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rel. Levine v. Fair serves as an up-to-date reminder that such situations do occur. No legislature is able to anticipate every conceivable circumstance that would raise a similar problem. It would seem wise, therefore, to sanction the court's reservation of some latitude of discretion in the application of habeas corpus to extremely pressing cases where no other remedy is adequate. A careful examination of the old authorities shows that there is an appropriate legal justification for granting such relief.

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MENS REA AND STRICT LIABILITY CRIMINAL STATUTES

During the twentieth century there has been a decided increase in the volume of legislation circumscribing and attaching criminal penalties to conduct which is not in itself wrongful and which was not considered as criminal by the common law.[1] As a consequence the courts increasingly speak of two distinct categories of offenses: those acts and omissions which are by their very nature wrongful and which were crimes at common law, or offenses *mala in se,* and those which, although innocent in themselves, have been proscribed by statute, or offenses *mala prohibita.* It is generally said that the two types of offenses differ by more than degree, that there is a difference in kind.[2] The difference most frequently encountered between the two involves *mens rea,* or awareness of some wrongdoing.[3] One is not pun-

[1]For a thorough general discussion of this subject see Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933).

[2]Perkins, Criminal Law 692 (1957). Perkins contends that an offense malum prohibitum is not a crime, which fact, he says, is clearly indicated by the persistent search for an appropriate label, such as "public welfare offenses," "public torts," "police regulations," "administrative misdemeanors," "quasi crimes," "prohibited acts," "prohibitory laws," "regulatory offenses," " or "civil offenses." Id. at 701-02.

[3]Id. at 693. "Awareness of some wrongdoing" was used by the Supreme Court in United States v. Dotterweich, 320 U.S. 277, 281 (1943), to characterize mens rea. However, the Court has not been consistent in adhering to any one definition of mens rea. For example, in Morissette v. United States, 342 U.S. 246, 252 (1952), the Court uses mens rea "to signify an evil purpose or mental culpability." The Court in the same case uses scienter to "denote guilty knowledge." Ibid. In United States v. Balint, 258 U.S. 250, 251 (1922), the Court said that "the general rule at common law was that scienter was a necessary element ... of every crime ...." Perkins comments that as so used in Balint the term "scienter" is synonymous with mens rea. Perkins, supra note 2, at 681. In distinguishing between mens rea and scienter, Perkins concludes that "there is an important difference ... between an offense having a special mental element such as 'knowledge' and one in which the mental

ished for committing an offense which is wrong in itself unless he was at the time conscious of his wrongdoing, but *mens rea* is not a necessary element of an act which is wrong only because it is committed. In the latter instance strict liability attaches for the doing of the prohibited act or for the omission.[4]

Although this distinction between the two kinds of offenses has been criticized,[5] it is firmly entrenched in the federal courts.[6] Since the United States Supreme Court had previously held that ignorance of the law will not excuse[7] and had upheld several *mala prohibita* convictions over due process objections,[8] much legal discussion was evoked when in 1957 the Court, in the five-to-four decision of *Lambert v. California*,[9] struck down a felon registration ordinance as violative of due process because the defendant had no actual or probable knowledge of the existence of the ordinance which required her to register as a felon with the police.[10] Although writers have not agreed as to the precise meaning of the Lambert Rule or as to whether *Lambert* represents a departure from prior holdings,[11] many have

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element is only the so-called general mens rea. In the former 'knowledge' is a positive factor which the prosecution is required to plead and prove; in the latter the prosecution has no such burden although defendant may be entitled to an acquittal if he can establish that he acted under a reasonable mistake of fact. No amount of negligence can be a substitute for 'knowledge,' whereas an utterly unreasonable mistake of fact will not be recognized as an excuse in a prosecution for an offense which has no special mental element, but only the general mens rea." Id. at 317.

[4]"[P]ublic policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 70 (1910).

[5]Perkins, supra note 2, at 692.

[6]See the lengthy discussion in Morissette v. United States, 342 U.S. 246 (1952).

[7]Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910).

[8]United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922); United States v. Behrman, 258 U.S. 280 (1922); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910).

[9]355 U.S. 255 (1957).

[10]See note 40 infra and accompanying text.

