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# VIRGINIA LAW REVIEW

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VOLUME 100

DECEMBER 2014

NUMBER 8

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### LAMBERT REVISITED

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## INTRODUCTION

IN an article written more than fifty years ago that was inspired by *Lambert v. California*,<sup>1</sup> Professor Herbert Packer said that “[*m*]ens rea is an important requirement, but it is not a constitutional requirement, except sometimes.”<sup>2</sup> In his dissent in *Lambert*, Justice Frankfurter characterized the case as “a derelict on the waters of the law,” destined to “turn out to be an isolated deviation from the strong current of precedents”<sup>3</sup> that in his view required that Virginia Lambert’s conviction be affirmed. In between these two characterizations is a slippery concept—one that is consistent both with the idea expressed by Packer that culpability is important as a matter of proper criminal law policy and important enough sometimes to be of constitutional dimension, and with Frankfurter’s view that moral fault as a constitutional requirement seems hard to reconcile with a large body of traditional criminal law doctrine.

<sup>1</sup> 355 U.S. 225 (1957).

<sup>2</sup> Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 107. Professors Richard Singer and Douglas Husak revisited Packer’s assertion thirty-six years later in *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 Buff. Crim. L. Rev. 859 (1999), and concluded that: “In short, we can say with Packer: *Mens rea* is not constitutionally mandated, except sometimes.” *Id.* at 943.

<sup>3</sup> 355 U.S. at 232 (Frankfurter, J., dissenting). *Lambert* is often described as having fallen under Frankfurter’s “derelict” curse. See, e.g., *Texaco v. Short*, 454 U.S. 516, 537–38 n.33 (1982) (“[*Lambert*’s] application has been limited, lending some credence to Justice Frankfurter’s colorful prediction . . . .”); Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 Mich. L. Rev. 1269, 1270 (1998) (“The curse that Justice Frankfurter cast . . . in *Lambert* appears to have stuck . . . .”); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 Ohio St. L.J. 1409, 1461 (2001) (describing *Lambert* as “little more than . . . a pedagogic chestnut”); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 589 (2001) (“*Lambert*’s notice principle has never taken off. Few decisions rest on it, and the principle itself remains an unenforced norm, not a genuine constitutional rule.”).

Neither the exposition by Justice Douglas for the *Lambert* majority nor the ramblings by Frankfurter for the *Lambert* dissent did much at the time to explain the decision. And although the case has attracted considerable attention since it was handed down, little has happened since to clarify the murkiness the two opinions left behind. It is the objective of this Article to revisit the decision and to suggest that its holding can be cabined by a narrow and defensible, and we believe correct, rationale.

That rationale, to state it simply at the outset, is that *Lambert* should be understood as a variant on the vagueness doctrine. We call it below a quasi-vagueness case. It was motivated, we believe, by many of the same concerns that underlie a line of modern vagueness decisions, even though the text of the Los Angeles ordinance that Lambert violated and the basics of its meaning were crystal clear to anyone who took the trouble to read it. Our conclusion is that the rationale that motivated the Court to reverse Lambert's conviction was derived not only from the concept of fair notice on which the majority specifically focused but was, equally importantly, based on concerns derived from the rule of law. The Los Angeles ordinance invited arbitrary enforcement in a street-cleaning context based not on conduct but on status, where there was no countervailing law enforcement rationale—really none whatsoever—that created a justifying need. The Los Angeles ordinance at issue in *Lambert* was an illustration of law by cop, not law by law. It authorized arrests without probable cause, and diversion of the arrestee to another crime if interrogation and search did not establish the motivating offense. It authorized gratuitous, arbitrary, and unfair punishment for behavior the state did not need to prohibit in order to accomplish any conceivable legitimate public protection objective.

The moral principle for which many take *Lambert* to stand is so deeply embedded in criminal law policy, however, that it is tempting to elevate it to constitutional status. It is not uncommon to read *Lambert* to stand for what we would call a principle of *socialization*—that is, the idea that it is unfair (perhaps to the point of being unconstitutional) to prosecute a person for a crime if two conditions are satisfied: (a) The defendant did not in fact know that the behavior was illegal; and (b) people in general who are reasonably socialized to contemporary moral values would have no idea that the behavior was wrong.<sup>4</sup> One objective of the

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<sup>4</sup> See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401, 433–34 (1958) (arguing that *Lambert* limits the ability of legislatures to “brand[] inno-

discussion below is to illustrate the pervasiveness and importance of this socialization idea in both traditional and contemporary criminal law. Another is to draw out some of the implications of taking the socialization concept too far as a matter of freestanding constitutional doctrine. To read *Lambert* as importing a Constitution-based socialization limit into ordinary applications of the criminal law where the socialization issue is involved would, we believe, be a mistake.

We proceed as follows. Part I describes the *Lambert* litigation in some detail, including the Court's unusual appointment of an amicus to reargue the case on Lambert's behalf and the crucial impact of the resulting brief. Part II rejects the oft-repeated conclusion that the meaning of *Lambert* is limited to crimes of omission. Part III begins to address the different theory that *Lambert* in some sense constitutionalizes the socialization principle. We think it important to start the analysis of that possibility by examining the operation of the socialization principle in everyday criminal law. We do so in Part III at both the level of traditional criminal law doctrine and as the concept is used in aid of statutory construction. We then confront directly in Part IV the proposition that *Lambert* should be read to stand for a freestanding constitutional socialization principle and conclude, as we say above, that it should not be so read. We defend in Part V our conclusion that *Lambert* is best understood as an implementation of vagueness principles. We add a short conclusion at the end.

## I. THE DECISION

The basic facts of *Lambert* are familiar enough. Virginia Lambert was a resident of Los Angeles who had previously been convicted of for-

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cent people as criminals"). In *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985), Professor John Calvin Jeffries, Jr., embraced this idea:

The concern is . . . whether the ordinary and ordinarily law-abiding individual would have received some signal that his or her conduct risked violation of the penal law. Punishment for conduct that the average citizen would have had no reason to avoid is unfair and constitutionally impermissible. That, at any rate, is the teaching of *Lambert v. California*. The meaning of that case is subject to infinite disputation, but to me it stands for the unacceptability in principle of imposing criminal liability where the prototypically law-abiding individual in the actor's situation would have had no reason to act otherwise.

Id. at 211–12 (citation omitted). For another description of the socialization idea that we have in mind throughout this Article, see *infra* note 68.

gery.<sup>5</sup> An ordinance classified her as a “convicted person” because her forgery offense was a felony.<sup>6</sup> A different section of the ordinance said that it was “unlawful for ‘any convicted person’ to be or remain in the City of Los Angeles for more than five days without registering” with the Chief of Police.<sup>7</sup> Detailed registration procedures were stated in the same provision.<sup>8</sup> Still a different section of the ordinance provided that a person who was obligated to register committed a separate criminal offense on each day that registration did not occur.<sup>9</sup> We will develop more details later,<sup>10</sup> but in short Lambert was convicted for failing to register and claimed in defense, so far as is relevant now, that she was unaware of the need to register.<sup>11</sup> The California courts construed the ordinance to impose strict liability on this question, and therefore rejected her claim as irrelevant.<sup>12</sup> The issue before the Supreme Court was whether this violated the Constitution.<sup>13</sup>

The case was initially briefed and argued during the Court’s 1956 Term. The brief filed on behalf of Lambert presented a potpourri of assertions by a lawyer named Samuel C. McMorris, a man of, shall we say, modest talent and, it later emerged, questionable ethics.<sup>14</sup> Despite this, McMorris has the unlikely distinction of being the lawyer who nearly convinced the Supreme Court to constitutionalize substantive criminal law. In addition to representing Virginia Lambert, he also represented Lawrence Robinson in *Robinson v. California*.<sup>15</sup> Like *Lambert*,

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<sup>5</sup> *Lambert*, 355 U.S. at 226.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

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

<sup>9</sup> *Id.* The various provisions of the ordinance are collected in Brief of Attorney General of the State of California for Respondent app. at i–ix, *Lambert*, 355 U.S. 225 (No. 47).

<sup>10</sup> See *infra* Section V.A.

<sup>11</sup> *Lambert*, 355 U.S. at 226–27. Her offer to prove that she did not know of the duty to register was objected to by the City and “the court sustained this objection.” Transcript of Record at 17, *Lambert*, 355 U.S. 225 (No.47) [hereinafter Record].

<sup>12</sup> The jury was instructed that “ignorance of the law requiring Registration is no excuse,” Record, *supra* note 11, at 18, and the California appellate court held that “[t]here is no merit to the defense . . . that she did not know she had to register with the police.” *Id.* at 30. She was sentenced to probation for three years and to pay a fine of \$250. *Id.* at 5.

<sup>13</sup> *Lambert*, 355 U.S. at 227.

<sup>14</sup> But the record does contain an affidavit by McMorris in which he said that he was “donating his services to defendant because of her inability to pay counsel fees, and as a charity matter.” Record, *supra* note 11, at 24. It appears that Lambert worked for an attorney, maybe even for McMorris. See *infra* text accompanying note 243.

<sup>15</sup> 370 U.S. 660 (1962).

*Robinson* had potentially dramatic implications,<sup>16</sup> but its promise remains unfulfilled and it is often regarded as a one-off decision of little lasting significance.<sup>17</sup> McMorris's ethical lapses included advising the Supreme Court at the *Robinson* oral argument that his client was on probation, when in fact he was dead due to a drug overdose eight months prior.<sup>18</sup> McMorris was later disbarred in California for "willful failure to communicate with several of his clients and to perform the services for which he was retained."<sup>19</sup>

Of course the Court could not know all this at the time *Lambert* was under consideration. But what it did know was that it needed help in understanding the case from Lambert's point of view, and that the help would not come from McMorris. His brief consisted of a scattergun array of assertions, some of which met their mark, but most of which were clearly wide of the target and plainly of no interest or persuasive power at that level.<sup>20</sup> It is most likely for this reason that the Court took the unusual step of setting the case for reargument in its 1957 Term and ap-

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<sup>16</sup> In traditional terms, *Robinson* holds at least that the Constitution requires crimes to have an actus reus and that mere "status" is constitutionally insufficient. Taken together with *Lambert*, *Robinson* "gave rise to expectations that the Warren Court was prepared to read requirements of blame and guilt into the Constitution." Singer & Husak, *supra* note 2, at 864; see also Gary V. Dubin, *Mens Rea* Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility, 18 Stan. L. Rev. 322, 386 (1966) ("[T]he result in *Robinson* suggests that the Court is now willing to bring principles of responsibility within the express protection of the Constitution . . ."). This has not happened. For a thorough analysis of *Robinson*, its potential, and what it means today, see Erik Luna, *The Story of Robinson: From Revolutionary Constitutional Doctrine to Modest Ban on Status Crimes*, in *Criminal Law Stories* 47 (Donna Coker & Robert Weisberg eds., 2013).

<sup>17</sup> See, e.g., Singer & Husak, *supra* note 2, at 864 (stating that *Powell v. Texas*, 392 U.S. 514 (1968), "clearly represents the Court's unwillingness to 'Constitutionalize' the substantive criminal law" (footnotes omitted)); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contemp. Legal Issues 1, 5-6 & n.13 (1996) (arguing that *Powell* "basically undoes *Robinson*"); see also Billionis, *supra* note 3, at 1319 ("According to this narrative, *Lambert* and *Robinson* go down as one-hit wonders, for neither produced any principle that the Court has been willing to expand beyond the narrow factual confines of each case."). We discuss *Powell* extensively below, see *infra* text following note 223.

<sup>18</sup> See *Robinson*, 371 U.S. at 905 (denial of petition for rehearing). Indeed, he died ten days prior to the date on which McMorris filed the jurisdictional statement in the Supreme Court. See *id.*; Luna, *supra* note 16, at 64.

<sup>19</sup> *McMorris v. State Bar of Cal.*, 672 P.2d 431, 432 (Cal. 1983). The U.S. Supreme Court also took action against him. See *In re Disbarment of McMorris*, 465 U.S. 1002 (1984).

<sup>20</sup> For example, the brief posed ten "Questions Presented for Review," the tenth of which had seven subparts. One of the claims was that "[t]he complaint filed against appellant does not state a cause of action." Appellant's Opening Brief at 3-4, *Lambert*, 355 U.S. 225 (No. 47).

pointing a new attorney as an amicus on behalf of Lambert.<sup>21</sup> The new attorney was the highly credentialed Warren Christopher, who was later to become Secretary of State under President Clinton. At the time, he was a practicing lawyer in Los Angeles. He was a former Douglas law clerk, and was the founding president of the *Stanford Law Review*.<sup>22</sup>

The Christopher brief was a masterpiece. But before developing what we believe to be its controlling impact on the outcome, another interesting but ultimately irrelevant sidelight is worth noticing. Christopher had pointed out that the ordinance was published once in a Los Angeles legal newspaper with a circulation of about 4000.<sup>23</sup> This was in 1936, when Lambert was nine years old. She did not move to Los Angeles until 1947.<sup>24</sup> The crime that triggered her registration requirement occurred in 1951, and there was no indication in the contemporaneous records that she was notified of the registration requirement at the time of her conviction or during subsequent probation proceedings in 1952.<sup>25</sup> The arrest that led to the failure-to-register prosecution occurred in 1955<sup>26</sup> and, as

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<sup>21</sup> Setting a case for reargument in the Supreme Court's next Term is not that unusual, but appointing an amicus to represent a person already represented by privately retained counsel surely is. Professor Packer asked the Clerk's Office whether it was aware of a prior occasion where this had happened, and reported that there was "no recollection of another instance in which the Court had invited an amicus to participate on behalf of a private party already represented by counsel." Packer, *supra* note 2, at 128 n.79. We asked a Supreme Court law clerk during the Court's 2013 Term to find out whether Court officials knew of any instance of such an occurrence since *Lambert*. The response from the Court Library and from the Clerk's Office was that, to their knowledge, the Court has made no such appointments in the intervening years.

The Court did appoint private counsel two years prior to *Lambert* in *Williams v. Georgia*, 349 U.S. 375 (1955), but the situation there was different. *Williams* was a capital case in which the lawyer for Williams essentially defaulted, filing only a token brief and refusing to argue the case. The Court appointed a former Supreme Court law clerk, Eugene Gressman, as an amicus to brief and argue the Williams position. See Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 Yale L.J. 1423, 1437–38 (1994).

<sup>22</sup> The State was represented the first time around by the City Attorney for Los Angeles and his Assistant and Deputy. Shortly after the case was set down for reargument, the Court invited Christopher to file an amicus brief on behalf of Lambert and the Attorney General of California to file an amicus brief on behalf of the State. The California Attorney General at the time was Edmund G. (Pat) Brown, who was later to become Governor and who was the father of the current California Governor.

<sup>23</sup> Brief of Amicus Curiae for Appellant at 9, *Lambert*, 355 U.S. 225 (No. 47) [hereinafter Christopher Brief].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 9–10.

<sup>26</sup> *Id.* at 10.

the Supreme Court's opinion pointed out,<sup>27</sup> she was given no chance to register then.

About three weeks before the oral argument, the City of Los Angeles filed a supplemental brief responding to Christopher's amicus brief. Among other things, the city's new brief asserted that Lambert in fact "was given personal notice" of her duty to register pursuant to the city's practice of informing probationers of all relevant registration ordinances and statutes.<sup>28</sup> It thus appears in hindsight that the state attorneys could have secured their conviction without controversy by allowing Lambert to testify that she was unaware of the duty to register and then proving from the city's records—had they bothered to look them up at the time—that the Probation Office had told her about the ordinance.

But the state had dug its own grave on this point at the trial. The ruling that Lambert could not testify as to her lack of knowledge of the duty to register was made in response to a prosecution objection to the admissibility of her offer to so testify.<sup>29</sup> The city effectively conceded in its supplemental brief that its ability to prove actual knowledge was at that point irrelevant by acknowledging that the trial court had held that it did not matter whether Lambert knew of the duty to register.<sup>30</sup> Thus in spite of the city's last-minute effort to show that actual notice had been given, the facts on this question were clearly not open to debate before the Supreme Court. It is ironic in the end, if the city's representations are to be believed, that one of the Court's leading cases on fair notice turned out to be one in which the petitioner may not have been unfairly surprised at all.

In any event, the case arrived at the Supreme Court in the procedural posture that Lambert had failed to register as a previously convicted felon and that whether she was aware of her duty to register was immaterial under California law. In terms of traditional criminal law doctrine, her claim could be characterized in at least three different ways.

First, the claim could be based on ignorance of the criminal law; that is, that she did not know that failure to register as a convicted felon was a crime. Looked at this way, it would not be unusual—indeed it would be typical—for the California courts to reject the claim. It is standard

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<sup>27</sup> *Lambert*, 355 U.S. at 229.

<sup>28</sup> Supplemental Brief of Appellee at 3, *Lambert*, 355 U.S. 225 (No. 47).

<sup>29</sup> See *supra* note 11.

<sup>30</sup> Supplemental Brief of Appellee, *supra* note 28, at 3.

lore that ignorance of the criminal law does not excuse criminal behavior.

Second, the claim could be based on ignorance of a duty established by a non-criminal law, namely the regulatory regime establishing the duty to register. Duties that are established by the non-criminal law may be, but often are not, reinforced by criminal prohibitions.<sup>31</sup> On this view, it was a non-criminal provision that created the duty to register by making it “unlawful” not to register, and it was an independent provision that made it a crime not to obey that duty.

As a general matter with respect to this second characterization, had Lambert been aware of the legal duty to register, but not the fact that failure to register was a crime, her conviction most likely would not have been controversial and undoubtedly the Supreme Court would not have set it aside.<sup>32</sup> The situation is more complex, however, when a duty is created by the non-criminal law, when failure to obey the duty is punished by the criminal law, and when the question is whether the defendant must know about the duty. We will return to this issue later,<sup>33</sup> but for now the answer must be sometimes yes, sometimes no.

Third, Lambert’s claim could be seen as a challenge to the denial of the opportunity to assert a mistake of fact defense. When the definition of the crime does not require a higher level of culpability, the default

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<sup>31</sup> See generally *Billingslea v. State*, 780 S.W.2d 271, 273–76 (Tex. Crim. App. 1989) (describing sources of non-criminal legal duties, the breach of which can constitute a crime). So-called “hybrid statutes,” in which a duty is created in one section, liability to private parties for breaches is created in another, and criminal liability for breaches is created in a third, are a variation on this theme. Jonathan Marx, Note, How to Construe a Hybrid Statute, 93 Va. L. Rev. 235, 235 (2007).

<sup>32</sup> Cf. *Cheek v. United States*, 498 U.S. 192 (1991). *Cheek* was a prosecution, in part, for “willfully” failing to file a tax return. The Court held that “willfully” required the “voluntary, intentional violation of a known legal duty.” *Id.* at 201. It was a defense, therefore, if Cheek did not know that the tax laws required him to file a return. But the Court held that it was not a defense to believe that the federal tax structure was unconstitutional or, we would extrapolate, to believe that it was a not a crime to fail to file a return or pay a tax even though it was known that there was an obligation under the Internal Revenue Code to do so. Cheek had to know the legal duties imposed by the tax laws, not that it was a crime to disobey them.

There is debate in the cases and the literature about whether this view of *Cheek* is correct, see Kenneth W. Simons, Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact, 9 Ohio St. J. Crim. L. 487, 515–16 (2012), but we think it clear that the case does not involve a mistake of criminal law. Cf. *People v. Hagen*, 967 P.2d 563, 568 n.4 (Cal. 1998) (“[A] taxpayer may defend . . . on the basis . . . that he mistakenly believed certain deductions were proper under the tax laws, but not on the basis that he was unaware it was a crime to lie on one’s tax return.”).

<sup>33</sup> E.g., *infra* Subsection III.B.1.

common law position is that an honest and reasonable mistake of fact is a defense.<sup>34</sup> But strict liability with respect to factual matters is not unknown,<sup>35</sup> and here Lambert could be seen as claiming that this is a situation where strict liability violates the Constitution. On this view of her claim, she was not aware of the fact that she was not registered and would argue that some level of culpability with respect to her mistake was required by the Constitution. This was one of those “sometimes,” to borrow from Packer,<sup>36</sup> where the Constitution requires mens rea.

In fact, all three of these characterizations of Lambert’s claim can be called challenges to applications of “strict liability.” The first—captured in the homily “ignorance of the [criminal] law is no excuse”—imposes strict liability on whether behavior is a crime.<sup>37</sup> A hit man whose claim is that “this is simply a way of earning an honest living” is held to a form of strict liability when the argument “I had no idea it was a crime” is rejected. Liability is strict on this question because it does not matter what the hit man thinks about the criminality of the profession. Similarly, when it is a crime to fail to obey a duty that is created by the non-criminal law, conviction of one who is ignorant of that duty is a form of strict liability. The lifeguard who fails to attempt to rescue someone, when it could readily and safely be done, will likely be held to strict liability if a claim of ignorance of the duty to rescue is advanced as an excuse in a criminal prosecution. Generally speaking, it is assumed without proof that people whose liability is based on an omission are aware (or should be aware) of the duty they violated.<sup>38</sup> And as to mistakes of fact, of course, examples of strict liability abound. Typically, for example, the

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<sup>34</sup> See, e.g., Jerome Michael & Herbert Wechsler, *Criminal Law and Its Administration* 756 (1940); Joshua Dressler, *Understanding Criminal Law* § 12.03[A], [C], [D] (6th ed. 2012).

<sup>35</sup> See *infra* note 81 and accompanying text.

<sup>36</sup> See *supra* note 2 and accompanying text.

<sup>37</sup> The term “strict liability” is not ordinarily used in this context, but as observed in Gerald Leonard, *Rape, Murder, and Formalism: What Happens if We Define Mistake of Law?*, 72 *U. Colo. L. Rev.* 507, 508 (2001), “refusal to consider mistake of law as a defense is, of course, a species of strict liability.”

<sup>38</sup> For two explicit modern examples, see *infra* text accompanying note 144. The statement in the text immediately above will probably be viewed as controversial, but we are as confident about the lifeguard illustration as we would be for a parent who allows his or her infant child to drown in a foot of water and claimed ignorance of the duty to rescue in defense of a criminal prosecution. It is, in any event, unimportant for present purposes to dig deeply into this issue. For further discussion, see Graham Hughes, *Criminal Omissions*, 67 *Yale L.J.* 590, 600–07 (1958); Simons, *supra* note 32, at 510 & n.58.

