THE LOST PROMISE OF *LAMBERT V. CALIFORNIA*

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As others in the symposium will discuss, the Warren Court's criminal procedure decisions are far-reaching and continue to impact how criminal law is practiced in the United States. In contrast, the impact of *Lambert v. California*[1] has been more limited and in many ways is a story of a moment in history where one single Supreme Court case could have sparked meaningful changes in our criminal legal system, but didn't. The Court and the United States as a whole failed to live up to the promise of *Lambert*.[2]

In *Lambert*, the Court held that the defendant's constitutional due process rights were violated when the defendant was convicted for failing to register as a convicted felon.[3] *Lambert* is a relatively short case and has been described as "replete with unhelpful and largely irrelevant meanderings and . . . frustratingly unclear on the scope of its fair notice principle."[4] Despite this, legal scholars initially held out great hope that *Lambert* would begin an era of limiting strict liability and increasing scrutiny of the constitutionality of criminal statutes.[5] *Lambert* was decided before mass incarceration began[6] and, had it lived up to the

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1. Lambert v. California, 355 U.S. 225 (1957).

2. *Compare id.*, *with* Gideon v. Wainwright, 372 U.S. 335 (1963). One small example of the difference: *Lambert* has been cited 3,327 times—while *Gideon* has been cited 29,331 times (Westlaw, Oct. 20, 2019). This number is the total reported by Westlaw as of July 25, 2019. *Id.*

3. *Lambert*, 355 U.S. at 227.

4. Peter W. Low & Benjamin Charles Wood, *Lambert Revisited*, 100 VA. L. REV. 1603, 1616 (2014).

5. Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 383 (1966); Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 433–35 (1958); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 858 (1999); Gerhard O.W. Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1104 (1958).

6. *See, e.g.*, Jacob Kang-Brown et al., *The New Dynamics of Mass Incarceration*, VERA INST. OF JUSTICE, June 2018, at 1, 8, https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-new-dynamics-of-mass-incarceration/legacy_downloads/the-new-dynamics-of-mass-incarceration-report.pdf ("After decades of stability, the U.S. incarceration rate increased markedly between 1970 and 2000, growing by an average of 12 percent each year to reach a total increase of about 400 percent—and the highest rate of incarceration in the world.").

early hopes of scholars, could have played a role in moderating or preventing mass incarceration. *Lambert* could have inspired the beginning of an era where criminal laws were placed under meaningful constitutional scrutiny and notice to a defendant about violating a law was required before prosecution. Instead, the Court largely ignored both concepts, and lower courts continue to interpret *Lambert* narrowly.

This Article will start with a brief overview of the *Lambert* case. It will then discuss the differing views on how to interpret this relatively short case. Next, it will review the cases citing to *Lambert* that illustrate the narrow approach that courts have taken when applying this case. Finally, it will offer some thoughts on how *Lambert* could have played a role in preventing some of the excesses of mass incarceration, but failed.

I. OVERVIEW OF LAMBERT V. CALIFORNIA

The defendant, Virginia Lambert, was convicted of felony forgery.[7] Under Los Angeles Municipal Code Section 52.39, it was "unlawful for 'any convicted person' to be or remain in Los Angeles for a period of more than five days without registering . . . ."[8] Ms. Lambert failed to register, although she had been a resident of Los Angeles for over seven years.[9] Under Los Angeles Municipal Code Section 52.43(b), failure to register was a "continuing offense, each day's failure constituting a separate offense."[10] Ms. Lambert was convicted of failing to register, placed on three years of probation, and ordered to pay a $250 fine.[11] Ms. Lambert alleged that her due process rights had been violated and, in recounting the facts, the Court said, "[w]e must assume that appellant had no actual knowledge of the requirement that she register under this ordinance, as she offered proof of this defense which was refused."[12]

The U.S. Supreme Court, in a five–four decision authored by Justice Douglas, found in favor of Ms. Lambert and held that the Code's registration requirements "violate the Due Process requirement of the Fourteenth Amendment."[13] The Court, unlike the lower courts in California, did not consider the ordinance to be a strict liability offense.[14]

7. *Lambert*, 355 U.S. at 226.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 227.
12. *Id.* at 226–27.
13. *Id.* at 227.
14. *Id.* at 228–29. *See also* Low & Wood, *supra* note 4, at 1607; Michaels, *supra* note 5, at 856–57.

The Court instead focused on whether Ms. Lambert had "actual knowledge of the duty to register."[15] The Court also discussed that this case "deal[s] . . . with conduct that is *wholly passive—mere failure to register*."[16] The Court discussed the importance of notice as being "[e]ngrained in our concept of due process . . . ."[17]

Justice Frankfurter wrote the dissent and was joined by Justices Harlan and Whittaker.[18] The dissent disagreed with the majority's reasoning that a key factor was the defendant's omission to act. Justice Frankfurter wrote: "[W]hat the Court here does is to draw a constitutional line between a State's requirement of doing and not doing . . . a distinction that may have significance in the evolution of common-law notions of liability, but is inadmissible as a line between constitutionality and unconstitutionality."[19]

Justice Frankfurter went on to express concern that if this case were more widely applied, "a whole volume of United States Reports would be required to document in detail the legislation in this country that would fall or be impaired."[20] Justice Frankfurter ended with his well-known line that this case would be an "isolated deviation . . . a derelict on the waters of the law."[21] As will be discussed, Justice Frankfurter was right. *Lambert* has largely stood in isolation and has not led to widespread invalidation of existing statutory law on constitutional grounds.[22] And, as the next Part will discuss, some of the Justices joining the majority forced the opinion away from a more far-reaching rationale due to concern that *Lambert* could invalidate too many existing criminal laws if the Court was not careful.

