9-1-2014

Demonstrators' Right to Fair Warning

Caleb Hayes-Deats

Follow this and additional works at: http://scholarship.law.unc.edu/falr

Part of the First Amendment Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/falr/vol13/iss1/4

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in First Amendment Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
DEMONSTRATORS’ RIGHT TO FAIR WARNING

CALEB HAYES-DEATS

ABSTRACT

Protesting has become an integral part of American politics, so much so that federal courts of appeals have recently restricted police officers’ power to arrest demonstrators who have concededly violated otherwise valid statutes and regulations. Specifically, courts have found that, where demonstrators may reasonably, yet mistakenly believe that police officers have permitted their conduct, officers must give “fair warning” before arresting or dispersing those demonstrators. In § 1983 suits, courts have even found that demonstrators’ right to fair warning is “clearly established.” While the right to fair warning may be clearly established, its doctrinal roots are not. Ordinarily, the requirement of fair warning, grounded in the Due Process Clause, guides courts in their application of statutes. The cases mentioned above, however, consider not the content of statutes—indeed, the statutes’ applicability is frequently conceded—but instead the conduct of police officers and demonstrators. As a result, the courts that have recognized demonstrators’ rights to fair warning have not clearly specified whether the First Amendment, the Fourth Amendment, or the Due Process Clause creates that right. Identifying the source of this right is more than an academic exercise. Such identification will help courts expound the right’s contours and determine its future application. Ultimately, this Article argues that courts have unconsciously employed the right to fair warning as a less sweeping form of First Amendment review, one that applies First Amendment principles to officers’ enforcement of a statute.

* B.A. 2006, Amherst College; J.D. 2011, Columbia Law School; currently, Assistant United States Attorney, Southern District of New York. I would like to thank Peter Aronoff, Esha Bhandari, Jessica Lutkenhaus, Henry P. Monaghan, and Matthew Shahabian for their helpful feedback. The ideas set forth in this Article are mine alone and do not necessarily reflect the views of the Department of Justice, or any component thereof.
rather than to the statute itself. Only by attributing the right to fair warning to the First Amendment can courts both explain existing doctrine and vindicate the principles that earlier decisions have recognized when invoking that right.

INTRODUCTION

"I never knew until today that a law enforcement official—city, state, or national—could forgive a breach of the criminal laws. I missed that in my law school, in my practice and for the two years while I was head of the Criminal Division of the Department of Justice." – Justice Clark

Imagine the following: While walking through your town, you hear chanting and singing in the distance. As you walk towards these sounds, you discover that several hundred people have gathered for a demonstration. Police officers accompany the demonstrators, directing their movements and making no apparent attempt to discourage further protest. From the demonstrators' signs and statements, you realize that they are promoting a cause in which you earnestly believe. And so, you join them, participating in one of American democracy's great traditions. After proceeding for several blocks, the demonstration comes to a halt. Looking ahead, you see a line of police officers preventing further progress. Officers have also formed a barrier behind the march. On both sides, they begin arresting demonstrators. As it turns out, the march you joined lacked a parade permit. Moreover, by proceeding in the middle of the street, you and your fellow demonstrators have blocked traffic in violation of your town's ban on disorderly conduct. The officers reach you. As they slip plastic "flexicuffs" around your wrists, you begin to wonder: "Am I guilty of a crime?"

According to four Circuit Courts of Appeals, the answer is clearly no.\(^1\) So clearly, in fact, that demonstrators may sue officers over

---

\(^1\) See generally Garcia v. Does, 12-2634-cv, 2014 WL 4099270 (2d Cir. Aug. 21, 2014); Vodak v. City of Chi., 639 F.3d 738 (7th Cir. 2011); Buck v. City of Albuquerque, 549 F.3d 1269 (10th Cir. 2008); Papineau v. Parmley, 465 F.3d 46 (2d Cir. 2006); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977).
such arrests.² But how each court has reached that conclusion varies. The Seventh Circuit has analyzed an arrest of demonstrators entirely under the Fourth Amendment, characterizing parallel First Amendment claims as “largely duplicative.”³ The Second Circuit, in contrast, has held that even officers who have a “lawful basis to interfere with [a] demonstration” under the Fourth Amendment can nonetheless violate the “separate” requirements of the First Amendment.⁴ In reaching these conclusions, both the Second and the Seventh Circuits relied on the Supreme Court’s decision in Cox v. Louisiana,⁵ which analyzed the issue primarily under the Due Process Clause.⁶

In each of these cases, courts have recognized a substantially similar right. Specifically, they have held that, where demonstrators reasonably believe that they are lawfully exercising their First Amendment rights, officers cannot arrest or disperse them without first giving “fair warning as to what [about their conduct] is illegal.”⁷ Most commonly, courts find that demonstrators reasonably believe that their actions are lawful because police officers have either expressly or apparently permitted those actions.⁸ In other cases, however, courts have imputed a right to fair warning to demonstrators simply because those demonstrators “had an undeniable right” to engage in “peaceable protest activities.”⁹ Where courts attribute a right to fair warning to demonstrators, they generally forbid officers from dispersing or arresting

---

². Vodak, 639 F.3d at 746–47; Buck, 549 F.3d at 1286–87; Papineau, 465 F.3d at 61; Dellums, 566 F.2d at 183.
³. Vodak, 639 F.3d at 750.
⁴. Papineau, 465 F.3d at 60.
⁵. 379 U.S. 559 (1965).
⁶. Id. at 571–72 (“The Due Process Clause does not permit convictions to be obtained under such circumstances.”); see also Vodak, 639 F.3d at 746; Papineau, 465 F.3d at 60 n.6.
⁷. Cox, 379 U.S. at 574; see also Garcia v. Bloomberg, 865 F. Supp. 2d 478, 487 (S.D.N.Y. 2012) (citing Cox, Papineau, and Vodak for “the basic proposition that before peaceful demonstrators can be arrested for violating a statutory limitation on the exercise of their First Amendment rights, the demonstrators must receive ‘fair warning’ of that limitation, most commonly from the very officers policing the demonstration”), aff’d sub nom. Garcia v. Does, 12-2634-cv, 2014 WL 4099270 (2d Cir. Aug. 21, 2014).
⁸. See Cox, 379 U.S. at 569; Buck v. City of Albuquerque, 549 F.3d 1269, 1283 (10th Cir. 2008).
⁹. Papineau, 465 F.3d at 60.
demonstrators until those demonstrators have received a reasonable opportunity to conform their conduct to the officers’ demands. In practice, then, the right to fair warning frequently imposes a difficult burden on officers. Before officers may deploy their customary enforcement mechanisms, the right to fair warning requires them to clearly communicate a message to a large mass of people and to give that mass a reasonable opportunity to comply. The right to fair warning is surprising. Courts most commonly refer to the requirement of fair warning when interpreting statutes. In the cases described above, however, the relevant statutes had provided sufficient warning, and courts instead focused on police officers’ enforcement efforts, concluding that officers had failed to adequately warn demonstrators of the possibility of arrest. But why should officers enforcing a valid statute have to provide any warning at all? Many of the relevant statutes have no mens rea requirements, and ignorance of the

10. *Id.* (quoting City of Chi. v. Morales, 527 U.S. 41, 58 (1999)) (“[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law.”).

11. *See Vodak*, 639 F.3d at 746 (finding that a bullhorn was “no mechanism . . . for conveying a command to thousands of people stretched out [over several blocks].”).

12. *See* Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 455–56 (2001) (identifying three examples: the void-for-vagueness doctrine, the rule of lenity, and “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 be within its scope.’” (quoting United States v. Lanier, 520 U.S. 259, 266 (1997))).


14. *Id.* at 571; *Vodak*, 639 F.3d at 746; *Papineau*, 465 F.3d at 60–61.

15. *See, e.g.*, *Vodak*, 639 F.3d at 741 (discussing CHI. MUNIC. CODE § 10–8–330, which prohibits parading without a permit); N.Y. CITY ADMIN. CODE § 10–110(a). Moreover, even where statutes impose a mens rea requirement, reasonable officers could conclude that this requirement was met based on circumstances that fell far short of “fair warning.” For example, N.Y. PENAL LAW § 240.20(5), one of the statutes at issue in *Papineau*, prohibits “obstruct[ing] vehicular or pedestrian traffic” where doing so would “recklessly creat[e] a risk” of “public inconvenience.” *Papineau*, 465 F.3d at 59. Surely, an officer who witnesses a large group of people walk down the middle of a street has probable cause to believe that they recklessly run the risk of obstructing vehicular traffic. *See* Brinegar v. United States, 338 U.S. 160, 175–76 (1949).
law usually provides no defense. More surprising still is the fact that courts often conclude that police officers’ conduct creates the need for fair warning. Under most circumstances, such conduct excuses an offense only where the arrestee can invoke the exceedingly narrow affirmative defense of entrapment. Thus, the requirement that officers give fair warning represents a substantial departure from the ordinary operation of the criminal law, essentially adding another element to otherwise valid criminal statutes.

To understand the breadth of this departure, one must know its origin. Yet, courts enforcing the right to fair warning have not clearly grounded their rationale in the First Amendment, the Fourth Amendment, or the Due Process Clause. The differences between these constitutional provisions are significant. While each generally balances individual liberty interests against the government’s concern for order and efficiency, each does so differently and for distinct reasons. Under

16. See Ratzlaf v. United States, 510 U.S. 135, 151 (1994) (“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.” (quotation marks omitted)); see also Model Penal Code § 2.04 (outlining the circumstances in which ignorance or mistake of law qualifies as a defense).

17. See Cox, 379 U.S. at 569–74; Buck v. City of Albuquerque, 549 F.3d 1269, 1283 (10th Cir. 2008); see also Cox, 379 U.S. at 588 (Clark, J., dissenting) (“I never knew until today that a law enforcement official—city, state or national—could forgive a breach of the criminal laws. I missed that in my law school, in my practice and for the two years while I was head of the Criminal Division of the Department of Justice.”).

18. Matthews v. United States, 485 U.S. 58, 62–63 (1988). Entrapment “has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct.” Id. at 63. Requiring officers to give fair warning to demonstrators as a whole shifts courts’ focus from a particular defendant’s mental predisposition to what a reasonable officer should understand about demonstrators generally. Cf. Vodak, 639 F.3d at 745 (“Maybe the marchers . . . should have guessed that it was a forbidden route as well, and no doubt some did, but others may simply have been following the crowd.”) (emphasis added).

The Due Process Clause creates a defense for those who act in reliance upon an official interpretation of a law. See Raley v. Ohio, 360 U.S. 423, 425–26 (1959). The Raley defense bears some resemblance to the defense of entrapment, and courts considering it ask whether an official, while “speaking for the State,” has “clearly told” a defendant that the law permitted certain conduct. Id. at 425–26. Nonetheless, demonstrators’ right to fair warning differs even from the defense recognized in Raley. See infra text accompanying notes 239–249.
the First Amendment, courts attempt to protect robust discourse from “impermissible deterrence” by considering the expressive interests of not only the individual litigant—who may concede that a given restriction appropriately enjoins her conduct—but also others whose protected speech the restriction might chill. 19 The Due Process Clause, in contrast, focuses on a particular defendant, ensuring that “no [one is] held criminally responsible for conduct which he could not reasonably understand to be proscribed.” 20 Finally, the Fourth Amendment balances two entirely different considerations: the need for “swift [police] action predicated upon . . . on-the-spot observations,” on the one hand, and the “great indignity and . . . strong resentment” that may result from “serious intrusion upon the sanctity of the person,” on the other. 21 Given the differences between the concerns animating each constitutional provision, one cannot understand the precise contours of demonstrators’ right to fair warning without first determining which constitutional provision creates that right. 22

This Article attempts to identify the right to fair warning’s constitutional basis. Ultimately, it argues that the First Amendment provides the most plausible foundation for that right. A careful analysis of the decisions recognizing the right to fair warning indicates that courts focus on officers’ conduct in order to accommodate First Amendment concerns, without subjecting the ordinances at issue to the exacting review that the First Amendment typically requires. Specifically, courts in those cases appear to attribute a valid, nondiscriminatory purpose to the ordinance in question; yet these courts also understand that that ordinance infringes First Amendment rights. 23 Because of such infringement, ordinary First Amendment review would likely require that ordinance’s invalidation. But the mere fact that the ordinance sweeps

22. For a discussion of how the right’s scope changes based on the constitutional provision that creates it, see infra Parts III.A.3, III.A.4.
23. Compare Cox v. City of Louisiana, 379 U.S. 559, 564 (1965) (holding that a statute prohibiting protesting “near” courts “vindicate[s] important interests of society”), with Edwards v. South Carolina, 372 U.S. 229, 236–37 (1963) (suggesting that statutes could restrict protests only by “limiting the periods during which the State House grounds were open to the public”).
overbroadly does not mean that the legislature can draft a narrower ordinance that accomplishes the same purpose.\footnote{24} Thus, in these cases, ordinary First Amendment review appears to force courts to choose between the ordinance’s interests, on the one hand, and the First Amendment’s, on the other. The right to fair warning, in contrast, avoids such a zero-sum conflict by permitting the courts to balance the relevant interests. Effectively, the right to fair warning allows courts to review not the ordinance itself, but instead the ordinance \textit{as applied} by police officers in the relevant circumstances. Thus, we can understand the right to fair warning as a narrower form of First Amendment scrutiny that accommodates First Amendment concerns without unnecessarily complicating otherwise legitimate legislative schemes.

Conceptualizing the right to fair warning as a First Amendment right also provides satisfactory answers to some of the most vexing questions raised by the existing doctrine. If courts have recognized a right to fair warning in order to vindicate First Amendment concerns, then the scope of the right must fully accomplish that purpose. The need to vindicate First Amendment concerns potentially explains why courts have made decisions that might otherwise appear puzzling. For example, whereas \textit{Cox} recognized a right to fair warning only where officers had explicitly allowed the conduct at issue,\footnote{25} later decisions applying \textit{Cox} have extended that right to situations in which officers gave only implicit permission.\footnote{26} The Fourth Amendment and the Due Process Clause provide little support for such a result.\footnote{27} Yet distinguishing between

\footnote{24. \textit{Cf} Vodak \textit{v.} City of Chi., 639 F.3d 738, 741 (7th Cir. 2011) ("[W]hen a march is planned for the unknown date of some triggering event, \ldots even two days’ notice is infeasible.").}
\footnote{25. \textit{Cox}, 379 U.S. at 571.}
\footnote{26. \textit{See} Buck \textit{v.} City of Albuquerque, 549 F.3d 1269, 1283 (10th Cir. 2008) (arguing that officers “may have \textit{implicitly} sanctioned the march not only by closing off streets to traffic, but also by directing the progress and direction of the procession”) (emphasis added).}
\footnote{27. Specifically, the Due Process Clause protects a demonstrator only from being “held criminally responsible for conduct which he could not reasonably understand to be proscribed.” United States \textit{v.} Lanier, 520 U.S. 259, 266 (1997) (quoting \textit{Bouie v. City of Columbia}, 378 U.S. 347, 351 (1964)). In the absence of some explicit directive from officers, courts would likely expect demonstrators to reasonably understand that valid, sufficiently specific statutes proscribed their conduct. \textit{Cf} \textit{Raley v. Ohio}, 360 U.S. 423, 425–26 (1959) (creating a defense where an official had “clearly told” a defendant that the law permitted certain conduct).}
explicit and implicit permission, as Fourth Amendment and Due Process Clause jurisprudence might lead courts to do, is unsatisfying. In large demonstrations, the vast majority of participants will not know what officers have explicitly permitted the demonstration's leaders or organizers to do. For the majority of demonstrators, then, discerning whether officers have explicitly or implicitly permitted others' actions will be nearly impossible. Upholding convictions in the latter case, but not the former, would create a distinction without a difference, at least from the perspective of a majority of demonstrators. Focusing on First Amendment concerns, however, resolves the problem of distinguishing between explicit and implicit permission by leading courts to ask whether or not police conduct would have the effect of chilling speech. Thus, regarding the right to fair warning as a First Amendment right offers a compelling explanation for the existing doctrine.

By abstracting from the First Amendment principles that have tacitly guided existing doctrine, courts can generate a coherent and satisfactory framework for determining how the right should apply in future cases. First, as suggested above, courts considering demonstrators' right to fair warning should ask whether officers' actions will chill the

Similarly, the Fourth Amendment asks only whether officers have a "reasonable ground for the belief" that an arrestee has committed a crime. Maryland v. Pringle, 540 U.S. 366, 370–71 (2003) (internal quotation marks omitted). Because officers traditionally have discretion over "when and where to enforce city ordinances," they can reasonably believe that a decision not to enforce an ordinance at a given time does not amount to permission to engage in certain conduct. Town of Castle Rock v. Gonzales, 545 U.S. 748, 761 (2005) (internal quotation marks omitted).

28. For example, in Garcia v. Bloomberg, demonstrators at the back of a march watched as hundreds of demonstrators followed police officers onto the portion of the Brooklyn Bridge reserved for vehicles. 865 F. Supp. 2d 478, 483 (S.D.N.Y. 2012), aff'd sub nom. Garcia v. Does, 12-2634-cv, 2014 WL 4099270 (2d Cir. Aug. 21, 2014). Although the officers had asked the demonstrators near them not to follow them onto the bridge, they made no further efforts to stop them, and those at the back of the march mistakenly concluded that the officers had granted permission. Id. at 483–84. If demonstrators have difficulty distinguishing between permission and refusal, surely they will also struggle with the finer distinction between tacit and explicit permission.