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thief who is convicted of grand larceny for stealing the crown jewels will be held to strict liability when the claim that they were believed to be a cheap imitation is offered as a reason to reduce the charge to petty larceny.<sup>39</sup>

Regardless of the legal characterization of Lambert's defense, in any event, in lay terms her complaint was that she had no idea that she was required to register and therefore could have no idea that she was not registered or that anything she had failed to do might be punishable as a crime. The state court held that such ignorance or mistake, however it might be characterized in traditional legal terms, was not a defense.<sup>40</sup> And the Supreme Court, without bothering to characterize the claim along these analytical lines, held that her conviction was unconstitutional.<sup>41</sup>

Why did it do so? The place to begin an answer to this question is the Christopher brief. The brief said that two questions were presented. The second, which seems to us central to the brief's strategy, presaged a straightforward substantive due process argument:

Does the ordinance constitute an unwarranted invasion of the right of privacy, right to liberty, and privileges and immunities of a citizen of the United States in that it (a) purports to make unlawful a morally innocent and passive status and (b) is not reasonably restricted to the evil with which it purports to deal?<sup>42</sup>

It is not surprising that the Court declined the invitation to decide the case on this ground, and no doubt Christopher was well aware that it was unlikely to do so. He had been, after all, a Douglas law clerk and would have been familiar with the Court's aversion (if not Douglas's) to substantive due process reasoning.<sup>43</sup> But he nonetheless devoted two-thirds

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<sup>39</sup> See *infra* note 81 and accompanying text.

<sup>40</sup> See *supra* note 12.

<sup>41</sup> *Lambert*, 355 U.S. at 229–30.

<sup>42</sup> Christopher Brief, *supra* note 23, at 2. Note the reference to criminalizing “a morally innocent and passive status.” Christopher returned to this theme in the body of the brief: “The Los Angeles ordinance, as we have pointed out, penalizes not conduct, but a morally innocent and passive status—namely, being an unregistered convicted person in Los Angeles.” *Id.* at 27.

<sup>43</sup> See Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 *Stan. L. Rev.* 1361, 1366–67 (2010).

In support of the position that “the time is ripe” for lawyers to press for substantive due process reform of the criminal law, Professor Packer said that the Court “took the wrong

of his brief to elaborating the argument that requiring registration of convicted felons was an unwarranted restriction on privacy and liberty and that it did not serve a legitimate law enforcement need. As a strategic matter, this gave Christopher an opportunity to point out the many shortcomings of the underlying statute and why it served no legitimate law enforcement purposes. In the end, this portion of the brief functioned (and we suspect was designed) as an invitation to decide the case in Lambert's favor but to do so on a narrower ground. And, as we develop below,<sup>44</sup> it provided a crucial rationale for the result that was hinted at in the Court's opinion but lay just below its surface.

Christopher's first argument proposed the narrow ground for decision. He stated the first question presented as: "Does conviction under the ordinance in the absence of wrongful intent violate due process of law?"<sup>45</sup> His summary of the argument on this point got to the heart of his position and stated the socialization principle for which the Court's opinion is frequently taken to stand:<sup>46</sup>

Because the status penalized by the ordinance was morally innocent, appellant did not have the warning or notice provided by a sense of wrongdoing that usually attends legally punishable conduct. . . . In these circumstances, appellant's conviction under the Los Angeles ordinance in the absence of wrongful intent violates due process of law.<sup>47</sup>

The first quoted sentence turned out to be the central argument of the Court's opinion.<sup>48</sup> Like any good lawyer, Christopher hammered the point over and over in his brief. The main thrust of his argument was:

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turn" in *Lambert* by ignoring Christopher's substantive due process argument and instead deciding the case "on the basis of a flabby and disingenuous opinion." Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. Cal. L. Rev. 490, 490, 498 (1971). Packer's comments are a paean to the Christopher brief. We agree, as we say above, that the brief was a masterpiece, but we would have expected then and now that the Court would not openly embrace a substantive due process rationale.

<sup>44</sup> See *infra* Part V.

<sup>45</sup> Christopher Brief, *supra* note 23, at 2.

<sup>46</sup> See *supra* note 4 and accompanying text.

<sup>47</sup> Christopher Brief, *supra* note 23, at 5. It was a clever (and prescient) touch for Christopher to refer, as he did throughout the brief, to Lambert's conviction as being based on her "status," for the Court would later find in *Robinson* that legislatures cannot constitutionally criminalize status and was clearly influenced by that insight in *Lambert*. See *supra* notes 15–16 and accompanying text.

<sup>48</sup> See *infra* text accompanying note 50.

The Los Angeles ordinance outlaws not conduct or an activity but the wholly passive status of being an unregistered convicted person in Los Angeles. In addition to being passive, the status penalized is morally innocent and has, to borrow Judge Learned Hand's phrase, no ethical significance. . . . [T]here is not even a hint of criminality for an unregistered convicted person to be and remain in Los Angeles for five days. . . . Because the status penalized by the ordinance was morally innocent, appellant did not have that warning or notice provided by a sense of wrongdoing which usually attends legally punishable conduct. . . . In short, the effect of appellant's lack of knowledge of her duty to register is seriously aggravated by the fact that neither her status nor her conduct provided any "built-in" notice that she was committing a crime punishable by imprisonment.<sup>49</sup>

A close reading of Justice Douglas's opinion for the Court in *Lambert* demonstrates the extensive influence of Christopher's argument. The opinion starts with the observation that legislatures have wide latitude to exclude "elements of knowledge and diligence" from the definition of crimes.<sup>50</sup> But, paraphrasing Christopher, the opinion immediately pivots to the fact that the ordinance at issue punishes "wholly passive" conduct, and is thus "unlike the commission of acts, or the failure to act *under circumstances that should alert the doer to the consequences of his deed.*"<sup>51</sup> Though the Douglas opinion is enigmatic, it repeatedly elaborates on the Christopher brief's themes.

Douglas thus describes Lambert as being "wholly passive and unaware of any wrongdoing."<sup>52</sup> He further notes that "circumstances which might move one to inquire as to the necessity of registration are completely lacking," rendering Lambert "entirely innocent."<sup>53</sup> Under such circumstances, the Court held that "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent fail-

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<sup>49</sup> Christopher Brief, *supra* note 23, at 11–12 (citations omitted) (internal quotation marks omitted); see also *id.* at 19–20 ("Appellant neither knew nor should have known of the existence of the registration requirement. The status which the ordinance makes criminal is morally innocent and passive and hence does not contain the built-in notice ordinarily accompanying wrongful or active conduct. Conviction in these circumstances in the absence of wrongful intent is hostile to due process of law.").

<sup>50</sup> *Lambert*, 355 U.S. at 228.

<sup>51</sup> *Id.* (emphasis added).

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

<sup>53</sup> *Id.* at 229.

ure to comply are necessary before a conviction under the ordinance can stand.”<sup>54</sup> The opinion concludes in high moral terms:

As Holmes wrote in *The Common Law*, “A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.” . . . Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.<sup>55</sup>

Even in this coda to the *Lambert* opinion, the influence of the Christopher brief can be detected. It cannot be a coincidence that Christopher referenced Caligula in a footnote to a discussion of the failure of the police to give an opportunity to register to those who did not know of the requirement.<sup>56</sup> Note too that Douglas also refers to the failure of the police to give Lambert an opportunity to comply once they made her aware of the requirement.<sup>57</sup>

But unfortunately for lower courts and commentators, if Justice Douglas’s theme was Warren Christopher, his style and structure were more Samuel McMorris. The *Lambert* opinion is replete with unhelpful and largely irrelevant meanderings and is frustratingly unclear on the scope of its fair notice principle.<sup>58</sup> Indeed, it fails even to address what quantum of notice must be proved under the ordinance at issue, save some undefined “probability.”<sup>59</sup> We turn to the problems left in *Lambert*’s wake.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 229–30.

<sup>56</sup> See Christopher Brief, *supra* note 23, at 11 n.\* (“The net effect is reminiscent of Caligula’s Rome where the laws were written in fine print and hung up on pillars too high for the people to read.”).

<sup>57</sup> *Lambert*, 355 U.S. at 229; Christopher Brief, *supra* note 23, at 11.

<sup>58</sup> For criticism of the Douglas opinion along these lines, see Packer, *supra* note 2, at 131–33. For an unrelenting attack on both the Douglas and Frankfurter opinions, see Hart, *supra* note 4, at 434; see also Bilionis, *supra* note 3, at 1322 (describing *Lambert* as “inscrutable”).

<sup>59</sup> *Lambert*, 355 U.S. at 229.

## II. OMISSIONS VS. POSITIVE ACTS

*Lambert* has been the source of much puzzlement since it was handed down, and a consensus on its ultimate import has yet to be reached. With the benefit of hindsight, however, some early readings of the case can now safely be ruled out. *Lambert* was initially heralded in some quarters as the start of the constitutionalization of substantive criminal law, a sign that the Supreme Court was beginning to set meaningful limits on the ability of legislatures to criminalize conduct. For example, a year after *Lambert*, one commentator wrote that it “unmistakably points the way in the right direction and will ultimately lead to a complete moral recovery of our penal law. . . . Absolute criminal liability is beginning to end in America.”<sup>60</sup> Indeed, some authors continue to hold out hope that *Lambert*, *Robinson*, and a handful of other constitutional substantive criminal law cases will lead to expansive doctrinal innovation.<sup>61</sup> But because this has not come to pass, most scholars have retreated from this view of the case<sup>62</sup> and plainly it is not on the foreseeable horizon. The decision’s lack of obvious doctrinal impact calls for a more nuanced view of what it should be taken to mean.

Most narrowly, *Lambert* might stand for a principle not much bigger than its facts: A legislature may not create strict liability *mala prohibita* crimes of omission.<sup>63</sup> We will talk more below about why we think this

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<sup>60</sup> Gerhard O.W. Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043, 1104 (1958); see also Dubin, *supra* note 16, at 383 (“One can certainly agree with Professor Mueller [in this respect].”).

<sup>61</sup> See, e.g., Markus Dirk Dubber, Toward a Constitutional Law of Crime and Punishment, 55 Hastings L.J. 509, 572 (2004); Stuntz, *supra* note 3, at 588–91; see also A.F. Brooke II, Note, When Ignorance of the Law Became an Excuse: *Lambert* & Its Progeny, 19 Am. J. Crim. L. 279, 280 (1992) (“[*Lambert*] provides a fundamental basis for mens rea jurisprudence . . .”).

<sup>62</sup> Indeed, it was only six years after *Lambert* that Herbert Packer described “this first foray in the direction of a general doctrine of *mens rea*” as “abortive.” Packer, *supra* note 2, at 136–37; see also *supra* notes 16–17; *infra* notes 223–37 and accompanying text.

<sup>63</sup> See, e.g., Laurie L. Levenson, Good Faith Defenses: Reshaping Strict Liability Crimes, 78 Cornell L. Rev. 401, 457 n.288 (1993) (“*Lambert* . . . has been restricted to regulatory crimes involving omissions . . .”); Mark Tushnet, Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of *Mullaney v. Wilbur*, 55 B.U. L. Rev. 775, 792 (1975) (arguing that *Lambert* was based “on the rationale that the ordinance punished passive conduct”); see also Dressler, *supra* note 34, § 13.02[C] (describing the “*Lambert* doctrine” as having uncertain scope, but probably applying only to *mala prohibita* crimes of omission involving status); 1 Wayne R. LaFare, Substantive Criminal Law § 3.3(d) (2d ed. 2003) (arguing that while “the intended reach of the *Lambert* decision is far from clear,” it is “most likely to be applicable to omissions statutes”).

reading is too narrow,<sup>64</sup> but for now notice that Douglas emphasizes at the outset of his opinion that, whatever *Lambert* stands for, its principle operates whether the defendant is engaging in positive conduct or an omission. It is triggered, Douglas says, by “*the commission of acts, or the failure to act* under circumstances that should alert the doer to the consequences of his deed.”<sup>65</sup> Not only does this sentence refer equally both to affirmative acts and to omissions, its key phrase—“circumstances that should alert the doer to the consequences of his deed”—has no necessary connection to omissions as opposed to positive acts. Both an act and an omission can occur in a morally neutral context.<sup>66</sup>

Douglas does, to be sure, emphasize the fact that an omission is a central part of the actus reus of the registration offense at issue. And the case did, of course, involve the concurrence of strict liability and an omission. But the key to the Court’s reasoning is the *context* in which strict liability was imposed, not whether Lambert was engaged in a positive act or an omission. All omissions that are the basis of criminal punishment occur in the context of affirmative behavior. One assumes the function of a lifeguard or a parent, for example, by affirmative behavior, not by an omission or a series of omissions. It is the defendant’s *behavior* in cases where omissions are criminalized that gives rise to the duty to act, which in turn triggers criminal liability for failing to obey the duty *in that context*. And it is the context that typically gives the warning signals—the duty to rescue for the lifeguard, the duty of care for the parent—that in turn make it fair to impose criminal liability for blatant failures to perform the duty without asking (as we normally do not ask in omission cases) whether the defendant was actually aware of the duty.

The problem in *Lambert* is the absence of warning signals in the affirmative behavior in which Virginia Lambert engaged—walking around, eating breakfast, going to the grocery store, attending a Dodgers

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<sup>64</sup> See, e.g., *infra* text accompanying note 78.

<sup>65</sup> *Lambert*, 355 U.S. at 228 (emphasis added). His quotation from *Lambert* in his opinion for the Court in *United States v. Freed* also referenced both “the commission of acts” and “the failure to act” even though the prosecution in *Freed* too was based on an omission. 401 U.S. 601, 608 (1971) (quoting *Lambert*, 355 U.S. at 228); see *infra* note 194.

<sup>66</sup> See Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828, 861 (1999) (“[I]t is hard to see why the action/inaction distinction should have constitutional significance apart from the question whether the defendant’s act or omission ‘alert[s] the doer to the consequences of his deed.’”).

game,<sup>67</sup> and other acts of ordinary life in the city. No aspect of *that* behavior, in the Court's view, warned her that registration as a previously convicted felon was required. Strict liability is normally imposed on the duty-to-act requirement that the lifeguard or parent ignores, and we accept that because of the moral signals sent by the affirmative behavior of becoming a lifeguard or a parent. But in *Lambert*, strict liability was imposed on the duty-to-register element in a situation where (a) there was no reason given her affirmative conduct for Lambert to think that she was required to register and (b) there was no reason in general for *any* person in Lambert's situation who did what Lambert did every day to believe that registration was required. At least that is the view of the case that the Supreme Court adopted.

We are comfortable, therefore, with our conclusion that *Lambert* does not stand for a constitutional principle that is inextricably tied to the fact that she was convicted for failing to do something. There is no principle we can extract from the case that turns on the difference between acting when the action is punishable and failing to act when a duty to act is created by law. One way or another, the key to the meaning of *Lambert* must rest on the socialization idea, on the lack of warning given by the context in which Virginia Lambert went about her daily life. It is to that idea, therefore, that we now turn.

### III. SOCIALIZATION IN EVERYDAY CRIMINAL LAW

The concept of socialization is one of the important inputs—not the only one but one of the important ones—in legislative and judicial determinations of mens rea for *every* crime. This does not mean that it will be the controlling factor for any given offense, or even that it will be the most critical factor. The utilitarian goal of public protection will always be a potential counteracting force, and for many crimes will be the dominant consideration. But the possibility that the definition of a crime will ensnare people with innocent intentions—people who are justified in be-

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<sup>67</sup> We understand that the Dodgers did not move from Brooklyn to Los Angeles until after Lambert was convicted, but we still like the image. Cf. Arthur Leavens, A Causation Approach to Criminal Omissions, 76 Calif. L. Rev. 547, 582 n.117 (1988) (“[T]he thrust of Douglas’ point was not that the defendant was inactive during her stay in Los Angeles, but that she had engaged in no conduct fairly connected with any need to check in with the police. She was quintessentially ‘minding her own business,’ and the fact that the city’s ordinance book had two or three lines of type saying she should register with the police did not fairly warn her of her duty.”).

lieving that they are engaging in acceptable behavior and who are unlikely to be aware that they are crossing a moral threshold—is always relevant in making the policy determination of the mental frame of mind that any crime should require.<sup>68</sup>

This poses a problem in determining the role of the socialization idea in the constitutional holding of *Lambert*. The most promising views of *Lambert* to be found in the literature postulate that it might stand for a limited constitutional notice principle in derogation of the maxim that ignorance of the law is no excuse.<sup>69</sup> A more sophisticated version of the same idea is that the case might stand for a constitutionalized socialization requirement.<sup>70</sup> If either of these views is right, and if the socializa-

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<sup>68</sup> Compare the comments in Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 Rutgers L.J. 539, 555 (1988):

I would defend [fair notice] as a minimum condition of fairness for any proscription of conduct that will be subject to serious criminal sanctions. Specifically, the context must be such that the actor, through the normal processes of socialization that we can reasonably expect of the average citizen, could be expected to be alerted to the wrongfulness of the behavior. Stated another way, the criminal law cannot fairly be applied unless one's moral signals are likely to be alerted by the context in which the behavior occurs. The inquiry is objective; it is derived from standards that can reasonably be expected of the average citizen. The inquiry is also qualitative and judgmental; it cannot be quantified beyond statement of the standard itself. It also necessarily involves a question of degree—that is, the moral alert, as it were, must be sufficient to bring home to the actor that a non-trivial breach of societal standards may be involved in contemplated behavior.

<sup>69</sup> See, e.g., Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 Duke L.J. 341, 358 n.72 (1998) (suggesting that *Lambert* may create a “constitutional dimension[]” to certain mistake-of-law defenses); Singer & Husak, *supra* note 2, at 881 (“[*Lambert*] involved the doctrine of *ignorantia legis*—that mistake or ignorance of the law is not an excuse. *Lambert* had created an exception to that rule, as a matter of substantive due process.”); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 68–69 (1997) (“[*Lambert*] seemed to state a broad notice principle,” although it “turn[ed] out not to matter.”); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 Va. L. Rev. 1021, 1034 n.30 (1999) (describing *Lambert* as “providing an apparently unique mistake of law defense founded in the Constitution”). One author, relying on a patchwork of constitutional and statutory cases, including *Lambert*, has argued for a fairly robust constitutional mistake-of-law defense. See Bruce R. Grace, *Note, Ignorance of the Law as an Excuse*, 86 Colum. L. Rev. 1392 (1986).

<sup>70</sup> Professor Michaels calls this the “innocence” or “lack of blameworthiness” reading of *Lambert*. See Michaels, *supra* note 66, at 861–62; see also Hart, *supra* note 4, at 433–34 (arguing that *Lambert* limits the ability of legislatures to “brand[] innocent people as criminals”); Jeffries, *supra* note 4, at 211–12 (“[*Lambert*] stands for the unacceptability in principle of imposing criminal liability where the prototypically law-abiding individual in the actor’s situation would have had no reason to act otherwise.”).

tion idea is always present in mens rea determinations, there are logical consequences that must be addressed. Is the constitutional holding of *Lambert* potentially relevant when the mens rea level is set for *every* crime? The question is whether a clear line can be drawn—or, we suppose, needs to be drawn—between a *policy* of paying attention to the socialization idea and a constitutional mandate that it be respected.

The best way to address this concern is to think a bit about ordinary criminal law doctrine. The socialization idea that is so close to the surface of the *Lambert* opinion is deeply embedded in everyday applications of the criminal law. We illustrate this below in two ways—first by examining several widely accepted criminal law doctrines at a theoretical level, and then by looking at statutory interpretation in a series of U.S. Supreme Court cases involving federal crimes.

#### A. 20,000 Feet

The criminal law is heavily fault-oriented, in principle punishing bad choices. One important component of the fault judgments ordinarily made by the criminal law is the socialization idea discussed above. A person is at fault for making a bad choice when, in part, commonly accepted moral values suggest the need for more circumspect conduct in the context in which proposed behavior is undertaken.<sup>71</sup> Turning it around, one might be inclined to say that a criminal defendant was not sufficiently at fault—did not make a bad choice—when, to use Christopher’s phrasing, the context did not provide “the warning or notice provided by a sense of wrongdoing that usually attends legally punishable conduct.”<sup>72</sup>

This idea is deeply embedded in numerous traditional common law doctrines. We illustrate the pervasiveness of the socialization idea with brief examinations of three such doctrines below. They deal with ordinary mistakes of fact, the use of strict liability for the grading elements of crimes, and implementation of the idea that ignorance of the law is no excuse. Our purpose is to make the simple (and we think obvious) point that the socialization idea plays a central part in the implementation of

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<sup>71</sup> Cf. *Nash v. United States*, 229 U.S. 373, 377 (1913) (Holmes, J., majority opinion) (“The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.” (quoting 1 Edward Hyde East, *A Treatise of the Pleas of the Crown* 262 (London, A. Strahan 1803) (internal quotation marks omitted))).

<sup>72</sup> See *supra* text accompanying note 47.

each of them. We mean also to imply that the same is true of many other doctrinal issues in the criminal law.<sup>73</sup>

### *1. Mistakes of Fact*

To illustrate the centrality of the socialization principle to ordinary mistake of fact doctrine, take a silly example.<sup>74</sup> Assume an ordinary consumer who buys a bottle labeled “aspirin” in a drug store. If the bottle selected contained a prohibited narcotic placed there by a pusher as a previously arranged method of distribution to a particular buyer—unknown to the consumer, the aspirin shelf was actually a prearranged drug drop—is it likely that the consumer could be convicted of possession of the narcotic based on strict liability as to the nature of the substance? Ordinary common law mistake of fact principles suggest that the answer is “no.” So would basic fairness.<sup>75</sup> So would the socialization principle.

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<sup>73</sup> For example, defenses based on immaturity and insanity are grounded in part on the possibility of socialization to community moral values. We discuss this aspect of the insanity defense below. See *infra* Section IV.A. Another example where the idea of socialization is close to the surface is found in the old common law doctrine that strict liability is appropriate when “there is a measure of wrong in the act as the defendant understands it” and the courts conclude that “ignorance of the fact that makes it a greater wrong will not [provide relief] from the legal penalty.” *State v. Audette*, 70 A. 833, 834 (Vt. 1908). Rollin M. Perkins elaborated on this doctrine in *Ignorance and Mistake in Criminal Law*, 88 U. Pa. L. Rev. 35, 63 (1939):

These are cases in which the deed would have involved a high degree of moral delinquency even under the supposed facts, and the claim for acquittal is based, not upon the ground that defendant thought his deed was proper or lawful but only that he thought it was a type of wrongful conduct for which no criminal penalty had been provided. The common examples fall within the fields of statutory rape, abduction and adultery.

<sup>74</sup> We borrow this example from Richard J. Bonnie et al., *Criminal Law* 212 (3d ed. 2010). Since one of the authors of this Article was the author of the example in the cited casebook, we are not embarrassed to call it “silly.” It does, nonetheless, provide a good illustration of the point we wish to make.