II. WHY NOT VOID FOR VAGUENESS?

When the Justices first voted on the case, they held nine to zero in favor of Ms. Lambert to reverse the appellate court decision.[23] Justice Douglas wrote a draft opinion overturning the lower court due to the municipal code provision being unconstitutionally vague, as the average

15. *Lambert*, 355 U.S. at 229.
16. *Id.* at 228 (emphasis added).
17. *Id.*
18. *Id.*
19. *Id.* at 231.
20. *Id.* at 232.
21. *Id.*
22. *See infra* pt. V.
23. A.F. Brooke II, *When Ignorance of the Law Became an Excuse:* Lambert *& Its Progeny*, 19 AM. J. CRIM. L. 279, 282 (1992).

person would not know what the words "punishable as a felony" meant.[24] Justice Douglas questioned how an average person could understand whether something was a felony or a misdemeanor after observing that there were at least five different definitions of what may be defined as a felony.[25] In his draft opinion, Justice Douglas also wrote, "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."[26]

The void for vagueness rationale was not one the majority of the Court was ready to accept due to concerns that it would have a wider impact on other laws, including invalidating laws targeting repeat offenders.[27] Justice Clark expressed concern to Justice Douglas that this reasoning 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."[28] Justice Clark said he would join the opinion if it was decided on notice grounds, specifically, it seemed, to limit the potential impact of *Lambert*.[29]

To get a majority, Justice Douglas had to rewrite the opinion to clearly avoid the feared impact on existing criminal laws. As a result, when the final opinion was released, Justice Douglas was not expecting that the case would have a far reaching impact.[30] He feigned some concern about Justice Frankfurter's dissent and wrote him a note asking for an example of a statute that would be unconstitutional under *Lambert*.[31] When Justice Frankfurter didn't respond, Justice Douglas wrote the following to Justice Black:

> Since the announcement of [Frankfurter's] dissent, I have been writing him asking him to give us just one citation of one other statute which would be held unconstitutional.
>
> It is now 11:40 AM, December 17th, and this has been going on for nearly 24 hours. He has not yet sent me any citations, but if he does I

24. *Id.* at 283.
25. *Id.*
26. *Id.*
27. *Id.* at 283–84. Robert Gorman, one of Justice Tom Clark's clerks, was concerned this rationale would invalidate "three-time loser" statutes. *Id.* (citing Memo No. 2 from Robert P. Gorman to Tom C. Clark at 2 (undated) (available in Archives, Box A64, Lambert File)).
28. *Id.* at 285.
29. *Id.*
30. *See infra* text accompanying notes 32–34 (illustrating his conversations with Justice Frankfurter).
31. Brooke II, *supra* note 23, at 287–89.

> will rush it all down to you, because I know you must be as worried about the devastating effect of *Lambert* . . . as I am.[32]

If the Court had decided on void for vagueness grounds, and if, as Justice Clark and his law clerk feared, this invalidated habitual offender laws, *Lambert* could have prevented some of the extraordinarily long sentences that came to define mass incarceration, such as the three-strikes laws. But, as the memos make clear, Justice Douglas did not expect that larger impact. The majority of the Court did not support this case being anything but narrowly decided. The majority did not support deciding the case on void for vagueness grounds, and the majority opinion did not clearly invalidate strict liability offenses.

III. EARLY HOPES ABOUT LAMBERT*'S IMPACT*

Scholars who wrote about *Lambert* just after it was decided did not have the benefit of reading Justice Douglas' memos.[33] These scholars arrived at their projections of what *Lambert* might mean despite the lack of clarity in the opinion itself. The analysis of these scholars also appears to have been heavily influenced by larger ongoing conversations about criminal justice reform at the time. Looking back with the benefit of hindsight, these early articles, published the year after *Lambert*, were more about the scholars' hopes about what *Lambert* could mean and less about what the Court actually wrote or meant to do in the future.

Gerhard O.W. Mueller declared in 1958, at the beginning of his article *On Common Law Mens Rea*, that "[o]ne hundred years of American complacency in matters of mens rea . . . have come to an end with . . . *Lambert v. California*."[34] Mueller went on to say that "[i]n the field of criminal law no question occupies today's scholars, reformers and legislators as much as that of the mental element of crime, mens rea."[35] Mueller was right about the importance of mens rea at the time. The American Law Institute was in the middle of a decade-long process to draft the Model Penal Code (MPC), which had begun in 1952.[36] The MPC's greatest and most lasting influence was its approach to mens rea,

32. WILLIAM O. DOUGLAS, *Letter from William O. Douglas to Hugo Black (December 17, 1957), in* THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF WILLIAM O. DOUGLAS, 87 (Melvin I. Urofsky ed., 1987); Brooke II, *supra* note 23, at 288 (explaining the circumstances behind the letter from William O. Douglas to Hugo Black from December 17, 1957).

33. The memos were published later. *See, e.g.*, DOUGLAS, *supra* note 32, at 87.

34. Mueller, *supra* note 5, at 1043.

35. *Id.* at 1045.

36. MODEL PENAL CODE (AM. LAW INST., Official Draft and Explanatory Notes 1962).

or the "General Requirements of Culpability."[37] It would have been difficult for criminal law scholars of the time to avoid viewing *Lambert* through the "mens rea lens" promulgated by the ongoing MPC drafting process.