29. See Monaghan, supra note 19, at 1–2. Arrests would chill legitimate speech in cases of both explicit and implicit permission. Specifically, arrests in cases of implicit permission would deter bystanders, who do not know whether demonstrators have received explicit permission, from joining even permitted marches.
protected conduct that they attempt to permit. The danger of deterring protected conduct is especially acute in cases involving the right to fair warning because the statutes at issue will appear to prohibit protected conduct. Thus, courts must encourage officers to clearly define not only what they prohibit, but also what they permit.30 Second, courts must bear in mind that empowering officers to suspend a statute’s normal operation may create the threat of discriminatory enforcement. To neutralize that threat, courts should demand that officers adopt enforcement procedures that openly display, to demonstrators and courts alike, how officers intend to promote the legitimate purposes of the overbroad statutes they hope to narrow.31 These two principles, which past cases have suggested, but not clearly articulated, illuminate what it means to provide demonstrators with fair warning. Understanding their importance will allow courts to generate continuity between existing doctrine and future decisions, which will inevitably have to address many different and unforeseeable circumstances.

This Article contains four parts. Part I analyzes cases that have recognized the right to fair warning, noting the right’s existing contours and the questions it raises. Part II then discusses the rights protected by the First Amendment, the Fourth Amendment, and the Due Process Clause, explaining why each provision could serve as a plausible, if not wholly satisfying, basis for the right to fair warning. Finally, Part III argues that courts should ultimately characterize the right to fair warning as a First Amendment right. As set forth below, First Amendment concerns best explain existing doctrine, and only by focusing on the interests protected by the First Amendment can courts fashion a right to fair warning that fully and coherently vindicates the principles they have identified. Part IV concludes with some brief reflections and suggestions for future inquiry.

I. THE HISTORY OF DEMONSTRATORS’ RIGHT TO FAIR WARNING

Because the textual foundations of demonstrators’ right to fair warning are unclear, any description of that right must begin with its history. Part I analyzes that history and then attempts to delineate the

30. See infra text accompanying notes 398–399.
31. See infra text accompanying notes 400–402.
basic contours of the right that has emerged. Like many other constitutional protections, demonstrators’ right to fair warning was first recognized by the Supreme Court in a case arising from the civil rights movement: *Cox v. Louisiana.* Part I.A discusses *Cox*, describing its facts and holdings and analyzing the tensions that emerge from the interchange between the majority and the dissent. Next, Part I.B explores how Circuit Courts of Appeals have treated *Cox* and the right it created. Finally, Part I.C analyzes these precedents, distills the fundamental characteristics of demonstrators’ right to fair warning, and identifies the questions that remain.

A. *Cox v. Louisiana*

Opinions describing demonstrators’ right to fair warning typically identify *Cox v. Louisiana* as the origin of that right. *Cox* arose from a civil rights demonstration. On December 14, 1961, police officers in Baton Rouge, Louisiana arrested twenty-three black students from Southern University for picketing stores that had segregated lunch counters. In response to those arrests, the Reverend B. Elton Cox organized a demonstration involving approximately 2,000 students. On December 15, these demonstrators proceeded from a meeting place to the state courthouse where officers were holding the twenty-three arrested students. Police officers learned of the demonstration in advance, and a number of them, including the Chief of Police, met with Cox as the march proceeded. The Chief of Police instructed Cox that “he must

33. Vodak v. City of Chi., 639 F.3d 738, 746 (7th Cir. 2011); Papineau v. Parmley, 465 F.3d 46, 60–61 n.6 (2d Cir. 2006); Dellums v. Powell, 566 F.2d 167, 182–83 (D.C. Cir. 1977).
35. *Cox I*, 379 U.S. at 538.
36. *Id.* at 538–39.
37. *Id.* at 539.
38. *Id.* at 539–41.
confine' the demonstration 'to the west side of the street,’” and Cox then directed the marchers to that area, which was “across the street from the courthouse, 101 feet from its steps.”

Cox gave a speech in which he characterized the arrest of the twenty-three students as “illegal.” During this time, “a small crowd of 100 to 300 curious white people . . . gathered on the east sidewalk and courthouse steps.” Cox concluded his speech by encouraging the gathered demonstrators to engage in the same activities for which officers had arrested the twenty-three students. This remark angered some of those who had gathered on the courthouse steps. The sheriff then intervened. Addressing the marchers, he stated that, although they had been “allowed to demonstrate” and had been “more or less peaceful,” their present actions constituted “a direct violation of the law, a disturbance of the peace, and [needed] to be broken up immediately.” Cox instructed the demonstrators to remain in place, and officers subsequently used tear gas to disperse the march.

Police officers arrested Cox, and a jury convicted him of three offenses: disturbing the peace, obstructing public passages, and picketing before a courthouse. The Supreme Court’s opinion in Cox dealt only with the conviction for picketing before a courthouse. The relevant Louisiana statute—which the State had modeled after 18 U.S.C. § 1507—prohibited “picket[ing] or parad[ing] in or near a building housing a court of the State of Louisiana” with “the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer.” Cox challenged his conviction under this statute on both First Amendment and Due Process grounds.

The majority opinion decisively rejected Cox’s challenges to the statute. First, the Court found it unquestionable “that a State has a

39. Id. at 541.
40. Id.
41. Id.
42. Id. at 542.
43. Id. at 543.
44. Id.
45. Id. at 544.
46. Id. at 538, 544.
legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create." Then, characterizing the statute as "narrowly drawn," the Court reasoned that this legitimate state interest clearly outweighed the modest impact the statute had on demonstrators' abilities to speak. Accordingly, the majority found that the statute did not violate the First Amendment. Nor did the majority regard the statute unduly vague, "at least as applied to a demonstration within the sight and hearing of those in the courthouse." In fact, the majority would have had great difficulty avoiding these conclusions. As Justice Clark noted in his dissent, "Louisiana's statute . . . was taken in haec verba from . . . 18 U.S.C. § 1507," which "was written by members of [the Supreme] Court after disturbances similar to the one [at issue] occurred at buildings housing federal courts."

Nonetheless, the majority expressed concern over how officers had administered the statute. In rejecting Cox's vagueness argument, the majority recognized that "demonstrators, such as those involved here, would justifiably tend to rely on . . . administrative interpretation of how 'near' the courthouse a particular demonstration might take place." According to the majority, the statute itself envisioned such reliance since it could best serve its goal of insulating judges from pressure by entrusting its application to the discretion of officers who would observe whether any pressure actually occurred. This discretion, however, created First Amendment concerns where the statute itself had not. Analogizing the statute to constitutionally valid restrictions on "the time, place, duration, and manner of demonstrations," the majority noted that officials could not use their discretion "to pick and choose among expressions of view the ones [they] will permit to use the streets and other public facilities."

49. Id. at 562.
50. Id. at 562–64.
51. Id. at 568.
52. Id. at 585 (Clark, J., dissenting); see id. ("It has been said that an author is always pleased with his own work.").
53. Id. at 568–69 (majority opinion).
54. Id.
55. Id. at 569.
On the basis of these concerns, the majority found that Cox’s arrest violated his rights under the Due Process Clause. According to the majority:

[A]t no time did the police recommend, or even suggest, that the demonstration be held further from the courthouse than it actually was. The police admittedly had prior notice that the demonstration was planned to be held in the vicinity of the courthouse. They were prepared for it at that point and so stationed themselves and their equipment as to keep the demonstrators on the far side of the street. As Cox approached the vicinity of the courthouse, he was met by the Chief of Police and other officials. At this point not only was it not suggested that they hold their assembly elsewhere, or disband, but they were affirmatively told that they could hold the demonstration on the sidewalk of the far side of the street, 101 feet from the courthouse steps. This area was effectively blocked off by the police and traffic rerouted.56

Given these facts, the majority concluded that sustaining Cox’s “conviction for demonstrating where [officers] told him he could ‘would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him.’”57

The majority did not, however, rely entirely on the Due Process Clause. As the dissent observed, Cox not only engaged in conduct that officers had explicitly permitted, but also continued to demonstrate even after officers had ordered him to disperse.58 Addressing this point, the majority noted that the sheriff had ordered the demonstrators to disperse “not because [they were] peacefully demonstrating too near the

56. Id. at 570–71.
57. Id. (“The Due Process Clause does not permit convictions to be obtained under such circumstances.”) (citation omitted).
58. Id. at 582–83 (Black, J., dissenting).
courthouse, nor because a time limit originally set had expired, but because officials erroneously concluded that what [Cox] said threatened a breach of the peace.\(^{59}\) According to the majority, under the First Amendment, "this was not a valid reason for a dispersal order."\(^{60}\) Thus, Cox had not only a Due Process right to engage in conduct that officers had permitted, but also a First Amendment right to demand that officers revoke their prior permission based on legitimate reasons.\(^{61}\) In other words, although the text of the statute complied with both the First Amendment and the Due Process Clause, the officers' administration of that statute ran afoul of both provisions.

Justice Black and Justice Clark, in separate dissents, each criticized the majority for finding problems in the officers' conduct that the majority would not ascribe to the statute itself. First, both dissenters criticized the majority's unsubstantiated claim that the statute "foresees a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it."\(^{62}\) According to the dissenters, the statute clearly applied to the conduct at issue.\(^{63}\) In the words of Justice Clark: "One hardly needed an on-the-spot administrative decision that the demonstration was 'near' the courthouse with the disturbance being conducted before the eyes and ringing in the ears of court officials, police officers and citizens throughout the courthouse."\(^{64}\) Second, because the dissenters found the statute clear, at least as applied to Cox, they accused the majority of impugning the well-established principle that "a police chief cannot authorize violations of his State's criminal laws."\(^{65}\) Justice Clark again provided the most strident criticisms: "I never knew until today that a law enforcement official . . . could forgive a breach of the criminal laws. I missed that in my law school, in my practice and for the two years while I was head of the Criminal Division of the Department of Justice."\(^{66}\)

---

59. *Id.* at 572 (majority opinion).
60. *Id.* (citing *Cox 1*, 379 U.S. at 551, which discussed relevant First Amendment precedents).
61. See *id.* at 569–573.
62. *Id.* at 568.
63. See *id.* at 582 (Black, J., dissenting); *id.* at 586 (Clark, J., dissenting).
64. *Id.* at 586 (Clark, J., dissenting).
65. *Id.* at 582 (Black, J., dissenting). Justice Black cited numerous cases for this proposition. *Id.* at 582 n.5.
66. *Id.* at 588–89 (Clark, J., dissenting).
Also problematic, from the dissents’ perspectives, was that the majority regarded discretion not as a tool that empowered officers to respond flexibly to changing circumstances, but instead as a mechanism for conferring rights on the demonstrators, and thus for imposing additional restrictions on the police. Under typical circumstances, so long as prosecutors and officers do not act based on certain, impermissible considerations such as race, they have broad discretion over whether to arrest or prosecute.\textsuperscript{67} As the dissents noted, the officers did not need to rely on any impermissible consideration when they changed their minds and decided not to permit the demonstration to occur across from the courthouse.\textsuperscript{68} Instead, whereas telling demonstrators “to come no closer to the courthouse” may have initially struck officers as the best strategy for maintaining control over a crowd of “2,000 or more people,”\textsuperscript{69} the officers may have reevaluated that strategy as they became more concerned about the crowd of observers that had gathered on the courthouse steps.\textsuperscript{70} According to the dissents, the majority’s approach prohibited officers from adapting their commands to developing circumstances, requiring police either to immediately prohibit a

\textsuperscript{67} See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. . . . [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.”) (internal quotation marks omitted); see also Town of Castle Rock v. Gonzales, 545 U.S. 748, 760–61 (2005) (describing a “well established tradition of police discretion” and noting that “[i]t is . . . simply common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.”) (internal quotation marks omitted).

\textsuperscript{68} Cox II, 379 U.S. at 593 (White, J., dissenting in part).

\textsuperscript{69} Id. at 582 (Black, J., dissenting). Justice Clark argued that any decision the officers made occurred “in the heat of a racial demonstration in a southern city for the sole purpose of avoiding what had the potentialities of a race riot.” Id. at 588 (Clark, J., dissenting). This framing of the issue, however, ignores the peaceful nature of the demonstration. Cox I, 379 U.S. at 536. It also ignores the well established principle that an audience’s reaction to speech cannot justify restricting that speech. Terminiello v. City of Chi., 337 U.S. 1, 4–5 (1949).

\textsuperscript{70} Cox I, 379 U.S. at 543.
demonstration or to forfeit their right to do so. Justice Clark even went so far as to suggest that the novel “protection” the majority had recognized threatened the country’s dedication “to freedom under law” by empowering mobs to extract legal concessions from officers eager to defuse fraught confrontations.

The majority characterized the dissenters’ indignation as unwarranted. Turning first to the argument that police officers cannot immunize violations of statutes, the majority suggested that the Court had “consistently recognized as necessary and permissible” a “limited administrative regulation of traffic,” and that such regulation required that officers have a modest power to “waive[]” even statutory requirements. Similarly, the majority rejected the suggestion that its holding had meaningfully restricted police officers’ ability to disperse crowds of demonstrators:

Of course [our holding] does not mean that the police cannot call a halt to a meeting which though originally peaceful, becomes violent. Nor does it mean that, under properly drafted and administered statutes and ordinances, the authorities cannot set reasonable time limits for assemblies related to the policies of such laws and then order them dispersed when these time limits are exceeded.

The majority’s tepid response to the dissenters’ arguments suggests that it regarded itself as holding only, and unexceptionally, that officers enforcing statutes could not exercise discretion that the Constitution did not permit the statutes to give.

---

71. Cox II, 379 U.S. at 587 (Clark, J., dissenting) (“The only way the Court can support its finding is to . . . hold—as it does sub silentio—that once Cox and the 2,000 demonstrators were permitted to occupy the sidewalk they could remain indefinitely . . . This, I submit, is a complete frustration of the power of the State.”).
72. Id. at 589. As described above, Justice Clark’s dissent occasionally resorted to hyperbole. See supra note 71 and accompanying text.
73. See Cox II, 379 U.S. at 569 (majority opinion).
74. Id.
75. Id. at 573.
76. Id. (“Indeed, the allowance of such unfettered discretion in the police would itself constitute [an unconstitutional] procedure.”).
The majority's brief responses to the dissents identify some of the limits of the right to fair warning, but they raise many questions about both the rationale behind and the ultimate basis for the right. First, the majority suggests that officers will have discretion to permit otherwise illegal conduct—and thus will need to provide fair warning of what they intend to prohibit—only where they engage in a "limited administrative regulation of traffic."\(^77\) Since traffic patterns may vary so extensively that statutes cannot hope to cover all of the possibilities, courts and legislatures alike might reasonably choose to rely on officers' discretion in this limited context. However, the statute at issue in *Cox II* did not regulate traffic. Instead, it protected the judicial system from "the pressures which picketing near a courthouse might create."\(^78\) Indeed, the majority recognized a legitimate state interest in preventing the "judicial process from being misjudged in the minds of the public," which might attribute the outcome of cases to the "conscious[] or unconscious[] influence[]" of demonstrators.\(^79\) In contrast to officers administering traffic, who can perceive the costs and benefits of permitting modest violations, officers confronting a demonstration can hardly know whether, at some point in the future, a court may render a judgment that "the minds of the public" will attribute to that demonstration's conscious or unconscious influence.\(^80\) Thus, the majority appears not to have explained its rationale for relying on officer discretion. Other than stating that "it is clear that the statute . . . foresees a degree of on-the-spot administrative interpretation"—and that such interpretation is frequently permitted in traffic cases—the majority did not explain why the concededly valid and applicable statute failed to control the case.\(^81\)

Similarly, although the majority clarified that officers retain the discretion to disperse demonstrators in order to prevent violence or serve a statutory purpose, it did not explain why officers could not disperse the demonstrators under the statute they later charged Cox with violating. A short example illustrates this point. Officers may, and frequently do, permit drivers to proceed through an intersection against a traffic light. If, after receiving such permission, a driver stops in the intersection and

\(^77.\) *Id.* at 569.
\(^78.\) *Id.* at 562.
\(^79.\) *Id.* at 565.
\(^80.\) See *id.*
\(^81.\) *Id.* at 568.
begins demonstrating, the First Amendment surely permits an officer to order her to disperse and, if she fails to comply, to arrest her. The reason is simple: the officer enforces a statute that complies with the First Amendment.\footnote{See Cox v. New Hampshire, 312 U.S. 569, 574 (1941) ("The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.").} Why then could the officers in \textit{Cox} not order the demonstrators to disperse on the ground that their conduct, although formerly permitted, potentially frustrated the statute's purpose of maintaining judicial independence?

Instead of answering this question, the majority noted that officials failed to rely on the statute when ordering Cox to disperse.\footnote{Cox \textit{II}, 379 U.S. at 572 ("He was expressly ordered to leave, not because he was peacefully demonstrating too near the courthouse, nor because a time limit originally set had expired, but because officials erroneously concluded that what he said threatened a breach of the peace.").} This explanation, however, is problematic, especially given that the Court apparently based its holding on the First Amendment. First, where officers have a legitimate basis for making arrests, courts have shown great unwillingness to invalidate or impugn those arrests on the ground that the officers had unlawful intentions, even when they intended to suppress speech.\footnote{See Hartman v. Moore, 547 U.S. 250, 252 (2006) (holding that a plaintiff cannot state "an actionable [claim of retaliation under] the First Amendment without alleging an absence of probable cause to support the underlying criminal charge"); Mozzochi v. Borden, 959 F.2d 1174, 1180 (2d Cir. 1992) (holding that motive need not be examined if "probable cause to arrest existed independent of defendants' motive"); cf. Devenpeck v. Alford, 543 U.S. 146, 153–54 (2004) (holding that officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause").} But that is precisely what happened in \textit{Cox}. Second, a right to have officers identify the permissible reason for dispersal is not the right to engage in "uninhibited, robust, and wide-open" discourse that the First Amendment guarantees.\footnote{N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).} In other words, the majority's rationale appears to limit officers' discretion without truly protecting First Amendment rights, requiring only that arrests conform to a script.

