CONSTITUTIONAL INNOCENCE

Alan C. Michaels

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What limits, if any, does the Constitution establish on the use of strict liability in the criminal law? Academic commentators have argued for generations that, properly understood, the Constitution places severe restrictions on strict liability in the criminal law and have simultaneously condemned the Supreme Court's strict liability jurisprudence for failing to recognize any significant constitutional limitation. In this Article, Professor Michaels demonstrates that the Court's decisions have in fact followed a middle course—an unarticulated principle that places important limits on the use of strict liability in the criminal law, but still leaves substantial scope for its operation. Under this principle, which he calls "constitutional innocence," a legislature may employ strict liability regarding an element of a crime only if it has the power to criminalize the intentional elements of the crime with the strict liability element excluded. After defending constitutional innocence on descriptive grounds, partly by reference to First Amendment and abortion decisions that have often been overlooked in the strict liability debate, Professor Michaels describes the virtues of the principle and its firm constitutional grounding. Professor Michaels then develops the principle by canvassing current uses of strict liability in both state and federal crimes and exploring the impact explicit recognition of the principle of constitutional innocence would have in cases arising under such statutes.

I. CONSTITUTIONAL INNOCENCE — AN INTRODUCTION

Something bad has happened. At least, something the legislature considers bad has happened. A video dealer sold a pornographic video featuring a minor. A drug wholesaler shipped pills with the wrong label. A doctor performed an abortion on a woman whose fetus was viable. A bartender sold beer to a minor. The legislature, in order to assure that such actors will be punished and to deter others from allowing these things to happen, has made each of these actions criminal, as it, of course, has the power to do. Can the legislature do so if the actor had no reason to know that the pornographic video featured a minor, that the drugs had the wrong label, that the fetus was viable, or

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1 See United States v. X-Citement Video, 513 U.S. 64, 66 (1994).
that the beer purchaser was a minor? The answers to these questions are no,\textsuperscript{5} yes,\textsuperscript{6} no,\textsuperscript{7} and yes.\textsuperscript{8} Why?\textsuperscript{9}

These cases, and many like them, present the question of the constitutionality of strict liability in the criminal law. “Strict liability,” as used in this Article, refers to crimes that authorize liability no matter what the evidence would show about the actor’s fault with regard to a particular material element\textsuperscript{10} of the offense. In other words, strict liability crimes contain a material element for which the actor’s culpability is irrelevant.\textsuperscript{11} Hornbook examples of strict liability crimes in-

\textsuperscript{5} See X-Citement Video, 513 U.S. at 66.
\textsuperscript{6} See Dotterweich, 320 U.S. at 284–85.
\textsuperscript{8} See Dahlke, 57 N.W.2d at 556.
\textsuperscript{9} The question is answered in the body of this Article. For those who wish to learn all the answers now, see note 370 below.
\textsuperscript{10} A material element is:

an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct.

\textsuperscript{11} Model Penal Code § 1.13(10) (1985).

This is a slightly narrower definition of strict liability than that of the Model Penal Code, which designates as absolute (i.e., strict) liability any crime that does not require the state to prove that the actor was at least negligent with regard to each material element. See Model Penal Code § 2.05 and commentary at 282 n.1 (1985).

The literature is rife with definitions of strict liability, and there is some significant (and dizzying) variation among them. See, e.g., Joshua Dressler, Understanding Criminal Law § 11.01, at 125 (2d ed. 1995) (strict liability offenses are those that “do not contain a mens rea requirement regarding one or more elements”); George P. Fletcher, Rethinking Criminal LAW § 9.3.2, at 716 (1978) (strict liability means “liability imposed for an act or omission . . . without considering at trial whether the defendant may exculpate himself by proving a mistake or accident bearing on the wrongfulness of his violation”); Hyman Gross, A Theory of Criminal Justice 343 (1979) (“Strict liability characterizes offenses that are usually, though incorrectly, said to entail liability without culpability.”); Norman Abrams, Criminal Liability of Corporate Officers and Directors for Strict Liability Offenses — A Comment on Dotterweich and Park, 28 UCLA L. REV. 463, 463 n.3 (1981) (strict liability is “liability without culpability”); James B. Brady, Strict Liability Offenses: A Justification, 8 CRIM. L. BULL. 217, 217–18 (1972) (strict liability is not susceptible to definition, but is best illustrated by example); Douglas N. Husak, Varieties of Strict Liability, 8 CAN. J.L. & JURIS. 189, 190, 193 (1995) (strict liability encompasses at least seven different types of liability that share the central feature of allowing conviction even when the defendant is “substantially less at fault than the paradigm perpetrator of that offense”); Phillip E. Johnson, Strict Liability: The Prevalent View, in 4 Encyclopedia of Crime & Justice 1518, 1518 (Sanford H. Kadish ed., 1983) (“[S]trict liability [exists] if there is no requirement of knowledge, negligence, or any other type of culpability . . . .”); Sanford H. Kadish, Excusing Crime, 75 CAL. L. REV. 257, 267 (1987) (“Strict liability imposes guilt without regard to whether the defendant knew or could reasonably have known some relevant feature of the situation.”); Alan Saltzman, Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process, 24 WAYNE L. REV. 1571, 1575 (1978) (strict liability “means criminal liability for the commission of an offense without regard to whether the defendant was culpable with respect to one of the elements of the offense”); Richard G. Singer, The Resurgence of Mens Rea: III — The Rise and Fall of Strict Criminal Liability, 30 B.C. L. REV. 337, 364 n.114 (1989) (in strict liability, the mental state of any actor is irrelevant); Richard A. Wasserstrom, Strict Li-
clude statutory rape and public welfare offenses (such as selling adulterated meat).\textsuperscript{12} Felony murder, which consists of causing a death during the occurrence of a felony, even if the death is caused accidentally and non-negligently,\textsuperscript{13} is also a strict liability offense. No showing of culpability is required with regard to the material element of causing a death.\textsuperscript{14}

Strict liability has endured decades of unremitting academic condemnation.\textsuperscript{15} Its use has been widely criticized as both ineffectual and unjust:

[Strict liability] is ineffectual because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a so-

\textsuperscript{12} See Dressler, supra note 11, § 11.02, at 126–27.
\textsuperscript{13} See id. § 31.06, at 479. An example would be a bank robber who, pulling away from the bank in his car, accidentally hits and kills a motorist.
\textsuperscript{14} See, e.g., Johnson, supra note 11, at 1519.

cially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy.16

In accordance with such attacks, the Model Penal Code launched a "frontal assault" on strict liability, requiring culpability for all crimes in the Code.17

Nonetheless, although the United States Supreme Court has established interpretive presumptions against strict liability,18 it persists in many contexts in the criminal law.19 It is frequently found in both state and federal criminal statutes.20 Moreover, for over seventy-five years the Court has affirmed and reaffirmed that strict liability as a general matter is constitutional.21

Yet, while consistently upholding strict liability crimes in general, the Court has simultaneously suggested that the Constitution does place some, unspecified, limits on them.22 The rule, in Herbert Packer's ironic phrase, is that "[m]ens rea . . . is not a constitutional requirement, except sometimes."23 Put slightly differently, strict liability is not constitutionally prohibited, except when it is. But when is that? The Supreme Court has expressly refused to delineate the constitutional limits on strict liability,24 leaving lower courts at sea and sometimes causing conflicting results.25

16 Packer, supra note 15, at 109; see also LAFAVE & SCOTT, supra note 15, at 248.
17 MODEL PENAL CODE § 2.05 cmt. at 283 (1985).
19 See infra Part IV (analyzing a wide array of strict liability cases decided since 1985); see also John C. Coffee, Jr., Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/ Crime Distinction in American Law, 71 B.U. L. Rev. 193, 216 (1991) (discussing the "explosion" in strict liability in federal crimes since the mid-1980s); Perkins, supra note 15, at 1068 (stating that recent cases and statutes show a trend toward strict liability); Saltzman, supra note 11, at 1572-73 (asserting that strict liability is "well entrenched in American criminal law").
20 See infra Part IV (documenting applications of strict liability in state and federal offenses since 1985); see also MODEL PENAL CODE § 2.05 cmt. at 290 (noting that most states continue to use strict liability for some crimes carrying the possibility of imprisonment); Levenson, supra note 15, at 406 n.29, 413 n.76, 453 n.266 (documenting continued and new uses of strict liability in federal offenses and compiling state and federal statutes).
21 See DRESSLER, supra note 11, § 11.04, at 129-30; LAFAVE & SCOTT, supra note 15, at 246; infra pp. 884-85.
25 Courts presently disagree about the constitutionality of strict liability in the following areas: felony murder, compare State v. West, 862 P2d 192, 205 (Ariz. 1993) (upholding strict liability), with State v. Ortega, 817 P2d 1196, 1204-05 (N.M. 1991) (striking down strict liability); production of child pornography, compare United States v. Reedy, 632 F. Supp. 1415, 1422-23 (W.D. Okla. 1986) (upholding strict liability for producers with respect to the age of the performer), and
Commentators, in turn, have long tried to define the constitutional limit on strict liability. Some have ambitiously argued that strict liability should be unconstitutional in every context, proposing minimum mental states that should apply to all elements of every offense.26 Others have suggested only slightly narrower prohibitions.27 Yet the


26 See Dubin, supra note 15, at 381, 378–93 (arguing for constitutionalization of “factual notice doctrine” and other principles of mens rea); Hippard, supra note 15, at 1054 (mens rea is constitutionally required for all crimes); Laylin & Tuttle, supra note 15, at 645 (mens rea of at least negligence is required by due process); Mueller, supra note 15, at 1103–04 (common law mens rea should be constitutionally mandated for all offenses); Packer, supra note 15, at 152 (mens rea of negligence should be constitutional doctrine); Saltzman, supra note 11, at 1639–40 (proposing a constitutional rule that the defendant may avoid liability in every case by “showing that [he or she] exercised the utmost care”); Note, Constitutionality of Criminal Statutes Containing No Requirement of Mens Rea, supra note 15, at 102 (hoping for United States v. Balint, 258 U.S. 250 (1922), to be overruled).

27 See Erlinder, supra note 15, at 190 (arguing for a constitutional requirement of mens rea in all common law and most regulatory crimes); Kent Greenawalt, “Uncontrollable” Actions and the Eighth Amendment: Implications of Powell v. Texas, 69 COLUM. L. REV. 927, 977 (1969) (arguing that strict liability is unconstitutional for any offense punishable by imprisonment); John Calvin Jeffries, Jr. & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 YALE L.J. 1325, 1376 (1979) (proposing a constitutional rule that, at least in nonregulatory crimes, “penal liability should be limited to cases in which it is shown that the actor has departed from that which the prototypical law-abiding citizen would have done in the actor’s situation”); Levenson, supra note 15, at 464–67 (a constitutionally grounded affirmative defense of good faith should always be available for crimes punishable by incarceration); Perkins, supra note 15, at 1080 (the Constitution should be read to limit strict liability to malum prohibitum offenses, and punishment for those offenses should be limited to fines); Nelson E. Roth & Scott E. Sundby, The Felony-Murder Rule: A Doctrine at Constitutional Crossroads, 70 CORNELL L. REV. 446, 485–90 (1985) (contending that the Constitution forbids strict liability in cases of non-regulatory crimes and crimes with significant punishment, including felony murder); William J. Stuntz, Substance,
Court has flatly declined to adopt any such limitation.\(^{28}\) Indeed, the Court’s approach has apparently led some commentators to conclude that there is no significant substantive constitutional limit on strict liability.\(^{29}\) And so the questions remain: If some conduct is too innocent to be punished, what principle underlies that judgment, and how can it be grounded in the Constitution?

This Article proposes an answer to these questions. Commentators have focused on a limited subset of the Court’s cases and have harshly criticized those cases on normative grounds, while almost entirely overlooking other lines of precedent in First Amendment and abortion jurisprudence that confirm the existence of important limits on strict liability. A more balanced appraisal of the Supreme Court’s strict liability decisions and these underappreciated lines of precedent reveals the Court’s consistent adherence to an underlying principle that establishes the constitutional parameters of strict liability. That principle, called “constitutional innocence” in this Article, explains both the cases in which the Court has upheld strict liability and those in which the Court has rejected strict liability. Moreover, the principle can be defended on both constitutional and normative grounds.

According to the principle of constitutional innocence, strict liability is constitutional when, but only when, the intentional conduct covered by the statute could be made criminal by the legislature. In other words, strict liability runs afoul of the Constitution if the other elements of the crime, with the strict liability element excluded, could not themselves be made a crime. Otherwise, strict liability is constitutional.

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\(^{28}\) This refusal may result in part from the heavy normative component usually found in arguments against strict liability. Opponents of strict liability often contend that strict liability is unjust, and conclude that it should therefore be unconstitutional. See, e.g., Hippard, supra note 15, at 1039–40. Not surprisingly, the Court has been leery of adopting broad principles barring legislative action on such grounds. Cf. Louis D. Bilionis, Process, the Constitution, and Substantive Criminal Law, 96 Mich. L. Rev. 1269, 1308–18 (1998) (discussing the Court’s practice of “rebuffing the [generalization of] [principles]”).

\(^{29}\) See Richard Singer & Douglas Husak, Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer, 3 Buff. Crim. L. Rev. (forthcoming Fall 1999) (discussing commentators’ views); cf. DRESSLER, supra note 11, § 11.04, at 130 (stating that the Court has held strict liability constitutional in public welfare offenses, has not rejected it elsewhere as a constitutional matter, and is very unlikely to reject it on proportionality grounds); Ronald J. Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harv. L. Rev. 321, 340 n.92 (1980) (arguing that Morissette and Lambert “never matured into a constitutional requirement of intent in criminal law”).
A sketch of the application of the constitutional innocence test to the crime of bigamy clarifies the concept. Bigamy has two elements: (i) marrying another while (ii) being married.\textsuperscript{30} Historically, most jurisdictions applied strict liability to the second element\textsuperscript{31} — being married — and many states continue to do so.\textsuperscript{32} Thus, even if a woman reasonably believed that her first husband was deceased, or that she was divorced from her first husband, she could nevertheless be punished for bigamy if she remarried and that belief turned out to be mistaken.\textsuperscript{33} Is this use of strict liability constitutional?\textsuperscript{34}

According to the principle of constitutional innocence, the decisive issue is whether the Constitution would permit the state to punish the woman under an otherwise identical statute without the strict liability element, that is, could the state constitutionally punish her simply for knowingly getting married?\textsuperscript{35} If the answer is yes, then strict liability with regard to the additional element of already being married would be constitutional. If the answer is no, it would not be. Because the fundamental right to marry prohibits the state from making a crime of all marriages, the latter would be the appropriate result.\textsuperscript{36}


If any person, being married, shall, during the life of the husband or wife, marry another person in this Commonwealth, or if the marriage with such other person take place out of the Commonwealth, shall hereafter cohabit with such other person in this Commonwealth, he or she shall be guilty of a Class 4 felony.


The Model Penal Code provision, which limits liability to negligence, provides as follows:

(1) Bigamy. A married person is guilty of bigamy, a misdemeanor, if he contracts or purports to contract another marriage, unless at the time of the subsequent marriage:

(a) the actor believes that the prior spouse is dead; or

(b) the actor and the prior spouse have been living apart for five consecutive years throughout which the prior spouse was not known by the actor to be alive; or

(c) a Court has entered a judgment purporting to terminate or annul any prior disqualifying marriage, and the actor does not know that judgment to be invalid; or

(d) the actor reasonably believes that he is legally eligible to remarry.


\textsuperscript{31} See Model Penal Code § 230.1 commentary at 380–81; Sayre, supra note 15, at 74 (tracing the development of strict liability for bigamy to Commonwealth v. Marsh, 48 Mass. (7 Met.) 472 (1844)).

\textsuperscript{32} See 10 C.J.S. Bigamy § 6 (1995); Saltzman, supra note 11, at 1576 n.18.

\textsuperscript{33} See 10 C.J.S. Bigamy § 7 (1995). Belief in the death of a spouse could be a defense if no word of the spouse was received for a specified number of years prior to the marriage. See id. English statutes established the period as seven years; in the United States the period varied from two to ten years. See Model Penal Code § 230.1 commentary at 381–82. In the case of belief in divorce, however, the general rule was that such belief was no defense no matter how much time passed. See 10 C.J.S. Bigamy § 7 (1995).

\textsuperscript{34} Bigamy is discussed in greater detail below at pp. 853–56.

\textsuperscript{35} Knowledge that one is getting married is usually required in a bigamy prosecution. See 10 C.J.S. Bigamy § 6 (1995).

\textsuperscript{36} See infra notes 140–141 and accompanying text.
The principle of constitutional innocence is consistent with a minimum culpability level of "imperfect care" for every element of an offense. The actor may not be punished if she is as careful as possible, but the legislature is free to use the other elements of an offense to define "as careful as possible" to be very careful indeed, and to punish when the imperfect care with regard to the strict liability element — established as imperfect by the other elements of the offense — causes the harm.

Felony murder provides an example. Although strict liability formally attaches to the element of causing a death, the other elements of the statute — in particular, committing a felony — establish imperfect care with regard to the strict liability element. A person guilty of felony murder displayed imperfect care with regard to causing a death because that person was not as careful as possible not to cause a death; the person could have been more careful by not committing the felony at all. The principle of constitutional innocence allows punishment for imperfect care, but recognizes limits on the legislature's power to define perfect care. When the legislature cannot punish the other elements of the statute in the absence of the strict liability element, it may not establish "imperfect care" by proving them; independent culpability must be established for that element.

This Article defends constitutional innocence from descriptive, theoretical, and practical perspectives as the limit on the legislative power to use strict liability. Part II begins this task by examining the doctrinal treatment of strict liability from the perspective of constitutional innocence. Section II.A briefly describes the history of strict liability and then considers the leading Supreme Court cases, showing that their holdings are consistent with constitutional innocence and that their rationales are often suggestive of it. Section II.B considers Lambert v. California, the one Supreme Court case widely recognized as holding strict liability unconstitutional. After briefly analyzing the traditional understandings of Lambert, this section suggests a different view of the case that accords with the principle of constitutional innocence: Lambert makes sense as a right-to-travel case. Section II.C considers the First Amendment and abortion cases in which the Court has mandated minimum mental states for criminal liability. Their relevance to the constitutional limits on strict liability has been significantly underappreciated by courts and commentators. Taken as a

37 355 U.S. 225 (1957). Lambert was a convicted forger living in Los Angeles. See id. at 226. She was charged and convicted under a local ordinance requiring felons residing in Los Angeles for more than five days to register with the police, even though she had been unaware of the registration requirement. See id. at 226–27. The Supreme Court held that her conviction in these circumstances was unconstitutional. See id. at 228–29.

38 See LAFAVE & SCOTT, supra note 15, at 247 n.22.
whole, they are strongly suggestive of the constitutional innocence limitation on strict liability.

Relying on this background, Part III argues for constitutional innocence as the test for assessing the constitutionality of strict liability. Both the principle's overall good fit with current law and its relation to the voluntary act requirement — a basic premise of the criminal law from which the principle can be derived — recommend its explicit adoption. Another advantage of the constitutional innocence principle described in Part III is that it allows courts to employ separately identifiable limits on legislative power, such as the Bill of Rights, to define the constitutional limits on strict liability. Rather than asking courts to decide whether a legislative choice of strict liability is "just" or "fundamentally unfair," the constitutional innocence test channels courts toward questions they are better suited to and more practiced at answering, such as whether the intentional conduct covered by a statute is protected by a fundamental right. By relying on established limitations on legislative power, the constitutional innocence approach also avoids additional intrusion on the legislative prerogative to decide the proper objects of the criminal law. For all of these reasons, constitutional innocence, though more modest than some other suggested constitutional limitations on strict liability, may ultimately serve as a more effective check on the use of strict liability in the criminal law.

Part IV demonstrates that explicit recognition of the principle of constitutional innocence would have a significant impact on the legal landscape. A survey of state and federal decisions from the past fifteen years addressing constitutional challenges to strict liability demonstrates that constitutional innocence can help resolve ongoing controversies in the lower courts. For example, constitutional innocence can resolve disputes over criminal statutes punishing sexually explicit expression, abortion, and false statements in a variety of contexts, as well as crimes such as possession and permitting unlawful activities on one's premises. Part IV also shows how the principle of constitutional innocence provides a more robust rationale for some results that courts already reach, dovetails with the Cruel and Unusual Punishment Clause, and affords a principled basis for deciding other strict liability questions that remain.

39 See sources cited supra notes 26–27.
II. CONSTITUTIONAL INNOCENCE AMIDST STRICT LIABILITY

A. Strict Liability

1. Strict Liability — In General. — Commentators frequently state that strict liability was virtually unknown at common law and only first began to appear in the latter half of the nineteenth century. Yet, felony murder, which is widely recognized as a species of strict liability, was well known long before the nineteenth century (indeed, it was developed at common law). The solution to this apparent paradox lies in a familiar distinction between two meanings of mens rea, which Joshua Dressler has usefully labeled as mens rea’s “culpability” and “elemental” meanings. The older “culpability” meaning refers to some “morally blameworthy state of mind,” which Blackstone called

40 See Dubin, supra note 15, at 351–52 (by the mid-seventeenth century “the so-called ‘guilty mind’ had become an essential element in the definition of most offenses”); Erlinder, supra note 15, at 166 (citing dicta as late as 1837 stating that there are no crimes without mens rea); R.M. Jackson, Absolute Prohibition in Statutory Offences, 6 CAMBRIDGE L.J. 83, 83 (1938) (mens rea is required in all common law crimes); Levenson, supra note 15, at 436 (for 300 years, until the middle of the nineteenth century, common law required mens rea for crimes); Perkins, supra note 15, at 1077 (“In the beginning, [the mens rea concept] was carried into all prosecutions . . .”); Rollin M. Perkins, Ignorance and Mistake in Criminal Law, 88 U. PA. L. REV. 35, 58–59 (1939) (civil wrong of public nuisance is the “only common law exception to the rule that criminal guilt requires mens rea . . .”); Sayre, supra note 15, at 56–57 (before the mid-nineteenth century, “apart from exceptional isolated cases criminal liability depended upon proof of a criminal intent”); Singer, supra note 11, at 338 n.4 (“[B]y the beginning of the seventeenth century, [mens rea] was firmly established as a sine qua non for criminal conviction.”); Joseph Yahuda, Mens Rea in Statutory Offences, 118 NEW L.J. 330, 330 (1968) (at common law, no crime was “complete without some sort of intent concurring with the prohibited act”); Johnson, Note, supra note 15, at 462 (before the middle of the 19th century, it was generally stated that crimes required proof of mens rea) (citing 1 BISHOP, CRIMINAL LAW § 287 (5th ed. 1923)); William J. Sloan, Note, The Development of Crimes Requiring No Criminal Intent, 26 MARQ. L. REV. 92, 92 (1942) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *31).

41 Sayre traced the beginning to two British cases, Regina v. Woodrow, 15 M. & M. 304 (Exch. 1846), and Regina v. Stephens, 1 L.R.-Q.B. 702 (1866). See Sayre, supra note 15, at 58–61. Singer disputes Sayre’s conclusions, see Singer, supra note 11, at 340–41, and argues that in the nineteenth century “English courts were wary of construing statutes to impose strict criminal liability, [but] courts in the United States were far less reticent,” id. at 363. Singer traces the start of strict liability to cases, beginning about 1870, holding liquor sellers strictly liable for the age of minor purchasers. See id. at 365 & n.121.

42 See, e.g., Johnson, supra note 11, at 1519; Packer, supra note 15, at 141–42.

43 It is uncertain when courts first began using the felony murder rule. See Roth & Sundby, supra note 27, at 449. However, it is hundreds of years old. See id.

44 See DRESSLER, supra note 11, at 102–03. Many have recognized these two meanings. See Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 STAN. L. REV. 681, 686 (1983) (“Most agree that the view of mens rea generally has shifted from a vague notion of wickedness to a more definite requirement of a specific state of mind.”); see also Brett, supra note 15, at 418–20; Frances Bowes Sayre, The Present Signification of Mens Rea in the Criminal Law, in HARVARD LEGAL ESSAYS 399, 411–14 (1934); Singer, supra note 11, at 337 n.1.

45 DRESSLER, supra note 11, at 102.
a "vicious will" and Justice Jackson described as "an evil-meaning mind." In contrast, the "elemental" meaning refers to the particular mental state or states provided in the definition of a particular crime, such as purpose, knowledge, or recklessness. The elemental meaning of mens rea makes possible the distinction between "offense analysis," in which a given offense has a single mens rea requirement, and "element analysis," in which each element of an offense may have a different mens rea.

