George Cameron Coggins and Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 167 (1978).

20. See *id.* For example, in 1857 the Ohio Legislature declined to pass a bill protecting the "wonderfully prolific" Passenger Pigeon. "There is no doubt about where those millions have gone. They went down and out by systematic, wholesale slaughter for the market and the pot, before the shotguns, clubs and nets of the earliest American pot hunters. Wherever they nested they were slaughtered." *quoted in* W. HORNADAY, OUR VANISHING WILDLIFE: ITS EXTERMINATION AND PRESERVATION 11 (1913).

21. Craig D. Sjostrom, *Comment, Of Birds and Men: The Migratory Bird Treaty Act*, 26 IDAHO L. REV. 371, 372 (1989). See also D. L. ALLEN, OUR WILDLIFE LEGACY 258-276 (rev. ed. 1962) (explaining that the costs of wildlife exploitation were considerable).

22. See Sjostrom, *supra* note 21, at 371.

23. See David G. Lombardi, *The Migratory Bird Treaty Act: Steel Shot Versus Lead Shot For Hunting Migratory Waterfowl*, 22 AKRON L. REV. 343 (1989).

24. See *id.* at 343.

25. See *id.*

26. See Act of May 7, 1894, Ch. 72, 28 Stat. 73 (53d Cong., 2d Sess. 1894).

went a step further and passed the Lacey Act,²⁷ which criminalized transporting or selling in interstate commerce any animal taken illegally from the state of provenance.²⁸

In 1913 another important step was taken towards federal wildlife preservation with the passage of the Migratory Bird Act of 1913.²⁹ This Act was designed to allow Congress to take custody of birds living in the United States.³⁰ Considerable doubt existed, however, as to whether Congress had the power to pass such legislation and within one year, the Act was challenged on constitutional grounds in *United States v. Schauver*.³¹

In *Schauver*, the defendant was arrested under the Migratory Bird Act of 1913;³² but the legislation was struck down and declared invalid as "beyond that power" delegated to Congress.³³ The defendant claimed that the federal government had no right to regulate migratory birds because such birds were the property of the state they inhabited.³⁴ The federal government argued that it had constitutional authority for the regulation of migratory bird species on three separate grounds.³⁵

First, the federal government claimed that it had the power to regulate migratory birds as property of the United States.³⁶ The government based its argument on the fact

27. See Act of Mar. 25, 1900, § 31 Stat. 187 (Congress did this pursuant to its authority under the Commerce Clause of the Constitution, U.S. CONST. art I, § 8 cl. 3). This Act was later expanded by the passage of the Back Bass Act of 1924, 16 U.S.C. § § 851-856 (1994).

28. See *id.*

29. See Act of Mar. 4, 1913, Ch. 145, 37 Stat. 828, 847 (62d Cong. 3d Sess.).

30. See *id.*

31. 214 F. 154 (E.D. Ark. 1914), *appeal dismissed*, 248 U.S. 594 (1919). See also *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915) (invalidating the 1913 Act as legislation beyond the powers delegated to Congress).

32. See *supra* note 29.

33. See *Schauver*, 214 F. at 154.

34. See *id.* at 157 (This argument comes from the case of *Geer v. Connecticut*, 161 U.S. 519, 527 (1896), which held that people of a state have a "transient property interest in wildlife, so long as the wildlife remains within the boundaries of that state").

35. See *id.* at 157-62.

36. See *id.* at 156. The government based this argument on U.S. CONST. art. IV, § 3, cl. 2

that migratory birds do not remain for "the entire year within the borders" of a particular state.³⁷ Therefore, they are not property of any state, and are "within the custody" and protection of the federal government.³⁸ The district court concluded that the federal government had no property interest in migratory wildlife, since animals residing in a state were owned by that state "for the benefit of [its] people in common."³⁹

Secondly, the federal government argued that it had concurrent jurisdiction of migratory wildlife with the states.⁴⁰ The government concluded that this concurrent jurisdiction remained a dormant right of the federal government until it became readily apparent that the states could not effectively pass legislation protecting migratory wildlife.⁴¹ The government determined that its right was no longer dormant because the states could not sufficiently protect migratory birds.⁴² However, the Court conservatively held that since the power to regulate migratory birds was not an express power delegated to the federal government, the states kept the power to effectively regulate wildlife pursuant to the Tenth Amendment.⁴³

Thirdly, the federal government argued that migratory birds were items of interstate commerce, and therefore subject to federal regulation.⁴⁴ The government asserted that migratory birds were articles of interstate commerce because as they traveled from state to state, so did the birds' ownership.⁴⁵ However, the court held that migratory wildlife was

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

37. See *supra* note 29.

38. See *id.*

39. See *Schauver*, 214 F. at 157.

40. See *id.* at 156-57.

41. See *id.* at 157.

42. See *id.*

43. See *id.*

44. See *Schauver*, 214 F. at 160.

45. See *id.*

not an article of interstate commerce because it was already recognized as an article of intrastate commerce.⁴⁶ Due to the federal government's failure to demonstrate that any provision in the Constitution allowed it to regulate migratory birds when they were located within a state, the court held that the legislation was unconstitutional.⁴⁷

After failing to establish constitutional authority to regulate migratory wildlife, the federal government appeared devoid of the authority to address the need for the preservation and regulation of migratory birds.⁴⁸ While frustrated by the *Schauver* decision, the government realized the necessity for a single, comprehensive regulation. However, the government was forced to sit idly by and accept that the states retained the sole right to regulate wildlife.⁴⁹

The government appealed the *Schauver* decision and the Supreme Court set a date for arguments.⁵⁰ The issue was never decided, however, because in 1916 at the request of Congress,⁵¹ Secretary of State Lansing and Senator Elihu Root found a constitutional "solution that present-day interpreters of the MBTA would do well to imitate."⁵² By utilizing the treaty power, they negotiated the Convention with Great Britain, on behalf of Canada,⁵³ to accomplish the same objective as the 1913 Act.⁵⁴

This Convention between the United States and Canada designed a treaty for the protection of migratory birds,⁵⁵

46. See *id.* at 161.

47. See *id.*

48. See Lombardi, *supra* note 23, at 345.

49. See *id.* (citing JAMES A. TOBER, WHO OWNS THE WILDLIFE? THE POLITICAL ECONOMY OF CONSERVATION OF NINETEENTH-CENTURY AMERICA 139 (1981)).

50. See Coggins and Patti, *supra* note 19, at 169.

51. See Bob Neufeld, *Comment, The Migratory Bird Treaty: Another Feather in the Environmentalist's Cap*, 19 S.D.L. REV. 307 (1974).

52. Sjostrom, *supra*, note 21, at 373. See also J. TREFETHEN, AN AMERICAN CRUSADE FOR WILDLIFE 153-55 (1975).

53. See Convention with Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702 (1916), T.S. No. 628 (At the time of this Treaty, the government of Canada was controlled by Great Britain).

54. See *id.*

55. See *id.*

many of which were "in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds."⁵⁶ The finished treaty was a uniform regulation, designed to protect all migratory species of birds.⁵⁷ It was divided into nine articles,⁵⁸ and although the Treaty was comprehensive, it failed to impose any penalties for the violation of its terms.⁵⁹

This "loophole in the treaty was later rectified when Congress enacted" the implementing legislation,⁶⁰ known as the Migratory Bird Treaty Act (MBTA).⁶¹ The MBTA created specific criminal penalties for violators including fines and jail terms.⁶² President Woodrow Wilson signed the MBTA into law on July 3, 1918,⁶³ which codified the Treaty.⁶⁴ The Treaty asserts that:

it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, . . . any migratory bird, any part, nest, or egg of any such birds . . . , included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds⁶⁵

Moreover, the MBTA gives the Secretary of the Interior the authority:

to carry out the purposes of the conventions . . . to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, . . . of any such bird, or

56. *Id.*

57. *See id.*

58. *See* Convention with Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702 (1916), T.S. No. 628.