As described above, a careful reading of the opinions in \textit{Cox} raises two important questions about the right that case recognized. First,
what motivated the majority’s decision to focus on the officers’ enforcement of the statute, rather than the statute itself? The answer to this question will determine when demonstrators can invoke the right to fair warning. To put the point in somewhat circular terms, only when courts focus on officers’ actions will they inquire into whether the officers, as opposed to the statute or regulation, provided the requisite warning. Second, after officers permitted the relevant demonstration, what needed to occur before they could validly arrest the demonstrators? Answering this question will reveal the content of the right to fair warning, i.e., what having such a right permits demonstrators to demand. Before turning to these questions, however, the Article first examines how Circuit Courts of Appeals have applied Cox.

B. Cox’s Legacy

At least four Circuit Courts of Appeals—the Second, Seventh, Tenth, and D.C. Circuits—have considered the right to fair warning that Cox recognized. Although each Circuit Court has confronted an analogous set of facts and reached a similar result, their analyses of the right to fair warning have differed significantly. Examining these differences will illuminate both the current extent of demonstrators’ right to fair warning—i.e., the set of propositions courts uniformly understand Cox to entail—and the remaining questions that surround the right. This subpart describes each Circuit Court’s decision, and the following subpart analyzes the current state of the doctrine.

86. See generally Vodak v. City of Chi., 639 F.3d 738 (7th Cir. 2011) (addressing claims that anti-war demonstrators’ constitutional rights were violated when they were arrested in a large protest in Chicago); Buck v. City of Albuquerque, 549 F.3d 1269 (10th Cir. 2008) (hearing claims by protestors that their constitutional rights were violated when police officers arrested them during a protest); Papineau v. Parmley, 465 F.3d 46 (2d Cir. 2006) (deciding whether police officers had qualified immunity in a case involving claims of excessive force against demonstrators); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977) (determining if officers violated demonstrators’ First Amendment rights when the officers arrested the demonstrators at a protest at the United States Capitol building).

87. Vodak, 639 F.3d at 746; Buck, 549 F.3d at 1287; Papineau, 465 F.3d at 60; Dellums, 566 F.2d at 184.

88. See supra text accompanying notes 3–4.
1. **Dellums v. Powell** — On May 5, 1971, approximately 2,000 demonstrators staged a protest against the Vietnam War at the United States Capitol.\(^8\) Several United States Congressmen, including Congressman Ronald Dellums, planned to address the demonstrators from the steps of the capitol building.\(^9\) When the protestors arrived at the capitol grounds, the capitol police initially stopped them, but subsequently permitted them to enter after a discussion with Congressman Dellums.\(^10\) After some period of time, however, “the police cordoned off the bottom of the steps, prevented anyone from leaving, and[, over the protests of Congressman Dellums,] began arresting members of the assemblage.”\(^11\) Congressman Dellums and a class of demonstrators sued, and a jury found in their favor, rejecting the officers’ claims that the protest was disruptive and that the chief officer had fairly warned the demonstrators.\(^12\)

Before the D.C. Circuit, the officers argued that they properly arrested the demonstrators under 9 D.C. Code § 124 and 22 D.C. Code § 3102.\(^13\) Section 124 prohibited “parad[ing], stand[ing], or mov[ing] in processions or assemblages in the United States Capitol Grounds,”\(^14\) and § 3102 forbade entering “any public or private dwelling, building or other property . . . without lawful authority.”\(^15\) In contrast to Cox, however, the D.C. Court of Appeals had previously invalidated each statute, as written, on First Amendment grounds.\(^16\) To save § 124 from its constitutional defects, the D.C. Court of Appeals had imposed a limiting instruction, under which, if officers determined that conduct was “more

---

89. *Dellums*, 566 F.2d at 173.
90. *Id.*
91. *Id.*
92. *Id.* at 174.
93. *Id.* at 196–97; *see also* *Id.* at 206 (Leventhal, J., concurring) (“A reporter testified that Chief Powell, after making his initial announcements, had turned to Chief Wilson and said that he thought many people had not heard the order to leave, and asked Wilson if he thought the order should be given again. ‘No,’ Wilson said, ‘let them tell their story in court.’”).
94. *Id.* at 177–78 (majority opinion).
95. *Id.* at 177 n.12.
96. *Id.* at 178 n.15.
disruptive . . . than that normally engaged in by tourists and others routinely permitted on the Grounds,98 they could:

bar or . . . order from the Capitol Grounds, any group which is noisy, violent, armed, or disorderly in behavior, any group which has a purpose to interfere with the processes of the Congress, . . . [and] any group which has the effect, by its presence, of interfering with the processes of the Congress.99

Although the officers argued that § 124 allowed them to arrest demonstrators who were “more disruptive . . . than . . . tourists and others routinely permitted on the Grounds,” the D.C. Circuit concluded that such a construction would not assuage the D.C. Court of Appeals’ constitutional concerns.100 Instead, because “it would be impossible for anyone to tell when his otherwise constitutionally protected behavior (or that of his group) had become ‘more disruptive’” than the conduct in which others normally engaged, the officers’ proposed interpretation would have “an unconstitutional chilling effect.”101 Thus, the D.C. Circuit understood § 124, as interpreted by the D.C. Court of Appeals, to require officers to literally “order [demonstrators] from the Capitol Grounds” before making any arrest.102

In the alternative, however, the Dellums Court held that Cox would have required a warning even if § 124 had not.103 According to the Court, because “the Capitol Police had in the past allowed persons invited to the Capitol by Members [of Congress] to come and go freely,”

100. Id. at 180.
101. Id.
102. Id. at 179, 181 (“[A]n order to quit must precede arrests under 9 D.C. Code § 124.”). Whether officer had given such a warning before arresting the plaintiffs was a question of fact that the jury had resolved in the plaintiffs’ favor. Id. at 183–84.
103. Id. at 183.
the officers' decision to "step[] aside on being told [that Representative Dellums] had invited the marchers to meet with [him]" amounted to "an unwritten 'permit'... to assemble on the Capitol Grounds and steps." In light of that unwritten permit, the Court interpreted Cox to require that no arrest occur "until an order to disperse had been given which was itself based on permissible considerations," i.e., considerations other than the demonstrators' viewpoint. Because the facts of Dellums were "very similar" to those of Cox, the D.C. Circuit had no occasion to consider the constitutional origins of the right it enforced. Nonetheless, the Court upheld the jury's determinations that officers had violated the demonstrators' rights under both the First and Fourth Amendments, thereby suggesting that it regarded the right to fair warning as intertwined with those provisions.

2. Papineau v. Parmley — On May 18, 1997, several dozen members of the Onondaga Nation gathered on private property to protest a new tax on the sale of tobacco products. The demonstrators chose that particular location for their protest in part because the property abutted an interstate highway. In response to the demonstration, seventy state police officers gathered, all dressed in riot gear. After the protest began, a group of demonstrators attempted to enter the interstate highway in order to "distribute literature." These actions potentially violated N.Y. Penal Law § 240.20(5), which prohibited "obstruct[ing] vehicular or pedestrian traffic" with "intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof." Subsequently, however, other protestors persuaded those in the roadway to abandon their efforts. After the small group of demonstrators had rejoined the main protest, the officers formed a "skirmish line," waited "for no more than thirty-five seconds," and then

104. Id. at 182 & n.34.
105. Id. at 183.
106. Id. at 182 n.35.
107. See id. at 176, 184, 195.
109. Id.
110. Id. The plaintiffs' evidence suggested that some of the officers spoke of the protestors' need "to get their asses kicked." Id.
111. Id.
112. Id. at 59.
113. Id. at 53.
"charged into the demonstration."114 After reaching the protestors, the officers allegedly "began arresting protesters . . . indiscriminately, assaulting plaintiffs, beating them with their riot batons, dragging them by their hair and kicking them."115

Considering this record, the Second Circuit held that qualified immunity would not protect the officers from the demonstrators' claims under the First and Fourth Amendments.116 Unlike the officers in Cox and Dellums, the officers in Papineau did not permit any of the demonstrators to attempt to distribute literature on a highway.117 Instead, because officers dispersed the protest only after the group that had entered the highway had rejoined those who had not, the question was "whether a reasonable police officer would have believed that he or she could disperse the otherwise peaceable demonstration because a few [unidentifiable] individuals within that crowd had violated the law at an earlier time . . . ."118 The Second Circuit, with then-Judge Sonia Sotomayor writing for the Court, first held that the transgressions of a few could not justify the officers' decision to disperse the entire demonstration.119

However, the Second Circuit went further, concluding that "even if the [officers] had a lawful basis to interfere with the demonstration," the plaintiffs "still enjoyed First Amendment protection, and absent imminent harm, the troopers could not simply disperse them without giving fair warning."120 Implicit in the requirement, the Court noted, was an opportunity for "the ordinary citizen to conform his or her conduct to the law."121 Thus, relying on Cox and Dellums, among other cases, the Second Circuit effectively held that, even where officers can interfere with a peaceful demonstration, the First Amendment entitles protestors to

114. Id.
115. Id.
116. Id. at 60–61, 63.
117. Id.
118. Id. at 59–60.
119. Id. at 60 ("Defendants could not . . . have reasonably thought that indiscriminate mass arrests without probable cause were lawful under these circumstances.").
120. Id.
121. Id. (quoting City of Chi. v. Morales, 527 U.S. 41, 58 (1999)).
a warning that will permit them to voluntarily comply with the officers’ directives. 122

The Second Circuit clearly grounded this right to fair warning in the First Amendment, describing the officers’ failure to warn as a “separate First Amendment violation . . . .” 123 Nonetheless, the right the Second Circuit described differed subtly from the right recognized in Cox and Dellums. On one hand, the Second Circuit assumed that, because some demonstrators had acted illegally, the officers had a legitimate basis for ordering the entire group to disperse.124 But on the other, the majority of demonstrators had violated no statute.125 As in Cox, then, the demonstrators could infer from context that they engaged in protected conduct. The basis for that inference, however, had changed. No longer could the Court claim that protestors were “demonstrating where [officers] told [them they] could.”126 In the absence of any permission, reliance on a due process right against “indefensible . . . entrapment” would have been inappropriate.127 Thus, although the Second Circuit analogized the facts it confronted to those in Cox and Dellums, it effectively identified a new basis for demonstrators’ justifiable belief that they acted appropriately: the demonstrators’ “undeniable right” to engage in “peaceable protest activities.” 128

122. Id. at 60–61 & n.6.
123. Id. at 60.
124. Id.
125. Id.
126. Cox II, 379 U.S. at 571.
127. Id. (quoting Raley v. Ohio, 360 U.S. 423, 426 (1959)).
128. Papineau, 465 F.3d at 60. As this Article went through First Amendment Law Review’s publication process, the Second Circuit issued another opinion addressing demonstrators’ right to fair warning. See Garcia v. Does, 12-2634-cv, 2014 WL 4099270 (2d Cir. Aug. 21, 2014). While time and editorial constraints have not permitted a full incorporation of Garcia into the Article’s analysis, that case’s discussion of demonstrators’ right to fair warning appears broadly consistent with the Article’s fundamental thesis. Specifically, the majority approved of Papineau’s First Amendment analysis, id. at *6, and held that the right to fair warning protected demonstrators who had received only implicit permission to engage in the conduct for which officers later arrested them, see id. at *7 (framing the issue as “whether a reasonable police officer (in the position of the officers who decided to arrest plaintiffs) should have known that under the totality of the circumstances, the conduct of the police could have been reasonably understood by plaintiffs as an implicit invitation to enter the Bridge roadway, and thus should have
3. Buck v. City of Albuquerque — On March 20, 2003, between five hundred and a thousand demonstrators gathered to protest the United States’ invasion of Iraq.\(^{129}\) Although the protestors lacked a parade permit, they met with the Albuquerque Police Department before the demonstration and arranged to have officers close a street.\(^{130}\) During the demonstration, the crowd began “spilling over onto” adjacent streets, causing officers to close a larger area than they had originally planned.\(^{131}\)

\(^{129}\) Buck v. City of Albuquerque, 549 F.3d 1269, 1274 (10th Cir. 2008) (noting that the 10th Circuit had described the relevant facts in Fogarty v. Gallegos); Fogarty v. Gallegos, 523 F.3d 1147, 1150 (10th Cir. 2008).

\(^{130}\) Fogarty, 523 F.3d at 1150.

\(^{131}\) Id. at 1151.
The protestors began marching down the newly closed street, and officers eventually formed a skirmish line in order to halt the march's progress. After being stopped, the demonstrators returned to their starting point. As they arrived, officers announced over a loudspeaker system that the demonstrators should disperse. Many demonstrators testified that, because of the surrounding noise, they could not understand officers' "garbled and unintelligible" warnings. When the demonstrators did not disperse, officers fired tear gas into the crowd and began making arrests.

Buck involved several plaintiffs whom officers had arrested. The officers argued that they had probable cause to believe that the plaintiffs had violated two laws: Albuquerque's parade permit ordinance; and section 66-7-339 of the New Mexico statutes, which prohibited walking "along and upon" a roadway "[w]here sidewalks are provided." Although the parties did not dispute that the demonstrators had proceeded "along and upon" the streets without first obtaining a parade permit, the Tenth Circuit noted that the officers had both closed streets before the demonstrators reached them and "direct[ed] the progress . . . of the procession." The Tenth Circuit concluded that these actions "sanctioned the protestors walking along the road and waived the permit requirement." Because officers had permitted the very violations for which they arrested the plaintiffs, the court concluded that

132. *Id.* The opinion in *Fogarty* suggests that the demonstrators may have proceeded as many as "four blocks" from the area they originally arranged to occupy. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* The named plaintiff in *Fogarty* provides an example of the type of demonstrator hypothesized in the introduction: "Fogarty, a physician and faculty member at [the University of New Mexico], was accompanied by his wife, a friend, and his friend's fiancee. Fogarty observed that several streets had been closed and assumed that police were permitting demonstrators to march in the streets. Fogarty then joined the main group of marchers . . . ." *Id.*

136. *Id.* at 1151–52.

137. *Buck* v. City of Albuquerque, 549 F.3d 1269, 1277–79 (10th Cir. 2008).


139. *Buck*, 549 F.3d at 1283.

140. *Id.* at 1284. The court also suggested that officers had granted "a *de facto* parade permit." *Id.* at 1283.
they lacked probable cause and thus had violated the plaintiffs' clearly established rights under the Fourth Amendment.\footnote{141}

Although the Tenth Circuit's opinion in \textit{Buck} did not cite \textit{Cox}, the reasoning applied in those two cases is strikingly similar. Each case held that officers could not constitutionally arrest demonstrators for conduct that the officers had permitted. But \textit{Buck} goes further than \textit{Cox}. Whereas the protestors in \textit{Cox} demonstrated only where officers had explicitly permitted them to do so, the protestors in \textit{Buck} exceeded the bounds of their original agreement with police.\footnote{142} Police officers thus had not explicitly permitted the conduct at issue in \textit{Buck}, a fact that the Tenth Circuit implicitly recognized when it stated that the officers' conduct "\textit{may have been interpreted} as . . . sanctioning . . . the demonstration."\footnote{143} Nonetheless, \textit{Buck}'s analysis seems to logically extend the reasoning in \textit{Cox}: demonstrators in large protests often will not know the scope of any agreement their leaders have made with the police and will look to officers for guidance on what is permissible. Indeed, some of the demonstrators in question testified that they had done precisely that.\footnote{144} Yet, focusing on the officers' conduct magnifies the concerns that the dissenters expressed in \textit{Cox}. Officers may not have voluntarily closed the streets onto which demonstrators "\textit{spill[ed]}," and may instead have waited to stop the demonstrators' progress only because they lacked the manpower necessary to comfortably do so.\footnote{145} Thus, the Tenth Circuit may have attributed to officer discretion actions that demonstrators had effectively compelled.

