FAIR WARNING AND THE RETROACTIVE JUDICIAL EXPANSION OF FEDERAL CRIMINAL STATUTES

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The "fair warning requirement" implicit in the Due Process Clause[1] demands that criminal statutes provide "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed."[2] As the Supreme Court has explained, this requirement has three "manifestations."[3] The first two—the void-for-vagueness doctrine and the rule of lenity—guide courts in the interpretation of criminal statutes.[4] The third is somewhat different. It is the rule that a court may not apply a "novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to

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1. U.S. CONST. amends. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."), XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law."). *See* United States v. Lanier, 520 U.S. 259, 265 (1997) (describing the fair warning requirement as an "application of [the Due Process Clause's] spacious protection of liberty").

2. *Lanier*, 520 U.S. at 265 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)).

3. *Id*. at 266.

4. The void-for-vagueness doctrine requires the invalidation of statutes containing language "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). The rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.*

be within its scope."[5] Unlike the others, this rule does not speak to how a court should interpret criminal statutes. Rather, it provides that once a court decides to interpret a statute so as to render the defendant's conduct criminal, it may not apply that interpretation retroactively unless "the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."[6] The rule is thus simply stated in theory, but in practice it has been considerably less clear.

Suppose, for example, that a United States Attorney charges an individual with violating a federal criminal statute. The defendant moves to dismiss the indictment on the grounds that settled precedent from the federal court of appeals in that part of the country interprets the statute not to reach his conduct. The district court grants the motion, and, in line with its prior decisions, the court of appeals affirms. The government petitions the Supreme Court for a writ of certiorari, noting that while the circuit in which the defendant was indicted interprets the statute in his favor, other circuits around the country interpret it differently. Under those circuits' more expansive interpretations, the defendant's conduct does violate the statute. The Supreme Court agrees to hear the case in order to resolve this split among the circuits, and a majority of the Court concludes that the more expansive reading of the statute is correct. May the Court apply that interpretation to the defendant in the instant case and authorize his prosecution, despite the fact that the law of his circuit held his conduct to be lawful at the time it was undertaken? Alternatively, if the prospect of a prosecution in the face of contrary circuit precedent seems too remote, suppose the Supreme Court seeks to resolve the same circuit split by granting certiorari in a case arising out of a circuit that construes the statute in the government's favor and affirming that circuit's interpretation. May United States Attorneys in circuits that had previously construed the statute more narrowly now indict individuals for conduct predating the Court's decision, where the conduct was lawful under those circuits' prior precedents but is unlawful under the Court's new decision?

The answer may seem obvious. Indeed, at least one prominent treatise on criminal law would apparently characterize these examples as presenting the "easiest case" for holding that the Court's new decision may not be applied retroactively.[7] Moreover, the Supreme Court's recent

5. *Id.*

6. *Id.* at 267.

7. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 2.4, at 143 (2d ed. 1986) ("Perhaps the easiest case is that in which a judicial decision subsequent to the

description of the fair warning requirement in *United States v. Lanier*,[8] while not addressing the specific questions raised here, seems to suggest the same. In *Lanier*'s terms, the existence of settled in-circuit precedent holding a defendant's conduct to be lawful would appear to mean it was not "reasonably clear" that his conduct was *unlawful* when undertaken.[9]

The Supreme Court, however, has held otherwise. In 1984, the Court in *United States v. Rodgers*[10] addressed the question, over which the circuits were split, whether making false statements to the Federal Bureau of Investigation (FBI) violates the False Statements Accountability Act.[11] The Eighth Circuit had affirmed the dismissal of the indictment against defendant Rodgers because settled Eighth Circuit precedent construed the Act as not covering false statements to the FBI.[12] The Court disagreed, and reinstated the indictment. Then, in the penultimate sentence of its opinion, the Court held:

> [A]ny argument by respondent against retroactive application to him of our present decision, even if he could establish reliance upon the earlier [Eighth Circuit] decision, would be unavailing since the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable.[13]

With that single sentence, *Rodgers* announced a rule that whenever the circuits are split as to whether certain conduct is covered by a criminal statute, a decision resolving the split in the government's favor can retroactively authorize the prosecution of individuals who engaged in that conduct even in circuits where the conduct had been held lawful.[14]

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defendant's conduct operates to his detriment by overruling a prior decision which, if applied to the defendant's case, would result in his acquittal. . . . Under such circumstances, the overruling decision . . . is not applied retroactively, at least when the defendant's conduct is not *malum in se*.") (footnote omitted).

8. 520 U.S. 259 (1997).

9. *Id.* at 266.

10. 466 U.S. 475 (1984).

11. 18 U.S.C. § 1001 (1994). The Act provides that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations . . . shall be fined under this title or imprisoned not more than five years, or both." *Id.*

12. *See* United States v. Rodgers, 706 F.2d 854 (8th Cir. 1983) (citing and following Friedman v. United States, 374 F.2d 363 (8th Cir. 1967)).

13. *Rodgers*, 466 U.S. at 484.

14. *See* Walter V. Schaefer, *Reliance on the Law of the Circuit—A Requiem*, 1985 DUKE L.J. 690, 691. As retired Illinois Supreme Court Justice Schaefer puts it, under *Rodgers*:

> [N]o one has any right to rely on a federal circuit court of appeals decision in ordering his affairs. Not only does the reliability of a court of appeals decision vanish in the face of a

In the years since it was announced, the *Rodgers* rule has kept a decidedly low profile. While the Supreme Court has occasionally resolved cases in a manner implicitly consistent with *Rodgers*,[15] it has eschewed direct examination of the rule.[16] Scholarly attention, too, has been scant.[17] Simply to state the *Rodgers* rule is to provoke a welter of questions about its basis, scope, and ramifications. When the Supreme Court overrules a circuit court's interpretation of a criminal statute to the disadvantage of the defendant, does the fair warning requirement described in *Lanier* not restrain retroactive application of the decision? Does a split among the federal circuits truly provide the requisite fair warning? From a more institutional standpoint, does a circuit court's authority to "say what the law is"[18] depend on its agreement with the decisions of other courts in other jurisdictions? Indeed, if the *Rodgers* rule provides that a defendant may be prosecuted for conduct that was lawful under binding circuit precedent, does the rule thereby authorize prosecutors to ignore circuit precedent whenever other circuits read criminal statutes more broadly?

> conflict among the circuits, but the possibility of a future conflict robs every court of appeals decision of reliability.

Id.

15. *See, e.g.*, United States v. Shabani, 513 U.S. 10 (1994). In *Shabani*, the defendant was convicted of violating the federal drug conspiracy statute, 21 U.S.C. § 846 (1994). The Ninth Circuit reversed the conviction, holding that under its prior decisions interpreting the statute, the government had the burden of proving that the defendant committed an overt act in furtherance of the conspiracy. *Shabani*, 513 U.S. at 11–12. Other circuits had addressed the issue and held that no proof of an overt act was required. *Id.* at 12. The Supreme Court agreed that no overt act was needed, overruled the Ninth Circuit's construction of the statute, and reinstated the defendant's conviction. *See id.* at 15–17. Although it did not cite *Rodgers*, the Court's decision is consistent with the *Rodgers* rule.

16. By the beginning of the 2000 Term, the Supreme Court had invoked the *Rodgers* rule explicitly only once. *See* Moskal v. United States, 498 U.S. 103, 108, 114 n.6 (1990). See *infra* note 92 for further discussion of *Moskal*. Lower court cases applying the *Rodgers* rule are few. By late 2000, there was barely a handful of published federal court of appeals decisions discussing the rule. *See, e.g.*, United States v. Zichettello, 208 F.3d 72, 99 n.13 (2d Cir. 2000); United States v. Qualls, 172 F.3d 1136, 1138 n.1 (9th Cir. 1999) (en banc); United States v. Zuniga, 18 F.3d 1254, 1258–59 (5th Cir. 1994); United States v. Rodriguez-Rios, 14 F.3d 1040, 1050 (5th Cir. 1994); Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422, 428 (6th Cir. 1990); United States v. Angiulo, 847 F.2d 956, 965–66 (1st Cir. 1988). Among those cases, the Ninth Circuit's decision in *Qualls* is most noteworthy. In that case, the court held that, under *Rodgers*, as long as a defendant's conduct is unlawful under the case law of a circuit court somewhere in the country, that defendant may be prosecuted even if previous prosecutions *against him* for the *same conduct* had earlier been dismissed because precedent in his circuit held his conduct to be lawful. *See Qualls*, 172 F.3d at 1138 n.1. See *infra* notes 94–107 and accompanying text for further discussion of *Qualls*.

17. Only two scholarly pieces discuss the *Rodgers* rule in any detail. *See* Harold J. Krent, *Should* Bouie *Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 70–72 (1997); Schaefer, *supra* note 14, at 690–94.

18. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

I undertake to answer some of these questions in this Article. In so doing, I aim to show that the *Rodgers* rule betrays the due process principles implicit in the fair warning requirement. I propose an alternative approach that better comports both with the fair warning requirement and with other principles in related areas, and that takes more accurate account of the role played by the courts of appeals in the federal judicial system.

This Article proceeds in seven parts. Part I begins by sketching a conceptual backdrop against which to appraise the *Rodgers* rule. The most obvious place to commence that undertaking is the constitutional prohibition of ex post facto laws.[19] Retroactive application of judicial decisions enlarging the scope of criminal statutes does raise ex post facto concerns, but, strictly speaking, the Ex Post Facto Clause does not apply to judicial decisions. Instead, the Supreme Court has held that the Due Process Clause restrains adjudicative retroactivity. The governing principle underlying this due process restraint is that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[20] To that end, a court may not "apply[] a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[21] It is this limit on adjudicative retroactivity that the *Rodgers* rule implicates.

Part II examines the *Rodgers* rule and its ramifications. It shows that the rule adopted by the Court in *Rodgers* is more sweeping than the rule the government itself proposed in that case. It further explains that while the ramifications of the *Rodgers* rule may not have been entirely clear when it was first articulated, a recent decision of the United States Court of Appeals for the Ninth Circuit has extended the rule to its logical limit. Yet as sweeping as the rule is, the *Rodgers* Court cited no authority to support it, and gave little indication of how it comported with the Court's jurisprudence in related areas.

Part III examines the doctrinal foundations of the *Rodgers* rule. While *Rodgers* cited no authority for its rule, it appears to build on *Bouie v. City of Columbia*,[22] which is generally viewed as the seminal case establishing a

19. This prohibition is embodied in two Ex Post Facto Clauses, one directed at Congress, *see* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."), the other at state legislatures, *see* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law."). For simplicity's sake, and because this Article focuses primarily on issues of federal law, I generally refer to the Ex Post Facto Clause addressed to Congress.

20. United States v. Lanier, 520 U.S. 259, 265 (1997) (quoting Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954))).

21. *Id.* at 266.

22. 378 U.S. 347 (1964).

constitutional constraint on the retroactive application of judicial constructions of criminal statutes. *Bouie*, however, does not speak directly to cases such as *Rodgers*. Although *Bouie* established a general due process constraint on adjudicative retroactivity, its specific expression of that constraint is not dispositive of cases such as *Rodgers*, where the Court must decide not just whether a new construction of a statute was foreseeable in light of the statute's text, but whether a decision overruling a prior judicial interpretation of a statute may be applied to the detriment of a defendant who may have relied on that prior interpretation. Part III then turns to a related but distinct line of cases that do address that question. The Supreme Court's decisions in *James v. United States*[23] and *Marks v. United States*[24] establish that where the Supreme Court expands criminal liability under a federal statute by overruling one of its own decisions construing the statute more narrowly, the more expansive construction may not be applied retroactively to criminalize conduct that was lawful under the earlier decision. Taken together, *James*, *Marks*, and *Rodgers* suggest that an individual may rely on Supreme Court precedent declaring his conduct to be outside the reach of a criminal statute, but may not rely on settled court of appeals precedent saying the same thing. Because the *Rodgers* Court made no mention of either *James* or *Marks*, it gave no justification for this discrepancy.

Parts IV and V make the case for an alternative to the *Rodgers* rule. An approach more consistent with the fair warning requirement asks whether, at the time of the defendant's conduct, any binding precedent in the relevant jurisdiction provided that the conduct was lawful. If so, a court (either the Supreme Court or the court of appeals acting en banc) may overrule that precedent, but due process prohibits the retroactive application of the new construction. This approach, which I call the "circuit precedent rule," recognizes the important difference between a naked statute capable of supporting a variety of constructions, and a judicial decision adopting a particular construction and holding certain conduct to be outside the reach of the statute so construed.

Parts VI and VII approach the *Rodgers* and circuit precedent rules from slightly different perspectives. Part VI raises and responds to two possible Article III objections to the circuit precedent rule, and explains why the Court could follow the rule without running afoul of Article III's case-or-controversy requirement. Part VII assesses the *Rodgers* rule as a

23. 366 U.S. 213 (1961).
24. 430 U.S. 188 (1977).

response to the problem of intercircuit conflicts. Disagreement among the circuits as to the meaning of laws of national application is a potentially significant problem, and it seems clear that the Supreme Court lacks the resources to resolve all such disagreements itself. But the *Rodgers* rule is not an appropriate remedy. It is neither an effective response to the problem of intercircuit conflicts nor a tolerable limit on the power of circuit courts to establish and maintain their own precedent.

I. GENERAL PRINCIPLES

This Part examines the principles underlying the fair warning requirement's restriction on the retroactive judicial expansion of criminal statutes. That restriction is informed by both the constitutional prohibition of ex post facto laws and the Supreme Court's decisions on issues of adjudicative retroactivity in general. This Part discusses those doctrinal areas in order to provide a context for the later examination of the *Rodgers* rule.

A. THE EX POST FACTO CLAUSE

When Congress enacts legislation declaring previously lawful conduct to be unlawful, the Ex Post Facto Clause prohibits application of the new law to pre-enactment conduct.[25] But the proposition that the law should not criminalize conduct that was lawful when committed has a pedigree long predating the Constitution.[26] Its roots are traceable in part to the

25. *See, e.g.*, Collins v. Youngblood, 497 U.S. 37, 42 (1990) ("[A]ny statute which punishes as a crime an act previously committed, which was innocent when done . . . is prohibited as *ex post facto*.") (quoting Beazell v. Ohio, 269 U.S. 167, 169–70 (1925)). That is not the only kind of legislative change to which the Ex Post Facto Clause applies. As early as 1798, the Supreme Court identified four categories of ex post facto laws:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis omitted). The Court recently reaffirmed those four categories. *See* Carmell v. Texas, 120 S. Ct. 1620 (2000).

26. Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."). *See also* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (The "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.").

maxim *nullum crimen sine lege, nulla poena sine lege*.[27] Known as the "principle of legality," this maxim has "for centuries [been] the basic *sine qua non* of criminal justice."[28] It was expressed, for example, in Blackstone's assessment that the "making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime . . . must of consequence be cruel and unjust."[29] Thus, by the time of the Founding it was hardly novel for Alexander Hamilton to claim that "the subjecting of men to punishment for things which, when they were done, were breaches of no law," was among "the favorite and most formidable instruments of tyranny."[30]

It has also long been clear, however, that the Ex Post Facto Clause applies only to legislation, and "does not of its own force apply to the Judicial Branch of government."[31] This limited application is in part a function of the purposes of the Clause. As Justice Chase described in the seminal case *Calder v. Bull*, the constitutional prohibition of ex post facto laws was conceived principally as a limit on legislative power.[32] Specifically, it was enacted in response to the Framers' fear, based on recent history in Great Britain, that legislatures might attempt to use ex post facto laws to single out unpopular groups or individuals for retroactive punishment.[33] Justice Chase concluded that "[t]o prevent such, and similar,

27. Roughly translated, the phrase states "no crime without law, no punishment without law." *See generally* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937).

28. JAMES J. ROBINSON, CASES ON CRIMINAL LAW AND PROCEDURE 1 (1941). *See also* HERBERT PACKER, THE LIMITS OF CRIMINAL SANCTION 79–80 (1968) (describing the legality principle as "*the* first principle" of the criminal law); JOHN RAWLS, A THEORY OF JUSTICE 238–40 (1971).

29. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *46 (1765).

30. THE FEDERALIST NO. 84, at 511–12 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See also* THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961) ("Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation."); *Carmell*, 120 S. Ct. at 1626 (describing the constitutional prohibition on ex post facto laws as among the provisions "the Framers . . . considered to be 'perhaps greater securities to liberty and republicanism than any [the Constitution] contains.'" (quoting THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

31. Marks v. United States, 430 U.S. 188, 191 (1977). *See also* Ross v. Oregon, 227 U.S. 150, 161 (1913) (holding that the Ex Post Facto Clause "is a restraint upon legislative power and concerns the making of laws, not their construction by the courts"); Calder v. Bull, 3 U.S. (3 Dall.) 385, 398 (1798) (Iredell, J., concurring) (finding no ex post facto problem by depicting the action at issue as "an exercise of judicial, not of legislative, authority").

32. *Calder*, 3 U.S. (3 Dall.) at 389.

33. *Id.* ("The prohibition against . . . making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws . . . .") (emphasis omitted). Justice Chase pointed to the 1641 conviction of the Earl of Stratford as a case where the British Parliament "declar[ed] [an] act[] to be treason, which [was] *not* treason, when committed." *Id.* at 389 n.*. He also identified the 1669

acts of violence and injustice . . . the Federal and State Legislatures, were prohibited from passing any bill of attainder, or any ex post facto law."[34] As the second Justice Harlan explained many years later, the same concerns of vindictive lawmaking do not apply to the courts, whose "opportunity for discrimination is more limited than the legislature's, in that they can only act in construing existing law in actual litigation."[35]

That distinction aside, however, the Ex Post Facto Clause also serves at least two other purposes that are not confined to legislative action. First, it provides "assur[ance] that legislative [criminal] Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[36] In this sense, the Ex Post Facto Clause imposes a requirement of notice consistent with the principle of legality: It requires that a legislature give advance notice of its intent to treat conduct as criminal so that individuals may ensure that their actions conform to the law.[37] Such notice-related concerns do not necessarily apply only to legislative changes in the law. Indeed, the fair warning requirement described in *Lanier* "bars *courts* from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[38]

Second, as the Supreme Court recently emphasized in *Carmell v. Texas*,[39] the Ex Post Facto Clause furthers a more generalized interest in "fundamental justice."[40] That is, "[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the

banishment of Lord Clarendon as a case where Parliament "inflicted punishments, where the party was not, by law, liable to any punishment." *Id.* at 389 n.‡ (emphasis removed).

34. *Id.* at 389 (emphasis omitted). *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 513 (1989) (Stevens, J., concurring) ("The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens."); James v. United States, 366 U.S. 213, 247 n.3 (1961) (describing the Ex Post Facto Clause as "rest[ing] on the apprehension that the legislature, in imposing penalties on past conduct . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons").

35. *James*, 366 U.S. at 247 n.3.

36. Weaver v. Graham, 450 U.S. 24, 28–29 (1981). *See also* Dobbert v. Florida, 432 U.S. 282, 298 (1977); Kring v. Missouri, 107 U.S. 221, 229 (1883); *Calder*, 3 U.S. (3 Dall.) at 388; 1 LAFAVE & SCOTT, *supra* note 7, § 2.4, at 136 (quoting *Weaver*).

37. *See* 1 LAFAVE & SCOTT, *supra* note 7, § 2.3, at 128; John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985) ("[T]he legality ideal . . . stands for the desirability in principle of advance legislative specification of criminal misconduct.").

38. *Lanier*, 520 U.S. at 266 (emphasis added).

39. 120 S. Ct. 1620 (2000).