Considered through the prisms of culpability mens rea and offense analysis, crimes described as imposing strict liability under the element analysis approach are not strict liability crimes at all because the offenses require some morally blameworthy state of mind. For example, in the case of felony murder, from the perspective of offense analysis and culpability mens rea, culpability could be found in the intentional participation in a felony. Similarly, in the famous case of Regina v. Prince, the defendant's conviction for taking a girl under the age of sixteen out of the possession of her father was upheld, even though the defendant reasonably believed she was over sixteen. Many commentators, adopting the perspective of element analysis, have considered this 1875 case to be an important move toward strict liability (because Prince was not even negligent with regard to the isolated element of the girl's age). However, others see it as an affirmation of the traditional rule against strict liability because in upholding the conviction, the law lords stressed that Prince's action of knowingly taking a girl out of the possession of her father amply demonstrated the mens rea for the offense.

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46 4 WILLIAM BLACKSTONE, COMMENTARIES 721.
48 See DRESSLER, supra note 11, at 103.
49 As described by Paul Robinson and Jane Grall:
The common law and older codes often defined an offense to require only a single mental state. Under this "offense analysis," one spoke of intentional offenses, reckless offenses, and negligent offenses. The general culpability provisions of the Model Penal Code, in contrast, recognize that a single offense definition may require a different culpable state of mind for each objective element of the offense.
Robinson & Grall, supra note 44, at 683 (footnotes omitted).
50 See Frank J. Remington & Orrin L. Helstad, The Mental Element in Crime — A Legislative Problem, 1952 Wis. L. Rev. 644, 655-58 (noting that some courts only require intent to prove the underlying felony in felony murder cases).
51 13 Cox Crim. Cas. 138 (1875).
52 See id. at 140-45, 156-58.
53 See Brady, supra note 11, at 220-21 (Prince was a typical case of "objective liability"); Jackson, supra note 40, at 86-87 (Prince was a turning point toward strict liability); Levenson, supra note 15, at 422-23 (discussing Prince as a strict liability case); Singer, supra note 11, at 360 n.96 (the Prince court imposed strict liability); Wasserstrom, supra note 11, at 733 (same).
54 See GROSS, supra note 11, at 364-66, 373 (arguing that calling Prince a strict liability case is mistaken); Robinson & Grall, supra note 44, at 689 n.37 (explaining that, in Prince, the defendant had mens rea from the court's offense analysis perspective).
In contrast, the new "strict liability offenses" that arose in the latter half of the nineteenth century did not, at least by their terms, require a criminal intent from even the offense analysis or culpability mens rea perspectives. These crimes did not mandate any mens rea in the "culpability" sense of the term used in offense analysis. For example, neither the man who sold liquor to a drunkard without knowing that the purchaser was a drunkard,\(^55\) nor the man who sold adulterated milk not knowing the milk was adulterated,\(^56\) had an "evil mind" altogether. Thus, writing in 1933, Francis Sayre could cite "an almost unbroken line of authorities"\(^57\) stating that an offense cannot exist without wrongful intent, while simultaneously noting the "steadily growing stream of offenses punishable without any criminal intent whatsoever,"\(^58\) which he dubbed "public welfare offenses."\(^59\) From the perspective of the elemental meaning of mens rea, both public welfare offenses and offenses such as felony murder or statutory rape (in which strict liability is imposed with regard to the element of the age of the defendant's victim) impose strict liability, because the defendant may be convicted regardless of his or her mental state with respect to a material element of the offense.\(^60\)

The view of mens rea one adopts not only affects the length of strict liability's pedigree, but also determines how "strict" strict liability is. As encapsulated in the passage from Sayre quoted above, public welfare offenses manifest complete strict liability when examined from the offense analysis perspective; the defendant is guilty even if he or she lacks "any criminal intent whatsoever."\(^61\) In contrast, from the perspective of element analysis, although an offense may impose strict liability with regard to a particular element, such offenses generally do not apply strict liability to every element — most or all contain some elements that have a culpable mental state, such as knowingly selling liquor.\(^62\)

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\(^{55}\) See Barnes v. State, 19 Conn. 397, 403–04 (1849).


\(^{57}\) Sayre, supra note 15, at 55.

\(^{58}\) Id.

\(^{59}\) Id. at 56. Richard Singer argues that the label "public welfare offense" is a mistake and that the early cases were actually "morals" offenses. See Singer, supra note 11, at 339, 363–73.

\(^{60}\) See Packer, supra note 15, at 138 (stating that element analysis reveals that the "allegedly pervasive principle of mens rea is . . . riddled with exceptions").

\(^{61}\) Sayre, supra note 15, at 55.

\(^{62}\) See Gross, supra note 17, at 343; Johnson, supra note 11, at 1519; Levenson, supra note 15, at 418 n.90 (stating that crimes applying strict liability to all elements are rare or nonexistent); Peter W. Low, The Model Penal Code, The Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?, 19 Rutgers L.J. 539, 560–64 (1988); Packer, supra note 15, at 140–41; Kenneth W. Simons, Rethinking Mental States, 72 B.U. L. Rev. 463, 554 (1992); Wasserstrom, supra note 11, at 742–43; cf. Robinson & Grall, supra note 44, at 719–23 (arguing that the "conduct" element of an offense should be understood "narrowly, . . . to mean the actual physical movement of the actor," and that knowing conduct of this sort is always required). But see
2. **Strict Liability — The Traditional Cases.** — Herbert Packer’s famous aphorism that “[m]ens rea is an important requirement, but it is not a constitutional requirement, except sometimes,” was intended to disparage the Supreme Court’s strict liability jurisprudence, and many commentators continue to agree with his assessment. If one searches the strict liability cases for a principle barring punishment in the absence of moral blameworthiness, which often means using the “culpability” meaning of mens rea and adopting an offense analysis perspective, one can easily agree with Packer’s conclusion. Whether or not the Court should do so, it plainly has approved strict liability punishment without “moral blameworthiness.”

On the other hand, reviewing the cases from the perspective of element analysis yields a more consistent, albeit limited, theme. In the cases in which the Court upheld strict liability, the defendant had intentionally engaged in conduct, covered by the statute, that the legislature had the power to forbid. In each of these cases, the Court relied on that conduct to justify the imposition of strict liability. Conversely, in cases in which the Court rejected strict liability on constitutional grounds, the defendant’s intentional conduct was beyond the legislature’s power to punish. Indeed, the cases are so consistent on this point that they suggest a rule that criminal punishment must be predicated on some independent culpability with regard to offense elements that the legislature has the power to punish. This is the principle of constitutional innocence.

The rest of section II.A examines the traditional constitutional Supreme Court strict liability cases from the perspective of constitutional innocence. These cases have almost uniformly not required mini-

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LAFAVE & SCOTT, *supra* note 15, at 243 (citing State v. Dobry, 250 N.W. 702 (Iowa 1933), involving a Blue Sky statute, as imposing strict liability on all elements).


64 Packer considered the situation he thus described a “failure” and a mark of “inadequate performance.” *Id.*


66 See *supra* pp. 838–39.


68 The cases examined in text are *Ballint*, *Dotterweich*, *Morissette*, *United States v. Freed*, 401 U.S. 601 (1971), and *Williams v. North Carolina*, 325 U.S. 226 (1945). This section does not examine other strict liability cases in text because in these other cases the Court unambiguously rejected strict liability on grounds of statutory interpretation; these cases therefore offer little guidance on constitutional issues. See, e.g., Staples v. United States, 511 U.S. 600, 619–20 (1994); Liparota v. United States, 471 U.S. 419, 423–33 (1985); United States v. United States Gypsum Co., 438 U.S. 422, 436–38 (1978). *Park* is discussed below at note 99, rather than in text, as most commentators conclude that it too interpreted the statute at issue as not imposing strict liability.
mum mental states as a constitutional matter. Section II.B gives special attention to Lambert v. California, the one case in this line in which the Court held strict liability unconstitutional. Section II.C examines freedom of expression, freedom of association, and abortion cases requiring minimum mental states from the same perspective. The cases in all three sections suggest the following result: Strict liability is constitutional when, but only when, the statute covers intentional conduct that the legislature could punish if the strict liability element were not included in the crime.

(a) United States v. Balint — United States v. Balint was the first important test of strict liability in a criminal case in the Supreme Court. Balint was charged with violating the Narcotic Act of December 17, 1914. As a means of taxing and restraining the use of

Other cases, such as United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971), which applied strict liability to the question of ignorance of the law, and United States v. Vermian, 468 U.S. 63 (1984), which applied it to the jurisdictional element of the offense, are not examined in this text of this section because they do not involve application of strict liability to material elements of the offense. United States v. Behrman, 258 U.S. 280 (1922), and Shevin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910), are included in the Balint discussion. This Article examines cases in accordance with the now-conventional perspective of element analysis, see supra p. 389, which is essential to the principle of constitutional innocence. For a discussion of the differences between this approach and offense analysis, in the context of deciding when strict liability is just (as opposed to when it is legal), see Simons, cited above in note 65, at 1085–93.


70 Shevin-Carpenter, decided twelve years before Balint, upheld strict liability in the imposition of a civil fine and, in dicta, stated that the statute's criminal provisions were also constitutional. See Shevin-Carpenter, 218 U.S. at 69–70. Because the case covers civil penalties, it is mentioned only briefly here. Nonetheless, the result is entirely consistent with the principle of constitutional innocence. Shevin-Carpenter was sued by the state for violating a state law prohibiting cutting timber on state land without a valid and existing permit. See id. at 62–63 & n.1. Shevin-Carpenter knew that it was cutting the timber and knew that it was on state land, but had a reasonable — albeit erroneous — belief that its permit had not expired. See id. at 63–64. The Court upheld the application of strict liability to the element of "without a permit," see id. at 69–70, but of course, the state could have outlawed the other elements of the offense that were concededly intentionally committed (cutting timber on state land) without relying on the strict liability element.

71 See, e.g., Hippard, supra note 15, at 1047 (in Balint, the "Court . . . conceded to legislatures the power to make criminals of innocent citizens"); Packer, supra note 15, at 113 (Balint is the "key decision in the sequence"); Saltzman, supra note 11, at 1592 (Balint is "the basic authority for strict liability's constitutionality"); Wasserstrom, supra note 11, at 732 (Balint is "undoubtedly the "landmark case").

72 The law provided in relevant part

[E]very person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on . . . .

Sec. 2. That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the afore-
narcotic drugs, the Act listed a number of drugs and required that all sales of "the aforesaid drugs" be recorded on an Internal Revenue form, which the seller had to save for two years. The indictment charged Balint with selling opium and coca derivatives without recording the sale on the appropriate form. Balint and his codefendant "demurred to the indictment on the ground that it failed to charge that they had sold the inhibited drugs knowing them to be such." The Supreme Court held both that "the statute [did] not make such knowledge an element of the offense" and that the statute was consistent with due process. What did the Court mean when it used the term "such knowledge"? It appears the Court was referring to the knowledge that the drugs the defendants were selling were the "aforesaid" drugs covered by the statute. In other words, if a defendant knew he or she was selling drugs, that defendant did not need to know either the precise character of the drugs or that those particular drugs were covered by the statute. Indeed, the Supreme Court itself recently endorsed this reading of Balint: "[I]n Balint, we concluded that the Nar-

73 See Balint, 258 U.S. at 253-54.
74 Narcotic Act § 2.
75 See Balint, 285 U.S. at 251.
76 Id.
77 Id. (emphasis added).
78 See id. at 252-53.
79 Neither the phrase itself nor the subsequent opinion specified whether the knowledge at issue was (i) that Balint was selling drugs at all, (ii) what drugs Balint was selling, or (iii) that the drugs in question were "inhibited" by the statute. Nor does the demurrer shed light on this issue. The demurrer in its entirety stated only:

The above-named defendants hereby demur to the indictment 28-316 filed against them in this court on the 23rd day of May, 1921, charging them with the crime of unlawfully selling cocaine and heroin, on the ground that it appears upon the face thereof:

First: That the facts stated do not constitute a crime.

Wherefore the defendants ask judgment of the court that they be dismissed and discharged from the said premises specified in the said indictment.

Transcript of Record at 3, Balint (No. 316). The only "facts" in the Supreme Court record are the allegations of the indictment. Those facts are only skeletal. Clearly, however, Balint did not simply sell a car in which the previous owner had hidden drugs or engage in some similar "accidental" drug sale. To the contrary, the indictment charged that on two consecutive days Balint did "sell, barter, and give" to one Peter Reager 10 grains of heroin hydrochloride and 10 grains of cocaine hydrochloride. Id. at 2-3.

United States v. Behrman, 258 U.S. 280 (1922), decided the same day as Balint and construing the same statute, did include some facts that suggest Behrman was an ignorance of the law case. The statute contained an exception to the requirement of an IRS form for doctors writing prescriptions to patients in the course of their professional practice. See id. at 285. Behrman wrote narcotics prescriptions for a narcotics addict. See id. at 286-87. Because the prescriptions were not "for the purpose of treating any disease or condition other than [defendant's] addiction," id. at 286, the Court held that they were not prescriptions in the course of professional practice within the meaning of the statute, see id. at 287-89. The Court also held that the indictment did not need to allege that Behrman knew these were not prescriptions within the meaning of the statute. See id. at 288.
cotic Act of 1914 . . . required proof only that the defendant knew that he was selling drugs, not that he knew the specific items he had sold were ‘narcotics’ within the ambit of the statute.”

Thus, the Court upheld strict liability with regard to the nature of the drugs (and their being covered by the statute). However, the Court predicated this result on the fact that the actor knowingly sold the drugs — broader intentional conduct that was a part of the crime and that the legislature had the power to prohibit. Because the legislature had the power to punish the sale of drugs more broadly — in effect, the power to demand that one be so careful with regard to selling the restricted drugs without a form that one not sell drugs at all — it had the power instead to punish only when the “harm” (the drugs were the restricted ones and no form was used) resulted from the choice not to exercise such care.

Commentators have long bemoaned this decision, and from the perspective of offense analysis and the search for a constitutional limit on punishing morally blameless conduct, it is not hard to see why. The government did not allege that Balint had any criminal intent. As far as the indictment was concerned, he may have been a reasonably careful pharmacist who made an “innocent” mistake. The Court’s point, however, was that the legislature had decreed that selling drugs at all is not an entirely innocent activity and that people will be punished for the bad results that flow from such sales. Moreover, persons who knowingly sell drugs are not too innocent to be punished as a constitutional matter because the legislature could punish all drug sales.

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80 Staples v. United States, 511 U.S. 600, 606 (1994); see also Erlinder, supra note 15, at 186 (asserting that the Court’s strict liability cases required “proof that [the] defendants purposely or knowingly sold or possessed certain items”).

81 In the context of whether strict liability is just from a retributive perspective (as opposed to the question of its constitutionality explored here), Richard Wasserstrom was perhaps the first forcefully to make this point. See Wasserstrom, supra note 11, at 742–43 (arguing that engaging in broader activity discloses some level of “fault”). Mark Kelman has made the same core observation in arguing that the contention that strict liability offenders are blameless “depends on the use of a rationally indefensible narrow time frame in focusing on the defendant’s conduct.” Kelman, supra note 15, at 1516; see also Gross, supra note 11, at 346–47 (arguing that strict liability does not violate the principle that “only persons who are to blame for what they do are justly punished for it”); Mark Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591, 605–11 (1981) (claiming that critics of strict liability crimes “invariably use narrow time-framing”); Low, supra note 62, at 556, 556–64 (arguing that strict liability as to one element of a crime is reasonable because of “the level of notice that is conveyed by the remaining elements of the offense”).


83 The Court’s opinion, though no doubt subject to a number of possible interpretations, supports this view. The key passage of the opinion provided:

[In the prohibition of the punishment of particular acts, the State may in the maintenance of a public policy provide "that he who shall do them shall do them at his peril and will not be
Of course, from the perspective of offense analysis, this result may not be very satisfactory, since even limiting punishment to persons who intentionally became drug sellers does not limit liability to those who committed a "moral wrong" or had a "criminal intent," because being a pharmacist does not imply either. From the perspective of element analysis, though, the result makes more sense. If a legislature has the power to enact a law punishing the knowing sale of drugs, it stands to reason that it has the power to enact a statute that punishes a narrower subclass of that conduct, to wit, the knowing sale of drugs when the drugs are in fact "inhibited" by statute. The legislative power to punish while applying strict liability to the second element (the drugs being inhibited by statute) is apparent when one considers

heard to plead in defense good faith or ignorance."... Again, where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.

_Balint_, 258 U.S. at 252–53 (citing _Hobbs v. Winchester Corporation_, 2 K.B. 471, 483 (1910)).

There is an apparent tension in the decision. The Court said on the one hand that "the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells," hinting that negligence may be required for punishment. _Id_ at 253. Yet only two paragraphs later, the Court noted with approval that Congress "weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided." _Id_ at 254. This language seemingly states that "innocence" may be punished.

The tension between the two passages dissolves, however, when one considers that the latter passage is immediately preceded by a sentence that limits its application to someone who is selling drugs in the first place. The fuller quotation is as follows:

[The statute's] manifest purpose is to require _every person dealing in drugs_ to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug... _Id_. (emphasis added).

The "innocent seller" is not just anyone. The innocent seller is the "person dealing in drugs," who uses the same level of care as a typical drug seller (hence the "innocence"). He may constitutionally be punished because although he was not negligent, he used imperfect care as Congress defined it. As the Court put the matter, he sold drugs at all "at his peril." _Id_. (emphasis added).

This reading of the Court's opinion is supported by the parallel between the language of the Court's opinion and the language of an English decision, _Hobbs v. Winchester Corp._, 2 K.B. 471 (1910). The brief for the United States excerpted substantial portions of _Hobbs_, which explicitly relied on the fact that the defendant knew he was selling regulated material. Consider this portion of a long quotation from _Hobbs_ that appeared in the Government's brief:

I should say that the natural inference from the statute and its object is that the peril to the butcher from innocently selling unsound meat is deemed by the legislature to be much less than the peril to the public which would follow from the necessity in each case of proving a mens rea... [If a man chooses for profit to engage in a business which involves the offering for sale of that which may be deadly or injurious to health he must take that risk, and that it is not a sufficient defense for anyone who chooses to embark on such a business to say, "I could not have discovered the disease unless I had an analyst on the premises." He has chosen to engage in that which on the face of it may be a dangerous business and he must do so at his own risk.

that the same statute would be within the legislative power if that element were deleted entirely. 84

84 As explained throughout this Article, this “greater includes the lesser” argument in the context of strict liability does not require a departure from the Court’s precedents; to the contrary, it is strongly suggested by them. Nor would it require development of a body of substantive constitutional criminal law principles. For excellent discussions in support of the “greater power includes the lesser” argument in the context of affirmative defenses, see Ronald Jay Allen, Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law — An Examination of the Limits of Legitimate Intervention, 55 Tex. L. Rev. 269, 284–91 (1977) [hereinafter Allen, Limits of Legitimate Intervention], and Jeffries & Stephan, cited above in note 27, at 1345–53. Professors Jeffries and Stephan argued that affirmative defenses should be constitutionally permissible only when there is “proof beyond a reasonable doubt of a constitutionally adequate basis for imposing the punishment authorized.” Id. at 1365. In a subsequent article, Professor Allen argued that a “greater power includes the lesser” approach should be employed to measure the constitutionality of the use of any evidentiary device that shifts the burden of persuasion, including affirmative defenses, shifting of the burden of production, judicial comment on the evidence, presumptions, and permissive inferences. See Ronald J. Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harv. L. Rev. 321, 326, 340–41 (1980) [hereinafter Allen, Evidentiary Devices]. Professor Allen argued that these devices could constitutionally be employed if the fact they affect is not one that the state is constitutionally mandated to demonstrate as an element of criminality. See id. at 341. Otherwise, under Professor Allen’s approach, such devices could only be employed if they move the jury “toward a more rational, accurate result.” Id.

These commentators recognized that their theories would not place effective limits on the use of affirmative defenses without the development of a body of substantive constitutional criminal law with real bite, including constitutional requirements of mens rea, actus reus, and proportionality. See id. at 342–43; Jeffries & Stephan, supra note 27, at 1365–66, 1370–79. They also recognized that the Court had thus far resisted developing such requirements. See Allen, Evidentiary Devices, supra, at 346; Jeffries & Stephan, supra note 27, at 1366–67. The approach was criticized at the time on the ground that the Court could not or would not give significant content to these substantive limitations, see Charles R. Nesson, Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen, 94 Harv. L. Rev. 1574, 1578–79 (1981), and such development certainly has not taken place in the ensuing two decades, see, e.g., Ronald J. Allen, Foreword: Montana v. Egelhoff — Reflections on the Limits of Legislative Imagination and Judicial Authority, 87 J. Crim. L. & Criminology 633, 655–56 (1997) [hereinafter Allen, Reflections].

Probably the strongest response to the “greater power includes the lesser” argument in the context of strict liability would be to claim that it allows the legislature to have its cake (by relying on its ability to criminalize the broader conduct) and eat it too (by not actually criminalizing all the broader conduct) in a way that somehow runs afoul of the Constitution. Cf. Barbara D. Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299, 1320–23 (1977) (arguing that legislative compromise represented by affirmative defenses is constitutionally inappropriate); Sundby, supra note 65, at 491 (arguing that to extend the presumption of innocence to all facts that could justify punishment is to “ignore that society has chosen not to condemn such behavior as criminal even though it legitimately could do so”).

There are at least three responses to this objection. First, as set out in this section, the Supreme Court case law strongly supports the “greater power includes the lesser” argument in the strict liability arena. Second, no obvious constitutional doctrine presents itself to support this objection. To the contrary, the Supreme Court has repeatedly insisted that the legislature has very broad powers to decide how to formulate the criminal law. See infra p. 882. Third, legislatures often decide to punish narrower conduct based on their ability to punish broader conduct in ways that are patently constitutional. For example, completed crimes are widely punished more severely than attempted ones, and reckless actions that are punished if harm results are often not punished at all if harm does not result. Yet whether or not the crime is completed or the harm results is often a matter of luck, which many believe has no relevance to the actor’s culpability. See infra note 337 and accompanying text (discussing moral luck). If occurrence of the harm is
(b) United States v. Dotterweich. — The next important Supreme Court case regarding strict liability and punishment was United States v. Dotterweich.85 Dotterweich was the president and general manager of a corporation, Buffalo Pharmacal, that received drugs from their manufacturers, repackaged them under Buffalo Pharmacal's label, and shipped them in interstate commerce.86 Dotterweich and the corporation were charged with the misdemeanor of introducing misbranded and adulterated drugs into interstate commerce.87 The jury could not reach a verdict as to the company, but Dotterweich was convicted and sentenced to a $500 fine and 60 days probation.88

The issue before the Supreme Court was whether Congress intended the statute to cover corporate employees or to apply only to the corporation itself.89 Although the Court concluded by a 5–4 vote that Congress did intend that corporate employees could be liable, both the majority and the dissent seemed to agree that, if it chose to do so, Congress could pass a law holding the president of the corporation liable for the shipment of adulterated drugs by his corporation without offending the Constitution.90

just luck, then in punishing only (or to a greater degree) when the harm occurs, the legislature is relying purely on the "culpability" of the broader conduct, conduct that it chooses not to punish (or to punish to a lesser degree) when it occurs without the "harm."

A separate argument against "greater includes the lesser" analysis raised in the contexts of presumptions and affirmative defenses was that if the legislature includes an element in an offense definition, but then provides inadequate process regarding that issue by using a presumption or making its absence an affirmative defense, "a violation of due process" has occurred, because the crime created has not truly "undergone the political checks guaranteed by representative government." Harold A. Ashford & D. Michael Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 178 (1969); see id. at 177–78, 189–90. But see Allen, Limits of Legitimate Intervention, supra, at 288–90 (rejecting this argument as relying on unwarranted assumptions about both legislative motives and popular comprehension of the law). Whatever the merits of such an argument in the realms of presumptions and affirmative defenses, it has no force in the realm of strict liability. By imposing strict liability, the legislature has expressly decided that, beyond the imperfect care demonstrated by intentionally engaging in the other conduct covered by the statute, mental culpability with regard to the strict liability element is not germane.