[11]72 Harv. L. Rev. 183 (1958); 44 Iowa L. Rev. 205 (1958); 18 La. L. Rev. 726 (1958); 56 Mich. L. Rev. 1008 (1958); 29 Miss. L.J. 338 (1958); 9 Syracuse L. Rev. 308 (1958); 19 U. Pitt. L. Rev. 799 (1958). Compare Hughes, Criminal Omissions, 67 Yale L.J. 590, 619-20 (1958), with Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043 (1958). Hughes concludes that "at the least the decision reveals a heightened awareness of the peculiar problems attending ignorance of the law with respect to criminal omissions, and of the special character of offenses of omission." Hughes, supra at 620. In praising the Lambert decision, Mueller states the issue involved as a moral one: "Will this libertine democracy of ours continue to permit the conviction of persons who justifiably had no notion of wrong-doing when they conducted themselves in violation of the law?" Mueller, supra at 1044. He con-

concluded that the decision should be clarified.[12]

The opportunity to delimit the Lambert Rule was provided recently in two similar cases, *United States v. Juzwiak*[13] and *Reyes v. United States*.[14] Both cases involved violations of a federal statute[15] which requires United States citizens who are addicted to or use narcotic drugs, except by prescription, or who have been convicted of a violation of any federal or state narcotic or marijuana law, the penalty for which is imprisonment for more than one year, to register with the Secretary of the Treasury before departing from or entering the United States. The convictions were affirmed by different federal courts of appeals, and both courts were emphatic in distinguishing the *Lambert* case.

In *United States v. Juzwiak* defendant had previously been convicted of a narcotic violation and left the United States as a seaman on board a merchant ship without having registered. Treasury Department agents, according to regulations issued pursuant to the federal narcotic registration statute,[16] had posted notices of the re-

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cludes that the Lambert decision "unmistakably points the way in the right direction and will ultimately lead to a complete moral recovery of our penal law." Id. at 1104.

[12]See the authorities cited in note 11 supra.

[13]258 F.2d 844 (2d Cir. 1958), cert. denied, 359 U.S. 939 (1959).

[14]258 F.2d 774 (9th Cir. 1958).

[15]70 Stat. 574-75 (1956), 18 U.S.C.A. § 1407 (Supp. 1958), states: "(a) In order further to give effect to the obligations of the United States pursuant to the Hague convention of 1912 ... and the limitation convention of 1931 ... and in order to facilitate more effective control of the international traffic in narcotic drugs, and to prevent the spread of drug addiction, no citizen of the United States who is addicted to or uses narcotic drugs, as defined in section 4731 of the Internal Revenue Code of 1954, as amended (except a person using such narcotic drugs as a result of sickness or accident or injury and to whom such narcotic drug is being furnished, prescribed, or administered in good faith by a duly licensed physician in attendance upon such person, in the course of his professional practice) or who has been convicted of a violation of any of the narcotic or marijuana laws of the United States, or of any State thereof, the penalty for which is imprisonment for more than one year, shall depart from or enter into or attempt to depart from or enter into the United States, unless such person registers, under such rules and regulations as may be prescribed by the Secretary of the Treasury with a customs official, agent, or employee at a point of entry or a border customs station. Unless otherwise prohibited by law or Federal regulation such customs official, agent, or employee shall issue a certificate to any such person departing from the United States; and such person shall, upon returning to the United States, surrender such certificate to the customs official, agent, or employee present at the port of entry or border customs station.

"(b) Whoever violates any of the provisions of this section shall be punished for each such violation by a fine of not more than $1,000 or imprisonment for not less than one nor more than three years, or both."

[16]19 C.F.R. § 23.9a (Supp. 1958). In United States v. Eramdjian, 155 F. Supp.

quirements in conspicuous places which defendant frequented. In upholding the conviction the Court of Appeals for the Second Circuit assimilated violation of the registration statute to an offense *malum prohibitum* and held that no proof of criminal intent was necessary for conviction since Congress had not made intent an element of the offense.[17]

When confronted with the objection that the case fell within the Lambert Rule, the court distinguished *Lambert* on two grounds: (1) whereas the felon registration ordinance in *Lambert* involved a "passive" act, the failure to register, the conviction in *Juzwiak* involved a "positive" act, leaving or entering the United States without having registered;[18] (2) in any event, there was a showing of the probability that appellant had knowledge of his duty to register, which showing satisfied the Lambert Rule that there had been a manifestation of "actual knowledge . . . or proof of the probability of such knowledge."[19]