4. \textit{Vodak v. City of Chicago} — Like \textit{Buck}, \textit{Vodak} involved a protest against the United States' 2003 invasion of Iraq.\footnote{146} On March 20, 2003, eight thousand demonstrators gathered in downtown Chicago.\footnote{147} A city ordinance required a permit for "any march, procession or other similar activity . . . upon any public street . . . which requires . . . police

\begin{footnotes}
\footnote{141} Id. at 1286.
\footnote{142} Fogarty v. Gallegos, 523 F.3d 1147, 1150–52 (10th Cir. 2008).
\footnote{143} Buck, 549 F.3d at 1285 (emphasis added).
\footnote{144} Fogarty, 523 F.3d at 1150–51 ("Fogarty observed that several streets had been closed and assumed that police were permitting demonstrators to march in the streets. Fogarty then joined the main group of marchers . . . .").
\footnote{145} Id.
\footnote{146} Vodak v. City of Chi., 639 F.3d 738, 740 (7th Cir. 2011).
\footnote{147} Id. at 742.
\end{footnotes}
officers to stop or reroute vehicular traffic . . . . 148 To obtain such a permit, applicants needed to specify the date and the route of the march and to give the city two days in which to process their applications. 149 In Vodak, however, the demonstrators could not specify a date for their protest because they wanted their march to coincide with the start of the war. 150 In such situations, the “police, as a matter of uncodified practice, [would] sometimes waive the requirement of a permit.” 151

Because the demonstrators had not obtained a permit from the city, they had not specified the exact route that their march would take. 152 At the beginning of the march, the organizers of the demonstration informed the police that they intended to proceed north up one of Chicago’s major north-south arteries and then disperse. 153 For unknown reasons, however, many of the demonstrators did not proceed as far north as the organizers had planned, and instead turned west. 154 The police became concerned that the marchers’ westward progression would block another of Chicago’s north-south arteries, Michigan Avenue. 155 To prevent this, the officers formed a barricade in front of Michigan Avenue and ordered marchers through a bullhorn not to enter that street. 156 The marchers reversed course, proceeded five blocks south past streets that officers had barricaded, and then turned again toward Michigan Avenue on the first street that officers had not blocked. 157 Rather than once again commanding demonstrators not to enter Michigan Avenue, officers blocked the march on both sides, trapping both demonstrators and passers-by, and then made approximately nine hundred arrests. 158

The Seventh Circuit held that these arrests violated clearly established Fourth Amendment rights. 159 According to the court, because officers had permitted the march, but had not insisted on a specified

148. Id. at 741 (citing CHI. MUNIC. CODE § 10-8-330).
149. Id.
150. Id.
151. Id.
152. Id. at 741–42.
153. Id. at 742.
154. Id. at 743.
155. Id.
156. Id.
157. Id.
158. Id. at 740, 744.
159. Id. at 746–47.
route such that they could expect demonstrators to know of that route, the officers needed to warn the demonstrators not to proceed toward Michigan Avenue before making any arrests.\(^{160}\) Although officers had attempted to provide such warnings through bull horns, the Seventh Circuit concluded that a bull horn “was no mechanism . . . for conveying a command to thousands of people stretched out [over several blocks].”\(^{161}\) Thus, this was a case in which “the police [said] to a person go ahead and march and then, five minutes later, having revoked the permission for the march without notice to anyone, [arrested] the person for having marched without police permission.”\(^{162}\)

The Seventh Circuit found that the First Amendment played only a “background role” in its analysis, and it characterized the demonstrators’ claims under that amendment as “largely duplicative.”\(^{163}\) The background role to which the court referred consisted largely of limitations on the city’s permitting scheme. According to the court, the First Amendment did not permit the city to “flatly ban groups of people from spontaneously gathering on sidewalks or in public parks in response to a dramatic news events,” although it would not have “forbidden the Chicago police to require of the organizers . . . a clear idea of the intended march route, to hold them to it, and to prepare in advance reasonable measures for preventing the demonstration from spilling over the boundaries.”\(^{164}\) The problem, then, was simply that officers had exercised their discretion under the First Amendment poorly, permitting a spontaneous march without first requiring demonstrators to identify a route on which the officers could later insist.\(^{165}\)

Of course, whether or not officers had required them to do so, the demonstrators had informed the police of their planned route, and the police had turned out “in force” along that route.\(^{166}\) Thus, \textit{Vodak} resembles \textit{Buck} in that demonstrators’ conduct exceeded the bounds of

---

160. \textit{Id.} at 745.
161. \textit{Id.} at 746.
162. \textit{Id.} at 746–47.
163. \textit{Id.} at 750–51.
164. \textit{Id.} at 749–50.
165. See \textit{id.} at 746 (“The underlying problem is the basic idiocy of a permit system that does not allow a permit for a march to be granted if the date of the march can’t be fixed in advance, but does allow the police to waive the permit requirement just by not prohibiting the demonstration.”).
166. \textit{Id.} at 742–43.
what officers might have understood themselves to authorize. Much like in *Buck*, where the Tenth Circuit found that officers had, by their conduct, implicitly permitted the march’s expansion, the Seventh Circuit in *Vodak* faulted the officers for not clearly delineating the scope of what they would allow.\(^{167}\) In effect, by explicitly permitting something uncertain, the police had effectively permitted anything they could not emphatically proscribe at a later time. Nonetheless, whether officers’ previous insistence on a particular route would have justified the arrests in question is unclear. The Seventh Circuit did not explain why a route that organizers had announced to officers was less likely to be known to 8,000 demonstrators than one that organizers had announced *and* on which officers had insisted. Moreover, that subtle difference has nothing to do with many of the states of mind that the Seventh Circuit attributed to the arrestees. According to the court, many arrestees may have “simply decided that [the planned route] was too long a walk,” “others may simply have been following the crowd, thinking that it either was a proper route for the march or a way out,” and still others “weren’t part of the march but were just trying to get home.”\(^{168}\) Official insistence on a particular route, then, arguably would not have weakened the arrestees’ claims of innocence.

**C. The Contours of Demonstrators’ Right to Fair Warning**

Despite the basic similarities between *Cox, Dellums, Papineau, Buck*, and *Vodak*, these cases differ significantly in their analyses of arrests of protestors. Specifically, whereas *Dellums* and *Papineau* meaningfully incorporate the First Amendment into their analysis, *Buck* and *Vodak* do not. Moreover, while *Papineau, Buck*, and *Vodak* each subtly broaden the right recognized in *Cox*, each does so differently: *Papineau* identifies a new situation in which officers must warn demonstrators, *Buck* predicates the need for warning on officers’ grant of implicit permission, and *Vodak* interprets officers to have permitted everything they did not explicitly forbid. Distilling these disparate cases into a set of rules or principles is not an easy task. Nonetheless, undertaking that task will help courts determine sensible boundaries for

\(^{167}\) *Id.* at 746, 750.

\(^{168}\) *Id.* at 743–45.
the right to fair warning in the many situations that the future may present. Section C contains two parts. The first identifies the set of principles on which agreement exists among all the courts to have considered the right to fair warning. The second attempts to pose the questions that courts have not yet resolved, questions on which the remainder of the article will focus.

1. Points of agreement — Despite their differences, each of the cases discussed above shares basic similarities, and these similarities delineate the fundamental contours of the right to fair warning. First, each of the cases dealt with a statute or ordinance that raised difficult First Amendment questions, yet also promoted a legitimate governmental interest. The most obvious example is *Dellums*, in which a court had previously held that the relevant statute violated the First Amendment, but had attempted to give that statute a saving construction that would allow officers to vindicate its underlying purpose. The statutes at issue in the remaining cases also implicated First Amendment rights, as the courts deciding those cases frequently acknowledged. For example, at least one Circuit Court of Appeals has concluded that the First Amendment prohibits statutes from imposing strict liability for parading without a permit, exactly what the legislative schemes at issue in *Vodak*

169. Although the Supreme Court acknowledged in *Cox* that the relevant conduct was “intertwined with expression and association,” it took great pains to emphasize the validity of the statute in question, which several of its members had written. *Cox II*, 379 U.S. at 563–64. Nonetheless, the Court applied a less exacting standard of First Amendment review in *Cox* than it had in previous cases involving similar statutes. See *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963) (“[F]reedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view.”) (quoting *Terminiello v. City of Chi.*, 337 U.S. 1, 4–5 (1949)). Many contemporary commentators noticed the shift in the Court’s analysis. See Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 9 (1965). Moreover, the Court has since rejected the argument that a legislature may restrict speech near courthouses in order to prevent members of the public from believing that lobbying affected courts’ decisions. See *United States v. Grace*, 461 U.S. 171, 183 (1983).

and Buck did.\textsuperscript{172} Similarly, the Supreme Court has frequently emphasized that the First Amendment protects a wide array of expressive activity from prosecution under statutes that criminalize breach of the peace or disorderly conduct, precisely the type of statute at issue in \textit{Papineau}.\textsuperscript{173} Notwithstanding the fact that these statutes raised First Amendment concerns, however, each also promoted a governmental interest that the Supreme Court has recognized as legitimate.\textsuperscript{174} Moreover, narrower tailoring might not have prevented the statutes at issue from implicating First Amendment rights.\textsuperscript{175} Thus, the courts in each of the cases described above might have reasonably feared that the conflict at issue pitted demonstrators’ First Amendment rights against a legislative scheme that narrowly pursued legitimate interests.

Second, in each case other than \textit{Papineau}, officers permitted the demonstrators to engage in at least some of the relevant conduct.\textsuperscript{176} Given that each of the statutes at issue implicated demonstrators’ First Amendment rights, the officers’ grants of permission suggest that they understood that the demonstrators might engage in protected conduct. While the officers’ motivations are unclear, as a matter of factual record, the courts considering their conduct noted the potential effect First Amendment considerations may have had on the officers’ actions.\textsuperscript{177} Indeed, in both \textit{Vodak} and \textit{Dellums}, the officers had adopted unwritten practices for enforcing the relevant statutes in situations that presented

\begin{itemize}
\item \textsuperscript{172} Am.-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 613 (6th Cir. 2005). See \textit{Vodak}, 639 F.3d at 741; Buck v. City of Albuquerque, 549 F.3d 1269, 1283 (10th Cir. 2008).
\item \textsuperscript{174} \textit{See Cox II}, 379 U.S. at 574.
\item \textsuperscript{175} \textit{See Vodak}, 639 F.3d at 741 (“[W]hen a march is planned for the unknown date of some triggering event, ... even two days’ notice is infeasible ...”); \textit{id.} at 749 (requiring legislatures to permit people to “spontaneously gather[] on sidewalks or in public parks in response to a dramatic news event”).
\item \textsuperscript{176} \textit{See Cox II}, 379 U.S. at 571; \textit{Vodak}, 639 F.3d at 741; Buck, 549 F.3d at 1283; Dellums v. Powell, 566 F.2d 167, 173 (D.C. Cir. 1977).
\item \textsuperscript{177} \textit{See Vodak}, 639 F.3d at 741 (“[W]hen a march is planned for the unknown date of some triggering event, so that even two days’ notice is infeasible, the police, as a matter of uncodified practice, will sometimes waive the requirement of a permit.”); \textit{id.} at 749 (requiring legislatures to permit people to “spontaneously gather[] on sidewalks or in public parks in response to a dramatic news event”); \textit{id.} at 751 (noting that the First Amendment played a “background role” in the case).
\end{itemize}
First Amendment concerns. In light of the First Amendment concerns at issue, the officers granting permission may not have simply exercised their discretion to allow proscribed conduct, and may instead have acknowledged and complied with legal constraints on their ability to enforce those proscriptions. Moreover, even assuming that officers had discretion over whether to permit the relevant conduct, the fact that they had granted permission suggested to the courts that they had initially resolved the apparent conflict between the purposes of the relevant statutes, on the one hand, and the demonstrators’ rights, on the other, in favor of the demonstrators.

Third, in each of the cases described above, the court emphasized the demonstrators’ states of mind. The analysis of demonstrators’ states of mind, moreover, focused not upon the mens rea requirements of the statutes officers sought to enforce, but instead upon demonstrators’ understandings of either the permission that officers had extended or the limitations that officers sought to impose. Two of the courts quoted Cox’s prohibition on “convicting a citizen for exercising a privilege which the State had clearly told him was available to him.”

178. See id. at 741 (“[W]hen a march is planned for the unknown date of some triggering event, so that even two days’ notice is infeasible, the police, as a matter of uncodified practice, will sometimes waive the requirement of a permit.”); Dellums, 566 F.2d at 178 (“[S]tandard practice at the Capitol would be for [dispersal] orders to be given because it was the experience of the Capitol Police that many people were not aware of the statutes governing conduct at the Capitol and would, upon being notified of a potential violation, bring their conduct into line with the law.”); id. at 182 n.34 (“[A]ny plaintiff familiar with precedents of administration of the Capitol Grounds statute could reasonably have concluded that ‘permits’ had been issued, since the Capitol Police had in the past allowed persons invited to the Capitol by Members to come and go freely.”).

179. Cox II, 379 U.S. at 571; Vodak, 639 F.3d at 745 (“[Demonstrators] may simply have been following the crowd, thinking that it either was a proper route for the march or a way out.”); Buck, 549 F.3d at 1283 (“[A]ny action by APD officers acquiescing to an unplanned march could reasonably have been interpreted as a waiver of the parade permit requirement.”); Papineau v. Parmley, 465 F.3d 46, 60 (2d Cir. 2006) (noting that demonstrators must know the relevant law and have an opportunity to conform to it); Dellums, 566 F.2d at 182 n.34 (“[A]ny plaintiff familiar with precedents of administration of the Capitol Grounds statute could reasonably have concluded that ‘permits’ had been issued . . . .”).

180. Cox II, 379 U.S. at 571; Vodak, 639 F.3d at 745–46; Buck, 549 F.3d at 1283; Papineau, 465 F.3d at 60; Dellums, 566 F.2d at 182 n.34.

181. Vodak, 639 F.3d at 747; Dellums, 566 F.2d at 182.
In contrast, the other two focused on what demonstrators could have reasonably understood about officers' commands. Finally, at least two courts expressed concern that bystanders and passers-by might have innocently joined or become caught up in the relevant demonstrations. Thus, each court, independently of the statute at issue, expressed concern about whether the arrestees could have reasonably understood that they engaged in conduct that the officers intended to prosecute.

Finally, when assessing the demonstrators' states of mind, several courts concluded that the actions or culpability of some would not justify the arrests of many. Of course, certain types of conduct are so clearly illegal that they permit officers to impute criminal intentions to a large group of people. But where, as in the cases described above, demonstrators might misapprehend the boundary between the permissible and the impermissible, courts have exercised great care to prohibit officers from enforcing the statutes at issue too broadly.

The four similarities discussed above reveal the fundamental contours of the right to fair warning. Specifically, where statutes or ordinances impose legitimate restrictions that nonetheless implicate demonstrators' First Amendment rights, courts will examine not only

---

182. Buck, 549 F.3d at 1283; Papineau, 465 F.3d at 60.
183. See Vodak, 639 F.3d at 744 ("The police then began culling the trapped herd, arresting marchers along with people who weren't part of the march but were just trying to get home . . . ."); Fogarty v. Gallegos, 523 F.3d 1147, 1151 (10th Cir. 2008) (discussing the case of a passerby who joined a demonstration after "observ[ing] that several streets had been closed and assum[ing] that police were permitting demonstrators to march in the streets.").
184. Vodak, 639 F.3d at 745 ("Maybe the marchers . . . should have guessed that it was a forbidden route as well, and no doubt some did, but others may simply have been following the crowd."); Papineau, 465 F.3d at 60 ("[P]laintiffs had an undeniable right to continue their peaceable protest activities, even when some in the demonstration might have transgressed the law."); Dellums, 566 F.2d at 177, 183 (requiring officers to believe that "plaintiffs as a group were violating the law") (emphasis added).
185. See Cox II, 379 U.S. at 574 ("Nothing we have said here . . . is to be interpreted as sanctioning riotous conduct in any form . . . ."); Carr v. District of Columbia, 587 F.3d 401, 408 (D.C. Cir. 2009); Papineau, 465 F.3d at 60 (noting that, where demonstrators threaten "imminent harm," officers need not provide fair warning).
186. Vodak, 639 F.3d at 746 ("[T]here was no mechanism . . . for conveying a command to thousands of people . . . .")
whether arrestees violated those provisions, but also whether the underlying circumstances would allow demonstrators to reasonably believe that they had engaged in legal conduct. If courts find that demonstrators reasonably, yet mistakenly, believed that they acted legally—either because officers permitted certain conduct or because only a small number of individuals transgressed the relevant prohibitions—then courts will analyze whether officers effectively dispelled that mistaken belief before making arrests. To dispel a reasonable, yet mistaken belief, however, police officers cannot communicate their demands only to a small fraction of demonstrators. Instead, officers must take measures to ensure that those they subject to penalties have each received the relevant warning. Thus, where circumstances raise questions about how certain, problematic statutes apply to demonstrators, the right to fair warning requires officers to provide individualized notice of what the law requires before they arrest demonstrators for engaging in conduct that the demonstrators may reasonably believe is innocent.  

2. Unanswered Questions — The outline of the right to fair warning described above raises as many questions as it answers. Most importantly, as described above, the courts that have vindicated the right to fair warning have attributed that right to different sources. Whereas Cox described the right as one of due process, Vodak grounded the right in the Fourth Amendment’s protection from unreasonable arrests, and Papineau characterized it as an extension of demonstrators’ right to peacefully protest. Each potential basis would change the scope of the right. Thus, understanding the right to fair warning requires determining exactly which constitutional provision creates that right.

Next, analysis of appellate decisions has not answered the two questions raised by Cox. First, when and why do courts focus on officers’ exercise of their discretion, rather than the statute that officers seek to enforce? Undoubtedly, the appellate cases clarify when courts will take

187. Although only Papineau discussed this question, the right to fair notice likely also requires that officers provide demonstrators with an opportunity “to conform [their] conduct to the law.” Papineau, 465 F.3d at 60 (quoting City of Chi. v. Morales, 527 U.S. 41, 58 (1999)).

188. Compare Cox II, 379 U.S. at 571, with Vodak, 639 F.3d at 746, and Papineau, 465 F.3d at 60.
this approach. In each of the cases described above, including Cox, the court did so when the statute at issue implicated First Amendment rights. Nonetheless, the mere fact that courts shift their focus in such cases does not explain why they do so. Accordingly, the explanation for the analytical turn that the dissent in Cox found so troubling remains to be seen. Second, and similarly, the appellate decisions have not clarified the circumstances under which officers who have granted permission may revoke it and when, if ever, the officers may base such revocation on the statute that they have permitted demonstrators to violate.

Finally, the court of appeals decisions raise two additional questions about whether the right to fair warning applies more broadly than the Supreme Court recognized in Cox. First, does the right to fair warning apply not only where officers have explicitly permitted demonstrators to engage in certain conduct, as in Cox, but also where officers have done so implicitly, as in Buck and Vodak? Second, can demonstrators reasonably believe that they do not violate the law only when, as in Cox, they have received permission from officers charged with enforcing the law, or did Papineau appropriately recognize that demonstrators' could form such a belief based on the fact that they exercised their "undeniable right" to peacefully protest? As described below, the answers to these questions depend upon the origins of the right to fair warning. Accordingly, with these questions in mind, the Article now shifts to an examination of each of the potential bases.