85 320 U.S. 277 (1943).
86 See id. at 278.
87 See id. The charges were brought under sections 301(a) and 303(a) of the Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §§ 331(a), 333(a) (1994), which made guilty of a misdemeanor "[a]ny person" who violated a prohibition on "the introduction or delivery for introduction into interstate commerce of any ... drug ... that is adulterated or misbranded." Dotterweich, 320 U.S. at 278. One of the counts was based on Buffalo Pharmacal labeling a bottle as containing "Hinkle" pills, even though the pills contained strychnine sulphate, which had been removed from the official definition of "Hinkle" pills. See United States v. Buffalo Pharmacal Co., 131 F.2d 500, 501 (2d Cir. 1942). The other two counts were based on the shipment of a bottle of digitalis tablets that were less than half as potent as the label claimed. See id. at 502.
88 See Buffalo Pharmacal, 131 F.2d at 501.
89 See Dotterweich, 320 U.S. at 281–82.
90 See id. at 286–88 (Murphy, J., dissenting) (framing the question as whether there was a clear legislative mandate, not whether Congress could impose liability).
Because the "principal" of the crime was the corporation, which shipped the misbranded drugs, the Court had to face whether Dotterweich (who did not personally ship or label any of the drugs) could be vicariously liable for the shipping. The court concluded that he could be: "To speak with technical accuracy, under § 301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial . . .".

The Court apparently assumed that the statute imposed strict liability as well as vicarious liability. "[A]]" who had "a responsible share in the furtherance of the transaction" were liable for the corporation's shipment, whether or not they were aware that the drugs were or might be mislabeled. "Congress has preferred to place [the hardship] upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce . . .". Once again, there was no moral wrong or criminal intent in Dotterweich's "offense."

Nonetheless, the strict liability aspect of Dotterweich's conviction is plainly consistent with the rule of constitutional innocence. The statute prohibited shipping mislabeled or adulterated drugs. Dotterweich intentionally engaged in conduct governed by the statute (shipping drugs); strict liability was applied only to the element of their being mislabeled or misbranded. Because the legislature had the power to punish the knowing shipment of drugs, it had the power to enact a statute punishing a narrower subclass of that conduct, to wit, the knowing shipment of drugs when the drugs are mislabeled or adulterated. In effect, conviction under the statute required a mens rea of

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91 See Dotterweich, 320 U.S. at 284–85.
92 Id. at 284.
93 Id.
94 Id. at 285.
95 See supra pp. 844–46.
96 Regulation of interstate drug shipments is within Congress's power under the Commerce Clause. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 191 (1997) ("The Court [has] held that Congress can set the terms for . . . virtually anything that can potentially travel across state lines."). When Congress chooses to ban particular drugs, its decision to do so is subject only to rational basis review. As one commentator puts it, "Any conceivable purpose is sufficient. The law only need seem a reasonable way of attaining the end; it need not be narrowly tailored to achieving that goal. The reality is that virtually any law can meet this very deferential requirement." Id. at 491. Congress would seem to have the power to prohibit the sale of broad categories of drugs on this basis if it so chose — even on the basis of avoiding the risk of mislabeling or adulteration.
97 The language of the Dotterweich opinion supports the notion that the constitutionality of strict liability with regard to the drugs being mislabeled was premised on the element of knowingly shipping drugs. As the Court put the matter:

Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission — assuming the evidence warrants it — to the jury under appropriate guidance . . . Congress has preferred
"imperfect care" with regard to the element of the drugs being mislabeled or adulterated.\textsuperscript{98} Dotterweich displayed that imperfect care by shipping drugs; when the "harm" (the drugs being mislabeled or adulterated) also resulted, the legislature could punish him.\textsuperscript{99}

\begin{quote}
 to place [the hardship] upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce . . .
\end{quote}

\textit{Dotterweich}, 320 U.S. at 284–85 (emphasis added).

\textsuperscript{98} The standard of "imperfect care," implied as the requisite minimum mens rea by the principle of constitutional innocence, also justifies, from a constitutional standpoint, the imposition of vicarious liability on Dotterweich. Dotterweich used imperfect care because he, as president of the corporation, presumably could have directed the corporation to demand a guarantee from the manufacturer that the drugs were neither adulterated nor misbranded yet failed to do so. Under the statute, such a guarantee would have provided immunity from prosecution. \textit{See} Federal Food, Drug, and Cosmetic Act § 303(c)(2), 21 U.S.C. § 333(c)(2) (1994). In effect, Congress mandated a heightened duty of care — more than mere nonnegligence — for those in a position to obtain a guarantee, and provided criminal penalties if one knowingly failed to meet that duty and (knowingly or not) the harm resulted. It is as though Congress passed a law barring the authorization of the shipping of drugs without having first received a guarantee, but limited liability to cases in which mislabeled drugs were shipped. Because Congress could clearly enact a statute without the last proviso, it seems equally clear that it could enact the narrower statute including it.

That the imperfect care standard for constitutional innocence works with both strict liability and vicarious liability points to the possibility that imperfect care may not be a mental state at all. Although full discussion of this issue is beyond the scope of this Article, imperfect care will usually involve some mental state of indifference, awareness, or both. \textit{See generally} Simons, \textit{supra} note 62, at 464–65 (setting up a two-track model of mental states, involving "states of belief" and "states of desire"). When the actor is aware of the risk of the strict liability element occurring, the actor's imperfect care will demonstrate a mental state of indifference. The actor's indifference to the risk of the "harm," however slight, is sufficient to allow him to engage in the conduct, notwithstanding the risk of the harm that the actor recognizes. Even if the actor is not aware of the risk, we can say that the actor has the same level of indifference if he would have engaged in the conduct had he been aware of the risk. \textit{Cf.} Alan C. Michaels, \textit{Acceptance: The Missing Mental State}, 71 S. CAL. L. REV. 953, 960–63 (1998) (using a similar hypothetical question to measure the indifference equivalent in culpability to knowledge). If the actor would not have engaged in the conduct had the actor been aware of the risk of the harm, the actor through his imperfect care does not demonstrate a mental state of indifference, but does demonstrate, by acting in spite of this unawareness, either an imperfect "belief state" or imperfect conduct. \textit{See} Simons, \textit{supra} note 62, at 547–51 (analyzing the difference between negligent beliefs and negligent conduct). In any event, in most cases of strict liability, the actor probably does have some conscious awareness of the risk: Dotterweich obviously knew that the drugs could have been mislabeled, for example.

\textsuperscript{99} The Court faced the same statute more recently in \textit{United States v. Park}, 421 U.S. 658 (1975). As in \textit{Dotterweich}, a corporate president was charged with violating the Federal Food, Drug, and Cosmetic Act. Park was charged under 21 U.S.C. § 331(k) (1994), which prohibits in relevant part "the doing of any . . . act with respect to . . . a food, drug, device, or cosmetic, if such act is done while such article is held for sale . . . after shipment in interstate commerce and results in such article being adulterated or misbranded." \textit{Id.} Rather than mislabeling drugs, Park's company "adulterated" food by storing it in buildings where rodents contaminated it. \textit{See Park}, 421 U.S. at 660. Park was convicted and sentenced to pay a $50 fine on each of five misdemeanor counts. \textit{See id.} at 660, 666. His conviction could be subjected to the same analysis as Dotterweich's. He intentionally engaged in conduct covered by the statute: holding food for sale after its shipment in interstate commerce. (Park did not hold the food for sale himself; it was stored in corporate warehouses. \textit{See id.} at 660. Like Dotterweich, he was vicariously liable, and the Court did not separate potential strict liability from potential vicarious liability.) The only potential issue of strict liability related to the element of causing the food to be adulterated. Applying a con-
(c) Morissette v. United States. — The next Supreme Court case, Morissette v. United States,100 is noteworthy for present purposes, even though it was decided on purely statutory grounds. Morissette took three tons of spent bomb casings he found at a practice bombing range he knew to be government land, flattened them, and then sold them for $84.101 He was charged with “unlawfully, wilfully and knowingly steal[ing] and convert[ing] property of the United States,”102 and his defense was that he thought the bomb casings were abandoned and did not know they were the property of the United States.103 The government argued that such knowledge was irrelevant under the statute, because the statute did not require that the “conversion”104 be intentional.105 The Court disagreed, finding as a matter of statutory interpretation that the government had to prove that the conversion was intentional — in other words, that the defendant knew the property he was taking belonged to the government.106 While Justice Jackson’s lengthy and scholarly opinion has plainly influenced

institutional innocence analysis, if the legislature could prohibit holding food for sale after shipment in interstate commerce, it could apply strict liability to the adulteration element.

For present purposes, there are two notable and perhaps related differences between Dotterweich and Park. First, Dotterweich involved drugs, whereas Park involved food. Second, the Court in Park did not indicate that the way for Park to have been more careful and to have avoided liability was to have stayed out of the food business, and the Court steered clear of endorsing strict liability. Instead, the Court used ambiguous language. It approved of a charge instructing the jury to find the respondent guilty only if he “had a responsible relation to the situation,” id. at 674, but also stressed that the instruction must be understood in the context “of the whole trial,” id., and proceeded to cite evidence that Park had been negligent or even reckless in allowing the contamination, see id. at 676–78. Many have taken the opinion to indicate that Park could not have been held liable without culpability along the lines of negligence with regard to the food’s adulteration. See id. at 678–79 (Stewart, J., dissenting) (describing the Court’s opinion as imposing a standard of negligence); Abrams, supra note 11, at 469–70 (stating that Park imposed a duty of extraordinary care); Levenson, supra note 15, at 461; Saltzman, supra note 11, at 1612–15; Singer, supra note 11, at 400–01; Tushnet, supra note 15, at 794–95. But see Kathleen F. Brickey, Criminal Liability of Corporate Officers for Strict Liability Offenses — Another View, 35 VAND. L. REV. 1337, 1363–64 (1982) (asserting that Park did not require culpability).

The perspective of constitutional innocence suggests that the first distinction — between drugs and food — may explain the second. Because Congress’s power to ban Park’s intentional acts under the statute — the sale of food that has traveled in interstate commerce — seems far more doubtful, from a rational basis perspective, than its power to ban Dotterweich’s acts — the shipment of drugs in interstate commerce — Congress’s power to punish Park’s “risks” conduct when harm results seems commensurately less certain. Accordingly, the Court seemed to rely more heavily on Park’s culpability with regard to the contamination of the food, independent of his decision to go into the business.

100 See id. at 247; Morissette v. United States, 187 F.2d 427, 428–29 (6th Cir. 1951).
101 Morissette, 342 U.S. at 248–49.
102 See id. at 249.
103 Conversion is an unauthorized act of dominion over the personal property of another that deprives the rightful owner of her property rights. See BLACK’S LAW DICTIONARY 300 (5th ed. 1979).
104 In the realm of torts, conversion could be committed unwittingly because the defendant’s “well-meaning may not be allowed to deprive another of his own.” Morissette, 342 U.S. at 270.
105 See id. at 263.
courts to find mens rea requirements as a matter of statutory construction,\(^{107}\) the Court’s holding did not address whether strict liability would have been constitutionally fatal in the context of that case.

For present purposes, however, dicta in *Morissette* are significant in two respects. First, as many have noted, by describing a class of statutes that have “disregard[ed] any ingredient of intent”\(^{108}\) in order to control “industries, trades, properties or activities that affect public health, safety or welfare,”\(^{109}\) the Court indicated continued constitutional approval of strict liability in the circumstances of *Balint* and *Dotterweich.*\(^{110}\) Second, however — and of particular relevance to the present analysis — after generally approving the elimination of “criminal intent” from so-called public welfare offenses,\(^{111}\) the Court noted that “exhaustive studies of state court cases disclose [no] well-considered decisions applying the doctrine of crime without intent to . . . enacted common-law offenses, although a few deviations are notable as illustrative of the danger inherent in the Government’s contentions here.”\(^{112}\)

The poorly considered “deviations” the Court cited\(^{113}\) as illustrative of the danger of strict liability involved conduct — criminal syndicalism and sedition — that would be beyond the legislative power to punish if the statute omitted the strict liability element. Criminal syndicalism outlawed being a member of a group formed to advocate crime and violence, and the opinions the Court did not think well of approved strict liability with regard to the nature of the group’s activities.\(^{114}\) Sedition included making or publishing statements that were disloyal to the government of the United States or that would incite resistance to federal authority, and the opinions the Court did not think well of approved strict liability with regard to the nature of the statements.\(^{115}\) The Court’s indication that strict liability in these contexts would be peculiarly problematic is thus consistent with the principle of constitutional innocence, which would require independent culpability regarding the nature of the group one is joining in the case.

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\(^{107}\) See Packer, *supra* note 15, at 121.

\(^{108}\) *Morissette*, 342 U.S. at 253.

\(^{109}\) Id. at 254.


\(^{111}\) See *Morissette*, 342 U.S. at 259-60.

\(^{112}\) Id. at 262 (emphasis added).

\(^{113}\) See id. at 262 n.21 (citing People v. Ruthenberg, 201 N.W. 358 (Mich. 1924), State v. Smith, 190 P. 107 (Mont. 1920), State v. Kahn, 182 P. 107 (Mont. 1919), and State v. Hennessy, 195 P. 211 (Wash. 1921) (en banc)).

\(^{114}\) See *Ruthenberg*, 201 N.W. at 360-61; *Hennessy*, 195 P. at 216-17.

\(^{115}\) See *Smith*, 190 P. at 109-12; *Kahn*, 182 P. at 109. *Kahn* was actually somewhat ambiguous as to the intent requirement. See id. The *Smith* court, interpreting *Kahn*, acknowledged the ambiguity but held decisively that no intent was required. See *Smith*, 190 P. at 110-11.
of syndicalism and the nature of the statements in the case of sedition. Although the Court did not further describe the "danger" it saw in the Government's contention, the Court's clear disapproval of the application of strict liability in these cases suggests the constitutional limit on the strictness of liability: there must be culpability regarding elements that the legislature has the power to punish independently.

(d) United States v. Freed. — The next case, United States v. Freed, is plainly consistent with the principle of constitutional innocence. On the basis of their possession of unregistered hand grenades, the defendants were charged with violation of the National Firearms Act, which made it unlawful for any person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." As Justice Brennan explained in his concurrence, there was no question that the statute contained three material elements: "(1) that appellees possessed certain items; (2) that the items were hand grenades; and (3) that the hand grenades were not registered." There was also no question that a mens rea of knowledge applied to the first two elements. The Court concluded unanimously that strict liability applied to the third element.

The legislature's power to attach strict liability to this third element is consistent with the principle of constitutional innocence because the legislature could have punished the knowing possession of all hand grenades. By possessing hand grenades at all, the defendants used imperfect care with regard to their being unregistered. Not surprisingly, Justice Douglas's brief opinion for the Court relied on Balint and Dotterweich to conclude that Congress could make one who chooses to possess hand grenades do so at his own peril.

(e) Williams v. North Carolina. — Although commentators frequently treat Balint, Dotterweich, and Freed as high water marks for strict liability in the Supreme Court, the principle of constitutional

116 As to criminal syndicalism, in the Term following Morissette the Court made explicit the tacit disapproval of strict liability indicated in its Morissette opinion. See Wieman v. Updegraff, 344 U.S. 183, 190 (1952); infra pp. 873-74.
117 See Morissette, 342 U.S. at 262.
119 See id. at 607.
121 26 U.S.C. § 5861(d).
122 Freed, 401 U.S. at 612 (Brennan, J., concurring in the judgment).
123 See id.; Freed, 401 U.S. at 607.
124 See Freed, 401 U.S. at 607-10; id. at 612-16 (Brennan, J., concurring in the judgment).
125 Richard Singer has argued that, because the only question before the Court was the sufficiency of the indictment, its conclusions about the constitutionality of strict liability were no more than dicta with regard to what would have to be proven at trial. See Singer, supra note 11, at 401. Singer's contention is discussed below at note 311.
126 See, e.g., sources cited supra note 71.
innocence resolves them with little difficulty. The high water mark probably came in a case the strict liability commentators have generally ignored,127 Williams v. North Carolina,128 a bigamy case. Although at first blush Williams may appear to violate the principle of constitutional innocence, closer analysis reveals its consistency.

The defendants in Williams were North Carolina residents who were married to separate spouses. They travelled to Nevada to obtain divorces from their respective spouses in ex parte proceedings and to marry one another, and they then returned to North Carolina to live "together as man and wife."129 North Carolina charged the defendants with bigamous cohabitation, contending that the defendants had not been domiciled in Nevada,130 which would deprive Nevada of jurisdiction and the divorce decrees of validity. Defendants were convicted and sentenced to prison.131

The central issue before the Court was whether the Full Faith and Credit Clause132 prevented North Carolina from deciding that Nevada had lacked the jurisdiction over the defendants necessary for the divorce decrees. The Court concluded that the Clause did not prevent North Carolina’s decision and affirmed the defendants’ convictions for bigamous cohabitation.133

The plain language of the North Carolina bigamy statute134 imposed strict liability as to the element of "being married" to the first spouse. Although the issue was not addressed in the lower court

127 But see Dubin, supra note 15, at 381-82; Saltzman, supra note 11, at 1596-97.
128 325 U.S. 226 (1945).
129 Id. at 235.
130 See id. at 227 & n.1. While in Nevada, the defendants "stayed in an auto-court for transients," id. at 236, for six weeks, see Brief of the State of North Carolina at 3, Williams (No. 84), the minimum time required by Nevada to obtain the divorces. They then immediately remarried. See Williams, 325 U.S. at 236.
131 See State v. Williams, 29 S.E.2d 744, 746-47 (N.C. 1944). The husband, O.B. Williams, was sentenced to one to three years imprisonment. The wife, Lillie Shaver Hendrix, was sentenced to eight to twenty-four months imprisonment. See id.
132 U.S. Const. art. IV, § 1.
133 See Williams, 325 U.S. at 229-30, 239. The Court held that the Full Faith and Credit Clause presented no barrier largely because no party opposed to the divorce had appeared in the Nevada proceedings, see id. at 230, and the record supported a finding that Nevada had lacked jurisdiction, see id. at 234.
134 Section 14-183 of the General Statutes of North Carolina provided, in relevant part:
If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Williams, 325 U.S. at 227 & n.1 (quoting N.C. Gen. Stat. § 14-183 (1943)) (internal quotation marks omitted).
opinion,¹³⁵ raised in the petition for certiorari,¹³⁶ or urged by defendants in their brief to the Supreme Court,¹³⁷ the defendants could have argued that they reasonably believed they were divorced, and that imposition of strict liability with regard to the element of their already being married was unconstitutional. Recognizing this possibility, the Court did address the issue briefly, citing Balint and stating that "[t]he objection that punishment of a person for an act as a crime when ignorant of the facts making it so, involves a denial of due process of law has more than once been overruled."¹³⁸ The Court concluded that the defendants simply assumed the risk that they would be found not to have been domiciled in Nevada.¹³⁹

*Williams* may be called the high water mark of strict liability in the Supreme Court because the element to which strict liability arguably attached — already being married — now appears essential to a legislature’s power to make the defendants’ conduct criminal. The intentional conduct covered by the statute in *Williams* was getting married. Unlike selling drugs (the intentional conduct covered by the statutes in *Balint* and *Dotterweich*) and possessing hand grenades (the intentional conduct covered by the statute in *Freed*), the intentional conduct in *Williams* probably cannot be punished on its own. The Supreme Court has recognized a fundamental right to marry that prevents a state from simply prohibiting marriage.¹⁴⁰ Thus, without the element of already being married, a bigamy statute would be unconstitutional.¹⁴¹ Therefore, while *Balint* and *Dotterweich* by statutory defini-

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¹³⁵ State v. Williams, 29 S.E.2d 744 (N.C. 1944).
¹³⁶ See Petition for Writ of Certiorari to the Supreme Court of North Carolina and Brief in Support Thereof, *Williams* (No. 291).
¹³⁷ See Brief for Petitioners, *Williams* (No. 84).
¹³⁸ *Williams*, 325 U.S. at 238.
¹³⁹ See id.
¹⁴¹ See generally Robert F. Drinan, *The Loving Decision and the Freedom to Marry*, 29 OHIO ST. L.J. 358 (1968). Of course, saying that there is a fundamental right to marriage does not mean that the legislature could not restrict the right, but such a restriction would have to survive strict scrutiny. See CHEMERINSKY, supra, at 644; TRIBE, supra, §§ 16-7 to 16-13, at 1454–55. A law will survive strict scrutiny only if it is narrowly tailored to achieve a compelling governmental purpose. See, e.g., CHEMERINSKY, supra, at 416. Prohibiting all marriages in order to prevent polygamous ones plainly would not survive such a test. A bigamy statute mandating some degree of culpability with regard to “being married” would be much more narrowly tailored.

¹⁴ⁱ Indeed, the Court has struck down more limited prohibitions on marriage. For example, in *Safley*, the Court struck down a statute that effectively prohibited prison inmates from marrying
tion took imperfect care (they could have been more careful by not selling drugs at all), according to the principle of constitutional innocence the legislature cannot use strict liability to decide that the Williams defendants failed to exercise perfect care simply by getting married. The level of care of "not getting married" is beyond the state's power to mandate. On its face, then, Williams appears inconsistent with the principle of constitutional innocence, because that principle would prohibit punishment for bigamy in the absence of independent culpability with regard to the element of already being married.

 Nonetheless, although Williams seems to suggest the Supreme Court's approval of a broad scope for strict liability, there are several reasons for not taking it as a tacit rejection of constitutional innocence. First, the claim that the application of strict liability was unconstitutional was apparently not raised, considered, or proven below and not actually presented to the Court. Thus, the Court's comments on this issue are dicta, although this is true to some degree of a number of the Court's pronouncements regarding strict liability. Second, the facts apparently rebutted any claim of "perfect care" the defendants might have made. Because their domicile in Nevada was fraudulent — it was not intended to last beyond the time necessary to get a divorce decree — they knew of a significant and unjustified risk that they were still married.

 Third, and most importantly, the constitutional right to marry was not established at the time Williams was decided. Indeed, the landmark decision of Loving v. Virginia, in which the Court declared a

because the state could not sufficiently justify its ban, see Safley, 482 U.S. at 97-99, even though as a rule affecting prisoners, the regulation was subject to a lesser standard of scrutiny, see id. at 8t.

142 See supra pp. 853-54.
143 See sources cited infra note 309. The importance of focusing on which issues are actually presented in assessing the Court's holding is particularly clear in Williams, however, given its procedural history. The opinion considered here was the second time the case had reached the Supreme Court. The first time the Court overturned the bigamy convictions on the ground that North Carolina had to respect Nevada's divorce decree, even though the other spouses had not been served with process in Nevada and recognition of the divorce offended North Carolina's public policy. See Williams v. North Carolina, 317 U.S. 287, 303 (1942). The Court was able to reach the opposite conclusion about the validity of the same Nevada divorce decree the second time the case came before it because, it said, the claim that no bona fide domicile had been acquired in Nevada had not been presented by the record in the first case. See Williams, 325 U.S. at 237. Thus, that the holding of the first Williams decision was limited to the issues presented to the Court was essential to the second Williams decision.

144 As Justice Murphy wrote in his concurring opinion:

Petitioners especially must be deemed to have been aware of the possible criminal consequences of their actions in view of the previously settled North Carolina law on the matter. This case, then, adds no new uncertainty and came as no surprise for those who act fraudulently in establishing a domicil[e] and who disregard the laws of their true domiciliary states.

Williams, 325 U.S. at 243 (Murphy, J., concurring) (citation omitted).

145 388 U.S. 1 (1967).
fundamental right to marry, was more than two decades away.\textsuperscript{146} In \textit{Williams}, not only did the Court not recognize that strict liability might have the effect of punishing the exercise of a constitutionally protected right, it considered the marriage decision a matter especially subject to state regulation. The Court’s opinion noted that “particularly [a public policy] so important as that bearing upon the integrity of family life” could be vindicated by cautioning the defendant to act at his peril,\textsuperscript{147} and the concurrence noted that “[n]o issues of civil liberties [are] at stake here.”\textsuperscript{148} Even Justice Black, who in dissent argued that the result was unacceptable under the void for vagueness doctrine,\textsuperscript{149} did not contend that there was a right to marry. To the contrary, he conceded that lower court decisions upholding punishment for marriages that states considered against their public policies supported the Court’s conclusion,\textsuperscript{150} citing cases that were subsequently overruled by \textit{Loving}.\textsuperscript{151}

\textbf{B. Lambert v. California}

This brings us to the one case in the traditional strict liability pantheon in which the Court overturned a conviction, \textit{Lambert v. California}.\textsuperscript{152} Virginia Lambert had lived continuously in Los Angeles for seven and one-half years at the time of her arrest on February 2, 1955.\textsuperscript{153} After being taken into custody on suspicion of another offense,\textsuperscript{154} Lambert was charged with violating a provision of the Los Angeles Municipal Code that made it unlawful for a convicted felon to be in Los Angeles for more than five days without registering with the

\begin{footnotesize}
\textsuperscript{146} Commentators disagree about whether clear recognition of the right to marry as fundamental came in 1967 in \textit{Loving}, or in 1978 in \textit{Zablocki v. Redhail}, 434 U.S. 374 (1978). \textit{Compare Chemerinsky, supra note 140, at 644 (Loving), and Drinan, supra note 140, at 360 (Loving), with Nedrow, supra note 30, at 324 (Zablocki), and Developments in the Law — The Constitution and the Family, supra note 140, at 1250 (Zablocki). Either way, establishment of the right was at least twenty-two years away when the Court decided \textit{Williams}.}

\textsuperscript{147} \textit{Williams}, 325 U.S. at 238.