40. *Id.* at 1632. *See also The Supreme Court—Leading Cases*, 114 HARV. L. REV. 179, 192 (2000) (discussing *Carmell*'s description of this interest).

government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life."[41] The government runs afoul of this fairness interest when it passes an ex post facto law that makes it easier, after the fact, to convict or punish its citizens. But it also runs afoul of this interest when it achieves the same result through retroactive judicial decisionmaking.[42] The courts are no less a part of the government than is the legislature,[43] and fairness demands that the government abide by judicially announced rules just as it requires adherence to legislative enactments. In order for this point to make sense, however, one must first concede that judicial decisions can indeed supply—not just discover—the meaning of criminal statutes.

B. ADJUDICATIVE RETROACTIVITY IN GENERAL

Although it is facile today to say that judicial decisions may upset reliance interests by altering the law without notice,[44] the formalist view of the law prevalent in the eighteenth, nineteenth, and early twentieth centuries did not conceive of the judicial function in that way. To the legal formalists, whose ultimate champion was Blackstone, it went without saying that ex post facto concerns applied only to legislation.[45] Whereas

41. *Carmell*, 120 S. Ct. at 1633.

42. *See* Bouie v. City of Columbia, 378 U.S. 347, 353 (1964) ("[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law."). It does not necessarily follow, however, that every kind of legislative change that implicates the Ex Post Facto Clause has a judicial analog implicating the Due Process Clause. *See infra* note 116.

43. *See* Apprendi v. New Jersey, 120 S. Ct. 2348, 2367 (2000) (Scalia, J., concurring) ("Judges, it is sometimes necessary to remind ourselves, are a part of the State.").

44. To literary and critical theorists, it is a truism that interpretation is a creative act. In Foucault's formulation, "interpretation is the violent or surreptitious appropriation of a system of rules, which in itself has no essential meaning, in order to impose a direction, to bend it to a new will, to force its participation in a different game, and to subject it to secondary rules." MICHEL FOUCAULT, *Nietzsche, Genealogy, History*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE 139, 151–52 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977). Yet outside the critical legal studies movement, such a thoroughgoing deconstruction of the idea of interpretive objectivity is still rather rare in the law. *See generally* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 60–93 (1996). Still, the modest proposition that a judge helps define a statute when interpreting it seems beyond cavil. *See* Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 773 n.248 (1988) ("The very idea of a text is itself not straightforward; it is visible only through an interpretive lens."). Indeed, even the "stupidest housemaid" knows that "the law don't mean what its words say it mean. It mean what the judge say it mean." Paul Butler, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1917, 1920 (1999).

45. *See* Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 211 (1863) (Miller, J., dissenting) (stating that a judicial decision overruling prior precedent indicated "not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason"); 1 BLACKSTONE, *supra* note 29, at *69–70 (observing that judges are "not delegated to pronounce a new law, but to maintain and expound

legislatures had the power to create and change the law, to Blackstonians the law existed independent of, and prior to, judicial decisions. Judicial decisionmaking was understood as law-finding, not as law-making or law-changing. Thus, since by definition judicial decisions were not capable of changing the law, there was no controversy in applying them to past conduct.[46]

In the first half of the twentieth century, scholars and courts alike came to see judicial decisions as capable of presenting problems of retroactivity.[47] With the rise of legal realism came the recognition that, in Justice Cardozo's turn of phrase, the judicial "process in its highest reaches is not discovery, but creation."[48] If statutory interpretation is in part an act of legal creation and not mere discovery, then whether a new construction ought to be applied to past conduct becomes a vital question. But the judiciary was slow to face the issue head-on,[49] and it was not until the 1960s that the Warren Court began to define robust limits on adjudicative retroactivity.[50]

The immediate impetus for the Court's greater awareness of problems of adjudicative retroactivity was its dramatic expansion in the 1960s of the constitutional rights of criminal defendants.[51] Not wanting to "free the numerous defendants who had been convicted before the announcement of

the old one," and explaining that even when a "former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law"). *See also* Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1081–83 (1999) (discussing the Blackstonian view).

46. *See* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years.").

47. *See, e.g.*, Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364–65 (1932) (describing the Blackstonian model as "ancient dogma," and authorizing exclusively prospective application of a state court decision); W.J. Adams, Jr., *Constitutional Law—Protection of Rights Acquired in Reliance on Overruled Decisions*, 11 N.C. L. REV. 323, 329 (1933) (criticizing the Blackstonian model as "antiquated dogma and useless fiction").

48. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166 (1921). *See also* 2 SIDNEY POST SIMPSON & JULIUS STONE, LAW AND SOCIETY 705 (1949) (observing that "the fiction of *mere* law-finding by courts is being relegated to the shelf of forgotten things by both judges and jurists," and that the "creative nature of much judicial activity has become a commonplace").

49. *See* Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2–7 (1960).

50. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1059–63 (1997).

51. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964) (holding that the right to counsel attaches at the moment that a person becomes a criminal suspect); Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963) (holding that criminal defendants have a right to court-appointed counsel if they cannot afford to pay); Mapp v. Ohio, 367 U.S. 643, 655–57 (1961) (applying the Fourth Amendment exclusionary rule to the States).

the new legal standards,"[52] the Court in *Linkletter v. Walker* adopted a three-factor test of purpose, reliance, and effect for determining whether a newly announced constitutional rule ought to be applied retroactively.[53] In so doing, the Court established a rationale for not retroactively applying its decisions expanding the constitutional rights of criminal defendants.[54] In the 1980s, however, the Court began to favor adjudicative retroactivity again, at least under certain circumstances. As a general matter, the Court now retroactively applies new constitutional rules of criminal procedure on direct review,[55] but not on collateral review.[56] The result of these various shifts in the Court's retroactivity jurisprudence is confusion.[57] Indeed, the Court's decisions in this area have spawned a veritable cottage industry of academic attempts to impose some order on the chaos.[58]

That chaos need not detain us here. As the next Section shows, adjudicative retroactivity in the expansion of criminal statutes is distinct from more general issues of retroactivity.

C. ADJUDICATIVE RETROACTIVITY IN CRIMINAL STATUTORY INTERPRETATION

Although it has shifted its general stance on adjudicative retroactivity several times since the 1960s, the Court has maintained the same principled position on the retroactive judicial expansion of criminal statutes. In

52. Fisch, *supra* note 50, at 1059.

53. 381 U.S. 618, 627–28 (1965).

54. Although *Linkletter*'s approach is "deeply unsatisfying" to some, Roosevelt, *supra* note 45, at 1090, discussion of its merits is beyond the scope of this Article. Whatever its merits, *Linkletter* undeniably signaled a shift in the Court's approach to adjudicative retroactivity. *See id.* at 1089; Fisch, *supra* note 50, at 1059.

55. *See* Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

56. *See* Teague v. Lane, 489 U.S. 288, 289 (1989). Congress codified a more aggressive version of *Teague* in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1218, 1219 (codified as amended at 28 U.S.C. § 2254(d) (1996)).

57. *See* James B. Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus*, 79 NW. U. L. REV. 1062, 1062 (1984) ("[D]octrinal confusion and inconsistency are the hallmark of nonretroactivity jurisprudence."); Roosevelt, *supra* note 45, at 1104 ("Academics show rare consensus in their estimation of the Court's performance: it is unsatisfactory.").

58. *See, e.g.*, Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941 (1995); Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991); Fisch, *supra* note 50; Michael J. Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820 (1985); Haddad, *supra* note 57; Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373 (1977); Roosevelt, *supra* note 45; K. David Steele, *Prospective Overruling and the Judicial Role After* James B. Beam Distilling Co. v. Georgia, 45 VAND. L. REV. 1345 (1992); Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515 (1998).

essence, that position holds that the Due Process Clause prohibits the retroactive application of unforeseeable judicial enlargements of criminal statutes.[59] That this position has remained intact despite the many shifts in the Court's general retroactivity jurisprudence is, in part, a product of the Court's recognition that the reinterpretation of federal criminal statutes does not, formally speaking, create "new" law.

In formal terms, statutory interpretation does not raise questions about whether to apply a "new" rule to past conduct. Rather, when a federal court construes a statute, it "explain[s] its understanding of what the statute has meant continuously since the date when it became law."[60] Thus, if the Supreme Court overrules a prior interpretation of a statute, it necessarily holds that the previous interpretation was incorrect.[61] A Supreme Court decision overruling a prior interpretation of a statute—whether that prior interpretation was rendered by the Court itself or by a lower court—"[does] not change the law. It merely explain[s] what [the statute] had meant ever since the statute was enacted."[62] Accordingly, the difficult questions raised by the Court's decision in *Linkletter* and subsequent cases—questions of whether newly fashioned rules should be applied to conduct undertaken before the rules existed—do not arise in this context. Indeed, if it is true that "[t]he question of retroactivity is what to do when the law changes,"[63] then whether to apply an expanded judicial construction of a criminal statute to predecision conduct is not a problem of retroactivity at all. It is not such a problem because, in the federal context at least, the answer is the same in all cases: The decision applies retroactively insofar as it declares what the statute has always meant.

Despite the absence of a formal retroactivity problem in this area, the Supreme Court has acknowledged that judicial decisions can indeed change the *practical* meaning of statutory law. Beginning in the early 1960s, the Court came to acknowledge that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law."[64] Accordingly, the Court concluded that just as the Ex Post

59. *See* Bouie v. City of Columbia, 378 U.S. 347, 353–354 (1964).

60. Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 n.12 (1994).

61. *See id.* ("[I]t is not accurate to say that the Court's decision in *Patterson* 'changed' the law that previously prevailed in the Sixth Circuit when this case was filed. Rather, . . . the *Patterson* opinion finally decided what § 1981 had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress.").

62. Bousley v. United States, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part).

63. Roosevelt, *supra* note 45, at 1075.

64. *Bouie*, 378 U.S. at 353 (italics omitted).

Facto Clause prohibits legislatures from criminalizing conduct that was legal when undertaken, the Due Process Clause bars courts from "achieving precisely the same result by judicial construction."[65] Applying this principle, the Court has held that where settled Supreme Court precedent holds certain conduct to be beyond the reach of a given criminal statute, due process prohibits the retroactive application of a new decision overruling that earlier precedent and subjecting the previously lawful conduct to criminal sanction.[66]

Formally at least, this due process constraint does not apply to "new" rules of law. Rather, it provides that although a judicial interpretation of a statute typically declares what the statute has meant ever since its passage, due process constrains the retroactive *application* of certain interpretations in certain contexts. And despite the many shifts in the Court's approach to questions of retroactivity in general, this particular due process principle has remained relatively constant, at least in theory, since the Court first articulated it in the 1960s.[67]

As suggested at the beginning of this Article, this constraint on adjudicative retroactivity is typically discussed not as part of the Supreme Court's general jurisprudence on retroactivity, but as a "manifestation" of the due process requirement of fair warning.[68] In *Lanier*, the Court

65. *Id.* at 353–54. The Court further explained the principle in the early 1970s:

> [T]he principle on which the [Ex Post Facto] Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.

Marks v. United States, 430 U.S. 188, 191–92 (1977) (citations omitted). Commentators tend to agree with the Court on this point. *See, e.g.*, 1 LAFAVE & SCOTT, *supra* note 7, § 2.4, at 143 ("[I]t is obvious that the rationale behind the ex post facto prohibition . . . is relevant in the situation where a judicial decision is applied retroactively to the disadvantage of a defendant in a criminal case."); Fallon & Meltzer, *supra* note 58, at 1745 n.65 ("[R]etroactive application of a new decision that effectively criminalized primary conduct that had been previously held immune from prosecution would presumably deny due process.").

66. *See, e.g.*, *Marks*, 430 U.S. at 195–96; James v. United States, 366 U.S. 213, 221–22 (1961) (opinion of Warren, C.J., joined by Brennan and Stewart, JJ.); *id.* at 224 (opinion of Black, J., joined by Douglas, J., concurring in part and dissenting in part); *id.* at 242 (opinion of Harlan, J., joined by Frankfurter, J., concurring in part and dissenting in part).

67. I do not mean to suggest that the actual *scope* of the limit on adjudicative retroactivity that the Court first articulated in the 1960s has remained constant since then. It has not. Indeed, one purpose of this Article is to examine the disjunction between the principles articulated by the Court in the early 1960s and the application of those principles in *Rodgers*. At this point in the discussion, however, I mean simply to note that unlike the Court's shifting approach to adjudicative retroactivity in the area of constitutional criminal procedure and elsewhere, the Court has consistently adhered to the principle of nonretroactivity in the area of criminal statutory interpretation. The remaining questions go to the scope of the principle's protections, not to the continued validity of the principle itself.

68. United States v. Lanier, 520 U.S. 259, 266 (1997).

identified three such manifestations. First, the void-for-vagueness doctrine "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"[69] As John Jeffries has noted, "a law whose meaning can only be guessed at remits the actual task of defining criminal misconduct to retroactive judicial decisionmaking."[70] Second, "as a sort of 'junior version of the vagueness doctrine,' [the] rule of lenity[] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."[71] This rule "reflects the deference due to the legislature" by ensuring that criminal statutes reach only conduct that is clearly covered by the language of the statute.[72] Third, "although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[73] Unlike the void-for-vagueness doctrine and the rule of lenity, this rule of nonretroactivity is not a rule of statutory interpretation. Rather, it provides that once a court has decided to interpret a statute a certain way, the court may not apply that interpretation retroactively if the text of the statute, or prior constructions of it, did not fairly disclose the possibility that the statute could be read that way.[74]

69. *Id.* (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

70. Jeffries, *supra* note 37, at 196.

71. *Lanier*, 520 U.S. at 266 (quoting H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 95 (1968)) (citation omitted). Scholars have commented on the gradual withering of the rule of lenity. *See* Jeffries, *supra* note 37, at 189 ("[T]he rule of strict construction—at least as it is conventionally understood—is, and probably should be, defunct."); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 346 ("Judicial enforcement of lenity is notoriously sporadic . . . ."); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998) ("Although widely accepted, the rule [of lenity] is by no means adhered to universally."). I do not contest that point here. Conceptually, however, it is important when evaluating the fair warning requirement's rule against adjudicative retroactivity to recognize the relationship between that rule and the rule of lenity and the void-for-vagueness doctrine.

72. *Lanier*, 520 U.S. at 265 n.5.

73. *Id.* at 266 (citation omitted).

74. This rule applies only to constructions of criminal statutes that disadvantage the defendant. Due process does not bar retroactive application of constructions favoring defendants, just as the Ex Post Facto Clause does not bar retroactive application of criminal legislation favoring defendants. *See* Bousley v. United States, 523 U.S. 614, 620 (1998) (applying a decision restricting the scope of a criminal statute retroactively, because to apply the decision only prospectively would "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'") (quoting Davis v. United States, 417 U.S. 333, 346 (1974)). *See also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798) ("I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the *criminal* law; but only those that *create*, or *aggravate*, the *crime* . . . ."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 200 (1851) ("Laws, however, which

It is, of course, this third expression of the fair warning requirement—and not the void-for-vagueness doctrine or the rule of lenity—that is our concern here. But as we turn to a more direct examination of that principle, it is useful to bear in mind that all three manifestations of the fair warning requirement share the same basic purpose: ensuring that "no man [is] held criminally responsible for conduct which he could not reasonably understand to be proscribed."[75] That purpose, in turn, reflects the importance of applying to judicial decisions two of the interests that, in the legislative area, are served by the Ex Post Facto Clause: notice and fundamental fairness.[76]

II. THE *RODGERS* RULE

Having sketched the jurisprudential background of the limit on adjudicative retroactivity in the criminal law, the task now is to assess the proper scope of that limit. This Part begins with *Rodgers*, the Supreme Court's most recent direct pronouncement on the issue. It then turns to a recent lower court decision applying the *Rodgers* rule for evidence of the full ramifications of the rule. The discussion shows that if the *Rodgers* rule is consistent with the fair warning requirement, then there is scant substance to that requirement.

A. *UNITED STATES V. RODGERS*

In *Rodgers*, the defendant was charged in 1982 with making false statements to the FBI and the Secret Service, in violation of the False Statements Accountability Act.[77] He moved to dismiss the indictment against him for failure to state an offense, on the grounds that his alleged statements did not violate the False Statements Accountability Act. The district court granted the motion to dismiss.[78] The court considered itself bound by the Eighth Circuit's 1967 decision in *Friedman v. United*

mitigate the character or punishment of a crime already committed, may not fall within the prohibition, for they are in favor of the citizen.").

75. *Lanier*, 520 U.S. at 265 (quoting Bouie v. City of Columbia, 378 U.S. 347, 351 (1964)). *See also* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."); United States v. Brewer, 139 U.S. 278, 288 (1890) ("Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.") (citation omitted).

76. *See* Carmell v. Texas, 120 S. Ct. 1620, 1632–33 & n.21 (2000); Miller v. Florida, 482 U.S. 423, 430 (1987).

77. 18 U.S.C. § 1001 (1994). See *supra* note 11 for the relevant text of the Act.

78. *See Rodgers*, 466 U.S. at 477.

States,[79] which held that the Act did not cover false statements to the FBI that initiate a criminal investigation.[80] On appeal, the Eighth Circuit followed its decision in *Friedman* and affirmed the dismissal of the indictment.[81] The court noted that other courts of appeals had disagreed with *Friedman*,[82] but it adhered to *Friedman* as the law of the circuit.

The Supreme Court granted certiorari to resolve the split among the circuits. In his brief to the Court, Rodgers contended that even if the Court reversed the Eighth Circuit and concluded that he had violated the Act, due process precluded application of that decision against him.[83] The government devoted the bulk of its reply brief to responding to that argument.[84] It focused on the fact that Rodgers had not alleged actual reliance on *Friedman*: "Were [Rodgers] to claim that he actually relied on *Friedman* in deciding to make his false statements to the FBI and the Secret Service, a more colorable claim might be presented."[85] But in the absence of such reliance, the government argued that the split among the circuits over the scope of the Act meant that the law was unsettled at the time of Rodgers' actions. "In these circumstances," the government reasoned, "a decision by this Court to the effect that [Rodgers'] conduct was within the statutory prohibition surely would not be 'unforeseeable.'"[86]

In a unanimous opinion by then-Associate Justice Rehnquist, the Court resolved the merits of the question against Rodgers.[87] It was not until the final paragraph of its opinion, however, that the Court reached the retroactivity question. The Court described Rodgers as contending that "because the *Friedman* case has been on the books in the Eighth Circuit for a number of years a contrary decision by this Court should not be applied retroactively to him."[88] It rejected that contention in one sentence:

> [A]ny argument by [Rodgers] against retroactive application to him of our present decision, even if he could establish reliance upon the earlier *Friedman* decision, would be unavailing since the existence of

79. 374 F.2d 363 (1967).

80. *See Rodgers*, 466 U.S. at 477 (citing *Friedman*, 374 F.2d at 367).

81. United States v. Rodgers, 706 F.2d 854 (8th Cir. 1983).

82. *Id.* at 856 (citing United States v. Lambert, 501 F.2d 943, 946 (5th Cir. 1974) (en banc); United States v. Adler, 380 F.2d 917, 922 (2d Cir. 1967)).

83. Brief for the Respondent at 36–39, United States v. Rodgers, 466 U.S. 475 (1984) (No. 83-620).

84. Reply Brief for the United States at 5–12, *Rodgers* (No. 83-620).

85. *Id.* at 12.

86. *Id.* at 6–7.

87. That is, the Court held that false statements to the FBI and Secret Service do violate the Act. *See Rodgers*, 466 U.S. at 479–84.

88. *Id.* at 484.

> conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable.[89]

Especially given the government's own concession that the case might be different had Rodgers actually relied on *Friedman*, the extremity of the Court's holding is striking.[90] Simply stated, the Court held that whenever the circuits disagree as to whether certain conduct is covered by a criminal statute, a later decision holding that the conduct is covered may be applied against a defendant even if settled precedent in his circuit approves of his conduct, and even if he acted in reliance on that precedent.[91]

B. EXTENDING *RODGERS* IN THE LOWER COURTS: *UNITED STATES V. QUALLS*

The Supreme Court has not revisited the *Rodgers* rule in any detail,[92] and relatively few lower courts have expressly applied it.[93] As a result, the

89. *Id.*

90. The unanimity of the Court's opinion renders its holding all the more dramatic. One wonders precisely how the final paragraph of the opinion evolved, and whether earlier drafts were any different. The now-public files of Justice Marshall contain only one draft of the opinion, labeled "second draft," and show no editorial suggestions from any member of the Court. *See* Thurgood Marshall Papers, Library of Congress, box 350, file 3. Moreover, a bench memorandum on the case prepared for Justice Marshall by one of his law clerks focuses exclusively on the merits question (i.e., the scope of 18 U.S.C. § 1001), and does not even mention the retroactivity question. *See* Bench Memorandum, *Rodgers* (No. 83-620), Thurgood Marshall Papers, Library of Congress, box 330, file 2. This omission is striking in light of the fact that Rodgers' brief explicitly identified the retroactivity issue as the second of two questions presented in the case, *see* Brief for the Respondent at i, *Rodgers*, (No. 83-620) and considering that the United States devoted a substantial portion of its reply brief to that issue, *see* Reply Brief for the United States at 5–12, *Rodgers* (No. 83-620). There is, of course, no way for the public to know the draft history of the opinion for certain, nor should there be.

91. *See* Moore v. Floro, 614 F. Supp. 328, 333 n.6 (N.D. Ill. 1985) (noting that *Rodgers* "seems to suggest that whenever there is a split of opinion on an important issue among federal courts of appeals, review by the Supreme Court is foreseeable, and the reliance factor central to the prospectivity doctrine is meaningless").

92. The Court did cite the *Rodgers* rule in *Moskal v. United States*, 498 U.S. 103 (1990). At issue in that case was "whether a person who knowingly procures genuine vehicle titles that incorporate fraudulently tendered odometer readings received those titles 'knowing [them] to have been *falsely made*'" as provided in 18 U.S.C. § 2314 (1994). *Moskal*, 498 U.S. at 105. The circuits were divided on the question, but the circuit in which the petitioner was tried (the Third Circuit) had not addressed the question prior to his prosecution. In his argument before the Court, the petitioner focused on a decision of the Tenth Circuit under which, he claimed, his conduct did not violate the statute. The Supreme Court resolved the circuit split against the petitioner, and held that there was no fair warning impediment to applying its decision against the petitioner in that case. *Id.* at 114 & n.6. The Court cited *Rodgers* in support of both aspects of its decision.

First, in addressing the petitioner's claim that the rule of lenity ought to apply when construing the statute, the Court cited *Rodgers* for the proposition that "a division of judicial authority [is not] automatically sufficient to trigger lenity" in statutory construction. *Id*. at 108. This was a

full ramifications of the rule have remained somewhat obscure. Recently, however, in *United States v. Qualls*,[94] an en banc decision by the Ninth Circuit extended the *Rodgers* rule to its logical limit.

Although the Ninth Circuit applied the *Rodgers* rule directly in *Qualls*,[95] the case is most significant for its statement in a footnote[96] that *Rodgers* compelled the court to overrule its earlier decision in *United States v. Albertini*.[97] That case arose out of the prosecution of an antinuclear activist, Albertini, who had been ordered not to enter certain military bases. Despite that order, he entered a military base during an Armed Forces Day open house, planning to conduct an antinuclear demonstration.[98] He was

misapplication of the *Rodgers* rule. Part of the Court's opinion in *Rodgers* did address the rule of lenity, *Rodgers*, 466 U.S. at 484, and the *Moskal* Court seems right in concluding that a circuit split alone does not necessarily warrant adopting the most lenient possible construction of a statute. But the discussion of circuit splits in *Rodgers* did not concern the rule of lenity. Rather, the *Rodgers* Court held that once it decides to interpret a statute against the defendant, a circuit split justifies applying the interpretation in the instant case. Under *Rodgers*, therefore, circuit splits are relevant to questions of adjudicative retroactivity, but not to issues of statutory interpretation in the first instance.

The *Moskal* Court's second citation to *Rodgers* was more on point. In a footnote, the Court cited *Rodgers* to support its rejection of the petitioner's claim that since the Tenth Circuit had previously construed the statute not to reach conduct such as his, he lacked fair warning that his conduct violated the statute. *See Moskal*, 498 U.S. at 114 n.6. This was a proper application of the *Rodgers* rule, although the case against retroactive application of the Court's decision was less strong than in *Rodgers*, since in *Moskal* there was no in-circuit precedent holding the petitioner's conduct to be lawful.

93. *See* cases cited *supra* note 16. The *Rodgers* rule may, however, be experiencing something of a renaissance. In 1999 and 2000 alone, both the Second Circuit and the Ninth Circuit published opinions expressly applying the *Rodgers* rule, and the Fourth Circuit applied it in an unpublished disposition. *See* United States v. Zichettello, 208 F.3d 72, 99–100 n.13 (2d Cir. 2000); United States v. Qualls, 172 F.3d 1136, 1138 n.1 (9th Cir. 1999) (en banc); United States v. Rainey, No. 99-4494, 2000 WL 103052 (4th Cir. Jan. 31, 2000) (per curiam, mem.).

94. 172 F.3d 1136 (9th Cir. 1999) (en banc).

95. *Qualls* involved a prosecution under the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1) (1994), which prohibits anyone convicted of a state or federal felony from possessing firearms unless the convicting sovereign has restored the individual's civil rights. In *Caron v. United States*, 524 U.S. 308 (1998), the Supreme Court resolved a split among the circuits as to whether the statute permits state felons to possess firearms to the extent allowed by state law, or prohibits the possession of any firearm unless the state has fully restored the felon's right to possess all lawful firearms. The Court adopted the latter, all-or-nothing construction of the statute, thereby overruling the Ninth Circuit's more limited reading. *See id.* at 312–17. In *Qualls*, the defendant was alleged to have possessed two revolvers, one pistol, and four rifles. *Qualls*, 172 F.3d at 1138. He was indicted while the Ninth Circuit's pre-*Caron* construction of the statute was still good law. Under that construction, the defendant was permitted to possess the rifles (but not the handguns); under *Caron*'s all-or-nothing construction, the defendant was prohibited from possessing any of the firearms. The Ninth Circuit applied *Caron* against the defendant, reasoning that because there had been a split among the circuits, *Rodgers* dictated that *Caron* should be applied retroactively. *See id.* at 1138 n.1. *Cf. Rainey*, 2000 WL 103052 (reaching a similar conclusion).

96. *Qualls*, 172 F.3d at 1138 n.1.

97. 830 F.2d 985 (9th Cir. 1987).

98. *Id.* at 986.

prosecuted and convicted of violating 18 U.S.C. § 1382.[99] On appeal, the Ninth Circuit reversed the conviction, holding that Albertini's conduct was protected by the First Amendment.[100] In so holding, the Ninth Circuit acknowledged that its decision conflicted with an earlier decision from the Eighth Circuit.[101] The Supreme Court later granted certiorari and reversed the Ninth Circuit.[102]

After the Ninth Circuit rendered its decision and before the government petitioned the Supreme Court for certiorari, Albertini visited another military base on another open house day, carrying with him a copy of the Ninth Circuit's decision. As soon as he entered the base he was again arrested.[103] The government initiated trial proceedings against him, but then obtained a stay of those proceedings pending the Supreme Court's resolution of the earlier case.[104] After the Supreme Court released its decision reversing the Ninth Circuit, the second case resumed and Albertini was convicted.[105] Albertini appealed from that second conviction, and the Ninth Circuit again reversed. It determined that the Supreme Court's decision in the first case could not be applied against Albertini in the second, because he had entered the military base relying on a then-valid decision of the Ninth Circuit authorizing him to do so. The court held that "a person who holds the latest controlling court opinion declaring his activities constitutionally protected should be able to depend on that ruling to protect like activities from criminal conviction until that opinion is reversed, or at least until the Supreme Court has granted certiorari."[106]

In *Qualls*, the Ninth Circuit read *Rodgers* as compelling the overruling of *Albertini*. Because the *Rodgers* Court stated that the result in that case would not change "even if [Rodgers] could establish reliance upon the [Eighth Circuit's] earlier *Friedman* decision,"[107] *Qualls* held that *Albertini*'s emphasis on actual reliance had to be overruled. To be sure, *Albertini* was not a run-of-the-mill case of reliance. The defendant did not

99. *Id.* The statute provides, in pertinent part: "Whoever, within the jurisdiction of the United States, goes upon any military . . . reservation, post, fort, arsenal, yard, station, or installation, . . . after having been . . . ordered not to reenter by any officer or person in command or charge thereof—shall be fined not more than $500 or imprisoned not more than six months, or both." 18 U.S.C. § 1382 (1994).

100. *See* United States v. Albertini, 710 F.2d 1410, 1417 (9th Cir. 1983).

101. *See id.* at 1416 (citing Persons for Free Speech at SAC v. United States Air Force, 675 F.2d 1010 (8th Cir. 1982) (en banc)).

102. *See* United States v. Albertini, 472 U.S. 675 (1985).

103. United States v. Albertini, 830 F.2d 985, 987 (9th Cir. 1987).

104. *Id.*

105. *See id.*

106. *Id.* at 989.

107. *Rodgers*, 466 U.S. at 484.

merely rely on a prior decision construing the law in his favor; he relied on a decision in a prior case where he was the defendant, and where the Ninth Circuit specifically held that his conduct did not violate the statute at issue. But the *Qualls* court was surely right that there is no principled significance in the greater immediacy of the reliance in *Albertini*. Due process either protects an individual's reliance on a prior decision, or it does not. The identity of the defendant in the case on which one seeks to rely cannot be the determining factor. Thus, *Qualls* seems correct in concluding that *Rodgers* compels the overruling of *Albertini*.

III. THE DOCTRINE *RODGERS* PURPORTS TO APPLY AND THE DOCTRINE IT IGNORES

Rodgers held that the presence of a circuit split on the issue the Court faced in that case "made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable."[108] But where did the "reasonable foreseeability" standard come from? *Rodgers* cited no case on that point, but the standard appears to derive from the Supreme Court's 1964 decision in *Bouie v. City of Columbia*.[109] This Part shows that *Bouie*, though frequently cited as the seminal case in this area, does not fully address the precise issues raised by cases such as *Rodgers*. The Part goes on to identify a related but distinct line of cases that are both more directly applicable to cases like *Rodgers* and in clear tension with the *Rodgers* rule.

A. SEMINAL CASE? *BOUIE V. CITY OF COLUMBIA*

Bouie arose out of a 1960 sit-in at a whites-only restaurant in Columbia, South Carolina.[110] Two African-American college students were convicted of violating the state's trespass statute after they refused the restaurant manager's demand that they leave the restaurant.[111] The students appealed, arguing that their conduct did not violate the trespass statute. The Supreme Court of South Carolina affirmed. In so doing, it construed the trespass statute to cover "not only the act of entry on the

108. *Id*.

109. 378 U.S. 347 (1964).

110. *See id.* at 348.

111. *Id.* at 348–49. South Carolina's criminal trespass statute provided, in pertinent part:

> Every entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days.

Id. (quoting S.C. CODE § 16-386 (1952 & Cum. Supp. 1960)).

premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave."[112] The students then petitioned the Supreme Court for a writ of certiorari, contending, inter alia, that by construing the statute so broadly, the state court had "punished them for conduct that was not criminal at the time they committed it, and hence [had] violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits."[113]

The Supreme Court agreed. After citing several decisions involving the void-for-vagueness principle, the Court observed that "a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."[114] The Court then noted that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law."[115] Thus, the Court reasoned, if the Ex Post Facto Clause prohibits the retroactive application of a law criminalizing conduct that was innocent when committed, "it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."[116] The Court then crafted a test for triggering that due process bar: "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in

112. *Bouie*, 378 U.S. at 350.

113. *Id.* The students, represented by the NAACP Legal Defense Fund, actually argued in the first instance that South Carolina had applied its trespass statute in a racially discriminatory manner, in violation of the Equal Protection Clause of the Fourteenth Amendment. *See* Brief for Petitioners at 19–59, *Bouie* (No. 10). In the alternative, the students argued that due process precluded application of the new construction of the statute against them. *See id.* at 59–65.

114. *Bouie*, 378 U.S. at 352.

115. *Id.* at 353.

116. *Id.* at 353–54. Arguably, *Bouie* does not hold that *every* kind of law implicating the Ex Post Facto Clause has a judicial analog implicating the Due Process Clause. As noted above, *see supra* note 25, the Supreme Court has recognized four categories of ex post facto laws. In *Bouie*, the Court specifically mentioned two of those categories—laws that criminalize and punish acts that were lawful when they were committed, and laws that aggravate the offense or increase the punishment over what it was when the offense was committed—and concluded that "[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." 378 U.S. at 353–54. Whether *Bouie* thereby applied only two of the four categories of ex post facto laws to judicial decisions may be answered by the Court in *Rogers v. Tennessee*, 992 S.W. 2d 393 (1999), *cert. granted*, 120 S. Ct. 2004 (2000) (No. 99-6218) (argued and submitted November 1, 2000), which was pending at the time this Article went to press. But whatever the answer to that question, *Bouie* itself makes clear that for the particular legal changes at issue here—changes that render unlawful conduct that had been deemed lawful when committed—the Due Process Clause applies to judicial decisions effecting such changes just as the Ex Post Facto Clause applies to legislation doing so.

issue,' it must not be given retroactive effect."[117] Applying that test to the instant case, the Court held that at the time of the students' sit-in, South Carolina's trespass statute did not afford them fair warning that their actions violated the statute.[118] Accordingly, the Court reversed the students' convictions.[119]

Commentators have described *Bouie* as the seminal case establishing a due process limit on adjudicative retroactivity in the criminal law,[120] and in many respects they may be correct. But *Bouie* does not speak directly to cases like *Rodgers*. Rather, it differs from such cases in at least two respects. First, the Supreme Court's decision in *Bouie* seems based at least in part on its disagreement with how the South Carolina courts construed their trespass statute. The Court explained that "[t]here was nothing in the statute to indicate that it . . . prohibited" the student protestors' conduct, and concluded that the students "did not violate the statute as it was written."[121] Had the Court been reviewing a federal court's construction of a federal statute, it probably would have employed standard tools of statutory construction to reverse the court's interpretation and construe the statute more narrowly. But the Court did not have that option in *Bouie*. As a matter of statutory interpretation, the United States Supreme Court

117. *Id.* at 354 (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 61 (2d ed. 1960)).

118. *See id.* at 355.

119. The Court was undeterred by evidence that the students may have intended to be arrested when they went to the restaurant that day. *See id.* at 355 n.5. The students went to the restaurant because it did not serve African Americans. By holding a sit-in, the students intended to challenge the restaurant's policies and, evidently, "to be arrested." *Id.* But as the Court was careful to point out, "[t]he determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants." *Id.*

120. Roger Krent, for example, depicts *Bouie* as having created this area of law, and then describes *Bouie*'s "progeny" as failing to keep faith with its "promise." Krent, *supra* note 17, at 38, 51–72. *See also* Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 40 (1997); Dan M. Kahan, *Some Realism About Retroactive Criminal Lawmaking*, 3 ROGER WILLIAMS U. L. REV. 95, 106 (1997) (describing *Bouie* as the "classic decision" in this area); Suzanne M. McDonald, Casenote, *Foreseeability as a Limitation on the Retroactive Application of Judicial Decisions:* Davis v. Nebraska, 26 CREIGHTON L. REV. 931, 937–38, 954–56 (1993).

Other commentators, however, have criticized *Bouie* as a "disingenuous" attempt to avoid the equal protection issue raised by the petitioners. *See, e.g.*, Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 274 (1991) (arguing that in *Bouie* and other sit-in cases, "the Court employed a variety of clever/disingenuous strategies for reversing the demonstrators' convictions" without reaching the equal protection issue); Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1311 n.79 (2000) ("[T]he Court's willingness to base its decision on [the unforeseeability] rationale underscores its desire to avoid reaching the equal protection issue, even if doing so mean[t] jeopardizing doctrinal credibility.").

121. *Bouie*, 378 U.S. at 355.

generally accepts as controlling a state supreme court's construction of the laws of that state.[122] Thus, even if the *Bouie* Court thought the South Carolina courts had misinterpreted their trespass statute, it was beyond the Court's ken to tell South Carolina how to read its own laws. Unable to adopt its own reading of the statute, the Court instead engaged in a kind of damage control: It invoked the Due Process Clause to constrain the retroactive application of the state's reading. *Bouie*, therefore, may tell us more about the specific power of federal courts to impose due process limits on state courts' application of their own laws than it does about the full scope of the fair warning requirement in federal criminal cases.

Second, and perhaps more importantly, *Bouie* did not involve the overruling of any prior judicial interpretation of South Carolina's trespass statute. That is, in adopting its broad construction of the statute, the state supreme court did not overrule any earlier, more narrow interpretation. The Supreme Court found that ninety-five years of state precedent

122. *See* Wainwright v. Goode, 464 U.S. 78, 84 (1983) (per curiam); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 n.9 (1978); Brown v. Ohio, 432 U.S. 161, 167 (1977). For this reason, the Court was obliged to acknowledge that, while the Due Process Clause barred the retroactive application of South Carolina's new construction of the statute, it imposed no such bar on the prospective application of that construction. *See Bouie*, 378 U.S. at 362 (noting that the new construction was "of course valid for the future").

Three members of the Court apparently took a different view in *Bush v. Gore*, 121 S. Ct. 525 (2000). In his concurring opinion in that case, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, concluded that Article II, section 1, clause 2 of the Constitution establishes a federal constitutional constraint on state courts' interpretation of state law governing the selection of presidential electors. According to the Chief Justice, it is the task of the federal courts to enforce that constraint by reviewing a state court's construction of state law in this area to ensure that it is "both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate." *Bush*, 121 S. Ct. at 534–35. Having identified that constraint, the Chief Justice then discussed *Bouie* as one of several earlier cases in which, he claimed, the Court was similarly called upon "to undertake an independent, if still deferential, analysis of state law." *Id.* at 535. It appears, then, that the Chief Justice would read *Bouie* as establishing a federally enforceable constraint on state courts' construction of state law. But *Bouie* did not establish such a constraint. Rather than invalidating a state court's construction of state law, *Bouie* assigned a federal constitutional consequence to a state court's choice to construe state law in a particular way. This important distinction may be best grasped by dividing the inquiry into two separate questions: (1) What does the state law mean?; and (2) What are the federal constitutional consequences of applying a state law with a particular meaning to a particular case? In *Bouie*, the Supreme Court accepted the state court's answer to the first question, and addressed only the second question. In so doing, the Court imposed a federal constitutional limit not on the meaning of state law itself, but on the retroactive application of a certain reading of state law. Beyond that application, the *Bouie* Court had nothing to say about the meaning of the state law at issue. Thus, what the Court did in *Bouie* and what the Chief Justice would have done in *Bush v. Gore* are not, as the Chief Justice asserted, "precisely parallel." *Id*. In the latter, the federal constitutional constraint identified by the Chief Justice effectively collapses the two questions identified above, for it limits the ability of state courts to say what certain state laws mean.

suggested that the statute did not cover the students' conduct, but it did not view the state supreme court's decision as formally overruling any prior decision.[123] The state court thus simply construed the plain statutory text; it did not reject any settled judicial interpretation thereof. In *Rodgers*, however, the Court did not merely construe the federal statute at issue; it also overruled the Eighth Circuit's settled interpretation of the statute. *Bouie* and *Rodgers* thus represent two rather distinct classes of cases. In cases such as *Bouie*, where a court construes a bare statute without upsetting any prior precedent, the retroactivity inquiry properly focuses on whether the court's construction was foreseeable in light of the statutory text.[124] But in cases like *Rodgers*, where the Court overrules prior decisions construing the statute at issue, some attention must be paid to whether binding precedent in the defendant's jurisdiction held his conduct to be lawful at the time it was undertaken.[125]

In holding that its construction of the statute could be applied retroactively because it was "reasonably foreseeable," the *Rodgers* Court ignored these distinctions and treated *Bouie*'s foreseeability test as exhaustive of the fair warning inquiry. Yet while *Bouie* held that a textually unforeseeable construction of a criminal statute may not be applied retroactively, it did not hold that all foreseeable constructions may be applied retroactively. That is, *Bouie* held that textual unforeseeability is *sufficient* to bar retroactivity, not that it is *necessary*. Cases such as *Rodgers* raise the added question whether due process bars the retroactive application of a decision that may be foreseeable in light of the statute's text alone, but that also overrules prior precedent construing the statute more narrowly.