II. THE ORIGINS OF DEMONSTRATORS' RIGHT TO FAIR WARNING

The foregoing discussion suggests that the right to fair warning, while intuitively compelling, remains underdeveloped from a theoretical perspective. Most importantly, courts have not clearly identified the constitutional origin of the right to fair warning. Part II analyzes the three obvious candidates for that origin: the Due Process Clause, the Fourth Amendment, and the First Amendment. Each subpart examines one of these provisions in turn: Part II.A considers the Due Process Clause, Part II.B the Fourth Amendment, and Part II.C the First Amendment. After describing the doctrine that has developed under the relevant

189. See Cox II, 379 U.S. at 574.
190. Papineau, 465 F.3d at 60.
constitutional provision, each subpart examines, first, why that provision might provide a plausible explanation for demonstrators’ right to fair warning and, second, the potential problems that might result from attributing the right to that provision.

A. The Due Process Clause

When the Supreme Court first recognized demonstrators’ right to fair warning in Cox, it referred specifically to the “Due Process Clause” and to a line of jurisprudence it had developed under that provision. The Due Process Clause protects any “person” from deprivation of “life, liberty, or property, without due process of law.” In the context of criminal prosecutions, which implicate citizens’ liberty interests, due process requires that a government provide “fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.” The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” Ordinarily, a legislature provides the necessary fair warning simply by enacting a statute, publishing it, and giving those affected a reasonable opportunity to conform their conduct to it.

Nonetheless, the Supreme Court has identified three related circumstances in which the existence of a statute alone does not provide fair warning. “First, the 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.” Second, “the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to

192. U.S. CONST. amend. V. See also U.S. CONST. amend. XIV.
conduct clearly covered." Finally, "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." Courts considering vagueness challenges apply a more exacting standard of review where a statute curtails the exercise of constitutional rights, including First Amendment rights. In such circumstances, courts seek to ensure not only that the statute has adequately warned the accused about the illegality of her conduct, but also that the statute has not, by its vagueness, frustrated the exercise of constitutional rights by forcing individuals to avoid a wider swath of potentially covered conduct than the statute can legitimately proscribe. Building on these principles, the Supreme Court has further recognized that the actions of officials may create uncertainty about a statute's application, thereby depriving individuals of fair warning. In Raley v. Ohio, the precedent on which Cox relied, the Supreme Court considered a case concerning four Ohio residents who had appeared to testify about "subversive activities" before the state's "Un-American Activities Commission." During the course of their testimony, the Commission's chairman advised the witnesses that, if they believed their testimony would incriminate them, they could invoke Ohio's constitutional privilege against self-incrimination. Following the witnesses' invocation of that privilege, however, the State indicted them for failing to answer, and the Ohio Supreme Court concluded that the

198. Id.
199. Id.
200. See Reno v. ACLU, 521 U.S. 844, 870 (1997) ("Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment."); Colautti v. Franklin, 439 U.S. 379, 391 (1979) (finding lack of notice especially problematic "where the uncertainty induced . . . threatens to inhibit the exercise of constitutionally protected rights"); Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971) ("But the vice of the ordinance lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free assembly and association.").
203. Id. at 424–27.
204. Id. at 429–32.
privilege did not protect them from criminal conviction.\textsuperscript{205} Considering this sequence of events, the Supreme Court found a violation of the Due Process Clause. Specifically, the Court concluded that, “[a]fter the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him.”\textsuperscript{206} In reaching this conclusion, the Court invoked the Due Process Clause’s prohibition against convictions under “vague” or “[i]nexplicably contradictory” statutes.\textsuperscript{207} But it also regarded the retraction of the immunity defense as a more troubling violation of the Due Process Clause, finding that it involved “active misleading.”\textsuperscript{208}

The due process defense recognized in \textit{Raley} appears to have the following characteristics. First, the Court’s holding implies that whoever invokes the defense must show that the relevant official “sp[oke] for the State” and “clearly told” the defendant that her actions were permissible.\textsuperscript{209} Second, because the Due Process Clause prohibits conviction only where a defendant cannot “reasonably understand” that she has violated the law,\textsuperscript{210} those who hope to rely on official instructions must show that they had no reasonable basis for doubting that the requirements discussed above were met. Finally, because “the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law,”\textsuperscript{211} officials may prevent further reliance on their mistaken instructions by correcting those instructions and giving individuals a reasonable opportunity to conform their conduct to the newly disclosed requirements.

As described above, \textit{Raley’s} due process defense resembles the defense recognized in Model Penal Code § 2.04(3)(b)(iv). Under that provision, a “belief that conduct does not legally constitute an offense is a defense” so long as an individual “acts in reasonable reliance upon an official statement of the law . . . contained in . . . an official interpretation

\textsuperscript{205} Id. at 432–34.
\textsuperscript{206} Id. at 425–26.
\textsuperscript{207} Id. at 438.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at 425–26.
\textsuperscript{210} United States v. Harriss, 347 U.S. 612, 617 (1954).
\textsuperscript{211} City of Chi. v. Morales, 527 U.S. 41, 58 (1999).
of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.\textsuperscript{212} In exploring the contours of the defense from \textit{Raley}, courts have frequently analogized that defense to the one recognized in the Model Penal Code. Courts doing so have generally concluded that the official who offers the interpretation on which a defendant hopes to rely must actually possess, rather than merely appear to possess, the responsibility described by the Code.\textsuperscript{213} Similarly, courts have held that a defendant may not rely on statements that an officer has made to others, rather than to the defendant herself.\textsuperscript{214} Thus, the analogy to Model Penal Code § 2.04(3)(b)(iv) has reinforced the narrowness of \textit{Raley}'s requirements that an official "speak[] for the State" and "clearly t[ell]" defendants that a privilege is available.\textsuperscript{215} To qualify for the defense, defendants must obtain personal guarantees about the legality of questionable conduct, and they must carefully distinguish those with apparent authority from those with actual authority, trusting only the latter.

The cases vindicating demonstrators' rights to fair warning provide several reasons to believe that the Due Process Clause creates that right. First and foremost, as noted above, \textit{Cox} specifically cited to the \textit{Raley} defense when first recognizing demonstrators' right to fair warning.\textsuperscript{216} More generally, in several of the cases discussed,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{212} \textit{MODEL PENAL CODE} § 2.04(3)(b)(iv) (2014).
\item \textsuperscript{213} See, e.g., \textit{United States v. Gutierrez-Gonzalez}, 184 F.3d 1160, 1167-68 (10th Cir. 1999) ("[W]e hold that the defense of entrapment by estoppel requires that the 'government agent' be a government official or agency responsible for interpreting, administering, or enforcing the law defining the offense." (collecting cases)). Nonetheless, at least one judge has required instead that an official only appear to the defendant to have interpretive authority. See \textit{United States v. Barker}, 546 F.2d 940, 954 (D.C. Cir. 1976) ("[A] citizen should have a legal defense to a criminal charge arising out of an unlawful arrest or search which he has aided in the reasonable belief that the individual who solicited his assistance was a duly authorized officer of the law."). The majority of circuit courts have rejected Judge Wilkey's rationale. See, e.g., \textit{United States v. Pitt}, 193 F.3d 751, 757-58 & n.7 (3d Cir. 1999) (collecting cases).
\item \textsuperscript{214} See \textit{United States v. Eaton}, 179 F.3d 1328, 1332 (11th Cir. 1999) ("For a statement to trigger an entrapment-by-estoppel defense, it must be made directly to the defendant, not to others.").
\item \textsuperscript{216} \textit{Cox II}, 379 U.S. at 571.
\end{enumerate}
\end{footnotesize}
demonstrators relied on the instructions of police officers who bore "responsibility for the . . . enforcement of the law defining the offense," and thus could arguably give an authoritative interpretation of the law under Model Penal Code § 2.04(3)(b)(iv). For example, in Vodak, the police department could "waive" the requirement of a parade permit. Similarly, in Dellums, the Capitol Police had generated "precedents of administration" for "the Capitol Grounds statute." Thus, police officers frequently administer the traffic regulations that restrict demonstrators' ability to protest, and this fact provides the foundation necessary for demonstrators to reasonably rely on officers' commands as "official statement[s] of the law," which give rise to a due process defense.

Second, demonstrators' reliance on on-the-spot instructions by police officers often implicates the Due Process Clause's vagueness concerns. For example, in Dellums, a court had previously invalidated the statute at issue—which largely banned parading on the Capitol Grounds—as unduly vague because the officers administering the statute had the power to suspend its prohibitions. According to the Dellums Court, the power of suspension prevented demonstrators from "knowing whether they might be in violation of the law . . . except by . . . inquiries to . . . members of the Capitol Police Force." Officers have had a

217. MODEL PENAL CODE § 2.04(3)(b)(iv) (2014); Cox II, 379 U.S. at 571 ("[T]he highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did."); Vodak v. City of Chi., 639 F.3d 738, 741 (7th Cir. 2011) (noting that police officers could "waive the requirement of a permit"); Buck v. City of Albuquerque, 549 F.3d 1269, 1284 (10th Cir. 2008) (same); Dellums v. Powell, 566 F.2d 167, 182 n.34 (D.C. Cir. 1977) (noting that officers could issue "permits" and had in fact created "precedents of administration" governing the issuance of permits). But see Pitt, 193 F.3d at 757–58 & n.7 ("[T]he use of the defense of public authority [is limited] to those situations where the government agent in fact had the authority to empower the defendant to perform the acts in question").

218. Vodak, 639 F.3d at 741.
219. Dellums, 566 F.2d at 182 n.34.
221. See supra text accompanying notes 196–201.
222. Dellums, 566 F.2d at 177 n.12, 179–80.
223. Id. at 179.
similar ability to suspend parade permit requirements in several of the
cases that have protected demonstrators' rights to fair warning.\textsuperscript{224}

Thus, in these cases, as in \textit{Dellums}, ambiguity exists as to what
conduct an ordinance covers,\textsuperscript{225} and demonstrators cannot determine
what that ordinance prohibits without asking the officers charged with
enforcing it. In \textit{Dellums}, the D.C. Circuit concluded that, in order to
overcome the statute's vagueness problem, officers had to issue "an
order to quit" before making any arrests.\textsuperscript{226} In other words, because only
the officers could dispel the underlying vagueness problem, the court
asked not whether the officers had clearly told demonstrators that they
\textit{could} engage in the underlying conduct, but instead whether officers had
clearly told them they \textit{could not}. While such an approach does not
straightforwardly apply the \textit{Raley} defense invoked in \textit{Cox}, it recognizes a
more fundamental due process problem: namely, the fact that
demonstrators cannot reasonably discern what the law requires before
they have received the benefit of an official interpretation.

Finally, the fact that the cases recognizing demonstrators' right
to fair warning all implicate First Amendment rights may only sharpen,
rather than displace, the inquiry under the Due Process Clause.\textsuperscript{227}
Where litigants challenge a statute that restricts First Amendment rights
on vagueness grounds, the Supreme Court has described First Amendment
concerns as "related" to those raised by the Due Process Clause.\textsuperscript{228} When
reviewing such challenges, a court seeks not only to ensure notice—a
core due process concern—but also to avoid chilling the exercise of

\textsuperscript{224}. \textit{See Vodak v. City of Chi.}, 639 F.3d 738, 741 (7th Cir. 2011) ("[T]he
police, as a matter of uncodified practice, will sometimes waive the requirement of a
permit."); \textit{Buck v. City of Albuquerque}, 549 F.3d 1269, 1283 (10th Cir. 2008)
(finding that officers, by closing streets and "directing the procession," had
"essentially" granted "a de facto parade permit"). \textit{Cf. Cox II}, 379 U.S. at 571 ("[T]he
highest police officials of the city, in the presence of the Sheriff and Mayor, in effect
told the demonstrators that they could meet where they did.").


\textsuperscript{226}. \textit{Dellums}, 566 F.2d at 181.

\textsuperscript{227}. \textit{See Colautti v. Franklin}, 439 U.S. 379, 391 (1979) (finding lack of notice
especially problematic "where the uncertainty induced . . . threatens to inhibit the
exercise of constitutionally protected rights"); \textit{Grayned v. City of Rockford}, 408
U.S. 104, 108–09 (1972) ("Third, but related, where a vague statute abu[s] upon
sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise
of [those] freedoms.") (footnotes and internal quotation marks omitted).

\textsuperscript{228}. \textit{Grayned}, 408 U.S. at 109.
"basic First Amendment freedoms." Thus, courts' attention to the First Amendment concerns raised by parade-permitting schemes might indicate only that they apply a heightened form of due process review that incorporates First Amendment principles. Therefore, the Due Process Clause could very plausibly provide the basis for the right to fair warning.

Nonetheless, the Due Process Clause cannot explain everything about the right to fair warning that courts have attributed to demonstrators. First, the Due Process Clause provides little insight into why the Supreme Court disregarded the Sheriff's dispersal order in Cox. Because the Court had rejected Cox's vagueness challenge to the Louisiana statute, resting its holding instead on Cox's defense under Raley, the Sheriff's dispersal order should have precluded Cox from prevailing. In effect, far from telling Cox that he could demonstrate, the dispersal order "clearly told" Cox that he could not, revoking officers' earlier permission and reinstating the statute's normal operation. The Supreme Court's stated reason for disregarding the dispersal order—namely, that the Sheriff had not expressed a "valid reason" for that order—does not resonate with the concerns that animate due process review. As described above, the Due Process Clause prohibits holding

229. Id. For a discussion of the Court's concern with chilling the exercise of First Amendment rights, see infra text accompanying notes 295-301. In Grayned, the Court also identified the prevention of "arbitrary and discriminatory enforcement" as a concern that pertained to the Due Process analysis. Grayned, 408 U.S. at 108. But the Supreme Court has also associated that concern with review under the First Amendment. See, e.g., Cox I, 379 U.S. at 557. Thus, both the First Amendment and the Due Process clause protect individuals against "arbitrary and discriminatory enforcement." Grayned, 408 U.S. at 108.

231. Id. at 568, 571.
232. Id. at 571. The dissenters regarded this point as dispositive:
Here the demonstration was permitted to proceed for the period of time that the demonstrators had requested. When they were asked to disband, Cox twice refused. If he could refuse at this point I think he could refuse at any later time as well. But in my view at some point the authorities were entitled to apply the statute and to clear the streets. That point was reached here.

Id. at 593 (White, J., dissenting).

233. Id. at 572 (majority opinion).
someone "criminally responsible for conduct which he could not reasonably understand to be proscribed;" it does not entitle a person who has that understanding, based on both the statute and the instructions of the officer charged with enforcing it, to an account of how their prosecution "[r]elate[s] to any policy" of the statute. Moreover, although the Supreme Court has stated that the Due Process Clause forbids "arbitrary and discriminatory enforcement," reviewing the officers' stated reasons for revoking permission, as the Court did in Cox, regulates only the appearance of such enforcement. Where demonstrators have a mere right to hear a valid reason for their dispersal, little will prevent officers from engaging in precisely the discrimination that the Due Process Clause forbids. Finally, the Cox Court did not engage in the most basic aspects of a discrimination analysis, asking neither whether officers had treated others differently, nor whether the purpose the Court had attributed to the statute provided a legitimate, nondiscriminatory reason for the officers' actions. Thus, whatever motivated the Court to disregard the Sheriff's dispersal order in Cox, that decision appears to have had little to do with the Court's invocation of the Due Process Clause.

Similarly, later decisions invoking Cox have applied neither vagueness review nor the review required by Raley and its progeny. For example, rather than closely examining whether officers enforcing permitting schemes may truly "speak[] for the State," an important element of the Raley defense, these courts often simply assume that the officers can and do. In Buck, the Tenth Circuit concluded that "the officers' conduct essentially amounted to the grant of a de facto parade permit," without discussing whether officers had any authority to make

237. Cf supra text accompanying notes 84–85.
238. Cf Cox II, 379 U.S. at 581 (Black, J., dissenting) (comparing statute's treatment of labor unions to its treatment of other groups).
239. Raley v. Ohio, 360 U.S. 423, 426 (1959). See also United States v. Pitt, 193 F.3d 751, 757–58 & n.7 (3d Cir. 1999) (concluding that "the use of the defense of public authority [is limited] to those situations where the government agent in fact had the authority to empower the defendant to perform the acts in question").
such a grant, either by their conduct or otherwise. Similarly, in Vodak, the Seventh Circuit found that officers could waive the permit requirement "as a matter of uncodified practice," which consisted entirely "in not telling the demonstrators that they need[ed] a permit." In such circumstances, courts risk extending the Raley defense too far. The mere fact that officers enforce a statute or regulation cannot empower them to suspend it. Instead, as commentators have argued, the availability of the Raley defense must turn on legislative intent, the likelihood that the relevant official has carefully studied the scope and effect of a particular law, and the degree to which that official can be held accountable for authorizing otherwise unlawful conduct. As described above, however, the cases recognizing demonstrators' right to fair warning have not considered these complicated questions, suggesting that, if they apply the Raley defense, they do so only superficially.