\textsuperscript{148} \textit{Id.} at 243 (Murphy, J., concurring).

\textsuperscript{149} \textit{See id.} at 276–77 (Black, J., dissenting). According to Justice Black, the Court’s decision allowing a second state to find that a first state lacked jurisdiction to issue a divorce decree meant that persons who receive ex parte divorces can do little more than guess whether their divorces will be recognized in other states, and thus, whether they will be subject to criminal liability if they remarry — a circumstance Justice Black concluded was repugnant to due process. \textit{See id.}

\textsuperscript{150} \textit{See id.} at 265 n.6.

\textsuperscript{151} \textit{See id.} (citing State v. Bell, 66 Tenn. 9 (1872), and Greenhow v. James, 80 Va. 636 (1885)).

\textsuperscript{152} 355 U.S. 225 (1957).

\textsuperscript{153} \textit{See Brief of the Attorney General of California for Respondent at 3–4, Lambert (No. 47).}

\textsuperscript{154} Justice Douglas’s opinion for the Supreme Court stated suggestively that she was “arrested on suspicion of another offense.” \textit{Lambert}, 355 U.S. at 226. The record does not establish what led to Lambert’s custodial detention. In proffered testimony that the trial court did not permit, however, Lambert stated that the police had seized her on the street, taken her to the police station, and repeatedly and thoroughly searched her, including a strip search, apparently looking for narcotics. \textit{See Appellant’s Opening Brief at 5, Lambert (No. 47). At that point, she was charged with violating the registration law. See id.}
Chief of Police.\textsuperscript{155} Violation of the registration requirement was a misdemeanor.\textsuperscript{156}

At her trial, Lambert offered to testify that she did not know that her two forgery convictions in 1951 qualified as felonies\textsuperscript{157} (she had been sentenced to probation and was incarcerated only in a county jail),\textsuperscript{158} and that she did not know prior to the time of her arrest that she had a duty to register.\textsuperscript{159} The trial court permitted her to testify that she did not know she was a felon, but barred her from testifying about her knowledge of her duty to register.\textsuperscript{160} The trial court instructed the jury "that defendant was guilty if she knew, at the time of her failure to register with the Chief of Police as charged, that she had been found guilty of a crime punishable as a felony, that forgery is a crime punishable as a felony, and that ignorance of the law requiring Registration is no excuse."\textsuperscript{161} The jury convicted Lambert, and she was placed on three years probation and required to pay a $250 fine.\textsuperscript{162}

The Court reversed Lambert's conviction on the ground that it violated the Due Process Clause of the Fourteenth Amendment. In reaching its conclusion, the Court emphasized that Lambert's conduct was "wholly passive — mere failure to register,"\textsuperscript{163} and attempted to distinguish Lambert from Balint and Dotterweich by noting that those cases involved "the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed."\textsuperscript{164} Quoting Oliver Wendell Holmes, the Court noted that 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,"\textsuperscript{165} and concluded that "[w]here a person did not know of the duty to register and where there was no proof of the probability of

\textsuperscript{155} See Lambert, 355 U.S. at 226. The ordinance under which Lambert was charged provided, in relevant part: "It shall be unlawful for any convicted person to be or remain in the City of Los Angeles for a period of more than five day [sic], without, during such five-day period, registering with the Chief of Police ...." Los Angeles, Cal., Code § 52.39(a), available in Appellee's Brief app. A, Lambert (No. 590).
\textsuperscript{156} See Brief of Amicus Curiae for Appellant at 8, Lambert (No. 47).
\textsuperscript{157} See Transcript of Record at 17–18, Lambert (No. 590).
\textsuperscript{158} See id. at 18.
\textsuperscript{159} See id. at 17.
\textsuperscript{160} See id.
\textsuperscript{161} Id. at 18 (internal quotation marks omitted).
\textsuperscript{162} See id. at 20. The probation was also conditioned on Lambert not violating any law regarding the public health, welfare, or morals. See id. The possibility of being sent to jail for violating probation was real for Lambert, as she had previously been jailed for violating probation on one of her forgery convictions. See id.
\textsuperscript{163} Lambert v. California, 355 U.S. 225, 228 (1957).
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 229 (quoting Oliver Wendell Holmes, Jr., The Common Law 50 (1938)) (internal quotation marks omitted).
such knowledge, he may not be convicted consistently with due process.166

In the decade after it was decided, Lambert generated much excitement among commentators who believed it signaled that the Court would establish some substantive constitutional limits on punishment.167 Forty-one years later, however, the Court has neither followed nor expanded Lambert's rule, and other courts have rarely found Lambert dispositive in considering statutes.168 Commentators disagree about whether Justice Frankfurter's famous insulting prediction in dissent — that Lambert would "turn out to be an isolated deviation . . . — a derelict on the waters of the law."169 — has come true.170 But Lambert has enough vitality that it is reprinted in part in most and discussed in almost all criminal law casebooks.171 It has

166 Id. at 229–30. Perhaps one can conclude that the Court intended the opinion to apply at least a bit beyond Lambert herself from its use of the pronoun "he" in this statement of the holding, even though Lambert was a woman.


168 Rarely, but not never. See United States v. Mancuso, 420 F.2d 556, 557–58 (2d Cir. 1970) (holding that probability of knowledge of a statute's provisions is constitutionally mandated for a statute requiring narcotics law violators to register with customs officials on leaving and entering the country); State v. Garcia, 752 P.2d 34, 35–36 (Ariz. Ct. App. 1987) (requiring proof that the defendant had probability of knowledge of duty under a statute punishing failure to register as a sex offender); State v. Stephen M., No. CR 94406589, 1995 WL 904100, at *7–8 (Conn. Super. Ct. Nov. 7, 1995) (holding that the Constitution mandates proof that the defendant should have known of his duty to surrender his handgun prior to conviction under a statute prohibiting possession of a handgun while subject to a protective order).

169 Lambert, 355 U.S. at 232 (Frankfurter, J., dissenting).

170 Compare Sanford H. Kadish, Commentary: Justice Douglas and the Criminal Law: Another View, in "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 149, 151 (Stephen L. Wasby ed., 1990) (derelict prediction was "altogether right" on the level of constitutional adjudication), Richard G. Singer & John Q. LaFond, CRIMINAL LAW: EXAMPLES AND EXPLANATIONS 118 (1997) (Lambert is derelict precisely as Justice Frankfurter predicted), Coffee, supra note 19, at 240–45 (Justice Frankfurter's prediction has been confirmed over time), Ann Hopkins, Mens Rea and the Right to Trial by Jury, 76 CAL. L. REV. 391, 402 (1988) (Justice Frankfurter need not have feared), Stuntz, supra note 27, at 33, 35 (Lambert has been "curiously uninfluential" and its progeny almost nonexistent), and Tushnet, supra note 15, at 702 (Lambert "has had no significant impact"), with Steven B. Duke, Justice Douglas and the Criminal Law, in "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS, supra, at 133, 137 (although rarely cited, Lambert's "core idea . . . has . . . become commonplace and is often used to interpret criminal statutes"), and A.F. Brooke II, Note, When Ignorance of the Law Became an Excuse: Lambert & Its Progeny, 19 AM. J. CRIM. L. 279, 289 (1992) (derelict prediction could "hardly have been more wrong"). See also Saltzman, supra note 11, at 1605 (Lambert is "a derelict of sorts, but not an obscure one").

been such a persistent source of academic discourse\(^{172}\) that many plainly consider it relevant to constitutional limits on punishment.

Lambert has been explained and understood principally in three different ways: as an ignorance of the law case (Lambert did not know what she did was wrong),\(^ {173}\) as an omissions case (Lambert did not do anything),\(^ {174}\) and as an “innocence case” (what Lambert did was entirely innocent).\(^ {175}\) Each of these traditional understandings of Lambert, however, encounters substantial difficulties. Each will be discussed briefly in turn, before a fourth interpretation of Lambert consistent with the principle of constitutional innocence is suggested: Lambert is a right to travel case.

1. Ignorance of the Law. — One way to look at Lambert is as a rule that ignorance of the law is, in certain circumstances, a (constitutionally mandated) excuse. Lambert did not know about the law requiring her to register, and the Court’s opinion relied on that lack of knowledge. In this view, Lambert stands for the principle that ignorance of the law is an excuse when there is not a demonstrated probability that the defendant was aware of the law. This interpretation of Lambert, however, conflicts with a substantial body of case law.\(^ {176}\) In-

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\(^{172}\) See sources cited infra notes 173–175.

\(^{173}\) See Fletcher, supra note 11, § 6.4.1, at 424; Larry Alexander, Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law, Soc. Phil. & Pol’y, Spring 1990, at 84, 87 & n.18; Dubin, supra note 15, at 382; Duke, supra note 170, at 138; Husak, supra note 11, at 211 n.80; Low, supra note 62, at 555 n.32; Perkins, supra note 15, at 1970–71; Saltzman, supra note 11, at 1602; Singer, supra note 11, at 402 n.304; Stuntz, supra note 27, at 33; Brooke, supra note 170, at 292.


\(^{175}\) See Coffee, supra note 19, at 240 (Lambert placed a limit on what the legislature could criminalize); Hart, supra note 15, at 434 (Lambert recognized that “being a ‘criminal’ must mean something”); Jeffries & Stephan, supra note 27, at 1375–76 n.156; Kadish, supra note 170, at 151 (the logic of Lambert is that strict liability is unconstitutional, although the Court resisted saying so); Mueller, supra note 15, at 1104 (the logic of Lambert indicates that moral blameworthiness matters and that strict liability is beginning to end).

\(^{176}\) See Jeffries & Stephan, supra note 27, at 1375–76 n.156; see also Dressler, supra note 11, at 154 (stating that such an approach "would jeopardize the enforcement of many malum prohibitum offenses"). This is not to say that procedural due process does not require some minimum level of notice about illegality. It plainly does, just not to the degree of probability of knowledge. As Sanford Kadish has noted, however, three Supreme Court cases finding inadequate notice decided shortly after Lambert — Riley v. Ohio, 360 U.S. 423 (1959), Bouie v. City of Columbia, 378
deed, when the Supreme Court, precisely because of an absence of 
probability of knowledge of the law, has concluded that Congress in-
tended to include a requirement of knowledge of the law in particular 
crimes, the Court has not suggested in any way that a contrary result 
would run afoul of due process. To the contrary, the Court has 
states in dicta that Congress could choose to eliminate the knowledge 
requirement. Such expressions of approval strongly suggest that prob-
ability of knowledge of the law is not constitutionally mandated.

Perhaps equally damning of this interpretation is its reliance on the 
distinction between fact and law. If due process forbids punishment 
when there is insufficient probability of knowing the governing law, 
why would it not also forbid punishment when one had no chance to 
learn the facts? Indeed, Sanford Kadish has argued that the former 
would certainly imply the latter. Undoubtedly, the pedigree for an 
"innocent" mistake of fact excuse is much greater than for an "inno-
cent" mistake of law excuse. Thus, if Lambert meant that ignorance 
of the governing law is a constitutionally mandated excuse, then it 
would stand to reason that strict liability with regard to factual ele-
ments is also unconstitutional. The latter proposition, however, would 
only expand the body of case law belying this interpretation of Lam-
bert.

2. Omissions. — Another way to look at Lambert is as an omis-
sions case: When the crime is one of omission, rather than commission, 
due process imposes tighter limits on permissible punishment. The

U.S. 347 (1964), and Cox v. Louisiana, 379 U.S. 559 (1965), each of which might have cited Lambert (they involved circumstances in which the defendant was misted to some degree about the law by state officials) — did not mention it. See Kadish, supra note 170, at 151. "It is as if the 
Court went out of its way to keep the Lambert germ isolated." Id.


178 See Ratzlaf, 510 U.S. at 146; Liparota, 471 U.S. at 424-25 & n.6. Indeed, following Ratzlaf, 
the most recent case of this kind, in which the Supreme Court held that the crime of structuring 
including the element of knowing that structuring was a crime, Congress expressly overruled the 
of the law against structuring was not required for guilt. See H.R. REP. No. 103-438, at 22 (1994) 
(stating that § 5324 restores Congress's clear intent that currency reporting crime requires only an 
intent to evade reporting requirements, not proof that the defendant knew that structuring was illegal). 
Not surprisingly, the constitutionality of the new statute has been upheld, see United States v. Wrobel, No. 97-50352, 1998 WL 205776, at *1 (9th Cir. Apr. 17, 1998) (mem.), as ten of 
the circuit courts of appeals had, prior to Ratzlaf, interpreted the old statute not to require knowledge 
of the law, see Ratzlaf, 510 U.S. at 152 & n.3 (Blackmun, J. dissenting). By arguing that the 
law should be changed to constitutionalize the rule of Ratzlaf, William Stuntz also implicitly recog-
nizes that at present mens rea as to illegality is not required under the Constitution. See Stuntz, 
supra note 27, at 31-34.

179 See Kadish, supra note 170, at 151.

180 The Model Penal Code, for example, completely rejects liability for "innocent" mistakes of 
fact, see MODEL PENAL CODE § 2.04(1) (1985), but is extremely reluctant to allow a defense of 
"innocent" mistake of governing law, generally hewing to the traditional line that mistake of gov-
erning law is no defense, see id. §§ 2.02(9), 2.04(3).
Court’s opinion stressed, after all, that Lambert was being punished for “conduct that [was] wholly passive.” The first problem with this understanding of Lambert, originally emphasized by Justice Frankfurter in dissent, is that it 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.” Although omissions may more frequently fail to alert actors to potential consequences, one can fail to act in circumstances in which one ought to know doing so is wrong (for example, by negligently failing to get medical attention for one’s sick child), and one can act in circumstances in which one does not know one’s conduct is wrong (for example, by structuring a transaction to avoid filing a federal form).

The second problem with the “omission” understanding of Lambert is that it does not accurately describe Lambert’s own conduct. Strictly speaking, the conduct punished by the Los Angeles ordinance was not “wholly passive.” In addition to failing to register, Lambert’s crime included the element of “be[ing] or remain[ing] in the City of Los Angeles for a period of more than five day[s].” Thus, her crime could be characterized as the “act” of being in Los Angeles, under the circumstance of being unregistered, rather than simply the “omission” of not registering. Given this potential recharacterization, and its apparent irrelevance to Lambert’s culpability, the omission interpretation is hard to defend.

3. Lack of Blameworthiness. — The third view of Lambert is that it stands for the proposition that punishment without blameworthiness is unconstitutional. In this view, what Lambert did could not form the basis for just punishment, and therefore her punishment was unconstitutional. Support for this view is found particularly in the quotation from Holmes at the end of the opinion: “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.” Two problems bedevil this approach and those who would use Lambert as part of an argument that strict liability is unconstitutional: the substantial body of case law indicating that strict liability is not unconsti-

181 Lambert, 355 U.S. at 228.
182 See id. at 231 (Frankfurter, J., dissenting).
183 Lambert, 355 U.S. at 228.
185 See Ratzlaf v. United States, 510 U.S. 135 (1994). George Fletcher has also argued that the rule in Lambert should apply equally to affirmative conduct. See FLETCHER, supra note 11, at 425; see also Packer, supra note 15, at 132, 134 (explaining that the distinction between doing and not doing is not congruent with awareness or lack of awareness of a legal duty).
186 LOS ANGELES, CAL., CODE § 52.39(a), available in Appellee's Brief app. A, Lambert (No. 590).
tutional, and the difficulty in finding a basis for such a principle sufficiently rooted in the Constitution to justify overriding legislative primacy in the definition of crimes. These problems, which transcend Lambert and confront any theory that argues that strict liability is unconstitutional, are discussed in Part III.\textsuperscript{188} As far as Lambert is concerned, they may be summarized by the following two questions:

(i) What is the principle that made Lambert’s punishment unconstitutional and (for those who wish to fit theory with precedent) did not make Balint’s and Dotterweich’s so?; and

(ii) How can that principle be limited and found in the Constitution?

4. Lambert as a Right-to-Travel Case. — Viewing Lambert through the principle of constitutional innocence provides simple and elegant answers to these questions. The principle that made Lambert “innocent” as a constitutional matter, but did not make Balint or Dotterweich so, is that the only intentional conduct covered by the statute that she engaged in was conduct that the legislature could not punish. Lambert was rightly decided, because the intentional conduct covered by the Los Angeles ordinance that Lambert engaged in — being in Los Angeles — was not punishable by the legislature because of her constitutional right to travel.\textsuperscript{189} Balint and Dotterweich, in contrast, engaged in intentional conduct covered by the statutes they were charged under — selling drugs — that the legislature did have the power to punish. In effect, Los Angeles punished Lambert for her failure to maintain a level of care with regard to not being in Los Angeles unregistered that was beyond its power to mandate; the requisite level of care meant staying out of Los Angeles. The substantive rights and

\textsuperscript{188} See infra pp. 881–87.

\textsuperscript{189} Although the Constitution does not expressly mention the freedom to travel, “freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.” United States v. Guest, 383 U.S. 745, 758 (1966) (upholding an indictment in which the defendant was charged, under a statute prohibiting the violation of constitutional rights, with violating the victims’ constitutional right to travel). Indeed, the Supreme Court recognized the right of a citizen to travel freely among the states as early as 1849. See The Passenger Cases, 48 U.S. 283, 410 (1849) (holding that a tax on aliens arriving from foreign parts was unconstitutional); see also id. at 493–94 (Taney, C.J., dissenting) (agreeing that citizens have a constitutional right to pass through all parts of the United States). The right to travel has been recognized as a basic liberty since the Articles of Confederation. See Chemerinsky, supra note 140, at 697–700. In addition to The Passenger Cases, Chemerinsky charts the leading right-to-travel cases as Crandall v. Nevada, 73 U.S. 35, 49 (1867), which found a tax for transporting a passenger out of the state unconstitutional; Edwards v. California, 314 U.S. 160, 177 (1941), which found unconstitutional, seventeen years before Lambert, a law prohibiting the bringing of an indigent into the state; and Guest, which was decided nine years after Lambert. See Chemerinsky, supra note 140, at 697–99; see also Califano v. Aznavorian, 439 U.S. 170, 176 (1978) (stating that the right to interstate travel is “virtually unqualified”) (citation omitted). The right to travel within the United States is based on both the “dormant commerce clause which prevents states from burdening interstate commerce, and the privileges and immunities clause of Article IV, that prevents states from discriminating against out-of-staters with regard to basic liberties.” Chemerinsky, supra note 140, at 699; see also Tribe, supra note 140, § 16–8, at 1455–57.
other restrictions on legislative power independently established by the Constitution firmly ground the principle identified here in the Constitution and also establish its limits. Innocence, in short, is what the Constitution says may not be punished.

To see this clearly, consider Lambert’s crime from the perspective of element analysis. The crime contained four elements: (i) being in Los Angeles, (ii) for more than five days, (iii) as a convicted felon, (iv) without registering. Of the two elements likely to be contested, California applied strict liability to “without registering,” but not to “as a convicted felon.” By imposing a constitutional requirement of “knowledge . . . [or] probability of . . . knowledge” of the registration requirement, the Court effectively required something akin to negligence or recklessness as a minimum culpability level with regard to the fact of nonregistration. Thus, according to the Court, a statute that

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190 The Court’s analysis in United States v. Freed, 401 U.S. 601 (1971), supports a reading of Lambert that asks what mental state attaches to the element of “not registering” rather than viewing the case as one of ignorance of governing law. In Freed, the Court was also faced with a registration statute (the crime was possessing an unregistered hand grenade). Justice Douglas (the author of Lambert), writing for the Court, and Justice Brennan, concurring, both treated the registration of the hand grenade as simply another element of the offense and considered the issue in the case to be what mental state, if any, the statute required with regard to that element. See id. at 607 (stating that the act “requires no specific intent or knowledge that the hand grenades were unregistered”); id. at 612, 614 (Brennan, J., concurring in the judgment). As Justice Brennan put the matter:

Proof of intent with regard to [the element of non-registration] would require the Government to show that the appellees knew that the grenades were unregistered or negligently or recklessly failed to ascertain whether the weapons were registered. It is true that such a requirement would involve knowledge of law, but it does not involve “consciousness of wrongdoing” . . . . Rather, the definition of the crime, as written by Congress, requires proof of circumstances that involve a legal element . . . .

Id. at 614–15. Of course, in Freed, as in Lambert, the legislature made this a strict liability element. See supra p. 852.

191 This becomes clear when one considers the alternatives. Lambert was not negligent or reckless with regard to her own failure to register, as a reasonable person in her position (that is, one without notice of the registration requirement) would not have registered either. See Lambert, 355 U.S. at 228. Obviously, she was not purposely unregistered, as she did not hope or believe that she was unregistered. See Model Penal Code § 2.02(2)(a)(ii) (1985). Did she knowingly fail to register? It appears the answer is no. Knowingly not registering would entail a conscious awareness that she was unregistered. See id. § 2.02(2)(b)(i). She did not know of the registration requirement, thus she could not have been consciously aware of either her failure to register or her unregistered status.

192 Thus, the trial court permitted Lambert to testify, over the State’s objection, that she did not realize that her convictions were for felonies and indicated in its charge to the jury that the State had to prove that she knew she had been found guilty of a felony. See Transcript in the Supreme Court at 17–18, Lambert (No. 590). Presumably no issue arose in the case about Lambert’s knowledge of the other two elements — that she had been in Los Angeles for more than five days — and the record in the Supreme Court does not reveal the instruction, if any, on these elements.

193 Lambert, 355 U.S. at 229.

194 “Probability of knowledge” is not precisely akin to either recklessness or negligence (though it is closer to the latter). Rather, probability of knowledge is evidence that could be used to show either recklessness or negligence. To the extent circumstances show a probability that Lambert
makes it a crime to know you are in Los Angeles and to know you are a felon while "innocently" failing to register is invalid, even though the legislature tried to designate failure to register as not innocent. On the other hand, a statute that makes it a crime to sell narcotics knowingly while "innocently" not having the requisite form and a statute that makes it a crime to ship drugs in interstate commerce while "innocently" mislabeling the ingredients are constitutional. The explanation is that independent constitutional checks on the legislative power (such as the right to travel) restrict the legislature's otherwise broad authority to decide what is innocent and what is not.

The same result can be reached by understanding the statutes as legislative attempts to impose a very high degree of care regarding the strict liability element. By knowingly selling drugs, Balint and Dotterweich were not as careful as the legislature required them to be to avoid liability if the "harm" of mislabeling or selling without a form ensued. This reasoning can be seen in the Court's statements that one who engages in the intentional conduct covered by the statute does so "at his peril" or has "assumed [the] responsibilities." Similarly, by being in Los Angeles, Lambert was not as careful as the legislature required her to be to avoid liability if the "harm" of being unregistered ensued. The reason such a statute is unconstitutional in Lambert, however, is that the legislature could not require a degree of care of "not being in Los Angeles" because of the right to interstate travel. If the legislature tried to pass a law punishing felons for being in Los Angeles, the law would run afoul of the constitutional right of all United States citizens to take up residence in Los Angeles or anywhere else in the United States.

was aware of the registration requirement (for example, if written notice of the requirement had been given to all probationers resident in Los Angeles at the time of their sentence), that would tend to show both that she was aware of a risk that she was unregistered (recklessness) and, particularly, that a reasonable person would have been aware of the registration requirement (negligence).