Mueller discussed the ongoing conversations about mens rea, observing that "[t]he interest is world wide" and that "no topic of the criminal law is more hotly debated" in Western Europe.[38] Mueller said, "even in the Soviet Union, an astonishing ration of printer's ink and paper has been apportioned for scholarly excursus on the topic."[39] Mueller believed the developing scientific understanding of the "human psyche" was a key to crime control and therefore needed to be better understood as part of the evolving concept of the mental state required for crime.[40] Mueller concluded that *Lambert* had to be decided in the defendant's favor as "true criminality requires proof of awareness of wrongfulness."[41] Mueller focused on the part of Douglas' opinion about notice and the need for a person to be aware of the duty to do something, as "'where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process.'"[42]

Mueller criticized the dissenting Justices as they "completely failed to appreciate the moral issue of mens rea . . . ."[43] In Mueller's view, there would be no need to overhaul or rewrite existing statutes. Instead, the courts should simply interpret what he describes as the "mandate of common law mens rea," which meant that mens rea was a "universal requirement" regardless of the wording in the individual statute.[44] The only statutes that would need to be declared unconstitutional would be those that specifically "abolish a universal mens rea requirement."[45]

Mueller conceded that this is not what *Lambert* said and that the decision was "not a sweeping condemnation of all absolute criminal liability, but a carefully limited ban covering all offenses of omission in which . . . the defendant was not, and could not [have] be[en], aware of any wrong-doing."[46] However, Mueller said that *Lambert* "unmistakably points the way in the right direction and will ultimately lead to a

37. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 140 (7th ed. 2015).
38. Mueller, *supra* note 5, at 1045.
39. *Id.* at 1046.
40. *Id.*
41. *Id.* at 1102.
42. *Id.* at 1102–03 (citing Lambert v. California, 355 U.S. 225, 229–30 (1957)).
43. *Id.* at 1103.
44. *Id.*
45. *Id.* at 1104.
46. *Id.*

complete moral recovery of our penal law."[47] Mueller ended his article with the optimistic statement that "the Supreme Court has clearly told us that it detests the immoral use or misuse of the criminal sanction in the case of a morally blameless defendant. . . . Absolute criminal liability is beginning to end in America."[48]

A more senior professor at the time, Henry M. Hart Jr., shared Mueller's concern about strict liability crimes but was more cautious about *Lambert*'s impact.[49] Hart's article, *The Aims of the Criminal Law*, was a forceful argument against strict liability, and his comments were directed at the on-going Model Penal Code drafting process.[50] In *Lambert*, according to Hart, the Court belatedly "discover[ed] that the due process clauses had anything to say about branding innocent people as criminals."[51] Hart was critical of Douglas's reasoning in the opinion, as the majority "made no effort to analyze the nature of crimes of omission, as distinguished from those of commission."[52] Hart noted that the four dissenting votes were "led by so sensitive a judge as Mr. Justice Frankfurter . . . ."[53] Hart and Frankfurter were friends. Hart had been Frankfurter's student and dedicated the first edition of his book, *Federal Courts*, to Frankfurter.[54] However, this relationship did not stop Hart from criticizing the dissent as it "did not have the virtue even of the majority's muddy recognition that being a 'criminal' must mean something."[55] Hart did not share Frankfurter's concern about the impact of *Lambert* as "[t]he importance of constitutional doctrine is not to be measured by the number of statutes formally invalidated pursuant to it or formally sustained against direct attack."[56]

Hart was less convinced that *Lambert* would have the far-reaching effect that he (and Mueller) wanted. Hart advised that "what will be chiefly important to watch about the *Lambert* case will be the strength of the push it gives to interpretations insisting upon the necessity of a genuinely criminal intent."[57] Hart again criticized how the majority

47. *Id.*
48. *Id.*
49. *Id.* at 1043 n.* (providing that Mueller was an associate professor of law in 1958); *see infra* note 50 (providing that Hart was a professor of law in 1958).
50. Hart, *supra* note 5, at 422.
51. *Id.* at 433.
52. *Id.* at 434.
53. *Id.*
54. HENRY HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).
55. Hart, *supra* note 5, at 434.
56. *Id.* at 435.
57. *Id.*

opinion was written as "the push would have been stronger if the majority opinion had been more muscularly written."[58]

Hart focused in on one point that Mueller did not: the need for better direction by courts to legislatures in terms of how they were drafting criminal laws. Hart described the "shoddy and little-minded thinking of American legislatures about the problems of the criminal law . . . ."[59] To Hart, the legislatures needed better direction from the courts, as he said, "[o]nly if the courts acknowledge their obligation to collaborate with the legislature in discerning and expressing the unifying principles and aims of the criminal law is it likely that a coherent and worthy body of penal law will ever be developed in this country."[60] Hart was not convinced that *Lambert* was the case to give legislatures that better direction. As he said, "[f]or the most part, American courts have, thus far, failed not only in the fulfillment, but even in the recognition of th[e] obligation" to collaborate with legislatures.[61]

IV. LATER VIEWS OF LAMBERT

In the immediate years after the decision, *Lambert* was looked to as a case that would mark the beginning of a new era of constitutional criminal doctrine.[62] However, *Lambert* did not live up to the hopes of these earlier scholars that it would be the first of many cases to develop robust constitutional limits for criminal law or to eliminate strict liability offenses. In fact, the number of strict liability offenses, particularly under federal laws, has multiplied.[63] In the decades after the decision, scholars have developed other views of how to interpret *Lambert* once it became clear that *Lambert* was not having its hoped-for impact. As Peter Low and Benjamin Wood observed, "*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."[64] This Part reviews these different views.

58. *Id.*
59. *Id.*
60. *Id.* at 435–36.
61. *Id.* at 436.
62. *See, e.g.*, Low & Wood, *supra* note 4, at 1617.
63. *See, e.g.*, Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J. Sept. 27, 2011, https://www.wsj.com/articles/SB10001424053111904060604576570801651620000.
64. Low & Wood, *supra* note 4, at 1617.

