



The Maryland Hunting Coalition, Inc.

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Maryland Repeals Strict Liability Doctrine for Migratory Bird Baiting

It is imperative that legislatures draft laws that protect the innocent by requiring the government to prove a mens rea (guilty mind) and an actus reus (bad act) beyond a reasonable doubt before branding somebody a criminal and depriving him of his liberty, quite possibly for many, many years. If they do not, then we may all truly be criminals, and we will have lost sight of a profoundly important insight: that the criminal law ought to be reserved for truly culpable behavior.

Paul Rosenzweig

On May 12, 2015, a sportsmen's milestone occurred in Maryland. Governor Larry Hogan signed into law Senate Bill 88, an Act that repeals Maryland's strict liability doctrine pertinent to migratory bird baiting. This Act was the signature initiative of the bi-partisan Maryland Legislative Sportsmen's Caucus led by Senator John Astle ("First" President of the National Assembly of Sportsmen's Caucuses) and Delegate Wendell Beitzel (Member of NASC's Executive Council). The active role of the Maryland Hunting Coalition was significant to the passage of this legislation.

Herein is the story.

Maryland law – unlike federal law – does not require criminal intent as a condition of violating Maryland's migratory bird baiting law. The relevant provision of federal law (16 U.S.C. § 704) reads as follows: "It shall be unlawful for any person to take any migratory game bird by the aid of baiting, or on or over baited areas, **if the person knows or reasonably should know that the area is baited.**" Thus, under federal law, in addition to requiring the prosecution to prove that the person charged committed the prohibited act of hunting migratory birds by baiting over a baited area, the prosecution would have to prove criminal intent either under a subjective standard (that the person knew the area was baited) or an objective standard (that a reasonable person would have known that the area was baited). Clearly, federal law is fair and reasonable while Maryland law is arbitrary and capricious.

Simply, anyone hunting migratory birds in Maryland is at risk – under current law – of being charged by the Natural Resources Police for hunting over a baited field absent any proof of intent. *Conversely, a U.S. Fish & Wildlife enforcement officer would be required to prove intent via the Migratory Bird Treaty Reform Act of 1998.* What does this mean?

"If you are hunting over a baited field, whether you know it or not, you are guilty. There is no defense. There is virtually no opportunity to present evidence in a case. It does not matter whether there is a little or a lot of bait, or if it served as an attraction to the migratory bird. It does not matter if you have a signed affidavit from the landowner asserting that bait was not present. This document has no value in court. It does not matter if the bait is a mile away from the hunting site."

The implications of being so charged are horrific – stigma of being charged with a wildlife violation, loss of hunting privileges in Maryland and 44 other signatory states via the Interstate Wildlife Violator Compact Act, denial of access to Canada for hunting, etc. The waterfowl community of Maryland speaking through the voice of the Maryland Hunting Coalition appealed to the 2015 Maryland General Assembly for relief from this egregious law. Following a contentious battle lasting for over 2 months, State lawmakers sided with the waterfowl community in dramatic form. They voted to repeal Maryland's strict liability law – via Senate Bill 88 and House Bill 170 -- without a single negative vote in either the Maryland State Senate or Maryland House of Delegates. The Governor signature of Senate Bill 88 into law means that, come October 1, 2015, Maryland's migratory bird baiting law will conform to federal migratory bird baiting law with respect to enforcement having to prove intent to bait migratory birds as the legal prerequisite for conviction.

Let's look at this historic Act from a legalese view point.

Prior to the repeal of Maryland's strict liability law, Maryland's migratory bird baiting law violated one of the most basic principles of criminal law: that criminal liability is warranted only when a defendant is proven culpable. Ordinarily, a criminal offense requires a voluntary act (*actus reus*) and a culpable state of mind (*mens rea*). Maryland's strict liability baiting law permitted the criminal conviction of a person in the absence of *mens rea*. In ignoring the defendant's intent, the strict liability doctrine even allowed for punishment of an individual who, because of deception, unwittingly committed the prohibited act. Prior to repeal of this law, this has meant to thousands of innocent persons who hunted in Maryland, "tough luck." Evidence that the hunter acted in good faith and took reasonable care was a useless defense.

"Too many honest hunters with no intentions of taking advantage of migratory birds by baiting had their reputations tarnished by this doctrine. No more" said Allan Ellis, Executive Director of the Maryland Hunting Coalition.

Before its repeal, strict criminal liability for baiting was irrational and inadequate for retributive, deterrent, rehabilitative, and incapacitative purposes. But it afforded both an efficient and nearly guaranteed way to convict persons who hunted. The irrebuttable presumption has unjustly convicted thousands of persons in Maryland who were not criminally culpable. Traditional purposes of punishment were not served by prosecuting these individuals. Trial judges wished to uphold legislative intent and enforce laws as enacted, but they also had to confront, face-to-face, individual strict liability defendants for whom punishment simply was not warranted.

Because of the stigma attached to the application of any form of criminal sanction, the strict liability defendant in a baiting case gained little solace in the knowledge that he was only guilty of a misdemeanor. He was still punished even though the rationale underlying criminal punishment was not served. Minimizing punishment did not address the core problem: that honest but reasonably mistaken individuals were being branded as criminals.

One argument against repealing this egregious law was that we should rely upon prosecutors and Natural Resources Police Officers to use their discretion to refrain from charging hunters who proffer an honest and reasonable defense. That notion was cogently answered by a federal judge in California: "[I]f law enforcement officials could always be trusted to do the right thing, there need never have been a Bill of Rights."

Senate Bill 88 amends the Maryland law prohibiting the hunting of migratory birds with the aid of bait, and its principal feature is the elimination of the "strict liability" doctrine which prevents a hunter from presenting in a court a defense that he was unaware that bait either was present at the time of the hunt or was present sometime during the previous ten days.

This historic Act – which will become law effective October 1, 2015 -- permits a hunter to present a defense of good faith, which is the cornerstone of American constitutional law, pursuant to the right of due process.

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"First" Recipient of the NASC's Brad Rowse Leadership Award

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