One might ask, of course, how a probability of Lambert's knowledge of the registration requirement would show her culpability without a showing of actual knowledge. There are two possible answers that are not mutually exclusive. First, as noted above, probability could be an explicit endorsement of an objective culpability approach. If she should have known (which is what the probability of knowledge tells us), that is enough. Second, probability of knowledge could go to the burden of proof on the question of actual knowledge. Under this view, knowledge of her failure to register is not, strictly speaking, an element of the offense that the state must prove beyond a reasonable doubt. Instead, lack of knowledge is an affirmative defense that is rebuttable by the state if it can show a probability of knowledge. See Packer, supra note 15, at

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197 See supra pp. 842–49.
198 Balint, 258 U.S. at 254.
200 See supra note 189. Of course, the fact that the law deprived individuals of a fundamental right would not by itself make the statute unconstitutional. Rather, it would render the statute
In requiring Lambert to use the utmost care to be sure to register, Los Angeles could not constitutionally define the utmost care to mean staying out of Los Angeles. The state also failed to demonstrate some independent culpability on Lambert’s part regarding her failure to register, as showing a probability of knowledge about the registration requirement might have done. Because the only intentional action underlying Lambert’s punishment was being a felon in Los Angeles for more than five days and because the Constitution prevented the state from making that action the basis for punishment, the Los Angeles ordinance was unconstitutional as applied to Lambert. This rationale not only distinguishes Lambert from Balint, Dotterweich, and Freed, it is also supported by a firmly rooted constitutional principle. Strict liability was unconstitutional in Lambert but not in other cases, because the Los Angeles ordinance made punishment contingent on culpability for conduct that the legislature was separately barred from punishing.

Admittedly, the Court in Lambert did not expressly put forward the right-to-travel rationale. Indeed, the Court may not have been conscious of the relationship between the right to travel and its decision. Nonetheless, the fact that the first case in which the Court struck down strict liability fell in an area in which the imposition of strict liability effectively punished constitutionally protected activity seems like more than a mere coincidence. This is particularly true given

subject to strict scrutiny. See Chemerinsky, supra note 140, at 700–01; Tribe, supra note 140, § 16–7, at 1454–65. A statute prohibiting felons from being in Los Angeles, however, would not survive such scrutiny, just as a law against indigents coming into the state did not, see Edwards v. California, 314 U.S. 160, 177 (1941). The burden on the right to travel under such a statute would obviously be extreme. Rather than simply restricting travel, this law would be a rank prohibition for felons wishing to come to Los Angeles. Moreover, it would neither be narrowly tailored nor serve a compelling governmental interest. The only legitimate purpose for such a law would be to ensure that the police were aware of felons residing in the city (the purpose of keeping felons out of the city would not be “legitimate”), and that interest was dismissed by the Court in Lambert as a mere “convenience.” See Lambert, 355 U.S. at 229. Plainly, the Lambert statute also was not narrowly tailored, as it covered all felonies committed in California and all offenses committed anywhere else that would have been felonies in California. See Los Angeles, Cal., Code § 52.38 (a), available in Appellee’s Brief app. A, Lambert (No. 590).

To be sure, the fact of incarceration effectively eliminates a convicted felon’s right to travel during the period of such incarceration, just as it effectively eliminates or burdens other rights. A state can impose such burdens on constitutional rights as long as the burden “is reasonably related to legitimate penological interests.” E.g., Turner v. Safley, 482 U.S. 78, 89 (1987). The felon does not “waive” the constitutional right in perpetuity, however, by the act of committing a felony. Cf. Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105 (1991) (holding that the First Amendment rights of persons who committed crimes rendered invalid a statute that authorized seizure of payments received from writing about the crimes for payment to victims); Safley, 482 U.S. at 95 (“It is settled that a prison inmate ‘retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.’” (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974))).

201 See supra note 194.

202 It also casts light on subsequent decisions struggling over the constitutionality of a federal statute, 18 U.S.C. § 1407 (repealed in 1970), that made it a crime for convicted narcotics offenders to leave the country without registering. See United States v. Logan, 434 F.2d 131, 134–35 (9th
that the decision seems right despite the difficulties with the most frequently offered rationales.\footnote{203}

There is further support for the view that Lambert’s arising in the right-to-travel context was no coincidence. As the cases reviewed in section II.A demonstrated, when the legislature had the power to punish the intentional conduct covered by a criminal statute, the Court consistently approved applications of strict liability. For these statutes, the principle of constitutional innocence serves as a shield and explains why the Court found them constitutional. In Lambert, the right to travel barred the legislature from punishing the intentional conduct covered by the statute, and therefore the Court found the use of strict liability unconstitutional. \textit{Lambert} is the first example of the principle of constitutional innocence serving as a sword. The first example, but not the last. As the cases discussed in the next section demonstrate, the Court has consistently rejected strict liability as unconstitutional when, as in \textit{Lambert}, the other elements of the statute at issue would

\footnotetext{203}{The Court itself had difficulty settling on a rationale for \textit{Lambert}. The Court initially voted 9-0 to reverse. \textit{See} Brooke, supra note 170, at 282. The first draft opinion Justice Douglas circulated pinned the result on the vagueness of the element of being a felon. \textit{See id.} at 282-83. Douglas rewrote the opinion when his initial rationale failed to command a majority. \textit{See id.} at 287.}
be beyond the legislative power to punish because of a fundamental right.

C. *Speech, Association, and Abortion*

Punishment for crimes that limit their coverage of intentional conduct to constitutionally protected activity and then add a strict liability “harm” element has been rejected by the Court in at least three different areas: freedom of speech, freedom of association, and abortion. These cases demonstrate that even activities that the legislature has the power to prohibit cannot be made criminal without providing for some culpability regarding the element that makes the conduct punishable. The decisions in each of these areas are reviewed briefly below from the perspective of constitutional innocence. As in both *Lambert* and the cases upholding strict liability, the Court did not identify the principle of constitutional innocence as the driving force behind the decisions, though much of the language of the decisions and all of the results support that principle. The decisions also recognize that a criminal statute’s relationship to conduct unpunishable by the legislature is relevant to the constitutionality of strict liability. When the rules of decision in these cases are considered together and in combination with the cases already discussed, they provide strong grounds for considering constitutional innocence the limit on the legislature’s power to use strict liability.\(^{204}\)

1. *Freedom of Expression.* — The First and Fourteenth Amendments to the Constitution notwithstanding, certain types of expression lack constitutional entitlement to special protection. Specifically, ob-

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\(^{204}\) The importance of these decisions to broader strict liability issues has been largely unrecognized by courts and commentators. Herbert Packer, in his seminal article *Mens Rea and the Supreme Court*, cited above in note 15, at 125–27, did see a potential significance in these decisions. Packer hoped that certain First Amendment decisions suggested that “some constitutional doctrines about the substantive limits of criminal law may soon be born.” *Id.* at 127. He did not articulate what those limits would be or how they could be derived from those decisions, however. These lines of cases have developed considerably, but quietly, since Packer wrote 26 years ago.
scenity\textsuperscript{205} and child pornography\textsuperscript{206} are unprotected by the First Amendment. There is thus no constitutional barrier to punishing the creation or sale of obscene material or child pornography. Legislatures are free to create crimes punishing these activities. Nonetheless, when legislatures do so, the Court has held that punishment based on strict liability with regard to the elements that deprive the conduct of First Amendment protection is unconstitutional.

In \textit{Smith v. California},\textsuperscript{207} the Court confronted a bookstore owner who had been sentenced to thirty days in jail for possessing an obscene book in a place where books are sold.\textsuperscript{208} The statute imposed strict liability with regard to the element of obscenity. In other words, the California court held that if Smith knowingly sold books, and a book in his store was obscene, then the level of care he took concerning the contents of the book would be irrelevant.\textsuperscript{209}

The Supreme Court reversed. Recognizing that “it is doubtless competent for the States to create strict criminal liabilities,”\textsuperscript{210} the Court held that in the First Amendment context of this case, strict liability was unconstitutional. Distinguishing the bookseller from the defendants in \textit{Balint} and \textit{Dotterweich}, the Court noted that although “[t]here is no specific constitutional inhibition against making the distributors of foods the strictest censors of their merchandise, . . . the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller.”\textsuperscript{211} Although only obscene material fell under the terms of the

\textsuperscript{205} See, e.g., Alexander v. United States, 509 U.S. 544, 555 (1993); Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476, 485 (1957); see also Chemerinsky, supra note 140, at 829.

In \textit{Miller}, after years of struggle following \textit{Roth}, the Supreme Court settled on the following test for obscenity:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

\textit{Miller}, 413 U.S. at 24 (citations omitted); see also Chemerinsky, supra note 140, at 832; Tribe, supra note 140, § 12-16, at 909.

\textsuperscript{206} See New York v. Ferber, 458 U.S. 747, 758 (1982). The Court in \textit{Ferber} did not define child pornography; instead, it simply approved a particular statutory definition as covering material unprotected by the First Amendment, even if not obscene. See \textit{Ferber}, 458 U.S. at 758.

\textsuperscript{207} 361 U.S. 147 (1959).

\textsuperscript{208} The ordinance, section 41.01.1 of the Municipal Code of the City of Los Angeles, provided in relevant part:

\begin{center}
It shall be unlawful for any person to have in his possession any obscene . . . book . . .
\end{center}

\begin{center}
2. In any place of business where . . . books . . . are sold or kept for sale[.]
\end{center}


\textsuperscript{210} \textit{Id}., at 150.

\textsuperscript{211} \textit{Id}., at 152-53.
statute, and the First Amendment does not protect obscene material, the Court noted that there is no “state power to restrict the dissemination of books which are not obscene.” Because strict liability with regard to the element of obscenity would effectively be such a restriction, the Court held that the Constitution mandated that some level of culpability attach to the contents of the obscene materials.

Thus Smith, and the cases in which the Court has consistently reaffirmed Smith’s holding, support the view that when the intentional conduct covered by a statute is beyond the legislative power to punish, punishment is unconstitutional absent culpability with regard to some element that makes the conduct punishable. To be sure, although the holding and much of the language in Smith support the constitutional innocence view, the Court did not expressly predicate its holding on that rationale. The Court also emphasized the chilling effect that strict liability could have on the sale of books that were constitutionally protected. The one-sentence justifications offered by the Court as it subsequently applied Smith, however, suggest some discomfort with sole reliance on the chilling rationale. After one case that seemed also to rely on the “chilling” rationale, the Court added the distinct reason that a mental state requirement would help “to compensate for the ambiguities inherent in the definition of obscenity.” After citing both rationales in two subsequent cases, the Court began applying Smith without explanation for its rule. The Court has not consistently articulated the reason unprotected speech cannot be punished by the application of strict liability to the element that makes it unprotected. This inconsistency underlines the plausibility of and need for explicit recognition of constitutional innocence.

Although the Court in Smith firmly rejected strict liability with regard to the element of obscenity, it did not specify what level of culpability with regard to that element was necessary to satisfy the Constitution. In fact, the Court left open the possibility that a bookseller’s

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212 Id. at 152.
213 See id.
214 The mens rea for the obscenity element discussed in Smith related to knowledge of what was in the book, as opposed to knowledge of the legal standard of what constitutes obscenity. Although some mens rea element is required for the former, no mens rea element is required for the latter. See Hamling v. United States, 418 U.S. 87, 121–24 (1974). In other words, ignorance of the definition of obscenity is no excuse.
218 Mishkin, 383 U.S. at 511.
219 See Hamling, 418 U.S. at 121; Ginsberg, 390 U.S. at 643.
220 See X-Citement Video, 513 U.S. at 73, 78; Ferber, 458 U.S. at 765.
failure to use some level of heightened care might suffice. 221 In consistently reaffirming the rule of Smith 222 — that strict liability with regard to the obscenity of material is unconstitutional — the Court has not identified the minimum mental state needed to pass constitutional muster; the Court has approved, however, a culpability level of weak knowledge 223 and of recklessness 224 and has arguably indicated that a culpability level of negligence can suffice. 225 Lower courts on occasion have gone further and have held that both recklessness and negligence with regard to obscenity are sufficient. 226

221 In the Court’s words:

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be.

Smith, 361 U.S. at 154. But cf. Manual Enters., 370 U.S. at 493 (stating that failure to “make a ‘good faith effort’ to ascertain the character of . . . materials” did not satisfy the mental element of the statute).

222 See cases cited supra note 215.

223 In Mishkin, the Court approved an anti-obscenity statute that characterized the requisite mental state as being “in some manner aware of the character of the material.” Mishkin, 383 U.S. at 510 (quoting People v. Finkelstein, 174 N.E.2d 470, 471 (N.Y. 1961)) (internal quotation marks omitted) (emphasis removed). The patent sufficiency of that mental element, the Court noted, “makes it unnecessary for us to define today ‘what sort of mental element is requisite to a constitutionally permissible prosecution.’” Id. at 511 (quoting Smith, 361 U.S. at 154); see also Hamling, 418 U.S. at 123 (finding that knowledge of the content of the materials was sufficient).

224 See Osborne v. Ohio, 495 U.S. 103, 115 (1990) (stating that the mental state of recklessness “plainly satisfy[ed] the requirement . . . that prohibitions on child pornography include some element of scienter”).

225 In Ginsberg v. New York, 390 U.S. 629 (1968), the Court upheld against a facial challenge a New York statute that prohibited the “knowing” sale of obscene materials to minors. The statute defined “knowingly” to include “reason to know,” id. at 643, which would seem to indicate a negligence standard. In rejecting the challenge to the provision (which centered on what the defendant had to “know” more than the extent of his knowledge), the Court relied on New York’s interpretation of the statute as covering “only those who are in some manner aware of the character of the material they attempt to distribute.” Id. at 644 (quoting Finkelstein, 174 N.E.2d at 471) (emphasis omitted). This holding would seem to limit application of the New York statute to those with some degree of knowledge. See also Hamling, 418 U.S. at 123 (describing Ginsberg).

226 For example, in United States v. Linetsky, 533 F.2d 192 (5th Cir. 1976), the court held that “general knowledge that the material is sexually oriented” is enough. Id. at 204. This standard would seem to correspond with a mental state of recklessness, because if one is aware that material is sexually oriented, one is arguably aware of an unjustifiable risk that the contents are obscene.

In Newman v. Conover, 313 F. Supp. 623 (N.D. Tex. 1970), a district court upheld a negligence standard, approving a state statute that required only that the defendant have “knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.” Id. at 630 (quoting TEX. PENAL CODE ANN. § 527 (1969)). The precedents on which the Conover court relied, however — Ginsberg, and the Northern District of Georgia’s approval of a Georgia statute in Great Speckled Bird of the Atlanta Cooperative New Project v. Stynchcombe, 298 F. Supp. 1291 (N.D. Ga. 1969), see Conover, 313 F. Supp. at 630 — did not go so far. Ginsberg is discussed above in note 225. Great Speckled Bird held only that proof that the defendant knew facts that would lead a reasonable person to know the character of the materials could be sufficient evidence for a jury to conclude that the defendant had actual knowledge. See Great Speck-
The Court has also extended the Smith rule to child pornography. Like obscenity, child pornography is not entitled to constitutional protection. As with obscenity, however, when the involvement of children is the only reason why the First Amendment does not protect the material, "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." The Supreme Court recently reaffirmed the importance of the mental element in a child pornography case in its interpretation of the Protection of Children Against Sexual Exploitation Act, which prohibits knowingly transporting in interstate commerce visual depictions of minors engaging in sexually explicit conduct. In United States v. X-Citement Video, the Court considered whether the act's knowledge requirement applied merely to the transportation element, or also to the "sexually explicit conduct" and "depiction of a minor" elements. The Court conceded that the "most natural grammatical reading" of the statute suggested that the knowledge requirement applied only to the transportation element; nonetheless, the Court interpreted the knowledge requirement to apply to all three elements. Although the Court did not expressly hold that attaching strict liability to the "depiction of a minor" element would be unconstitutional, it strongly suggested as much. Noting that "nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First

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led Bird, 298 F. Supp. at 1292–93. Holding that a jury may infer knowledge of X from knowledge of Y (essentially a permissive inference) is an entirely different matter from holding that knowledge of Y without knowledge of X is sufficient for guilt. See Alan C. Michaels, Acceptance: The Missing Mental State, 71 S. Cal. L. Rev. 953, 992–94 (1998). This is the difference between a permissive and a conclusive presumption. Cf. Sandstrom v. Montana, 442 U.S. 510, 523–24 (1979) (holding that a conclusive presumption "conflict[s] with the overriding presumption of innocence with which the law endows the accused" (internal quotation marks omitted)).

228 Id. at 765.
230 See id. at (a)(1).
231 151 U.S. 64 (1994).
232 See id. at 68.
233 Id. Many might conclude that this is more than just the "most natural" reading of the statutory language (whether or not they agree with Justice Scalia's dissenting conclusion that such a view is "understatement to the point of distortion — rather like saying that the ordinarily preferred total for two plus two is four." Id. at 81 (Scalia, J., dissenting)).

The relevant statutory language was as follows:

(a) Any person who —

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if —

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished . . . .

234 See X-Citement Video, 513 U.S. at 78.
Amendment,” the Court concluded that “the age of the performers is the crucial element separating legal innocence from wrongful conduct.”\(^{235}\) In the Court’s view, “a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts.”\(^{236}\) Indeed, the likelihood that a statute imposing strict liability for the performer’s age would be unconstitutional was one of the reasons why the Court departed from both the plainest reading of the statute (which, as suggested above, would have limited the knowledge requirement to interstate shipping)\(^{237}\) and the plainest reading of the legislative history (which would have extended the knowledge requirement to only the sexually explicit nature of the materials).\(^{238}\) This use of the doctrine of “constitutional doubt” to avoid strict liability with regard to the minority of the performer strongly suggests that the alternative construction would have been unconstitutional.\(^{239}\)

\(^{235}\) Id. at 72–73 (emphasis added).

\(^{236}\) Id. at 78 (citing Osborne v. Ohio, 495 U.S. 103, 115 (1990)).

\(^{237}\) See supra note 233 and accompanying text.

\(^{238}\) As the Court concluded:

The legislative history . . . persuasively indicates that Congress intended that the term “knowingly” apply to the requirement that the depiction be of sexually explicit conduct. It is a good deal less clear from the Committee Reports and floor debates that Congress intended that the requirement extend also to the age of the performers.

\(^{239}\) X-Citement Video, 513 U.S. at 77.

The dissent put the matter more bluntly:

If what the statute says [i.e., that knowledge applies to neither sexually explicit conduct nor use of a minor] must be ignored, one would think we might settle at least for what the statute was meant to say [i.e., that knowledge applies to sexually explicit conduct but not use of a minor] . . . .

Id. at 83 (Scalia, J., dissenting).

The Court has recently held that the doctrine of constitutional doubt should be invoked only when there “is a serious likelihood that the statute will be held unconstitutional” if the alternative construction (in this case, strict liability with regard to age) is adopted. Almendarez-Torres v. United States, 118 S. Ct. 1219, 1228 (1998). Moreover, the doctrine is not applied when the “fear of a constitutional difficulty . . . upon analysis, will evaporate.” Id.

Thus, while the seven Justices in the majority in X-Citement Video evidently believed that strict liability with regard to the age of the minor would present “a serious likelihood” of unconstitutionality, Justice Scalia, joined in dissent by Justice Thomas, concluded in dicta that the statute would be constitutional, as long as it required knowledge of the sexually explicit nature of the materials. See X-Citement Video, 513 U.S. at 85 (Scalia, J., dissenting). Because Scalia viewed the material involved as “not merely pornography but fully proscribable obscenity, except to the extent it is joined with some other material,” id. at 84, he considered it “of minimal First Amendment concern,” id. at 85. This minimal First Amendment concern was outweighed, in Scalia’s view, by his perception that “the unconstitutionality of such absolute liability will cause Congress to leave the world’s children inadequately protected against the depredations of the pornography trade.” Id.

Beyond the obvious fact that seven Justices disagreed, two points about Scalia’s argument deserve mentioning. First, his argument, by depending on the notion that knowledge of the age of minors will be difficult to prove, fails to consider that intermediate mental states, such as recklessness or negligence, or even a duty to try to determine whether there are minors, might well be constitutional alternatives to strict liability. See supra pp. 869–70 (discussing the level of scienter in Smith). Indeed, the Court was careful in its opinion to state that “a statute completely bereft of
In summary, the Supreme Court has consistently held that, when a form of expression otherwise protected by the First Amendment can be made criminal by virtue of some element of the expression, a crime attaching strict liability to that element is nonetheless unconstitutional. Some culpability requirement must attach to the element for the expression to be criminalized.

2. Freedom of Association. — The Court has reached similar conclusions in freedom of association cases concerning statutes criminalizing membership in illegal organizations. Membership in a group whose sole purpose is to engage in illegal activity is not a fundamental right encompassed by the First Amendment’s guarantee of freedom of association.\(^{240}\) Indeed, were it not so, the crime of conspiracy would be unconstitutional.\(^{241}\) Yet the Court has consistently held that mere membership in an unlawful organization may not be criminalized without requiring knowledge of the organization’s criminal purpose. In other words, imposing strict liability with regard to this element is unconstitutional.\(^{242}\)

The Court first established this principle in *Wieman v. Updegraff*,\(^{243}\) which the Court relied on in *Smith v. California*.\(^{244}\) The *Wieman* Court invalidated an Oklahoma loyalty oath that required applicants for public employment to swear that they had never belonged to any subversive organization and exposed them to punishment regardless of whether they knew of the subversive character of an organization to which they had belonged. Although a refusal to take the oath incurred only a civil penalty, the Court emphasized the penalty’s harsh consequences\(^{245}\) and argued that applying the penalty to those who “innocently” associated with subversive organizations would “inhibit indi-

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\(^{240}\) See *Scales v. United States*, 367 U.S. 203, 228–29 (1961) (holding that a group engaging in illegal advocacy is not protected by the First Amendment).

\(^{241}\) See *id.* at 225–29.

\(^{242}\) In reaching this conclusion, the Court has used language similar to the language used in the freedom of expression cases. Absence of a scintever requirement would “tend[] to inhibit the exercise of constitutionally protected rights,” *see id.* at 229, in this case, freedom of association.

\(^{243}\) 344 U.S. 183 (1952).

\(^{244}\) See 361 U.S. 147, 151–52 (1959).

\(^{245}\) See *Wieman*, 344 U.S. at 190–91. As the Court put it, “In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when each man begins to ‘eye his neighbor as a possible enemy.’” *Id.* at 191 (quoting Judge Learned Hand, Address at the 86th Convocation of the University of the State of New York (Oct. 24, 1952)).
individual freedom of movement” and “stifle the flow of democratic expression.”

Since Wieman, the Court consistently has required a culpable mental state with regard to the nature of an organization as a predicate to criminal punishment for membership in that organization. Thus, when the intentional conduct covered by a statute is protected by the First Amendment right to freedom of association, strict liability with regard to the element that could eliminate that protection is unconstitutional. Once again, the result describes the test of constitutional innocence.

3. Abortion. — The federal courts have also rejected strict liability based on its interference with constitutional rights outside of the First Amendment arena — specifically, with abortion rights. Since it decided Roe v. Wade in 1973, the Court has recognized that the Due Process Clause of the Fourteenth Amendment protects a woman’s constitutional right “to have an abortion before viability and to obtain it without undue interference from the State.” For the same twenty-five years, however, the Court has also recognized the “State’s power to restrict abortions after fetal viability.” In short, the State cannot punish having or performing an abortion prior to fetal viability but can do so after viability.

Although the State may punish performance of an abortion after viability, it apparently may not do so by attaching strict liability to the element of viability. In other words, an abortion that is not constitutionally immune from prohibition nonetheless cannot be punished without some mens rea attaching to the element of viability.

246 Id.
247 See United States v. Robel, 389 U.S. 258, 264–66 (1967) (crime of working in a defense facility as a member of a communist party); Aptheker v. Secretary of State, 378 U.S. 500, 509–12 (1964) (crime of using a passport as a member of a communist party — also decided on right to travel grounds); Scales, 367 U.S. at 229 (crime of membership in an organization advocating the overthrow of the government by violence); Chemerinsky, supra note 140, at 944 (stating that the government may not punish membership in an organization absent knowledge of illegal objectives); see also Tribe, supra note 140, at § 12-26, 1015 (stating that the government may not directly punish the fact of membership in an association). In addition to knowledge of the nature of the illegal organization, the Court has required a specific intent to further the organization’s unlawful aims. See, e.g., Elfbrandt v. Russell, 384 U.S. 11, 15–19 (1966). The Court has also applied the same rules in the context of civil punishments. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589, 606–07 (1967) (finding unconstitutional a dismissal from a public teaching position based on a refusal to deny membership in the Communist Party).
250 Casey, 505 U.S. at 846. The state may restrict abortions after fetal viability only if the state excepts pregnancies that endanger the woman’s life or health. See id.
251 See id. at 879.
252 See id. (“We . . . reaffirm Roe’s holding that ‘subsequent to viability, the State . . . may, if it chooses, . . . proscribe abortion except where it is necessary . . . for the preservation of the life or health of the mother.’” quoting Roe, 410 U.S. at 164–65).
The Supreme Court suggested this principle in *Colautti v. Franklin.* Colautti concerned a criminal statute requiring a physician to determine whether there was “sufficient reason” to believe that a fetus may be viable before aborting it and, if there was sufficient reason, to follow certain statutorily prescribed techniques in performing the abortion. Noting that strict liability for an erroneous determination of viability “could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability,” the Court hinted strongly that such liability would be unconstitutional. However, because the viability provision was, in any event, void for vagueness, the Court did not ultimately reach the question whether strict liability under a properly drafted statute would have been unconstitutional.