In a concurring opinion Chief Judge Clark expressed doubt as to the validity of the first distinction and as to the reality of the probability of notice. Notwithstanding such disagreement with the facts used to distinguish *Lambert,* Judge Clark contrasted the purpose of the felon registration ordinance involved in *Lambert*—"but a law enforcement technique designed for the convenience of law enforcement agencies"—with the federal narcotic registration statute, which "obviously assists in the execution of a strongly held Congressional policy for the control of the traffic in narcotic drugs."[20] The concurring opinion further noted that since the *Lambert* decision disclosed such sharp division in the Court, "extension of its policy to new areas may well be thought unlikely."[21]

914, 922 (S.D. Cal. 1957), a case which was litigated before the Lambert decision and which is largely incorporated by reference in the Reyes opinion, the court held that "[these] regulations . . . are definite, and described plainly the how, when and where of the registration required. . . . The regulations take into account and jibe with the statutory requirement of the issuance of a certificate to a person departing from, and the surrender of such certificate by such person, upon returning to the United States. The regulations are in accord with the legislative intent of Congress . . . . We conclude the regulations are valid and together with the statute clearly define the crimes thus created by Congress." (Italics and footnotes omitted.)

[17]258 F.2d at 845. Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910). 14 Am. Jur. Criminal Law § 24 (1938). See also United States v. Hohensee, 243 F.2d 367, 371 (3d Cir. 1957), cert. denied, 353 U.S. 976 (1957), rehearing denied, 354 U.S. 927 (1957); Hargrove v. United States, 67 F.2d 820, 823 (5th Cir. 1933); Landen v. United States, 299 Fed. 75, 78 (6th Cir. 1924).

[18]258 F.2d at 847.

[19]Ibid. Lambert v. California, 355 U.S. 225 (1957).

[20]258 F.2d at 847-48.

[21]Id. at 848.

Reyes v. United States involved a conviction under the same federal narcotic registration statute.[22] Reyes, who had been previously convicted of possession of marijuana under a California statute making such possession a felony,[23] failed to register as a narcotic law violator before leaving the United States for Mexico and was arrested, tried, and convicted after re-entry.[24] On appeal Reyes urged that the lower court had erred in refusing to permit evidence of his lack of intent to violate the statute and of his lack of knowledge of the statute, citing *Lambert* on the latter point.[25]

The Court of Appeals for the Ninth Circuit held, however, that the federal narcotic registration statute created an offense *malum prohibitum* and that, accordingly, appellant's evidence of lack of intent to violate the statute, the existence of which he was entirely ignorant, was properly excluded at the trial.[26] In refusing to invoke

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[22]See note 15 supra.

[23]1 Cal. Health & Safety Code § 11500.

[24]258 F.2d at 776. Actually, Reyes v. United States involved two cases, that of Reyes and that of Perez. Perez, who had previously been convicted for addiction, failed to apply for a departure certificate and was apprehended at the point of re-entry into the United States from Mexico. He was noticeably under the influence of narcotics at the time. Id. at 776-77.

[25]Id. at 777. Several other issues were raised in the case. Upon conviction under the California statute, Reyes had been sentenced to only sixty days in the county jail. On appeal he urged that his sixty-day jail sentence was not a conviction of a violation under a narcotic law "the penalty for which is imprisonment for more than one year," as 18 U.S.C.A. § 1407 provides. See note 15 supra. Both Reyes and Perez contended that § 1407 was unconstitutional because (1) it was uncertain; (2) it unduly restricted a citizen's right to travel; and (3) it deprived affected persons of their privilege against self incrimination. 258 F.2d at 777. The court held that the Reyes conviction was within the meaning of § 1407 in that § 1407 referred to the penalty provided by the California narcotic statute under which Reyes had been previously convicted and not to the actual punishment imposed. Id. at 777-78 n.2. As to the certainty of § 1407, the court adopted that part of the opinion in United States v. Eramdjian, 155 F. Supp. 914, 921-22 (S.D. Cal. 1957), which upheld § 1407 as sufficiently definite. 258 F.2d at 778. On the issue of undue restriction of the right to travel, the court again adopted the applicable portion of the language in United States v. Eramdjian, supra at 929, which held such restriction not to be a violation of due process. 258 F.2d at 782, n.3. With regard to the contention that § 1407 deprived appellants of the fifth amendment privilege against self incrimination, the court pointed out that the alleged incriminatory registration slip is not used against a person, for he is prosecuted for not registering rather than for making the certificate or for any fact appearing therein. Id. at 780.