A. Omission to Act

The narrow view of *Lambert* is that it prohibits strict liability crimes that are mala prohibita crimes of omission.[65] *Lambert* is a popular case in first year criminal law casebooks for this proposition.[66] *Lambert* is often taught as part of the introduction to actus reus and omission to act and is given as an example of a case where the Court overruled a conviction due to lack of notice to the defendant that she needed to do an affirmative act (register) to avoid a criminal violation.[67] However, Justice Douglas, after noting that *Lambert* deals with a "wholly passive" act, stated that it is "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed."[68] This line has been interpreted by scholars to mean that *Lambert* should be viewed as applying to both affirmative acts and to omissions to act.[69] Under this analysis, the key fact to focus on is Lambert's lack of notice regarding what is criminal behavior (whether it is an affirmative act or omission to act).[70] Although other scholars have focused on whether, in fact, Lambert was "wholly passive" when she acted affirmatively by staying in Los Angeles.[71]

B. Ignorance of the Law

Another view is that *Lambert* disproves the maxim that "ignorance of the law is no excuse."[72] Under this analysis, if the law is one that most people would not know about (such as a requirement to register as a felon), and there is no notice to the individual defendant about the existence of the law, then ignorance of the law could be a defense.[73] Some academics have said that *Lambert* "might stand for a limited constitutional notice principle."[74] The challenge to this analysis of

65. *See, e.g.*, Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 457–58 n.288 (1993) and discussion in Low & Wood, *supra* note 4, at 1617.

66. ELLEN S. PODGOR, PETER J. HENNING, ALFREDO GARCIA & CYNTHIA E. JONES, CRIMINAL LAW: CONCEPTS AND PRACTICE, 206–08 (4th ed. 2018).

67. *See e.g.*, JOHN KAPLAN, ET AL, CRIMINAL LAW: CASES AND MATERIALS 193–98 (6TH ed. 2008); MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES AND COMMENTS 353-54 (2ND ed., 2009).

68. Lambert v. California, 355 U.S. 225, 228 (1957).

69. Low & Wood, *supra* note 4, at 1618.

70. *Id.*

71. Michaels, *supra* note 5, at 861.

72. *Id.* at 859–60; Brooke II, *supra* note 23, at 280.

73. Brooke II, *supra* note 23, at 286–87.

74. Low & Wood, *supra* note 4, at 1618–20.

Lambert is the subsequent caselaw that makes it clear that, in other circumstances, knowledge is not required.[75]

C. "Lack of Blameworthiness"

Blameworthiness is the idea that a person should only be held accountable if the punishment would be "just," which would only happen if the defendant were to "blame" for the conduct.[76] In giving this explanation, Professor (now Dean) Michaels focuses on a line in *Lambert*[77] from Holmes, which says, "[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."[78] This view suggests that *Lambert* stands for the proposition that strict liability crimes, when a person would not otherwise know it is a crime, would be unconstitutional. However, Michaels points out that there is a "substantial body of case law indicating that strict liability is *not* unconstitutional."[79]

D. Socialization

A related concept is socialization. This is premised on the idea that "criminal law is heavily fault-oriented, in principle punishing bad choices."[80] This means that when a person is not "sufficiently at fault" they should not be held to be responsible, especially if they "did not make a bad choice."[81] Peter Low and Benjamin Wood argue that socialization is part of the common-law doctrines of mistake of fact and ignorance of the law.[82] Low and Wood do not conclude whether negligence, recklessness, or knowledge should be the culpability standard for mistakes of fact, but they argue that "strict liability for factual mistake ought to be unacceptable."[83]

75. Michaels, *supra* note 5, at 860.
76. *Id.* at 861.
77. *Id.*
78. Lambert v. California, 355 U.S. 225, 229 (1957).
79. Michaels, *supra* note 5, at 861–62 (emphasis in original).
80. Low & Wood, *supra* note 4, at 1621.
81. *Id.*
82. *Id.* at 1622–28.
83. *Id.* at 1624.

Low and Wood use *Liparota v. United States*[84] as an example of socialization "in [f]act" by the Supreme Court.[85] In this case, the defendant bought food stamps from an undercover agent for less than their face value.[86] The relevant law required that the defendant "knowingly" transfer food stamps in "any manner not authorized."[87] The Court held that "the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations."[88] The Court did not cite to *Lambert*, but Low and Wood use this case as an example of using socialization to prevent the application of the principle that "ignorance of the criminal law is not an excuse."[89] Further,

> 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.[90]

E. "Right to Travel Case"

Michaels suggests that *Lambert* is instead a "right-to-travel case."[91] Michaels' analysis focuses on the affirmative act of being in Los Angeles and that to limit this act (by requiring registration) interfered with Lambert's constitutional right to travel.[92] Michaels argues that this analysis is the only one that makes sense when comparing *Lambert* to *United States v. Balint*[93] and *United States v. Dotterweich*.[94] Those cases both involved drugs—selling narcotics "while 'innocently' not having the requisite form," and shipping drugs in interstate commerce "while 'innocently' mislabeling the ingredients."[95] In Michaels' view, the

84. Liparota v. United States, 471 U.S. 419 (1985).
85. Low & Wood, *supra* note 4, at 1641–42.
86. *Liparota*, 471 U.S. at 419.
87. *Id.* (citing 7 U.S.C. § 2024(b)(1) (2018)).
88. *Id.* at 433.
89. Low & Wood, *supra* note 4, at 1642–43.
90. *Id.* at 1647.
91. Michaels, *supra* note 5, at 862.
92. *Id.*
93. 258 U.S. 250 (1922).
94. 320 U.S. 277 (1943); Michaels, *supra* note 5, at 842–49.
95. Michaels, *supra* note 5, at 864.

element of travel is the distinguishing feature of *Lambert*.[96] While it may be a distinguishing feature, as Michaels acknowledges, the Court itself never gave this reason.[97]

V. HOW THE COURTS HAVE USED LAMBERT

Since it was decided, *Lambert* has been cited in a total of 825 cases in federal and state courts.[98] As Douglas predicted, it is hard to find an example of any statute that has been invalidated due to *Lambert*, even sixty-two years later. Examples of defendants prevailing due to *Lambert* are also a small overall percentage. As will be discussed below, the defendant won in just twenty-two of the 825 cases (2.6% of the total). *Lambert* is a case that is more often cited to uphold the application of a law against a defendant than to invalidate a statute.