59. *See* Neufeld, *supra* note 51, at 310.

60. Lombardi, *supra* note 23, at 346.

61. Migratory Bird Treaty Act, ch. 128, § 2, 40 Stat. 755 (1918) (current version at 16 U.S.C. § 703-712 (1994)).

62. *See* 16 U.S.C. § 707.

63. 16 U.S.C. §§ 703-712 (World War I had diverted the nation's attention away from birds for several years before the Treaty could be signed into law).

64. *See* Neufeld, *supra* note 51, at 310.

65. 16 U.S.C. § 703.

any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same⁶⁶

This transition from treaty to codified legislation was not without problems though, and the MBTA was quickly challenged on the same basis as the Migratory Bird Act of 1913.⁶⁷ In *Missouri v. Holland*,⁶⁸ the State of Missouri claimed that the Treaty was a violation of the Tenth Amendment of the U.S. Constitution,⁶⁹ and that Congress could not limit a state's rights by regulating activity associated with migratory birds through the enactment of a treaty.⁷⁰ The Supreme Court upheld the Act as a valid application of the treaty power, thus evading the possible constitutional problems associated with the 1913 Act.⁷¹ The Court, in an opinion by Justice Holmes, held that:

Here a national interest of nearly the very first magnitude is involved. It can be protected only by national action in concert with that of another power But for the treaty and the statute there soon might be no birds for any power to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forest and our crops are destroyed. It is not sufficient to rely on the States The treaty and statute must be upheld.⁷²

The decision has since been labeled as one "that will give aid and comfort to the advocates of unlimited [national] power,"⁷³

66. 16 U.S.C. § 704 (The Convention allows both the United States and British governments to pass legislation to assure that the goals of the Convention are carried out).

67. See Forrest Revere Black, *Missouri v. Holland — A Judicial Milepost on the Road to Absolutism*, 25 ILL. L. REV. 911, 913 (1931).

68. 252 U.S. 416 (1920).

69. See *id.* at 431.

70. See *id.*

71. See Sjoström, *supra* note 21, at 373.

72. *Holland*, 252 U.S. at 435.

73. Black, *supra* note 67, at 916.

and also as, "part and parcel of the great movement for conservation of natural resources."⁷⁴

The facial constitutionality of the MBTA is no longer subject to serious debate.⁷⁵ In conjunction with the treaty power,⁷⁶ the present liberal interpretation of the Commerce Clause⁷⁷ buttresses federal jurisdiction over migratory birds.⁷⁸ The Seventh and Ninth Circuits have explained that "since migratory birds pass between states in their travels, they are objects of interstate commerce [such] that federal protection therefore attaches to them, and that Congress can regulate or prohibit their taking within a state even in the face of contrary state legislation."⁷⁹

The MBTA authorized the federal government to regulate migratory birds through the treaty power, and the Canadian Convention has been supplemented by a treaty with Mexico in 1936,⁸⁰ with Japan in 1972,⁸¹ and with the former Soviet Union, that was signed in 1976 and ratified in 1978.⁸² Each of the additional treaties has been consolidated into the MBTA by reference.⁸³ These later codifications demonstrate

74. Sjostrom, *supra* note 23, at 373 (quoting Edward S. Corwin, *Game Protection and the Constitution*, 14 MICH. L. REV. 613, 625 (1916)).

75. See Sjostrom, *supra* note 21, at 373.

76. U.S. CONST. art. II, §2, cl. 2.

77. U.S. CONST. art I, § 8, cl. 3.

78. See *id.*

79. *Comment, Federal Protection of Endangered Wildlife Species*, 22 STAN L. REV. 1289, 1300 (1970) (citing *Cerritos Gun Club v. Hall*, 96 F.2d 620, 624, 627, (9th Cir. 1938) and *Cochrane v. United States*, 92 F.2d 623, 627 (7th Cir. 1937)).

80. See Convention between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, 50 Stat. 1311 (1936), T.S. No. 912.

81. See Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar.4, 1972, 25 U.S.T. 3329, T.I.A.S. No. 7990 (1972).

82. See Convention for the Conservation of Migratory Birds and Their Environments, Nov. 19, 1976, 29 U.S.T. 4647, T.I.A.S. No. 9073 (1976).

83. See 16 U.S.C. §703 (1994).

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, . . . to kill . . . any migratory bird . . . included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded on August 16, 1916, the United States and the

the "ever-broadening" scope of the MBTA.⁸⁴ For example, while the only species protected by the original convention were those explicitly listed in the treaty,⁸⁵ the treaty with Mexico allows "the addition of migratory birds by families as the Presidents of the two nations might see fit to include from time to time."⁸⁶

Since the MBTA was written in flexible language it can be employed in situations that were not originally intended when the Treaty was drafted.⁸⁷ The present trend has been towards a progressive interpretation and expanded application of the MBTA.⁸⁸ This broad interpretation gives the MBTA a certain advantage compared to other specific environmental statutes whose narrow interpretation and loopholes tend to weaken their impact.⁸⁹

Pursuant to the MBTA, the United States Secretary of the Interior is permitted, within specific limits dictated by the Treaty, to establish regulations defining precisely when and where migratory birds can be hunted.⁹⁰ The regulations are then enforced by the U.S. Fish and Wildlife Service, which is the authorized representative of the Secretary of the Interior.⁹¹ One of these regulations is the anti-baiting regu-

United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972, and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976. *Id.*

84. See Coggins and Patti, *supra* note 19, at 170.

85. See *id.* at 171.

86. *Id.* at 171-72; See generally Convention for the Protection of Migratory Birds and Game Mammals, *supra* note 80, at 1314.

87. See Sjostrom, *supra* note 21, at 371.

88. See *id.*

89. See *id.* See, e.g., 42 U.S.C. §§ 4321-4370a (1994) (The National Environmental Policy Act of 1969 (NEPA), for example, has been filled with attempts to weaken and avoid its provisions).

90. See Schmalz, *supra* note 10, at 407. See 16 U.S.C. § 704.

91. See 50 C.F.R. § 10.1 (1994).

The regulations . . . promulgated to implement . . . [the MBTA] . . . [are] enforced by the [U.S.] Bureau of Sport Fisheries and Wildlife Service which regulate[s] the taking, possession, transportation, sale, purchase, barter, exportation, and importation of wildlife.

lation, embodied in 50 C.F.R. § 20.21 (1990), which banned hunting migratory birds:⁹²

(i) By the aid of baiting, on or over any baited area. As used in this paragraph, "baiting" shall mean the placing, exposing, depositing, distributing, or scattering of shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed so as to constitute for such birds a lure, attraction or enticement to, on, or over any areas where hunters are attempting to take them; and "baited area" means any area where shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed whatsoever capable of luring, attracting, or enticing such birds is directly or indirectly placed, exposed, deposited, distributed, or scattered; and any such area shall remain a baited area following complete removal of all such corn, wheat or other grain, salt, or other feed. However, nothing in this paragraph shall prohibit:

(1) The taking of all migratory game birds, including waterfowl, on or over standing crops, flooded standing crops (including aquatics), flooded harvested croplands, grain crops properly shocked on the field where grown, or grains found scattered solely as the result of *normal agricultural planting or harvesting*; and

(2) The taking of all migratory game birds, except waterfowl, on or over any lands where shelled, shucked or unshucked corn, wheat or other grain, salt, or other feed has been distributed or scattered as the result of *bonafide agricultural operations or procedures* or as the result of manipulation of a crop or other feed on the land where grown for wildlife management purposes: Provided, that manipulation for wildlife management purposes does not include the distributing or scattering of grain or other feed once it has been removed from on the field where grown.⁹³

The defendants were arrested for violating the aforementioned regulation in *United States v. Boynton*.⁹⁴ The wording

Id.