Since *Colautti,* lower federal courts have demanded that statutes prohibiting the performance of certain abortions attach a culpability requirement to the elements that allow the state to make them illegal. For example, in *Planned Parenthood v. Miller,* the Eighth Circuit struck down criminal and civil penalties for performing abortions without compliance with the parental notice, informed consent, or medical emergency provisions of South Dakota state law because the statute imposed strict liability with regard to the violation of each of

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254 *Colautti,* 439 U.S. at 380–81. The statute provided in relevant part:

(a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgement or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.

(b) Any person who fails to make the determination provided for in subsection (a) of this section, or who fails to exercise the degree of professional skill, care and diligence or to provide the abortion technique as provided for in subsection (a) of this section . . . shall be subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted.


255 *Colautti,* 439 U.S. at 396.

256 See id.

257 63 F.3d 1452 (8th Cir. 1995).

258 The criminal penalty provision of the statute, S.D. CODIFIED LAWS § 34-23A-10.2 (Michie 1994), made violation a Class 2 misdemeanor, punishable under state law by a 30-day imprisonment, a $200 fine, and a report of the conviction to the board of medical examiners. See *Miller,* 63 F.3d at 1456 n.6, 1463.

259 The civil damages provision, S.D. CODIFIED LAWS § 34-23A-22 (Michie 1994), provided for $10,000 in punitive damages in addition to “treble whatever actual damages the plaintiff may have sustained.” *Miller,* 63 F.3d at 1455 n.5, 1463.
these provisions.\textsuperscript{260} Other courts have similarly struck down statutes restricting abortions that the legislature has the power to ban because of insufficient culpability requirements with regard to elements essential to that power, such as medical necessity,\textsuperscript{261} medical emergency,\textsuperscript{262} and fetal viability.\textsuperscript{263} Although the appellate panel opinions are uniform on this issue, a recent order by a Fourth Circuit judge suggesting a different result indicates that the issue is likely to continue to percolate.\textsuperscript{264}

\textsuperscript{260} See Miller, 63 F.3d at 1465, 1467. The effect of strict liability with regard to these elements, the court reasoned, was to authorize penalizing a physician who “performs an abortion on a minor who he reasonably believes is more than eighteen years old ... [or] who in good faith supplies the mandatory information over the phone to the wrong person.” Id. at 1467.

\textsuperscript{261} See Women’s Med. Prof’l Corp. v. Voinovich, 130 F.3d 187, 203–06 (6th Cir. 1997), cert. denied, 118 S. Ct. 1347 (1998); Summit Med. Assoc’s. v. James, 984 F. Supp. 1404, 1446–48 (M.D. Ala. 1998). In Voinovich, the statute imposed a negligence standard, as opposed to strict liability. The statute banned the performance of post-viability abortions except in cases of medical emergency or medical necessity. The existence of “emergency” and “necessity” were to be determined by the physician “in good faith in the exercise of reasonable medical judgment.” Voinovich, 130 F.3d at 204 (quoting OHIO REV. CODE ANN. § 2919.17(A1) (Banks-Baldwin 1997)). In the Court’s words, “[A] physician may act in good faith and yet still be held criminally and civilly liable if, after the fact, other physicians determine that the physician’s medical judgment was not reasonable.” Id. A statute, such as Ohio’s, that does not punish an objectively reasonable mistake but does punish an objectively unreasonable mistake is more accurately described as imposing a negligence standard than as imposing strict liability. Like strict liability, however, liability under the Voinovich statute is objective, in the sense that it may be imposed even when the doctor in good faith believes in the emergency or necessity. The Voinovich court concluded that the absence of “a scienter requirement renders these exceptions unconstitutionally vague, because physicians cannot know the standard under which their conduct will ultimately be judged.” Id. at 205. As Justice Thomas noted in his dissent from denial of certiorari in the case, the court “appears to have been concerned not so much with vagueness, but rather with the statute’s lack of a scienter requirement relating to physician determinations about the medical necessity of an abortion.” Voinovich v. Women’s Med. Prof’l Corp., 118 S. Ct. at 1349 (Thomas, J., dissenting from denial of cert.). Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, thought the Court should hear the appeal in part because he questioned whether, in the abortion context, the Constitution mandated a scienter requirement. See id.

\textsuperscript{262} See Voinovich, 130 F.3d at 203–06 (holding a negligence standard unconstitutional); James, 984 F. Supp. at 1448 (holding a strict liability standard unconstitutional).

\textsuperscript{263} See Schulte v. Douglas, 567 F. Supp. 522, 527–28 (D. Neb. 1981) (striking down a statute imposing strict liability with regard to whether a fetus is “alive with any chance of survival”), aff’d sub nom. Women’s Services, P.C. v. Douglas, 710 F.2d 465, 466 (8th Cir. 1983) (per curiam) (finding “no error of law” in the district court’s holding); cf. Planned Parenthood Ass’n v. Ashcroft, 655 F.2d 848 (8th Cir. 1981), aff’d in part and rev’d in part on other grounds, 462 U.S. 476 (1983). In Ashcroft, the district court had struck down the statute as unconstitutional because, inter alia, no culpable mental state was required with regard to viability. See Ashcroft, 655 F.2d at 852–53. The court of appeals reversed by reading a culpable mental state provision into the statute, noting that with this interpretation the statute did not “impermissibly impinge on the rights of women and their physicians.” Id. at 862.

\textsuperscript{264} Virginia’s newly enacted Partial Birth Abortion Act, VA. CODE ANN. § 18.2-74.2 (Michie 1998), which took effect on July 1, 1998, provides in part:

[A] physician shall not knowingly perform a partial birth abortion that is not necessary to save the life of a mother. A violation of this section shall be punishable as a Class I misdemeanor.

§ 18.2-74.2(A). Prior to the effective date of the statute, several plaintiffs brought suit to enjoin its enforcement on the grounds that it is unconstitutionally vague and imposes a facially unconstitu-
III. Defending Constitutional Innocence

A. Constitutional Innocence — A Theoretical Justification

Although the principle of constitutional innocence offers a robust explanation for those cases that have held strict liability unconstitutional, without contradicting the cases that have not, and thus fits well with the case law, one could conclude that this match is mere coincidence. In this view, there is no identifiable constitutional bar to strict liability; Lambert is a derelict about notice, and the First Amendment and abortion cases are prophylactic decisions designed to protect against "chilling" of First Amendment rights and "undue burden[s]" on the right to abortion. To be sure, the state cannot punish the exercise of a protected right, such as the right to marry or the right to travel; but, if the exercise of those rights causes an unforeseeable harm, this argument might conclude, there is no constitutional barrier to punishment. This argument would be wrong.

The principle of constitutional innocence flows naturally from two relatively uncontroversial propositions. The first is that the legislature normally may not punish the exercise of a fundamental right. For example, a law that made voicing an opinion in public a crime would be unconstitutional. The second is that punishment must be predicated on some voluntary act or omission covered by a

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265 See supra sections II.B–C.
266 See supra section II.A.
267 See supra p. 869.
269 See note 140.
270 The relationship between the "act requirement" and the "voluntariness requirement," as well as their severability, are controversial issues. See DRESSLER, supra note 11, at 69 n.4. For a good discussion, see Paul H. Robinson, Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?, in ACTION AND VALUE IN CRIMINAL LAW 187, 187–202 (Stephen Shute, John Gardner & Jeremy Horder eds., 1993). My emphasis here is on the core voluntariness requirement.
statute.\textsuperscript{271} For example, a law that made stuttering a crime would be unconstitutional.\textsuperscript{272}

As Herbert Packer explained, the voluntary act requirement is in large measure a requirement of culpability.\textsuperscript{273} It provides "a locus po-

"[The voluntariness requirement is universal in application." Id. at 195; see also LAFAVE & SCOTT, supra note 15, at 199 (stating that a "voluntary act is an absolute requirement for criminal liability"); Johnson, supra note 11, at 1519 (stating that a voluntary act requirement is universal and that public welfare offenses are no exception). But see Allen, Reflections, supra note 84, at 644 (interpreting Montana v. Egelhoff, 518 U.S. 37 (1996), as approving the elimination of voluntariness from the definition of murder in intoxication cases, but describing the case so viewed as "shockingly wrong"). Indeed, although issues of voluntariness "[at] the edges," DRESSLER, supra note 11, at 75, (for example, hypnosis or addiction) can present difficult issues, the universal acceptance of the core principal has meant that the Supreme Court has not directly addressed it.

The Court did address voluntariness indirectly in Robinson v. California, 370 U.S. 660 (1962), and Powell v. Texas, 392 U.S. 514 (1968). Briefly, Robinson involved a California statute that made it a crime to "be addicted to the use of narcotics." Robinson, 370 U.S. at 660. The Court's opinion striking down the statute suggested that it did so because the law punished a status (being an addict) rather than an act, see id. at 666, and because it punished involuntary conduct (an addict arguably uses drugs "involuntarily"), see id. at 667.

In Powell, the Court examined a statute criminalizing "being found in a state of intoxication in any public place." Powell, 392 U.S. at 517. Powell argued that his conviction was unconstitutional because Robinson required a voluntary act and his drunkenness was involuntary given that he was an alcoholic. The four Justices in dissent adopted this view, see id. at 566-67 (Stewart, J., dissenting), while the four-Justice plurality read Robinson more narrowly to mean only that the Constitution forbids punishment for the mere status of being an addict (as opposed to the "act" of being intoxicated in Powell). See Powell, 392 U.S. at 533. Justice White cast the deciding vote against Powell. Although in dictum he agreed with the dissent's understanding of Robinson, see id. at 548-49 (White, J., concurring), so that five Justices understood Robinson to create a stout constitutional voluntariness principle, Justice White thought that Powell did not present the voluntariness issue because, even if Powell became intoxicated involuntarily, he voluntarily appeared in public. See id. at 549-50. The fact that Justice White dissented in Robinson further complicates the picture. See generally DRESSLER, supra note 11, at 81-84; Greenawalt, supra note 27, at 928-35; Robinson, supra, at 106-97.

Thus, the Supreme Court cases provide a basis for arguing that the constitutional voluntariness requirement forbids punishment of conduct that is "on the edge" of the voluntary/involuntary line — such as drinking by an alcoholic. Although the chances of such an argument succeeding today are probably not good, a constitutional "core" voluntariness requirement that would prohibit the crime of, for example, having an epileptic seizure likely exists. See Kadish, supra note 11, at 286-89 (distinguishing addiction from core involuntariness). As noted by the sources cited above, however, the acceptance of this principle is so universal that a statute in contravention has not reached the Court.

\textsuperscript{271} That the act or omission must be covered by a statute is a part of the legality requirement, which holds that "a person may not be punished unless her conduct was defined as criminal before she acted." DRESSLER, supra note 11, at 29. The doctrine's constitutional foundations lie in the Ex Post Facto, Bill of Attainder, and Due Process Clauses of the Constitution. See id. at 30-31 (discussing cases); LAFAVE & SCOTT, supra note 15, at 195 (describing the rule as a "basic premise" of criminal law). See generally Douglas Husak & Brian P. McLaughlin, Time-Frames, Voluntary Acts, and Strict Liability, 12 LAW & PHIL. 95 (1993).

\textsuperscript{272} See supra note 270.

\textsuperscript{273} See HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 76 (1968); see also DRESSLER, supra note 11, at 77 ("The voluntary act requirement is ... closely linked to the retributivist's respect for human autonomy."). Douglas Husak's argument that the actus reus requirement should be replaced by a "control principle" encompasses the same basic point. See DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 102-03 (1987); see also Alexander, supra note 173, at 86 (stating that Husak is correct on this point).
enitentiae, a point of no return, beyond which a person may be punished, but before which she is “free of the very specific social compulsions of the law.” By preventing the state from holding individuals accountable for conduct they plainly cannot control, the voluntary act requirement serves as the “first line of defense” against punishment that would undermine personal autonomy and security. One can see this aspect of the voluntary act requirement in the language of Supreme Court opinions, and to the extent the requirement is constitutionally mandated, it is a core minimum culpability requirement.

Most strict liability crimes do not run afoul of this irreducible core culpability requirement because, by engaging in some voluntary act, the actor has used imperfect care with regard to the strict liability element. Some level of culpability is supplied by the actor’s choice to engage in the voluntary act covered by the statute. The ability to choose not to take such action is the ground for the “measure of culpability” the Court has in mind when it says that a strict liability stat-

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274 Packer, supra note 273, at 75.
275 Id.
276 Id. at 78.
277 See id. at 76–77.
279 See supra note 270.
280 Section 2.05(2) of the Model Penal Code provides an interesting apparent exception to this rule. Section 2.05 provides that the Code’s voluntary act requirement, section 2.04, does not apply to “violations,” which are the only kind of strict liability offenses allowed under the Code. See Model Penal Code § 2.05 (1985). Thus, ironically, in the only circumstance that the Code allows strict liability, it does not require a voluntary act.

The exception is only apparent — indeed, it is the exception that proves the rule — because the Code is simultaneously explicit that “violations” are not “crimes” and cannot lead to any sentence other than a fine, forfeiture, or other civil penalty and cannot “give rise to any disability or legal disadvantage based on conviction of a criminal offense.” Id. § 1.04. In essence, “punishment” without a voluntary act is limited to the non-criminal context. Whether even such civil “punishment” that was not based on a voluntary act or omission would be constitutional is certainly open to question. The Supreme Court has repeatedly indicated in dicta that there are limits beyond which imposing civil penalties on “innocents” would go too far. See, e.g., Bennis v. Michigan, 516 U.S. 442, 450 (1996); Austin v. United States, 509 U.S. 602, 617 (1993); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689–90 (1974). Indeed, an argument could certainly be made for the principle of constitutional innocence in the punitive civil context. Such an argument is beyond the scope of this Article, however, and the important point for present purposes is that the Code provision does not authorize strict liability in the criminal context without a voluntary act.

Just as instructively, according to the Code’s commentaries, of the twenty-eight penal code revisions and proposals that addressed the issue, twenty-seven rejected the Code’s view that the voluntary act requirement should not apply in the strict liability context. See Model Penal Code § 2.05 commentaries at 292 n.9 (1985). Of course, this rejection of the Code’s approach fits hand in glove with the widespread rejection of the Code’s banishment of strict liability from crimes while retaining strict liability, legislatures have also retained the voluntary act requirement that is essential to it.

ute "does not require that which is objectively impossible," puts "the burden of acting at hazard" upon the person choosing to engage in the broader conduct, and requires someone engaging in the conduct to "ascertain at his peril" whether the relevant harm will result. The law provides a clear line of safety, and by engaging in the intentional conduct covered by the statute, a defendant charged with a strict liability crime crosses that line. As Hyman Gross described it, the actor is "negligent[t] per se" with regard to the strict liability element.

Relying on the other elements of the offense to provide the minimum requisite culpability mandated by the voluntary act requirement is not an available strategy, however, if the conduct described by the other elements is beyond the legislature's power to punish. If the other elements of the crime cannot be blamed themselves, then "voluntarily" engaging in them cannot serve as the basis of blame for the harm that

282 Id. at 673.
285 A number of scholars have defended strict liability as a policy matter on the ground that some culpability can be demonstrated with regard to an apparent strict liability element of an offense by considering the actor's conduct more broadly. See Gross, supra note 11, at 346-47; Kelman, supra note 15, at 1517; Low, supra note 62, at 556, 560-64; Wasserstrom, supra note 11, at 742-43. Others have responded that strict liability is nevertheless a bad idea because someone should not be punished on the basis of conduct that is not unreasonable and that the law does not want to discourage. See Johnson, supra note 11, at 1520-21; Kadish, supra note 11, at 268-69; Singer, supra note 11, at 406-07. These arguments about the wisdom of strict liability likely turn on whether the broader conduct that is the basis for culpability is in fact conduct the legislature wishes to discourage. See Wasserstrom, supra note 11, at 737 n.73.

As to the constitutionality of strict liability, however, this rationale is a significant, but incomplete, starting point. The principle of constitutional innocence adds the critical importance of the other elements of the offense to the analysis. The other elements of the offense define the limits within which the search for legislatively determined "culpability" can take place. Because the other elements of the crime must be proven beyond a reasonable doubt, if their presence demonstrates imperfect care with regard to the strict liability element, then conviction of the offense will also demonstrate imperfect care. The constitutionality of relying on this maneuver to demonstrate imperfect care, however, depends upon the constitutionality — as opposed to the wisdom — of prohibiting the other elements of the offense absent the strict liability element. Cf. Husak & McLaughlin, supra note 271, at 107-09 (arguing that the principle of legality limits the search for a "voluntary act" to the conduct specified in a criminal statute); Dressler, supra note 11, at 79 (using the elements of an offense to limit the "time-frame" in which a voluntary act can be found).

286 Gross, supra note 11, at 346. Alan Saltzman argues that the Constitution should be interpreted to mandate a defense of "utmost care" in every case. Saltzman, supra note 11, at 1639. That view is consistent with the principle of constitutional innocence. Saltzman does not appear to recognize, however, that "utmost care" could often mean not engaging in the other elements of the offense, so that proof of mens rea regarding the "strict liability" element could indeed be irrelevant if the other elements of the offense were proven. Discussing the fairness of strict liability, Richard Singer recognizes that Saltzman's argument leads to this result, and writes that Saltzman "may concede the entire issue." Singer, supra note 11, at 402 n.305. Whether or not recognizing the "negligence per se" aspect of strict liability "concede[s] the entire issue" on fairness, it certainly does not concede the entire issue of the constitutionality of strict liability. As detailed throughout this Article, but particularly in Part IV below, the principle of constitutional innocence would serve as a substantial check on strict liability.
results. This reasoning can be seen behind the Court’s conclusion in Smith v. California. Consider the Court’s holding, with parenthetical annotations:

There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise (because the requisite core minimum culpability embodied in the voluntary act requirement can be found in the choice to be a distributor of the food in question), but the constitutional guarantees of the freedom of speech and of the press stand in the way of (the legislature) imposing a similar requirement on the bookseller (because they prevent the legislature from designating the choice to sell books as the basis for culpability).

Therefore, criminal statutes that do not mandate culpability on the basis of some conduct that the legislature can punish, like the statutes in Lambert and Smith, are not constitutional. In such circumstances, independent culpability with regard to the strict liability element must be established. Hence, one finds the requirement of a “probability of knowledge” in Lambert and of some culpability with regard to the obscenity in Smith.

B. Constitutional Innocence — Practical Support

While a strict liability element in a statute is thus unconstitutional when the legislature would not have the power to punish the other elements of the crime, the flip side of this coin is that strict liability is constitutional when the legislature does have the power to punish the other elements of the crime. Simply put, if the legislature can prohibit selling liquor entirely, it is hard to see why it cannot punish selling liquor only when the sale is to a minor, but impose strict liability with regard to the age of the purchaser. There is a punishable voluntary act (selling liquor), and the liquor seller has not met the “perfect care” standard mandated by the legislature with regard to the age of the purchaser. By choosing to sell liquor, the defendant has passed the point designated by the legislature before which she can be safe from liability and has manifested the minimum level of culpability required

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287 Put differently, the “greater power includes the lesser” argument, see supra note 84, is unavailable when the greater power itself is unavailable.
289 Id. at 152–53.
290 In Smith, for example, although one could say that the bookseller was “culpable” for the sale of obscene books because he could have avoided that harm by not selling books at all, that does not make the crime constitutional, because the selling of books — an act beyond the legislative power to punish — cannot, under the principle of constitutional innocence, be the basis of culpability. There must be culpability for the obscenity (he knew the books were obscene, for example), independent of the inherent risk involved in selling books in the first place.
291 See supra pp. 863–64.
292 See supra pp. 868–69.
293 See supra note 84.
294 See supra p. 838.
by the Constitution. This conclusion means that conduct such as Dotterweich’s — conduct that many, including this author, would consider not morally blameworthy — can nonetheless be constitutionally punished.\footnote{Cf. Staples v. United States, 511 U.S. 600, 605–06 (1994) (stating that the principle of mens rea is important enough to require indications of congressional intent for crimes to be interpreted as dispensing with it); United States v. United States Gypsum Co., 438 U.S. 422, 437–38 (1978) (noting that strict liability has been upheld, but is disfavored); Morissette v. United States, 342 U.S. 246, 250, 260 (1952) (reaffirming Balint, but describing mens rea as essential in a mature system of law).}

Although this aspect of the principle of constitutional innocence may be unpalatable, powerful reasons exist to recognize explicitly the principle’s force and swallow the bitter taste along with the sweet. This is so even if it means giving up on a constitutionally based rule demanding negligence with regard to every material element of an offense (or some related formulation), which many commentators have sought.\footnote{See supra notes 26–27 and accompanying text.}

1. Respect for Legislative Prerogatives, Federalism, and the Courts’ Established Role. — The Supreme Court has been extremely reluctant to develop substantive due process rules governing what may be considered constitutionally proper objects of punishment.\footnote{See, e.g., Allen, Reflections, supra note 84, at 648–49 (“[V]irtually every ... foray of the Court into the constitutional aspects of the substantive criminal law ... ground down to virtual insignificance in subsequent cases.”); Bilionis, supra note 28, at 1292–94; Charles R. Nesson, Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen, 94 HARV. L. REV. 1574, 1580–81 (1981) (the Court “has quickly retreated” on the rare occasions that it has ventured into constitutional limits on substantive criminal law); Perkins, supra note 15, at 1068–69; Saltzman, supra note 11, at 1618–19; Stuntz, supra note 27, at 1; Sundby, supra note 65, at 477 (the Court has been extremely reluctant to adduce constitutional rules of criminal responsibility); Underwood, supra note 84, at 1328.}

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.\footnote{See, e.g., Patterson v. New York, 432 U.S. 197, 201–02 (1977); Powell v. Texas, 392 U.S. 514, 535–36 (1968) (plurality opinion); Lambert v. California, 355 U.S. 225, 228 (1957).}

The principle of constitutional innocence respects legislative primacy — including the principles of majority rule and federalism — in defining crimes,\footnote{For discussions of legislative primacy in criminal law choices, see Bilionis, cited above in note 28, at 1301–18, who discusses legislative primacy in his article to insure that “the familiar will [not] turn into the banal,” and Levenson, cited above in note 15, at 454 & n.268. See also Allen, Limits of Legitimate Intervention, supra note 84, at 300 (arguing for legislative primacy in the language of federalism).} but not slavishly. When legislatures attempt to punish conduct that the Constitution prevents them from reaching, the principle is ready to assert itself. By relying on independent constitutional limitations on legislative power, however, the principle does not expand judicial limitations on the legislature’s power to designate particular conduct as not innocent. The limitations employed are preexisting rules that courts already enforce.
Consider, for example, a statute forbidding the sale of alcohol to minors that imposes strict liability with regard to the age of the minor. Whether conduct running afoul of such a statute is sufficiently morally blameworthy or dangerous to be designated a crime is a question that the legislature must answer in the first instance. The principle of constitutional innocence then renders that judgment subject to substantive judicial review. That review, however, is limited to the use of other constitutional principles to decide whether the legislature has the power to punish the intentional conduct covered by the statute — selling alcohol. Declaring strict liability statutes unconstitutional when they effectively punish conduct that is beyond the legislative power to punish does not narrow the realm in which the legislature may decide what is innocent and what is not — it merely brings the realm of punishable conduct into sharper focus.