[26]Id. at 782-83. In support of its holding the court cited Morissette v. United States, 342 U.S. 246 (1952); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922); United States v. Behrman, 258 U.S. 280 (1922). Quoting from United States v. Dotterweich, supra at 280-81, the court acknowledged that hardship may be caused, but stated that when dealing with narcotics and their regulation the "larger good" must be considered paramount. 258 F.2d at 783.

the Lambert Rule the court distinguished *Lambert* on three grounds: (1) that *Reyes* involved misfeasance in crossing the border without having registered, whereas *Lambert* involved nonfeasance;[27] (2) that crossing the border into a foreign country was a comparatively uncommon act in contrast to Lambert's act of living in a community;[28] (3) that the federal narcotic registration statute is not merely a convenient aid to police departments, but rather is designed to reduce and control the amount of illegal narcotics crossing the border, as indicated in the preamble.[29] The first and third distinctions correspond to the first distinction in *Juzwiak* and to the concurring opinion therein.[30]

The fifth and fourteenth amendments condition the exertion of the police power by requiring that the purpose of legislation be legitimate and that such object be accomplished by methods consistent with due process.[31] "[T]he guaranty of due process ... demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[32] If less drastic and equally effective measures to achieve the same lawful end are available, a court will strike down the more drastic.[33]

In both *Juzwiak* and *Reyes* the courts discussed several criminal cases in which the Supreme Court had consistently upheld convictions for offenses *mala prohibita* as being consonant with the guaranty of due process.[34] In these cases the Supreme Court reasoned that "to hold otherwise would take from the legislature the power to adjust legislation to evils as they arise and to the ways by which they may be

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[27]Id. at 784.

[28]Ibid.

[29]Id. at 784-85.

[30]See text accompanying notes 18 and 20 supra.

[31]Whether legislation is actually within the scope of the police power, Lochner v. New York, 198 U.S. 45 (1905), and whether an enactment bears any reasonable and substantial relation to the accomplishment of the legitimate objects falling within the scope of the police power are both subject to judicial inquiry. Buchanan v. Warley, 245 U.S. 60 (1917); Chicago, B. & Q. Ry. v. Illinois ex rel. Drainage Comm'rs, 200 U.S. 561 (1906). See also Meyer v. Nebraska, 262 U.S. 390 (1923). Compare Marshall, C.J., in McCulloch v. Maryland, 4 U.S. (4 Wheat.) 415, 430 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

[32]Nebbia v. New York, 291 U.S. 502, 525 (1934).

[33]Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Liggett Co. v. Baldridge, 278 U.S. 105 (1928); Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

[34]258 F.2d at 846-47; 258 F.2d at 782-83. See cases cited in note 8 supra.

effected."[35] Thus the Court has seen no constitutional objection to "legislation [which] dispenses with the conventional requirement for . . . awareness of some wrongdoing,"[36] for "in the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[37]

In the light of these prior Supreme Court holdings, *Lambert v. California*[38] appears at first glance to be an anomaly—"a derelict on the waters of the law."[39] The Court reversed a conviction under a municipal ordinance which made it a misdemeanor for a previously convicted felon not to register with the police department.[40] The absence of precedent for the holding is suggested by the fact that the majority cited in support of its position three decisions concerning notice as a requirement of procedural due process in civil litigation[41] and quoted from Holmes, *The Common Law*.[42]

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[35]Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 69 (1910).

[36]United States v. Dotterweich, 320 U.S. 277, 281 (1934).

[37]Ibid.

[38]355 U.S. 225 (1957).

[39]Id. at 232 (dissenting opinion). See text accompanying note 47 infra.