92. See Schmalz, *supra* note 10, at 407.

93. 50 C.F.R. § 20.21(i) (1994) (emphasis added).

94. 63 F.3d 337.

of the first sentence of the regulation seems to forbid two distinct activities.⁹⁵ The first is "the taking of migratory birds by the aid of baiting," and the second is, taking the birds "on or over a baited area."⁹⁶ As the regulation goes on to define "baiting" and "baited area," it is apparent that there is no reference to intent as a necessary element of the offense, and that the regulation is, on its face, a strict liability offense.⁹⁷ Consequently, a majority of the courts have determined that intent is not an element of the offense.⁹⁸ This wholesale endorsement of the strict liability nature of the MBTA is followed by the Third, Fourth, Sixth, Seventh, and Eighth Circuits as well as by a number of federal district courts.⁹⁹

An example of the strict liability interpretation is demonstrated in *United States v. Catlett*.¹⁰⁰ In this case, the Sixth Circuit held that a defendant's state of mind is of no consequence when enforcing the anti-baiting regulation pursuant to the MBTA.¹⁰¹ The defendant was charged with "taking migratory birds on or over a baited area."¹⁰² The defendant was searching for morning doves during the hunting season in a Tennessee field.¹⁰³ The court held that the field was "baited" with corn nine days prior to the violation, and even though

95. See Schmalz, *supra* note 10, at 409.

96. *Id.*

97. See *id.*

98. See, e.g., *United States v. Schultze*, 28 F. Supp. 234; *United States v. Reese*, 27 F. Supp. 833 (W.D. Tenn. 1939); *United States v. Tarmon*, 227 F. Supp. 480 (D. Md. 1964); *Rogers v. United States*, 367 F.2d 998 (8th Cir. 1966), *cert. denied*, 386 U.S. 943 (1967); *United States v. Wood*, 437 F.2d 91 (9th Cir. 1971); *United States v. Ireland*, 493 F.2d 1208 (4th Cir. 1973); *United States v. Jarman*, 491 F.2d 764; *United States v. Ardoin*, 431 F. Supp. 493 (W.D. La. 1977); *United States v. F.M.C. Corp.*, 572 F.2d 902 (2d Cir. 1978); *United States v. Green*, 571 F.2d 1 (6th Cir. 1978); *United States v. Brandt*, 717 F.2d 955; *Catlett v. United States*, 747 F.2d 1102, *cert. denied*, 471 U.S. 1074; *United States v. Chandler*, 753 F.2d 360 (4th Cir. 1985); *United States v. Manning*, 787 F.2d 431 (8th Cir. 1986); *United States v. Engler*, 806 F.2d 425 (3rd Cir. 1986), *cert. denied*, 481 U.S. 1019 (1987); *United States v. Van Fossan*, 899 F.2d 636 (7th Cir. 1990).

99. See Schmalz, *supra* note 10, at 410.

100. 747 F.2d 1102 (6th Cir. 1984).

101. See *id.* at 1105.

102. *Id.* at 1104.

103. See *id.*

"there were only traces of bait left,"¹⁰⁴ the conviction was affirmed since an area is considered "baited" for up to ten days after the bait has been removed.¹⁰⁵ The fact that there was no evidence presented at trial showing that Catlett either baited the field, or knew it was baited, did not stop the court from deferring to the strict liability precedent expounded in *United States v. Green*,¹⁰⁶ which held that "the regulation [does] not require proof of knowledge."¹⁰⁷

Catlett demonstrates the unjust results that are possible based on the majority's strict liability approach. The court recognized the harshness of its approach, as shown by the apologetic tone of the opinion: "The unfortunate defendants were apparently unaware of, and had not participated in the baiting We concede that this is a harsh rule and trust that prosecution will take place in the exercise of sound discretion only We reluctantly in this case must affirm."¹⁰⁸ The court seemed to have reservations about imposing strict liability, but chose to follow nearly fifty years of precedent in baiting cases dating back to 1939.¹⁰⁹

The minority approach regarding the strict liability interpretation of the anti-baiting regulation was set forth in *United States v. Delahoussaye*.¹¹⁰ In *Delahoussaye*, the court raised the scienter issue sua sponte, and determined that the anti-baiting regulation requires a minimum form of scienter, a "should have known form,"¹¹¹ which the court held was a necessary element of a baiting offense.¹¹² The defendants in *Delahoussaye* had been convicted of shooting ducks over a baited area.¹¹³ It was clear that the defendants should have

104. *Id.* at 1103.

105. See 50 C.F.R. § 20.21(i) (1994).

106. 571 F.2d 1 (holding that the Government does not have to prove "that the defendant knew the field on which he hunted was baited, or that defendant had performed or had taken part directly or indirectly in the baiting, or that it had been done for his benefit as part of hunting method").

107. *Id.* at 2 (citing *United States v. Ireland*, 493 F.2d 1208).

108. *Catlett*, 747 F.2d at 1103.

109. See *supra* text accompanying note 98.

110. 573 F.2d 910.

111. *Id.* at 912.

112. See *id.* at 912.

113. See *id.* at 911.

seen that the area was baited.¹¹⁴ Rather than raise the requisite intent issue, the defendants argued that the regulation was unconstitutionally vague.¹¹⁵ The court stated:

We conclude that at a minimum [the bait] must have been so situated that [its] presence could have been reasonably ascertained by a hunter properly wishing to check the area of his activity for illegal devices. There is no justice for example, in convicting one who was barred by a property line from ascertaining that birds were being pulled over him by bait . . . standing crops attract game quite as well as bait does, and hunting over standing crops is expressly permitted If the hunter cannot tell which is the means next door that is pulling over him, he cannot justly be penalized. Any other interpretation would simply render criminal conviction an unavoidable occasional consequence of duck hunting and deny the sport to those such as, say, judges who might find such a consequence unacceptable.¹¹⁶

The approach taken in *Delahoussaye* was not based on existing case law, but on a legitimate fear of convicting a subjectively innocent person who lacks intent.¹¹⁷ The court was re-writing the regulation to include a non-existing element into the statute, a "should have known" form of scienter.¹¹⁸ The court was apparently trying to evade the obvious injustice of the harsh operation of the regulation, and to prevent the apparently law-abiding hunter from being convicted.¹¹⁹ The Fifth Circuit upheld its position ten years later stating that "unique among the circuits, we require a minimum level of scienter as a necessary element of an offense of the MBTA."¹²⁰ Some evidence has emerged, however, that this

114. *See id.* at 912.

115. *Delahoussaye*, 573 F.2d at 912.

116. *Id.*

117. *See id.*

118. *See id.* at 912.