B. A FAIR WARNING REQUIREMENT BEFORE AND BEYOND *BOUIE*: *JAMES V. UNITED STATES* AND *MARKS V. UNITED STATES*

While *Bouie* did not speak to the precise question raised in *Rodgers*, other pre-*Rodgers* decisions did. The *Rodgers* Court failed to cite those

123. *Bouie*, 378 U.S. at 356–57. *See also* 1 LAFAVE & SCOTT, *supra* note 7, § 2.4, at 144 n.69 (noting that "an examination of the prior state decisions shows that none were actually overruled" by *Bouie*).

124. *See Bouie*, 378 U.S. at 355 (finding "nothing in the statute to indicate that it . . . prohibited the . . . act of remaining on the premises after being asked to leave"); 1 LAFAVE & SCOTT, *supra* note 7, § 2.4, at 144–45.

125. *See* John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 53 (1997) (distinguishing between *Bouie* and cases where the defendant relied on an official interpretation of the law holding his conduct to be lawful).

cases, but an examination of them sheds light on the tension between the *Rodgers* rule and the Court's fair warning jurisprudence.

In *James v. United States*,[126] decided three years before *Bouie*, the Court first addressed whether a decision expanding criminal liability by overruling prior precedent could be applied retroactively to criminalize conduct that was lawful under the earlier precedent. In that case, the Court had to decide whether embezzled funds constitute "taxable income" under the Internal Revenue Code.[127] In its earlier decision in *Commissioner v. Wilcox*, the Court had answered that question in the negative.[128] The *James* Court overruled *Wilcox* and reversed course. The case produced five opinions, none of which enjoyed the support of a majority of the Court. Yet a majority of the Court did agree on one point: Although *Wilcox* should be overruled, the defendant was entitled to the benefit of *Wilcox* in the instant case, as it was binding at the time of his conduct.[129] As Justice Harlan explained, "[I]t would be inequitable to sustain this conviction when by virtue of . . . *Wilcox* . . . it might reasonably have been thought by one in petitioner's position that no tax was due in respect of embezzled moneys."[130] None of the opinions in *James* discussed the precise nature of the inequity that Justice Harlan identified, but it is clear that a majority of the Court felt constrained not to criminalize conduct that was lawful under the Court's own precedent when it was undertaken.

The Court faced a similar issue sixteen years later in *Marks v. United States*.[131] In that case, the defendants were charged with transporting and

126. 366 U.S. 213 (1961).

127. *Id.* at 213–14.

128. 327 U.S. 404 (1946).

129. Seven members of the Court agreed on this point. *See James*, 366 U.S. at 221–22 (opinion of Warren, C.J., joined by Brennan and Stewart, JJ.); *id.* at 224 (opinion of Black, J., joined by Douglas, J., concurring in part and dissenting in part); *id.* at 242 (opinion of Harlan, J., joined by Frankfurter, J., concurring in part and dissenting in part).

130. *Id.* at 242 (opinion of Harlan, J., concurring in part and dissenting in part). Chief Justice Warren explained:

> We believe that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed.

James, 366 U.S. at 221–22 (opinion of Warren, C.J.). Justice Black agreed:

> We do not challenge the wisdom of those of our Brethren who refuse to make the Court's new tax evasion crime applicable to past conduct. This would be good governmental policy even though the *ex post facto* provision of the Constitution has not ordinarily been thought to apply to judicial legislation.

Id. at 224 (opinion of Black, J., concurring in part and dissenting in part).

131. 430 U.S. 188 (1977).

conspiring to transport obscene materials in interstate commerce.[132] At the time the defendants committed the acts for which they were tried, the federal definition of obscenity was governed by the Supreme Court's decision in *Memoirs v. Massachusetts*.[133] Under *Memoirs*, a statute directed at obscenity covered only material that was "utterly without redeeming social value."[134] Material not meeting that strict test was not obscene and thus was protected by the First Amendment. Before the defendants were indicted, however, the Court adopted a broader definition of obscenity in *Miller v. California*.[135] Under *Miller*, material may be restricted as obscene if, "taken as a whole, [it does] not have serious literary, artistic, political, or scientific value."[136] In the district court, the defendants in *Marks* argued that they were entitled to an instruction that the jury should apply the more favorable *Memoirs* standard when determining whether the material at issue was in fact obscene.[137] The district court disagreed, and instead instructed the jury to apply the broader *Miller* standard.[138] The defendants were convicted, and the United States Court of Appeals for the Sixth Circuit affirmed.[139]

The Supreme Court approached the case by first citing *Bouie* for the proposition that a criminal defendant's "right to fair warning of that conduct which will give rise to criminal penalties . . . is fundamental to our concept of constitutional liberty. . . . [and] is protected against judicial action by the Due Process Clause of the Fifth Amendment."[140] Yet while the Court relied on *Bouie*'s statement of the relevant due process principle, the Court also acknowledged that the instant case was "not strictly analogous to *Bouie*."[141] In *Bouie*, the Court observed, the statutory language was "'narrow and precise' and that fact was important to our holding that the expansive construction adopted by the State Supreme Court deprived the accused of fair warning."[142] The language of the federal obscenity statute, in contrast, was sweepingly broad. Yet "precisely because the statute is sweeping, its reach necessarily has been confined

132. *Id.* at 189. *See* 18 U.S.C. §§ 371, 1465 (1994) (conspiracy and transporting obscene materials, respectively).
133. 383 U.S. 413 (1966).
134. *Id.* at 418.
135. 413 U.S. 15 (1973).
136. *Id.* at 24.
137. *Marks*, 430 U.S. at 190–91.
138. *Id.* at 191.
139. *Id.*
140. *Id.* at 191–92 (citations omitted).
141. *Id.* at 195.
142. *Id.* (quoting *Bouie*, 378 U.S. at 352) (citation omitted).

within the constitutional limits announced by this Court. *Memoirs* severely restricted its application. *Miller* also restricts its application beyond what the language might indicate, but *Miller* undeniably relaxes the *Memoirs* restrictions."[143] Thus, the Court concluded, "[t]he effect is the same as the new construction in *Bouie*. Petitioners, engaged in the dicey business of marketing films subject to possible challenge, had no fair warning that their products might be subjected to the new standards."[144] The Court therefore held that "the Due Process Clause precludes the application to petitioners of the standards announced in *Miller*."[145] Instead, the defendants were entitled to an instruction directing the jury to apply the *Memoirs* test.

In reaching its decision, the *Marks* Court did not merely apply *Bouie*'s unforeseeability standard. Whereas *Bouie* held that an unforeseeably broad construction of a naked statute could not be applied retroactively, *Marks* precluded retroactive application of a Supreme Court decision that "upset a previously established narrower construction" of the relevant statute.[146] That is, *Marks* focused on the fact that *Memoirs* was the governing standard at the time of the defendants' conduct, not on whether the *Miller* standard was a foreseeable construction of the statute without regard to *Memoirs*. In fact, *Miller* probably was not unforeseeably broad if compared to the plain text of the statute. As the *Marks* Court put it, *Miller* actually "restrict[ed the statute's] application beyond what the [statutory] language might indicate."[147] Thus, because a straight reading of the statutory text might have suggested that it swept even more broadly than the *Miller* standard would allow, the *Miller* standard was not unforeseeably broad in the *Bouie* sense.

As the *Marks* Court made clear, however, *Miller*'s relative foreseeability was beside the point. The Court stressed instead that *Memoirs* "was the law" prior to *Miller*,[148] and that the *Miller* standard upset *Memoirs*' "previously established narrower construction."[149] Accordingly,

143. *Id.*

144. *Id.* (footnotes omitted). Although the subject matter covered by the statute in *Marks* was not dispositive, the Court bolstered its holding by noting that it had "taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values." *Id.* at 196 (citing Buckley v. Valeo, 424 U.S. 1, 40–41 (1976); Smith v. Goguen, 415 U.S. 566, 573 (1974)).

145. *Id.* at 196.

146. *Id.* at 195 n.10.

147. *Id.* at 195. Moreover, the *Memoirs* standard that *Miller* replaced "never commanded the assent of more than three Justices at any one time," and may very well have appeared ripe for overruling. *Id*. at 192.

148. *Id.* at 194.

149. *Id.* at 195 n.10. *See also id*. at 194 ("*Miller* . . . marked a significant departure from *Memoirs*.").

to the extent *Miller* "impose[d] criminal liability for conduct not punishable under *Memoirs*," it could not be applied retroactively without offending due process.[150] It was the defendants' due process right to rely on *Memoirs*, not some abstracted assessment of the textual foreseeability of the broader *Miller* standard, that was at the heart of the Court's holding in *Marks*.

C. APPLYING *JAMES* AND *MARKS* TO *RODGERS*

Although *Rodgers* cited neither *James* nor *Marks*, those cases bear heavily on the *Rodgers* rule. In *James*, a majority of the Court recognized that it would be "inequitable" to apply its decision expanding tax liability under the Internal Revenue Code to the detriment of the defendant in that case, because prior Supreme Court precedent held that the defendant's conduct did not trigger such liability.[151] In *Marks*, the Court held that "the Due Process Clause precludes the application to petitioners of the standards announced in *Miller* . . . to the extent that those standards may impose criminal liability for conduct not punishable under *Memoirs*."[152] In *Rodgers*, the defendant argued that due process similarly required that he receive the benefit of the Eighth Circuit's decision in *Friedman*, which was binding precedent in that circuit at the time of his actions. The Court rejected that argument on the ground that the presence of a circuit split made the overruling of *Friedman* foreseeable.[153] Thus, *James*, *Marks*, and *Rodgers* together suggest that a Supreme Court decision expanding a criminal statute by overruling prior *Supreme Court* precedent may not be applied retroactively without offending the Due Process Clause, but that a decision overruling *court of appeals* precedent to resolve a circuit split may be so applied. At bottom, this means that while individuals may rely on Supreme Court constructions of criminal statutes, they may not rely on circuit court constructions.[154]

Rather than attempting to defend this discrepancy, the *Rodgers* Court simply ignored *James* and *Marks* and relied instead on *Bouie*'s generic

150. *Id.* at 196.

151. *James*, 366 U.S. at 242.

152. *Marks*, 430 U.S. at 196.

153. *See Rodgers*, 466 U.S. at 484.

154. *See* Moore v. Floro, 614 F. Supp. 328, 333 n.6 (N.D. Ill. 1985) (noting that *Rodgers* "seems to suggest that whenever there is a split of opinion on an important issue among federal courts of appeals, review by the Supreme Court is foreseeable, and the reliance factor central to the prospectivity doctrine is meaningless"); Schaefer, *supra* note 14, at 691 (arguing that "[n]ot only does the reliability of a court of appeals decision vanish in the face of a conflict among the circuits, but the possibility of a future conflict robs every court of appeals decision of reliability").

foreseeability standard. But as argued above, *Rodgers* is much more like *Marks* and *James* than it is like *Bouie*. The only difference between them is that *Rodgers* involved overruling circuit precedent, while *James* and *Marks* entailed overruling Supreme Court precedent. The question, then, is whether that difference is of any significance to the fair warning requirement.

IV. THE SUPREME COURT ON CIRCUIT PRECEDENT

Nominally at least, the *Rodgers* rule is still good law.[155] But the distinction on which it relies—a distinction between Supreme Court precedent and in-circuit precedent—is, for fair warning purposes, unsound. In both its most recent description of the fair warning requirement and its jurisprudence in the related area of qualified immunity, the Supreme Court has acknowledged that circuit precedent plays an important role in the fair warning calculus. As this Part shows, the Court's decisions in these two areas point in the direction of a rule that protects individuals from criminal liability for conduct that the law of their circuit holds to be lawful.

A. *UNITED STATES V. LANIER*

United States v. Lanier[156] contains the Supreme Court's most recent discussion of the fair warning requirement. The case involved the prosecution of a former state judge, David Lanier, for sexually assaulting five women in violation of their constitutional rights.[157] Lanier was convicted of violating 18 U.S.C. § 242, which makes it a criminal offense "to act (1) 'willfully' and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States."[158] The Sixth Circuit, sitting en banc, reversed the conviction, holding that because the Supreme Court had not previously held sexual assault by a judge or

155. In fact, the Court has not upheld a defendant's claim in this area since *Marks* itself. This extended dormancy has led Roger Krent to observe that "[c]ourts routinely sanction judicial change that would violate the Ex Post Facto Clause if initiated by the legislature." Krent, *supra* note 17, at 39. Krent further suggests that judges "impose more rigorous checks on legislative retroactivity in the criminal context because of their fear of interest group pressure on legislators," but that "judges trust themselves . . . not to give vent to vindictiveness in construing particular criminal enactments." *Id.* at 85, 89. Thus, Krent concludes, "judges' relative insulation from the political marketplace explains to some extent why courts have declined to afford the *Bouie* doctrine much play." *Id.* at 92. However, Krent does not explain why, if the underlying principle is fair warning for potential defendants, the judiciary's "relative isolation from the political marketplace" should be accorded any legal significance.

156. 520 U.S. 259 (1997).

157. *Id.* at 261.

158. *Id.* at 264 (quoting 18 U.S.C. § 242 (1994)).

other official to be a violation of a constitutional right, "[t]he indictment . . . for a previously unknown, undeclared and undefined constitutional crime cannot be allowed to stand."[159]

A unanimous Supreme Court reversed. The Court began by citing *Bouie* and *Marks* for the proposition that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[160] In determining whether there is such fair disclosure, the Court explained, "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."[161] Turning to the issue of liability under § 242, the Court held that the fair warning requirement could be satisfied even if no Supreme Court decision had yet recognized the specific constitutional right Lanier was accused of violating. The Court observed that when ascertaining whether a particular right was fairly recognized, it had never before held that "the universe of relevant interpretive decisions is confined to our opinions."[162] Rather, the requisite fair warning could also be provided by decisions of the federal courts of appeals. Moreover—and crucially for our purposes here—the Court suggested that an intercircuit split could also *impede* fair warning:

> Although the Sixth Circuit was concerned, and rightly so, that disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, *such a circumstance may be taken into account in deciding whether the warning is fair enough*, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it.[163]

To be sure, the *Lanier* Court made clear that the fair warning requirement can be satisfied even without any Supreme Court or in-circuit precedent holding the defendant's precise conduct to be unlawful. And it appeared to reject the argument that in the absence of any Supreme Court or in-circuit precedent on point, a split among the other circuits *always* means that the defendant lacked fair warning. At the same time, however, the Court seemed to recognize that a circuit split may, in certain circumstances, impede fair warning.[164] That recognition, in turn, suggests

159. United States v. Lanier, 73 F.3d 1380, 1394 (6th Cir. 1996) (en banc).

160. *Lanier*, 520 U.S. at 266.

161. *Id.* at 267.

162. *Id.* at 268.

163. *Id.* at 269 (emphasis added).

164. It might be objected that the criminal statute at issue in *Lanier*, which prohibits the "willful" deprivation of constitutional rights under color of law, is unlike typical criminal statutes and that

that the current Court might be inclined to hold that when there *is* in-circuit precedent on point, and when that precedent holds the defendant's conduct to be lawful, it may shield the defendant from criminal liability for that conduct, until it is overruled. Such a rule would, of course, conflict squarely with the *Rodgers* rule. But because the *Lanier* Court did not directly address the issue, the most that can be said about the decision is that it casts serious doubt on the continued vitality of the *Rodgers* rule.

B. THE QUALIFIED IMMUNITY CASES

Although doctrinally distinct from questions of fair warning in the criminal law, the Supreme Court's qualified immunity jurisprudence contains some useful parallels—parallels that the Court itself has recognized—to the issues raised here, and casts further doubt on the *Rodgers* rule.

The doctrine of qualified immunity provides that "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[165] This "clearly established" standard accommodates two competing concerns. On the one hand, the Court recognizes that "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees"[166] when "government officials abuse their offices."[167] On the other hand, the Court is aware that "damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."[168] The latter concern is unique to suits against government officials, and does not have a precise analog in criminal cases against private citizens.

Setting aside the particular policy concerns unique to qualified immunity, the Court in *Lanier* compared the "clearly established" standard to the fair warning requirement:

Lanier's discussion of the fair warning requirement is specific to that case. It is true that the statute at issue in *Lanier* is rather unlike most criminal statutes in that it prohibits conduct that violates the victim's constitutional rights but does not specifically define those rights. But nothing in the *Lanier* Court's discussion of the fair warning requirement suggests that the Court meant to limit that discussion to such statutes. Indeed, in describing the fair warning requirement, the *Lanier* Court cited a number of cases—including *Bouie*—that involved more typically structured criminal statutes. *Id.* at 265–66.

165. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

166. Anderson v. Creighton, 483 U.S. 635, 638 (1987) (quoting *Harlow*, 457 U.S. at 814).

167. *Id*.

168. *Id*.

> The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.[169]

That is, *Lanier* effectively equated the clearly established standard in qualified immunity cases with the fair warning requirement in criminal cases.[170] It follows, then, that the Court's treatment of circuit precedent when determining whether a right has been clearly established for qualified immunity purposes may inform how such precedent should be treated in the fair warning context.

As a general matter, "[a] court engaging in review of a qualified immunity judgment should . . . use its 'full knowledge of its own [and other relevant] precedents.'"[171] While it appears that out-of-circuit precedent may be relevant in this sense, neither the Supreme Court nor any federal court of appeals has ever held that liability may attach where settled in-circuit precedent clearly holds the conduct in question to be lawful.[172] Rather, to the extent out-of-circuit precedent plays a role in the qualified immunity context, the question is generally whether a circuit split is sufficient to confer qualified immunity, not defeat it.[173]

Consider the Court's recent decision in *Wilson v. Layne*.[174] After holding that law enforcement officers violate a homeowner's Fourth

169. *Lanier*, 520 U.S. at 270–71.

170. It bears emphasizing that although *Lanier* itself involved the criminal prosecution of a government official, the *Lanier* Court did not compare the clearly established standard to the fair warning requirement only as the latter applied to prosecutions of government officials, or prosecutions under 18 U.S.C. § 242. Rather, it compared the special protections that government officials enjoy in the civil context to the standard protections afforded to *all* defendants in the criminal context. *See id.*

171. Elder v. Holloway, 510 U.S. 510, 516 (1994) (quoting Davis v. Scherer, 468 U.S. 183, 192 n.9 (1984)).

172. *Cf.* Charles W. v. Maul, 214 F.3d 350, 360–61 (2d Cir. 2000) (dismissing an equal protection claim on qualified immunity grounds because settled Second Circuit precedent held conduct such as the defendant's to be lawful, even though a more recent state court decision involving the same government defendants held that the same conduct violated equal protection).

173. *See* Joyce v. Town of Tewksbury, 112 F.3d 19, 22 (1st Cir. 1997) (en banc) (per curiam) ("Circuit court precedent is also divided, with some decisions helpful to the police and others less so. Given the unsettled state of the law, we have no hesitation in concluding that the officers in this case are protected by qualified immunity."). *See also* Lum v. Jensen, 876 F.2d 1385, 1389 (9th Cir. 1989) (holding that if the circuits are split, the law is not clearly established until the Supreme Court resolves the split); Price v. Brittain, 874 F.2d 252, 261 (5th Cir. 1989) (finding that the law was not clearly established in light of an *intracircuit* conflict).