[40]Los Angeles, Calif., Municipal Code §§ 52.38(a), .39, .43(b). In § 52.38(a) a "convicted person" is defined as one "convicted of an offense punishable as a felony in the State of California," or one convicted of an offense which "if committed in the State of California, would have been punished as a felony." Section 52.39 has three provisions: (1) it shall be unlawful for "any convicted person" to be or remain in Los Angeles for a period of more than five days without registering; (2) any person having a place of abode outside the city must register if he comes into the city on five occasions or more during a thirty-day period; and (3) certain information must be furnished the chief of police on registering. Section 52.43(b) makes the failure to register a continuing offense, and each day's failure to register constitutes a separate offense. Mrs. Lambert was arrested on suspicion of another offense and then charged with a violation of the registration law. At the time of her arrest she had been a resident of Los Angeles for over seven years, had previously been convicted of forgery in Los Angeles, a felony under California law, and had failed to register under § 52.39. At the trial Mrs. Lambert's objection that § 52.39 violated due process was denied, as were her motions in arrest of judgment and for a new trial. The Appellate Department of the Superior Court affirmed the judgment of conviction, holding that there was no merit to the claim that the ordinance was unconstitutional. On appeal before the United States Supreme Court, the Court noted probable jurisdiction, 352 U.S. 914 (1956), designated amicus curiae to appear in support of appellant, and held that the registration provisions of § 52.39 violated the due process requirement of the fourteenth amendment. 355 U.S. at 227. For a comprehensive review of similar registration laws in effect before the Lambert decision see generally Note, 103 U. Pa. L. Rev. 60 (1954).

[41]355 U.S. at 228. Walker v. City of Hutchinson, 352 U.S. 112 (1956); Covey v. Town of Somers, 351 U.S. 141 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[42]355 U.S. at 229. "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." Holmes, The Common Law 50 (1946).

But this analogy to civil cases in which lack of notice was held to violate due process appears to be little more than a prelude to the real basis for the majority decision in *Lambert*. In holding that actual knowledge of a duty to register or proof of the probability of such knowledge and subsequent failure to comply were necessary before a conviction under the felon registration ordinance could stand, the majority opinion distinguished the several cases in which the Court had upheld *mala prohibita* statutes[43] on the ground that in those cases "the commission of acts, or the failure to act [was] under circumstances that should alert the doer to the consequences of his deed,"[44] whereas in *Lambert* "circumstances which might move one to inquire as to the necessity of registration are completely lacking."[45] The majority opinion indicated that "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."[46]

The lack of clarity in the majority's reasoning provoked a vigorous dissent from Mr. Justice Frankfurter, who contended that a distinction between "feasance and nonfeasance . . . is inadmissible as a line between constitutionality and unconstitutionality."[47] But does the Lambert Rule, as the dissent suggests, necessarily apply to all crimes of omission? Or is it confined to duties to act imposed on those in a designated category who find themselves in a locality? Does it apply to those omissions in which the duty arises from conduct which is not sufficiently different from proper everyday activity to apprise a person of the probable existence of such duty? Or is the Lambert Rule simply a restatement of prior Supreme Court holdings in cases in which the police power was used for purposes which are at variance with the very concept of due process?

The Court in *Lambert* faced the problem of whether the ordi-

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[43]355 U.S. at 228. See cases cited note 8 supra.

[44]Ibid. The court acknowledged and added its approval to the principles that "ignorance of the law will not excuse," Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910), and that of all the powers of government, the police power is "one of the least limitable," District of Columbia v. Brooke, 214 U.S. 138, 149 (1909), 355 U.S. at 228.

[45]Id. at 229.

[46]Ibid.

[47]Id. at 231. "[W]hat the Court here does is to draw a constitutional line between a State's requirement of doing and not doing. What is this but a return to Year Book distinctions between feasance and nonfeasance—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. One can be confident that Mr. Justice Holmes would have been the last to draw such a line." Ibid.

nance in question involved a permissible exercise of the police power or whether it went further and became an unreasonable, arbitrary, and capricious application of the police power. Implicit, but not expressed, in the majority opinion are the ideas: (1) that the main purpose of the ordinance was to ease the law enforcement process by the creation of a statutory duty which would usually be neglected because of ignorance of its existence, thus enabling the police to arrest and detain persons for investigation with regard to other unrelated criminal activity—in effect an attempt to accomplish indirectly what could not be done directly;[48] (2) that lack of knowledge was important, not because it fitted within any set of definite rules of due process, but because it connoted an arbitrary application of the ordinance; and (3) that punishment for an innocent omission under circumstances which did not move one to inquire served to magnify the unreasonableness of the ordinance. Thus the reasoning of the majority in *Lambert* appears to have stopped one step short of its logical conclusion: that neither the means nor the end were legitimate and that if either the means or the end failed to meet the test of due process the ordinance must fall.