In short, the constitutional innocence approach asks courts to go where they have gone before. Determining what intentional conduct the legislature has the power to prohibit is a task with which the courts are familiar. Although it is frequently difficult, it is a task they must face in any event, as indicated by the well-developed discussion of the subject. Moreover, courts have well-developed principles governing many areas of conduct. These doctrines come from discretely identifiable limits on legislative power already found in the Constitution. That pedigree substantially undercuts any argument that the principle of constitutional innocence derogates legislative primacy, and it firmly grounds the principle in the Constitution — both important advantages. Thus, a law that punished illegal voting by

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301 See, e.g., Chemerinsky, supra note 140, at 15–25, 640–42 (summarizing many of the leading views and the criticisms thereof and discussing the inevitable need for such principles).
302 In the area of fundamental rights, for example, in addition to the rights already discussed in text, the Court has developed rules, according to one leading commentator’s accounting, that severely restrict the legislature's power to punish matters of family autonomy (including the right to custody of one’s children, see Santosky v. Kramer, 455 U.S. 745, 758–59 (1982), the right to keep the family together, see Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion), and the right to control the upbringing of children, see Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925)), the exercise of rights relating to reproductive autonomy (including the right to procreate, see Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)), and the right to purchase or use contraceptives, see id. at 689), and the exercise of the right to vote, see Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969). See Chemerinsky, supra note 140, at 645–85, 710–11.
303 As described by Louis Billioni:

A successful theory of substantive constitutional criminal law, we saw earlier, depends upon the ability to identify some principle that can generate doctrine. . . . Not just any creatively articulated principle will do, however. To be vital in this connection, the principle requires a secure footing in some milieu that our practice of constitutional law recognizes as a legitimate source of content, such as text, history and tradition, or precedent. Billioni, supra note 28, at 1308 (concluding that the Court’s emphasis on legislative primacy has made it difficult for substantive criminal law theories to pass this test). Constitutional innocence plainly satisfies these criteria. The principle is rooted in text to the extent that the rights that de-
imposing strict liability as to whether the voter had established legal residence should be held unconstitutional because the legislature cannot prohibit legal residents from voting in an election, whereas a law that punished the sale of alcohol to minors by imposing strict liability with regard to the purchaser’s age should be constitutional because the legislature can forbid the sale of alcohol. Such decisions are easily reached, and they respect the legislature’s power — within extrinsically mandated constitutional confines — to decide what is innocent and what is not.

In contrast, broader proposed constitutional limitations on strict liability would stand on far shakier ground in restricting legislative prerogatives. For example, adoption of a rule that selling alcohol to minors could not be made criminal absent negligence with regard to the minor’s age, when the legislature conceded it could outlaw the sale of liquor entirely, would introduce a constitutional principle representing a significant new incursion on the legislature’s power to decide what is innocent and what is not.

2. Precedent. — The second reason for preferring constitutional innocence over its more ambitious cousins as the constitutional limit on strict liability is the seventy-five years of case law upholding strict

304 A state court, erroneously in my view, reached the opposite conclusion in State v. Pruser, 21 A.2d 641, 642–43 (N.J. 1941).
305 See Dahnke, 57 N.W.2d at 556.
306 See Jeffries & Stephan, supra note 27, at 1348 (“Within the range of permissible legislative choice, the greater-power-includes-the-lessor argument is fully applicable.”).
307 See, e.g., Packer, supra note 15, at 152 (advocating such a constitutional rule).
308 A legislature’s conclusion that imposing strict liability, rather than negligence, with regard to the minor’s age will lead to greater care on the part of liquor sellers would surely not be so irrational that the law would fail the rational basis test of the Due Process Clause. See infra note 348 (discussing the rational basis test). Nor would the choice of this more limited method of protecting minors over a complete ban on liquor sales fail rational basis analysis. It may be bad policy, but that does not make it unconstitutional. See Bilonis, supra note 28, at 1292–94 (defending legislative power to decide on the utility of strict liability). As the Supreme Court has stated: “Imposing liability without independent fault deters fraud more than a less stringent rule. It therefore rationally advances the State’s goal. We cannot say this is a violation of Fourteenth Amendment due process.” Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991). Labeling such a legislative judgment irrational would be a significant encroachment on legislative primacy.

The alternative approach would be to argue that the law punished the liquor seller for conduct that is, in a way that has constitutional force, either beyond his capacity to control or morally innocent. It is difficult to see either argument holding sway constitutionally, however, once one concedes that a law banning the intentional sale of liquor would be constitutional. In any event, even if one concluded that the Due Process Clause encompassed a fundamental right not to be punished for morally innocent acts and that courts, rather than legislatures, could define moral innocence, great difficulties would remain in defining, applying, and limiting the principle. Is strict liability ever just? Is punishment for negligence just? These questions, and others like them, are exceedingly difficult, and contemporary consensus on their answers is lacking. Broader constitutional restrictions on strict liability, however, would need to constitutionalize answers to such questions as new limits on legislative power.
liability. *Balint, Dotterweich,* and *Freed* by their holdings, and many other Supreme Court cases by their dicta, have affirmed and reaffirmed the legislature’s power to impose strict liability when constitutional innocence is absent. Lower court decisions to the same effect are legion. For better or for worse, generations of Supreme Court Justices have concluded that the demands of perfect care imposed by strict liability are not so irrational, or so offensive to a fundamental principle of justice deeply rooted in the traditions and conscience of our people, that they violate the Due Process Clause. Given the

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311 See, e.g., *Perkins*, supra note 15, at 1068; *Saltzman*, supra note 11, at 1591; *Nemerson*, supra note 15, at 1578–79. Most commentators calling for a broad, substantive constitutional limit on strict liability recognize that *Balint* and usually also *Dotterweich* would have to be overruled to comport with their conclusions. See *Dubin*, supra note 15, at 381; *Hippard*, supra note 15, at 1052; *Packer*, supra note 15, at 121, 149–50; *Saltzman*, supra note 11, at 1592–96; *Note, Constitutionality of Criminal Statutes Containing No Requirement of Mens Rea*, supra note 15, at 96–101. Because *Balint* came to the Court on a claim of insufficiency of the indictment, Richard Singer argues that it is not an example of the Court sustaining strict liability; in his view, *Balint* is a mere pleading case the holding of which “says nothing about whether knowledge . . . is relevant, or if so, upon whom the burden of proof lies.” Singer, supra note 11, at 399. Singer makes the point as part of a broader argument that, technically, the Court has never upheld strict liability: he limits *Freed* on the same grounds as *Balint, see id.* at 401, and restricts *Dotterweich* on the ground that “the Court’s limited certiorari grant in that case did not include the issue of the constitutionality of applying . . . strict . . . liability to the defendant,” id. at 400. (Singer does not address *Williams v. North Carolina*, 325 U.S. 226 (1945), discussed above at pp. 853–56, but would presumably limit that case on the same basis as *Dotterweich* and by characterizing *Williams* as an ignorance of the law case.) Even Singer concedes that these cases, and others, “team[] with language that supports strict liability” and have been widely read, including by the Court itself, as upholding the constitutionality of strict liability. Singer, supra note 11, at 398–402. Whether or not one agrees with Singer’s ultra-narrow reading of the cases, a debate on the issue would appear to be purely academic given the Supreme Court’s many statements that it has upheld strict liability, the wide acceptance of those statements by lower courts and commentators, and the obvious reliability on them by legislatures.
now well-settled expectations on the issue and the substantial body of legislation enacted against this interpretive backdrop, it would be extremely surprising — and arguably unwise — for the Court to reverse course significantly now. Because of this history, blanket constitutional attacks on strict liability have very little chance of success. In contrast, the principle of constitutional innocence, with its snug fit with precedent, could establish constitutional limits on strict liability without doing violence to a large body of well-developed law.

3. Conclusion. — The Supreme Court’s obvious and long-standing reluctance to impose substantive constitutional limitations on the criminal law must give pause to anyone suggesting a constitutionally based minimum culpability requirement. Nonetheless, because of the constitutional innocence principle’s strong fit with precedent, its re-

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312 See Bilionis, supra note 28, at 1279 ("[T]he fact that the people, their legislatures, and their judges have begged to differ so frequently and for so long makes dubious Hart's claim to an accurate descriptive account of the criminal law's[s] essence [as punishment of individual moral blameworthiness].").

313 See, e.g., Levenson, supra note 15, at 406 n.29, 413 n.76 (collecting statutes).

314 As the Court recently stated in reaffirming Roe v. Wade, 410 U.S. 113 (1973), when reexamining a prior holding, the Court's "judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992). The Court outlined four primary considerations: (i) whether the rule has proven unworkable; (ii) whether reliance on the rule would add significant costs to changing it; (iii) whether the development of related principles have rendered the rule an abandoned relic; and (iv) whether circumstances are so different as to have destroyed the old rule’s justification. See id. at 854-55.

Viewing the matter objectively, even one not fond of the Balint decision must recognize that these factors would counsel against overruling Balint and its progeny. First, not even strict liability's harshest critics have found it "unworkable." The legislative authority not to require a mental state with regard to particular elements of a crime has not prevented courts from rationally interpreting and applying statutes, particularly following Morissette's articulation of a presumption of a mental element in most circumstances. See Morissette v. United States, 342 U.S. 246, 260-63 (1952). Second, and perhaps most importantly, a vast amount of intricate federal regulatory legislation enacted over the past 75 years has relied on the constitutionality of some applications of strict liability. See source cited supra note 313. Furthermore, most states have recodified their penal codes and provided for some strict liability, notwithstanding the Model Penal Code's "frontal assault." See MODEL PENAL CODE § 2.05 commentary at 290 (1985) ("[S]trict liability offenses carrying the possibility of imprisonment still exist in most jurisdictions.").

A strong constitutional rule against strict liability thus could undermine a significant amount of legislation enacted on the premise of its constitutionality; much of it part of a larger regulatory scheme that could, at least from the legislature's perspective, be thrown out of kilter. Third, as demonstrated by the continued, though cabined, use of strict liability, the holding that it is constitutional is hardly an abandoned relic. See MODEL PENAL CODE § 2.05 commentary at 290 n.7 (documenting recent cases upholding strict liability); Parts III–IV. To the contrary, it is part of the Court's consistent refusal to restrict the legislature's ability to define crimes. See Bilionis, supra note 28, at 1304–06. Finally, although the wisdom of strict liability has always been open to question, the reasons for concluding that it is or is not a part of the legislative power have not changed over the past 75 years. Indeed, the demise of Lochner in the 1930's, which occurred after Balint was decided in 1922, would suggest that there is less basis today (rather than more) for concluding that strict liability, particularly regarding economic regulation, is beyond the legislative power.

315 See supra p. 882.
spect for the general rule of legislative primacy with regard to crime
definition, and its applicability through established constitutional
tools on legislative power, there is reason to hope that the principle
might be followed. As demonstrated in the next Part, such a result
would not be an empty victory for opponents of strict liability.

IV. THE IMPACT OF CONSTITUTIONAL INNOCENCE

To gauge the impact explicit recognition of the principle of constitu-
tional innocence would have on current cases, this author conducted
a survey of federal and state cases decided since 1985 adjudicating
the constitutionality of strict liability. The survey cast a wide net;316 but
its results are intended to be illustrative, not comprehensive. As ex-
plained in this Part, the survey reveals numerous federal and state
cases to which the principle of constitutional innocence might be ap-
plied. Although most cases were decided consistently with this prin-
iple, examining the cases in light of constitutional innocence suggests
that some have been wrongly decided and promises resolution for
some instances of court conflict. More generally, by changing the focus

316 The survey was conducted through searches of the Westlaw ALLCASES database, which
includes all reported federal and state cases and many unreported decisions as well. Searches
were run for the following terms:


ii) “Strict Liability” /p [in the same paragraph as] “Constitution!” [the I is a root expander] &
    Date (>1984)

iii) “Strict Liability” /p “Unconstitution!” & Date (>1984) % [but not including] “Products Li-
    ability”

iv) The West Constitutional Law Key number 258(4) after 1984

v) The West Constitutional Law Key number 258(8) after 1984; and

vi) “No” or “Absence” or “Lack of” w/3 (within 3 words of) “sclerent” or “mental state” or
    “mens rea”/p “Constitution!” or “Unconstitution!” or “Due Process” & Date (>1984).

These searches yielded a total of 1030 cases, though this total included some of the same
decisions more than once as well as different opinions in the same case. Each case was then reviewed
to determine whether the court considered a constitutional challenge to strict liability. Inevitably,
there was some degree of subjectivity in these judgments. If the court construed a statute to pro-
vide for strict liability and either upheld or struck down the statute, the case was included. If the
court construed a statute to include a mental state requirement or to provide an affirmative de-
fense of lack of some mental state, and the court stated that it reached the construction in part to
avoid constitutional issues raised by a strict liability construction, the case was also included. See
supra note 239 (discussing the significance of the doctrine of constitutional doubt). If the court
construed a statute to include a mental state requirement or to provide an affirmative defense of
lack of some mental state, but the court indicated clearly in dicta that a strict liability construc-
tion would have been constitutional, the case was included (only five cases qualified on this basis).
All other cases were excluded, including the many cases that read mental state requirements into
statutes as a matter of statutory construction, without explicit reference to the constitutional issue.
Also, only one opinion for any given case was included.

This winnowing reduced the number of cases to 162. Of these, 19 were civil cases (regarding
the applicability of constitutional innocence to civil cases, see note 280 above) and 7 were pure
ignorance of governing law claims. Of the remaining 136 cases, 96 involved state statutes, 39 in-
volved federal statutes, and one involved a Virgin Islands statute. A complete record of the re-
results is on file with the author.
of judicial inquiry to the legislature’s power to prohibit the intentional conduct covered by a statute, the principle would assist courts in understanding the nature of their inquiry into the constitutionality of strict liability in particular cases and thereby provide firmer rationales and better pathways for decision.

Section IV.A examines the continuing relevance of constitutional innocence to statutes relating to sexually explicit expression and to abortion. Strict liability issues regarding these statutes remain controversial. Section IV.B examines other oft-litigated issues of strict liability. This section uses the principle to justify the nearly uniform view that strict liability is constitutional in the context of felony murder and a wide array of “aggravating factor” statutes and explains why statutory rape laws present more difficult questions. Section IV.B also demonstrates that strict liability in three other categories of cases — crimes on one’s premises, crimes of possession, and false statements — is unconstitutional, a result that courts have frequently, but not always, reached. Possession and ownership of premises exemplify conduct that the legislature cannot punish without more, not because of a fundamental right, but because a statute eliminating the strict liability element would fail a rational basis test and might be considered void for vagueness as well. The survey revealed some other crimes of this nature that are discussed in section IV.B. Section IV.C briefly considers some other possible implications of explicit recognition of the principle of constitutional innocence.

A. Sexually Explicit Expression and Abortion

1. Sexually Explicit Expression. — As previously discussed, the Supreme Court has repeatedly indicated that strict liability is unconstitutional in a variety of situations involving sexually explicit expression, including the sale of obscene books and the sale and possession of child pornography. Nonetheless, legislatures continue to attempt to employ strict liability in this context. Although such efforts are sometimes rebuffed, lower courts have struggled in applying the Supreme Court precedent. The principle of constitutional innocence would bring order to this field.

When the intentional elements of a statute could not be criminalized because of the First Amendment, adding an element that renders the conduct unprotected by the First Amendment will not make the crime constitutional if the element is one of strict liability. Numerous recent cases have correctly rejected strict liability as a constitutional matter consistently with this principle. Except for a particular

317 See supra pp. 867–73.
318 See United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (reading the knowledge requirement of a statute prohibiting knowing possession or receipt from interstate commerce of child pornography to apply to the “child” element to avoid the constitutional issue); United States
group of cases — those involving the use of a minor in the production of sexually explicit materials — the survey yielded only one case in the sexually explicit expression category that arguably ran afoul of the principle of constitutional innocence, and that one only in dicta.\footnote{319}

Strict liability statutes prohibiting the use of minors in the production of sexually explicit materials are the focus of ongoing controversy. The legislature indisputably has the power to prohibit the use of minors in the production of sexually explicit materials, but can it impose strict liability with regard to the age of the performers when it could not ban the production of the materials if the performers were not minors? Courts are divided on this issue.\footnote{320} Part of the confusion results

\footnote{319} In \textit{State v. Kevin L.C.}, 576 N.W.2d 62 (Wis. 1997), the court upheld the conviction of a defendant for exposing a child to harmful materials. \textit{See id.} at 64. Rather than imposing strict liability with regard to the child's age, the statute provided an affirmative defense of reasonable mistake of age. \textit{See id.} at 71. In rejecting the defendant's constitutional challenge, the court implied that the statute might be constitutional even without the affirmative defense. \textit{See id.} at 72.

from the malleable nature of the “chilling effect” rationale that the Court used in *Smith v. California*\(^{321}\) and employed subsequently\(^{322}\) to forbid strict liability in the First Amendment context. The argument that producers of sexually explicit materials will be discouraged from making videotapes because they might accidentally employ a minor is neither an easily made nor a sympathetic claim. Courts can easily find that filmmakers are less likely to be “chilled” than the bookseller in *Smith*.\(^{323}\) How much “chilling” is constitutional and how much chilling would occur in the face of strict liability are unrealistic questions to expect courts to answer consistently or in a principled fashion.

The principle of constitutional innocence, in contrast, easily resolves this issue. If production of sexually explicit material is beyond the legislative power to punish because such expression is protected by a First Amendment right, then taking that right seriously means that strict liability may not be imposed with regard to the use of minors in the production of such materials.\(^{324}\)

2. *Abortion.* — Following the Supreme Court’s 1992 decision in *Casey* reaffirming the right to abortion but simultaneously clarifying the state’s ability to outlaw abortions under certain circumstances, many states have passed new abortion statutes. These statutes seem likely to raise a host of questions that the principle of constitutional innocence would help resolve. So far, all but one of the federal courts that have faced the issue seem to have concluded that strict liability with regard to an element necessary to the state’s ability to make an abortion criminal is not constitutional.\(^{325}\)

The courts that have rejected strict liability in the abortion context, however, have been far less uniform in their proffered explanations, which have included “chilling effects,”\(^{326}\) “vagueness,”\(^{327}\) or both.\(^{328}\) This confusion and misdirection open the door for arguments that strict liability will not place an undue burden on abortion rights because doctors will probably not be chilled and because the statutes’


322 See supra p. 869.


324 To be sure, it will often be easier for a producer of pornographic films to determine the age of the performers in the film than it will be for the mere possessor of such films, and the producer is also more likely to be aware of the risk that an actor may be underage. All this likelihood means, however, is that independent culpability with regard to the performer’s age, be it negligence or recklessness, ought to be easier to prove against the producer than against the possessor. It does not eliminate the constitutional mandate for such culpability.

325 See supra pp. 874–76.

326 See Planned Parenthood v. Miller, 63 F.3d 1452, 1465 (8th Cir. 1995).


meanings are clear — arguments that at least one court of appeals judge has made and three Supreme Court Justices seem likely to make in the future. The principle of constitutional innocence would leave no doubt about the unconstitutionality of strict liability in this context: because the underlying act of abortion cannot be criminalized, strict liability is unconstitutional. By identifying the correct rationale for striking down strict liability, the principle would put such abortion decisions on much firmer ground.

B. Other Oft-Litigated Strict Liability Issues: Aggravating Factors, Possession, Premises, and False Statements

The survey of recent constitutional strict liability decisions revealed several other areas of repeated litigation to which the principle of constitutional innocence may be applied. The cases again reveal a pattern of consistency with the constitutional innocence approach but also demonstrate how explicit adoption of the principle would have some bite and would provide an important focus for certain decisions.

1. Felony Murder and Aggravating Factors. — Criminal statutes frequently contain a strict liability element that makes a greater crime out of conduct that is already a crime without the strict liability ele-

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330 See Voinovich v. Women’s Med. Prof’l Corp., 118 S. Ct. 1347, 1349 (1998) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting from denial of certiorari) (“[W]e have never held that, in the abortion context, a scienter requirement is mandated by the Constitution.”). The statute that the court of appeals invalidated in Voinovich essentially made negligence the requisite mental state for liability. See supra note 261. The court of appeals struck down the statute on the ground that it lacked a scienter requirement, by which the court of appeals apparently meant some degree of objective fault, that is, recklessness. See Voinovich, 130 F.3d at 203–06. Unfortunately, the word scienter is sometimes used to indicate a mental state of subjective fault and sometimes used to indicate the presence of any mental element, including negligence. Thus, although he signaled his disapproval of a constitutional scienter requirement in the abortion context, it is at least possible that Justice Thomas would approve a constitutional requirement of objective fault.

The principle of constitutional innocence teaches that strict liability would be impermissible in this context, but determining what level of mental state would be required when strict liability is not permitted is a separate question. Full discussion of that issue is beyond the scope of this Article. Three observations can be made, however. First, it would be impossible to answer this question through descriptive analysis. Consensus among courts on “how much” culpability is enough when strict liability is rejected is thoroughly lacking. See supra section II.C. Second, a preliminary answer might be “sufficient culpability to ensure that the punishment is for a voluntary choice apart from the choice to engage in the activity that the legislature cannot forbid.” Although this answer comports with the constitutional derivation of the principle, see supra section III.A., and would appear usually to imply a minimum mental state of at least negligence when constitutional innocence applies, judgment of its viability and effect would have to await express recognition of the principle. Third, the opportunity to develop consistent rules about minimum mental states when strict liability is not permitted, based on an explicit understanding of why strict liability is unconstitutional, would be an additional benefit of express recognition of constitutional innocence.
Although the constitutionality of this use of strict liability is often challenged, it is almost always upheld. Thus, the survey revealed many decisions upholding statutes punishing felony murder (imposing strict liability as to causing a death during the intentional commission of a felony), the sale of illegal drugs in specially protected areas (imposing strict liability as to the specially protected area), and involving a minor in a crime, as victim or participant (imposing strict liability as to the age of the minor), as well as statutes enhancing sentences for otherwise illegal possession of a weapon because of some special fact about the weapon, such as it being stolen (imposing strict liability as to the special fact about the weapon).

Commentators disagree about whether such uses of strict liability are just from a retributive perspective, depending in large part on their views as to whether "chance" outcomes — someone dies during the felony, the drug sale happens to be near a school, the victim happens to be a minor — are relevant to the retributive desert of the ac-

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331 See, e.g., Johnson, supra note 11, at 1519; Simons, supra note 65, at 1082 (distinguishing strict liability in criminalizing from strict liability in grading criminal offenses).

332 See Conner v. Iowa Dir. of Div. of Adult Corrections, 870 F.2d 1384, 1387 (8th Cir. 1989); United States v. Peters, No. 92 C 3228, 1992 WL 368035, at *1 (N.D. Ill. Nov. 30, 1992); State v. West, 862 P.2d 192, 205 (Ariz. 1993); People v. Howard, 661 N.Y.S.2d 386, 387-88 (App. Div. 1997); State v. McGuire, 686 N.E.2d 1112, 1117, 1126 (Ohio 1997); State v. Middlebrooks, 840 S.W.2d 317, 336 (Tenn. 1992); State v. Oimen, 516 N.W.2d 399, 408-09 (Wis. 1994). But see State v. Ortega, 817 P.2d 1196, 1204-05 (N.M. 1991) (construing a felony murder statute as requiring proof that the defendant was at least knowingly heedless that death might result from his conduct, and holding that unintentional or accidental killing will not suffice).


336 Compare Gross, supra note 11, at 368 (arguing that strict liability is just), Kevin Cole, Killings During Crime: Toward a Discriminating Theory of Strict Liability, 28 AM. CRIM. L. REV. 73, 99-102 (1990) (same), and Simons, supra note 65, at 1110-11 (arguing that strict liability is possibly just), with Model Penal Code § 210.2 commentary at 36-40 (1985) (arguing that strict liability is unjust), Fletcher, supra note 11, § 9.3, at 729 (same), and Roth & Sundby, supra note 27, at 457-60, 490-92 (same).
tor.\textsuperscript{337} The constitutionality of such crimes, however, is confirmed by the principle of constitutional innocence. Because the legislature patently has the power to punish the crime without the strict liability element (indeed, it has done so), adding a strict liability element cannot exceed the bounds of the legislature's power. Moreover, the legislative decision to reserve the harsher punishment for those cases in which the "harm" of the strict liability element occurs is certainly not so irrational as to fail the rational basis test of the Due Process Clause.\textsuperscript{338} Indeed, the Supreme Court has held that "chance" outcomes may constitutionally be used in the area of punishment in which the Court has been most exacting in its scrutiny: the decision whether to impose the death penalty.\textsuperscript{339}

The survey revealed one use of strict liability in this category that is less easily resolved by the principle of constitutional innocence: statutory rape. Statutory rape laws criminalize sexual intercourse with individuals below a certain age and impose strict liability as to the element of the individual's age. In this context, strict liability continues to generate frequent and usually unsuccessful constitutional challenges.\textsuperscript{340} In many jurisdictions, the intentional conduct covered by the statute — intentionally engaging in sexual intercourse (with a nonspouse) — is no longer itself criminal.\textsuperscript{341} According to the principle of


\textsuperscript{338} See infra note 348.