119. *See id.*

120. *United States v. Sylvester*, 848 F.2d 520, 522 (5th Cir. 1988).

position is contrary to the intent of subsequent sessions of Congress.¹²¹

The Fifth Circuit is not the only jurisdiction to interpret the regulation as requiring some "should have known" standard of scienter.¹²² In *United States v. Angueria*,¹²³ a baiting case from Puerto Rico, the First Circuit stated "we assume for present purposes that scienter is required."¹²⁴ The court cited *United States v. Sylvester*¹²⁵ as authority, but the defendants in *Angueria* were found to have known of the existence of the baiting and were convicted,¹²⁶ leaving the language as mere dictum. Therefore, it is unclear if the First Circuit follows the minority approach at this time, since the court limited its support of the strict liability doctrine, "leaving to another day the determination of that issue."¹²⁷

The acknowledged division between the circuits regarding the intent issue could have been settled when the Sixth Circuit's decision in *United States v. Catlett*¹²⁸ was appealed to the Supreme Court. However, certiorari was denied, although not by a unanimous bench.¹²⁹ Justice White argued that since the anti-baiting regulation "is a national one founded on a treaty . . . , [it] should not mean one thing in one state and another elsewhere."¹³⁰ Justice White asserted that certiorari should have been granted "to resolve the split among the Court[s] of Appeals,"¹³¹ but unfortunately the division among circuits continues.

A similar division between the circuits has recently developed in cases interpreting the "bona fide agricultural oper-

121. See S. Rep. No. 445, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 6113, 6128 ("Nothing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. § 707(a), a standard which has been upheld in many Federal court decisions").

122. See *United States v. Angueria*, 951 F.2d 12 (1st Cir. 1991).

123. *Id.*

124. *Id.* at 15.

125. *Sylvester*, 848 F.2d at 520.

126. *Angueria*, 951 F.2d at 15-16.

127. See *id.* at 15.

128. 747 F.2d 1102, cert. denied, 471 U.S. 1074.

129. See *Catlett*, 471 U.S. at 1075.

130. *Id.*

131. *Id.*

ations or procedures" exception to anti-baiting regulation,¹³² as promulgated by the Secretary of the Interior. The exceptions to the anti-baiting regulation allow for the hunting of migratory birds over grains found scattered as the result of "normal agricultural planting or harvesting" or "bona fide agricultural operations or procedures."¹³³ The only reported cases that have discussed the "bona fide" exception to the regulation besides *United States v. Boynton*,¹³⁴ are *United States v. Sylvester*¹³⁵ and *United States v. Brandt*.¹³⁶

In *Sylvester*, the defendants' convictions for violating the anti-baiting regulation were affirmed as the court held that the defendants "should have known" that the field they were hunting over was baited.¹³⁷ However, the court did not state whether it was relying on an objective or subjective standard to determine whether the grain was scattered in a practice that was "bona fide."¹³⁸ In *Sylvester*, vast quantities of clumpy and moldy grain were unevenly spread during the two day period immediately preceding the hunting season.¹³⁹ The court may have objectively decided that it was neither an agricultural operation nor a procedure to strew grain in this manner.¹⁴⁰ The court could have also used this fact as circumstantial evidence to find that the person who disseminated the grain did not intend to partake in an agricultural operation.¹⁴¹ The opinion, while not giving clear authority for either an "objective or . . . subjective construction of the regulatory language, reached a conclusion consistent with the view that the statute should be read objectively."¹⁴²

In *United States v. Brandt*, the court used a subjective standard in determining the applicability of the "bona fide"

132. See 50 C.F.R. § 20.21(i) (1994).

133. See *id.*

134. 63 F.3d 337.

135. 848 F.2d 520.

136. 717 F.2d 955.

137. See *Sylvester*, 848 F.2d at 520.

138. See *id.* at 522-523.

139. See *id.* at 522.

140. See *id.*

141. See *id.* at 522-523.

142. *Boynton*, 63 F.3d at 345.

exception.¹⁴³ In *Brandt*, the defendants were arrested for hunting doves, a type of migratory bird, on a "baited area."¹⁴⁴ The charges were punishable by six months imprisonment and a maximum fine of \$500.¹⁴⁵ The defendants consented to a trial before a United States magistrate, and at the completion of the government's case, the charges were dismissed when the magistrate held that the "anti-baiting regulation was unconstitutionally vague."¹⁴⁶ The government appealed the decision to the district court, which overruled the magistrate's determination and remanded the actions to the magistrate.¹⁴⁷ Trials were then conducted before the magistrate and the defendants were found guilty.¹⁴⁸ These convictions were later affirmed by the district court.¹⁴⁹

The defendants then appealed to the Sixth Circuit Court of Appeals and claimed that the "normal agricultural planting or harvesting" and "bona fide agricultural operations or procedures" exceptions to the regulation were so vague, "that they fail to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly."¹⁵⁰ The testimony presented at trial revealed that agricultural practices varied greatly with respect to the broadcasting of fields, leading the appellants to contend that it was impossible to determine what practices were considered "normal" or "bona fide."¹⁵¹ The court held that the exceptions to the regulation did not require a hunter to engage in a complex inquiry to determine the confines of customary agrarian practices, but rather the inquiry should be a subjective interpretation "directed at determining the intent of the person seeding the land."¹⁵² The court affirmed the convictions, holding "that the intent of the person seeding the field

143. See *Brandt*, 717 F.2d at 957-958.

144. See *id.* at 956.

145. See *id.*

146. See *id.*

147. See *id.*

148. See *Brandt*, 717 F.2d at 956.

149. See *id.*

150. *Id.* at 957 (quoting *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

151. See *Brandt*, 717 F.2d at 957.

152. *Id.*

is simply a fact to be proven as in any trial involving intent as an element of the offense.”¹⁵³

This same issue arose again twelve years later in *United States v. Boynton*, but contrary to the holding in *Brandt*, the court used an objective standard to determine the applicability of the “bona fide agricultural operations or procedures exception.”¹⁵⁴ The court held that requiring proof of a farmer’s subjective intent in scattering the grain would be contrary to the strict liability nature of the offense.¹⁵⁵

III. *United States v. Boynton*

On September 4, 1993, Stephen Boynton, James Booth, and Bernard Dadds, Jr. were hunting for morning doves, a type of migratory bird, in Queen Anne’s County, Maryland.¹⁵⁶ The defendants were hunting over a field which was “in effect, baited, by virtue of the presence of wheat seeds, a grain which attracts doves.”¹⁵⁷ The wheat seeds were a combination of low quality seeds and chaff, called “screenings.”¹⁵⁸ The screenings had been disseminated by using a spreader, which left the grain dispersed on top of the soil without incorporating it into the soil.¹⁵⁹ The spreading covered an approximately ninety yard tract next to a somewhat dried-up pond.¹⁶⁰ The grain was located both over and under the normal water line, on ground that was dry due to a recent drought.¹⁶¹ Since the ground was parched and the grain was not mixed into the soil when it was spread one month earlier, the grain had not germinated.¹⁶² All the hunters were cited for hunting in a baited area by agents of the Fish and Wildlife Service pursuant to 16 U.S.C. § 703 et seq. and 50 C.F.R.

153. *Id.* at 958.

154. *Id.* at 337.

155. *See id.*

156. *See Boynton* 63 F.3d at 339.

157. *Id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *See Boynton*, 63 F.3d at 339.