<sup>75</sup> For a recent case in which the dissent provided numerous realistic examples of how such a hypothetical could occur, see *State v. Adkins*, 96 So. 3d 412, 431 (Fla. 2012) (Perry, J., dissenting). Justice Perry argued that the Florida narcotics statute at issue was unconstitutional because it imposed strict liability on the nature of the substance. See *id.* A fractured majority saw the problem differently. *Id.* at 414, 423 (majority opinion). In the end, the statute was upheld because (a) it was read to require knowledge of the nature of the substance and (b) it explicitly provided an affirmative defense of lack of knowledge that the punishable acts—sell, manufacture, deliver, or possess with intent to sell, manufacture, or deliver—were illicit. The statute therefore did not, in the majority’s view, punish “innocent” conduct. *Id.* at 416.

The consumer in that situation would be held at common law to the standard of an “honest and reasonable” mistake.<sup>76</sup> Importantly, the “reasonableness” requirement in that formula would perform the function of assuring that the socialization principle was respected. If the context at the time of purchase made the mistake objectively unreasonable or negligent, the reasoning would go, then the jury would rightfully conclude that the consumer *should have known* that the aspirin bottle contained narcotics. And, the socialization principle would suggest, one who should have known that narcotics were being purchased should also have known not to buy them—or, to put it more directly, should have known that it was a crime to buy them. “Fair warning,” in other words, is provided by the same facts that justify the jury finding that the defendant’s mistake was not reasonable.<sup>77</sup> A *reasonable* mistake, on the other hand—the kind of mistake any one of us readily could have made, and in this hypothetical the kind of mistake any one of us would in fact have made—would lead to the conclusion that the defendant’s behavior was entirely innocent. None of us would be socialized to the possibility that buying a bottle of aspirin in a drug store could lead to a criminal conviction for purchasing narcotics. This hypothetical involves positive

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The *Adkins* situation is a minefield of interesting issues that are related to the topic of this Article, but are too distracting for thorough consideration in these pages. For the view that the *Adkins* opinions were a “judicial train wreck” and praise in the end for one of the justices for “walk[ing] away from it” by concurring in the result without opinion, see Robert Batey, *Mens Rea and Constitutional Law: A Report Card for the Florida Supreme Court in State v. Adkins*, 43 *Stetson L. Rev.* 3, 4, 15 (2013). For a federal habeas corpus sequel to *Adkins* in which relief was denied because the Florida courts did not “unreasonably” apply prior Supreme Court precedent, see *Shelton v. Secretary, Department of Corrections*, 691 F.3d 1348, 1349 (11th Cir. 2012), cert. denied, 133 S. Ct. 1856 (2013). Acting prior to the Florida Supreme Court decision in *Adkins*, the district court in *Shelton* had read the statute much the same way as the *Adkins* dissent and held it facially unconstitutional. See *Shelton v. Sec’y, Dep’t of Corr.*, 802 F. Supp. 2d 1289, 1297 (M.D. Fla. 2011).

<sup>76</sup> See the quotation from Michael & Wechsler, *supra* note 34, at 756, reproduced *infra* note 81. Today, mistake of fact defenses are usually understood as derivative of the applicable level of mens rea. See, e.g., LaFave, *supra* note 63, § 5.6 (“[I]gnorance or mistake of fact or law is a defense if it negatives the existence of a mental state essential to the crime. . . . [I]t is merely a restatement in somewhat different form of one of the basic premises of the criminal law.”). But this is a distinctly modern perspective based on insights developed in the Model Penal Code, see Model Penal Code §§ 2.02, 2.04 (1962), and is in any event unimportant for present purposes.

<sup>77</sup> And if the defendant’s mistake was not “honest,” that would mean that no mistake was made; that is, that the defendant knew that the bottle contained narcotics. Once that finding is made, it would be commonplace to conclude that the defendant should have been socialized not to make the purchase.

conduct and not an omission, to be sure, but plainly on these facts there would be nothing in the context that would signal to the ordinary consumer that illegal drugs were about to be purchased. If the mistake was honest and reasonable, there would be nothing, in Douglas's words in *Lambert*, that would "alert the doer to the consequences of [the] deed."<sup>78</sup>

The factual context in which behavior occurs, in other words, paints the moral picture in an actor's mind that in turn triggers the moral signals that warn the ordinary person that the behavior is unacceptable. A nonculpable mistake about the facts that changes the picture from morally blameworthy to morally neutral ought to be a defense—and the typical doctrine makes it a defense—because it cannot be said in that situation that the defendant has made a bad choice. One can debate, of course, whether the culpability standard for mistakes of fact ought to be negligence, recklessness, or knowledge, to use Model Penal Code terminology,<sup>79</sup> but strict liability for a factual mistake ought to be unacceptable—and normally is—when the context in no sense provides socialization warning. Among other things, in other words, traditional mistake of fact doctrine implements the socialization principle.

## 2. *Strict Liability for Grading Elements*

A similar analysis applies to the use of strict liability as it applies to one element of a multi-element crime. Often this is the case, for example, with respect to grading elements; that is, those elements that differentiate one level of a particular crime from another level of the same type of crime.<sup>80</sup> The usual formulation is that, if the facts as the defendant believed them to be would have resulted in a lesser version of the same crime, then the traditional mistake of fact rules do not apply.<sup>81</sup> This

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<sup>78</sup> See *supra* text accompanying note 51.

<sup>79</sup> See Model Penal Code § 2.02 (1962).

<sup>80</sup> Of course, grading elements do not necessarily carry strict liability. For example, the difference between murder, manslaughter, and negligent homicide will depend on the defendant's culpability as to the act of homicide. The "grade" of the relevant homicide offense will be determined by the defendant's *mens rea*. It is always an option for the legislature to require culpability for the factors that differentiate one level of criminality from another and, as homicide grading in every jurisdiction illustrates, legislatures frequently do so.

<sup>81</sup> Professor Perkins illustrated the rule in *Perkins*, *supra* note 73, at 62:

A misdeed, committed with knowledge of sufficient facts to establish its criminality, is not necessarily limited to some lower grade of offense than would otherwise be found merely because the offender was mistaken as to some fact relating only to the degree of the crime or the extent of the wrong done. It is submitted, for example, that the stealing of goods of such value as to constitute grand larceny is not to be forced in-

rule, as with all other uses of strict liability, is justified (if at all) by utilitarian arguments related to public protection. But it nonetheless respects the baseline socialization concern because the defendant plainly has made a bad choice. The defendant would have received fair warning from the context not to engage in the conduct in the first place, even if it was thought that the conduct was less serious than it turned out to be. The defendant's moral signals should have been triggered based on what was known about the situation.

The problem with such a rule, if there is one in general or as it is applied for a particular crime, has to do with the proportionality of the punishment, in particular with whether the sentence should be gauged by the harm intended or by the harm caused. That issue is debatable. What is not debatable is the proposition that the defendant made a bad choice and had a fair opportunity to refrain from the underlying conduct. Strict liability for grading elements respects the socialization principle when the mens rea for the remaining elements paints a moral picture that warns of potential criminality.<sup>82</sup>

*Dean v. United States*<sup>83</sup> provides a dramatic example. It is an independent federal offense to carry a firearm during the commission of a violent crime.<sup>84</sup> There is a mandatory minimum sentence of ten years "if the firearm is discharged,"<sup>85</sup> and a lesser sentence if it is carried or

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to the category of petit larceny merely because the thief mistakenly thought them worth less than the sum required for this purpose.

For a more formal statement of the doctrine, see Michael & Wechsler, *supra* note 34, at 756 (emphasis added):

If an actor honestly and reasonably, although mistakenly, believed the facts to be other than they were, *and if his conduct would not have been criminal had the facts been as he believed them to be*, then his mistake is a defense if he is charged with a crime which requires "mens rea" . . . .

Though not generally thought of this way, felony murder—correctly we think—is another example of the use of strict liability in grading. See Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 *J. Crim. L. & Criminology* 1075, 1082 (1997) ("[F]elony-murder is an instance of strict liability in grading, because the underlying felony is already a crime, and the causation of death increases the penalty."). For further discussion of the pervasiveness of the use of strict liability in grading, see *id.* at 1103–05.

<sup>82</sup> Compare the defense by Professor Michaels of his thesis that "strict liability is constitutional when, but only when, the intentional conduct covered by the statute could be made criminal by the legislature." Michaels, *supra* note 66, at 834, 877–81.

<sup>83</sup> 556 U.S. 568 (2009).

<sup>84</sup> See 18 U.S.C. § 924(c)(1)(A) (2012).

<sup>85</sup> See *id.* § 924(c)(1)(A)(iii).

“brandished.”<sup>86</sup> In the course of a bank robbery, Christopher Dean’s gun discharged, apparently by accident. He seemed surprised when it went off.<sup>87</sup> No one was injured, but several people who were present were startled and scared.<sup>88</sup> The question in *Dean* was whether the sentencing enhancement portion of the statute required some level of mens rea with respect to the gun’s discharge or whether strict liability was to be applied to this aspect of the offense.<sup>89</sup>

The answer was strict liability. Chief Justice Roberts wrote the opinion for a 7-2 majority.<sup>90</sup> Characteristically, much of the opinion consists of a careful textual exegesis of the language used by Congress. In the end, the Court held inapplicable the normal assumption that mens rea will be read into criminal statutes even when they are silent on the question,<sup>91</sup> and then added:

It is unusual to impose criminal punishment for the consequences of purely accidental conduct. But it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts. . . . The felony-murder rule is a familiar example: If a defendant commits an unintended homicide while committing another felony, the defendant can be convicted of murder. . . .

. . . .

The fact that the actual discharge of a gun . . . may be accidental does not mean that the defendant is blameless. . . . A gunshot in such circumstances—whether accidental or intended—increases the risk that others will be injured, that people will panic, or that violence (with its own danger to those nearby) will be used in response. Those criminals wishing to avoid the penalty for an inadvertent discharge can lock or unload the firearm, handle it with care during the underlying

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<sup>86</sup> There is a five-year mandatory minimum for the basic offense, see *id.* § 924(c)(1)(A)(i), and a seven-year mandatory minimum for brandishing the weapon, see *id.* § 924(c)(1)(A)(ii).

<sup>87</sup> *Dean*, 556 U.S. at 570.

<sup>88</sup> *Id.* at 577.

<sup>89</sup> *Id.* at 571.

<sup>90</sup> *Id.* at 569.

<sup>91</sup> *Id.* at 574–76. For an example of application of this assumption, see *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436–43 (1978).

violent or drug trafficking crime, leave the gun at home, or—best yet—avoid committing the felony in the first place.<sup>92</sup>

The reason for imposing strict liability in this instance had to do with the text and intent of the statute, and as an underlying policy matter with its public protection goals. And, as the Court all but said, there was no socialization issue here. Holding the defendant responsible for unintended consequences is a valid criminal law policy, the Court concluded, in a situation where the defendant had plenty of fair warning not to engage in “the felony in the first place.”<sup>93</sup> It is commonplace in such situations to balance the moral responsibility of the defendant against the preventive goal of protecting the public from present and future harm. *All* decisions about the amount of fault required in the criminal law in the end come down to this trade-off. And such decisions should, and normally do, as the Court did in *Dean*, take the socialization principle into account as one factor on the scale.

### 3. Ignorance of the Criminal Law

Our final illustration of the infusion of the socialization principle into the traditions of the criminal law is provided by the maxim “ignorance of the criminal law is no excuse.”<sup>94</sup> Although the maxim must be justified on other grounds,<sup>95</sup> it can be defended as fundamentally fair most of

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<sup>92</sup> *Dean*, 556 U.S. at 575–76. Roberts went all the way back to Blackstone for support of his reasoning:

“[I]f any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt: but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.” 4 W. Blackstone, Commentaries on the Laws of England 26–27 (1769).

Id.

<sup>93</sup> Id. at 576.

<sup>94</sup> Interestingly, it appears that Blackstone, the ultimate source of this rule, may have made it up from whole cloth. See Singer & Husak, *supra* note 2, at 867 n.25.

<sup>95</sup> We are partial to the rationale articulated by Professor Jerome Hall that the maxim is required by “the implications of the principle of legality”:

To permit an individual to plead successfully that he had a different opinion or interpretation of the law would contradict the . . . postulates of a legal order. For there is a basic incompatibility between asserting that the law is what certain officials declare it to be after a prescribed analysis, and asserting also, that those officials *must* declare it to be, *i.e.* that the law is, what defendants or their lawyers believed it to be. A legal order implies the rejection of such contradiction. It opposes objectivity to subjectivity,

the time because the combination of behavior and intent covered by the typical crime will generally warn members of the community of potential criminality.<sup>96</sup> To return to the hit man example, the defense “I thought contract killing was not a crime because it is just an honest way to make a living” is laughable because the socialization principle is so obviously satisfied.<sup>97</sup> Ordinarily strict liability can be applied to mistakes about or ignorance of the criminal law, in other words, because the socialization principle is respected. The occasions when the “ignorance of the criminal law” doctrine comes under justified attack are precisely those where the context does not provide any warning, when the prohibitions of the criminal law have so far departed from the underlying moral culture that “fair warning” is not supplied by what most people understand the moral culture to be.

An example of a close debate in these terms is provided by *United States v. Wilson*.<sup>98</sup> After Carlton Wilson was arrested pursuant to an outstanding warrant, officers discovered three guns in his truck: a 12-gauge shotgun in a case, a MAC 90 Sportster rifle on the floor behind the driver’s seat, and a loaded 9-millimeter Lorcin handgun in a fanny pack he had been wearing.<sup>99</sup> He was convicted for knowingly possessing a firearm while under an order of protection.<sup>100</sup> He clearly had mens rea in the ordinary sense, because he knew that he possessed the firearms and knew that he was subject to an order of protection. What he did not

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judicial process to individual opinion, official to lay, and authoritative to non-authoritative declarations of what the law is. This is the rationale of *ignorantia juris neminem excusat*.

Jerome Hall, *General Principles of Criminal Law* 383 (2d ed. 1960).

<sup>96</sup> Cf. Dan M. Kahan, *Ignorance of the Law Is an Excuse—But Only for the Virtuous*, 96 Mich. L. Rev. 127, 140 (1997) (“Most individuals know how to live law-abiding lives without ever consulting their community’s criminal code. This is so because they assume that the criminal law tracks certain basic moral norms, with which the law-abiders and law-breakers alike *are* thoroughly familiar.”); Grace, *supra* note 69, at 1408 (“Where criminal law closely tracks common understanding of what behavior is acceptable, notice of the law is provided by shared cultural understanding.”).

<sup>97</sup> See *supra* note 37 and following text. Cf. *United States v. Wilson*, 159 F.3d 280, 295 (7th Cir. 1998) (Posner, J., dissenting) (“When a defendant is morally culpable for failing to know or guess that he is violating *some* law (as would be the case of someone who committed a burglary without thinking—so warped was his moral sense—that burglary might be a crime), we rely on conscience to provide all the notice that is required.”).

<sup>98</sup> 159 F.3d 280 (7th Cir. 1998). The Supreme Court denied certiorari, 527 U.S. 1024 (1999), choosing not to resolve the debate.

<sup>99</sup> *Id.* at 284.

<sup>100</sup> *Id.* at 283. The offense is codified at 18 U.S.C. § 922(g)(8) (2012).

know was that federal law made such behavior a crime. He appealed his conviction on a number of grounds, one of which was that due process was denied by not reading the statute to require that he know that his behavior was punishable by the criminal law.

The majority made short work of this claim, relying on the “traditional rule in American jurisprudence . . . that ignorance of the law is no defense to a criminal prosecution.”<sup>101</sup> Judge Posner dissented. In his view, given the gun-friendly society in which we live and the failure of the Department of Justice to publicize the offense, the socialization principle was violated by not allowing ignorance of the criminal law as a defense.<sup>102</sup> He thought Wilson was “entitled to a new trial at which the government would have to prove that he knew that continued possession of guns after the restraining order was entered was a crime.”<sup>103</sup>

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<sup>101</sup> *Wilson*, 159 F.3d at 288–89. The majority further held that Wilson did not fall within either of two purported exceptions to this proposition, citing *Cheek v. United States*, 498 U.S. 192 (1991), and *Bryan v. United States*, 524 U.S. 184 (1998), for one, and *Lambert* for the other. We discuss *Bryan* extensively below, see *infra* Subsection III.B.2.b, but for present purposes it suffices to note that it does not establish such an “exception.” Nor does *Cheek*. See *supra* note 32.

As for *Lambert*, the majority read it to require notice “when [a] penalty may be exacted for failing to act.” *Wilson*, 159 F.3d at 289. We dispute this “omissions” reading of *Lambert* in Part II, and have argued throughout that the crucial factor there, as it was in *Wilson*, was whether the context warned of potential criminality. But even under an omissions theory, *Lambert* and *Wilson* are in fact quite close. The crucial aspect of Wilson’s criminality could easily be characterized as an omission: He failed to divest himself of his guns when a federal criminal law created a duty to do so upon issuance of a protection order.

<sup>102</sup> The Justice Department could easily have asked state judges responsible for protection orders to explain the criminality of continued gun possession each time they issued such an order. As Posner pointed out, the Department eventually directed local U.S. Attorneys to do so, but this direction came four years after the federal crime was enacted and, importantly, after Wilson was tried. See *Wilson*, 159 F.3d at 294 (Posner, J., dissenting). And, as Posner said, “[d]omestic-relations judges would be happy to include such a warning because it would give added teeth to their orders.” *Id.* at 295.

<sup>103</sup> *Id.* at 296. An ordinary negligence standard (by analogy to the common law mistake of fact rule) may well have sufficed instead of requiring actual awareness, although the statutory text could be regarded as posing a difficulty with that conclusion because it explicitly required a mens rea of knowledge. But that need not pose an insuperable obstacle. The statute in *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971), required knowledge, but the Court held that strict liability applied to a critical element. See *infra* Subsection III.B.1.a. And the statute in *Bryan* required willfulness, but the Court required a combination of strict liability and general awareness of illegality. See *infra* Subsection III.B.2.b. Indeed, requiring the *Bryan* instruction would have cured the problem Posner saw in *Wilson*.

Posner did not rest his conclusion on constitutional grounds, though he hinted that he might be willing to do so.<sup>104</sup> “It is wrong,” he said, “to convict a person of a crime if he had no reason to believe that the act for which he was convicted *was* a crime, or even that it was wrongful.”<sup>105</sup> He described this as “one of the bedrock principles of American law” that “lies at the heart of any civilized system of law.”<sup>106</sup> He concluded that this principle—essentially the socialization idea that we have been describing—in this case should trump the normal maxim that ignorance of the law is no excuse.<sup>107</sup>

The net result, then, is that all of the judges agreed that the statute in *Wilson* required a level of culpability that was consistent with traditional criminal law doctrine—a mens rea of knowledge was applied to each of the actus reus elements of the offense. But in this particular context, Posner argued, this was not enough because ordinary citizens would not be likely to know that this particular combination of actus reus and mens rea would constitute a crime.<sup>108</sup> Whether Posner was right in this contention is, so far as we are now concerned, beside the point. He was clearly right that there was a kind of entrapment aspect to this particular prosecution. And he was clearly right to engage the majority on this issue. The idea of socialization belongs in the debate about how to read the mens rea terms of any criminal statute, especially this one.

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<sup>104</sup> “In the unusual circumstances of this case, the maxim of expedience should yield to the bedrock principle; and there is enough room in the statutory language to achieve this end without having to trundle out the heavy artillery of constitutional law.” *Wilson*, 159 F.3d at 293 (Posner, J., dissenting).

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

<sup>106</sup> *Id.*

<sup>107</sup> See supra note 104.

<sup>108</sup> Sex offender registration statutes are another context in which *Lambert* claims have been raised. Nearly all of the federal circuit courts have rejected the claim under the federal Sex Offender Registration and Notification Act (“SORNA”). They reason that being a convicted sex offender is sufficient to give defendants notice that they should register. See, e.g., *United States v. Hester*, 589 F.3d 86, 91–93 (2d Cir. 2009) (collecting and agreeing with decisions that reject *Lambert* claims to SORNA convictions).

A few state courts have reached a different outcome under their sex offender registration statutes. See, e.g., *State v. Giorgetti*, 868 So. 2d 512, 519–20 (Fla. 2004); *Garrison v. State*, 950 So. 2d 990, 993, 994 (Miss. 2006). Relying solely on *Lambert*, *Garrison* grudgingly overturned a conviction for failing to register as a sex offender because the state failed to prove “actual knowledge of the duty to register *or* . . . the probability of such knowledge.” *Garrison*, 950 So. 2d at 994. Noting that “*Lambert* has been distinguished on sixty-three separate occasions and criticized on three,” *Garrison* emphasized that, “[e]xcept in the most limited of circumstances, *Lambert* like, a claim of ignorance of the law will be soundly rejected by this Court.” *Id.* at 993–94.

*B. On the Ground*

The most visible operation of the socialization principle in everyday applications of the criminal law is in the arena of statutory interpretation. We illustrate this phenomenon by considering a series of well-known Supreme Court decisions construing the mens rea required for a number of federal statutes. The Court, in substance, decided in each of these cases how to deploy the socialization principle in determining mens rea levels, but made no suggestion that the principle has a constitutional foundation. A very brief proof of this is that not one of them cites *Lambert* as any kind of controlling authority. Instead, the socialization judgment is made on a case-by-case basis, as but one factor among many in determining the scope of the criminal statute.

We divide the cases into two categories. The first is the ordinary situation, where the Court itself makes the socialization judgment as it balances that factor against other concerns it deems relevant to the statutory interpretation issues posed by its mens rea decision. We call this “socialization per se.” Our illustrations here are *United States v. International Minerals & Chemical Corp.*,<sup>109</sup> *United States v. Freed*,<sup>110</sup> *Staples v. United States*,<sup>111</sup> and *Carter v. United States*.<sup>112</sup> *International Minerals* is a garden-variety strict liability case in which the Court held that the legislature meant for public protection goals to trump a mens rea requirement because, in part, potential defendants should be socialized to know better. *Freed* and *Staples* provide a nice counterpoint to each other—*Freed* applied strict liability to one element of a statute to achieve public protection goals and *Staples* adopted a mens rea standard for another element of the same statute in order to achieve socialization goals. The statute itself said nothing about mens rea. All three of these cases involve omissions. We add *Carter* as a further illustration because it applies the same approach to a case that involves positive conduct.<sup>113</sup>

The second category, which we call “socialization as applied,” uses *Liparota v. United States*<sup>114</sup> and *Bryan v. United States*<sup>115</sup> as illustrations.

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<sup>109</sup> 402 U.S. 558 (1971).

<sup>110</sup> 401 U.S. 601 (1971).

<sup>111</sup> 511 U.S. 600 (1994).

<sup>112</sup> 530 U.S. 255 (2000).