The Court acknowledged that in the cases which it had distinguished there was a justification for strict liability without regard to knowledge and intent in the interest of the "larger good"—the overriding social interest securing compliance by a facilitated enforcement process in such matters as narcotics[49] and misbranded foods.[50] That justification shrinks in stature when applied to an ordinance the ultimate purpose of which is not to secure compliance with its provisions, but rather to catch unwary ex-felons and detain them for purposes possibly unrelated to the subjects of their prior convictions.[51]

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[48]For more direct attempts which were declared invalid under either the due process clause of the fourteenth amendment or under similar provisions of state constitutions, see Lanzetta v. New Jersey, 306 U.S. 451 (1939), involving a gangster statute which purported to punish any person not engaged in a lawful occupation who had been convicted of disorderly conduct three times or of any crime in New Jersey or any other state; People v. Belcastro, 356 Ill. 144, 190 N.E. 301 (1934), wherein persons reputed to be habitual violators of the criminal laws were deemed to be vagabonds and punishable as such; People v. Licavoli, 264 Mich. 643, 250 N.W. 520 (1933), involving a statute which provided that proof of recent reputation for engaging in an illegal occupation or business was deemed prima facie evidence of being engaged in an illegal occupation or business.

[49]United States v. Balint, 258 U.S. 250 (1922); United States v. Behrman, 258 U.S. 280 (1922).

[50]United States v. Dotterweich, 320 U.S. 277 (1943).

[51]Query as to whether the Court would uphold an ordinance similar to that struck down in Lambert if a preamble were attached asserting that the ordinance

Viewed in such a light, the *Lambert* holding is no departure from prior Supreme Court decisions.

Such ideas, however, are but vaguely deducible from the reasoning of the majority in the *Lambert* case. Thus the courts in *Juzwiak* and *Reyes* were faced with a so-called Lambert Rule attacking the constitutionality of a conviction under another registration statute wherein there had been no showing of either actual or probable knowledge of a duty to register. Faced further with lack of guidance as to the underlying reasons for the Lambert Rule, the two courts chose the alternative and distinguished *Lambert*,[52] identifying the cases at bar with those which the majority in *Lambert* had distinguished[53] as involving circumstances that "should alert the doer to the consequences of his deed."

Because of the lack of clarity in the majority's reasoning in *Lambert*, the constitutionality of many strict liability statutes will depend on how broadly the holding will be read and applied. The courts in *Juzwiak* and *Reyes* limited the Lambert Rule in three respects: first, limiting it to statutes authorizing law enforcement techniques "designed for the convenience of law enforcement agencies," as distinguished from statutes which facilitate the execution of a "strongly held Congressional policy;"[54] secondly, applying the Lambert Rule only to those omissions in which the duty arises from conduct which is not sufficiently different from proper everyday activity to apprise one of the probable existence of such duty; and thirdly—in the event that the Lambert Rule should later be interpreted to apply to all crimes of omission—both courts carefully emphasized that the acts in question constituted "positive" rather than "passive" acts, although one judge disagreed with the validity of such a distinction,[55] as did the dissenting opinion in *Lambert*.[56]

As the first two cases in which federal appellate courts have been faced with the Lambert Rule,[57] *Juzwiak* and *Reyes* have not attempted

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was in response to urgent public safety requirements? Mr. Justice Holmes in Otis v. Parker, 187 U.S. 606, 608 (1903), emphasized that "the mere fact that an enactment purports to be for the protection of public safety, health or morals, is not conclusive upon the courts." Accord, Lawton v. Steele, 152 U.S. 133, 137 (1894): Mugler v. Kansas, 123 U.S. 623, 661 (1887).

[52]See notes 18-20 and 27-29 supra and accompanying text.

[53]See note 8 and text accompanying note 43 supra.

[54]See text accompanying notes 20 and 29 supra.

[55]See text accompanying note 20 supra.

[56]See note 47 supra.

[57]In Bellah v. United States, 256 F.2d 958 (5th Cir. 1958), the appellant did not raise the Lambert decision as an objection to conviction under 18 U.S.C.A. § 1407, and the conviction was affirmed.