162. *See id.*

§ 20.21 (i).¹⁶³ The three hunters conceded the preceding facts, contested their citations and went to trial.¹⁶⁴

The evidence at trial conflicted as to “whether the manner in which the grain was scattered was the result of normal agricultural planting or harvesting or bona fide agricultural operations or procedures, as those terms are defined by farmers in the region, experts in agronomy, and the Fish and Wildlife Service.”¹⁶⁵ There was also conflicting evidence presented as to the subjective intent of Jay Quimby, the farmer who scattered the grain.¹⁶⁶

Jay Quimby alleged that he intended for the screenings to sprout and form a root system so that it would help impede leakage from the pond.¹⁶⁷ He contended that this had been his practice for six years, and that in years in which there was a normal amount of rainfall the “grain had sprouted and helped retard the leakage.”¹⁶⁸ Jay Quimby claimed that he had not “disced the wheat under, i.e., incorporated the seeds into the soil,” because this process would have only advanced the leakage.¹⁶⁹ His father, Joseph Quimby, who owned the land, stated that he “thought the grain had been placed there to feed some ducklings who had been living on the pond but who were then eaten by raptors.”¹⁷⁰

Jay Quimby asserted that before the hunt began, Joseph Judge, the organizer of the hunt, had called him and asked permission to use the area around the pond for hunting, but had not asked if the area was “baited.”¹⁷¹ Joseph Judge stated that when he contacted Quimby, he “specifically asked whether the area was baited, and Jay Quimby had said it was not.”¹⁷² Judge also testified that prior to the hunt at the Quimby farm, he examined the area around the pond and

163. *See id.*

164. *See id.*

165. *Id.*

166. *See Boynton*, 63 F.3d at 340.

167. *See id.*

168. *Id.*

169. *See id.*

170. *Id.*

171. *See Boynton*, 63 F.3d at 340.

172. *Id.*

had not discovered any grain.¹⁷³ He stated that he had also been cited and fined for a baiting violation one week before the Quimby farm hunt.¹⁷⁴

The pond had been built with the assistance of public funds from the Queen Anne's County Soil Conservation Service (SCS) to relieve prior erosion.¹⁷⁵ Jeffrey Opel, a member of the SCS dealing with erosion control permits, testified that his "inspection of the pond revealed no signs of leakage, and that a March 1993 SCS inspection did not report leakage."¹⁷⁶ Opel also stated that the procedure in which Quimby had scattered the wheat around the pond was neither a "normal" nor "recognized method of erosion control."¹⁷⁷ During Mr. Opel's testimony he alluded to an SCS statement of standards for planting in eroding areas, which made it a requisite for "seedbed preparation when the ground was dry so that the seed and soil will in fact mix."¹⁷⁸ Quimby had not completed such preparation.¹⁷⁹

Subsequent to the aforementioned citations being issued, Joseph Judge asked Joseph Haamid, another employee of the SCS who had accompanied Opel in inspecting the area around the pond, to write a letter about what he had observed.¹⁸⁰ The letter was offered as a government exhibit and it stated that "planting seeds below a pond's waterline is not a normal stabilization (i.e., anti-erosion) practice."¹⁸¹ At trial it was explained that this method of scattering wheat was not considered normal because as the water level rises, the plants and roots decompose and no longer provide "any anti-erosion function."¹⁸² The letter also stated that SCS specifications for erosion control require some form of seedbed preparation.¹⁸³

173. *See id.*

174. *See id.*

175. *See id.*

176. *Boynton*, 63 F.3d at 340.

177. *Id.*

178. *Id.*

179. *See id.*

180. *See id.*

181. *Boynton*, 63 F.3d at 340.

182. *Id.*

183. *See id.*

The letter declared that it is a "cultural practice" for some farmers to spread seed without any soil preparation, but this method demands "a higher rate of application."¹⁸⁴

An agronomist named Ronald Mulford, who had experience working with small grain, including screenings, also testified for the government.¹⁸⁵ He stated "that putting wheat screenings on unprepared ground in the middle of the summer without incorporating the seed into the soil was not normal agricultural planting, and that wheat screenings planted in this manner could not be expected to grow."¹⁸⁶ Mr. Mulford also testified that although "farmers sometimes use screenings to create a cover crop," when it is done, the farmers mix the seeds into the ground.¹⁸⁷ He stated "that when the seed is not incorporated, it is not intended as a cover crop."¹⁸⁸

The government additionally introduced into evidence a pamphlet which was available from Fish and Wildlife Service interpreting the regulation that stated:

WHAT IS LEGAL

Any grain in the field must be the result of a normal agricultural planting The agricultural planting must be done in a way which uses the normal planting methods in an area to produce an agricultural crop. Grain found in piles or in other large concentrations is not a normal agricultural planting. A normal agricultural planting includes many factors such as recommended planting dates, proper seed distribution, seed bed preparation, application rate, and seed vitality

The normal planting must be done for agricultural purposes. Planting wildlife food plots, planting a 'dove field,' or sowing seeds for erosion control on a construction site are not agricultural purposes. Dove hunts are not legal over these areas

184. *Id.*

185. *See id.*

186. *Boynton*, 63 F.3d at 340.

187. *See id.*

188. *Id.*

There are several agricultural operations or procedures other than planting or harvesting that scatter grain, salt, or feed. These activities also attract doves. The Latin words 'bona fide,' included in the hunting regulations mean in good faith or without fraud. A well-intentioned agricultural operation or procedure produces livestock or a crop Dove hunting is legal on these areas as long as these are 'bona fide' agricultural operations or procedures.¹⁸⁹

The defense introduced the testimony of Bernard Dadds, Jr., one of the defendants, who had taken a one-day class in erosion control,¹⁹⁰ and he testified that "broadcasting seed was a method of erosion control."¹⁹¹ The defense also introduced the testimony of Bernard Dadds, Sr., the defendant's father who was an accomplished state natural resource police officer.¹⁹² He stated that "broadcasting a crop is a bona fide agricultural activity and that the method used around the Quimby pond was a normal agricultural activity."¹⁹³

The magistrate judge who conducted a bench trial found as a matter of fact that Jay Quimby, the farmer who dispersed the grain, did not intend to reap the product of the grain.¹⁹⁴ He, therefore, held that the first regulatory exception for "normal agricultural planting or harvesting" was not satisfied.¹⁹⁵ The magistrate judge next stated, "I cannot find, as a matter of fact, that Jay Quimby's intent was to spread bait as the word is used [in the regulation]."¹⁹⁶ However, the magistrate judge held as a matter of law that Quimby's intent was not the determining factor as to whether the spreading fell into the next regulatory exception, for "bona fide agricultural operations or procedures."¹⁹⁷ The magistrate objectively analyzed the facts encompassing the strewing and

189. *Id.* at 341.

190. *See id.*

191. *Boynton*, 63 F.2d at 341.

192. *See id.*

193. *Id.*

194. *See id.*

195. *See id.*

196. *Boynton*, 63 F.3d at 341.