\textsuperscript{339} See Payne v. Tennessee, 501 U.S. 808, 825 (1991). In Payne, the Court held that juries may consider, in deciding whether to impose a death sentence, testimony concerning the impact of a murder victim's death on those who survived, without regard to the defendant's awareness of the particular circumstances of his victim that caused the impact. See id. In essence, the jury may constitutionally choose between life and death for the defendant on the basis of "strict liability" with regard to the impact of the homicide.


\textsuperscript{341} The crime of fornication is the means by which such intentional conduct is sometimes made criminal, with the added element of the sexual partners not being married. As of 1991, fornication was still a crime in 13 states and the District of Columbia. See Note, Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex, 104 Harv. L. Rev. 1660, 1661 n.9 (1991) (collecting statutes). The survey did reveal one case that suggested an interesting variation on this point. In Commonwealth v. Knapp, 592 N.E.2d 747 (Mass. 1992), the defendant argued that he thought the person who crawled into his bed, and with whom he proceeded to have sexual intercourse, was his underage girlfriend, not the underage victim. The court refused to rec-
constitutional innocence, the cases upholding the use of strict liability in statutory rape are correct if, but only if, the defendant’s conduct is not “otherwise innocent” — that is, if there is no constitutional right to engage in sexual intercourse with someone other than one’s spouse. Whether the legislature can constitutionally make fornication a crime is uncertain, and the principle of constitutional innocence does not answer that question. It only mandates that courts face the question forthrightly when deciding the constitutionality of strict liability in statutory rape.

Ognize this as a possible defense, on the ground that the statute applied strict liability as to the identity of the statutory rape victim. Had the defendant claimed that he reasonably believed he was having sex with his wife, something the state presumably cannot prohibit, the doctrine of constitutional innocence would have mandated that he at least be allowed to make the claim.

342 The United States Supreme Court has not directly addressed the constitutionality of fornication statutes. Some commentators have concluded that the logic of the right to contraception cases, particularly Eisenstadt v. Baird, 405 U.S. 438 (1972), dictate that fornication statutes are unconstitutional. In Eisenstadt, the Court struck down on Equal Protection Clause grounds a statute that prohibited the distribution of contraceptives to unmarried persons: “If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Id. at 453. Without a corresponding right to engage in sexual intercourse, the argument runs, the right to contraceptives recognized in Eisenstadt and Griswold v. Connecticut, 371 U.S. 479 (1965), would be meaningless. See Note, supra note 341, at 1663–65; see also State v. Saunders, 381 A.2d 333, 339 (N.J. 1977) (holding that a fornication statute infringed the constitutional right of privacy); Tribe, supra note 140, § 15–21, at 1423 (Eisenstadt “mandated heightened scrutiny . . . of restrictions on recreational or expressional sex . . . between unmarried lovers”); Note, Fornication, Cohabitation, and the Constitution, 77 Mich. L. Rev. 253, 290–91 (1978) (arguing that “the cases preserving the right of privacy in sexual matters together with Eisenstadt” create a constitutional right to be free from state regulation of heterosexual intercourse.

On the other hand, even after Eisenstadt, the Court stated explicitly that the constitutionality of fornication statutes is an open question. See Carey v. Population Servs. Int’l, 431 U.S. 678, 694 n.17 (1977) (plurality opinion) (“The Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual behavior] among adults.”). Moreover, individual Justices have more than once stated in dicta that fornication statutes are constitutional. See Griswold v. Connecticut, 381 U.S. 479, 498–99 (1965) (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) (stating that the constitutionality of fornication statutes is “beyond doubt”); Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) (arguing that a ban on the use of contraceptives by married couples would be unconstitutional, but that such a result “would not suggest that . . . fornication . . . [is] immune from criminal enquiry”). Perhaps more ominously for proponents of a right to fornication, Justice White, speaking for the Court, wrote in Bowers v. Hardwick, 478 U.S. 186 (1986), that “the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.” Id. at 191; see also Nelson v. Morarity, 484 F.2d 1034, 1035–36 (1st Cir. 1973) (per curiam) (stating that nothing in Eisenstadt or Roe v. Wade, 410 U.S. 113 (1973), suggests that strict liability in statutory rape cases is now unconstitutional); Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, 39 J. Fam. L. 25, 82–85 (1991/1992) (suggesting that although the Court may have formerly recognized a right to sexual privacy, Bowers casts serious doubt on the status of that right).

343 Two possible objections to the use of the constitutional innocence principle may be noted at this point. First, an observer eager to have courts recognize fundamental rights might object that the principle of constitutional innocence would deter courts from doing so. For example, knowledge that a right of choice of sexual partners would make strict liability in statutory rape uncon-
The constitutional innocence perspective may also, in some cases, help sharpen the focus of Eighth Amendment proportionality analysis. The Cruel and Unusual Punishment and Excessive Fines Clauses of the Eighth Amendment require that punishments fit the crime to at least some degree.\textsuperscript{344} Currently, legislatures may properly decide that a strict liability element is relevant to the quantum of punishment.\textsuperscript{345} However, courts have struck down punishments on Eighth Amendment grounds, despite substantial strict liability harm, when the other elements (the intentional conduct) of the statute fell too far short of justifying the punishment.\textsuperscript{346} The Court mandates the application of constitutional might lead courts to conclude that there is no such right. The possibility of marginal deterrence of "rights recognition" on this basis is undeniable, although recognizing that the defendant's mental state has constitutional relevance would not reduce in any way the conduct that a legislature could prohibit. My answer to this objection would be skepticism that such marginal deterrence would be significant, and more fundamentally, belief that such risks are inherent in any argument for taking rights seriously, but that without such risks rights would have little value.

A second, related, objection would be that the admittedly formal approach of the principle of constitutional innocence relies on an inappropriate, unitary conception of the nature of a right. According to this objection, a "right" is merely a shorthand expression for a bundle of special protections that can vary according to the right involved and are never absolute, and there is no reason that some "rights" cannot be weaker than others — a "right" may forbid direct punishment of the conduct protected by the right (for example, fornication), but permit punishment of the conduct when it causes a strict liability harm (for example, statutory rape). Such an objection may misunderstand the nature of constitutional innocence. Constitutional innocence actually says little about the nature of rights per se. Whether a "right" prohibits the state from punishing the intentional conduct covered by the statute is not an issue that the principle of constitutional innocence addresses. The formal implications of finding a right of at least this strength, however, are that, even with the addition of a strict liability element, the "core culpability" embodied in the voluntary act requirement is missing. \textit{See supra} pp. 877–81. This outcome has more to do with the nature of culpability than the nature of rights. In any event, putting what may be semantic quibbles about the meaning of a "right" to one side, the arguments from precedent, theory, and pragmatism in support of this formal approach are set out in Parts II and III above.

\textsuperscript{344} \textit{See} United States v. Bajakajian, 118 S. Ct. 2028, 2036–37 (1998) (holding that the same standard of "gross disproportionality" applies to both the Excessive Fines and the Cruel and Unusual Punishment Clauses). \textit{See generally} DRESSLER, \textit{supra} note 11, at 43–50. The Court's holding in \textit{Bajakajian} that a forfeiture of $357,144 was a grossly excessive penalty for willful failure to report the removal of currency from the United States may pave the way for greater scrutiny in this area. \textit{See Bajakajian}, 118 S. Ct. at 2038 n.14 (implying that a five year term of imprisonment would also have been grossly disproportional).

\textsuperscript{345} \textit{See} Harmelin v. Michigan, 501 U.S. 957, 998–99 (1991) (Kennedy, J., concurring) (stating that the penological theory on which to base prison terms "is properly within the province of legislatures, not courts," and that "the Eighth Amendment does not mandate adoption of any one penological theory" (internal quotation marks omitted)).

\textsuperscript{346} \textit{See} Tison v. Arizona, 481 U.S. 137, 156 (1987) (describing Enmund v. Florida, 458 U.S. 782 (1982), as forbidding the death penalty for minor accomplices who were not shown to have had a culpable mental state regarding causing a death); State v. Weitbrecht, No. 97 CA 588, 1998 WL 549027 (Ohio Ct. App. July 31, 1998) (holding that incarceration for two to ten years for causing a death in the course of committing a strict liability traffic misdemeanor violates the Eighth Amendment); State v. Shy, No. 96 CA 587, 1997 WL 381782, at *4–*6 (Ohio Ct. App. June 30, 1997) (same); State v. Campbell, 691 N.E.2d 711, 713–18 (Ohio Ct. App. 1997) (same); \textit{cf.} Harmelin, 501 U.S. at 1004 (quoting Solem v. Helm, 463 U.S. 277, 300 n.15 (1983)) (stating in dicta that no sentence of imprisonment is disproportionate for felony murder); State v. Ojien, 516
relevant, objective criteria to proportionality analysis, and the framework suggested by the constitutional innocence approach helps provide these criteria by identifying with greater precision the factors that make conduct punishable. A punishment under strict liability thus might be barred by the Eighth Amendment, even if the principle of constitutional innocence is satisfied.

2. Possession and Premises and the Rational Basis Test. — Sometimes the intentional conduct covered by a statute, although not protected by a fundamental right, cannot be outlawed entirely. In these cases, a statute containing only the elements constituting the intentional conduct would fail either a due process or equal protection rational basis test, or a void for vagueness analysis. For example, a crime of "possessing anything" or "owning any premises," without fur-

N.W.2d 399, 408-09 (Wis. 1994) (finding that the intentional commission of a felony combined with strict liability for resultant death was not grossly disproportional to a penalty of life imprisonment); Cole, supra note 336, at 122 ("[I]f certain felonies could be punished as harshly as . . . murder, then the felony-murder rule does not violate negative retributive principles . . . .").

See Harmelin, 501 U.S. at 1000 (stating that proportionality review should "be informed by objective factors to the maximum possible extent" (quoting Rummel v. Estelle, 445 U.S. 263, 274-75 (1980) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion)) (internal quotation marks omitted)); cf. Allen, Limits of Legitimate Intervention, supra note 84, at 395-300 (arguing that to determine the constitutionality of a punishment, a court should compare the amount of punishment to the elements proven beyond a reasonable doubt); Allen, supra note 29, at 342-48; Jeffries & Stephan, supra note 27, at 1384-86 (arguing that the proportionality of aggregated penalties to aggravated culpability should govern the constitutionality of felony murder in any given case).

347 The Due Process and Equal Protection Clauses of the Constitution impose some substantive limitations on the police power even when fundamental rights are not at issue. A criminal statute must bear some relationship to injury to the public. See LAFAVE & SCOTT, supra note 15, at 149-55. Criminal "[i]lllegislation must be rationally related to a legitimate governmental interest. This 'rational basis test' is commonly said to be the minimum standard of judicial review — the standard that all legislation must meet to survive constitutional attack, whether challenged under the due process or the equal protection clause." Scott H. Bice, Rationality Analysis in Constitutional Law, 65 MINN. L. REV. 1, 1 (1980) (citing Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974), for the equal protection standard, and Williamson v. Lee Optical Co., 348 U.S. 483 (1955), for the due process standard, and noting that the standards may appropriately be treated as identical). Courts have infrequently, but occasionally, invalidated statutes on this basis. See CHEMERINSKY, supra note 140, at 533-45 (citing cases); LAFAVE & SCOTT, supra note 15, at 149-55; Bice, supra, at 4 n.5 (citing cases).

349 Under the Due Process Clauses, a criminal statute will be held unconstitutionally vague not only if it is so unclear that people "of common intelligence must necessarily guess at its meaning," Connally v. General Constr. Co., 269 U.S. 385, 391 (1926), but also if it provides so few guidelines that "[i]t vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute," Kolender v. Lawson, 461 U.S. 352, 358 (1983). A statute that "permits and encourages an arbitrary and discriminatory enforcement of the law," Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972), is unconstitutionally vague. See generally John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 VA. L. REV. 189, 212-19 (1985); DRESSLER, supra note 11, at 33-34. A statute that criminalized unavoidable everyday activity, such as "possessing anything," would be vague in this way, because it would allow enforcement authorities to pick and choose their targets at will.
other elements, would be beyond the legislative power. According to the test of constitutional innocence, statutes that add an additional element — for example, that the thing possessed is a weapon, or that a crime occurs on the premises — are not constitutional if they impose strict liability with regard to that additional element. The survey yielded a number of cases raising this issue, and the results were mostly, but not completely, consistent with the principle of constitutional innocence.

The survey revealed three cases in which the government sought to limit a possession statute’s mental state requirement to possession of a thing, while imposing strict liability as to the nature of the thing. In each case, the court rejected the government’s view of the statute, finding that view violative or likely violative of due process. Three cases arose challenging statutes imposing strict liability for conduct occurring on the defendant’s property in which, arguably, the only intentional conduct covered by the statute was owning the premises or operating a business on the premises. In two of the three cases, the decisions were consistent with the principle of constitutional innocence.

For example, in the New York case of People v. Small, police arrested David Small immediately after he had broken into a car and emerged with its contents, which included a stun gun. Small was charged with criminal possession of a weapon. Small contended that

\[ \text{\cite{Baender Barnett}} \]
\[ \text{\cite{United States Garrett}} \]
\[ \text{\cite{State Michlitsch}} \]
\[ \text{\cite{People Gean}} \]
\[ \text{\cite{State Larson}} \]
\[ \text{\cite{State Brandner}} \]
\[ \text{\cite{State Holmberg}} \]
\[ \text{\cite{City Colorado Springs}} \]

\[ \text{\cite{People Small}} \]
he thought the stun gun was a radar detector. The court rejected the government's argument that the defendant must be guilty even if he did not know what he possessed, as long as he "was aware of possessing an object which was in fact a stun gun."\textsuperscript{354} Noting that a law punishing the mere possession of any object would "exceed[] the legislature's powers,"\textsuperscript{355} the court concluded that strict liability with regard to the thing possessed would be unconstitutional.\textsuperscript{356}

In another case, a defendant charged with "Letting Prohibited Acts on Premises"\textsuperscript{357} challenged the imposition of strict liability with regard to the occurrence of the prohibited acts on his premises. The court rejected the defendant's challenge, but relied on the fact that the statute applied only to people who also knowingly sold liquor on the premises where the prohibited conduct occurred. The court reasoned that, because the state could ban the sale of liquor entirely,\textsuperscript{358} it could impose regulations short of such a ban through the use of strict liability.\textsuperscript{359} The court expressly distinguished a similar crime that did not include the element of knowingly selling liquor on the premises and a law that imposed strict liability in the possession context, indicating that those statutes would be unconstitutional.\textsuperscript{360}

These cases illustrate that one way in which legislatures continue to use strict liability in violation of the constitutional innocence standard is by limiting the intentional conduct covered by the statute to conduct that is so broad and essential to everyday life that, by itself, it could not be prohibited. Although courts often manage to reach the correct result and strike down statutes that merely add a strict liability element to such conduct, they do make errors in considering challenges to such statutes\textsuperscript{361} — errors that they could avoid by recognizing the principle of constitutional innocence.

3. False Statements. — The survey also revealed a number of recent cases in which courts have struggled with crimes involving the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{354} Id. at 432.
  \item \textsuperscript{355} Id. at 434 (citing People v. Munoz, 172 N.E.2d 535 (N.Y. 1960)).
  \item \textsuperscript{356} See id. at 436.
  \item \textsuperscript{357} See Larson, 653 So. 2d at 1160. The statute under which the defendant was charged provided in relevant part: "No person holding a retail dealer's permit [a liquor license] and no agent, associate, employee, representative, or servant of any such person shall do or permit any of the following acts to be done on or about the licensed premises . . . ." LA. REV. STAT. ANN. § 26:90(A) (West 1994). The statute provided a maximum penalty of six months in jail. See Larson, 653 So. 2d at 1161.
  \item \textsuperscript{358} See Larson, 653 So. 2d at 1165 (citing New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715 (1981)).
  \item \textsuperscript{359} See id. at 1163, 1166.
  \item \textsuperscript{360} See id. at 1164.
  \item \textsuperscript{361} See State v. Holmberg, 527 N.W.2d 100, 104-05 (Minn. Ct. App. 1995); see also State v. Merdinger, 655 A.2d 1167, 1171 n.4, 1172 (Conn. App. Ct. 1995) (erroneously upholding strict liability with regard to the element of failure to pay wages in a statute that prohibited being an employer and failing to pay an employee's wages, and therefore affirming the defendant's 90 day jail sentence).
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\end{footnotesize}
making of false statements, and in which the principle of constitutional innocence would have an impact. Faced with challenges to statutes that prohibit the making of false statements in a variety of contexts in which such falsehoods are clearly not protected by the First Amendment (for example, in connection with the sale of securities, in making statements to the police, in picketing, and in attorney advertising), courts have had to decide whether strict liability with regard to the element of falsehood is unconstitutional. In a number of cases the courts appear to have incorrectly concluded that strict liability is constitutional. In other cases they have focused on the wrong issue, at a minimum leaving their conclusions open to question.


In Texans Against Censorship, the court held that because the Supreme Court has held that false or misleading commercial speech is not constitutionally protected, imposition of strict liability with regard to the falsity was constitutional. See Texans Against Censorship, 888 F. Supp. at 1350. However, "[b]ecause disclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information, only false, deceptive, or misleading commercial speech may be banned. Truthful advertising related to lawful activities is entitled to the protections of the First Amendment." Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation, 512 U.S. 136, 142 (1994) (citations omitted). Because the intentional conduct covered by the statute in Texans Against Censorship, truthful advertising by an attorney, could not be criminally punished, strict liability with regard to the element that eliminates the protection, falsity, is not permissible according to the principle of constitutional innocence. Perhaps the court would have reached a different result had criminal penalties rather than bar discipline been at issue in Texans Against Censorship, but the opinion gives no such indication.

In Azodi, the court held that a statute that prohibited the giving of a false name, address, or date of birth to a law enforcement officer could constitutionally apply strict liability to the element of falsity. Inadvertence or mistake would be no excuse. See Azodi, 1992 WL 393151, at *1–*2. Obviously, giving such information truthfully to a law enforcement officer could not be criminal; thus, the principle of constitutional innocence indicates that this case was wrongly decided. The court apparently approved strict liability in part because it thought there was "no risk" of making an accidental mistake about this information. See id. at *1. The risk might be small, but making it irrelevant is beyond the legislature’s power.

In Simon, the court construed a statute that prohibited making false statements in connection with the sale of securities as not imposing strict liability with regard to the element of falsehood on the ground that the authorized penalty for the statute, three years imprisonment, meant that the statute would raise significant due process questions if strict liability were imposed. See Simon, 886 F.2d at 1290. To be sure, the penalty imposed is grounds for determining whether the legislature intended strict liability, see, e.g., Morissette v. United States, 342 U.S. 246, 256, 260 (1952), and some penalties under strict liability statutes would run afoul of the prohibition on cruel and unusual punishments if actually imposed, see supra pp. 895–96. In deciding whether strict liability with regard to falsehood offended due process, however, the court should have considered whether the California legislature could outlaw the sale of securities. Strict liability would be constitutional if, but only if, it could do so. See also Keating, 922 F. Supp. at 1489 (containing
The principle of constitutional innocence provides a clear path for resolving these cases. If the legislature could prohibit the making of the statement in the context of the other elements of the statute, regardless of its truth or falsity, strict liability is permissible. Otherwise, it is not.

C. Outstanding Issues

Although explicit recognition of constitutional innocence would clarify results across a wide range of statutes, some questions remain open. First, the survey identified some statutes in which the answer to the question whether the state could prohibit the intentional conduct covered by the statute is uncertain. Cases in which the only intentional conduct covered by the statute is driving a vehicle are one example. Such cases are less easily resolved than bigamy statutes in which the only intentional conduct covered by the statute is getting married, statutes in which the only intentional conduct is voting, and statutes in which the intentional conduct is or plainly could be criminalized. The principle of constitutional innocence does, however, tell courts what question they should ask in deciding whether the statute punishes "innocent conduct." The constitutional innocence definition of what is innocent and what is not would be a useful analytic tool for such cases, as demonstrated by the examples in this Article.

Second, in cases in which a court concludes that strict liability is unconstitutional, questions will remain as to the minimum mental state necessary to make the statute constitutional and to what extent, if at all, burdens on these issues can be placed on defendants. The Su-


\[366\] See supra p. 854.

\[367\] See supra pp. 883-84.

\[368\] See supra note 330.

\[369\] The Due Process Clause requires that the state prove beyond a reasonable doubt every element of the crime charged, see Patterson v. New York, 432 U.S. 197 (1977), but the Court has not made clear what limits, if any, the Constitution places on the state's ability to define circumstances or conduct as defenses rather than elements. Some believe that if strict liability is unconstitutional, the state may place the burden of production and persuasion with regard to the defendant's lack of culpability on the defendant. See, e.g., United States v. X-Citement Video, Inc., 982 F.2d 1285, 1296-97 (9th Cir. 1992) (Kozinski, J., dissenting); Levenson, supra note 15, at 452-68; Saltzman, supra note 11, at 1659. Others contend that when some culpability is constitutionally mandated, the state must bear the burden beyond a reasonable doubt. See, e.g., John Quigley, The Need to Abolish Defenses to Crime: A Modest Proposal to Solve the Problem of Burden of Persuasion, 14 VT. L. REV. 335 (1990) (arguing that the state must bear the burden of production and the burden of proof); Sundby, supra note 65, at 500-06 (arguing that the state may shift the burden of production, but must accept the burden of proof). Neither view is implausible, but the Court has certainly not resolved this issue, and its resolution is beyond the scope of this Article.
preme Court has yet to provide anything close to definitive guidance on these difficult issues. This Article certainly does not resolve them. Explicit recognition of the principle of constitutional innocence, however, would be a useful starting point toward courts' appropriately and consistently considering these questions.

V. CONCLUSION

Despite the protests of academic commentators and the recommendations of the Model Penal Code, strict liability persists in criminal legislation. The Supreme Court has not heeded the academy’s many calls for broad constitutional prohibitions on strict liability. A review of the Supreme Court's jurisprudence, including cases involving fundamental rights largely ignored by strict liability commentators, nonetheless reveals that the Court has followed a consistent and powerful, though unstated, principle regarding strict liability. Under this principle, here called constitutional innocence, strict liability is constitutional when, but only when, the intentional conduct covered by the statute (i.e., the statute minus the strict liability element) could be made criminal.

Constitutional innocence provides a robust explanation for both the cases that have rejected and those that have accepted the constitutionality of strict liability. In addition, constitutional innocence, in both its negative and positive aspects, is well justified as a matter of constitutional interpretation. Furthermore, it has the virtue of respecting legislative primacy and allowing courts to decide strict liability cases using doctrines they already employ; under a constitutional innocence framework, courts can override legislative decisions regarding strict liability only on the basis of independently established limits on legislative power — in particular, recognized fundamental rights, void for vagueness doctrine, and the rational basis test of the Due Process Clause. From a practical perspective, because of constitutional innocence's strong precedential pedigree, its respect for legislative primacy (a longstanding special concern of the Court in matters of substantive criminal law), and its reliance on independently established limits on legislative power, courts may be expected to employ its restrictions on the use of strict liability far more readily than the broader, normative

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Explicit recognition of the principle of constitutional innocence would assist, however, in bringing the question into sharper relief.

370 The answers to the question posed at the beginning of Part I should now be readily apparent. The distributor of pornographic videos cannot be held liable on the basis of strict liability with regard to the video's containing minors, because the legislature cannot punish the mere distribution of pornographic videos. The drug shipper can be held liable on the basis of strict liability with regard to the mislabeling of the drugs because the legislature could ban the shipment of the drugs altogether. The doctor cannot be held liable on the basis of strict liability with regard to the viability of the fetus because the legislature cannot punish the performance of all abortions. The beer seller can be held liable because the legislature could ban the sale of alcohol.
prohibitions commentators have unsuccessfully urged on them in the past.

A review of contemporary state and federal decisions addressing challenges to strict liability on constitutional grounds shows that express recognition of the principle of constitutional innocence would have important effects. While the strong weight of authority already implicitly favors the principle, explicit recognition would resolve conflicts and help correct mistakes in many areas in which strict liability is still employed (including sexually explicit conduct, abortion, possession, allowing certain activities on one’s property, false statements, and the definition of aggravating factors for offenses). Finally, explicit recognition of constitutional innocence would be useful in the many cases in which courts are already reaching results consistent with the principle, because it would provide a firmer ground for decision and a valuable framework for considering novel strict liability issues that arise in the future.