In the years immediately following *Lambert*, lower courts did not jump to read *Lambert* broadly. Instead, they were cautious and applied *Lambert* narrowly. For example, in *United States v. Juzwiak*, the Second Circuit upheld the defendant's conviction for leaving the United States without registering under the federal narcotic registration statute.[99] In *Reyes v. United States*, the Ninth Circuit upheld the defendant's conviction for violating the same statute as in the *Juzwiak* case.[100] These cases took a narrow view of *Lambert*, due to the "lack of clarity" in the majority opinion.[101] The concurring opinion in *Juzwiak* also observed that "the *Lambert* case disclosed so sharp a division in the Court that the extension of its policy to new areas may well be thought unlikely."[102] Lower courts did not seem to try to see how far they could push the Supreme Court in terms of limiting strict liability crimes.

A. *Lambert* in the Federal Courts

A total of 451 federal cases have cited to *Lambert*. Of these, there are just sixteen cases (3.5% of cases) where the defendant cited to

96. *Id.* at 864–66.
97. *Id.* at 865.
98. This number is the total reported by Lexis as of April 30, 2019.
99. 258 F.2d 844, 847 (2d Cir. 1958).
100. 258 F.2d 774, 776 (9th Cir. 1958).
101. Frank C. Bozeman, Comment, *Mens Rea and Strict Liability Criminal Statutes*, 16 WASH. & LEE L. REV. 238, 247 (1959).
102. *Juzwiak*, 258 F.2d at 848 (Clark, J., concurring).

Lambert and prevailed (at least in some measure) due to *Lambert*.[103] Those thirteen cases, for the most part, focused on failures to register, omissions to act, and notice issues. Interestingly, of the thirteen cases, the earliest was in 1970—thirteen years after *Lambert* was decided.

Of the federal cases where *Lambert* was used and the defendant did not prevail, nearly 20% (eighty-seven cases) were sex offenses, with over 86% of those cases being sex-offender registry cases.[104] It is not surprising that defendants are not prevailing using *Lambert* in sex offender registry cases as there are rarely problems with notice in those cases. Defendants who are subject to sex offender registration are usually advised on the record, as part of the plea deal, and it is specifically stated as a term of probation (if there is probation). Nearly 10% of the federal cases citing to *Lambert* involved firearm offenses, including unlawful possession of a firearm due to status (such as being a felon).

B. *Lambert* in the State Courts

A total of 375 state court cases have cited to *Lambert*. Of these, the defendant prevailed in just six cases (1.6% of cases).[105] These six cases overwhelmingly involved notice issues. At the state level, one of the six cases was decided in 1960—just three years after *Lambert* was decided. However, that case was a direct response to *Lambert* and held that the city did not have the constitutional power to enact the municipal

103. *See* Wright v. Georgia, 373 U.S. 284, 293 (1963); Smith v. Roe, 159 F. App'x 810, 811 (9th Cir. 2005); Bartlett v. Alameida, 366 F.3d 1020, 1023–24 (9th Cir. 2004); United States v. Mishra, 979 F.2d 301, 306–07 (3d Cir. 1992); United States v. $359,500 in U.S. Currency, 828 F.2d 930, 935–36 (2d Cir. 1987); United States v. Gregg, 612 F.2d 43, 51 (2d Cir. 1979); United States v. Boucher, 509 F.2d 991, 995 (8th Cir. 1975); United States v. Mancuso, 420 F.2d 556, 558 (2d Cir. 1970); United States v. Marquez, 424 F.2d 236, 240 (2d Cir. 1970); Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1303 (M.D. Fla. 2011); United States v. Aldrich, No. 8:07CR158, 2008 U.S. Dist. LEXIS 11411 at *14 (D. Neb. Feb. 14, 2008); United States v. Barnes, 2007 U.S. Dist. LEXIS 53245 at *17 (S.D.N.Y. July 23, 2007); United States v. Emerson, 46 F. Supp. 2d 598, 612–13 (N.D. Tex. 1999); United States v. Hall, 751 F. Supp. 1380, 1384–85 (E.D. Cal. 1990); Sisson v. United States, 630 F. Supp. 1026, 1034–35 (D. Ariz. 1986); United States v. Dover, 3 M.J. 764, 766 (A.F.C.M.R. 1977).

104. Listing of cases are on file with author. *See, e.g.*, United States v. Le Tourneau, 534 F. Supp. 2d 718 (2008); United States. v. Stock, 685 F.3d 621 (2012).

105. There was a seventh case: Lambert v. Mun. Court of L.A. Cty., 53 Cal. 2d 690, 691 (1960); however, this is the *Lambert* case sent back by the U.S. Supreme Court and dismissed due to a finding of unconstitutionality of the underlying municipal code section. The six cases are: Abbott v. City of Los Angeles, 53 Cal. 2d 674, 680, 689 (1960); University Heights v. O'Leary, 68 Ohio St. 2d 130, 133–36 (1981); Wolf v. State, 292 P.3d 512, 518 (Okla. Crim. App. 2012); State v. Buttrey, 651 P.2d 1075, 1081, 1083 (Or. 1982); State v. Binnarr, 400 S.C. 156, 167–68 (2012); State v. Chester, 82 Wash. App. 422, 428–30 (1996).

ordinance under which Lambert, and the defendant in the case, were convicted.[106]

A total of 25% of the state cases citing to *Lambert* where the defendant did not prevail involved a sex offense. A total of 69% of the sex offense cases involved sex offender registry offenses. Just over 5% of the state cases involved firearm offenses (compared to nearly 10% of the federal cases).