197. *See id.*

held that the scattered grain did not fall into the “bona fide” exception.¹⁹⁸ The magistrate determined that “there had to be some mixing into the soil of the seed and not just laying [the screenings] on top” for the method to be bona fide.¹⁹⁹ The defendants were all found guilty and each was fined \$190, with a \$10 special assessment.²⁰⁰

The defendants appealed to the district court, which ultimately concurred with the magistrate judge’s holding that seeding done without the intent to reap is not considered “normal agricultural planting or harvesting.”²⁰¹ The district court also agreed with the magistrate judge’s holding that Jay Quimby’s subjective intent in dispersing the seed was not the determining factor as to whether the seed was disseminated as the result “of normal planting or bona fide procedures.”²⁰² The district court affirmed all aspects of the convictions because the evidence put forth at trial supported the factual finding by the magistrate that “the spreading of wheat screenings during a drought, without incorporation or other measures to insure germination, for the claimed purpose of stabilizing an erosion control pond was neither a ‘normal’ planting operation nor a ‘bona fide’ agricultural operation or procedure.”²⁰³

The defendants appealed this decision to the Fourth Circuit Court of Appeals which recognized that “the proper construction of . . . regulations is a matter of law,” and reviewed the district court’s disposition of the matter *de novo*.²⁰⁴ The defendants claimed that “normal” and “bona fide” should be interpreted to require as an element of the offense proof of the intent of the person who seeded the field.²⁰⁵ They argued that the definitions of the words “normal” and “bona fide” require that “when the subjective intent of the person who scattered the grain was to engage in an agricultural planting,

198. *See id.*

199. *Id.*

200. *See id.*

201. *See Boynton*, 63 F.3d at 341.

202. *See id.*

203. *Id.*

204. *See id.* at 342.

205. *See id.*

harvesting, operation or procedure, hunting over the grains falls within the exception.”²⁰⁶ The defendants claimed that the court should have required the government to prove it was not the intent of Jay Quimby to partake in a soil control procedure.²⁰⁷ The defendants further argued that there was insufficient evidence to determine that the procedure Quimby used was not a “subjectively ‘normal’ or ‘bona fide’ method of erosion control in the area.”²⁰⁸

The Court of Appeals recognized that it was required to give deference to the Fish and Wildlife Service’s interpretation of that agency’s own regulation, but it did not have to uphold that interpretation if it was “plainly erroneous or inconsistent with the regulation’s language or the intent of the regulation as manifest by the agency at the time of the regulation’s promulgation.”²⁰⁹ The court stated:

On its face, the pamphlet issued by the Fish and Wildlife Service interpreting 50 C.F.R. § 20.21 (i) did not support the defendants’ interpretation of ‘normal agricultural planting or harvesting,’ but did support, to some extent, the defendants’ interpretation of ‘bona fide agricultural operations or procedures.’²¹⁰

The Fish and Wildlife Service pamphlet explains that the first exception applies only to planting “done in a way which uses the normal planting methods in an area to produce a crop.”²¹¹ Thus, the court held that the intent of the person who scattered the screenings is not the determining factor for the analysis, rather, the inquiry should be whether the seed was scattered “by means of the methods used in the area to produce a crop.”²¹² The court held that this objective interpretation of the regulation was neither incorrect nor illogical within the regulatory scheme.²¹³

206. *Boynton*, 63 F.3d at 342.

207. *See id.*

208. *See id.*

209. *Id.*

210. *Id.*

211. *Boynton*, 63 F.3d at 342.

212. *Id.*

213. *See id.*

However, the court found that the Fish and Wildlife Service's interpretation of the second exception, for "bona fide agricultural operations or procedures," introduced a subjective element into the scheme.²¹⁴ The Fish and Wildlife Service pamphlet is somewhat inconsistent on the point because it states, "[t]he Latin words 'bona fide' included in the hunting regulations mean in good faith or without fraud."²¹⁵ This apparently introduces a subjective element into the analysis.²¹⁶ However, after defining bona fide, the pamphlet reads, "a well-intentioned agricultural operation or procedure produces livestock or a crop."²¹⁷ This reintroduces an objective element, even though if the inquiry were purely subjective, a "bona fide" operation "might or might not produce livestock or a crop."²¹⁸

The court tried to solve this ambiguity and looked to the history and structure of the MBTA.²¹⁹ The court held that a subjective interpretation is clearly incorrect and conflicted with the regulatory scheme for two reasons.²²⁰ The first is that a subjective interpretation would be a radical change in the regulatory scheme because no intent to alter it was suggested by the Secretary of the Interior when the regulations containing the "bona fide" exception were promulgated.²²¹ Secondly, the interpretation would lead to the foolish result of requiring an intent element to be proven "when Congress intended that misdemeanor violations of the MBTA be regulatory, strict liability crimes."²²²

The court was aware of the Fifth Circuit's position taken in *United States v. Delahoussaye*,²²³ but noted that this hold-

214. See *id.*

215. *Id.*

216. See *Boynton*, 63 F.3d at 342.

217. *Id.*

218. *Id.*

219. See *id.*

220. See *id.*

221. See *Boynton*, 63 F.3d at 343.

222. *Id.* See *supra* text accompanying note 98 (indicating that since the passage of the Migratory Bird Treaty, the majority of courts have held that the government is not required to prove intent as an element of the offense).

223. 573 F.2d 910.

ing was “unique among the [c]ircuits,”²²⁴ and “contrary to the intent of a subsequent Congress.”²²⁵ The court held that just as “Congress is presumed to enact legislation with knowledge of the law,”²²⁶ “absent a clear manifestation showing of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.”²²⁷ The court noted that administrative agencies are also presumed, absent a clear showing to the contrary, to have instituted regulations “consistent with the existing regulatory scheme.”²²⁸

Relying on these principles, and a background of nearly consistent judicial interpretation of baiting violations being strict liability crimes, the court declined to adopt an interpretation that would require the prosecution to prove an intent element of the crime.²²⁹ The court held that requiring proof of the subjective intent of a person who disperses the grain would frustrate enforcement of the MBTA, and would produce the foolish result “clearly not contemplated by Congress, of nullifying the ease of prosecution created by the designation of hunting over a baited area as a strict liability crime.”²³⁰

The court then looked at the defendants’ assertion that there was insufficient evidence to support the district court’s

224. *Boynton*, 63 F.3d at 343 (quoting *United States v. Sylvester*, 848 F.2d at 522).

225. *Boynton*, 63 F.3d at 343. See *supra* text accompanying note 121.

226. *Boynton*, 63 F.3d 343 (quoting *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995)).

227. *Boynton*, 63 F.3d at 343. (quoting *Estate of Wood v. C.I.R.*, 909 F.2d 1155, 1160 (8th Cir. 1990)).

228. *Id.* See also *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (declining to adopt a statutory interpretation which would result in “radical departure” from established principles of law in the area, without a clear showing that Congress intended to alter the existing principle).

229. See *Boynton*, 63 F.3d at 344.

230. *Id.* at 344-345. See *United States v. Schultze*, 28 F.Supp. at 236 (holding that “[i]t was not the intention of Congress to require guilty knowledge or intent to complete the commission of the offense, and . . . accordingly scienter is not necessary. The beneficial purpose of the [Migratory Bird] 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 the defendants accused of violating the provisions of the act”).

finding that Jay Quimby's spreading of screenings was not the "normal" and "bona fide" method in the area.²³¹ The court held that "[b]ecause the proper standard was an objective one rather than [a] subjective one, the defendants' attack on the sufficiency of the evidence [did] not provide a basis for challenging the convictions."²³² Although the court held that both sides had presented evidence of objectively normal and bona fide agricultural practices in the community, on an appeal, "the evidence must be viewed in the light most favorable to the conviction" and the judgements were affirmed.²³³

IV. Analysis

In *United States v. Boynton*, the Fourth Circuit held that an objective standard should be used to determine the applicability of the "bona fide agricultural operations or procedures" exception to the anti-baiting regulation.²³⁴ The court held that requiring the prosecution to prove the subjective intent of the farmer who scattered the grain would be contrary to the strict liability nature of the offense.²³⁵ The court's decision relied on a background of "nearly consistent judicial interpretation" of baiting violations as being strict liability crimes.²³⁶ The court also looked at the legislative history of the anti-baiting regulation to see if the Secretary of the Interior intended to alter the regulatory scheme in such a way as to require the prosecution to prove intent as an element of the offense.²³⁷

Even though over fifty years of case law and the legislative history of the anti-baiting regulation support the court's holding, a detailed analysis of the language of the regulation

231. See *Boynton*, 63 F.3d at 345.

232. *Id.*

233. See *id.* at 346. See, e.g., *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Ireland*, 493 F.2d at 1208 (both holding that on appeal, the evidence must be viewed in the light most favorable to upholding the conviction).