174. 526 U.S. 603 (1999).

Amendment rights by bringing the press into a home while executing a warrant,[175] the Court turned to whether the right against such intrusions was clearly established at the time of the search in that case. In an opinion by the Chief Justice, the Court held that the right was not clearly established. The Court noted that the homeowners in that case had failed to cite "any cases of controlling authority in their jurisdiction at the time of the incident that clearly established the rule on which they seek to rely."[176] It also observed that "a split among the Federal Circuits . . . [had] developed on the question whether media ride-alongs that enter homes subject the police to money damages."[177] The Court concluded that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."[178] That is, the Court treated a circuit split as sufficient to provide immunity.

Although the *Wilson* Court did not expressly announce a per se rule under which a circuit split will yield immunity in all cases, the opinion certainly suggests that as a general matter circuit splits tend to cut in the defendant's favor. Moreover, *Wilson* is consistent with the prevailing view that, in general, the law is not "clearly established" for qualified immunity purposes until there is a Supreme Court or in-circuit appellate decision on point.[179] That is, unless either Supreme Court or in-circuit precedent runs directly against the defendant, a court should generally hold the defendant immune. In light of that general rule, it seems clear that in cases where in-circuit precedent squarely *supports* the defendant by holding his conduct to be lawful, the defendant will always enjoy immunity without regard to the law in other circuits.

The *Rodgers* rule, of course, accords circuit splits precisely the opposite significance. Even if in-circuit precedent holds a defendant's

175. *See id.* at 609–14.

176. *Id.* at 617.

177. *Id.* at 618 (citations omitted).

178. *Id.*

179. *See, e.g.*, Russell v. Selsky, 35 F.3d 55, 60 (2d Cir. 1994) ("We conclude that in the absence of Supreme Court or Second Circuit precedents prescribing a right to have separate review and hearing officers in a state prison disciplinary hearing, there is no such clearly established right."); Hansen v. Soldenwagner, 19 F.3d 573, 578 n. 6 (11th Cir. 1994) ("[T]he case law of one other circuit cannot settle the law in this circuit to the point of it being 'clearly established.'"); Marsh v. Arn, 937 F.2d 1056, 1069 (6th Cir. 1991) ("[W]hen there is no controlling precedent in the Sixth Circuit our court places little or no value on the opinions of other circuits in determining whether a right is clearly established."). *See also* Karen M. Blum, *Section 1983: Qualified Immunity*, 595 PRACT. L. INST./LITIG. 407, 514–96, WL 595 PLI/Lit 407 (1998) (collecting cases); John M.M. Greabe, Mirable Dictum!*: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 407 n.20 (1999).

conduct to be lawful, *Rodgers* provides that the existence of a circuit split means that a decision overruling that precedent may be applied retroactively against him. But if, as *Lanier* explained, the fair warning requirement affords criminal defendants the same protections that government officials receive through qualified immunity,[180] then the *Rodgers* rule is difficult to justify.[181]

In sum, recent Supreme Court decisions in the fair warning and qualified immunity areas cast serious doubt on *Rodgers*' treatment of circuit precedent. Moreover, the Court's decisions in those areas suggest that the preferable approach is to adopt a rule under which individuals may not be held liable for conduct approved by the law of their circuit. The next Part suggests such a rule.

V. THE CIRCUIT PRECEDENT RULE

This Part proposes an alternative to the *Rodgers* rule that is more consistent with the due process principles implicit in the fair warning requirement. This alternative, which I call the circuit precedent rule, provides that, as long as the federal courts are divided into separate circuits, and as long as each of those circuits treats its own precedent as binding,[182] individuals may not be held criminally liable for conduct that was lawful under the settled law of their circuit when they engaged in it.[183]

180. *Lanier*, 520 U.S. at 270–71.

181. Legal realists would be unsurprised to learn that the Court's qualified immunity jurisprudence protects government officials more than the *Rodgers* rule protects criminal defendants. They would say that this difference simply reflects the social reality that the law favors "good" government officials over "bad" criminal defendants. To engage that point is to enter into a debate over whether the Court *ought* to bring its fair warning jurisprudence into line with its qualified immunity decisions. The discussion of qualified immunity here is not normative in that sense. Rather, it is descriptive: It notes that the Court itself, in *Lanier*, has analogized the clearly established standard to the fair warning requirement. *See Lanier*, 520 U.S. at 270–71. That analogy provides insight into the current status of the *Rodgers* rule.

182. *See* Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1038 (1999) (noting that "all courts of appeals follow a rule under which panel decisions are binding on later panels unless overruled by the Supreme Court or by the court of appeals en banc"). *See also infra* notes 280–81 and accompanying text.

183. I emphasize that the law of the circuit must be settled in order for the rule I propose to apply. A circuit court's decision does not become settled until all petitions for panel rehearing, rehearing en banc, and certiorari are resolved, or, if no such petitions are filed, until the time for filing them has passed. *See* Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (explaining that a conviction becomes final when, on direct review, certiorari is denied by the Supreme Court). *See also* United States v. DiFrancesco, 449 U.S. 117, 136 (1980) (Defendant "has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired."); United States v. Foumai, 910 F.2d 617, 620 (9th Cir. 1990) ("No expectation of finality can attach during the period in which either party may appeal.").

Before elaborating on the circuit precedent rule, it is worth recalling some of the principles underlying the Ex Post Facto Clause and its judicial analog, the fair warning requirement. As the Court explained in *Bouie* and *Marks*, the due process constraint on adjudicative retroactivity applies to judicial decisions many of the principles that the Ex Post Facto Clause applies to legislation.[184] Leading among those are the principles of notice and fundamental fairness.[185] As to the former, the Supreme Court has stressed the need for "assur[ance] that legislative [criminal] Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[186] And as to the latter, the Court has emphasized that "[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life."[187] The Court's decisions in *James* and *Marks* give effect to the notice and fairness principles by providing that the government may not hold someone criminally liable for conduct that was lawful under Supreme Court precedent at the time it was undertaken. But as this Part shows, full fidelity to these principles requires extending that rule to settled in-circuit precedent as well. The circuit precedent rule meets that requirement.

This Part's discussion of the circuit precedent rule is organized around three classes of cases. The first covers cases where the defendant acted in actual reliance on the law of his circuit. The second is comprised of cases where the defendant acted without actual reliance, but where his conduct is still lawful under the law of the circuit. In the third, the defendant is in a circuit that has not yet considered whether the relevant statute proscribes his conduct.

184. *See Bouie*, 378 U.S. at 353 ("[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law."); *Marks*, 430 U.S. at 191–92. As the *Marks* Court noted:

> [T]he principle on which the [Ex Post Facto] Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.

Id. (citations omitted).

185. *See supra* notes 36–43 and accompanying text.

186. Weaver v. Graham, 450 U.S. 24, 28–29 (1981). *See* United States v. Brewer, 139 U.S. 278, 288 (1890) ("Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."); 1 LAFAVE & SCOTT, *supra* note 7, § 2.4, at 136 (quoting *Weaver*).

187. Carmell v. Texas, 120 S. Ct. 1620, 1633 (2000).

A. ACTUAL RELIANCE ON THE LAW OF THE CIRCUIT

In cases where an individual engages in certain conduct in specific reliance on settled circuit precedent that the Supreme Court later overrules, the fair warning requirement's emphasis on notice coincides with traditional mistake of law principles, and should protect the individual from criminal liability.[188] When a legislature changes its substantive criminal laws, the Ex Post Facto Clause protects individuals' reliance on the laws that existed at the time of their actions. Similarly, when an individual relies on a court's interpretation of the relevant statute only to see that interpretation subsequently overruled, the same interest in notice and reliance is protected by the mistake of law defense.

As a general rule, of course, mistake of law is not a defense.[189] But there are a few exceptions to the rule, and one of them applies here: Mistake of law may be a defense if the mistake is based on an official statement of the law. This defense, which the Supreme Court has described as anchored in the Due Process Clause,[190] embodies the rule that, "[o]rdinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. . . . [The courts] may not convict 'a citizen for exercising a privilege which the State had clearly told him was available to him.'"[191] This rule has particular force when the state entity at issue is a court. Accordingly, the Model Penal Code recognizes mistake of law as a defense if it derives from "reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in . . . a judicial decision, opinion, or judgment."[192]

188. As Professors Wayne LaFave and Austin Scott explain:

> If the defendant was actually aware of the prior decision and relied upon it, then the basis of decision may be that the defendant has the defense of mistake of law as a result of being misled as to the existence or interpretation thereof by the highest court of the jurisdiction.

1 LAFAVE & SCOTT, *supra* note 7, § 2.4, at 144. *See also* Parry, *supra* note 125, at 70 ("[T]he defendant may be able to rely on a statement of the law contained in a judicial decision, a statute, or some other public pronouncement. . . . [T]hese statements are more authoritative than the interpretations of individual officers and consequently are an appropriate source of knowledge of the law.").

189. *See* Cheek v. United States, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."). *See generally* Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939).

190. *See* Cox v. Louisiana, 379 U.S. 559, 571 (1965); Raley v. Ohio, 360 U.S.423, 437–39 (1959).

191. United States v. Laub, 385 U.S. 475, 487 (1967) (quoting *Raley*, 360 U.S. at 438). *See also Cox*, 379 U.S. at 571.

192. MODEL PENAL CODE § 2.04(3)(b) (Proposed Official Draft 1962). *See also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 13.02(B)(2) (2d ed. 1995).

In *Marks*, the Court implicitly recognized this defense when it held that the Due Process Clause protected the defendants' reliance on the Court's earlier decision in *Memoirs*, even after it was overruled.[193] In principle, that protection should apply to reliance on binding circuit precedent just as it does to reliance on the decisions of the Supreme Court. Some lower federal courts appear to have taken this position.[194]

Moreover, a number of states provide a rather broad mistake of law defense. Some states specify that the judicial decision must be from a particular level of court.[195] Others provide (perhaps unnecessarily) that the opinion must be from the highest state or federal court to have addressed the question.[196] Still others are less particularized.[197] In all states that recognize the defense, however, it appears that if a federal court of appeals was the highest court to have construed the provisions of a particular state statute, and if the defendant then acted in reliance on the federal court's determination that his conduct was lawful, then he could rely on that decision as a defense against state criminal liability. Admittedly, the presence of these state statutes does not compel the conclusion that the Due Process Clause must provide a mistake of law defense against federal criminal liability when the mistake is based on the decision of a federal court of appeals. It does, however, raise questions about the principled basis for recognizing a defense in cases such as *Marks*, but denying it in cases like *Rodgers*.

193. *Marks*, 430 U.S. at 195–96.

194. *See, e.g.*, United States v. Ruiz, 935 F.2d 1033, 1035–36 (9th Cir. 1991); United States v. Moore, 586 F.2d 1029, 1033 (4th Cir. 1978); Kratz v. Kratz, 477 F. Supp. 463, 481 (E.D. Pa. 1979) ("It would be an act of 'intolerable injustice' to hold criminally liable a person who had engaged in certain conduct in reasonable reliance upon a judicial opinion instructing that such conduct is legal.") (footnotes omitted). None of these cases directly addressed the *Rodgers* rule.

195. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/4-8(b)(3) (West 1993) ("an order or opinion of an Illinois Appellate or Supreme Court, or a United States appellate court later overruled or reversed"); KAN. STAT. ANN. § 21-3203(2)(c) (1995) ("an order or opinion of the supreme court of Kansas or a United States appellate court later overruled or reversed"); MO. ANN. STAT. § 562.031(2)(b) (West 1979) ("[a]n opinion or order of an appellate court").

196. *See, e.g.*, ALA. CODE § 13A-2-6(b) (1994) ("latest judicial decision of the highest state or federal court which has decided on the matter"); ARK. CODE ANN. § 5-2-206(c)(2) (Michie 1997) ("latest judicial decision of the highest state or federal court that has decided the matter").

197. *See, e.g.*, COLO. REV. STAT. § 18-1-504(2)(c) (1998) ("judicial decision . . . binding in the state of Colorado"); CONN. GEN. STAT. § 53a-6(b)(2) (1969) ("judicial decision of a state or federal court"); HAW. REV. STAT. ANN. § 702-220(2) (Michie 1994) ("judicial decision, opinion, or judgment"); KY. REV. STAT. ANN. § 501.070(3)(b) (Banks-Baldwin 1995) ("judicial decision, opinion or judgment"); ME. REV. STAT. ANN. 1.C. 17-A, § 36(4)(A)(2) (West 1983) ("final judicial decision, opinion or judgment"); N.J. STAT. ANN. § 2C:2-4(c)(2)(b) (West 1995) ("judicial decision, opinion, judgment, or rule"); N.Y. PENAL LAW § 15.20(2)(c) (McKinney 1998) ("judicial decision of a state or federal court").

The reasons for recognizing mistake of law as a defense in cases such as *Rodgers* may be best grasped by considering the purposes that underlie the default rule that mistake of law is generally not a defense. There are at least three different explanations for that rule. The first, posited by Justice Holmes, is that allowing a mistake of law defense would discourage individuals from learning the law. "[T]o admit the excuse at all," Holmes wrote, "would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales."[198] That concern has no place, however, in cases where the defendant relied on a prior judicial interpretation of the law. Far from remaining ignorant of the law, defendants in such cases have actually undertaken to learn the law and to conform their conduct to it.[199]

Dan Kahan describes the second explanation as "anti-Holmesian."[200] He contends that rather than encouraging knowledge of the law, the general prohibition on the mistake of law defense tells individuals that even if they think their conduct is legally permissible, they should refrain from engaging in it if they know it is morally problematic.[201] That is, denying a mistake of law defense discourages "loopholing," where individuals attempt to take advantage of ambiguity in the law to justify actions they know to be morally wrong, even if not clearly legally prohibited.[202] It "remove[s] offenders' temptation to look for loopholes ex ante by giving courts the flexibility to adapt the law to innovative forms of crime ex post."[203] Implicit in Kahan's argument is the idea that when courts interpret the law, they imbue it with moral judgments about what conduct should be declared unlawful even if it is not clearly enjoined by the statute. The courts therefore supply a kind of legal and moral determinacy to more open-ended statutory law. On this view, conduct that a court holds to be

198. OLIVER WENDELL HOLMES, THE COMMON LAW 48 (1881).

199. *See* United States v. Barker, 546 F.2d 940, 955 (D.C. Cir. 1976) ("Exoneration of an individual reasonably relying on an official's statement of the law would not serve to encourage public ignorance of law, for the defense requires that the individual either seek out or be cognizant of the official statement upon which he or she relies.").

200. Dan M. Kahan, *Ignorance of Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 128 (1997).

201. *See id.* at 129 ("By denying a mistake of law defense, the law is saying, contra Holmes, that if a citizen suspects the law fails to prohibit some species of immoral conduct, the only certain way to avoid criminal punishment is to be a good person rather than a bad one.").

202. *Id.* at 137–44. *See also* Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) ("There is scarcely any law which does not admit of some ingenious doubt; and there would be perpetual temptations to violations of the laws, if men were not put upon extreme vigilance to avoid them.").

203. Kahan, *supra* note 200, at 139.

lawful is, by virtue of that holding, also moral.[204] It follows that when a court holds conduct to be lawful under a given statute, individuals are not only legally but also morally justified in relying on that construction.[205]

The third explanation for why mistake of law is generally not a defense is more pragmatic. Jerome Hall describes the point this way:

> Now comes a defendant who truthfully pleads that he did not know that his conduct was criminal, implying that he thought it was legal. . . . If that plea were valid, the consequence would be: whenever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law were thus and so, *i.e. the law actually is thus and so*.[206]

Because any attempt at achieving consistency and fair warning in the law would be frustrated by allowing the law to become whatever any individual mistakenly thinks it is, a misunderstanding of the law does not generally state a defense. The key principle here is that individuals may not substitute their own idiosyncratic view of the law for what the law actually is. Yet concomitant with that principle is the rule that only "competent officials" may interpret the law, and that once they do "the debate must end."[207] Ambiguity in the law is avoided by insisting that only official interpretations of the law are "binding."[208] Individuals are encouraged to forego engaging in their own legal analysis, and instead to adhere to the official interpretations of the law announced by authorities vested with the power to render such interpretations. It is entirely consistent with this view to say that individuals may—indeed, should—rely on judicial interpretations of the law without fear that those interpretations might later be overruled. To say otherwise would be to encourage individuals to question the legitimacy and authority of the judiciary.

204. Kahan's account arguably provides a justification for adjudicative retroactivity in cases such as *Bouie*, where a court construes a statute to cover conduct that it had not clearly covered before. In *Bouie*, of course, one would hope that the courts would have resisted any argument that the African-American defendants had committed a moral wrong merely by sitting at a whites-only lunch counter. Indeed, it is certainly possible that the Supreme Court's holding in *Bouie* was informed in part by a belief that the defendants were morally justified in their actions. But regardless of how one views the specific facts of *Bouie*, Kahan's justification for not recognizing mistake of law as a defense applies more to cases such as *Bouie* than it does to cases where an authoritative court has previously held the conduct at issue to be lawful.

205. *See* Kent Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of* Powell v. Texas, 69 COLUM. L. REV. 927, 970 (1969) ("In some narrowly defined circumstances, as when a person acts on the interpretation of an official agency or a prior judicial decision directly on point, the argument in favor of punishment . . . is very weak.").

206. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 382–83 (2d ed. 1960).

207. *Id.* at 382.

208. *Id.* at 383. *See also* Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 355 n.61 (1998) (discussing Hall's explanation).

Thus, the three principal explanations for why mistake of law is generally not a defense are all consistent with recognizing an exception for reliance on judicial decisions.[209] Moreover, while neither *James* nor *Marks* involved an explicit mistake of law claim, the results in those cases are entirely consistent with recognizing reliance on Supreme Court precedent as establishing a mistake of law defense. And as noted above,[210] some federal courts have recognized such a defense in broad terms, without regard to whether the decision on which the defendant relied is from the Supreme Court or a lower federal court.

Courts have not, however, directly addressed whether the defense is available in cases where the circuit precedent on which the defendant relied is in conflict with the law in other circuits. But nothing in the description of the defense suggests that it should not be available in such cases. By definition, the defense is available only to defendants who relied on statements of the law made by authorities empowered to interpret the law *in that jurisdiction*.[211] Accordingly, if an individual engaged in conduct that was clearly *unlawful* under the law of his circuit, it would be no defense to claim that he had relied on precedent from another circuit holding his conduct to be lawful. The reverse must surely be true as well. When federal courts of appeals disagree as to the meaning or scope of a federal statute, it is not for the general citizenry to assess which circuit has the better approach. Rather, citizens must be expected to abide by, and be entitled to rely upon, the law of their circuit.

209. In his study of *Bouie* and its progeny, Harold Krent dismisses the reliance argument because "[d]efendants generally do not rely on existing judicial interpretations when deciding whether to undertake certain actions." Krent, *supra* note 17, at 72. I do not necessarily disagree with Krent's point that actual reliance is quite rare, but I find it an inadequate account of why reliance should not be protected in cases where it can be proven. Krent also suggests that "even if individuals and firms relied on existing law prior to acting, there is little reason to encourage reliance when the conduct is plainly blameworthy." *Id.* This is like Kahan's "anti-Holmesian" account of why mistake of law is generally not a defense: Defendants should not be able to take advantage of loopholes in the law by engaging in conduct that they should know is immoral. As I describe above, *see supra* notes 200–05 and accompanying text, this argument actually supports recognizing reliance on judicial decisions holding one's conduct to be lawful. In the anti-Holmesian view, the courts inject morality into the law by construing ambiguous statutes to prohibit immoral conduct. It follows, then, that conduct held by a court to be lawful is also moral, or at least that it can be presumed by the individual actor to be moral. On this view, it is a contradiction in terms to say that certain conduct may be *malum in se* even though it is upheld by the courts.