<sup>113</sup> Recall our contention in Part II that, whatever *Lambert* means, it does not turn on the difference between omissions and positive acts.

<sup>114</sup> 471 U.S. 419 (1985).

<sup>115</sup> 524 U.S. 184 (1998).

In both of these cases the Court adopted a mens rea principle that effectively puts the socialization question to the jury. Both involved strict liability offenses, even though the statute required knowledge in *Liparota* and willfulness in *Bryan* without textual distinctions among the various elements involved.<sup>116</sup> *Liparota* involved positive conduct, while *Bryan* involved an omission. The Court came to the same conclusion in both cases. In both it approved an instruction that asked the jury whether the defendant knew that something illegal was going on, with no requirement that the defendant know precisely why the conduct was illegal. The jury was to be asked, in other words, whether the defendant was socialized to know that circumspect conduct was required.

### 1. Socialization Per Se

#### a. United States v. International Minerals & Chemical Corp.

*United States v. International Minerals & Chemical Corp.*<sup>117</sup> is an example of the typical approach to implementation of the socialization concept in practice. Either the legislature in advance or a court by interpretation calibrates the requisite socialization in the abstract as it chooses the applicable mens rea. The question is not whether any given defendant will actually know whether covered conduct is criminal or in some other sense illegal or immoral. The question is whether the public in general—or the segment of the public that can commit the particular crime—is likely to know. The issue is the extent to which the offense poses a serious threat to conviction of people with truly innocent intentions. This factor is then balanced against the other legitimate concerns that are considered in the mens rea calculus.

Like *Lambert*, *International Minerals* involved an omission. The defendant corporation was charged with shipping sulfuric acid and hydrofluosilicic acid in interstate commerce having failed to attach the label “Corrosive Liquid” on the shipping papers in the face of federal regulations that required such a label.<sup>118</sup> It was a federal crime to “knowingly violate[] any such regulation.”<sup>119</sup> The question was whether the company

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<sup>116</sup> We call them strict liability offenses because the statutes involved in the two cases contained elements—violation of a food stamp regulation in the one case and failure to obtain a business license in the other—as to which no specific culpability was required by the Court.

<sup>117</sup> 402 U.S. 558 (1971).

<sup>118</sup> *Id.* at 559.

<sup>119</sup> *Id.* The statute, since repealed, was located at 18 U.S.C. § 834(f) (1976).

had to know about the requirements of the regulation, or in more general terms whether it had to know about the duties established by the regulation.<sup>120</sup> The case for dispensing with such knowledge as an element of the offense was, by analogy to the catalogue of “public welfare” offenses,<sup>121</sup> utilitarian. Public safety is promoted by requiring companies that deal with dangerous products to comply with regulatory law at their own risk. This conclusion is consistent with the socialization principle, one could conclude, if it is reasonable to expect businesses that deal with dangerous products to understand that regulations are out there, that compliance with them is important, and that it is up to them to find out what the regulations say and to obey them. Strict liability is justified on utilitarian grounds, but is acceptable because prospective defendants should be socialized to know about the potential of legal regulation.<sup>122</sup>

This was the conclusion the Court came to in *International Minerals*. It held (with Justice Douglas writing) that lack of knowledge of the existence of the regulation (that is, lack of knowledge of the duty to label) was not a defense, and that all the defendant had to know were the facts of the situation.<sup>123</sup> That is, the defendant had to be aware of the positive conduct (shipping acids in interstate commerce) that gave rise to the duty.<sup>124</sup> The defendant did not need to know about the duty itself because

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<sup>120</sup> *Int'l Minerals*, 402 U.S. at 560.

<sup>121</sup> See *Morrisette v. United States*, 342 U.S. 246, 254–60 (1952); Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933). *Morrisette* is a well-known theft case in which Justice Jackson delivered a long lecture about the mens rea differences between crimes based on the common law and “public welfare” offenses.

<sup>122</sup> We mean only to describe this rationale, not endorse it. Justice Stewart rejected it as applied to this situation in his *International Minerals* dissent, expressing concern that “the casual shipper, who might be any man, woman, or child in the Nation . . . might make a single shipment . . . in the course of a lifetime,” and might have no idea that the behavior was subject to federal regulation. 402 U.S. at 569 (Stewart, J., dissenting). In effect, he said, an ordinary person could be caught in a web of technical regulations without socialization warning of potential criminality.

Stewart could not, of course, cite *Liparota v. United States*, 471 U.S. 419 (1985), in support of this conclusion, since it was not to be decided until fourteen years later. But, as we develop in Subsection III.B.2.a below, his concern was identical to the concern that led the Court to require a finding of actual socialization in applications of the food stamp statute at stake there. For elaboration of this point and an argument that the Court was wrong in *International Minerals* and that Stewart was right, see Wiley, *supra* note 69, at 1053–55.

<sup>123</sup> *Int'l Minerals*, 402 U.S. at 563.

<sup>124</sup> Douglas said, for example, that a “person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered.” *Id.* at 563–64. This would be a classic mistake of fact situation, where the claim was that the defendant was not aware of the nature of the positive conduct that gave rise to the duty.

the Court thought that the context gave adequate warning of the duty to inquire: “[W]here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”<sup>125</sup>

Strict liability with respect to the duty to label was justified on utilitarian grounds, in other words, but was fair because the Court thought socialization notice would be present in the commercial context in which these regulations were likely to be enforced.<sup>126</sup> Indeed, one can generalize this point as applicable to most if not all so-called public welfare offenses. Invariably the defendant to whom strict liability is applied on a public welfare rationale will be acting in a context where awareness of detailed regulation is likely.<sup>127</sup> And given the underlying assumption of socialization, it is correct to say that strict liability for public welfare offenses—and indeed for any crime so long as the socialization assumption is not inaccurate<sup>128</sup>—does not involve a rigid concept of liability

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<sup>125</sup> Id. at 565. Douglas distinguished situations where “[p]encils, dental floss, [or] paper clips” were regulated. These, Douglas said, “may be the type of products which might raise substantial due process questions if Congress did not require . . . ‘mens rea’ as to each ingredient of the offense.” Id. at 564–65. The reason, presumably, is that socialization would be lacking in such cases, no matter the identity of the shipper. Although Douglas did not pursue the question this far, we infer that he would have required knowledge of the duty to label for such products and that this would solve the problem.

Importantly, although the above passage does advert to a potential due process problem, there was no citation to *Lambert* at any point in the opinion. Douglas relied instead on references to *United States v. Balint*, 258 U.S. 250 (1922), *United States v. Murdock*, 290 U.S. 389 (1933), *Morissette*, 342 U.S. 246, and *Freed*, 401 U.S. 601. Justice Stewart did cite *Lambert* in his dissent, but only in passing. See *Int’l Minerals*, 402 U.S. at 565 (Stewart, J., dissenting).

<sup>126</sup> The answer to Justice Stewart, see *supra* note 122, presumably was that criminal prosecutions were unlikely to be filed against the casual, one-time, member-of-the-public shipper. The Court accepted Stewart’s argument in *Liparota*, see *infra* text accompanying note 175, we guess because the incidence of innocent misuse of food stamps was thought to be greater by orders of magnitude than mistreatment of corrosive liquids by the ordinary public. Whether the Court was right in this surmise is a question we leave to others. Professor Wiley thought it was not. See Wiley, *supra* note 69, at 1053–55.

<sup>127</sup> Justice Thomas would later recognize this in his opinion for the Court in *Staples*. 511 U.S. at 607 (“[A]s long as a defendant knows that he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, . . . he should be alerted to the probability of strict regulation.” (citations omitted) (internal quotation marks omitted)).

<sup>128</sup> Professor Low has made this point elsewhere:

There is no instance of which I am aware where the criminal law uses strict liability for one element of an offense without any inquiry into fault on other elements. . . .

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without fault.<sup>129</sup> The idea of socialization itself is based on the notion that the defendant *should* know about the prospect of illegality, therefore *should* act more circumspectly, and therefore is at fault—has made a bad choice—for not doing so.

*b. Freed and Staples*

*United States v. Freed*<sup>130</sup> and *Staples v. United States*<sup>131</sup> both construed the same provision of the National Firearms Act,<sup>132</sup> but reached different conclusions on essentially socialization grounds. The statute punished by up to a maximum of ten years in prison<sup>133</sup> the possession of special categories of firearms<sup>134</sup> that were not properly registered under an elaborate federal regulatory structure.<sup>135</sup> The statute said nothing about the level of mens rea required for its violation.<sup>136</sup>

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[T]he rare occasions where the criminal law uses strict liability involve cases where . . . the law could be described as holding the actor to a combination of subjective and objective standards of liability. The objective standards, moreover, are based (or at least ought to be) on the premise that the actor had a fair opportunity to ascertain the situation and hence can fairly be punished.

Low, *supra* note 68, at 551.

<sup>129</sup> Justice Thomas's *Staples* opinion recognized this as well. See 511 U.S. at 607 n.3 (“By interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, we have avoided construing criminal statutes to impose a rigorous form of strict liability. See, e.g., *United States v. International Minerals & Chemical Corp.* . . . True strict liability might suggest that the defendant need not know even that he was dealing with a dangerous item.”).

<sup>130</sup> 401 U.S. 601 (1971).

<sup>131</sup> 511 U.S. 600 (1994).

<sup>132</sup> The Act, which has been amended over the years, is currently codified as Chapter 53 of Title 26 of the U.S. Code.

<sup>133</sup> 26 U.S.C. § 5871 (2012). This section was amended after *Freed* was decided. Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, § 227, 98 Stat. 2030 (codified at 26 U.S.C. § 5871 (2012)). The amendment removed parole eligibility, but did not change the maximum sentence.

<sup>134</sup> See 26 U.S.C. § 5845 (2012). The covered weapons included sawed-off shotguns, machineguns, hand grenades, and the like. See *infra* note 140.

<sup>135</sup> 26 U.S.C. § 5861(d) (2012).

<sup>136</sup> As the Court observed:

The language of the statute, the starting place in our inquiry, . . . provides little explicit guidance in this case. Section 5861(d) is silent concerning the *mens rea* required for a violation. It states simply that “[i]t shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.”

*Staples*, 511 U.S. at 605.

The question in *Freed* was whether the government had to charge (and, by extension, prove) that a defendant in possession of unregistered hand grenades knew of the registration requirement.<sup>137</sup> Justice Douglas's opinion for the Court held that it did not.<sup>138</sup> Douglas's opinion is unsatisfactory in many respects,<sup>139</sup> but it does clearly focus on the socialization issue as a central concern. A defendant could "hardly be surprised to learn that possession of hand grenades is not an innocent act," Douglas reasoned, because they are "highly dangerous offensive weapons."<sup>140</sup>

*Staples* involved a conviction for possession of a machinegun. The question there was whether the defendant needed to know the characteristics of the weapon that made it a machinegun.<sup>141</sup> The Court, Justice Thomas writing, concluded that he did. The concept of socialization notice was central to the rationale. Because "guns generally can be owned in perfect innocence," Thomas reasoned, "their destructive potential . . . cannot be said to put gun owners sufficiently on notice of the

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<sup>137</sup> 401 U.S. at 605.

<sup>138</sup> In holding that knowledge of the registration requirement did not have to be proved, the majority cited *Lambert*, but only to write it off as readily distinguishable. See *id.* at 607–10. The portions Douglas quotes, however, are the very ones that highlight the socialization concern that we stressed in Part I. This is further evidence that the Court had socialization in mind in *Freed*.

<sup>139</sup> It is unsatisfactory because it imposes strict liability on the "duty to register" element by placing the case in the public welfare category, even though the offense carried a ten-year maximum sentence. This aspect of the case was corrected by the Court in *Staples*. See 511 U.S. at 616–19. "[A]bsent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*." *Id.* at 618. The Court declined to adopt this position as "a definitive rule of construction," *id.*, but the strong implication is that public-welfare-offense reasoning should not be used in the case of serious felonies. As clearly it should not be.

<sup>140</sup> *Freed*, 401 U.S. at 609. Justice Brennan wrote separately, also concluding that strict liability should be imposed on the duty to register. He relied in part on decisions interpreting a prior version of the statute, but mainly invoked utilitarian concerns. He thought that the Court's unanimous result was fair to individual defendants because the statute covered the sorts of weapons that were so inherently dangerous that anyone would think that they were subject to government regulation. *Id.* at 616 (Brennan, J., concurring) (characterizing the statute as reaching "major weapons," "deceptive weapons," and "major destructive devices"; it applied, among other things, to anti-tank guns and bazookas). Brennan concluded, in other words, that the presence of socialization notice made it fair to adopt strict liability in a situation where there were strong utilitarian reasons for dispensing with normal *mens rea* requirements.

<sup>141</sup> 511 U.S. at 602.

likelihood of regulation to justify interpreting [the statute] as not requiring proof of knowledge of a weapon's characteristics."<sup>142</sup>

The symbiotic relationship of *Freed* to *Staples* is clear. The strict liability conclusion in the one is fair to defendants for the same reason that a high level of mens rea was required in the other. The Court was faced with interpreting a statute that was totally silent on mens rea, and in both cases relied on the concept of socialization as a central step in its reasoning. Utilitarian concerns were allowed to dominate in *Freed* because the crime—think current terrorist situations<sup>143</sup>—was so serious and most people who handled such weapons could be expected to know that the kinds of weapons involved were likely to be regulated. But fair notice dominated in *Staples* because the Court thought that ordinary citizens could otherwise face a serious penalty—potentially ten years in prison—without their moral signals being triggered. The Court did not care in *International Minerals* and *Freed* whether in fact the defendants were aware of the duties established by the relevant regulatory regimes because it concluded that socialization notice was satisfied.<sup>144</sup> It was prepared to conclude as a matter of law (that is, strict liability) that people in those situations were likely to know their respective duties or could be faulted for not knowing or finding out. *Staples*, however, was different. There the Court required that the defendant know of the capacities of the

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<sup>142</sup> Id. at 611–12. Others have observed that since the statute in *Staples* contained no mens rea words, “[T]he Court easily could have construed the statute to require recklessness, criminal negligence, or even tortious negligence.” See Singer & Husak, *supra* note 2, at 900. We agree, but we think a strong case could be made that it was more fair to require knowledge on the one element (the nature of the firearm) in light of the strict liability conclusion on the other (the registration requirement).

<sup>143</sup> Indeed, the briefs in *Freed* “indicate that the defendants were part of an alleged terrorist ring infiltrated by undercover police agents.” See Singer & Husak, *supra* note 2, at 866. This possibility was technically not before the Court, however, because the only issue was the sufficiency of the indictment, and that document made no reference to possible terrorism. See *id.*

<sup>144</sup> As we have said repeatedly, we do not believe that strict liability in these cases was *justified* because the Court thought there would be socialization in the two situations. The decision to impose strict liability is invariably based, and was based in these cases, on utilitarian public protection premises:

As de Saint-Exupery has his airline manager say, to justify cutting pilots' punctuality bonuses whenever their planes started late, even where it was due to the weather and was not their fault: “If you only punish men enough, the weather will improve.” It is a hard doctrine, but an effective one.

Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641, 648 (1941) (footnote omitted). Socialization operates as a *limit* on the use of strict liability when strict liability is adopted in order to further other values.

firearm because it thought that without such knowledge ordinary users would be unlikely to be aware of potential government regulation.<sup>145</sup>

c. *Carter v. United States*

*International Minerals, Freed, and Staples* all involved omissions—the failure to comply with a duty established by federal law. We argued above in Part II that the rationale of *Lambert* was not centrally tied to the fact that it involved a failure to act. We conclude this Part of our discussion with *Carter v. United States*<sup>146</sup> because it applied socialization reasoning to a defendant who engaged in positive conduct. Neither the socialization idea underlying *Lambert* nor the use of the socialization concept by the Supreme Court in statutory interpretation cases turns on whether omissions or positive acts are involved. The difference between omissions and positive acts can be relevant, of course, because of the way it affects the context. But it is the context that matters. Omissions as opposed to positive acts do not make a litmus test difference.

*Carter* involved a federal statute that in relevant terms punished a person who “by force and violence . . . takes . . . from the person or presence of another . . . money . . . [from a] bank.”<sup>147</sup> The issue was the required level of mens rea, which in turn controlled whether another related crime should have been charged as a lesser included offense.<sup>148</sup> For the Court, Justice Thomas found several textual differences between the two provisions that precluded one being a lesser offense to the other, including the absence of a required specific intent to steal in the charged

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<sup>145</sup> Justice Stevens dissented on this very point, and may well have been right given the easy convertibility of the particular weapon Harold Staples possessed: “Petitioner knowingly possessed a semiautomatic weapon that was readily convertible into a machinegun. The ‘character and nature’ of such a weapon is sufficiently hazardous to place the possessor on notice of the possibility of regulation.” *Staples*, 511 U.S. at 633 (Stevens, J., dissenting) (citation omitted) (internal quotation marks omitted). The jury had been given an instruction similar to the one that would later be approved by the Court in *Bryan*, see *infra* notes 188–92 and accompanying text: “It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation.” *Staples*, 511 U.S. at 604. Stevens thought this instruction was enough.

<sup>146</sup> 530 U.S. 255 (2000).

<sup>147</sup> 18 U.S.C. § 2113(a) (2012).

<sup>148</sup> *Carter*, 530 U.S. at 267–70. The other offense was 18 U.S.C. § 2113(b), which punished, in relevant terms, one who “takes and carries away, with intent to steal or purloin, any . . . money . . . [from a] bank.” Subsection (a) carried a maximum sentence of twenty years, while subsection (b) carried a maximum sentence of ten years.

offense.<sup>149</sup> The Court declined to read that requirement into the charged offense because “the presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct,’”<sup>150</sup> and it was sufficient for that purpose to require proof that Carter knew he was engaging in each of the acts described in the offense.<sup>151</sup> *Staples* was cited as a supporting example because the conclusion there was adopted “to avoid criminalizing the innocent activity of gun ownership.”<sup>152</sup> The same analysis, the majority believed, applied to the statute at issue in *Carter*:

Section 2113(a) certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity), but this result is accomplished simply by requiring, as *Staples* did, general intent<sup>153</sup> . . . . [O]nce this mental state and [the] *actus reus* are shown, the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of the otherwise innocent.<sup>154</sup>

The Court’s references to “otherwise innocent conduct” clearly serve the function of incorporating the socialization idea into its reasoning. The Court used the idea here, to be sure, as a reason for not *raising* the mens rea level for the charged offense. But it settled on a mens rea of knowledge as sufficient to protect the socialization concern, indicating that at least this much was required. It does not matter for our purposes whether the Court was correct to conclude, as it did, that the applicable mens rea was “knowledge.” Alternatively, as the traditional common

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<sup>149</sup> *Carter*, 530 U.S. at 262.

<sup>150</sup> *Id.* at 269 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)). While *X-Citement Video* in part applied the socialization ideas we have discussed, it did so with an important twist. The majority relied on the canon of constitutional avoidance to extend a mens rea provision to a portion of a statute to which it did not grammatically apply. *X-Citement Video*, 513 U.S. at 68–69. The element at issue—the age of performers in sexually explicit videos—was “the crucial element separating legal innocence from wrongful conduct” because it demarked the line between sexually explicit material that was constitutionally protected and such material that was punishable. *Id.* at 73; see also *Smith v. California*, 361 U.S. 147, 152–53 (1959) (finding strict liability constitutionally unacceptable when it requires booksellers to identify at their peril books that are obscene).

<sup>151</sup> *Carter*, 530 U.S. at 269.

<sup>152</sup> *Id.*

<sup>153</sup> The term “general intent” is notoriously malleable. See Bonnie et al., *supra* note 74, at 163–65, 173–76. The Court equates it with “knowledge” in *Carter*.

<sup>154</sup> 530 U.S. at 269–70 (internal quotation marks omitted).

law normally meant when the term “general intent” was used, the Court could have said that some form of negligence or even strict liability would suffice, at least for some elements.<sup>155</sup> The point is that culpability requirements in part serve the function of embedding the socialization principle in everyday application of the criminal law. Indeed, we repeat, one can say in *all* cases that the level of mens rea selected for a crime is designed to take into account, among other factors, the need for the offense to satisfy the minimal fairness guide reflected in the socialization idea. Even where utilitarian principles dominate the calculus by calling for reduced levels of culpability—even all the way down to strict liability—the socialization concept should always be a background consideration. The moral fault built into the criminal law can serve a number of important purposes, one of which is to provide a “fair notice” civil liberties check that will alert the average citizen “to the consequences of his deed.”<sup>156</sup>

The cases considered to this point involved socialization decisions made in the abstract as a matter of law. The Supreme Court determined in each of them the conditions under which it would be fair to expect people in general to be alerted to potential criminality, without reference to jury findings as a matter of fact about what the defendants before them actually knew or understood about whether their behavior might lead to criminal sanctions. Justice Stevens in *Staples* took a different approach. Rather than adopt, as the Court did, a traditional mens rea level of knowledge for the machinegun element of the offense involved there, he in effect would have submitted the socialization question for a factual determination by the jury. Did this particular defendant, Stevens would have the jury determine, know that the weapon he possessed was the likely subject of government regulation?<sup>157</sup> We turn now to two cases where the Court itself did the same thing.

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<sup>155</sup> Indeed, the Court itself might be inclined to apply negligence or strict liability if facing a different issue involving the same statute. Suppose, for example, the defense was “I didn’t know I was taking money from a bank.” See *Bonnie et al.*, *supra* note 74, at 173–85 (illustrating situations where the common law imposed strict liability for an element in what otherwise could be called a “general intent” offense).

<sup>156</sup> See *supra* text accompanying note 51.

<sup>157</sup> See *supra* note 145.

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## 2. Socialization in Fact

### a. Liparota v. United States

*Liparota v. United States*<sup>158</sup> involved federal food stamp fraud under a statute that punished anyone who, in relevant terms, “knowingly” transferred a food stamp “in any manner not authorized” by applicable regulations.<sup>159</sup> On three occasions, Frank Liparota “purchased food stamps from an undercover agent for substantially less than their face value.”<sup>160</sup> The purchases were made in a back room of his restaurant in order “to avoid the presence of the other patrons.”<sup>161</sup> The Government represented that the food stamps were marked “nontransferable.”<sup>162</sup> The question was what Liparota, who had clearly violated a number of food stamp regulations, had to “know” about the transaction in which he entered.<sup>163</sup>

In dissent, Justice White read the statute in a traditional manner. The phrase “in any manner not authorized” by regulations, he said, was shorthand that incorporated each of the specific regulations into the criminal statute.<sup>164</sup> Thus, because the regulations prohibited purchasing food stamps from another person, the statute criminalized this exact behavior. Under this construction, all Liparota had to know was that he was purchasing a food stamp in a private transaction. He did not have to know that doing so was a violation of the ground rules for using food stamps, that it violated any specific regulations for their use, or that it was in any other sense illegal.