C. *Lambert*'s Use

This quick survey of cases citing to *Lambert* supports the view that *Lambert* did not bring to an end "[o]ne hundred years of American complacency in matters of mens rea . . . ."[107] *Lambert* has not been widely used and has not acted as a protection against strict liability offenses or acted to encourage greater care in the legislative drafting process. Courts have continued to read the case narrowly and to be cautious about applying *Lambert* beyond a few narrow cases. But what if *Lambert* had lived up to the earlier hopes and promises? What might have happened?

VI. LAMBERT *AND MASS INCARCERATION*

The Warren Court cannot be faulted for not predicting and acting to prevent mass incarceration. Incarceration rates in the United States had been fairly steady before and during the Warren Court era. There was no history or experience of mass incarceration as incarceration numbers did not start to dramatically climb until the 1970s, over a decade after *Lambert* was decided.[108] However, *Lambert* did not prevent or play a role in moderating mass incarceration. As has been discussed, in practice, *Lambert* has been read narrowly and has only prevented criminal prosecution of cases when the defendant fails to act in a case under circumstances where the duty to act is not obvious.[109] But, what if *Lambert* had been more widely applied? What if Frankfurter's fears had been realized? Could a wider application of *Lambert* have prevented or moderated mass incarceration? On the face of it, *Lambert* would not have prevented the longer sentences or increased filing of cases that are

106. *Abbott*, 53 Cal. 2d at 689.
107. Mueller, *supra* note 5, at 1043.
108. *See, e.g.*, Kang-Brown et al., *supra* note 6, at 8.
109. *See, e.g.*, Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 457 n.288 (1993) and discussion in Low & Wood, *supra* note 4, at 1617.

important contributors to mass incarceration.[110] However, if *Lambert* had been more widely and broadly applied, it could have changed the political culture both in legislatures and in prosecutors' offices. As will be discussed, the existing cultures of both of these institutions are moving forces behind mass incarceration.

A. Local Legislatures

When the Supreme Court decided *Lambert*, it should have struck fear, or at least concern, into the heart of the U.S. Congress and state legislators around the country. There should have been concern that newly drafted criminal laws would have to withstand constitutional scrutiny. This would have meant, at the very least, taking a more serious look at strict liability offenses and at notice requirements for all offenses. There is no indication that *Lambert* had that impact.[111]

In 1962, five years after deciding *Lambert*, the Court decided *Robinson v. California*.[112] This was the second Warren Court decision that sparked the hope that the Court would develop constitutional criminal law.[113] *Robinson* was not the next in a great line of cases. It was, instead, a case that "downscaled . . . a revolutionary spark to a modest principle."[114]

Both *Lambert* and *Robinson* seemed to sit on their own in isolation and both failed to lead to more court decisions. This would have led any legislator who might have been thinking about it to conclude there was no reason to exercise caution before doing a serious review or overhaul of existing criminal statutes. More importantly, in the 1970s, as the widespread restructuring of penal codes started around the nation, there was no reason to think the Court would step in to limit what was declared a crime, or to limit the increasing punishment ranges. The Warren Court, through *Lambert* and *Robinson*, had the opportunity to start a process to check legislative power and could have helped to prevent the seemingly unchecked and widespread criminal code changes that started under the War on Crime and continued under the

110. *See, e.g.*, Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining,* 15 U. MD. L.J. RACE RELIGION GENDER & CLASS 191, 199–200 (2015) [hereinafter Alkon, *Reversing Mass Incarceration*].

111. *See, e.g.*, Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 57–58 (2008).

112. Robinson v. California, 370 U.S. 660, 660 (1962).

113. ERIK LUNA, *The Story of* Robinson*: From Revolutionary Constitutional Doctrine to Modest Ban on Status Crimes*, *in* CRIMINAL LAW STORIES 47, 50 (Donna Coker & Robert Weisberg eds., 2013).

114. *Id.*

War on Drugs.[115] Legislators around the country increased the numbers of acts that were crimes, increased the number of strict liability offenses, increased the number of enhancements (use of a gun, committing a crime within 100 yards of a school, etc.), and increased the range of potential sentences, including increasing the number of offenses that could be charged as either a felony or misdemeanor.[116] These changes in the laws were and continue to be significant drivers of mass incarceration.

B. Prosecutors

According to John Pfaff, the single biggest reason for increased incarceration rates since 1990 is an increase in the percentage of felony filings per arrest.[117] However, it is unclear why prosecutors are filing a larger percentage of cases. I would suggest that one reason is because they can. For decades, the political message of our larger society was to encourage more incarceration and to look at prison as the solution for a wide range of societal ills. Legislators increased prosecutorial power by passing laws that gave prosecutors more discretion.[118] Prosecutors can now decide whether to file a case with largely similar facts as a misdemeanor or a felony.[119] Prosecutors can decide to add or strike enhancements as part of a plea deal.[120] In the decades following *Lambert*, legislators around the country gave wider and wider discretion to prosecutors through revised criminal codes.[121] More discretion has meant more power. This power has been largely unchecked. If prosecutors were concerned that crimes would need to withstand constitutional scrutiny, that might have acted as a check on their power. Any check on prosecutorial power might have meant a change in

115. Gershowitz, *supra* note 111, at 57–59 ("Yet, that rigorous oversight did not come to pass. . . . [S]ince *Powell*, it is nearly impossible to find a non-capital case in which the Court has restricted legislatures' power to criminalize.").