210. *See supra* note 194 and accompanying text.

211. *See* HALL, *supra* note 206, at 383 (referring to the interpretations of "competent officials"); 1 LAFAVE & SCOTT, *supra* note 7, § 2.4, at 144 (referring to reliance on decisions of "the highest court of the jurisdiction").

This approach accords with Kahan's "anti-Holmesian" view as well. In Kahan's view, courts give both legal determinacy and moral substance to open-ended statutory law by deciding what conduct the relevant statute should prohibit. But if, as Kahan suggests, courts thereby play an important morality-imposing role in areas of statutory law left intentionally vague,[212] then the ability of any individual federal court of appeals to inject such morality by *approving* of certain conduct and holding it lawful is undermined if its judgments are subject to effective override by the decisions of other circuits. The *Rodgers* rule subjects circuit precedent to such override, and thus undermines the role of the courts as Kahan portrays it.

Individuals must, therefore, be permitted to rely on the law of their circuit when ordering their affairs. *Albertini* provides the most obvious illustration of the problems with discounting that reliance simply because of a circuit split. Recall that Albertini relied on the Ninth Circuit's decision in a prior case in which he was the defendant and the court held his conduct to be lawful.[213] The Supreme Court later reversed the Ninth Circuit, but before the government petitioned for certiorari, Albertini engaged in the same conduct again, relying explicitly on the Ninth Circuit's decision. Under the *Rodgers* rule, the fact that another circuit court had held conduct such as Albertini's to be unlawful would mean that Albertini could be prosecuted for engaging in that conduct a second time, even though he did so in express reliance on a decision holding *his* conduct to be lawful.[214] Such a bizarre outcome is beyond defending.[215] If a court of appeals' decision holding a defendant's conduct to be lawful cannot be relied on even by that same defendant, then it is unclear whether the decision has any effect at all.

212. *See* Kahan, *supra* note 200, at 137–44.

213. *See supra* notes 97–106 and accompanying text.

214. *See Rodgers*, 466 U.S. at 484; United States v. Qualls, 172 F.3d 1136, 1138 n.1 (9th Cir. 1999) (en banc).

215. I emphasize, however, that I do not necessarily agree with the *Albertini* court's holding that a court of appeals' decision may be relied upon as soon as it is issued, before the time for filing petitions for panel rehearing, rehearing en banc, and certiorari has passed. As noted above, *see supra* note 183, the circuit precedent rule I propose applies only to circuit precedent that is settled, and a circuit court's decision does not become settled precedent until all petitions for panel rehearing, rehearing en banc, and certiorari are resolved, or, if no such petitions are filed, until the time for filing them has passed. Thus, it may have been appropriate to resolve *Albertini* by holding that while individuals may rely on the settled law of their circuit, Albertini himself was wrong to rely on the earlier decision in his favor while that decision was still subject to review by the Supreme Court. The *Rodgers* rule, of course, does not rely on this distinction. Rather, it provides that even *settled* circuit precedent may not be relied upon in the face of an intercircuit split.

Albertini also highlights a substantive area of law where the *Rodgers* rule may be most troubling: the First Amendment. The message underlying *Rodgers* is that since a circuit split creates reasonable doubt as to the scope of a particular criminal statute, individuals ought to err on the side of caution by complying with the most expansive reading of the statute. While an individual wanting to ensure that he is safe from prosecution might be wise to take this approach, it is not clear that society's interests are best served by such incentives. Indeed, the *Rodgers* rule has a self-censoring effect that is particularly undesirable in cases where the defendant asserts that his conduct is protected by the First Amendment. In *Albertini*, for example, the defendant acted in reliance on a Ninth Circuit decision holding that the First Amendment conferred on him a right to engage in political protest on a military base while it was open to the public.[216] That the Supreme Court ultimately rejected the defendant's claim is largely irrelevant. Rather, the point is that even if the Court ultimately held the defendant's conduct to be lawful, had he been mindful of the *Rodgers* rule he may well have refrained from engaging in that conduct in the interim for fear that a split in the circuits might subject him to prosecution.[217]

The *Rodgers* rule thus endorses precisely the sort of ambiguity that First Amendment doctrine typically seeks to prevent. The Court has held that the "most important factor affecting the [degree of] clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights."[218] If it does, "a more stringent vagueness test should apply" so that protected activity will not be chilled.[219] The same principle should apply in the adjudicative retroactivity

216. *See Albertini*, 830 F.2d at 986–87.

217. It is important to note one qualification to the *Rodgers* rule. Although *Rodgers* provides that reliance on the law of the circuit may not bar prosecution, it does not necessarily affect the ability of individuals to seek a declaratory judgment holding their conduct to be lawful. The *Rodgers* rule limits the precedential power of circuit court decisions in the face of a circuit split; it does not purport to circumscribe the preclusive protections afforded to a party who prevails in a declaratory judgment action. Thus, under the Federal Declaratory Judgment Act, an individual wanting assurance that his conduct is lawful may be able to seek a declaratory judgment that, if granted, would immunize him from prosecution. *See* 28 U.S.C. §§ 2201–02 (1994). But in cases where a circuit court has already construed a statute not to reach certain conduct, it is all the more absurd—and an inefficient allocation of judicial resources—to say that although an individual may seek and rely on a declaratory judgment reaching the same result, he may not simply rely on the original circuit precedent if other circuits hold otherwise.

218. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

219. *Id. See also* Smith v. Goguen, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the

context.[220] Rather than allowing a circuit split to chill potentially protected speech in all jurisdictions, the Court should hold that individuals may engage in that speech to the extent the law of their circuit protects it. By the same token, individuals in circuits whose precedent offers no protection must abide by that precedent. In cases where the Supreme Court ultimately holds that the speech is constitutionally protected, this will of course mean that some First Amendment activity had been suppressed in the meantime. But if the choice is between chilling potentially protected speech throughout the country and chilling it only in the circuits that have (erroneously) found no constitutional protection, the choice should be obvious.

Admittedly, *Albertini* is a rather extreme case. Albertini himself was the defendant in the case on which he later relied, and he asserted a First Amendment defense for his conduct. Thus, the case against applying the *Rodgers* rule in *Albertini* is unusually strong. But in terms of the basic principles underlying the mistake of law doctrine, *Albertini* is no different from any case where a defendant expressly relied on a judicial decision. The fact that Albertini himself was the defendant in the case on which he relied makes his reliance appear more immediate, but in doctrinal terms the power of precedent does not depend on the identity of the parties. Similarly, Albertini's invocation of the First Amendment may heighten our concern about problems of chill, but in principle the decisions of a circuit court should be no less reliable simply because the First Amendment is not implicated. Ultimately, *Albertini* simply makes more clear the flaws in the *Rodgers* rule. A better approach is to permit a mistake of law defense in cases where the defendant establishes actual reliance on the law of his circuit.

B. NO RELIANCE ON THE LAW OF THE CIRCUIT

Consider now a case where circuit precedent clearly holds the defendant's conduct to be lawful, but the defendant did not act in reliance on that precedent. Such cases are surely far more common than cases of actual reliance. Indeed, outside certain First Amendment contexts, where individuals engaging in activities on the margin of constitutional protection may often pay close attention to judicial decisions affecting their

First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.").

220. *See* Marks v. United States, 430 U.S. 188, 196 (1977) ("We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values.").

activities,[221] cases of actual reliance are probably quite rare.[222] In *Rodgers*, for example, the defendant made no showing that he had relied on the Eighth Circuit's prior decision holding false statements to the FBI to be outside the coverage of the False Statements Act.[223] Yet even in cases without actual reliance, the *Rodgers* rule is seriously misguided and should be replaced by the circuit precedent rule.

To understand the problems with the *Rodgers* rule in this area, it is useful to ask whether, and why, there should be *any* limit on adjudicative retroactivity in cases without actual reliance. In *Lanier*, the Court described the "touchstone" of the fair warning requirement as "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."[224] At bottom, this "touchstone" embodies the two key interests of the Ex Post Facto Clause that the fair warning requirement applies to judicial decisions: notice and fundamental fairness.

The fair warning requirement's concern for notice teaches that in order for a particular construction of a statute to be applied retroactively, there must have been reasonable notice that the statute might be construed that way. But in cases where the defendant concedes that he did not specifically rely on any particular understanding of the law when he acted, the emphasis on notice raises another question: "Notice to whom?" There are three answers commonly given to this question. The first is that the notice requirement protects individuals who do rely on judicial statements of the law, even if the defendant in a given case did not so rely.[225] At bottom, however, this response is simply a defense of the mistake of law doctrine discussed above. If the goal is to protect those who rely on judicial decisions from retroactive application of new decisions overruling the precedent on which they relied, it should be enough simply to recognize a mistake of law defense for those who can establish such reliance.

221. *See id.* at 195 (depicting individuals who sell sexually explicit material as "engaged in the dicey business of marketing films subject to possible challenge," and as seeking to understand what constitutional "standard" would govern their activities).

222. *See* McBoyle v. United States, 283 U.S. 25, 27 (1931) ("[I]t is not likely that a criminal will carefully consider the text of the law before he murders or steals.").

223. *See* Reply Brief for the United States at 12, *Rodgers* (No. 83-620).

224. *Lanier*, 520 U.S. at 267.

225. *See* LON L. FULLER, THE MORALITY OF LAW 51 (1964) ("Even if only one man in a hundred takes the pains to inform himself concerning [the law] . . . this is enough to justify the trouble taken to make the laws generally available. This citizen at least is entitled to know, and he cannot be identified in advance."); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 270 n.265 (1982) ("Regardless of whether it is realistic to expect one to consult the law before committing an offense, doctrines designed to afford notice protect those who would.").

The second answer is somewhat more satisfying. As Lon Fuller explains, "in many activities men observe the law, not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves. In this way knowledge of the law by a few often influences indirectly the actions of many."[226] On this view, it is the tendency of the many to model their behavior on the actions of the few that the notice requirement protects. It is difficult to know how many people actually do model their actions on the conduct of others in this way, but in some contexts it certainly seems plausible. Consider the federal obscenity laws at issue in *Marks*. While some purveyors of sexually explicit material may well have studied the Court's decision in *Memoirs* in an attempt to ascertain precisely what material counted as "obscene," many vendors probably looked to what others in the industry were selling to ascertain what was legal and what was not. Provided at least some in the industry were acting on a reasonable reading of the *Memoirs* standard, such modeling is a salutary practice.

The third answer focuses on notice to institutional actors such as the police, prosecutors, and trial courts. As Fuller puts it, without adequate notice "there is no check against a disregard of [the law] by those charged with their application and enforcement."[227] By requiring that the line between illegality and legality be clearly drawn, the fair warning requirement enables society to ascertain whether the law is being fairly and consistently enforced and applied.[228] Thus did Justice Holmes write for the Court:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.[229]

Implicit in that warning is a complementary prohibition: Unless individuals cross the specified line, the state is not to pursue, arrest, or prosecute them.

This third version of notice—notice to governmental actors—merges with the interest in fundamental fairness. As the *Carmell* Court explained

226. FULLER, *supra* note 225, at 51.

227. *Id.*

228. The Supreme Court has described the void-for-vagueness doctrine as serving a similar purpose in that it "require[s] that a legislature establish minimal guidelines to govern law enforcement. . . . Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 556, 574–75 (1974)) (internal quotation marks omitted, alteration in original).

229. McBoyle v. United States, 283 U.S. 25, 27 (1931).

in the context of ex post facto lawmaking, "[t]here is plainly a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life."[230] This interest is not confined to purely legislative matters. Rather, the point is that once the government—whether in its legislative or judicial capacity—announces what constitutes lawful and unlawful conduct under a particular criminal statute, it is fundamentally unfair for government actors then to treat lawful conduct as unlawful, and for the legislature or judiciary to justify that treatment after the fact by changing the law.[231]

In sum, adequate notice of what the law intends to treat as criminal both protects desirable modeling behavior by the citizenry and promotes clarity in the line between legality and illegality so that the government's respect for that line can be ensured. In some circumstances, the relevant questions of notice and fairness will be answered by the text of the statute itself. But in cases where the statute has been judicially construed, the questions are whether that construction provides the requisite notice, and whether the government respects that construction in a fair manner. As John Gray puts it, "[t]he shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts."[232] The *Rodgers* rule holds that as long as a federal circuit court somewhere in the country holds certain conduct to be unlawful, individuals may be prosecuted for that conduct even if the law in their circuit permits it. But that rule undermines the principles animating the fair warning requirement. By casting doubt on the reliability of in-circuit precedent, it obscures the line between legality and illegality, and invites instability, uncertainty, and arbitrariness.

Consider a circuit split from the perspective of institutional actors charged with enforcing and applying the law. Law enforcement officers, United States Attorneys, and federal district courts are all bound to adhere to the law as construed by the federal court of appeals in their jurisdiction. If circuit precedent holds certain conduct to be lawful under a given federal statute, federal law enforcement officers are bound by that holding when

230. *Carmell*, 120 S. Ct. at 1633.

231. *Cf.* Lopez v. Heckler, 713 F.2d 1432, 1441 (9th Cir. 1983) (Pregerson, J., concurring) ("The government expects its citizens to abide by the law—no less is expected of those charged with the duty to faithfully administer the law."). John Parry makes a similar point in a related context. *See* Parry, *supra* note 125, at 57 (arguing that "it is unfair to place upon the individual the consequences of a division within the government with respect to what the law is").

232. JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW 125 (1960).

enforcing the statute in that circuit.[233] Similarly, United States Attorneys are expected not to prosecute people for engaging in conduct deemed lawful under the law of their circuit.[234] Moreover, even if a prosecutor does bring such a case, the federal district court hearing the case will be bound by circuit precedent to grant the defendant's motion to dismiss for failure to state an offense.[235] None of these obligations depends on agreement among the federal courts of appeals, nor should they. It cannot be, for example, that law enforcement officers in the First Circuit may arrest individuals for violating a statute as construed by the Ninth Circuit, even though the First Circuit has expressly held that the conduct at issue is lawful under that same statute.[236] Yet the *Rodgers* rule holds that such an arrest—and an ensuing prosecution and conviction—is foreseeable because of the circuit split. Taken to its extreme, the *Rodgers* rule is an assault on a

233. *See* Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339, 1396 (1991) ("Because there *is* a 'law of the circuit,' and because executive officers are bound to execute 'the laws,' American tradition counsels that an executive officer must honor legal interpretations issued by that circuit that alone has supervisory authority over the action that officer is contemplating."). In certain noncriminal areas, federal agencies sometimes "nonacquiesce" in court of appeals decisions with which they disagree. Whether such nonacquiescence is permissible or desirable is a matter of considerable debate. *See generally* Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1991); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Samuel Figler, *Executive Agency Nonacquiescence to Judicial Opinions*, 61 GEO. WASH. L. REV. 1664 (1993). Without regard to its propriety in the civil context, nonacquiescence has no place in the criminal law. Neither federal agencies nor private individuals have the discretion to disobey judicial constructions of criminal statutes.

234. *See* Coenen, *supra* note 233, at 1396. By the same logic, United States Attorneys are expected to prosecute individuals for conduct that the law of their circuit holds to be illegal, even if other circuits hold otherwise. If the Supreme Court later resolves the circuit split in favor of the defendant, then those who have been convicted and incarcerated under a more expansive, now-overruled construction of the statute may be released on the ground that they committed no crime. *See* Bousley v. United States, 523 U.S. 614, 620 (1998) ("[D]ecisions of this Court holding that a substantive federal criminal statute does not reach certain conduct . . . necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'") (quoting Davis v. United States, 417 U.S. 333, 346 (1974)). This is because retroactive application of a decision favoring the defendant does not raise the due process concerns presented by retroactive application of a decision prejudicing the defendant. *See supra* note 74.

235. *See, e.g.*, Jones v. United States, 224 F.3d 1251, 1257 (11th Cir. 2000) ("[T]he district court would be required to follow the law of this circuit until it was overruled by the Supreme Court or an *en banc* panel of this court."); Moore v. Valder, 65 F.3d 189, 195 n.9 (D.C. Cir. 1995), *cert. denied*, 519 U.S. 820 (1996) ("[T]he district court below is bound to follow the law of *this* circuit.").

236. *Cf.* W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 268–69 (1953) (Frankfurter, J., concurring) ("No one can feel more strongly than I do that the function of the courts of appeals in the federal judicial system requires that their independence, within the area of their authority, be safeguarded.").

circuit court's ability to bind any person or institution in its jurisdiction to its interpretation of federal criminal law.

Although *Rodgers* holds that defendants may be prosecuted for conduct that was lawful in their circuit as long as it was unlawful in at least one other circuit (and the Supreme Court ultimately resolves the circuit split in favor of the government), the last fifteen years have not seen a flood of such prosecutions. In the Ninth Circuit, for example, before the Supreme Court in *Caron* resolved the circuit split over the scope of the federal felon-in-possession statute,[237] state felons were not typically prosecuted for possessing firearms they were allowed to possess under state law, even though other circuits held such possession to violate the federal statute unless the state had restored all of the felon's civil rights. United States Attorneys in the Ninth Circuit tended to prosecute individuals for violating the Ninth Circuit's construction of the felon-in-possession statute, not for violating other circuits' more expansive reading of the statute.[238]

Yet the relative rarity of prosecutions flouting circuit precedent does not redeem the *Rodgers* rule. Rather, it makes the rule all the more arbitrary. In circuits where settled precedent holds certain conduct to be lawful, practically speaking it is unlikely that the government will attempt to prosecute individuals for engaging in such conduct simply because other circuits hold it to be unlawful. Even if the government does bring such prosecutions, the district court and court of appeals will be obliged to dismiss the case under the law of the circuit. The *Rodgers* rule will only be triggered in the relatively rare case where either the circuit hears the case en banc and overrules its own precedent, or the Supreme Court grants certiorari and resolves the circuit split in the government's favor. When that happens, the *Rodgers* rule provides that the defendant may be convicted for engaging in conduct that was lawful under the law of his circuit. Cases that might lead to such a result—as opposed to cases that simply end when the district court grants a motion to dismiss for failure to state an offense, or the court of appeals reverses a conviction on similar grounds—are virtually impossible to identify ex ante. The result is

237. *See supra* note 95.

238. *See, e.g.*, United States v. Rehder, No. 98-10225, 1999 WL 197182 (9th Cir. Apr. 6, 1999) (mem.). In *Rehder*, the defendant was prosecuted for violating the felon-in-possession statute because he possessed a handgun in violation of state law. But he also possessed several rifles, all of which he was permitted to possess under state law. Under the "all-or-nothing" reading of the federal statute adopted by some circuits and ultimately upheld by the Supreme Court, the possession of the rifles would violate the statute. The government did not, however, prosecute the defendant for possessing the rifles. Rather, it prosecuted him only for possessing the handgun, and sought to introduce the possession of the rifles only as uncharged relevant conduct for purposes of sentencing.

arbitrariness: Individuals are usually safe to the extent their conduct comports with the law of their circuit, but in rare and largely unpredictable cases they may be convicted for engaging in that conduct.