Analytically, White’s reasoning is flawless. As he said, “Knowingly to do something that is unauthorized by law is not the same as doing something knowing that it is unauthorized by law.”<sup>165</sup> The only defense Liparota would have under White’s construction would be based on a mistake of fact, as if he thought he was buying postage stamps. If he knew he was buying food stamps, which he plainly did, he would have all the knowledge that was required for his conviction.

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<sup>158</sup> 471 U.S. 419 (1985).

<sup>159</sup> *Id.* at 420 n.1. The current version of the statute, found at 7 U.S.C. § 2024(b)(1) (2012), is worded slightly differently.

<sup>160</sup> *Liparota*, 471 U.S. at 421.

<sup>161</sup> *Id.* at 434 n.17.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 420–21.

<sup>164</sup> *Id.* at 436 (White, J., dissenting).

<sup>165</sup> *Id.*

This was not enough for the majority. Justice Brennan's opinion for the Court held that the statute required "that the defendant [know] his conduct to be unauthorized by statute or regulations."<sup>166</sup> This requirement did not, Brennan added, require the Government to bear "an unduly heavy burden" of proof.<sup>167</sup> The government would not have to prove that Liparota "had knowledge of specific regulations governing food stamp acquisition or possession."<sup>168</sup> All it would have to show is that he "knew that his conduct was unauthorized or illegal."<sup>169</sup> That would be relatively easy on these facts.<sup>170</sup>

Why did the Court majority insist on more culpability than White's requirement of knowledge of the facts composing the actus reus of the offense? Because, it said, "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."<sup>171</sup> There are all sorts of situations, the Court hypothesized, where people in possession of food stamps could unwittingly engage in seemingly unexceptionable behavior that would nonetheless violate the detailed regulations governing their use.<sup>172</sup> There could well be in many such situations an absence, to borrow from Douglas in *Lambert*, of "circumstances that should alert the doer to the consequences of his deed."<sup>173</sup> One could, as Justice White would have had it,<sup>174</sup> rely on prosecutorial discretion to sort out those who deserve to be treated as criminals and those who do not, but the Court refused to rely on executive discretion to avoid what it considered to be potentially "harsh results."<sup>175</sup>

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<sup>166</sup> Id. at 425 (majority opinion).

<sup>167</sup> Id. at 433–34.

<sup>168</sup> Id. at 434.

<sup>169</sup> Id.

<sup>170</sup> See id. at 434 n.17 ("[T]he Government introduced evidence that petitioner bought food stamps at a substantial discount from face value and that he conducted part of the transaction in a back room of his restaurant to avoid the presence of the other patrons. Moreover, the Government asserts that food stamps themselves are stamped 'nontransferable.' A jury could have inferred from this evidence that petitioner knew that his acquisition and possession of the stamps were unauthorized." (citation omitted)).

<sup>171</sup> Id. at 426.

<sup>172</sup> See id. at 426–27.

<sup>173</sup> See supra text accompanying note 51.

<sup>174</sup> See *Liparota*, 471 U.S. at 437 n.3 (White, J., dissenting).

<sup>175</sup> Id. at 427 (majority opinion). This is a feature of *Liparota* that is applauded in the literature. See, e.g., Singer & Husak, supra note 2, at 879, 939; Wiley, supra note 69, at 1058–68.

Others have argued that “*Liparota* may be seen as the first wedge undermining the entire doctrine of *ignorantia legis*.”<sup>176</sup> Such enthusiasm is reminiscent of the way scholars received *Lambert* itself, where it was, as we have seen, premature.<sup>177</sup> So too here. Consider the following situation. Suppose a person engaged in conduct that violated a regulation on food stamp use and admitted knowledge of the regulation. And suppose in defense of a criminal charge the claim was “yes, I knew that I violated a food stamp regulation, but I did not know that it was a crime to do so.” Good defense after *Liparota*? While we cannot prove it, we assume that the answer would be “no” and certainly think it should be “no.”<sup>178</sup> All that *Liparota* requires is that the government prove that the defendant has used food stamps in a manner that is known to be impermissible. Proof of knowledge that it is also a crime is not required.

We think that *Liparota* is not, in other words, an exception to the principle that ignorance of the criminal law is not an excuse. What it requires is the socialization that Virginia Lambert lacked. The prosecution must prove that the defendant used food stamps in an unauthorized manner and that the context actually alerted the user to the unlawfulness of the behavior. As Brennan points out, this would not be hard to prove in Frank Liparota’s case.<sup>179</sup> To paraphrase Christopher, a jury would be unlikely to conclude that Liparota’s conduct was “morally innocent.” As the facts lay, the jury could readily have concluded that he would have had “the warning or notice provided by a sense of wrongdoing that usually attends legally punishable conduct.”<sup>180</sup> Other food stamp users acting in other contexts, Brennan thought, might well not have that level of notice, and their moral signals might well not warn them that they were

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<sup>176</sup> Singer & Husak, *supra* note 2, at 879. Justice White also criticized the *Liparota* Court on the ground that it ignored the background assumption that ignorance of the law is no excuse. See 471 U.S. at 441 (White, J., dissenting). But see *Grace*, *supra* note 69, at 1402–03 (applauding *Liparota*, but criticizing the Supreme Court for explicitly couching the decision as a matter of statutory interpretation with no constitutional implications).

<sup>177</sup> See *supra* note 60 and accompanying text.

<sup>178</sup> Compare this conclusion with our discussion of *Cheek* in note 32, *supra*. *Cheek* requires only that the defendant know of the legal obligation to file a return or pay the tax, not that it is a crime to fail to obey either obligation. *Liparota* requires only that the defendant know of the duty not to use food stamps in particular ways. *Liparota*, 471 U.S. at 433–34. It does not provide a defense—or at least should not—if the defendant knows of the duty but does not know that disobeying it is a crime.

<sup>179</sup> See *supra* note 170.

<sup>180</sup> See *supra* text accompanying note 47.

using food stamps in an unauthorized manner.<sup>181</sup> Leaving that issue to the jury, the Court concluded in the end, was a proper accommodation of fairness to the individual and protection of the public from food stamp fraud.

*b. Bryan v. United States*

*Liparota* involved positive conduct. The defendant made an illegal purchase of food stamps. Although it involved an omission and a different culpability term, we think *Bryan v. United States*<sup>182</sup> is a near perfect parallel to *Liparota*. It also bears some analytical similarity to *Lambert*, although the result was different because the context was different and the finder of fact was charged with a different task. The *Bryan* defendant failed to take action in the face of a legal duty to act. But the jury found, as would be required for a conviction under the *Liparota* statute, that the defendant knew perfectly well that he was acting in violation of the law.

The issue in *Bryan* was the mens rea required by a statute that punished “willfully” engaging in the business of dealing in firearms without a federal license.<sup>183</sup> The defendant, Sillasse Bryan, was not a traditional firearms dealer. He used straw purchasers to make false statements in the course of buying pistols in Ohio, and then resold them on Brooklyn street corners known for drug trafficking after filing off the serial numbers.<sup>184</sup> Two constructions of “willfully” were on the table. The defendant sought an interpretation that would require proof that he had knowledge of the duty to obtain a license.<sup>185</sup> In effect he wanted to read “willfully” as requiring knowledge of one of the actus reus elements of the offense—the failure to have a license. The alternative position, which was accepted by the majority of the Supreme Court, was that proof that the defendant had acted with “knowledge that the conduct [was] unlawful” was enough.<sup>186</sup> It was not required that the defendant

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<sup>181</sup> See *Liparota*, 471 U.S. at 426–27.

<sup>182</sup> 524 U.S. 184 (1998).

<sup>183</sup> *Id.* at 186. One section of the federal code, 18 U.S.C. § 922(a)(1)(A) (2012), established the duty to obtain a license when “engage[d] in the business” of dealing in firearms. Another section, 18 U.S.C. § 924(a)(1)(D) (2012), provided criminal punishment for one who “willfully” violated this requirement.

<sup>184</sup> *Bryan*, 524 U.S. at 189.

<sup>185</sup> *Id.* at 190.

<sup>186</sup> *Id.* at 196.

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know he was required to obtain a license or that he did not have the required license.

Like Lambert, Bryan was engaged in ordinary behavior—standing on a street corner, selling goods, running a business—but he did so in a context that gave rise to a duty to obtain a federal license. His claim was that he was unaware of this requirement, and that this should be a defense.<sup>187</sup> The majority opinion by Justice Stevens rejected the claim, quoting with approval the jury instructions on the “willfulness” requirement:

A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.<sup>188</sup>

The effect of this instruction was to ask the jury to perform essentially the same function that was required by *Liparota* for prosecutions under the food stamp statute. Bryan had a duty to obtain a federal license before engaging in his business of selling guns. He claimed not to know this, and the Court said it didn’t matter. Strict liability was imposed on this issue.<sup>189</sup> But the additional instruction put the socialization issue directly to the jury. It was required to find as a matter of fact that Bryan

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<sup>187</sup> See *id.* at 189–90.

<sup>188</sup> *Id.* at 190.

<sup>189</sup> A different portion of the instructions, also quoted with approval by the majority, made this explicit. See *id.* at 199 (“In this case, the government is not required to prove that the defendant knew that a license was required, nor is the government required to prove that he had knowledge that he was breaking the law . . . that required a license.”). While the final four words of the instruction (“that required a license”) were not actually given to the jury, the Court held for reasons that are not relevant here that the omission did not matter in Bryan’s case. *Id.* at 199–200.

There is a good argument that strict liability on this element would have been acceptable on the *Bryan* facts even without the additional mens rea required by the *Bryan* Court. By analogy to *International Minerals* and *Freed*, one could take the position that the context itself—selling weapons that had been obtained by false pretenses with their serial numbers filed off—contained sufficient warning of illegality. See Bonnie et al., *supra* note 74, at 337–38. But requiring the instruction approved in *Bryan* will assure that fair socialization notice exists in all future applications of the statute, some of which may occur in contexts that are not so blatantly illegal. This of course was the Court’s concern in *Liparota*, which also involved blatant illegality on its facts and, as such, a case where it would not be hard for the jury to make the finding required by both cases. As we say above, the same instruction would also have satisfied Posner’s concerns in *Wilson*. See *supra* note 103.

knew he should not have been doing what he did. On the facts as they lay, it should not have been hard for the jury to reach this conclusion.

The two portions of the *Bryan* instruction taken together make *Bryan* the substantial equivalent of *Liparota*.<sup>190</sup> The jury is asked to conclude that, in context, the defendant acted, again to paraphrase Douglas in *Lambert*, under circumstances that alerted him to the consequences of his deed.<sup>191</sup> The defendant must have known at the time that the behavior was illegal in some general sense, but need not have known either precisely why or that it was a crime. The jury must believe that the defendant was in fact socialized to know better.<sup>192</sup>

#### IV. SOCIALIZATION AS A FREESTANDING CONSTITUTIONAL PRINCIPLE

The thrust of Part III was to show that the socialization principle is a serious component of everyday criminal law, both in theory and in practice. Sometimes the required judgment is made in the abstract as a matter of law—defendants are assumed to be socialized to a certain level simply by living in our culture, and it matters not that in individual cases they might not be. In a few cases like *Liparota* and *Bryan*, the jury is actually asked whether the particular defendant understood the illegality of the charged behavior. The question to which we now turn is whether this deeply embedded principle ought to be regarded simply as one among the many policies that determine culpability levels in the criminal law or

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<sup>190</sup> Both impose strict liability on an element of the offense—see supra note 116—and both approve essentially the same instruction.

<sup>191</sup> See supra text accompanying note 51.

<sup>192</sup> Again we would ask, compare this assertion with the text accompanying notes 176–78: Suppose *Bryan* knew that federal law required him to obtain a license before going into the business of selling firearms, but claimed not to know that the failure to do so was a crime. Is it likely that this would be a defense? We think not. *Bryan*, like *Liparota* and *Cheek*, is not an exception to the principle that ignorance of the criminal law is not an excuse.

Although he wanted to read *Lambert* as establishing a more pervasive constitutional limitation than has emerged, Professor Stuntz saw the point:

[T]he kind of notice that matters is functional, not formal; the question is not whether the defendant knew he was violating this particular statute, but rather whether the defendant knew that his behavior was, in some more general sense, out of line. . . .

. . . .

*Bryan* amounts to a requirement that the government prove functional notice where notice is not inherent in the crime charged. This is no more, and no less, than a faithful application of *Lambert*.

Stuntz, supra note 3, at 590.

whether it should be regarded as a freestanding constitutional principle that gives it the special weight which that status would require.

Given the pervasiveness of the socialization principle in everyday criminal law, we find it remarkable that *Lambert* is not prominently featured in any of the decisions we have reviewed above. Judge Posner did bring it into play in *United States v. Wilson*, to be sure, but the majority in that case thought it irrelevant.<sup>193</sup> And almost all of the Supreme Court cases discussed in the preceding section ignored *Lambert* completely.<sup>194</sup> In none of them was it cited for a proposition that mattered.

It is a commonplace canon of construction that, where fairly possible consistent with their text, statutes should be read to avoid potentially serious constitutional problems.<sup>195</sup> But there is no Supreme Court decision of which we are aware that has brought *Lambert* into this kind of service on a statutory construction issue involving the appropriate level of fault in a criminal case. It must be, therefore, that *Lambert* is not widely perceived, at least by the Supreme Court, as stating a broadly applicable socialization principle that places a heavy constitutional thumb on the scale of everyday mens rea interpretations in the criminal law.<sup>196</sup>

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<sup>193</sup> See supra note 101.

<sup>194</sup> *United States v. Freed* is the exception. Cryptically, Douglas said there:

Being in Los Angeles is not *per se* blameworthy. The mere failure to register, we held, was quite “unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed.” The fact that the ordinance was a convenient law enforcement technique did not save it.

401 U.S. 601, 608 (1971) (citation omitted) (quoting *Lambert*, 355 U.S. at 228). Brennan’s opinion also cited *Lambert* in a footnote, but not in a manner that is relevant here. See *id.* at 613 n.4 (Brennan, J., concurring). Justice Stewart also mentioned *Lambert* in passing in his opinion in *United States v. International Minerals & Chemical Corp.*, but the citation did no useful work. See 402 U.S. 558, 565 (1971) (Stewart, J., dissenting).

<sup>195</sup> See Frederick Schauer, *Ashwander Revisited*, 1995 Sup. Ct. Rev. 71, 72 (“[N]one [of Justice Brandeis’s *Ashwander* principles] has been as important as the one directing courts to construe a statute to avoid reaching a constitutional question if such a construction is at all possible.”). For a recent application of this principle in the federal criminal law context, see *Skilling v. United States*, 561 U.S. 358, 402–04 (2010). Justice Scalia’s dissent in *Skilling* disagreed with the Court’s application of the principle, though not its existence. He thought that the Court’s saving construction was unsupported by the statutory text. It was “not interpretation but invention.” *Id.* at 422 (Scalia, J., dissenting).

<sup>196</sup> See Michaels, supra note 66, at 859–60 (arguing that the Court’s cases “strongly suggest that probability of knowledge of the law is not constitutionally mandated”). The Supreme Court’s use of the case in other contexts provides further support. Most pointedly, in *Texaco v. Short*, the Court wrote that *Lambert*’s “application has been limited, lending some credence to Justice Frankfurter’s colorful prediction.” 454 U.S. 516, 537–38 n.33 (1982). Equally revealing, the Court has also cited it not for its fair notice holding, but for its dictum

So the socialization idea underlying *Lambert* seems not to be generally regarded as stating a constitutional minimum applicable to all crimes. If it were, one would have thought that Brennan in *Liparota* and Stewart in *International Minerals* would have called on *Lambert* to reinforce their arguments that their mens rea conclusions were necessary in order to avoid entrapping innocent people in the statutory webs involved in those cases. The possibility that ordinary citizens would innocently use food stamps in a manner that offended a technical regulation was so great, Brennan thought, that the jury should be instructed that it must make a finding of actual awareness of potential illegality before it can convict. Same with the shipment of corrosive liquids, said Stewart in his *International Minerals* dissent. Yet neither of them relied on *Lambert* as stating a constitutional socialization limit that supported the construction they favored. We turn now to some of the reasons why we think they were right not to do so.

#### A. The Insanity Defense

We have the insanity defense in mind as a testing example of the issues we mean to raise, both because it nicely illustrates our concerns and because there is an important open question about its required scope that may well be headed to the Supreme Court before too long. That question, in brief, is whether some version of the “right-wrong” branch of the *M’Naghten* formula is constitutionally required. Some background is necessary before we turn to why the resolution of that question is relevant to our present topic.

The national outrage that followed John Hinckley’s acquittal in his 1981 trial for attempting to assassinate President Reagan led to substantial reforms of the insanity defense.<sup>197</sup> When the dust settled, five states had abolished insanity as a separate defense. The Supreme Court of Nevada later held its abolition statute unconstitutional.<sup>198</sup> The supreme

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that ignorance of the law is generally no excuse. See *Cheek v. United States*, 498 U.S. 192, 199 (1991).

The Court has used constitutional leverage as an aid to statutory construction as justification for a version of the socialization principle, but in the example we have in mind, it was free speech that provided the justification, not fair notice in the abstract. See *supra* note 150 (discussing *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)).

<sup>197</sup> See Richard J. Bonnie et al., *A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr.* 121–38 (3d ed. 2008).

<sup>198</sup> *Finger v. State*, 27 P.3d 66, 84 (Nev. 2001), cert. denied, 534 U.S. 1063 (2002).

courts in the other four states—Idaho, Kansas, Montana, and Utah—upheld their abolition statutes against constitutional attack.<sup>199</sup> These states do admit psychiatric evidence on mens rea issues. What they have abolished is the separate affirmative defense of insanity.

The insanity defense, so far as is now relevant, has over the years consisted of one or another combination of three different ideas. The *M’Naghten* rules embraced two of them: that as a result of mental disease the defendant lacked the capacity to know the “nature and quality of the act he was doing” or that “he was doing what was wrong.”<sup>200</sup> The third idea, often captured in the phrase “irresistible impulse,” is based on the inability of defendants to control behavior. It provides an insanity defense, in one well-known formulation, if the defendant, as a result of mental disease, has lost “the power to choose.”<sup>201</sup>

The Supreme Court held long ago that the irresistible impulse part of the defense is not constitutionally required.<sup>202</sup> One of the issues in the most recent Supreme Court consideration of the relevance of mental disease to defense of a criminal case, *Clark v. Arizona*, was whether the first branch of *M’Naghten*—the nature and quality of the act inquiry—was constitutionally required.<sup>203</sup> The Court answered “no.” The states and the federal government are therefore free to make their own independent policy decisions on whether to allow a defense based on either of these two inquiries.<sup>204</sup> Unanswered by *Clark* or any other Supreme

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<sup>199</sup> *State v. Delling*, 267 P.3d 709 (Idaho 2011), cert. denied, 133 S. Ct. 504 (2012); *State v. Searcy*, 798 P.2d 914 (Idaho 1990); *State v. Bethel*, 66 P.3d 840 (Kan. 2003), cert. denied, 540 U.S. 1006 (2003); *State v. Cowan*, 861 P.2d 884 (Mont. 1993), cert. denied, 511 U.S. 1005 (1994); *State v. Korell*, 690 P.2d 992 (Mont. 1984); *State v. Lafferty*, 20 P.3d 342 (Utah 2001); *State v. Herrera*, 895 P.2d 359 (Utah 1995). See also *People v. Skinner*, 704 P.2d 752, 757 (Cal. 1985) (“[T]he suggestion that a defendant whose mental illness results in inability to appreciate that his act is wrongful could be punished by death or imprisonment raises serious questions of constitutional dimension under both the due process and cruel and unusual punishment provisions of the Constitution.”).

<sup>200</sup> See *Bonnie et al.*, supra note 197, at 11.

<sup>201</sup> See *Parsons v. State*, 2 So. 854, 866 (Ala. 1887). The description in this paragraph is based on the introduction on the history of the insanity defense in *Bonnie et al.*, supra note 197, at 8–21.

<sup>202</sup> *Leland v. Oregon*, 343 U.S. 790, 801 (1952). This holding was reaffirmed in dicta in *Clark v. Arizona*, 548 U.S. 735, 753 (2006).

<sup>203</sup> 548 U.S. at 753.

<sup>204</sup> It does need to be said that both *Leland* and *Clark* reached their conclusions in a context where the state recognized *some* version of the insanity defense. It may well be that the Court will regard the constitutional question differently if the state provides *no* version of the defense. That possibility does not, however, affect the points we wish to make about *Lambert*’s potential relevance to the constitutional debate.

Court decision is whether the Constitution is offended by not permitting defendants to assert the “right-wrong” branch of the insanity defense.<sup>205</sup> This was the issue in *State v. Delling*, in which the Supreme Court of Idaho upheld abolition of the defense.<sup>206</sup>

The United States Supreme Court denied certiorari in *Delling* in November of 2012.<sup>207</sup> It was urged to grant the petition and to hold that the defense enjoyed constitutional status by an unusual array of highly credentialed lawyers and amici. The petition was written by professors and students from the Stanford Supreme Court Litigation Clinic, and amicus briefs in support were written by expert law professors on behalf of fifty-two of their colleagues. The American Psychiatric Association also weighed in on behalf of the petitioner, joined by a collection of defense lawyer groups from the four affected states and a group called the Constitutional Accountability Center.<sup>208</sup> Taken together with the response and the answer by the petitioner to the response, that made seven different written submissions addressing one or another aspect of why the Supreme Court should or should not grant certiorari and why the Constitution does or does not require a separate “right-wrong” version of the insanity defense. There was not one single citation in any of these documents to *Lambert*. Nor was there a relevant citation to *Lambert* in any of the state supreme court decisions dealing with the issue.<sup>209</sup>

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<sup>205</sup> See *Clark*, 548 U.S. at 752 n.20. Some Justices have spoken to the question. See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting) (“States are free to recognize and define the insanity defense as they see fit.”); *Ake v. Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting) (“It is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant . . .”).

<sup>206</sup> 267 P.3d 709 (Idaho 2011).

<sup>207</sup> *Delling v. Idaho*, 133 S. Ct. 504 (2012). Joined by Justices Ginsburg and Sotomayor, Justice Breyer dissented. Breyer illustrated by hypothetical the type of defendant who would be denied a defense under the Idaho law, referred to American Psychiatric Association and law professor amicus briefs, and concluded: “I would grant the petition for certiorari to consider whether Idaho’s modification of the insanity defense is consistent with the Fourteenth Amendment’s Due Process Clause.” *Id.* at 506.