116. *See, e.g.*, Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 585–87 (2014).

117. John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1242 (2012).

118. *See, e.g.*, Alkon, *supra* note 116, at 587 ("Structural changes in penal codes around the country gave prosecutors more choices when deciding how to charge an offense and what offers to make; these legislative changes have often been made precisely to give prosecutors more 'bargaining chips.'").

119. *See, e.g.*, Alkon, *Reversing Mass Incarceration*, supra note 110, at 203–05 (recommending that legislatures reduce the number of acts that can be charged as either a felony or misdemeanor, to reduce prosecutorial power).

120. *Id.* at 192.

121. *See, e.g.*, Alkon, *supra* note 116, at 585–87.

prosecutorial culture that might have reigned in the increased filing rates.

VII. WHAT CRIMES MIGHT BE DIFFERENT IF LAMBERT *HAD LIVED UP TO ITS PROMISE?*

Criminal laws are rarely subjected by the courts to serious constitutional scrutiny. What if they were? What if the various theories of what *Lambert* stood for had been the beginning of meaningful restrictions on legislative power to add enhancements and strict liability offenses? If *Lambert* had been the first in a line of cases holding criminal laws up to true constitutional scrutiny, the following acts might not have become crimes or led to serious sentencing enhancements, or penal codes might have been drafted more narrowly.

A. Repeat Offender Statutes

Longer prison terms are one factor contributing to mass incarceration. Habitual offender statutes, including "three strikes and you are out" statutes, are a factor in long prison terms. However, habitual offender statutes existed at the time of *Lambert*, which is one reason that Justice Clark wanted to be sure that *Lambert* was narrowly decided—so those statutes would not be invalidated.[122]

Habitual offender statutes were meant to deal with the problem of recidivism. Under this theory, if a defendant re-offends, he should be punished more heavily to encourage him not to keep re-offending or, in the case of more serious criminal behavior, to protect society from those who keep committing crimes.

But what if *Lambert* had been decided on the broader grounds that Clark feared? It is possible that it could have required that existing habitual offender statutes be subjected to greater scrutiny, and some might have been invalidated. It is also likely that laws such as California's "three strikes and you are out" would not have passed muster. The U.S. Supreme Court upheld the constitutionality of the California law, holding that it was not cruel and unusual punishment.[123] If *Lambert* had been more broadly written, would other arguments have worked? Could defendants have successfully argued that they did not have notice that prior convictions could carry the severe consequences of the three

122. *See* discussion *supra* pt. II.
123. Ewing v. California, 538 U.S. 11, 35 (2003); Lockyer v. Andrade, 538 U.S. 63, 77 (2003).

strikes law and therefore at least convictions pre-dating the law and possible notice should not be able to be used?

B. Strict Liability Statutes

This is the large category of crimes that the early *Lambert* scholars hoped *Lambert* would invalidate. If *Lambert* had done what they predicted, it would have prevented the large increase in strict liability offenses. As the early scholars hoped, *Lambert* could have had the impact of requiring legislators to draft clearer mens rea standards into legislation and would have subjected existing laws to more serious scrutiny.[124]

C. Sexual Offender Registry

Sex offender registry laws were created so that communities would be aware of sex offenders in their midst, reasoning that the community would be safer if sex offenders were known. Some states had sexual offender registry laws dating back to the 1940s and 1950s.[125] However, twenty-six states passed their laws in just a two-year period between 1994–1996. Beginning in 1994, Congress passed a series of federal laws requiring sex offenders to register.[126] As was discussed above, a number of the cases citing to *Lambert* have been sex offender registry cases. Defendants are routinely advised about the need to register if they are convicted of a crime that requires sex offender registration. Defendants, therefore, do not get relief under the narrow wording of *Lambert*. For example, state courts have held that sex offender registry statutes were constitutional without an element of criminal intent.[127]

What if *Lambert* had been decided on broader omission to act grounds? Is it possible that these laws would not have passed scrutiny? Sex offender laws have had other serious consequences that might have been mitigated or prevented if *Lambert* could have been used to invalidate, instead of uphold, them. Sex offenders may not be able to find

124. *See* discussion *supra* pt. III.

125. Scott Matson & Roxanne Lieb, *Sex Offender Registration, A Review of State Laws*, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, at 5 (July 1996), http://www.wsipp.wa.gov/ReportFile/1227.

126. *Legislative History of Sex Offender Registration and Notification*, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, https://www.smart.gov/legislation.htm.

127. State v. Watts, 41 So. 3d 625, 638 (La. Ct. App. 2010).

housing.[128] Juvenile sex offenders have been required to register for life for offenses such as "sexting"—arguably an excessive punishment for the offense.[129] This offense, as an act of omission, could have been invalidated on constitutional grounds if *Lambert* had been more broadly decided.

D. Gun Offenses

Some laws prevent certain types of people from possessing firearms. Felons, for example, are prohibited from possessing handguns.[130] Would a different *Lambert* have invalidated these offenses? Given how few laws exist that restrict gun ownership in this country, and the narrow categories for these restrictions, a more broadly worded *Lambert* might not have had much of an impact here. It has also been viewed as an issue of notice and might have led to more careful advisements so that anyone who might fall into a prohibited category would have been fully advised, thereby preventing prosecutions of those who were not given adequate notice.