There is, moreover, a related—and rather more common—class of cases implicating the *Rodgers* rule. Once the Supreme Court has resolved a circuit split in favor of the government, United States Attorneys in the circuits whose precedent previously held the conduct at issue to be lawful may attempt to prosecute individuals who engaged in that conduct prior to the Supreme Court's decision.[239] That is, prosecutors may attempt to use the Court's new decision to reach individuals who were previously immune from prosecution under the law of their circuit. This is a potentially common phenomenon: It will arise as a possibility any time the Supreme Court resolves a circuit split over the scope of a federal criminal statute in the government's favor. Under the *Rodgers* rule, prosecutors are justified in pursuing such cases. Under the circuit precedent rule, they are not. The circuit precedent rule applies to these cases just as it applies to cases (such as *Rodgers* itself) initiated in the face of controlling circuit precedent. In both circumstances, to expose individuals to criminal liability would be to betray the interests in notice and fairness underlying the fair warning requirement, and to ignore the injunction that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[240]

239. *See, e.g.*, United States v. Rainey, No. 99-4494, 2000 WL 103052 (4th Cir. Jan. 31, 2000) (per curiam, mem.). In *Rainey*, the defendant was prosecuted under 18 U.S.C. § 922(g), the same felon-in-possession statute at issue in *Caron* and *Qualls*. *See* discussion of *Qualls*, *supra* note 95. The defendant possessed several rifles during a period when such possession did not violate the Fourth Circuit's reading of the statute. *See Rainey*, 2000 WL 103052 at **1. After the Supreme Court held in *Caron* that such possession did violate the statute, the defendant was prosecuted under the *Caron* standard. *See id.* Because the circuits were split at the time as to whether such possession violated the statute, the Fourth Circuit cited *Rodgers* and held that the defendant "was thus on notice that the Supreme Court could review the issue and reach a decision contrary to this circuit's interpretation, and accordingly, his due process rights were not violated by the district court's application of *Caron*." *Id.*

240. United States v. Lanier, 520 U.S. 259, 265 (1997) (quoting Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954))). Admittedly, in cases where a prosecutor seeks to use a new Supreme Court decision to reach conduct that had previously been deemed lawful under the law of his circuit, the prosecutor is not flouting the *current* law of his circuit. Thus, such prosecutions do not undermine circuit precedent the same way that prosecutions like the one in *Rodgers* do. But they do still undermine individuals' ability either to rely on the law of the circuit or to model their behavior on the actions of those who have determined what that law requires.

C. NO PRIOR LAW OF THE CIRCUIT: CASES OF FIRST IMPRESSION

There remains one other class of cases to which the *Rodgers* rule at least implicitly applies. In cases where there is no in-circuit precedent determining whether the conduct at issue is covered by the relevant statute, the *Rodgers* rule would appear to hold that the defendant may be convicted whenever at least one circuit elsewhere in the country construes the statute to reach his conduct. This is a per se rule: As long as the conduct in question is held to be unlawful by a circuit court somewhere in the country, defendants everywhere in the country may be prosecuted for engaging in that conduct, and their convictions may be upheld if a reviewing court elects to construe the statute against them. Yet the absolutism of this rule chafes with *Lanier*'s description of the fair warning requirement.

In *Lanier*, the Court recognized that "disparate decisions in various Circuits might leave the law [so] insufficiently certain even on a point widely considered" that a defendant would not have adequate warning of the law's intention to treat his conduct as criminal.[241] Rather than responding with a rule that a circuit split always constitutes fair warning, *Lanier* held that the presence of a circuit split "may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it."[242] *Lanier* did not cite *Rodgers* on this point, but the two cases stand in clear conflict: *Rodgers* held that a circuit split is fair warning per se; *Lanier* held that the presence of a circuit split may be taken into account in determining whether there was fair warning, but that it does not necessarily lead to a particular answer.

Lanier's is the better approach. It recognizes that circuit decisions are part of the "universe of relevant interpretive decisions,"[243] but it does not automatically privilege the circuit precedent that construes the statute most expansively. Without examining the conduct at issue in the case, the clarity of the statutory text, and the degree to which other circuits' precedents have become settled law, there is no persuasive reason to hold that out-of-circuit precedent alone constitutes fair warning in all cases.[244]

If the Court were to follow the *Lanier* approach in cases where the relevant circuit has not yet construed the statutory provision in question,

241. *Lanier*, 520 U.S. at 269.

242. *Id.*

243. *Id.* at 268.

244. *Cf.* Garcia v. Miera, 817 F.2d 650, 658 (10th Cir. 1987) (criticizing the use of a per se rule regarding circuit splits in the qualified immunity area).

the analysis would often focus on whether the case truly presented an issue of first impression within the circuit.[245] Much would turn on that determination. On the one hand, if it could be fairly said that in-circuit precedent held the defendant's conduct to be lawful, then under the approach I suggest here the defendant would have a complete defense. On the other hand, if there is no in-circuit precedent on the precise issue, then the presence of decisions from other jurisdictions holding the defendant's conduct to be unlawful might be enough to authorize his prosecution. But the federal courts of appeals commonly examine whether the cases before them present issues of first impression in their respective circuits, and there is nothing wrong with predicating part of the fair warning analysis on such an assessment.[246]

Moreover, shunning a per se rule for cases of first impression is entirely consistent with *Lanier*'s discussion of the fair warning requirement. There, the Court held that "all that can usefully be said about criminal liability" and the fair warning requirement is that liability may be imposed "if, but only if, 'in the light of pre-existing law the unlawfulness [of the conduct in question was] apparent.'"[247] Accordingly, in cases of first impression within a circuit, it may be appropriate to take other circuits' precedents into account when assessing whether the fair warning requirement is met, but there should be no categorical rule to that effect.[248]

245. I refer here only to issues of first impression in *federal* criminal cases. I do not refer to state criminal cases where, for example, the defendant invokes federal circuit precedent holding his conduct to be constitutionally protected. In such cases, the question is how a state court facing an issue of first impression should treat a federal court's prior treatment of the issue. The federalism dimensions of that problem distinguish it from cases where a federal appellate court faces an issue of first impression in federal criminal law that other federal courts have already addressed.

246. To be sure, cases of this sort may present particularly thorny problems. Suppose, for example, that ten courts of appeals have addressed whether certain conduct is covered by a certain federal statute, with five circuits on each side of the issue. Suppose then that an eleventh circuit hears a case presenting the same issue. The court is unsure of how best to construe the statute, but is certain that given the split among the circuits and in light of other relevant circumstances, the fair warning requirement would preclude applying the statute to the detriment of the defendant in that case. Notwithstanding the general rule that courts should avoid constitutional issues in cases that can be resolved on statutory grounds, *see infra* note 262 and accompanying text, the court decides to resolve the case without definitively interpreting the statute. It finds for the defendant on the ground that regardless of whether the statute covers his conduct, the fair warning requirement prohibits applying the statute against the defendant in that case. Some time after that decision, the same circuit hears another case presenting the same issue. What is the impact of the court's prior decision? Is the issue still one of "first impression" in the circuit? There can be no blanket answer to these questions. Whether the court's earlier decision constitutes fair warning will depend in part on the content of the court's opinion in that earlier case.

247. *Lanier*, 520 U.S. at 271–72 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

248. *Id.* at 269.

VI. APPLYING THE CIRCUIT PRECEDENT RULE: CASE OR CONTROVERSY?

With the substance of the circuit precedent rule now outlined, this Part anticipates some possible objections to the rule grounded in Article III of the Constitution. Article III limits the federal judicial power to the adjudication of "cases" and "controversies."[249] Advisory decisions—decisions that construe the law for future purposes, but do not apply those constructions in the instant case—are beyond the power of the federal courts.[250] There are two ways in which the circuit precedent rule might be said to chafe with this case-or-controversy requirement. This Part addresses them in turn.

A. UNNECESSARY MERITS ANALYSIS?

It might be contended that in cases implicating the circuit precedent rule, any merits analysis by the Court is purely advisory and thus improper under Article III. The argument runs as follows: When the Court grants certiorari to review a case arising out of a circuit whose settled precedent holds the defendant's conduct to be lawful under the relevant statute, the circuit precedent rule provides that the defendant will always prevail. This will happen in one of two ways. If the Court construes the statute in the defendant's favor, then the defendant will prevail on the merits. If the Court construes the statute in the government's favor, then, because settled precedent in the defendant's circuit holds his conduct to be lawful, the circuit precedent rule prohibits applying the Court's construction against the defendant. Arguably, therefore, any merits analysis by the Court is unnecessary, since the outcome of the case will never depend on how the Court construes the statute. Moreover, if unnecessary legal analysis constitutes an advisory opinion, then Article III compels the Court to refrain from reaching the merits. The Court should simply decline to say what the statute means, since the defendant will prevail in any event. In this way, the circuit precedent rule puts the Court in an untenable position: Either it exceeds its Article III power by construing the statute in an essentially advisory fashion, or it sacrifices an opportunity to resolve the

249. U.S. CONST. art. III, § 2, cl. 1.

250. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 548–49 (1991) (Scalia, J., concurring). Professor Wright describes the prohibition against advisory opinions as "the oldest and most consistent thread in the federal law of justiciability." CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 65 (5th ed. 1994).

disagreement among the circuits by declining to say what the statute means.[251]

This argument is premised on the idea that any "unnecessary" analysis in a federal court's opinion is impermissibly advisory. That premise, in turn, relies on a distinction between holding and dictum that defines the holding as only those judicial statements truly necessary to a particular outcome, and depicts the rest of a judicial opinion as advisory dicta. Such a rigid distinction is untenable. Although there is considerable disagreement over where the line between holding and dictum ought to be drawn,[252] it cannot credibly be maintained that any judicial statement not strictly necessary to a certain outcome is illegitimate.[253] In fact, there is ample reason to believe that to the extent the Court has used the term "advisory opinion" to refer to any opinion or portion thereof not strictly necessary to the result of a case, it has done so more as a matter of judicial discretion than constitutional imperative.[254] That is, while it may be prudent for federal courts to limit their opinions only to that which is necessary to the outcomes they reach, it is not constitutionally compelled.

Michael Dorf portrays the federal judicial power more broadly by defining a holding as comprising everything "essential to the rationale of a

251. This argument implicates more than just the circuit precedent rule. If analysis of the relevant statute is impermissibly advisory where the circuit precedent rule applies, then the Court's opinions in *James* and *Marks* were also impermissibly advisory. In those cases, the Court construed the relevant statutes to expand criminal liability, but then refrained from applying those constructions retroactively because they overruled prior Supreme Court precedent reading the statutes more narrowly. *See supra* notes 126–30 and accompanying text (*James*); notes 131–50 and accompanying text (*Marks*). The circuit precedent rule simply extends *James* and *Marks* to cases where the Court overrules the law of the circuit in which the defendant is prosecuted. If that formulation runs afoul of Article III, so too do *James* and *Marks*.

252. *See, e.g.*, Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2018–21 (1994) (discussing the varying views).

253. Greabe, *supra* note 179, at 422. Indeed, any attempt at applying such a rule would surely fail, "because every material fact in a case can be stated at different levels of generality, each level of generality will yield a different rule, and no mechanical rules can be devised to determine the level of generality intended by the precedent court." MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 53 (1988). *See also* Dorf, *supra* note 252, at 2035–37.

254. *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 645 (1992). Lee explains that the Court has used "advisory opinion" to mean at least five different things: (1) "Any judgment subject to review by a co-equal branch of government"; (2) "Advice to a co-equal branch of government prior to the other branch's contemplated action (that is, pre-enactment review)"; (3) "Supreme Court review of any state judgment for which there is or may be an adequate and independent state ground of decision"; (4) "Any opinion, or portion thereof, not truly necessary to the disposition of the case at bar (that is, dicta)"; and (5) "Any decision on the merits of a case that is moot or unripe or in which one of the parties lacks standing." *Id.* at 644–45. He further shows that "the weight of the authority establishes that only the first two of these usages denote a constitutional bar. The other three usages are a function of judicial discretion." *Id.* at 645.

case, not just its result."[255] This formulation includes all "legal rulings that form an essential part of the natural process by which a court reaches a dispositive ruling."[256] On this more expansive view, where the Supreme Court construes a criminal statute in the government's favor but then invokes the circuit precedent rule and refrains from applying that construction against the defendant in that case, the Court's holding encompasses both steps in its analysis. The Court's interpretation of the statute may not be strictly necessary to the outcome in that case, but it is certainly an integral part of the process by which the Court reached its decision.[257] After all, if the Court were to construe the statute in the defendant's favor, it would have no need to apply the circuit precedent rule and thus the rationale of its decision would be dramatically different. Thus, under Dorf's "essential-to-the-rationale" formulation, the Court is within its Article III power to construe a criminal statute in the government's favor but then to apply the circuit precedent rule and refrain from applying its construction to the instant case.

The Supreme Court's qualified immunity jurisprudence again provides a useful analogy. In any case where a court first finds that the defendant violated the plaintiff's constitutional rights but then grants the defendant qualified immunity, the first part of the court's analysis is arguably unnecessary to the outcome. The court could reach the same result by engaging in a "merits bypass."[258] That is, it could hold that without regard to whether the defendant violated the Constitution, he is immune from suit because any constitutional right he might have violated was not "clearly established" at the time. Some courts have followed such an approach.[259] The Supreme Court's preferred practice, however, is "to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question."[260] A majority of the Court evidently sees no Article III problem

255. Dorf, *supra* note 252, at 2049.

256. Greabe, *supra* note 179, at 424 (applying Dorf's formulation).

257. *See id.* at 424–25 (advancing a similar argument in the qualified immunity context). As Judge Friendly put it, "A court's stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided [the case] on another basis." Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 385–86 (1964).

258. *See generally* Greabe, *supra* note 179.

259. *See id.* at 410 n.35 (calculating that lower courts undertook merits bypasses in fifty-one of seventy-nine recent qualified immunity cases because the asserted right was not clearly established).

260. County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998). *See also* Siegert v. Gilley, 500 U.S. 226, 232 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination

in this practice. An analogous practice in the federal criminal context is for a court to construe the criminal statute first, and then to determine whether the fair warning requirement permits the application of the court's construction against the defendant. If the Court's approach to qualified immunity does not run afoul of Article III, then neither does the analogous approach in the criminal context.[261]

Merits review in cases implicating the circuit precedent rule is also consistent with the well-established principle that courts should refrain from reaching constitutional issues in cases susceptible to resolution on statutory or other nonconstitutional grounds.[262] The constitutional issue here is whether the Due Process Clause bars imposing a particular statutory construction on the defendant. Courts need not reach that issue in cases where they interpret the statute in the defendant's favor.[263] Thus, it is entirely proper for a court to construe the statute first, and to turn to constitutional questions of fair warning only when the statutory construction it adopts runs against the defendant.

of whether the plaintiff has asserted a violation of a constitutional right at all"; courts should not "assume[], without deciding, this preliminary issue.").

261. Furthermore, the two principal reasons supporting the Court's approach to qualified immunity cases apply in the criminal context as well. The first reason is that, analytically speaking, it frequently makes sense to determine whether there is a constitutional right at stake at all before determining whether that right is clearly established. *See Lewis*, 523 U.S. at 841 n.5. Similarly, the construction of a federal criminal statute logically precedes a determination of whether that construction can permissibly be applied in the instant case. The second reason is more pragmatic, and more compelling: If courts commonly granted immunity without first deciding whether the asserted constitutional right existed at all, "standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals." *Id.* So too in the federal criminal context, the imperative of settling the meaning of federal statutory law warrants construing a statute before ascertaining whether the fair warning requirement bars retroactive application of that construction.

262. As the Supreme Court has explained, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Jones v. United States, 120 S. Ct. 1904, 1911 (2000) (quoting United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)). *See also* Three Affiliated Tribes v. Wold Eng'g, P.C., 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them."); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

263. This principle does not apply in qualified immunity cases, where there is no avoiding the constitutional issue. A court either decides whether certain conduct is unconstitutional, or it determines whether it was clearly established at the time that such conduct was unconstitutional, or it does both. *See Lewis*, 523 U.S. at 841 n.5 (noting the unavoidability of a constitutional question).

B. A LIVE CASE?

A related Article III-based objection is that the circuit precedent rule limits the Supreme Court's ability to grant certiorari by effectively mooting any case implicating the rule. The argument here proceeds as follows: If the government elects to prosecute an individual for engaging in conduct that is lawful under settled in-circuit precedent but unlawful in other circuits, the district court should dismiss the indictment for failure to state a claim. The government, however, may be convinced that the law of the circuit is wrong, and may appeal in an effort to correct that precedent. If the court of appeals adheres to its settled precedent, it will affirm the district court. At that point, the government may petition the Supreme Court for certiorari, identifying the circuit split and asking the Court to resolve the split in the government's favor. Under the circuit precedent rule, however, even if the Court were to grant certiorari and resolve the circuit split in the government's favor, the government could not prevail in the instant case. Because the government concedes that the defendant's conduct is lawful under the law of his circuit, the circuit precedent rule would bar application of the Court's decision against him. This being so, the Court's proper response to the government's petition for certiorari is to deny the petition as effectively moot. Thus, if the Supreme Court adheres to the circuit precedent rule when reviewing petitions for certiorari, it will insulate defendant-friendly circuit precedent from plenary review.

Implicit in this argument is the idea that the government ought to be able to bring prosecutions even though it concedes that the challenged conduct is lawful under the law of the circuit. That idea, however, is misguided. As I have explained above,[264] law enforcement officers and federal prosecutors have no authority to defy the law of their circuit, especially in matters of criminal law. As long as the federal system is organized so that the individuals and institutions in any given geographical region are bound by the decisions of the federal court of appeals corresponding to that region, officers and prosecutors charged with enforcing federal law must look to the law of their circuit to ascertain precisely what the federal law means. Accordingly, federal prosecutors have no warrant to prosecute individuals for engaging in conduct that the government concedes is lawful under in-circuit precedent. The circuit precedent rule is consistent with this view; the *Rodgers* rule undermines it by rewarding prosecutors who flout the law of their circuit.

264. *See supra* notes 233–40 and accompanying text.

To say that prosecutors should not bring cases in the face of controlling in-circuit precedent is not, however, to say that cases implicating the circuit precedent rule ought never arise. Rather, conscientious federal prosecutors acting in good faith may still bring routine cases implicating the rule. For example, suppose the government charges a defendant with violating a particular statute. The defendant moves to dismiss, citing in-circuit precedent that, he claims, holds his conduct to be lawful under the statute. The government responds that the instant case is not controlled by the precedent the defendant identifies, either because the precedent cases are distinguishable on their facts or because they do not say what the defendant claims they say. At that point, the district court has two options: grant the defendant's motion on the ground that controlling in-circuit precedent holds his conduct to be lawful; or deny the motion on the ground that the indictment is not inconsistent with any controlling in-circuit precedent. The court of appeals has the same options on appeal.

Beginning with en banc rehearing by the court of appeals,[265] a third option emerges: The court may acknowledge that in-circuit precedent holds the defendant's conduct to be lawful under the relevant statute, but overrule that precedent as misconstruing the statute and then (per the circuit precedent rule) refrain from applying the new construction against the defendant in the instant case. That option is also available to the Supreme Court. But the availability of this third option does not moot the government's petition for certiorari. Rather, as long as the government articulates a rationale by which it could win *even under the prevailing law of the circuit* (that is, as long as the government argues at least in part that there is no controlling in-circuit precedent holding the defendant's conduct to be lawful), the Court can adhere to the circuit precedent rule and still view the petition as presenting a live case or controversy. While the Court might not ultimately accept the government's characterization of the in-circuit precedent, the government's willingness to argue for that characterization ensures that the case is not moot.

In sum, the cases most likely to implicate the circuit precedent rule are cases where the government initially prosecutes the defendant on the theory that the prosecution is consistent with in-circuit precedent. On reviewing the law of the circuit after granting certiorari, the Supreme Court might disagree with the government and conclude that in-circuit precedent does hold the defendant's conduct to be lawful. The Court might further

265. See *infra* notes 280–81 and accompanying text for a discussion of the general rule that a court of appeals can overrule its own precedent only when sitting en banc.

determine, however, that the in-circuit precedent is wrong, and that under a correct reading of the statute the defendant's conduct is unlawful. In such circumstances, the circuit precedent rule provides that the Court should make clear what the proper reading of the statute is, but should refrain from applying that reading to the detriment of the defendant in the instant case.[266] Nothing in this process runs afoul of Article III.