<sup>208</sup> See Petition for Writ of Certiorari, *Delling*, 133 S. Ct. 504 (No. 11-1515); Brief of American Psychiatric Association and American Academy of Psychiatry and the Law as Amici Curiae, *Delling*, 133 S. Ct. 504 (No. 11-1515); Brief of Amicus Curiae of Constitutional Accountability Center, *Delling*, 133 S. Ct. 504 (No. 11-1515); Brief of Amici Curiae 52 Criminal Law and Mental Health Law Professors, *Delling*, 133 S. Ct. 504 (No. 11-1515); Brief of Amici Curiae the Idaho Association of Criminal Defense Lawyers, et al., *Delling*, 133 S. Ct. 504 (No. 11-1515).

<sup>209</sup> It was not mentioned at all in the California, Idaho, Kansas, or Montana cases cited *supra* note 199. In Utah, *Lambert* was cited in one of the *State v. Herrera* dissents as secondary authority for the proposition that “[p]unishment cannot be inflicted on the basis of a physical

Should *Lambert* have been cited? Consider the following logic. An important part of the theory of the criminal law is that people are punished for making bad choices. People have made a bad choice when they cross a moral barrier by engaging in behavior that society has defined as a crime. It is standard lore that ignorance or mistake of the criminal law is not a defense to a criminal charge. It is not a defense if the defendant claims to be unaware of the moral barrier that has been breached.

As we say above,<sup>210</sup> this form of strict liability is generally regarded as fair because, most of the time at least, the actus reus-mens rea combinations punished by the criminal law will send moral warning signals of potential criminality to the average citizen. Ordinarily, strict liability on whether given conduct is a crime is acceptable—and consistent with the idea that the criminal law is punishing bad choices—because the socialization principle has been respected. People will know, or at least should know, that they should not have done what they did.

Assume now that *Lambert* means that this socialization principle is a freestanding due process requirement. Combinations of behavior and intent can be punished as criminal only if they emit moral warning signals to the average citizen. Virginia Lambert's conviction was unconstitutional because all of her positive behavior was morally innocuous, whether she knew of the obligation to register was irrelevant under state law, and the Court thought the average citizen—even the average convicted felon—would not have guessed that registration with the police was required.

If this is the meaning of *Lambert*, we think it could be taken to follow that the right-wrong branch of *M'Naghten* is constitutionally required. A person who lacks the capacity to understand the morality<sup>211</sup> of behavior underlying a criminal prosecution cannot possibly be socialized not to do it. If the Due Process Clause requires that the criminal law give potential offenders moral signals that provide them a fair opportunity not to commit the crime in question, the argument would go, then it would offend due process to convict a defendant who was incapacitated by

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or mental condition of a person.” 895 P.2d 359, 386 (Utah 1995) (Stewart, J., dissenting). The dissent in *Finger v. State*, the Nevada case that held that an insanity defense is constitutionally required, also referenced *Lambert* in passing, but only for the proposition that there is no general constitutional bar on strict liability crimes. See 27 P.3d 66, 89–90 (Nev. 2001) (Shearing, J., dissenting).

<sup>210</sup> See supra text accompanying note 95.

<sup>211</sup> Or legality—that debate does not matter for present purposes. See Bonnie et al., supra note 197, at 12–13.

mental disease from receiving those signals. Fair warning is meaningless if the defendant is unable to comprehend the warning. The defendant who is insane under the right-wrong branch of *M'Naghten* by definition does not have a fair opportunity not to become a criminal if the ability to defend on this ground is denied. The moral signals that are required by the Constitution to be sent, as we say, cannot be received.

Were the Court to follow this logic and hold that the right-wrong branch of the insanity defense was constitutionally required, a virtual Pandora's box would be opened. None of the submissions urging the Court to grant certiorari in *Delling* and constitutionalize the right-wrong branch of the insanity defense addressed how the holding would be implemented. All they did was urge the Court to decide that some version of the defense should be required by the Constitution. What the required content of the defense would be was left unsaid, as well as other implications that might follow from the holding.

Holding that the Constitution required a "right-wrong" insanity defense could hardly be the end of the matter. It could be, and at least to some extent would have to be, a first step that has the potential to lead the Supreme Court to additional questions that might require a constitutional answer.

It is well accepted, for example, that the burden of persuasion on the insanity defense can be placed on the defendant, often today by a standard as demanding as "clear and convincing."<sup>212</sup> If it violates the Constitution to punish a person as a criminal for whom the difference between right and wrong is indistinguishable because of mental incapacity, would it nonetheless be constitutional to make that person prove such incapacity? Might the capacity to draw moral lines—the ability to be socialized—be regarded as so fundamental that it is a constitutionally required

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<sup>212</sup> The Supreme Court upheld the constitutionality of an even more onerous standard in *Leland v. Oregon*, 343 U.S. 790, 798–99 (1952) (upholding state rule that defendant must prove insanity beyond a reasonable doubt); see also *Clark v. Arizona*, 548 U.S. 735, 769, 771 (2006) ("[A] jurisdiction may place the burden of persuasion on a defendant to prove insanity as the applicable law defines it, whether by a preponderance of the evidence or to some more convincing degree."). The current federal insanity defense requires the defendant to bear the burden of persuasion by "clear and convincing evidence," 18 U.S.C. § 17(b) (2012), as did the Arizona law at issue in *Clark*.

The burden was placed on the defendant by the original *M'Naghten* decision, and most states continued that practice in the early days of the Republic. See *Leland*, 343 U.S. at 796. Today, two-thirds of the states put the burden on the defendant, usually by a preponderance of the evidence. Bonnie et al., *supra* note 197, at 133.

“element” of every offense that the prosecutor must prove beyond a reasonable doubt?<sup>213</sup>

And take it another step. Establishing the existence of a qualifying “mental disease” is a threshold requirement for assertion of the insanity defense under any formula. One of the major debates in determining the content of the defense is what kinds of mental diseases count.<sup>214</sup> Is resolution of debate about the kinds of mental diseases that can be used for this purpose to be fodder for the Supreme Court to determine as a matter of constitutional law? If the gateway to the insanity defense is too narrow, the contention would be, a constitutionally required defense could easily be undermined.

There is, in short, a serious slippery slope here. If *Lambert* stands for a freestanding constitutionally required socialization principle, it could be taken to follow that the right-wrong branch of *M’Naghten* is constitutionally required, which in turn could mean that the prosecutor must prove capacity to make right-wrong judgments beyond a reasonable doubt and could also mean that the Supreme Court must decide what kinds of diseases can be used for this purpose. And so on. This is quite a mouthful. The socialization principle standing by itself offers no limiting principle that would help the Court decide how far down the track this train must run.<sup>215</sup>

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<sup>213</sup> See the *Mullaney-Patterson* debate. *Patterson v. New York*, 432 U.S. 197, 215 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). The clear principle that emerges from these two decisions is that, once a given factor is an element of an offense, the prosecutor must prove it beyond a reasonable doubt. This, of course, is also the teaching of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny.

<sup>214</sup> See Bonnie et al., *supra* note 197, at 20–21.

<sup>215</sup> We do not mean to be making a complete argument against a constitutionally compelled right-wrong branch of the insanity defense, nor even to tip our hand as to how we might come out on that question. It may be that arguments of the sort made in the *Delling* certiorari papers—basically they advanced a due process fundamental fairness claim and a cruel and unusual punishment claim—can be sorted out in ways that limit the intrusion of the Constitution into the interstices of the insanity defense. No doubt historical practice would play a strong role in however the Court might choose to limit such a decision. But if the Court holds the right-wrong test to be constitutionally required, whatever argument turns out to be successful will in any event have to address the slippery slope issue. Thinking about the issue through the prism of a *Lambert*-based socialization principle, for us at least, does not lead to a logical stopping point.

As we say above, the certiorari papers in *Delling* are conspicuously silent on this topic. The scholarly literature is highly critical of the abolition of the defense, and most authors argue it is unconstitutional. For a sampling, see Elizabeth Bennion, *Death Is Different No Longer: Abolishing the Insanity Defense Is Cruel and Unusual Under Graham v. Florida*, 61 *DePaul L. Rev.* 1 (2011); Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of*

*B. Institutional Competence*

One way to stop the train, of course, is not to let it start. Serious questions of manageability and institutional competence would be introduced if the socialization principle were to become a constitutional command. To see this, think with us about exactly how a constitutionally required socialization principle would be implemented and what its content would be. Who would make the judgments and what judgments would be required?

As it now stands, the socialization judgment is usually made by some combination of legislative and judicial action, and more commonly than one might think is left explicitly to the jury. The default is the legislature. When the law punishes murder as the premeditated killing of another person without justification or excuse, no one asks whether the moral signals of the ordinary citizen provide fair notice of potential criminality. The legislature makes this decision when it defines the offense, and the principle that ignorance of the criminal law is no defense quite rightly disposes of the socialization issue with finality. This will be the case with most crimes, at least the more serious ones. Most crimes are screamingly immoral, and no one gives a second thought to whether defendants will be socialized to know that the criminal law might be in play.

The discussion in Part III above provides a number of illustrations where courts have made the socialization judgment. Courts did so historically when they developed the common law mistake-of-fact defense and when they decided, in the absence of guidance from the legislature, that strict liability was often appropriate for grading elements and in cases like statutory rape. But even in this “age of statutes,”<sup>216</sup> the Supreme Court continues to make the socialization judgment, as when it interpreted the National Firearms Act to require strict liability in *Freed* and when it decided not to add mens rea components to the Armed Career Criminal Act provisions involved in *Dean*.

*Liparota* and *Bryan* provide examples of leaving the issue to the jury. Those cases ask the jury to determine whether the defendant was actual-

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the Mens Rea Model: Due Process and the Abolition of the Insanity Defense, 28 Pace L. Rev. 455 (2008); Stephen M. LeBlanc, Comment, Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense, 56 Am. U. L. Rev. 1281 (2007).

<sup>216</sup> See Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

ly aware that the behavior being prosecuted was unlawful. More subtly, the socialization issue is left to the jury when recklessness or negligence is adopted as the standard for a given element of a crime, at least as those concepts are set forth in the Model Penal Code. For recklessness, the jury is asked to decide whether ignoring a known risk is a “gross deviation from the standard of conduct that a law-abiding person would observe” in the context as known to the actor.<sup>217</sup> For any element to which this standard applies, the jury is asked to decide, in other words, whether—given what was known and understood about the context—the actor should have known better; that is, should have been socialized to know not to take the risk. The same holds for jury determinations of negligence. In that case, the jury is asked to decide whether, given what was actually known about the context, the defendant should have known about the risk and whether the failure to appreciate the risk was a “gross deviation from the standard of care that a reasonable person” would have observed.<sup>218</sup> Again, the jury is asked to decide whether the average person would have been socialized to know better.<sup>219</sup>

If *Lambert* is taken to incorporate a socialization principle as a constitutional minimum, how does this conclusion intersect with these practices? Does the Supreme Court need to decide as a constitutional matter whether and when it is appropriate for the legislature to make the socialization judgment? Suppose a state court held that public protection concerns required strict liability for a given offense and that the context provided adequate socialization. Would this present a federal question open to review by the Supreme Court? By the federal district courts on federal habeas corpus?<sup>220</sup> Should the Court require that the socialization

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<sup>217</sup> Model Penal Code § 2.02(2)(c).

<sup>218</sup> *Id.* § 2.02(2)(d).

<sup>219</sup> Analytically, this situation is often a bit more complicated. If negligent homicide is the question, then the jury is essentially making the socialization judgment when it determines that the homicidal act was negligent. The jury will have decided that the defendant violated a community standard of care and should have known not to act in the manner the evidence proves. If the jury decides that a mistake of fact was negligently made, on the other hand, it has determined only that the defendant should have known the facts as they actually were. At that point the “ignorance of the law” principle kicks in. Normally, the judgment will then have been made as a matter of law that a person who should have known the facts in that context should also have been socialized not to do it.

<sup>220</sup> With respect to habeas, it would be hard to conclude that resolution of a federal question in such cases would not be “substantive” rather than “procedural,” which would make decisions that establish a “new rule” retroactively applicable to convictions that became final before the decision was made. See *Schriro v. Summerlin*, 542 U.S. 348, 351, 353 (2004)

judgment be given to the jury in some or all cases?<sup>221</sup> And if only some, does the Supreme Court decide which ones as a matter of constitutional law?

Superimpose on top of this difficulty questions about exactly what it means for an offense to fail to give socialization warning. There is a frothy range of possibilities. Is it enough if most people would know that the proscribed behavior is immoral? If most would know that, if not immoral, it nonetheless violates some regulation or other non-criminal law? If most would know that it violates a criminal prohibition? That it is likely to be the subject of government regulation? That it is arguably immoral in some quarters? Or likely to be regarded as immoral by a significant segment of society? Or by a majority? Suppose the activity involved is regarded as morally acceptable (or morally compelled) by the subculture in which the defendant was raised. Should that matter? Should it matter whether the defendant had a fair opportunity by way of background and training to be exposed to the moral principle adopted by the relevant criminal law? Should it matter if the relevant moral norms are in flux? That most people would think that the conduct, though widely viewed as immoral, would not be punishable by criminal sanctions? And, perhaps most importantly, how is a court supposed to find out whether the relevant criteria, whatever they may be, are satisfied? By what empirical process—as a matter of constitutional law, remember—does the Supreme Court—if it is to have the final say—resolve the answer to whichever ones of these questions are controlling?

The socialization idea is important and manageable when it is one factor among many in policy decisions that sort out proper levels of culpability, to be given whatever weight the context suggests when balanced against the many other goals, some competing, some complementary, of the criminal law. This is how socialization is handled today. But serious questions of manageability and institutional competence are introduced when the socialization principle becomes a constitutional command. The slippery slope problem, the content of the judgment, who would make it, and how the relevant questions are to be answered raise impossibly difficult questions when elevated to a constitutional plateau.

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(“New *substantive* rules generally apply retroactively. . . . A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.”).

<sup>221</sup> For an argument that the socialization judgment should routinely be given to the jury, see Susan L. Pilcher, Ignorance, Discretion and the Fairness of Notice: Confronting “Apparent Innocence” in the Criminal Law, 33 Am. Crim. L. Rev. 1, 50–51 (1995).

These questions are easily avoided if *Lambert* is not read to establish a freestanding constitutionally required socialization principle. We think it hard to make the case for superimposing an additional layer of constitutional protection on issues that arise in the criminal law every day when, as we think it is, the system is taking the underlying concerns into account pretty well as things stand.<sup>222</sup>

The Court faced exactly this problem in *Powell v. Texas*.<sup>223</sup> The issue in *Powell* was whether a chronic alcoholic could be convicted for being drunk in public. In traditional doctrinal terms, the question was how much of the “voluntary act” requirement,<sup>224</sup> if any, was embedded in the Constitution. The claim was that Powell’s drinking and his appearance in public while drunk involved acts that were beyond his control because of his disease.

The logic of Powell’s claim was compelling. *Robinson v. California*<sup>225</sup> had held at least that the Constitution required that punishment be based on conduct, not status.<sup>226</sup> The rationale for this requirement must at least in part be based on the idea that people can control their behavior in ways that they cannot control their status, and that it is constitutionally unfair to punish people based on conditions they cannot change. It is then a small leap to the conclusion that people cannot constitutionally be punished if they have no control over their behavior—whether for physical reasons (for example, an epileptic seizure), addiction reasons (alcoholism), or mental disease (irresistible impulse). The criminal law punishes people whose bad choices result in conduct that deeply offends community standards. People who have no control over their conduct

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<sup>222</sup> Cf. Michaels, *supra* note 66, at 882 (“The Supreme Court has been extremely reluctant to develop substantive due process rules governing what may be considered constitutionally proper objects of punishment. The Court has repeatedly and emphatically stated that deciding what is criminal is the right of the legislatures, particularly the state legislatures, in the first instance.” (footnotes omitted)).

<sup>223</sup> 392 U.S. 514 (1968).

<sup>224</sup> Section 2.01(1) of the Model Penal Code states the traditional requirement: “A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act . . . .” Section 2.01(2) gives several examples of involuntary acts, and concludes with a generic definition: “a bodily movement that . . . is not a product of the effort or determination of the actor, either conscious or habitual.”

<sup>225</sup> 370 U.S. 660 (1962).

<sup>226</sup> The Court was unanimous in *Powell* that *Robinson* meant at least this much. The question that divided the Justices was whether it meant more.

have not made a bad choice because their behavior does not involve “choosing” at all.<sup>227</sup>

Surprisingly, at least to us, the theory underlying this claim appeared to get five votes.<sup>228</sup> Justice Fortas wrote in dissent<sup>229</sup> that Powell’s conviction offended the principle, “narrow in scope and applicability,”<sup>230</sup> that “[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.”<sup>231</sup> Justice White basically said that he was willing to accept Powell’s claim insofar as it involved an inability to control behavior as a result of chronic disease. But he saw no evidence that Powell could not control the “in public” aspect of his conviction. Powell had a home and a job, and could well have chosen to do his drinking in private.<sup>232</sup>

What interests us now about this case, though, is the position taken by the other four Justices.<sup>233</sup> Black’s argument, essentially, was that Powell’s claim could not be accepted without starting down a slippery slope that the Court was institutionally incapable of handling. Monitoring such decisions at the constitutional level would exceed both the Court’s competence and its capacity. Black could see no limiting principle that would distinguish Powell’s claim, for example, from a claim that the “irresistible impulse” branch of the insanity defense was constitutionally required<sup>234</sup> or, even more broadly, the claim that the Constitution made it unacceptable “to punish a person who is not morally blameworthy.”<sup>235</sup>

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<sup>227</sup> For elaboration of a similar argument, see Dubin, *supra* note 16, at 387–90. Dubin begins with the observation that “[t]he *Robinson* decision can easily be extended to cover all cases of alleged loss of capacity,” *id.* at 387, and continues to explore the constitutional status of the insanity defense.

<sup>228</sup> Although five Justices bought into the idea that the Constitution embraced at least some kind of “voluntary choice” requirement, that idea has gone nowhere. There is no subsequent Supreme Court case that embraces or extends this theory. For an interesting and elaborate discussion of the long-term meaning of *Robinson*, see Luna, *supra* note 16.

<sup>229</sup> He was joined by Justices Douglas, Brennan, and Stewart.

<sup>230</sup> *Powell*, 392 U.S. at 569 (Fortas, J., dissenting). He offered no explanation for why his principle was “narrow in scope and applicability,” nor how this limitation could be derived from a constitutionally based rationale.

<sup>231</sup> *Id.* at 567.

<sup>232</sup> See *id.* at 548–54 (White, J., dissenting).

<sup>233</sup> Justice Marshall announced the result and wrote for a plurality of four—himself, Chief Justice Warren, and Justices Black and Harlan. Justice Black wrote separately for himself and Justice Harlan.

<sup>234</sup> The Court has shown no inclination to revisit its 1952 decision that the “irresistible impulse” formula was not constitutionally required. See *supra* note 202 and accompanying text.

<sup>235</sup> *Powell*, 392 U.S. at 544 (Black, J., concurring). In a similar vein, Justice Marshall said for the plurality: “[I]t is difficult to see any limiting principle that would serve to prevent this

Undertaking these inquiries as a matter of constitutional law, Black argued, would interfere with the legislative prerogative to make the inevitably necessary compromises between personal responsibility and public protection involved in defining crimes and defenses. As Marshall added, “[t]raditional common-law concepts of personal accountability and essential considerations of federalism”<sup>236</sup> required the Court to reject Powell’s claim:

The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms.<sup>237</sup>

The consequences of reading *Lambert* to establish a general constitutional principle requiring adequate socialization seem to us equally troublesome. Not only could it lead to constitutionalizing a portion of the insanity defense as we describe above, but all sorts of mens rea and strict liability issues could potentially come under constitutional scrutiny. We offer a different interpretation of *Lambert* below, one that we think is an accurate characterization of why the Court intervened in that case. Our reading of *Lambert* also offers the advantage of completely avoiding the constitutional thicket described above.

#### V. LAMBERT AS A QUASI-VAGUENESS CASE

We think the factors that controlled the outcome in *Lambert* bear a significant relationship to the factors that control decisions that apply the vagueness doctrine. But we need to be clear at the outset about one important point. We do not claim that the case is in any sense a literal application of the vagueness doctrine. Whatever “vagueness” means as a

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Court from becoming . . . the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.” *Id.* at 533 (plurality opinion). Marshall later said that the Court should resist embarking on an enterprise that could only lead to “a constitutional doctrine of criminal responsibility.” *Id.* at 534.

<sup>236</sup> *Id.* at 535.

<sup>237</sup> *Id.* at 536.

constitutional limit on lawmaking, it plainly has something to do with defects in the manner in which the statutory text describes the punishable conduct.<sup>238</sup> The open-endedness of the words of a statute held unconstitutional for vagueness creates the problem, and fixing the words—making the conduct covered by the statute more predictable and more precise—cures it.

*Lambert* cannot be seen as a literal application of the vagueness doctrine because there was nothing about the text of the Los Angeles ordinance under which Virginia Lambert was convicted that made it even remotely subject to a vagueness analysis. The behavior to which it applied was described in language that was definite and precise. Its wording was as clear as most criminal statutes. Describing the covered conduct more clearly would not have fixed the problem that concerned the Court. The ordinance plainly required Lambert to register as a convicted felon and, as construed by the California courts,<sup>239</sup> it plainly carried no mens rea that would make lack of awareness of the duty to register a defense. Whatever the *Lambert* problem was, it was not about imprecision, open-endedness, unpredictability of coverage, or lack of clarity in the meaning of the words used by the City of Los Angeles and the California courts to define the components of the crime on which her conviction was based. The way to fix the Court's concern was to add a substantive mens rea requirement of some sort—negligence with respect to the duty to register probably would have done it. That is a substantive addition, not a clarification of the actus reus and mens rea that were already plainly included in the offense.

We do not mean to suggest that substantive fixes cannot cure vagueness. The inclusion of new substantive elements in an offense can “cure” a vagueness problem by narrowing the range of behavior punishable by the statute and making its reach more predictable and more understanda-

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<sup>238</sup> See, e.g., *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”); see also Anthony G. Amsterdam, Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 88 (1960) (“Certainly a precondition to the Court’s accepting an argument of uncertainty seems to be that the statute is in fact more uncertain . . . than the mine run of statutes.”).

<sup>239</sup> It is hornbook law, of course, that the vagueness doctrine tests not only the text of a statute but the text as construed. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 355–56 (1983).

ble.<sup>240</sup> Adoption of a mens rea “cure” in *Lambert*—specifically culpability with respect to the obligation to register—would not have had the same effect. The reach of the ordinance was already predictable and understandable. There was no doubt about who was covered and no doubt about what had to be proved for conviction. The “cure” adopted by the Court in *Lambert* accomplished the different objective of adding an element to a clearly defined offense that would make it more just and more fair. The challenge in understanding *Lambert* is to figure out why this additional substantive requirement was compelled by the Constitution.