More importantly, however, the courts considering demonstrators' right to fair warning have turned Raley's second requirement on its head, asking not whether officers "clearly told" demonstrators that they could march, but instead whether they clearly told them they could not. One cannot explain court decisions on the basis that officers' conduct rendered the underlying regulatory regime vague. No court appears to have held that an officer's decision not to enforce a legal provision can render that provision vague under the Due

---

240. Buck v. City of Albuquerque, 549 F.3d 1269, 1283 (10th Cir. 2008).
241. Vodak v. City of Chi., 639 F.3d 738, 741 (7th Cir. 2011).
242. Cf. Pitt, 193 F.3d at 758 ("[O]nly the Director of Customs and the Director of the Drug Enforcement Agency, in conjunction with the approval of the United States Attorney for the subject district, could sanction and authorize the type of conduct in which Pitt and Strube engaged with respect to the charged 468 kilograms of cocaine.").
244. See supra text accompanying notes 232–235.
245. See supra text accompanying notes 221–226.
Process Clause, and for good reason: such a holding would conflict with the "deep-rooted" tradition of "law-enforcement discretion." 246 Indeed, as the Supreme Court noted, "[i]t is . . . simply 'common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.'" 247 If the decision not to enforce rendered enforcement constitutionally impermissible, then officers would have no discretion over "when . . . to enforce city ordinances." 248 In situations where, because of "insufficient resources" or "sheer physical impossibility," officers could not make an initial arrest, enforcement discretion would be eliminated altogether. 249

Furthermore, if a lack of enforcement generates constitutional protection, then demonstrators can confer rights on themselves and each other, a result that is difficult to explain under the Due Process Clause. 250 In Vodak, the Seventh Circuit acknowledged that some demonstrators may not have received any instructions from officers, and instead were "simply . . . following the crowd." 251 In Buck, the fact that demonstrators "spill[ed] over onto" adjacent crosswalks forced officers to close more streets than they had originally planned, which in turn permitted demonstrators to "flood[ ] into" new areas. 252 These examples demonstrate that, if officers need not give explicit permission to trigger demonstrators' rights, then the existence of constitutional protection will

247. Id. (quoting City of Chi. v. Morales, 527 U.S. 41, 62 n.13 (1999)).
248. Id.
249. Id. at 760 (quoting 1 ABA Standards for Criminal Justice 1-4.5, commentary, pp. 1-124 to 1-125 (2d ed. 1980)).
250. United States v. Eaton, 179 F.3d 1328, 1332 (11th Cir. 1999) ("The defense applies only when an official tells a defendant that certain conduct is legal.") (internal quotation marks omitted). Moreover, this result is precisely what the dissenters in Cox feared. Cf. Cox II, 379 U.S. at 588 (Clark, J., dissenting) ("Here the demonstrators were determined to go to the courthouse regardless of what the officials told them regarding the legality of their acts. Here, like the one petitioner in Raley whose conviction was affirmed by an equally divided Court, appellant never relied on the advice or determination of the officer.").
251. Vodak v. City of Chi., 639 F.3d 738, 745 (7th Cir. 2011).
252. Fogarty v. Gallegos, 523 F.3d 1147, 1151 (10th Cir. 2008). See also Buck v. City of Albuquerque, 549 F.3d 1269, 1274 (10th Cir. 2008) (noting that the 10th Circuit had described the relevant facts in Fogarty v. Gallegos).
depend on informational dynamics that officers cannot control. The concern that individuals may misinterpret commands given to third parties has led courts to apply the *Raley* defense only when permission is given “directly to the defendant.” One court has even warned that a different approach would “eviscerate the long-standing notion that ignorance of the law is no defense to a crime” since reasonable mistakes about officers’ interactions with others abound. Thus, courts construing demonstrators’ right to fair warning have consistently regarded that right as broader than the due process right they have recognized in other circumstances.

Finally, the Due Process Clause cannot explain the Second Circuit’s decision in *Papineau v. Parmley*. In *Papineau*, the officers did not give any instructions to the demonstrators. Nor did the Second Circuit characterize the statute at issue, which prohibited obstructing traffic, as vague. Rather, the court reasoned that officers had to give fair warning before dispersing the demonstrators because those demonstrators “had an undeniable right to continue their peaceable protest activities, even when some in the demonstration might have transgressed the law.” In other words, while the demonstrators in *Papineau* had the requisite belief in the legality of their conduct, that belief originated not from uncertainty about what the law required, but instead from the First Amendment’s protections, which required solicitude even where officers had a valid basis for arresting some members of the group. Thus, while the Due Process Clause provides a plausible basis for some aspects of the right to fair warning, it fails to explain others, raising questions about whether it motivates the decisions courts have reached.

---

253. *Cf.* Bert I. Huang, *Shallow Signals*, 126 Harv. L. Rev. 2227, 2230 (2013) (describing how individuals may mistakenly believe that others act legally and imitate them, leading to a “spread of misconduct”).

254. Eaton, 179 F.3d at 1332.

255. *Id.*

256. 465 F.3d 46, 60–61 (2d Cir. 2006).

257. *Id.* at 52–53.

258. *See id.* at 59–60.

259. *Id.* at 60.
B. The Fourth Amendment

In contrast to Cox, which invalidated a criminal conviction, subsequent cases have considered demonstrators’ right to fair warning in the context of § 1983 claims alleging that officers had violated the Fourth Amendment by arresting demonstrators. Under the Fourth Amendment, an officer may arrest a suspect without first obtaining a warrant only if the officer has probable cause to believe that the suspect has committed or is about to commit a crime.\(^{260}\) An officer has probable cause when, viewing “the events leading up to the arrest . . . from the standpoint of an objectively reasonable police officer,” there is a “reasonable ground for the belief of guilt.”\(^{261}\) That belief of guilt, however, must be “particularized with respect to the person to be . . . seized.”\(^{262}\)

Because the Fourth Amendment governs whether or not officers can arrest demonstrators, courts considering demonstrators’ § 1983 claims for false arrest will invoke the Fourth Amendment regardless of whether that provision provides the basis for the right to fair warning. As a result, the question of whether the Fourth Amendment creates the right to fair warning differs from the question of whether courts invoke the Fourth Amendment when prohibiting the arrest of demonstrators who have not received fair warning. To answer the former question, we must ask whether the requirement that officers have probable cause creates the need for fair warning in cases like those discussed here.

At least two courts have perceived a connection between the requirement of probable cause and the need for fair warning.\(^{263}\) In both cases, the courts noted that police officers had discretion to waive the permit requirements they sought to enforce and had in fact granted such a


\(^{262}\) Id. at 371. Because courts view the circumstances from the perspective of a reasonable officer, the arresting officer’s state of mind “is irrelevant to the existence of probable cause,” and the offense an officer identifies when making an arrest need not be the offense that a reasonable officer would suspect. Devenpeck, 543 U.S. at 153–54.

\(^{263}\) See generally Vodak v. City of Chi., 639 F.3d 738 (7th Cir. 2011); Buck v. City of Albuquerque, 549 F.3d 1269 (10th Cir. 2008).
Because police officers could waive these requirements, the crime of parading without a permit effectively had an unwritten element: the absence of a waiver from police officers. In order to have probable cause to arrest demonstrators for parading without a permit, officers needed to have a reasonable basis for believing that this unwritten element had been satisfied. Thus, where officers had previously granted a waiver, they could not have particularized probable cause with respect to a large group of demonstrators until they had provided demonstrators with adequate notice of the revocation of that waiver. A different approach would allow officers to arrest demonstrators simply because the officers had changed their minds, a result the Seventh Circuit found utterly unacceptable in Vodak:

No precedent should be necessary . . . to establish that the Fourth Amendment does not permit the police to say to a person go ahead and march and then, five minutes later, having revoked the permission for the march without notice to anyone, arrest the person for having marched without police permission.\textsuperscript{265}

Thus, according to this reasoning, the right to fair warning originated from the Fourth Amendment because officers needed to provide fair warning before they could have probable cause to believe that they had not waived the permit requirement.

This rationale, while persuasive, nonetheless raises many difficult questions that might lead other reviewing courts to reject it. First, the courts that have propounded this rationale have neither explained why police officers can grant waivers nor examined what procedures they must employ when doing so. Thus, skeptics might reasonably ask why these courts have excepted the parade-permitting ordinances at issue from the general rule that officers may not suspend

\textsuperscript{264} Vodak, 639 F.3d at 741; Buck, 549 F.3d at 1283 ("[O]fficers' conduct essentially amounted to the grant of a \textit{de facto} parade permit, as the officers would have been aware.").

\textsuperscript{265} Vodak, 639 F.3d at 746–47. See also Buck, 549 F.3d at 1283–84.
the criminal law and that the failure to initially enforce an ordinance does not deprive officers of the discretion to do so later.

Moreover, the courts that ground the right to fair warning in the Fourth Amendment have derived the standards they apply from other legal provisions. Officers comply with the Fourth Amendment whenever they enforce a specific criminal statute or ordinance in a reasonable manner. The reasonableness of failing to provide a warning depends not on the Fourth Amendment, but instead on the content of the underlying statute.266 Thus, even courts that ground the right to fair warning in the Fourth Amendment look to other sources when determining what that right entails. Vodak illustrates this point. While the Seventh Circuit argued that officers had revoked permission without notice, the officers arguably had not permitted demonstrators to depart from the organizers' "intended route," and the arrests in fact occurred far away from that route.267 The Seventh Circuit did not address whether, under the Fourth Amendment, the officers could have reasonably concluded that they had not permitted the conduct for which they arrested the demonstrators. Instead, the court inferred broad permission from the fact that officers had not insisted that demonstrators adhere to the intended route "as a condition of waiving the permit requirement."268 But the need for officers to impose such conditions derived from the interplay between the First Amendment, which required officers to permit spontaneous marches, and the parade-permitting ordinance, which empowered the officers to take measures to regulate traffic.269 Thus, the Seventh Circuit effectively understood the word "permission" as a term of art, construing it not in light of the Fourth Amendment's touchstone of reasonableness, but instead based on the interplay between a specific statutory scheme and the First Amendment.

266. Cf. United States v. Dotterweich, 320 U.S. 277, 284 (1943) (interpreting a statute to criminalize conduct even though "consciousness of wrongdoing be totally wanting").
267. Vodak, 639 F.3d at 742–43, 746–47.
268. Id. at 750.
269. See id. at 749–50 (noting that, although the ordinance cannot "flatly ban groups of people from spontaneously gathering . . . in response to a dramatic news event," it does permit officers to "hold" demonstrators to an "intended march route" as "a condition of waiving the permit requirement").
270. See supra text accompanying notes 163–165.
If the underlying ordinance governs the reasonableness of an arrest, then the considerations that have led courts to imply an "uncodified" exception to the ordinance should also impose the requirement of fair warning.\(^{271}\) Vodak again provides a good example. On its face, Vodak might be interpreted to suggest that the officers needed to provide warnings only because they had previously permitted the relevant conduct.\(^{272}\) As noted above, however, the Seventh Circuit understood permission in light of First Amendment principles. A close analysis of the decision reveals that this understanding of permission essentially incorporated the concept of fair warning. According to the Seventh Circuit, officers could avoid granting permission only if they both insisted on a particular route and "prepare[d] in advance reasonable measures for preventing the demonstration from spilling over the boundaries of the authorized march."\(^{273}\) In other words, officers had granted permission by failing to take sufficient steps to ensure that demonstrators understood what was forbidden. In contrast to a focus on factors that demonstrators could not perceive, such as negotiations between officers and organizers, the Seventh Circuit's approach ensured that officers provided a warning to those demonstrators the court characterized as innocent—\(i.e.,\) those who "simply decided that [the planned route] was too long a walk," those who were "simply . . . following the crowd," and those who "weren't part of the march but were just trying to get home."\(^{274}\)

The breadth of the Seventh Circuit's understanding of permission rebuts the contention that officers needed to provide fair warning only because they had previously granted permission. Instead, they needed to provide fair warning—either prior to or during the march—in order to avoid granting permission. Indeed, the Seventh Circuit's examples of innocent arrestees suggest that the court fashioned its definition of permission based on the need it perceived for adequate warning. As described above, the Seventh Circuit's broad understanding of permission derived from the competing requirements of the First

\(^{271}\) Vodak, 639 F.3d at 741.

\(^{272}\) Id. at 746-47 (faulting the police for "having revoked the permission . . . without notice to anyone").

\(^{273}\) Id. at 750.

\(^{274}\) Id. at 743-45. The Tenth Circuit has discussed similar examples. See supra notes 129, 135.
Amendment and the parade-permitting ordinance.\textsuperscript{275} By implication, then, the concept of fair warning incorporated into that understanding of permission also derives from those same, competing requirements. Thus, the "background role" the Seventh Circuit attributed to the First Amendment—\textit{i.e.}, the fact that the First Amendment required the alteration of the parade-permitting ordinance at issue—permeated the entirety of the court’s analysis, informing even the concept of "notice" that the court ascribed to the Fourth Amendment.\textsuperscript{276}

\textbf{C. The First Amendment}

All of the cases in which courts have protected the right to fair warning have involved statutes or ordinances that implicate demonstrators’ right to communicate their views in public fora. The Supreme Court has long recognized that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."\textsuperscript{277} Nonetheless, the right to communicate in the streets is "relative," rather than "absolute," and legislatures may regulate it to promote "peace," "good order," "comfort," and "convenience."\textsuperscript{278} Legislatures may not, however, "in the guise of regulation," "abridge[]" or "deny[]" First Amendment rights.\textsuperscript{279}

In general, courts permit legislatures to regulate demonstrators’ access to the streets through nondiscriminatory limitations on the "time, place and manner" of demonstrations.\textsuperscript{280} In the words of Henry Kalven, time, place, and manner restrictions are justified by "the unbeatable proposition that you cannot have two parades on the same corner at the same time."\textsuperscript{281} Exactly what level of scrutiny the Supreme Court applies to time, place, and manner restrictions is unclear. While the Court has

\begin{itemize}
\item \textsuperscript{275} See supra text accompanying notes 268–269.
\item \textsuperscript{276} Vodak, 639 F.3d at 746–47, 751.
\item \textsuperscript{278} Hague, 307 U.S. at 516.
\item \textsuperscript{279} Id.
\item \textsuperscript{280} Cox v. New Hampshire, 312 U.S. 569, 576 (1941).
\item \textsuperscript{281} Kalven, supra note 169, at 25.
\end{itemize}
characterized the government's ability to impose such a "prior restraint" on speech in public fora as "very limited," it has recognized a great number of governmental interests that may justify time, place, and manner restrictions. Furthermore, although the Court has required legislatures to narrowly tailor time, place, and manner restrictions to the governmental interests they promote, it has clarified that a prohibition "need not be the least restrictive or least intrusive means of" accomplishing a legitimate purpose, but instead will pass muster so long as the legitimizing purpose "would be achieved less effectively absent the regulation."

The Supreme Court has further held that time, place, and manner restrictions must "leave open ample alternative channels of communication." Courts have not fully resolved what this entails for public demonstrations, but many have recognized that "[s]taged demonstrations—capable of attracting national or regional attention in the press and broadcast media—are for better or worse a major vehicle by which those who wish to express dissent can create a forum in which their views may be brought to the attention of a mass audience." Given the importance of demonstrations, courts have consistently concluded that ordinances requiring parade permits—although generally permissible as time, place, and manner restrictions—must include an exception for spontaneous demonstrations that respond to emerging

286. Dellums v. Powell, 566 F.2d 167, 195 (D.C. Cir. 1977). See also id. ("It is facile to suggest that no damage is done when a demonstration is broken up . . . simply because . . . the demonstration might be held at another day or time.").
events. The courts imposing this requirement reason that, because demonstrations often seek to attract immediate attention to contemporaneous developments, even short delays may leave only inadequate alternative channels of communication. Based on these concerns, many local governments have endeavored, either formally or informally, to incorporate exceptions for spontaneous demonstrations into their permitting schemes. Thus, even though statutes may

288. See Church of Am. Knights of Ku Klux Klan v. City of Gary, 334 F.3d 676, 682 (7th Cir. 2003) ("[A] very long period of advance notice with no exception for spontaneous demonstrations unreasonably limits free speech."); see also Sullivan v. City of Augusta, 511 F.3d 16, 38 (1st Cir. 2007) ("Notice periods restrict spontaneous free expression and assembly rights safeguarded in the First Amendment."); Am.-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 605 (6th Cir. 2005) ("Any notice period is a substantial inhibition on speech."); Douglas v. Brownell, 88 F.3d 1511, 1523–24 (8th Cir. 1996) ("We are convinced, however, that the five-day notice requirement is not narrowly tailored."); NAACP v. City of Richmond, 743 F.2d 1346, 1355 (9th Cir. 1984) ("The delay inherent in advance notice requirements inhibits speech. By requiring advance notice, the government outlaws spontaneous expression."). Cf. Boardley v. U.S. Dep't of Interior, 615 F.3d 508, 523 (D.C. Cir. 2010) (invalidating a permitting scheme that "effectively forbids spontaneous speech" by small groups).

289. See City of Gary, 334 F.3d at 682 ("A group that had wanted to hold a rally to protest the U.S. invasion of Iraq and had applied for a permit from the City of Gary on the first day of the war would have found that the war had ended before the demonstration was authorized."); see also City of Augusta, 511 F.3d at 38 ("People may, in some cases, wish to engage in street marches in quick response to topical events. While even in such time-sensitive situations, a municipality may require some short period of advance notice[,] . . . the period can be no longer than necessary to meet the City's urgent and essential needs."); City of Richmond, 743 F.3d at 1356 ("[S]imple delay may permanently vitiate the expressive content of a demonstration. A spontaneous parade expressing a viewpoint on a topical issue will almost inevitably attract more participants and more press attention, and generate more emotion, than the 'same' parade 20 days later. The later parade can never be the same. Where spontaneity is part of the message, dissemination delayed is dissemination denied.").

290. See Fort Wayne, Ind., Code of Ordinances § 101.03(D) (1996) ("This chapter shall not apply to . . . [s]pontaneous events occasioned by news or affairs coming into public knowledge within three days of such public assembly, provided that the organizer thereof gives written notice to the city at least 24 hours prior to such public assembly."); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1045 (9th Cir. 2006) ("Santa Monica's spontaneous events exception provides that '[s]pontaneous events which are occasioned by news or affairs coming into public knowledge less than forty-eight hours prior to such event may be
generally restrict the time, place, and manner of demonstrations, the First Amendment's guarantee of "ample alternative channels of communication" forecloses any absolute prohibition on protestors' ability to speak here and now.