234. See *Boynton*, 63 F.3d at 337.

235. See *id.* at 343.

236. See *id.* at 344.

237. See *id.* See also 38 Fed. Reg. 22015, 22022 (Aug. 15, 1973) (codified at 50 C.F.R. § 20.21 (i)).

elucidates that the holding in *United States v. Boynton* is inconsistent with the regulatory scheme. A better interpretation of the regulation was demonstrated in *United States v. Brandt*, in which the court held that the crucial factual finding in prosecutions arising under the anti-baiting regulation should be determining the intent of the person scattering the grain, and not the distinction between conventional and unconventional farming practices in the community.²³⁸

An analysis of the anti-baiting regulation indicates that it seeks to prevent the taking of migratory birds which have been deliberately lured to an area by bait.²³⁹ However, migratory birds are also allured to grain and other screenings that are scattered in the course of ordinary farming activities.²⁴⁰ The Secretary of the Interior concluded "that the taking of migratory birds over areas to which the birds are attracted as a natural and ordinary consequence of agricultural practices is compatible with the United States' obligations under the various migratory bird treaties."²⁴¹

As a result of this determination, the Secretary provided that the taking of migratory birds over "grains found scattered as a result of normal agricultural planting or harvesting" is not forbidden.²⁴² The Secretary's intent was not to differentiate between conventional and unconventional farming practices, but to differentiate between areas that birds are attracted to because of legitimate farming practices, and areas that birds are deliberately enticed by baiting.²⁴³ Even though there may be many distinct methods for seeding and harvesting in a community, as was demonstrated by the testimony in *United States v. Boynton*, it is obvious that the main purpose of the "normal agricultural planting and harvesting" exception has as its primary goal, the development and reaping of crops, and not the inveiglement of migratory birds.²⁴⁴

238. See *United States v. Brandt*, 717 F.2d at 958.

239. See 50 C.F.R. § 20.21(i) (1994).

240. See *Brandt*, 717 F.2d at 957.

241. *Id.* at 957-958.

242. See *id.* at 958.

243. See *id.*

244. See *id.*

This proposition was supported in *Boynton* by the U.S. Fish and Wildlife Service pamphlet that the government introduced into evidence at trial.²⁴⁵ The pamphlet interpreted this exception to apply only to planting "done in a way which uses the normal planting methods in an area to produce an agricultural crop."²⁴⁶

According to the manner in which the regulation is interpreted by the U.S. Fish and Wildlife agency, an objective analysis is required for the "normal agricultural planting or harvesting" exception.²⁴⁷ The court in *Boynton* stated that the intent of the person who scattered the seedlings "is not determinative," but rather, the relevant examination should ask only whether the seed was scattered by utilizing means adopted in the community to produce a crop.²⁴⁸

The problem with this objective rationale, adopted in *Boynton*, is that it is logically inconsistent. A farmer may also be a hunter, and participating in farming activities, he would definitely realize, and perhaps even aspire, that one of the consequences of his activities would be attracting migratory birds.²⁴⁹ If this were the case, the more sensible and pertinent inquiry should be a subjective one which would determine whether the farmer's intent to lure birds caused him to take measures he would not have ordinarily taken in the growth of his crops.²⁵⁰

Similarly, the "bona fide agricultural operation or procedure" exception also favors the subjective interpretation adopted in *Brandt*. The United States Fish and Wildlife Service pamphlet indicates that bona fide means "in good faith or without fraud."²⁵¹ An examination of the regulatory scheme elucidates that an operation or procedure would be embarked upon in good faith if it is done with an intent related to the

245. See *Boynton*, 63 F.3d at 341.

246. *Id.*

247. See *id.* at 342.

248. See *id.*

249. See *Brandt*, 717 F.2d at 958.

250. See *id.*

251. *Boynton*, 63 F.3d at 341. See also BLACK'S LAW DICTIONARY 177 (6th ed. 1990) (defining "bona fide" as "in or with good faith; honestly, openly, and sincerely; without deceit or fraud").

growth of crops, such as, erosion control.²⁵² Therefore, the words "bona fide" introduce a subjective element into the regulation making the critical inquiry, with respect to the exception, the intent of the person scattering the grain.²⁵³ The regulatory language requires that intent be proven as an element of the crime.²⁵⁴

Nonetheless, due to the strict liability nature of the offense, the hunter is therefore placed in an untenable position.²⁵⁵ Before beginning the hunt, he must ascertain the intent of the person who scattered the grain, and if he is incorrect in that determination, he will be criminally liable.²⁵⁶ However this is innate in all of the so called "public welfare offenses," where proof of intent is not required as an element of the offense.²⁵⁷ Furthermore, prosecutions for these types of crimes have long been authorized by the courts.²⁵⁸

As a result of the aforementioned ambiguities, the circuits are divided as to whether to apply a subjective standard, or objective standard, to the exceptions of the anti-baiting regulation pursuant to the MBTA. The Fourth Circuit has held that requiring the prosecution to prove an intent element would be highly untenable, and would contravene Congress' intent that misdemeanor violations of the MBTA be strict liability crimes.²⁵⁹ Thus, the court applied an objective standard to determine the applicability of

252. See *Brandt*, 717 F.2d at 958.

253. See *id.*

254. See *id.*

255. See *id.*

256. See *id.*

257. *Brandt*, 717 F.2d at 958. See, e.g., *United States v. Balint*, 258 U.S. 250. In *Balint*, the "[d]efendants were charged under the Narcotics Act of 1914 with selling certain amounts of a derivative of opium and coca leaves. The defendants demurred to the indictment on the ground that it failed to charge that they knew the content of the drugs that they sold. The district court quashed the indictment, but the Supreme Court reversed." *Id.* at 257. The Court held that the statute required the defendants to determine, at their own peril, whether their activity came within the violation of the statute. See *id.* at 254.

258. See *Brandt*, 717 F.2d at 958.

259. See *Boynton*, 63 F.3d 337.

the "bona fide agricultural operations or procedures" exception.²⁶⁰

The Sixth Circuit, in an opinion endorsed by this author, held that requiring the prosecution to prove the intent of the person seeding the field would not alter the strict liability nature of the crime.²⁶¹ The court held that the intent of the individual seeding the field is the crucial factual finding in a prosecution arising under the anti-baiting regulation, and the hunter must ascertain, at his peril, whether a field has been improperly baited.²⁶²

Due to the current division between the Circuits on this key aspect of the anti-baiting regulation, and because the main purpose of enacting federal regulations is to provide uniformity throughout the states, this division should be addressed by the Secretary of the Interior.²⁶³ If the Secretary believes that the interpretation adopted by the judiciary in *Brandt* is incorrect, the regulation should be re-drafted to require the inclusion of the words "*as defined by the U.S. Fish and Wildlife Service*" immediately after the words "normal agricultural planting and harvesting," and "bona fide agricultural operations or procedures." The first exception of 50 C.F.R. § 20.21(i) (1994) would then allow:

(1) the taking of all migratory game birds, including waterfowl, on or over standing crops, flooded standing crops (including aquatics), flooded harvested croplands, grain crops properly shocked on the field where grown, or grains found scattered solely as the result of normal agricultural planting or harvesting *as defined by the U.S. Fish and Wildlife Service*.²⁶⁴

260. See *id.*

261. See *Brandt*, 717 F.2d at 959.

262. See *id.*

263. The Secretary of the Interior might also want to address the "minimum scienter" requirement that has been adopted by the Fifth Circuit for the anti-baiting regulation. While the court's attempt to avoid the obvious injustice that can follow a strict liability approach is a commendable endeavor, it plainly violates the intent of the drafters.