Moreover, the “fair notice” concern that was clearly an important part of the Court’s rationale—what we have been calling socialization—had nothing to do with the manner in which the substantive coverage of the offense was described in the ordinance. People get “fair warning” in the sense in which we have described it not from the text of the law but from their moral compass.<sup>241</sup> Socialization as we have been using the term has to do with contextual warnings that people receive from the combination of the moral signals transmitted by their behavior and cultural understanding. The “fair notice” concern advanced so compellingly by Christopher and seemingly adopted by the Court in *Lambert* has nothing to do with any kind of imprecision or overreach in the wording of the law under which Lambert was convicted.

We think that it was not *just* the socialization concern so repeatedly invoked by the Court that led to its conclusion, but the combination of that concern with other factors. It is the existence of these other factors that we regard as limiting the doctrinal effect of the decision and that leads us to the conclusion that the case can be read as not establishing a freestanding constitutional socialization requirement. It is socialization in combination with these other factors, in other words, that produced the *Lambert* result and that defines its meaning.

We seek below to identify these other factors, but we can say now that the ones we regard as critical are often found in vagueness decisions. We develop this thesis in two steps. First we examine evidence from the manner in which *Lambert* was litigated at trial and in the Supreme Court which points in that direction. Also of interest in this respect is a first draft of the Douglas opinion that was made public in a

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<sup>240</sup> For three examples, see *Skilling v. United States*, 561 U.S. 358, 412 (2010), *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499–500 (1982), and *Screws v. United States*, 325 U.S. 91, 103 (1945).

<sup>241</sup> See supra note 96.

law review note based on examination of Justice Clark's papers. Interestingly, that draft would have reversed Lambert's conviction based explicitly on a vagueness rationale. Second, we discuss some of the features that *Lambert* and traditional vagueness cases have in common. While we cannot conclude for the reasons we have stated that the case *is* a vagueness decision, we do think in the end that it is close enough to be called a quasi-vagueness decision.<sup>242</sup>

#### A. *Indicia of Concern About Vagueness Factors*

We begin by returning to the litigation in *Lambert* at the trial level. Lambert offered to testify that she was unaware of the duty to register. After this offer was rejected and she was convicted, she moved for arrest of judgment and a new trial, offering to testify, in language that remains both chilling and poignant almost sixty years later, that:

[O]n the date of her arrest . . . , she was accosted on the street corner by the two arresting officers, who, without informing her of the reason of their arrest or detention of her, began a search of defendant's person and effects, apparently for dope, by rolling up the sleeves of her coat and inspecting her veins and rummaging through her purse; that, when she protested this conduct, she was handcuffed and roughly shoved into the rear of the prowl car driven by the arresting officers; that at the time of her arrest, she was in the company of her employer and attorney, who attempted to discuss the matter with the arresting officers, who ignored him; that she was taken to Wilshire Station and there interrogated for two hours in an offensive and insulting manner; and disrobed and further searched throughout her person, all without being told the reason for her arrest; that, while she was there detained, her attorney and employer requested permission to talk to her, but that such permission was refused by the lieutenant in charge; that, after their investigation and interrogation failed to reveal that she was engaged in any present criminal conduct, that the lieutenant "decided" to

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<sup>242</sup> Anthony Amsterdam, whose law review note on vagueness was recognized at the time as a classic and is still rightly regarded in those terms, may well have had a similar idea in mind when he described *Lambert's* rationale as "contiguous" to the vagueness doctrine. See Amsterdam, *supra* note 238, at 82–83 n.79. He did not elaborate. Nor did he elaborate on the meaning of *Lambert* in his frontal attack on vague statutes in Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 *Crim. L. Bull.* 205, 241 (1967).

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book her on a charge of failure to register as an ex-convict; that that was the first time she had been informed of any charge upon which she was being held; and that no effort was made to permit her to register in lieu of being further held by them and booked.<sup>243</sup>

The trial court refused to allow such testimony and denied her motion.<sup>244</sup> The state courts affirmed the conviction, and an appeal was taken to the Supreme Court.<sup>245</sup>

The unmistakable implication of her post-trial motion, an implication we are quite sure the Court would have noticed,<sup>246</sup> is that the registration charge was lodged in order to provide cover for an illegal arrest and search because the police suspected Lambert of some other offense but had insufficient grounds for their suspicions. Given the procedural posture of this issue, moreover, the Court may well have guessed that this was what actually happened. Lambert had offered to prove it and her proof was ruled inadmissible.<sup>247</sup> But whether or not the Court thought

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<sup>243</sup> Record, *supra* note 11, at 19–20.

<sup>244</sup> *Id.* at 20.

<sup>245</sup> 28 U.S.C. § 1257(2) (1982) since repealed, provided at the time that a federal constitutional challenge to a state law that was rejected by the highest available state court could be taken to the Supreme Court on appeal. A municipal ordinance was treated like a state statute for this purpose. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975). Today the case would come to the Court by writ of certiorari. See 28 U.S.C. § 1257 (2012).

<sup>246</sup> It appears that the details of the post-trial motion proceeding were brought to the attention of at least Justice Clark. See Brooke, *supra* note 61, at 280 & n.3, which refers to a bench memorandum written by one of Justice Clark's law clerks that is on file with Clark's papers at the University of Texas Law Library. This is also the source of the archival research discussed in the text following *infra* note 255. Christopher, of course, did not ignore the post-trial motion, though we think he could have made more of it than he did. See Christopher Brief, *supra* note 23, at 4.

<sup>247</sup> It may be that her offer of proof was irrelevant; that is, that any arrest and search illegality related to some other offense would not undermine an independently valid prosecution for failure to register. On the other hand, a sophisticated challenge to the failure to register ordinance as applied to Lambert—indeed the one that in our opinion succeeded at the Supreme Court—would regard the fact that the ordinance was used for pretext arrests as highly relevant. For more on this thought, see *infra* Subsection V.B.2.

It does need to be noted that there might have been an independent procedural reason that justified denial of the motion. The State's brief in *Lambert* argued that:

Her effort to interject issues of illegal arrest, brutality and violation of civil rights appear *only* after the trial had been completed and the verdict of the jury returned. These assertions were orally made in connection with a motion in arrest of judgment and by way of an offer of proof . . . Her offer of proof and motion were properly denied for under California law such a motion is directed only to the sufficiency of the accusatory pleading or jurisdiction of the trial court.

that this was what happened to Lambert, it would surely have been justified in being concerned about this potential use of the ordinance.<sup>248</sup>

This image was reinforced by the appellant's brief. In spite of the shortcomings of the brief submitted by Lambert's attorney, some of its assertions, as we say above, hit the mark. The example that is relevant here is an especially telling quotation from a note in the *University of Pennsylvania Law Review* referring to the Los Angeles ordinance that led to Lambert's conviction:

Referring to the adoption of the Los Angeles, California, ordinance, it was reported that: "District Attorney Buron Fitts and Robert P. Stewart, chief deputy district attorney, who framed the legislation, and Chief of Police James Davis, one of its chief supporters, declare, however, that the very fact that dangerous ex-convicts will not register is the strength of the law.

"In the past," says Chief Davis, "after every major crime we have picked up many suspects with criminal records. In some of these cases we have been sure that we had in custody the guilty men, but we often lacked legal proof to convict. Under the new registration laws, each of these men can now be dealt with not for the crime suspected, but for failing to register."<sup>249</sup>

And Christopher, not surprisingly, picked up the same point. "Since convicted persons are often not aware of their duty to register," he said, "the ordinance is susceptible of being used by the police to harass persons who are regarded as 'undesirable.'"<sup>250</sup> If a mens rea element were

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Appellee's Brief at 25, *Lambert*, 355 U.S. 224 (No. 47) (emphasis added). Be that as it may, the possibility that the failure to register charge was lodged as a cover for an illegal arrest and search was there for the Court to observe and is certainly a concern in which it would be interested.

<sup>248</sup> Christopher candidly admitted that "the record here does not contain . . . evidence of systematic or intentional discrimination," Christopher Brief, supra note 23, at 20 n.\*, but he did emphasize the potential for police to use the offense for illegitimate purposes. See infra notes 250–51 and accompanying text.

<sup>249</sup> Appellant's Opening Brief, supra note 20, at 22. The quote is from Note, Criminal Registration Ordinances: Police Control over Potential Recidivists, 103 U. Pa. L. Rev. 60, 63 n.17 (1954). Christopher of course referred to this note as well. Christopher Brief, supra note 23, at 20 n.\*; see also Bilonis, supra note 3, at 1332 (applauding Christopher's use of the Pennsylvania note).

<sup>250</sup> Christopher Brief, supra note 23, at 20 n.\*.

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required for the failure to register, he added, “the possibilities of unfair harassment would be drastically reduced if not totally eliminated.”<sup>251</sup>

There were two places in the Court’s opinion that show recognition of the potential for police use of the Los Angeles ordinance for pretext arrests. In his description of the facts Justice Douglas said that Lambert was charged with the failure to register after she had been “arrested on suspicion of another offense.”<sup>252</sup> An arrest on “suspicion of another offense,” Douglas may well have meant to imply, does not mean they had probable cause for the arrest, as we guess they did not.<sup>253</sup> And importantly, the Court’s opinion suggested that it understood that no serious public protection objective was served by the registration ordinance:

At most the ordinance is but a law enforcement technique designed for the convenience of law enforcement agencies through which a list of the names and addresses of felons then residing in a given community is compiled. The disclosure is merely a compilation of former convictions already publicly recorded in the jurisdiction where obtained.<sup>254</sup>

The potential that the police could use the *Lambert* ordinance for harassment and for pretext arrests suggests an analogy to the vagueness doctrine that we explore more fully in Section V.B. But for now it is important to note that Douglas clearly saw the analogy too. We find it fascinating, though not really surprising, that he tried a vagueness approach in the initial draft of the *Lambert* opinion that he circulated to the Court.<sup>255</sup>

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<sup>251</sup> *Id.*

<sup>252</sup> *Lambert*, 355 U.S. at 226.

<sup>253</sup> It appears that the “other offense” was suspected possession or use of narcotics. See *supra* text accompanying note 243. It is possible that they had probable cause for an arrest on that basis, but one “suspects” (to turn the tables, perhaps without probable cause) that they did not. Our guess is that the charge of failing to register was a cover for an illegal arrest. Using another arrow from his multifaceted quiver that may have met its mark, McMorris claimed below that the Lambert prosecution was “a vindication of the will of two police officers who had made a false arrest and were using the ordinance in an effort to justify that arrest, as an afterthought.” Record, *supra* note 11, at 19.

But whether or not that was in fact the case, the offense clearly has the potential for such use. We think the Court understood and was bothered by that potential.

<sup>254</sup> *Lambert*, 355 U.S. at 229.

<sup>255</sup> The following description is based on the archival research reported in Brooke, *supra* note 61, and the quotations are taken from the opinion as reported in that note. The initial circulated draft of the Douglas opinion to which we refer is reproduced in a chart in appendix A of the note that compares it to subsequent drafts that are available in the Clark papers.

The focus of his draft was on the ambiguity of the word “felony.” The opinion held the registration provisions of the ordinance unconstitutionally vague because “they provide no adequate ascertainable standard of guilt.”<sup>256</sup> Standard vagueness cases that he cited<sup>257</sup> were different from this situation, he said, because “in each of them anyone would be frustrated wherever he looked for a definition that gave reasonable clarity to the statutory terms.”<sup>258</sup> One can find out what qualified as a “felony” in California by going to the California Code. But:

The difficulty is that unless one is a lawyer he is not apt to have the Code or know his way through it.

For the average person the words “punishable as a felony” are the equivalent of Arabic script or a formula written in mathematical symbols. He can take it to an expert and have it translated, interpreted, and construed. But it gives him no reliable clue that he is in a danger zone and must . . . act or fail to act at his peril.<sup>259</sup>

His requirement before this statute could overcome the vagueness hurdle was that the line drawn by its language be “meaningful . . . for laymen.”<sup>260</sup> “The concept ‘felony’ has no generally accepted con-

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Apparently it was the second draft Douglas wrote; the first was not circulated to the rest of the Court. See *id.* at 282 n.21.

We are indebted to Professor Risa Goluboff for bringing to our attention Justice Douglas’s conference notes made on the day after *Lambert* was argued. These notes reveal that a majority was leaning towards vagueness in its initial consideration of a rationale for reversal. Douglas was thus not off on a frolic of his own when his first circulated draft relied on vagueness reasoning. Conference Notes of William O. Douglas, Justice, U.S. Supreme Court (Oct. 18, 1957) (on file with the Library of Congress, William O. Douglas Papers, Box 1192, *Lambert v. California*).

<sup>256</sup> Brooke, *supra* note 61, at 295.

<sup>257</sup> In the order in which he cited them: *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926); *Winters v. New York*, 333 U.S. 507 (1948); *Herndon v. Lowry*, 301 U.S. 242 (1937).

<sup>258</sup> Brooke, *supra* note 61, at 296.

<sup>259</sup> *Id.* at 298–99. We read the “danger zone” reference here as *not* referring to the socialization concept we have been discussing. Rather, we think what Douglas meant was that the average person would not be able to figure out what “felony” meant by looking at the legal sources without the aid of expert help. The difference is that Douglas is talking about how easy it would be for the average person to understand the text of the statute. What we are talking about has nothing to do with the text of the statute, but instead is concerned with whether life in context provides moral warning signals when certain kinds of conduct is proposed to be taken.

<sup>260</sup> *Id.* at 299.

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tent,”<sup>261</sup> he added, and “California’s definition is no part of our cultural, business, or professional heritage. It has in common parlance no accepted meaning.”<sup>262</sup> After illustrating this by references to various state and federal definitions of the term, having previously discussed the complexities of California’s definition, he said:

We conclude that the statutory standard “punishable as a felony” is a snare for the average man and therefore too vague to pass the requirements of Due Process. It prescribes a danger zone and sets limits. But it leaves the forbidden line to the expert to ascertain. Notice to the expert is not in this instance adequate notice to the layman.<sup>263</sup>

This reasoning is so plainly flawed that the Court was clearly right to reject it. We are aware of no vagueness case in an even remotely similar context that strikes down a statute that would be clear to lawyers but unclear to the lay public. Such a standard would endanger far too many crimes.<sup>264</sup> Bear in mind as well the corollary of the vagueness doctrine that it is the statutory language as construed by the courts that is to be tested against the constitutional vagueness standard.<sup>265</sup> This makes the job even more daunting if it is required that the law be clear to the lay public. Not only would the statutory language have to be clear to the average non-lawyer, but so would all of the judicial opinions that interpret it. Surely that is not what the vagueness doctrine requires.

Douglas did hint that adding a mens rea requirement might cure the problem he had in mind. He said without elaboration that “no element of willfulness is . . . included in the ordinance nor read into it by the California court as a condition necessary for a conviction.”<sup>266</sup> The addition

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<sup>261</sup> Id.

<sup>262</sup> Id. at 300.

<sup>263</sup> Id. at 303 (footnote omitted).

<sup>264</sup> Professor Goluboff also brought to our attention, see supra note 255, the text of a note Justice Clark wrote to the Court indicating that he could not join the Douglas vagueness rationale. Clark said that reversal on the ground that “‘punishable as a felony’ is too vague a standard to satisfy due process . . . . It would wreck a host of state statutes, such as habitual criminal, harboring, misprision, and would cast a shadow on many old and well-established common law rules, such as felony murder, common law burglary, etc.” Letter from Tom C. Clark, Justice, U.S. Supreme Court, to William O. Douglas, Justice, U.S. Supreme Court (Nov. 14, 1957) (on file with the Library of Congress, William O. Douglas Papers, Box 1192, Lambert v. California).

<sup>265</sup> See supra note 239.

<sup>266</sup> Brooke, supra note 61, at 295. Sometimes such a reference serves merely as a throwaway line. See, e.g., *City of Chi. v. Morales*, 527 U.S. 41, 55 (1999) (Stevens, J., majority opinion). And sometimes it strongly supports a conclusion that a statute under attack is not

of a requirement that Lambert know that she was a felon (or be negligent about that fact) would, to be sure, have clarified the text somewhat and perhaps have provided an “ascertainable standard of guilt.”<sup>267</sup> This would at least have moderated the significance of ambiguity in the meaning of “felony,” not only for Lambert but for any other felons out there.

But most importantly, even if Lambert had known that the forgery offense for which she had been convicted was a felony (she testified that she did not<sup>268</sup>), this would not have cured the problem underlying her conviction. She still would have been no more likely to have known (or been otherwise culpable about the fact) that she was required to register. She never would have thought to look for the registration ordinance in the first place. And it is that shortcoming that lies at the core of the Christopher brief and the opinion of the Court as it ultimately turned out. What Lambert knew or did not know about her status as a felon was of little consequence. The problem, as she sought to testify, was that she had no idea she was required to register.<sup>269</sup> If one changes the focus from

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vague. See, e.g., *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952). The Douglas opinion for the Court in *Screws v. United States*, 325 U.S. 91 (1945), is frequently cited for the latter proposition. See, e.g., *Colautti v. Franklin*, 439 U.S. 379, 394–95 & n.13 (1979).

<sup>267</sup> See supra text accompanying note 256.

<sup>268</sup> Lambert offered to testify that she did not know that she was a felon, the City objected, and the objection was overruled. Record, supra note 11, at 17. She then testified that she did not know her prior conviction was a felony because she was “in a confused mental state” throughout the proceedings, she did not understand the difference between a felony and a misdemeanor, she thought felons were sentenced to a state prison whereas she had only been confined in a local jail, and no one had told her that her prior offense was a felony. Id. at 17–18.

The jury was instructed at the conclusion of the trial that “defendant was guilty if she knew, at the time of her failure to register . . . that she had been found ‘guilty of a crime punishable as a felony’” and that “forgery is a crime punishable as a felony.” Id. at 18. We read this instruction as holding her to strict liability on whether her crime was a felony. She was required to know that she had been convicted of a previous crime (which she admitted) but how it was classified was a question determined by law. Her ignorance of that law was immaterial.

This reading of the instruction is confirmed by the holding of the California appellate court that “[t]here is no merit to the defense that she did not know she had been convicted of felonies.” Id. at 30.

<sup>269</sup> As previously discussed, see supra notes 23–30 and accompanying text, Lambert had offered to prove at the trial that she did not know she was required to register, but the court rejected the offer of proof as irrelevant. Whether she actually knew was therefore not a live question at the level of the Supreme Court. The City told the Supreme Court that it had evidence that she in fact knew, but their submission was too little too late.

the ordinance as applied to Lambert to the ordinance on its face as it would be applied to all potential felons in the future, moreover, the disease as Douglas diagnoses it in his vagueness draft has nothing to do with the problem that needs to be cured. Understanding whether one is or is not a convicted felon still would not trigger moral signals having to do with the necessity of registering with the police.

But, all this having been said, we still think it instructive that the Court's initial intuition was that there was a relationship between Lambert's conviction and the ordinary concerns underlying the vagueness doctrine.<sup>270</sup> The ordinance under which she was convicted authorized a form of entrapment that permitted, if it did not invite, exactly the kinds of arbitrary enforcement that the vagueness doctrine is designed to prevent. There was no rule of law problem in the sense that the statutory language was unclear. But there was a quintessential rule of law problem in the sense that the law authorized police to enforce street arrests of a class of people by a subterfuge that was unconstrained by the normal probable cause requirements of the Fourth Amendment or by any other meaningful limitation. As we said in the Introduction, this was law by cop not law by law. We turn now to our thoughts on that subject.

### *B. Similarity to Vagueness*

Although, as we say above,<sup>271</sup> we do not believe *Lambert* was a vagueness case as such, we do think that the decision was motivated by many of the factors associated with the vagueness doctrine.<sup>272</sup> One of the traditional twin concerns of vagueness is "fair notice," and surely socialization notice fits within that concept. But there are many other triggers of the vagueness doctrine.<sup>273</sup> We focus on some of those triggers below,

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<sup>270</sup> Recall that the Court was leaning towards a vagueness rationale in its first conference consideration of the case. See *supra* note 255.

<sup>271</sup> See *supra* discussion preceding note 242.

<sup>272</sup> *Lambert* is occasionally lumped in with the vagueness cases, but typically as a flourish or an aside. See, e.g., *Billingslea v. State*, 780 S.W.2d 271, 276 n.6 (Tex. Crim. App. 1989); Dru Stevenson, *Entrapment by Numbers*, 16 U. Fla. J.L. & Pub. Pol'y 1, 66 n.183 (2005). At least one author has discussed *Lambert* more extensively alongside the vagueness cases. Professor Bilionis situates *Lambert* with vagueness cases and cases from a number of other constitutional sources in his analysis designed to divert discussion from substantive limitations to implementation of process values. See Bilionis, *supra* note 3, especially at 1331–32. Our view of *Lambert* fits well with his.

<sup>273</sup> See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163–64 (1972). One of the fair notice concerns in the Court's application of the vagueness doctrine was that the Jacksonville ordinance "makes criminal activities which by modern standards are normally inno-

and believe them to be part of the *Lambert* rationale. We think the absence of socialization was not the only reason for reversal of Lambert's conviction. It was only one of several, and it was the combination that carried the day. We suggest below two possible relationships to traditional vagueness doctrine. Though we tend to be partial to the second, in the end they may amount to much the same thing viewed through different lenses.

### 1. *Amsterdam's Buffer-Zone Theory*

In his famous law school note, Anthony Amsterdam observed that the vagueness "doctrine was born in the reign of substantive due process and throughout that epoch was successfully urged exclusively in cases involving regulatory or economic-control legislation."<sup>274</sup> "Since the advent of the New Deal Court," he continued, "there has been . . . ever increasing emphasis upon protection of first amendment liberties [and] free speech vagueness cases have begun to proliferate."<sup>275</sup> The thesis that emerged from his exhaustive study of pre-1960 vagueness cases was that "vagueness alone, although helpful and important, does not provide a full and rational explanation of the case development in which it appears so prominently."<sup>276</sup> Instead, "the doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms."<sup>277</sup>

We infer from the fact that the Court set *Lambert* down for reargument and appointed Christopher to present the case for reversal of the conviction that the Court—or at least a working majority—was worried about the constitutional implications of the Los Angeles registration ordinance but could not quite figure out what was unconstitutional about it. In an argument that he knew would appeal at least to Douglas, Christopher hammered on the ways in which the ordinance burdened at least

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cent" and that it may set "a trap for innocent acts." *Id.* The other twin, of course, is arbitrary enforcement. See *id.* at 162 ("This ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' and because it encourages arbitrary and erratic arrests and convictions." (citations omitted)).