E. Voting While a Felon

Crystal Mason voted in the November 2016 presidential elections.[131] However, Ms. Mason was ineligible to vote under Texas law as she was still on supervised release from an earlier felony conviction.[132] Under the law, Ms. Mason could only be found guilty of the crime of illegal voting if she "knew" she was not eligible to vote.[133] Ms. Mason said that she did not know that she was not eligible to vote. As Ms. Mason said, when she was placed on supervised release, "[t]hey tell you certain things like you can't be around a felon, you can't have a gun.

128. Although housing issues may also exist due to restrictions such as prohibiting defendants from being within a certain distance of a school.

129. *See, e.g.*, *Sex Offender Registries: Should Kids Be Listed?*, USA TODAY May 1, 2013, https://www.usatoday.com/story/news/nation/2013/05/01/sex-offender-registries/2125699/.

130. *See, e.g.*, 18 U.S.C. § 922(g) (2018).

131. Anna M. Tinsley & Deanna Boyd, *Convicted Felon Indicted on Illegal Voting Charge in Tarrant County*, FORT WORTH STAR-TELEGRAM Mar. 1, 2017, https://www.star-telegram.com/news/politicsgovernment/election/article135748503.html.

132. *Id.*

133. TEX. PENAL CODE § 12.33(a) (2011) (a second-degree felony carried a maximum sentence of twenty years in prison); TEX. ELEC. CODE § 64.012(a)(1) (2010); TEX. ELEC. CODE § 64.012(b) (2010) (a person who "votes or attempts to vote in an election in which the person knows the person is not eligible to vote" has committed the crime of illegal voting which is a second-degree felony).

No one actually said, 'Hey, you can't vote this year.'"[134] Ms. Mason brought her identification to the polling place, but her name was not on the list.[135] According to Ms. Mason, one of the poll workers encouraged her to fill out a provisional ballot and walked her through the process. Ms. Mason did not carefully read the ballot herself and did not see anything about not being able to vote if she was on supervised release.[136] Ms. Mason voted with the provisional ballot. She later received a letter telling her that her vote was not counted, but with no explanation as to why. Ms. Mason was later arrested and charged. Ms. Mason waived her right to a jury trial and was convicted through a bench trial.[137] The judge sentenced her to five years in prison.

Ms. Mason's case made the national headlines. It was one of only a few criminal prosecutions for illegal voting nationwide. Ms. Mason's case was couched in the following political rhetoric, both nationally and statewide, that illegal voting "'must be stopped'" and "'we need every tool to go after it.'"[138]

Ms. Mason's case is on appeal. She lost her first motion for a new trial. Ms. Mason's lawyers have not cited or looked to *Lambert v. California* for relief.[139] What if *Lambert* had been decided on broader grounds? Voting laws are complicated. Ms. Mason's defense is complicated by the fact that she signed a provisional ballot that clearly stated that anyone on conditional release is not eligible to vote.[140] Ms. Mason maintains that she did not read before signing. Ms. Mason was not told at the time of her sentence, or when she was put on supervised release, that she would not be eligible to vote. Could *Lambert* have

134. Tinsley & Boyd, *supra* note 131.

135. *Id.*

136. The language on the provisional ballot, which Ms. Mason said she did not read, states, "I am a registered voter of this political subdivision and in the precinct in which I'm attempting to vote and have not already voted in this election (either in person or by mail). I am a resident of this political subdivision, have not been finally convicted of a felony or if a felon, I have completed all of my punishment including any term of incarceration, parole, supervision, period of probation, or I have been pardoned." (on file with Author).

137. Sarah Sarder, *Texas Felon Who 'Didn't Even Want to Go Vote' Gets Prison Time for Voting Illegally*, THE DALLAS MORNING NEWS, Mar. 29, 2018, https://www.dallasnews.com/news/courts/2018/03/29/texas-felon-who-didn-t-even-want-to-go-vote-gets-prison-time-for-voting-illegally/.

138. Tinsley & Boyd, *supra* note 131.

139. Brief for Appellant at iv–vi, *Mason v. State*, http://www.search.txcourts.gov/searchMedia.aspx?MediaVersionID=ae019747-5045-479e-acf9-91c3d893da4f&coa=coa02&DT=Brief&MediaID=fd9a3c87-066d-489e-a0bc-e09121a4009b (Tex. App. Nov. 19, 2018) (No. 02-18-00138-CR); Appellant's Reply Brief at ii–v, *Mason v. State*, https://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=909c4356-642a-4e4f-980d-941280d1fcd6&coa=coa02&DT=Brief&MediaID=cb887f3c-a289-4c5d-9ce4-5906374367f0 (Tex. App. July 1, 2019) (No. 02-18-00138-CR).

140. Tinsley & Boyd, *supra* note 130.

required notice to defendants who lose their voting rights before they can be prosecuted for illegal voting? What about notice regarding other collateral consequences of the conviction, such as not being allowed to possess a firearm?

VIII. CONCLUSION

One Supreme Court case does not have the power to change everything. One case on the right issue does, however, have the power to change the direction of our legal system in fundamental ways. *Lambert* was a case that could have led to fundamental changes. Perhaps if *Lambert* had been more clearly written, it could have had that impact. However, the majority of the Court was not ready for *Lambert* to have that more clear and larger impact.[141] In the end, Douglas wrote the opinion that would garner the necessary votes at the time.[142] *Lambert*'s lack of clarity was combined with the majority of the Court's unwillingness to make *Lambert* the first case in a series developing constitutional criminal doctrine. The Court did not follow up on *Lambert* in future decisions and allowed it to sit on its own. Unfortunately, a case that could have had a serious impact in shaping criminal law practice for generations has instead perhaps had its largest impact as an interesting case to discuss with first year criminal law students.

141. Brooke II, *supra* note 23, at 281–88.
142. *Id.*