Laws criminalizing disorderly conduct also implicate First Amendment rights. In the words of the Supreme Court: "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."\(^{291}\) Accordingly, the hostile reaction of a crowd to demonstrators' unpopular views cannot render demonstrators guilty of disorderly conduct.\(^{292}\) Moreover, even where disorderly conduct statutes focus on the obstruction of traffic, rather than on speech, courts endeavor to ensure that the statutes circumscribe officers' discretion and do not, through their vagueness, permit discriminatory enforcement.\(^{293}\) For example, a statute cannot allow officers to permit some demonstrators to obstruct traffic unless it contains detailed standards that apply equally to all.\(^{294}\) Thus, because protected speech so often confronts and challenges listeners, the First Amendment requires disorderly conduct statutes to operate neutrally, clearly, and within narrow boundaries.

In applying the substantive law described above, courts often consider how statutes affect not only the particular litigants before them, but also others who engage in indisputably protected conduct. This approach, called overbreadth review, originates from an understanding that a "statute's very existence may cause others not before the court to conducted on the lawn of City Hall without the organizers first having to obtain a Community Event Permit."\(^{295}\) (quoting local ordinance); \textit{City of Dearborn}, 418 F.3d at 612 ("Other cities such as Omaha, Nebraska, exempt spontaneous political demonstrations entirely from their parade ordinances.").\(^{296}\)


294. \textit{Id.} Courts' treatment of parade-permit requirements strongly suggests that a complete ban on the obstruction of traffic, with no exception for expressive conduct, would violate the First Amendment. \textit{See supra} text accompanying notes 285–290.
refrain from constitutionally protected speech or expression.” When a statute is overbroad, courts need not attempt to foresee every type of legitimate speech that it may “chill,” and can instead strike the statute down in its entirety. Because overbreadth review permits litigants to seek the complete invalidation of a statute based on its unconstitutional application to others, it constitutes a departure both from “traditional rules of standing,” which require each plaintiff to demonstrate personal injury, and from “traditional rules governing constitutional adjudication,” which require a court to consider only the particular circumstances before it. In light of these departures, courts have characterized overbreadth review as “strong medicine,” using it “sparingly and only as a last resort.” For a court to apply overbreadth review, the potential for unconstitutional application of a statute to third parties “must not only be real, but substantial as well.” Moreover, when the parties challenging a statute themselves engage in protected conduct, courts retain their discretion to apply a limiting construction, declaring the statute “invalid

295. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). Some scholars, including Professor Henry Paul Monaghan, argue that overbreadth review, rather than shielding third parties from impermissible deterrence, protects litigants’ right to “insist on the application of a constitutionally valid rule.” Monaghan, supra note 19, at 4; see also Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 YALE L.J. 853, 867 (1991) (describing the differences between two prevailing theories of overbreadth). The scholarly dispute over the origins of overbreadth review does not, however, change the analysis of whether the First Amendment creates demonstrators’ right to fair warning. Monaghan’s understanding of overbreadth review acknowledges that courts must consider other potential applications of a law when determining whether that law is “constitutionally valid.” Monaghan, supra note 19, at 9–10. Moreover, Monaghan argues that First Amendment concerns require increased scrutiny of such applications by limiting courts’ abilities to sever problematic legislative provisions from permissible ones. Fallon, supra, at 871–72. Thus, according to either understanding, First Amendment overbreadth review requires probing analysis of a law’s application to potentially protected conduct. To the extent that courts conduct a similar analysis when protecting demonstrators’ right to fair warning, see infra text accompanying notes 309–312, they suggest that First Amendment principles inform that right.

297. Broadrick, 413 U.S. at 613; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (requiring that “the party seeking review be himself among the injured”) (quoting Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972)).
298. Broadrick, 413 U.S. at 613.
299. Id. at 615.
to the extent that it reaches too far, but otherwise [leaving it] intact.”

Thus, while overbreadth review provides courts with a strong tool to deploy in defense of First Amendment values, courts often seek to avoid using it precisely because of its strength. Both the Supreme Court and lower courts have subjected time, place, and manner requirements and other restrictions on demonstrators to overbreadth review.

Numerous considerations potentially indicate that, when courts enforce the right to fair warning, they consciously or unconsciously invoke the First Amendment. First, a concern over vagueness and unbounded officer discretion is critical to the inquiry under both the First Amendment and the right to fair warning. The First Amendment requires time, place, and manner restrictions to prescribe “narrow, objective, and definite standards” for the officials charged with applying them. Such standards prevent officials from discriminating based on the content of speech, and thus from effectively acting as censors. Moreover, as the Supreme Court has made clear, vague standards inhibit free speech by forcing demonstrators to avoid areas of legal uncertainty and “restrict[] their conduct to that which is unquestionably safe.” Thus, definite standards both prevent content-based discrimination and permit demonstrators to confidently exercise the full scope of their First Amendment rights.

The right to fair warning also prevents censorship and promotes transparency. First, where officers have the discretion to permit or forbid demonstrations—and can even change their minds—the danger arises that they may discriminate based on the content of speech. The possibility of such discrimination generates a need for courts to impose narrow, objective standards on officers. Thus, in Cox, a dispersal order that was “unrelated to any policy of [the relevant] statutes” did not provide demonstrators with the necessary free warning. In the words

303. Id.
305. Cox II, 379 U.S. at 573.
of the Court, "the allowance of such unfettered discretion in the police would itself constitute a procedure" that violated the First Amendment.\footnote{306} Similarly, in Dellums, the D.C. Circuit required a dispersal order to precede any arrest because officers' "contradictory and uncertain" administrative precedents had created a vagueness problem.\footnote{307} In the absence of a dispersal order, "it would be impossible for anyone to tell when his otherwise constitutionally protected behavior (or that of his group) had become" impermissible.\footnote{308} These two examples indicate that, when courts review officer conduct to ensure fair warning, they focus on the same concerns—specifically, limiting officer discretion and promoting transparency—that animate their First Amendment review of statutes. This similarity between the two forms of review plausibly suggests that the right to fair warning simply extends First Amendment protections into a novel context.

Second, courts enforcing the right to fair warning exhibit the same concern for the protection of potentially innocent conduct as courts engaged in overbreadth review. As described above, courts applying such review worry that broadly worded statutes will deter demonstrators from engaging in expressive conduct that the First Amendment protects.\footnote{309} This concern causes courts to review the application of the statute to hypothetical individuals who are not parties and whose cases, as a result of the statute's deterrent effect, may never arise.\footnote{310} Courts enforcing the right to fair warning also frequently hypothesize the existence of undeniably innocent demonstrators in the process of explaining why the demonstrators before the court had not received the requisite warning. For example, in Vodak, the Seventh Circuit supposed that some of the demonstrators whom officers had arrested "may simply have been following the crowd, thinking that it either was a proper route for the march or a way out," and that still others "weren't part of the

\footnote{306. Id.}
\footnote{307. Dellums v. Powell, 566 F.2d 167, 180 (D.C. Cir. 1977).}
\footnote{308. Id.}
\footnote{309. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("[T]he statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").}
\footnote{310. Dellums, 556 F.2d at 181.}
march but were just trying to get home." Moreover, because the plaintiffs purported to bring class actions, the potentially innocent demonstrators to whom the courts referred could eventually become parties. Nonetheless, the courts’ reasoning bears a striking resemblance to overbreadth review: where officers have potentially arrested many who did not receive a warning, courts will regard the warnings in their entirety as insufficient. This focus on the hypothetically, rather than the demonstrably, innocent—which courts adopt even at the expense of allowing potentially unmeritorious cases to proceed—suggests that courts enforcing the right to fair warning worry about the deterrence of protected conduct. Such a concern most plausibly originates from the First Amendment.

Finally, the same First Amendment considerations that require local governments to permit demonstrators to access the streets presumably apply with no less force to officers’ and demonstrators’ interactions in the streets. As described above, numerous courts have held that the First Amendment requires local parade-permitting schemes to permit spontaneous demonstrations. A right to enter the streets would mean little, however, if officers enforcing traffic and disorderly conduct ordinances could immediately direct demonstrators to leave. Thus, the right to fair warning might apply the same restrictions to officers that the First Amendment applies to statutes and ordinances. This component of the right to fair warning potentially explains why

311. Vodak v. City of Chi., 639 F.3d 738, 744–45 (7th Cir. 2011). Similarly, in Buck v. City of Albuquerque, the Tenth Circuit found that the officers’ actions “could reasonably have been interpreted as a waiver of the parade permit requirement,” without asking whether those before the court had so interpreted those actions. Buck v. City of Albuquerque, 549 F.3d 1269, 1283 (10th Cir. 2008); see also Fogarty v. Gallegos, 523 F.3d 1147, 1151 (10th Cir. 2008) (discussing the case of a passerby who joined a demonstration after “observ[ing] that several streets had been closed and assum[ing] that police were permitting demonstrators to march in the streets”). Finally, in Dellums, the D.C. Circuit inferred official permission from the fact that “any plaintiff familiar with precedents of administration of the Capitol Grounds statute could reasonably have concluded that ‘permits’ had been issued.” Dellums, 566 F.2d at 182 n.34.

312. See Vodak, 639 F.3d at 745 (“Maybe the marchers . . . should have guessed that it was a forbidden route as well, and no doubt some did, but others may simply have been following the crowd, thinking that it either was a proper route for the march or a way out.”).

313. See supra notes 285–290 and accompanying text.
officers must not only warn demonstrators of their orders, but must also base those orders on a "valid reason" that is independent from enforcement of the underlying statute or ordinance.\textsuperscript{314} Simply put, if the officers' grant of permission resolves a problem with the underlying statute, then the statute cannot justify revocation of that grant without recreating the original problem. Thus, one might reasonably conclude that First Amendment concerns animate courts' articulation of the right to fair warning, rendering the right to fair warning a First Amendment right.

Nonetheless, many other considerations suggest that the First Amendment does not provide the basis for demonstrators' right to fair warning. First, if the right to fair warning protects demonstrators only from the "indefensible sort of entrapment" described in \textit{Cox}, then the fact that courts often vindicate this right in cases involving protected expression may be entirely coincidental.\textsuperscript{315} In fact, as described above,\textsuperscript{316} the Supreme Court first discussed "indefensible . . . entrapment" in a case that did not consider First Amendment rights, but instead the applicability of a state's constitutional privilege against self-incrimination.\textsuperscript{317} Thus, demonstrators may receive only the same protection from entrapment that all people enjoy, whether or not they engage in protected speech.\textsuperscript{318} Because the right presumably always has the same constitutional foundation, its application in the absence of protected expression precludes the First Amendment from providing that foundation.

A second, related consideration bolsters this reasoning: where courts protect demonstrators' right to fair warning, the First Amendment may "play[] only a background role."\textsuperscript{319} Even if the First Amendment has shaped the legal provisions at issue in a case, courts considering the right to fair warning may nonetheless ask only how officers have applied those

\footnotesize{314. \textit{Cox II}, 379 U.S. at 572. See also id. at 573 (holding that "the allowance of . . . unfettered discretion in the police would itself constitute a procedure" that violated the First Amendment).
315. \textit{Id.} at 571.
318. For example, if a non-demonstrator was told by an officer that she could jaywalk, and then was arrested for jaywalking, a court surely would not permit a conviction and would instead find a rights violation.
319. \textit{Vodak v. City of Chi.}, 639 F.3d 738, 751 (7th Cir. 2011).}
provisions. In other words, the mere fact that the First Amendment provides boundaries for the legal provision that officers enforce does not ensure that the First Amendment constrains officers’ enforcement of it. For example, in Vodak, the Seventh Circuit emphasized that the First Amendment did not require officers to permit the march in the manner they had. Thus, the requirement that officers clearly revoke that permission may have arisen not from the First Amendment, but instead from the officers’ course of conduct: the fact that they had declared the parade legal, as the permitting scheme allowed them to do, required them to clearly announce their later decision to treat it as illegal. As the Seventh Circuit reasoned, allowing officers to change their decision about the legality of the parade without notifying demonstrators would amount to “entrapment.” But the fact that officers had such discretion as a result of First Amendment considerations was merely part of the “background,” playing no meaningful role in the analysis.

The First Amendment’s background role in the cases discussed above may explain why courts so often discuss the right to fair warning in cases that involve protected expression. Specifically, because traffic regulations frequently raise difficult First Amendment questions, legislatures may often rely on officers to ensure that those regulations sweep narrowly and respect demonstrators’ legitimate interests. In other words, courts might often consider the right to fair warning in cases involving protected speech not because the First Amendment requires officers to give warning, but instead because the First Amendment

320. Id. at 750 (“Nothing in either the First Amendment or local law would have forbidden the Chicago police to require of the organizers, as a condition of waiving the permit requirement in order to allow a demonstration on a date as yet uncertain, a clear idea of the intended march route, to hold them to it, and to prepare in advance reasonable measures for preventing the demonstration from spilling over the boundaries of the authorized march.”).

321. Id. at 746–47.

322. See Garcia v. Bloomberg, 865 F. Supp. 2d 478, 486 (S.D.N.Y. 2012) (“[B]ecause of the tension between First Amendment protections and local laws aimed at preventing disruption, difficult questions frequently arise as to the applicability to protest marchers and demonstrators of laws that require parade permits or that criminalize disruption of the peace. As a result, ‘fair warning as to what is illegal’ often comes not from the legislative bodies that draft the potentially relevant laws, but instead from the executive officials who enforce them.”), aff’d sub nom. Garcia v. Does, 764 F.3d 170 (2d Cir. 2014).
RIGHT TO FAIR WARNING

2014

creates exception-ridden legal schemes that require officers to make determinations about legality, thereby creating the need for warning. Yet, the fact that the First Amendment helped to produce the underlying circumstances does not ensure that it plays a meaningful role in the relevant legal analysis.

Finally, the First Amendment may not provide the constitutional foundation of the right to fair warning simply because, in the relevant context, it does not require much. As described above, a parade-permitting scheme “need not be the least restrictive or least intrusive means of” accomplishing a legislature’s purpose, and instead must only “promote[] a substantial government interest that would be achieved less effectively absent the regulation.” Moreover, courts generally will not consider the abstract interests of non-litigants except in cases of “substantial” overbreadth. Combining these two doctrines, one might conclude that time, place, and manner regulations will trigger exacting scrutiny only where they restrict substantially more conduct than necessary to most effectively accomplish one of the many governmental purposes that can legitimate such regulations. Thus, so long as a permitting scheme does not discriminate based on the content of speech, the First Amendment may require only that the scheme make some good faith attempt to maintain “ample alternative channels of communication.” Given that the First Amendment places only weak constraints on the laws a legislature may adopt, expecting it to impose further limitations on officers’ enforcement of those laws may make little sense.

Thus, the First Amendment, like the Due Process Clause and the Fourth Amendment, provides a plausible, yet potentially problematic

325. See supra note 283.
327. United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass’n v. Perry Local Educator’s Ass’n, 460 U.S. 37, 45 (1983)). For example, courts have upheld permitting schemes that limit spontaneous demonstrations to one location. Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1045–46 (9th Cir. 2006); see also El-Haj, supra note 277, at 550–54 (describing the “significant ways” in which “local officials may shape protests” by imposing time, place, and manner requirements).
basis for demonstrators' constitutional right to fair warning. Having discussed why each provision might and might not create the right, analysis now turns to identifying the constitutional provision that best explains the contours of existing doctrine.

III. LOCATING THE RIGHT TO FAIR WARNING

Although all of the constitutional provisions examined above potentially provide a basis for the right to fair warning, substantial arguments suggest that each does not. Part III first attempts to determine which potential basis most persuasively explains existing doctrine. Then, it begins the process of articulating what the basis of the right to fair warning entails for its scope. Part III.A endeavors to locate the right's basis by returning to the questions set forth in Part I.\(^{328}\) Asking whether the principles attributed to the Due Process Clause, the Fourth Amendment, and the First Amendment provide satisfactory answers to those questions, Part III.A concludes that only the principles associated with the First Amendment can. Next, Part III.B reexamines the arguments against identifying the First Amendment as the basis for the right to fair warning,\(^{329}\) discussing why those arguments, although significant, should not ultimately persuade courts. Finally, Part III.C examines the scope of the right that emerges from the proposed interpretation of existing doctrine. Ultimately, courts should focus on whether demonstrators have received fair warning when an ordinance infringes First Amendment rights, but cannot easily be narrowed. To determine whether demonstrators have received fair warning, courts should focus on two considerations: whether officers' actions will deter demonstrators from engaging in protected conduct; and whether officers have exercised their discretion in a manner that might permit them to discriminate based on viewpoint.

A. Unanswered Questions

The review of existing doctrine undertaken in Part I generated numerous questions. Having described courts' interpretations of the Due

---

328. See supra text accompanying notes 188–190.
329. See supra text accompanying notes 315–327.
Process Clause, the Fourth Amendment, and the First Amendment, we can now determine whether those interpretations provide any answers. In fact, the preceding discussions have already suggested some of the answers set forth below. This Part considers each of Part I's questions in turn and concludes that First Amendment doctrines provide the most satisfactory answers. In short, only the First Amendment's concern for fostering "uninhibited, robust, and wide-open" discourse can justify courts' focus on how officers enforce laws and generate coherent standards for determining what officers must do to make a valid arrest.