<sup>274</sup> Amsterdam, *supra* note 238, at 74 n.38.

<sup>275</sup> *Id.* at 75 n.38.

<sup>276</sup> *Id.* at 74.

<sup>277</sup> *Id.* at 75.

the peripheries of recognized constitutional liberties, if not their core. We suspect that he never expected the Court to strike down the Los Angeles ordinance as a violation of the rights he emphasized. But there is a sense in which he anticipated the Amsterdam thesis. His strategy was to invite the Court in one way or another to create, in the terms in which Amsterdam was later to put it, “an insulating buffer zone of added protection” to these liberties by showing the Court that the evils at which the vagueness doctrine is aimed were fully present here. And, importantly as we have discussed at length in Part I, he offered them a way to reach this result in the opening section of his brief.

Christopher did the best he could to push the Court in this direction. The registration requirement, he argued, was burdensome, liberty threatening, and not needed for effective law enforcement.<sup>278</sup> He began the substantive due process portion of his brief with a description of the onerous nature of the registration requirement.<sup>279</sup> Everyone convicted anywhere in the world of an offense punishable as a felony in California, he said, must register with the Chief of Police and, within five days of conviction or of moving to California, furnish a full description, a photograph, and fingerprints, and must notify the police of their current residence and, within 48 hours, any change of residence.<sup>280</sup> This information was public, and the requirements of the ordinance extended to anyone who had been convicted of a felony within the previous 35 years.<sup>281</sup>

Christopher went on in this portion of his brief to detail a litany of constitutional rights offended by these burdensome requirements. He began with the argument that the registration ordinance violated the “right of privacy—a right to be let alone.”<sup>282</sup> A section on the right to liberty returned to the theme noted in Section V.A: “[T]he impact of the ordinance far transcends the physical burdens of the registration process. The fact of registration may subject the convicted person to frequent detention and questioning during police roundups of suspects for crimes of

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<sup>278</sup> See Christopher Brief, *supra* note 23, at 21–27.

<sup>279</sup> See *id.* at 21; see also Record, *supra* note 11, at 12–13 (listing ten components of the registration requirement).

<sup>280</sup> See Christopher Brief, *supra* note 23, at 21, 23.

<sup>281</sup> *Id.* at 23.

<sup>282</sup> *Id.* at 21–22. Anticipating the rationale of *Griswold v. Connecticut*, 381 U.S. 479 (1965), if not its exact language, Christopher suggested that “[t]he right of privacy is the synthesis of a number of constitutional rights which are applicable here by virtue of the Due Process Clause.” Christopher Brief, *supra* note 23, at 22.

which he is completely innocent.”<sup>283</sup> And for good measure Christopher added an argument that the Privileges and Immunities Clause was violated by the impact of the registration process<sup>284</sup> on “[t]he right to move freely within the United States.”<sup>285</sup>

Christopher’s argument offered the Court a way to have its cake and eat it too. The Court can be seen as avoiding a number of difficult constitutional questions raised by the ordinance but reversing the conviction on a narrow constitutional ground that did not portend great difficulty down the road.<sup>286</sup> The ground it chose, moreover, closely resembled in motivation the line of vagueness cases about which Amsterdam was later to write. No statute is unconstitutionally vague, Amsterdam reasoned, based on its language alone. The vagueness conclusion is based on a balance of factors that includes, essentially, the threats posed by the law to identified constitutional rights set off against the need for police and prosecutors to possess the powers established by the challenged law in order to perform their legitimate law enforcement functions. A classic vagueness holding strikes down a law that poses a threat to constitutional rights and is not needed for effective law enforcement.

Application of this vagueness rationale to the Los Angeles ordinance at stake in *Lambert* is straightforward. It is not hard to conclude that there was no significant law enforcement need for the ordinance. As Douglas said, at most it was a convenient method for compiling lists that were readily available in public records.<sup>287</sup> And at its worst, he could have added, it was also a convenient method for rounding up for questioning, or simply harassing, people for whom probable cause to arrest did not exist.<sup>288</sup> One could have defended the *Lambert* result in Amsterdam terms as a “buffer zone” decision designed to protect Fourth

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<sup>283</sup> Christopher Brief, *supra* note 23, at 25.

<sup>284</sup> *Id.* at 27.

<sup>285</sup> *Id.* at 26. See *infra* note 290.

<sup>286</sup> Here we use “avoid” in its ordinary sense, not in the sense of avoiding constitutional doubt, for *Lambert* was certainly a constitutional decision—just a narrow and persnickety one. Compare the 1964 sit-in cases. See *Griffin v. Maryland*, 378 U.S. 130 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); see generally Brad Ervin, Note, Result or Reason: The Supreme Court and the Sit-In Cases, 93 Va. L. Rev. 181 (2007) (summarizing and comparing the various sit-in cases of the early 1960s).

<sup>287</sup> See *supra* text accompanying note 254.

<sup>288</sup> See *supra* text accompanying note 249.

Amendment values.<sup>289</sup> Or one could have defended it as adding “buffer zone” protection to the right to privacy, the right to liberty, the privileges and immunities of citizenship, the right to travel,<sup>290</sup> or any one of a number of other civil liberties we take for granted in everyday life.

For reasons we think obvious, the Court would not have wanted to deal in this first consideration of a felony registration ordinance with whether it violated some form of constitutionally protected privacy or liberty. Herein lay the genius of the Christopher brief. Christopher offered the Court a “fair notice” based rationale for reversing the conviction and curing at least part of the problem. Police would no longer be able to count on the fact that arrests of previously convicted felons would be routinely available because their targets were unaware of the registration requirement. An important component of the unfairness of the ordinance—its entrapment potential—was removed by the Court’s decision. Courts, probation officers, and police thereafter would need to take steps to ensure that convicted felons were aware of the registration requirement and given an opportunity to comply. The ultimate question whether such ordinances were constitutional when measured against protected liberties could be postponed for another day. How Supreme-Court-like to adopt a narrow resolution before considering a frontal attack.

## 2. *Arbitrary Enforcement, Status, and Other Vagueness Factors*

We also offer a second vagueness analogy, and once again we begin with the influential Amsterdam note. Amsterdam recognized that not all vagueness cases were explained by his buffer zone theory. After initial development of that thesis, he added that his theory “does not mean . . . that unconstitutional uncertainty will never be found in a stat-

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<sup>289</sup> This concern is evident in the archetypal vagueness case, *Papachristou v. City of Jacksonville*: “We allow our police to make arrests only on ‘probable cause’ . . . . Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even where the arrest is for past criminality.” 405 U.S. 156, 169 (1972).

<sup>290</sup> See Michaels, *supra* note 66, at 862–67. Professor Michaels’s right-to-travel theory is a reading of *Lambert* that fits his thesis that “strict liability is constitutional when, but only when, the intentional conduct covered by the statute could be made criminal by the legislature.” *Id.* at 834. Our reading of *Lambert* is also consistent with the constitutional limitation on strict liability that he so carefully, persuasively, and creatively develops. For a citation of *Lambert* in support of the possibility that notice as to the grade of an offense may be required in the context of protected acts of interstate travel, see *Jones v. Helms*, 452 U.S. 412, 428 (1981) (Blackmun, J., concurring).

ute all of whose possible applications the enacting legislature would have had constitutional power to prescribe.”<sup>291</sup> Amsterdam’s most prominent example of this form of vagueness was *Lanzetta v. New Jersey*.<sup>292</sup>

A better example today would be *Papachristou v. City of Jacksonville*.<sup>293</sup> *Papachristou* did not, at least on its face, strike down the Jacksonville ordinance at stake there because it threatened the peripheries of recognized constitutional rights.<sup>294</sup> The ordinance involved in that case was held unconstitutionally vague because, in the traditional language of the vagueness doctrine, it denied “fair notice” and led to “arbitrary” enforcement.<sup>295</sup>

The “fair notice” branch of the vagueness doctrine is well represented in the *Lambert* opinion. As we have said before,<sup>296</sup> its use in vagueness cases comfortably embraces the socialization idea advanced by Christopher and sprinkled throughout the Court’s opinion. It also in vagueness cases embraces the idea that what “ordinary people can understand” and “actual notice to citizens”<sup>297</sup> are somehow relevant to the vagueness doctrine. These assertions, as we have said above,<sup>298</sup> of course cannot be taken literally, but that does not mean that they are empty of content. The reality is that the fair notice branch of the vagueness doctrine must be taken as a proxy for a complex panoply of ideas, as can be seen from a careful parsing of Douglas’s fair notice discussion in *Papachristou*.<sup>299</sup>

A full theory of the vagueness doctrine is beyond the scope of this article, and will be addressed in a sequel now in the planning stages. What is important now is that the socialization idea is a significant factor among many in vagueness decisions. Our thesis here is that the same

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<sup>291</sup> Amsterdam, supra note 238, at 85.

<sup>292</sup> 306 U.S. 451 (1939). See Amsterdam, supra note 238, at 85–87.

<sup>293</sup> 405 U.S. 156. *Papachristou* was decided twelve years after Amsterdam wrote his note.

<sup>294</sup> For a fascinating background study of *Papachristou*, see Goluboff, supra note 43. Professor Goluboff points out, based on archival research, that “the Court came closer to the brink of substantive due process than [many] have realized.” Id. at 1365. Perhaps, indeed, *Papachristou* itself can be explained as an example of Amsterdam’s buffer zone theory. And so, it may be, might all vagueness cases.

<sup>295</sup> *Papachristou*, 405 U.S. at 162. For the full quote, see supra note 273.

<sup>296</sup> See supra note 273 and accompanying text.

<sup>297</sup> See *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited . . . . [T]he doctrine focuses . . . on actual notice to citizens . . .”).

<sup>298</sup> See supra text accompanying note 265.

<sup>299</sup> See 405 U.S. at 162–68.

ought to be regarded as true of *Lambert*. A constitutionally based socialization requirement was not *the* rationale of *Lambert*, but was only one of several factors that led to the outcome in that case.

There are at least two other ideas central to the vagueness doctrine that one can also see in *Lambert*. One is arbitrary enforcement. The Court would later say in *Kolender v. Lawson* that although the vagueness doctrine “focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.”<sup>300</sup> Be that as it may, the rule of law idea that legislatures should provide ascertainable guidelines to govern the conduct of police on the streets—that it should not leave the content of the laws to the “moment-to-moment opinions of a policeman on his beat”<sup>301</sup>—is both central to the vagueness doctrine and fully descriptive of a major problem with the *Lambert* ordinance. As the Los Angeles prosecutors and police chief were reported to have said, and as both the appellant’s brief and the Christopher brief brought to the attention of the Court, “the very fact that dangerous ex-convicts will not register is the strength of the law.”<sup>302</sup> This was so, the Chief went on to say, because it allowed the police to corral numerous suspects with criminal records after major crimes. Although they were sure in many cases that they had people who were guilty, they often resorted to charging the registration offense because they “lacked legal proof to convict.”<sup>303</sup>

It appears that the Los Angeles police may even have *hoped* that previously convicted felons would not register, because that would give them a chance for conviction of at least some crime any time they wanted to pick up an unregistered felon. Presumably, this strategy would work only once, at least if felons preferred the police to be able to keep tabs on their whereabouts to taking their chances by not registering once they knew of the requirement. As Christopher pointed out, there was no

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<sup>300</sup> 461 U.S. at 358 (internal quotation marks omitted).

<sup>301</sup> *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (Black, J., concurring in part and dissenting in part).

<sup>302</sup> For the full quote and its source, see *supra* note 249 and accompanying text.

<sup>303</sup> See *supra* note 249 and accompanying text. The *Papachristou* Court would later advert to this very concern: “A direction by a legislature to the police to arrest all ‘suspicious’ persons would not pass constitutional muster. A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest.” 405 U.S. at 169.

actual evidence in the *Lambert* record that her conviction was a pretext for an illegal arrest,<sup>304</sup> but the potential for arbitrary enforcement was there, and requiring some sort of mens rea on the registration element of the offense would provide at least a partial limitation on that potential.<sup>305</sup>

The rule-of-law problem addressed by the *Lambert* result is identical in all relevant respects to the rule-of-law problem underlying an ordinance that is as hopelessly vague as the one in *Papachristou*.<sup>306</sup> Both the Jacksonville ordinance and the Los Angeles ordinance gave police the authority to arrest people in whom they were interested for collateral reasons that could involve mere suspicion of criminal activity but could just as well involve a simple desire to harass. Both offered the opportunity to arrest “suspicious” people without the constitutionally required probable cause. Both offered the opportunity for law by cop rather than law by law. Both undermined the rule of law by delegating to the police the power to arrest a class of people whenever they wanted.<sup>307</sup>

This last point isolates the second of the factors common to both *Lambert* and the vagueness doctrine that we wish to emphasize, namely a focus of the challenged statute on the status of the offender rather than on what the putative offender is doing or not doing. Christopher argued in the substantive due process portion of his brief that:

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<sup>304</sup> Although the record did show that it was a possibility. See supra note 243 and accompanying text.

<sup>305</sup> See supra text accompanying notes 250–51.

<sup>306</sup> The ordinance in that case read:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

405 U.S. at 156 n.1.

<sup>307</sup> This idea was in part captured by Douglas in *Papachristou* by his recitation of the familiar quotation from *United States v. Reese*, 92 U.S. 214, 221 (1875), that is a standard in vagueness cases: “It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.” Douglas added: “Here the net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police.” 405 U.S. at 165.

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The Los Angeles ordinance, as we have pointed out, penalizes not conduct, but a morally innocent and passive status—namely, being an unregistered convicted person in Los Angeles. As we shall show, the mere fact of that status does not justify the restrictions outlined above on the right of privacy, right to liberty, and privileges and immunities of citizens of the United States.<sup>308</sup>

This was followed by reference to a series of state and lower federal court vagueness cases holding statutes that punished “innocent status” (for example, habitually to loaf or loiter) unconstitutional. This section of the brief then developed the argument that the ordinance’s restriction on constitutional rights “cannot be justified on the assumption that ‘convicted persons’ are more likely than the population in general to commit crimes.”<sup>309</sup> And finally, the brief added an elaborate section arguing that the ordinance was not reasonably restricted to the evil—crime prevention—with which it purported to deal.<sup>310</sup>

Again, these are exactly the sorts of problems to which the vagueness doctrine is addressed. Some of the prosecutions that were set aside on vagueness grounds in *Papachristou* were based on the status of the defendants—“vagran[t],” “vagabond[ ],” “common thief.”<sup>311</sup> And the case Amsterdam used as his illustration for the type of vagueness now under discussion—*Lanzetta v. New Jersey*—set aside Lanzetta’s conviction because it was based on his status as a “gangster.”<sup>312</sup> Christopher hammered over and over the fact that the registration offense of which Lambert was convicted was based on her status as a convicted felon and not on any culpable behavior in which she engaged after her conviction.<sup>313</sup> It cannot be that this aspect of Lambert’s offense was lost on the Court. Nor was it likely to be lost on the Court that the law the police were enforcing, as Christopher argued, did not involve a serious public protection objective that could not have been accomplished by means that were more fair and less arbitrary.<sup>314</sup> As Professor Billionis said after the

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<sup>308</sup> Christopher Brief, *supra* note 23, at 27–28.

<sup>309</sup> *Id.* at 31.

<sup>310</sup> *Id.* at 34–46.

<sup>311</sup> 405 U.S. at 158.

<sup>312</sup> See *supra* note 292.

<sup>313</sup> See, e.g., *supra* notes 42, 47–49 and accompanying text.

<sup>314</sup> The Court was explicit on this point in *Papachristou*, 405 U.S. at 171:

A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law.

fact, the *Lambert* decision “took no power of critical importance away from the legislatures”—they still retained “primacy in matters of substantive criminal law.”<sup>315</sup>

We need to say again that our purpose now is not to deliver a comprehensive treatment of the vagueness doctrine as it applies to cases that traditionally have not been understood as fitting Amsterdam’s “buffer zone” theory. That will be the subject of a forthcoming article. We do think, however, that there is sufficient affinity between the factors that influence vagueness decisions in this class of cases and what happened in *Lambert* to make the parallel persuasive. For reasons we developed at the beginning of this Part, it was not possible for the Court to strike down the *Lambert* ordinance for vagueness. But describing it as a quasi-vagueness decision is, we believe in the end, wholly accurate. *Lambert* was a response by the Court to many of the same sorts of factors that it deems controlling when a statute is attacked for vagueness.

#### CONCLUSION

If the rationale of *Lambert* is read, as we believe it should be, as inextricably tied to the arbitrary enforcement potential of the Los Angeles ordinance, then the case does not have a lot to say about a constitutionally based socialization requirement in other contexts. This, we believe, is as it should be. As we have illustrated above, the socialization idea is deeply embedded in criminal law policy at the level of basic theory and in day-to-day practice. The mens rea for most crimes accommodates the concern, and even strict liability is rarely, if ever, used in a context where it cannot be argued that there was adequate socialization notice based on what the defendant actually knew about the situation.

Both *United States v. International Minerals & Chemical Corp.* and *United States v. Freed*, for example, fit this mold. There may be factual variations of these cases that would pose a socialization problem as their respective statutes were applied, but it cannot be said that the Court was oblivious to the socialization concern when it concluded that public pro-

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The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible.

<sup>315</sup> Bilonis, supra note 3, at 1332.

tection objectives outweighed the additional individual moral fault that a higher level of mens rea would have introduced. If the use of strict liability in the criminal law is to be criticized, as often it should be,<sup>316</sup> we think the debate in most cases can better be characterized as a disagreement about proportionality rather than a lack of fair notice based on socialization. It might be argued that there is not *enough* fault in the *International Minerals* and *Freed* situations to justify the penalties involved,<sup>317</sup> but normal statutory construction principles took account of the fact that there would generally be at least *some* socialization fault in the two situations.

The felony murder rule provides another example. It involves a commonly criticized use of strict liability, and properly so.<sup>318</sup> It is inappropriate where the underlying culpability is not the moral equivalent of the culpability required for murder, and it is unnecessary where it is. But the felony murder debate is not about whether the defendant can appropriately be punished at all, nor is it about whether the defendant should have been socialized not to engage in the underlying behavior. The debate is about whether there is an imbalance in, on the one hand, the level of fault demonstrated by the defendant's conduct and, on the other, the label attached to the crime and the punishment imposed. It is not strict liability that is the culprit, but the relationship between the conduct, what the defendant knew and intended, what the crime is called, and the penalty. That is a proportionality issue, not an issue about whether the defendant is, in some minimum sense, at fault.

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<sup>316</sup> And as often it is. For a particularly colorful attack, see James J. Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 *Hous. L. Rev.* 1039, 1040 (1973) ("Strict liability crimes are alien to our criminal law; they are unconstitutional anomalies that the Supreme Court should have suppressed long ago. That they have been permitted to grow and flourish in our midst is a breach of faith with the American people on the part of Congress, the various state legislatures, the state and federal courts, and most particularly the United States Supreme Court.").

<sup>317</sup> The maximum penalty in *Freed*, for example, was ten years. See *supra* note 133.

<sup>318</sup> See Guyora Binder, *Making the Best of Felony Murder*, 91 *B.U. L. Rev.* 403, 404–05 n.1 (collecting sources). For a thorough discussion of the history and "questionable wisdom" of the felony murder rule, see *People v. Aaron*, 299 *N.W.2d* 304, 307–19 (Mich. 1980) ("[C]riminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result. . . . [T]he felony-murder rule violates this basic principle." (internal quotation marks omitted)).

It is best in any event if these debates can be undertaken without relying on the “heavy artillery” of constitutional law.<sup>319</sup> We have illustrated above some of the mischief that could be caused by constitutionalizing the socialization principle. Reading *Lambert* to implement the concerns underlying the vagueness doctrine makes the case meaningful and keeps the intrusion of the Constitution into ordinary criminal law doctrine under control. The socialization principle is doing its work quite adequately as one factor among many as legislatures and courts make the difficult judgments involved in fine-tuning the proper balance between fault and public protection in the definition and punishment of crime. It is both unnecessary and undesirable to turn one aspect of those judgments into a constitutional trump card.

Does this mean that *Lambert* is, as Frankfurter predicted,<sup>320</sup> a “derelict on the waters of the law” that can be consigned to a constitutional wastebasket? We think not. Frankfurter meant his comment as the conclusion to an argument that *Lambert* was wrongly decided. We think, to the contrary, that the outcome was correct. The case should be read as standing for a holding that applies core vagueness values to a situation that does not literally fit within the vagueness doctrine. This means that its precedential value should be limited to that context, but—like any pure vagueness decision—does not mean that it means nothing. It would have no relation, for example, to the insanity defense debate about whether some version of the “right-wrong” portion of the *M’Naghten* formula is constitutionally required. Nor would it be relevant to most of the situations we discuss in Part III. We say “most” because we can imagine variations of the *Wilson*<sup>321</sup> facts, for example, and even some of the other cases we have discussed, that might present a compelling analogy to *Lambert*. For *Lambert* to be relevant to the solution, we contend, the situation would have to involve—in addition to socialization concerns—a law with most or all of the following characteristics: The terms in which it is drafted are justified by little or no public protection necessity and, based on the fact that they fit a status-based profile, it creates

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<sup>319</sup> United States v. Wilson, 159 F.3d 280, 293 (7th Cir. 1998) (Posner, J., dissenting); see *supra* note 104.

<sup>320</sup> See *supra* text accompanying note 3.

<sup>321</sup> See *supra* text accompanying note 98.

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the potential for arbitrary and perhaps pretextual arrests of people who are going about their ordinary affairs in an ordinary manner.<sup>322</sup>

In the end, we are convinced that Packer was right.<sup>323</sup> Mens rea is an important requirement. It is here to stay as a deeply embedded and critically important component of the criminal law. But it is not, as a general matter, a constitutional requirement. The proper calibration of mens rea (including the mix of mens rea and strict liability), as Justice Marshall said in a closely related context, is best regarded as a matter of legislative policy that lies within “the province of the States.”<sup>324</sup> But mens rea is a constitutional requirement sometimes. Some form of traditional or non-traditional mens rea is constitutionally required in a narrow range of cases that are limited by the particulars of their context. *Lambert* was one of them.

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<sup>322</sup> One author has developed a similar idea in reliance on a series of state and federal cases, including *Lambert* but not in primary reliance on that case. See Grace, *supra* note 69, at 1413 (“[I]n making the decision to allow . . . a mistake of criminal law defense [courts] should ask whether the law is likely to encourage arbitrary enforcement, whether it is likely that the defendant would have had notice of the law, and . . . whether ignorance of the law is in itself blameworthy, showing a willful disregard for important social values.”).

<sup>323</sup> See *supra* text accompanying note 2.

<sup>324</sup> See *supra* text accompanying note 237.