264. 50 C.F.R. § 20.21(i) (1) (1994).

The second exception of 50 C.F.R. § 20.21(i) (1994) would permit:

(2) the taking of all migratory game birds, except waterfowl, on or over any lands where shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed has been distributed or scattered as the result of bona fide agricultural operations or procedures *as defined by the U.S. Fish and Wildlife Service*. . . .²⁶⁵

These changes would make the standard for determining the applicability of the exceptions to the anti-baiting regulation purely objective, for the hunter could ascertain the farming practices of the community by questioning the Fish and Wildlife Service before beginning in the hunt.²⁶⁶ This inquiry would be more dependable and valuable for a hunter attempting to avoid strict liability, than it would be asking the person who scattered the seed what his intent was.²⁶⁷ This is because the person who seeded the field might not be available for guidance, and even if he were accessible, he would have no obligation to be honest in his explanation.²⁶⁸

In *Boynton*, for example, Jay Quimby had no duty to honestly describe why he scattered the seed to Joseph Judge when Judge contacted Quimby.²⁶⁹ However, if Judge had contacted the Fish and Wildlife Service, the office, pursuant to its obligation to uphold the MBTA, would surely have advised him "throwing screenings on the ground around a pond is neither a normal planting nor a bona fide agricultural method."²⁷⁰ Another benefit of the proposed change to the regulation would be the continued designation by Congress of hunting over a baited area as being a strict liability crime.²⁷¹ The person who seeded the field would not have to be subpoe-

265. *Id.* § 20.21(i) (2).

266. *See Boynton*, 63 F.3d at 345.

267. *See id.*

268. *See id.*

269. *See id.*

270. *See id.*

271. *See Boynton*, 63 F.3d at 345.

naed and interrogated, nor would any witnesses.²⁷² This would lessen the burden on the prosecution and uncharged parties called to testify.²⁷³

V. Conclusion

The purpose of the anti-baiting regulation, which is certainly laudable, is to prevent the unsporting harvest of game birds from hunting methods likely to jeopardize the bird's existence. The Secretary of the Interior, who promulgated the regulation pursuant to the MBTA, has determined that hunting migratory birds over an area where seed or other bait is scattered is generally prohibited. However, two exceptions to this general rule have been set forth in the anti-baiting regulation. These are the "normal agricultural planting or harvesting" exception, and the "bona fide agricultural operations or procedures" exception.

A specific examination of the anti-baiting regulation compels the conclusion that a subjective standard should be used to determine the applicability of these exceptions, contrary to what the court held in *United States v. Boynton*. An analysis of the regulation demonstrates that it does not require a court or hunter to engage in a detailed inquiry to determine the limits of recognized agricultural practices in the community. Rather, as the court in *United States v. Brandt* held, the relevant inquiry should be directed at determining the intent of the person scattering the grain. The intent of the individual scattering the grain should be the crucial factual finding in prosecutions arising under the regulation.

The objective standard adopted by the court in *Boynton* clearly contradicts the Secretary of the Interior's intent. The Secretary's intent was not to differentiate between conventional and unconventional farming practices, but to differentiate between areas to which birds are allured because of legitimate farming practices and areas to which birds are deliberately lured by baiting. An objective construction of the statute is clearly inconsistent with the regulatory language.

272. See *id.*

273. See *id.*

The court in *Boynton* noted that the regulatory language introduced a subjective element into the regulatory scheme, but held that requiring the prosecution to prove an intent element would contradict the intent of Congress that misdemeanor violations of the MBTA be strict liability crimes.

If the Secretary of the Interior disagrees with the holding in *United States v. Brandt*, he should resolve the division between the Fourth and Sixth Circuits by re-drafting the regulation so as to eliminate the need for a subjective application. This could be accomplished by the inclusion of the words "*as defined by the U.S. Fish and Wildlife Service*" immediately at the end of both exceptions. This proposal would make the standard for determining the applicability of the exceptions purely objective, thus, providing a more dependable and practical inquiry for the hunter attempting to avoid culpability. Moreover, this proposed re-drafting would continue the ease of enforcement of an indispensable hunting regulation, and should be adopted in the immediate future.

NINTH ANNUAL PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Pace University School of Law is the organizer and host of the National Environmental Law Moot Court Competition, which is the oldest and largest moot court competition of any kind held in one location. The competition gives law students from around the country the opportunity to develop skills in environmental law and appellate advocacy.

The competition was originated by Pace students in 1988, and each year the Pace National Environmental Law Moot Court Competition Board (PNELMCC Board), a board comprised entirely of students, develops, organizes and hosts the competition. This year, sixty-six teams attended oral arguments, represented by nearly two hundred law students.

The environmental problem argued at the competition was designed by Barry Breen, with help from the Environmental Law Institute and Pace University. Each year the problem focuses on an area of unsettled national environmental law. This year's problem focused on medical monitoring cost recovery under CERCLA and the constitutionality of environmental statutes in issues of intrastate commerce.

Each team must brief and argue the two issues in the problem. The competition format centers around three parties, with each party briefing and arguing the two issues. This three party format was selected to mirror actual environmental litigation. While teams file briefs for only one party, the oral arguments require the team to represent each party in the successive rounds.

The Pace Environmental Law Review publishes the competition's best briefs. This year, we commend the University of Texas for its submission, which had the highest brief score in the competition. The University of Baltimore and the Uni-

versity of Houston had the best brief for their respective parties.

The competition's bench memorandum is also published by the Pace Environmental Law Review. The bench memorandum was written to assist the competition's judges in evaluating both oral and written arguments.

The PNELMCC Board and Pace University congratulate Southwestern University, the overall winner of the Ninth Annual National Environmental Moot Court Competition. Northwestern School of Law of Lewis & Clark College and the University of Memphis are also honored for their excellent oral arguments in the Final Round of the competition. Minjoo Lee of Washington University was the Best Oralist for the competition.

Additionally, we commend the effort of all the people taking part in the competition as judges, brief graders, bailiffs, advisors and participants. To all involved, we extend our warmest appreciation.

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Edward E. Reich is an Environmental Appeals Judge with the U.S. Environmental Protection Agency's Environmental Appeals Board. Judge Reich previously served as Legal Advisor to the Administrator of EPA and as the Acting Assistant Administrator and Deputy Assistant Administrator in EPA's Office of Enforcement. As Deputy Assistant Administrator, he was the senior career official in the Enforcement Office with responsibility for management and oversight of EPA's enforcement litigation under the various statutes administered by the Agency. Judge Reich has been actively involved in the implementation of environmental laws since 1968. He is a graduate of the Georgetown University Law Center and a member of the bars of the Commonwealth of Virginia and the District of Columbia.

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