VII. INSTITUTIONAL IMPLICATIONS: CIRCUIT SPLITS AND FEDERAL LAW

The bulk of this Article has been devoted to three things: examining the *Rodgers* rule in light of the principles underlying the fair warning requirement, showing that the rule is unfaithful to those principles, and proposing the circuit precedent rule as a preferable alternative. This final Part lays such doctrinal matters to one side, and appraises the *Rodgers* rule as a response to the problem of intercircuit conflicts.

In 1984—the same year he wrote the opinion for the Court in *Rodgers*—then-Associate Justice Rehnquist remarked on the growing problem of unresolved circuit splits:

> The Court cannot review a sufficiently significant portion of the decisions of any federal court of appeals to maintain the supervisory authority that it maintained over the federal courts fifty years ago; it simply is not able or willing, given the other constraints upon its time, to review all the decisions that result in a conflict in the applicability of federal law.[267]

Justice Rehnquist was not alone in his assessment. In the mid-1980s a number of observers commented on, and proposed various solutions to, the rising problem of unresolved circuit splits.[268] Decided against the back-

266. There is at least one other way for the Court to resolve circuit splits over the meaning of federal criminal statutes without implicating the circuit precedent rule: It can grant certiorari in cases that come from circuits whose precedent is in the government's favor. In such cases, because the law of the circuit is against the defendant, there would be no due process limit on applying the Court's construction of the statute in the instant case. *See supra* note 74 (explaining that the Due Process Clause does not bar the retroactive application of decisions favoring the defendant). However, if the Court grants certiorari in such a case and resolves a circuit split in the government's favor, the circuit precedent rule *would* be implicated if United States Attorneys in circuits whose precedents previously favored defendants attempted to use the Court's new construction of the statute to prosecute individuals for conduct undertaken before the Court's decision. *See supra* notes 239–40 (discussing the circuit precedent rule's application to such cases).

267. William H. Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U. L.J. 1, 4–5 (1984).

268. *See, e.g.*, Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400 (1987); Warren E. Burger, *The Time is Now for the Intercircuit Panel*, A.B.A.

drop of growing judicial and scholarly concern in this area, *Rodgers* may have been an attempt at a remedy. That is, by holding that a defendant may be prosecuted for conduct that is lawful in his circuit but unlawful elsewhere in the country, *Rodgers* may have sought to encourage greater uniformity in federal criminal law. Before assessing whether the *Rodgers* rule actually might promote such uniformity, I first turn to an outline of the problem.

A. THE PROBLEM OF UNRESOLVED CIRCUIT SPLITS

In the early part of the last century, the Supreme Court was reasonably able to ensure consistency among the federal courts of appeals. In the 1920s, for example, the Supreme Court reviewed about one in every ten decisions of the courts of appeals.[269] Thus, to the extent the circuits construed federal statutes differently, the Supreme Court was well situated to resolve the differences. But the docket volume of the circuits has increased greatly, and today the Court reviews fewer than 1% of all circuit decisions.[270] Even excluding those cases in which the losing party does not petition for certiorari, the current Court typically grants certiorari in fewer than 2% of all the petitions it considers each year.[271] To be sure, not all petitions present a circuit split, and the Supreme Court does give some priority to cases involving circuit splits when reviewing petitions.[272] Yet it appears quite clear that the number of intercircuit conflicts far exceeds the Court's capacity to resolve them.

J., Apr. 1985, at 86; Walter V. Schaefer, *Reducing Circuit Conflicts*, A.B.A. J., Apr. 1983, at 452; Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307 (1983).

269. THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 19 (1994).

270. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 283 (1996) ("For all practical purposes, the courts of appeals are the courts of last resort in the federal system; fewer than one percent of their decisions receive plenary review by the Supreme Court.").

271. *The Supreme Court, 1999 Term: The Statistics*, 114 HARV. L. REV. 390, 397 (2000) (reporting that the Court granted review in 92 out of 7339, or 1.3%, of the certiorari petitions it considered during the 1999 Term); *The Supreme Court, 1998 Term: The Statistics*, 113 HARV. L. REV. 400, 407 (1999) (reporting that the Court granted review in 81 out of 7002, or 1.2%, of the certiorari petitions it considered during the 1998 Term).

272. *See* SUP. CT. R. 10(a) (describing cases where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" as warranting Supreme Court review); BAKER, *supra* note 269, at 19–20 ("In recent Supreme Court Terms, intercircuit conflicts have comprised approximately 5% of the entire docket and about one-third of the signed opinions. This suggests a certain priority being given to conflict resolution by the Supreme Court.").

Considerable data supports this conclusion. Justice White, who made it a practice of dissenting from the denial of certiorari in any case presenting a circuit split, identified 166 such cases during the Court's 1988, 1989, and 1990 Terms.[273] A 1991 study conducted by Arthur Hellman for the Federal Judicial Center identified an additional forty-four conflicts among the cases denied review during the 1989 Term.[274] Together, Hellman's and Justice White's figures suggest that the Court denied review in over 200 cases presenting circuit splits over the course of three years. Revisiting those same cases in 1997 and 1998, Hellman found that sixty-two had since been resolved by legislative or judicial action and that sixty-three had "died a natural death."[275] That left over seventy-five intercircuit conflicts remaining.[276]

Whether the persistence of such conflicts is tolerable is a debatable issue. Justice White has expressed serious concern:

> [D]enying review of decisions that conflict with other decisions of Courts of Appeals . . . results in the federal law being enforced differently in different parts of the country. What is a crime, an unfair labor practice or an unreasonable search and seizure in one place is not a crime, unfair practice or illegal search in another jurisdiction.[277]

Hellman, however, sees the issue differently:

> The problem of unresolved conflicts exists only if you look for it. . . . If you concentrate your attention on individual court of appeals decisions that create conflicts and on individual denials of certiorari in conflict cases, you will see "a judicial 'darkling plain' where ignorant armies [clash] by night." But if you look at the conflict issues over a period of time and in context, you will find, if not certitude, a landscape in which courts build upon and reexamine one another's decisions in the untidy but constructive tradition of the common law.[278]

Still others suggest that it may actually be desirable to allow intercircuit conflicts to develop on certain issues, at least in the short term.[279] Yet

273. Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247, 251.

274. *Id.*

275. *Id.* at 256.

276. *See id.* at 256–57.

277. BAKER, *supra* note 269, at 20 (quoting *Establishing an Intercircuit Panel: Hearings on S. 704 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 99th Cong. 147–48 (1985) (prepared statement of A. Leo Levin, quoting Justice White)).

278. Hellman, *supra* note 273, at 300 (citing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring)) (alteration in original).

279. *See, e.g.*, Michael C. Dorf, *Supreme Court, 1997 Term Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 65 (1998). As Dorf puts it,

while many disagree as to the seriousness of the problem, no one denies that there are far more circuit splits today than the contemporary Court can quickly resolve.

B. *RODGERS*: A RESPONSE TO THE PROBLEM?

Some kind of response to the problem of unresolved circuit splits may well be in order. The *Rodgers* rule, however, is not it. First, the *Rodgers* rule is unlikely to reduce the actual number of circuit splits in federal criminal law. Although the rule seems to encourage prosecutions whenever at least one circuit holds the conduct in question to be unlawful, as a practical matter United States Attorneys are unlikely to proceed with prosecutions that conflict directly with the law of their circuit. Additionally, it is unlikely that the courts of appeals involved in the circuit split will abandon their respective precedents simply because other circuits see the issue differently. Although a panel will often find it useful to consult the decisions of other circuits when addressing an issue of first impression in that circuit, once the issue has been addressed the binding power of circuit precedent trumps.[280] Even in cases where a panel finds decisions from other circuits more persuasive than in-circuit precedent, as a general rule a three-judge panel is powerless to overrule the law of the circuit. Only an en banc court or the Supreme Court can achieve that result.[281]

> [T]emporary disuniformity of federal law can assist the Court in learning from experience. The Court sometimes defers decision on a relatively novel question of federal law so that the issue can "percolate" in the state and lower federal courts. Rather than decide such issues immediately, the Court hopes to address them with the benefit of well-reasoned opinions by the federal courts of appeals and perhaps the state courts of last resort. To this justification should be added the possibility that the passage of time during which there is a circuit split creates a record of the consequences of different legal regimes.

Id. *See also, e.g.*, Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 898 (1974) ("Many [circuit splits] can be endured and sometimes perhaps ought to be endured while judges and scholars observe the respective workings out in practice of the conflicting rules, particularly where the question of law is a close one, to which confident answer will in any case be impossible."); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule.").

280. BAKER, *supra* note 269, at 18–19 ("[T]he 'law of the circuit' . . . basically obliges a three-judge panel to treat earlier panel decisions as binding precedent, absent intervening en banc or Supreme Court considerations. Decisions of other Courts of Appeals, by contrast, are deemed merely persuasive authority.").

281. *See, e.g.*, Thomson v. Harmony, 65 F.3d 1314, 1320 (6th Cir. 1995); United States v. Wilson, 37 F.3d 1342, 1343 (8th Cir. 1994); Etheridge v. Norfolk & W. Ry., 9 F.3d 1087, 1090–1091 (4th Cir. 1993); Horwitz v. Alloy Auto. Co., 992 F.2d 100, 103 (7th Cir. 1993); United States v. Washington, 872 F.2d 874, 880 (9th Cir. 1989); *In re* Jaylaw Drug, Inc., 621 F.2d 524, 527 (2d Cir. 1980). In the

Moreover, the rule of stare decisis militates against a circuit overruling its precedent simply because other circuits take different positions. This is particularly true in cases involving statutory interpretation: If a court egregiously misconstrues a federal statute, Congress is free to undo the error by amending the statute.[282] Although Congress may be more reluctant to act when the decision at issue is from a lower court and not the Supreme Court, its ability to act is no less in such cases. Until Congress does act, the need for intracircuit consistency and the limits of judicial resources compel a circuit's fidelity to its prior decisions.

Even if a circuit's construction of a statute is ultimately overruled by the Supreme Court or superseded by Congress, the circuit's interim adherence to its precedent plays an important, if temporary, settling role. At the circuit level no less than at the Supreme Court, fidelity to precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[283] Additionally, the rule of stare decisis conserves scarce judicial resources. As Justice Cardozo observed, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[284] To the extent the *Rodgers* rule facilitates intercircuit uniformity at all, it does so by encouraging circuit courts to reexamine their own precedents on a

Third Circuit, this rule has been codified as an operating procedure. 3D CIR. IOP 9.1 ("It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court en banc consideration is required to do so."). The D.C. Circuit follows a slightly different procedure. Although in general only the en banc court can overrule the law of the circuit, a three-judge panel may clarify minor intracircuit conflicts if it first precirculates its opinion to the entire court and obtains the full court's approval. In such cases, the panel includes an "*Irons* footnote," named after *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981), indicating that the full court has been made aware of the opinion and does not object to it. Use of the *Irons* footnote is apparently rather rare, however, and in general the D.C. Circuit relies on rehearing en banc to overrule circuit precedent. Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1042 (1991) ("The *Irons* footnote has fallen into relative disuse.").

282. Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992); Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for . . . Congress remains free to alter what we have done."); Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). Of course, if Congress amended a criminal statute to render unlawful conduct that had been deemed lawful by one or more circuits, it is without question that the Ex Post Facto Clause would bar retroactive application of the amendment.

283. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

284. CARDOZO, *supra* note 48, at 149.

continuous basis. The toll of such reexamination on intracircuit consistency and efficiency is too high a price to pay.

It bears emphasizing, moreover, that the *Rodgers* rule is one-directional: It holds that individuals throughout the country may be prosecuted under the most expansive reading of a criminal statute adopted by any court of appeals anywhere in the country. In so doing, the *Rodgers* rule favors the government by giving prosecutors throughout the country the benefit of the most expansive reading of the statute. Yet if the goal of the *Rodgers* rule is simply to achieve greater intercircuit uniformity, then there is no reason not to have a rule that *any* out-of-circuit precedent construing the relevant statute, whether expansively or restrictively, binds later courts.

Finally, because the *Rodgers* rule favors only the most expansive reading of a statute, there are some circumstances under which it will actually encourage the pursuit of *disuniformity* among the courts of appeals. If court A holds that certain conduct is lawful under a given statute, that holding will have no binding effect on court B's later consideration of the issue. Yet if court B concludes that the same conduct actually violates the statute, the *Rodgers* rule would appear to authorize subsequent prosecutions even in court A, the law of that circuit notwithstanding. Thus, the *Rodgers* rule gives federal prosecutors an incentive to keep pressing their interpretations of federal criminal statutes in every court of appeals, without regard to how other circuits have decided the issue. Such practice may be acceptable from an advocacy standpoint. But to the extent *Rodgers* encourages that kind of advocacy, it does not promote uniformity among the courts of appeals.

C. THE COURTS OF APPEALS IN THE FEDERAL SYSTEM

In the final analysis, the *Rodgers* rule is inconsistent with the essential role of the courts of appeals in the federal system as it is now organized. As a general matter, appellate courts serve two distinct purposes: (1) correcting errors in (or pronouncing the correctness of) the decision below, and (2) developing the law more generally by creating, elaborating, and overruling precedent.[285] The federal courts of appeals were created in the late nineteenth century primarily to serve the first purpose so that the

285. *See* PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 2–3 (1976); ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 3-4 (1941).

Supreme Court could focus on the second.[286] But as the federal judiciary's docket has continued to expand,[287] the responsibilities of the courts of appeals have grown as well. Justice White's description of the situation over fifteen years ago is just as apt today:

> The Supreme Court . . . reviews only a small percentage of all judgments issued by the twelve courts of appeals. Each of the courts of appeals, therefore, is for all practical purposes the final expositer of the federal law within its geographical jurisdiction. This crucial fact makes each of those courts a tremendously important influence in the development of the federal law, both constitutional and statutory.[288]

Accordingly, the federal courts of appeals today play a crucial role in "preserving the uniformity and coherence of federal law, if not on a national level, then within each circuit itself."[289]

The hallmark of coherence in the law is precedential consistency. If a court's precedents are inconsistent, they are unreliable; if a court's precedents are unreliable, then public understanding of, and confidence in, the law is compromised. Admittedly, as the courts of appeals are now organized the pursuit of intercircuit consistency is sometimes frustrated by the maintenance of intracircuit consistency. That is, a circuit court's fidelity to its own precedents may cause or exacerbate intercircuit

286. Specifically, the Evarts Act, ch. 517, 26 Stat. 826 (1891), created the courts of appeals "to correct individual injustice and control erroneous or lawless behavior by judges or other officials while the Supreme Court assured doctrinal coherence and national uniformity." CARRINGTON ET AL., *supra* note 285, at 200. *See also* Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 112 (1959). In *Sentilles*, the Court noted:

> Congress established intermediate courts of appeals to free this Court from reviewing the great mass of federal litigation in order to enable the Nation's ultimate tribunal adequately to discharge its responsibility for the wise adjudication of cases "involving principles the settlement of which is of importance to the public as distinguished from that of the parties."

Id. (quoting Layne & Bowler Corp. v. W. Well Works, Inc., 261 U.S. 387, 393 (1923)). *See also* Robert L. Chisea, Frank A. Kaufman, Robert M. Landis, A. Leo Levin, James E. Noland, Maurice Rosenberg, Mary M. Schroeder, Robert S. Thompson & Daniel J. Meador, *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth*, 125 F.R.D. 523, 526 (1989) (explaining that the courts of appeals replaced the old circuit courts, which had functioned as both trial and appellate courts).

287. *See supra* notes 269–71 and accompanying text.

288. Byron R. White, *Dedication*, 15 TEX. TECH L. REV. ix, ix (1984). To borrow from Justice Jackson's turn of phrase, the relative "finality" of most court of appeals decisions gives them a certain "infallibility" that they lacked in previous eras, when the likelihood of Supreme Court review was much greater. *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

289. Chiesa et al., *supra* note 286, at 531. *See also* Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 766 (1995) ("The federal courts of appeals have a special obligation to articulate a coherent body of decisional law because they are the de facto courts of last resort in the federal system.").

conflicts.[290] As described above, however, the *Rodgers* rule does not remedy that problem.[291] Rather, it jeopardizes even intracircuit consistency by selectively authorizing prosecutions that flout the law of the circuit. As a result, public confidence in the law of the circuit may be undermined. The *Rodgers* rule confers no benefit worth such a cost. Even if a circuit's precedents are clearly wrong, any corrective effect in the *Rodgers* rule does not justify the extent of its interference with the law of the circuit.[292]

Commentators have occasionally suggested tackling the problem of intercircuit conflicts by "eliminat[ing] altogether the geographical boundaries between the Courts of Appeals and consolidat[ing] them into one unified administrative and jurisdictional tier of an intermediate court."[293] It is beyond the scope of this Article to speculate on the merits of such a proposal.[294] But even if it is good policy to move toward a system of national circuit precedent where each circuit's decisions are binding on all other circuits, *Rodgers* is not a constructive means to that end. As long as the federal courts of appeals are organized geographically so that each circuit has the exclusive power to bind those within its jurisdiction, the impact of the *Rodgers* rule can only be deleterious. Especially in the criminal field, the current federal system demands that all individuals and institutions within a given circuit adhere to that circuit's interpretation of the law. Because the *Rodgers* rule discourages that adherence in certain contexts, it is inconsistent with the federal judicial system.

CONCLUSION

In 1717, Bishop Hoadley preached to King George that "[w]hoever hath an absolute authority to interpret any written or spoken laws; it is he who is truly the lawgiver to all intents and purposes and not the person who wrote or spoke them."[295] Later that same century, Alexander Hamilton

290. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 855–56 (1994).

291. *See supra* Part VII.B.

292. As Justice Brandeis famously observed, "in most matters it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

293. BAKER, *supra* note 269, at 271. *See also* Schaefer, *supra* note 14, at 455. *Cf.* Chiesa et al., *supra* note 286, at 532–40 (advocating the establishment of nonregional circuits with national jurisdiction over certain subject matter).

294. It bears noting, however, that creating a single national court of appeals might simply replace one set of problems with another: Such a court would obviously remove the problem of *intercircuit* splits, but its sheer size might cause a dramatic increase in *intracircuit* ones.

295. Bishop Hoadley, Sermon Before King George I (Mar. 31, 1717), *quoted in* LEARNED HAND, THE BILL OF RIGHTS 8 (1958).

sounded a similar note in emphasizing that "[l]aws are a dead letter without courts to expound and define their true meaning and operation."[296] These words resonate today because they describe so accurately the role of the modern American judiciary.[297] It is a role played not just by the Supreme Court, but by the lower federal courts as well.

As the volume of cases in the federal system continues to far outstrip the reviewing capacity of the Supreme Court,[298] the courts of appeals play an increasingly important part in interpreting and applying federal law. To be sure, circuit courts across the country are not always in agreement on certain issues, and intercircuit disagreement can be particularly troubling in areas of federal statutory law. But however troubling the persistence of circuit splits, each circuit must remain free to bind those within its jurisdiction to its interpretation of federal law. By permitting retroactive application of decisions overruling circuit precedent to the detriment of a criminal defendant even if he expressly relied on that prior precedent, the *Rodgers* rule erodes the binding power of circuit law and undermines the principles of fair warning that the Court recently reaffirmed in *Lanier*. Only by replacing the *Rodgers* rule with the circuit precedent rule will the Court give full effect to the basic premise of the fair warning requirement that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[299]

296. THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

297. As Paul Freund puts it, "to say that judges make law, is not the end but only the beginning of sophistication." PAUL A. FREUND, ON UNDERSTANDING THE SUPREME COURT 3 (1977).

298. *See* BAKER, *supra* note 269, at 19–21.

299. United States v. Lanier, 520 U.S. 259, 265 (1997) (quoting Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954))).