1. When and Why Do Courts Focus on Officers' Exercise of Their Discretion? — Cox and its progeny all raise a similar question: why do the courts considering the right to fair warning scrutinize how officers have enforced a valid statute, departing in certain respects from the tradition of judicial deference to officer discretion? Existing First Amendment doctrine provides a potential answer: the statutes at issue raise First Amendment problems that the available First Amendment remedies cannot satisfactorily resolve. As noted above, courts have consistently held that the First Amendment creates a right to spontaneously demonstrate in response to current events. Both parade-permitting ordinances and bans on interfering with traffic ostensibly prohibit such demonstrations. Thus, even though courts have recognized that such ordinances serve legitimate purposes, a straightforward First Amendment analysis—particularly one that, like overbreadth review, considers the statutes' effects on hypothetical third parties—apparently requires their invalidation. But what would invalidation of such ordinances accomplish? If courts seek to permit spontaneous demonstrations, then one might wonder whether any ordinance can articulate standards that provide the necessary flexibility. As the Seventh Circuit explained in Vodak, "when a march is planned for the unknown date of some triggering event, . . . even two days' notice is infeasible." Thus, revised ordinances may not cure the problems courts seek to

331. See supra text accompanying notes 246–249.
332. See supra notes 288–290.
333. See Cox II, 379 U.S. at 574 (permitting "properly drawn statutes" that "regulate traffic").
334. Vodak v. City of Chi., 639 F.3d 738, 741 (7th Cir. 2011).
address, and invalidating existing ordinances could only frustrate the legislature’s legitimate interest in regulating traffic.

The inability of First Amendment remedies to satisfactorily resolve the problem that courts confront indicates that courts require a narrower standard of review. The right to fair warning provides that standard. By focusing attention on the officer’s enforcement of an ordinance, the right to fair warning allows courts both to protect demonstrators’ ability to spontaneously protest and to preserve the legislature’s ability to pursue its legitimate interests. As the Supreme Court reasoned in Cox, permitting officers to exercise “a degree of on-the-spot administrative interpretation” allows them, and the courts that review them, to conduct a more nuanced balancing of the competing interests than a legislature could in the abstract.335 Thus, existing First Amendment doctrine suggests that courts will examine whether officers have provided fair warning when, although a statute raises First Amendment problems, the traditional remedy of invalidation proves unsatisfactory.

Although courts have never explained their decisions in these terms, a close reading of the relevant cases suggests that they have unconsciously adopted this approach. While the majority in Cox did not consider the possibility of a narrower statute, it almost certainly confronted a problematic statute that it felt compelled to uphold. As noted above, the statute at issue in Cox largely copied a federal statute that Supreme Court Justices had drafted in order to protect their own court from disruptions.336 Invalidating the statute would thus have required the Court both to find fault with its prior work and to undermine one of the safeguards of its own repose. This conflict of interest suggests that the Court had a motive to apply a lax standard of review, and contemporaneous commentators claimed that the Court had done exactly that, contrasting the standard of review applied in Cox with that applied in Edwards v. South Carolina.337 Nonetheless, focusing on officers’ enforcement of the statute allowed the Court to effectively protect Cox’s First Amendment rights without impugning the statute’s validity.338

336. See supra text accompanying note 52.
337. See Kalven, supra note 169, at 9; see also supra note 169.
338. For a discussion of how the Court’s focus on officer discretion vindicated Cox’s First Amendment rights, see infra text accompanying notes 353–354.
Thus, *Cox* appears to have been a historical accident: the Supreme Court’s unique unwillingness to invalidate a statute on First Amendment grounds led it to develop an alternative mechanism for vindicating First Amendment concerns, albeit *sub silentio*.

Circuit Courts of Appeals have availed themselves of the mechanism *Cox* created, adapting it to the new circumstances described above. Nowhere is this clearer than in *Dellums*. As noted above, the D.C. Court of Appeals had previously determined that the statute at issue in *Dellums* violated the First Amendment, and the court had imposed a limiting construction that required officers to provide fair warning. Significantly, however, the D.C. Circuit noted that *Cox* would have required the same result. Thus, the D.C. Circuit effectively acknowledged that the right to fair warning required of the officers at issue exactly what the First Amendment required of the statute more broadly. Similarly, the Second Circuit in *Papineau* held that, “even if [officers] had a lawful basis to interfere” with a demonstration—*i.e.*, even if the statute at issue, as applied to the demonstrators, complied with the First Amendment—the First Amendment still regulated the manner in which officers interfered, requiring them to provide fair warning. Finally, as described above in Part I.B, the Seventh Circuit in *Vodak* implicitly derived the standards it attributed to the right to fair warning from the requirements the First Amendment imposed on the parade-permitting scheme at issue. Thus, Courts of Appeals have effectively, if unconsciously, treated the right to fair warning as a form of First Amendment review that applies to officer conduct, invoking it in addition to, or as an alternative to, broader First Amendment review of statutes and ordinances.

In contrast to the First Amendment, the Due Process Clause and the Fourth Amendment appear to provide no explanation for the focus on how officers enforce the statutes at issue. While the Court in *Cox* invoked Raley’s due process defense, it provided no satisfactory

---

343. *See supra* text accompanying notes 266–274.
explanation for why that defense would apply. Indeed, the Cox majority’s suggestion that officers could provide binding interpretations of the law when administering traffic regulations raises two seemingly insurmountable difficulties: first, the statute at issue did not actually regulate traffic; and, second, the Court acknowledged that the statute clearly applied to the demonstrators in question, thereby undercutting the need for any interpretation, much less a binding one. Later decisions by Courts of Appeals simply compound the problem. By invoking the right to fair warning even in cases where officers have only implicitly permitted certain actions, Courts of Appeals appear to have dispensed with Raley’s requirement that officers “clearly” allow the conduct at issue. Indeed, if officers can “permit” conduct simply by declining to enforce a statute, then the due process defense articulated in Raley conflicts with the judiciary’s “deep-rooted” recognition of “law-enforcement discretion.” Thus, principles of due process appear to provide no satisfactory answer to the question of why courts enforcing the right to fair warning focus on officers’ actions, rather than the statutes the officers invoke.

Neither does the Fourth Amendment provide any answer. While the Fourth Amendment focuses courts’ attention on whether officers have acted reasonably, it does so by asking whether officers have “a reasonable ground for [the] belief” that a suspect violated a statute. In the vast majority of circumstances, officers do not need to provide fair warning in order to form such a belief. Moreover, even courts that invoke the Fourth Amendment when protecting the right to fair warning

345. See supra text accompanying notes 78–81.
347. Raley, 360 U.S. at 426.
do not attribute the requirement of fair warning to Fourth Amendment principles, instead characterizing it as an unwritten element of the underlying statute. Because the Fourth Amendment inquiry need not analyze whether officers have provided fair warning, and does so only where contextual considerations require it, nothing suggests that Fourth Amendment principles somehow explain such analysis. Thus, only First Amendment considerations provide a convincing answer to the primary question raised by *Cox* and its progeny, namely, the question of why courts ask about warning in the first place.

2. *When and How Can Officers Revoke Permission?* — *Cox* also raised a second question: why could officers not revoke the limited permission they granted to *Cox* simply because his conduct violated the prohibition on demonstrating near the courthouse? Framing the right to fair warning as a narrower form of First Amendment scrutiny renders an immediate answer: if courts focus on officers’ actions because a statute poses problems under the First Amendment, then they must require officers to act in a manner that does not recreate those same First Amendment problems. The majority opinion in *Cox* disapproved of officers’ dispersal order almost explicitly on First Amendment grounds. Specifically, the *Cox* Court held that officers had not provided a “valid reason for the dispersal order” under the First Amendment and that, if the statute had given the officers the “unfettered discretion” they exercised, it would have amounted to an unconstitutionally broad prior restraint on expression. These restrictions on officer discretion, when read in conjunction with the majority’s earlier insistence that the statute complied with the First Amendment, suggest that the Court implicitly applied a limiting construction. In other words, only because the Court interpreted the statute to limit officer discretion could the statute withstand First Amendment scrutiny. Thus, since limitations on officer discretion rescued the statute from unconstitutionality, the officers could not invoke the statute as a justification for broader discretion.

Later decisions by Courts of Appeals have adopted a similar reasoning, suggesting that those courts interpret *Cox* to vindicate First

---

352. See *supra* text accompanying notes 81–82.
354. *Id.* at 564.
Amendment concerns. In *Vodak*, for example, the Seventh Circuit devoted pages to describing the First Amendment’s “background role”—i.e., the limitations it imposed on the city’s ability to require parade permits.\(^{355}\) Although the Seventh Circuit discussed this “background role” only after it concluded that officers had not provided fair warning, it incorporated into its understanding of fair warning the very restrictions that the First Amendment placed on the parade-permitting requirement at issue.\(^{356}\) For example, while the Seventh Circuit purported to require warning only where officers had permitted certain conduct, it implicitly adopted a broad understanding of permission that applied whenever officers had not imposed the types restrictions the First Amendment would have permitted.\(^{357}\) In other words, fair warning constituted a mechanism for imposing restrictions that complied with the First Amendment, one to which officers could resort whenever they had initially failed to impose such restrictions. Thus, the Seventh Circuit, much like the Supreme Court in *Cox*, effectively understood the right to fair warning to apply the same limitations to officers’ actions that the First Amendment imposed on the parade-permitting ordinance.

Once again, the jurisprudence interpreting the Due Process Clause and the Fourth Amendment, unlike that construing the First Amendment, provides no satisfactory explanation for the limitations that *Cox* imposed on officers’ discretion. The majority in *Cox* did not attempt to explain its decision under the Due Process Clause, and such an explanation would have made little sense.\(^{358}\) While *Cox* initially had a

\(^{355}\) *Vodak* v. City of Chi., 639 F.3d 738, 749–51 (7th Cir. 2011).

\(^{356}\) See *supra* text accompanying notes 271–276.

\(^{357}\) *Vodak*, 639 F.3d at 750. These restrictions included insisting that demonstrators adhere to an “intended march route” and preparing “reasonable measures for preventing the demonstration from spilling over the boundaries.” *Id.* The Seventh Circuit stated only that the First Amendment permitted these restrictions, and did not claim that it required them. Nonetheless, the court evidently intended to instruct officers on how to simultaneously comply with the First Amendment’s requirement that officers permit spontaneous demonstrations and avoid having to give on-the-spot warnings to large groups of confused people. As argued below, a right to spontaneously demonstrate would have little meaning if officers could subsequently arrest demonstrators without providing fair warning. See *infra* text accompanying notes 368–371.

\(^{358}\) See *supra* text accompanying notes 58–60 (discussing the majority opinion’s invocation of the First Amendment).
defense under Raley because the sheriff had "clearly told" him he could march, he should not have had any such defense after officers had ordered him to disperse, thereby unambiguously revoking their prior permission. The majority opinion dismissed the dispersal order on the ground that officers had not provided a valid reason for it. Nonetheless, the majority did not suggest that the Due Process Clause would have required such a reason, and it failed to explain why the statute the officers sought to enforce would not have provided the necessary justification.\textsuperscript{359} The Fourth Amendment provides even less support for the majority’s reasoning. Because the Fourth Amendment requires courts to view circumstances from "the standpoint of an objectively reasonable police officer,"\textsuperscript{360} analysis under that provision would have led the Cox majority to ask not whether officers had provided a valid reason, but instead whether a reasonable officer could have.\textsuperscript{361} Thus, only the First Amendment can plausibly explain the Cox majority’s decision to require officers to provide a valid reason for revoking the permission they had previously granted to demonstrators.

3. Does a Right to Fair Warning Exist in Cases of Implicit Permission? — Whereas Cox recognized a right to fair warning where officers had given demonstrators explicit permission, later cases, specifically Buck and Vodak, have enforced that right even where officers had only implicitly permitted the relevant conduct.\textsuperscript{362} The extension of the right to fair warning recognized in Buck and Vodak raises two questions. First, should the right to fair warning apply even where officers have not provided the kind of explicit permission that the Supreme Court considered in Cox? Second, if the right to fair warning protects demonstrators who have received only implicit permission, what does that fact suggest about the right’s constitutional basis?

A simple fact about mass demonstrations answers the first question. Where an enormous crowd has gathered, officers can communicate with only a small fraction of its members, and those who do not receive direct communications can know what officers have

\textsuperscript{359} Cox II, 379 U.S. at 572. See also supra text accompanying notes 82–84.


\textsuperscript{362} See supra text accompanying notes 142–143, 166–167.
permitted only by observing the behavior of others.\textsuperscript{363} In such circumstances, the vast majority of demonstrators will have no way of distinguishing between actions that officers merely tolerate and actions that they invite, \textit{i.e.}, between implicit and explicit permission.\textsuperscript{364} Thus, applying the right to fair warning in cases of explicit, but not implicit, permission would amount to a distinction without a difference for the vast majority of demonstrators. Cox reinforces this point. Only after Cox was separated from the marchers and “brought to” the police chief did he receive explicit permission to demonstrate across from the courthouse.\textsuperscript{365} The rest of the demonstrators apparently received no communications from the officers, and they simply proceeded to an area where they were “directed by Cox.”\textsuperscript{366} As a result, those demonstrators may not have known whether Cox had obtained permission or had instead decided to defy the officers, something he had done before.\textsuperscript{367} Conditioning the right to fair warning on the content of Cox’s private conversation, then, would have altered the protections the majority of demonstrators enjoyed, even though they had acted based on the same information and in an identical fashion. Courts of Appeals have correctly avoided such a strained interpretation of Cox.

Only the First Amendment explains why the right to fair warning should apply in both cases of explicit and implicit permission. As described above, the First Amendment creates a right to spontaneously demonstrate in response to emerging events, and it requires officers to craft exceptions to traffic laws that would interfere with the exercise of

\textsuperscript{363} For discussions of the difficulty of communicating a message to thousands of demonstrators, see Vodak v. City of Chi., 639 F.3d 738, 746 (7th Cir. 2011) (“[T]here was no mechanism (at least no mechanism that was employed) for conveying a command to thousands of people stretched out on Oak Street between the inner drive and Michigan Avenue.”); Garcia v. Bloomberg, 865 F. Supp. 2d 478, 489 (S.D.N.Y. 2012) (“[T]he surrounding clamor interfered with the ability of demonstrators as few as fifteen feet away from the bull horn to understand the officer’s instructions.”), aff’ed sub nom. Garcia v. Does, 764 F.3d 170 (2d Cir. 2014).

\textsuperscript{364} Of course, demonstrators who hear and defy warnings have received fair warning and thus cannot invoke any defense. See, \textit{e.g.}, Faustin v. City and Cnty. of Denver, Colo., 423 F.3d 1192, 1202 (10th Cir. 2005).

\textsuperscript{365} \textit{Cox I}, 379 U.S. at 540–41.

\textsuperscript{366} \textit{Id}.

\textsuperscript{367} \textit{Id}. at 540 (“Kling asked Cox to disband the group . . . . Cox did not acquiesce in this request but told officers that they would march by the courthouse . . . .”).
such a right. If officers could, after permitting spontaneous demonstrations, arrest demonstrators either for disobeying commands of which the demonstrators had no knowledge or for engaging in actions that the demonstrators believed officers had permitted, then the right to spontaneously demonstrate would be chilled. In effect, fear of unforeseen or unforeseeable arrest would prevent many demonstrators from spontaneously demonstrating at all. The First Amendment rationale for applying the right to fair warning in cases of implicit permission is strikingly similar to the one on which the Supreme Court relied in *Cox*: where courts focus on officers’ discretion in order to resolve a First Amendment problem with the statute—here, the need for parade-permitting schemes and other traffic laws to allow spontaneous demonstrations—they cannot permit officers to take actions that would create the same problem. If statutes cannot ban spontaneous marches, then officers cannot act in a way that deters it.

Grounding the right to fair warning in the Due Process Clause would raise severe doubts about whether the right applies to demonstrators who have received only implicit permission. In cases of implicit permission, officers have not “clearly told” demonstrators anything, and thus the *Raley* defense should not apply. Indeed, courts have not permitted defendants to invoke Model Penal Code § 2.04(3)(b)(iv) based on the defendants’ beliefs about what officers communicated to others, holding instead that a statement “must be made directly to the defendant” in order to “trigger an entrapment-by-estoppel defense.” For example, in *United States v. Eaton*, the Eleventh Circuit upheld a defendant’s conviction for illegally importing snakes even though the defendant testified at trial that “other missionaries had hand-

---

368. *See supra* note 288.
370. While Courts of Appeals have not articulated this rationale, they frequently analyze whether officers may have arrested those who had no reason to believe that they had violated the law, precisely the type of arrest that would deter others from spontaneously demonstrating. *See supra* notes 309–312 and accompanying text.
carried small quantities of snakes into the United States for at least a
decade with approval from customs officials. Demonstrators who
have received implicit permission are indistinguishable from the
defendant in Eaton; they base their claims of innocence not on what
officers have communicated to them directly, but instead on their beliefs
about what officers have permitted others to do. Thus, conceiving of the
right to fair warning as a defense against entrapment, rooted in the Due
Process Clause, would presumably lead courts to apply the rationale
from Eaton, and thus to provide no protection to demonstrators who had
received only implicit permission.

Neither does the Fourth Amendment explain why demonstrators
who have received only implicit permission should receive protection.
As described above, police officers generally have considerable
discretion over “when and where to enforce city ordinances.” Officers
who exercise this discretion—for example, by declining to enforce a
statute against a mass of demonstrators until reinforcements arrive—can
reasonably believe that they have not implicitly permitted the behavior in
question. Because officers in such cases have a reasonable belief that
they have not permitted conduct that, under existing law, constitutes a
crime, the Fourth Amendment should not prohibit them from making
arrests. Thus, only the First Amendment provides a justification for the
decision by Courts of Appeals to extend the right to fair warning to cases
in which demonstrators have received only implied permission.

4. Do Demonstrators Have a Right to Fair Warning When They
Peacefully Protest Without Permission? — Finally, Papineau raises the
question of whether the right to fair warning can protect demonstrators
even where permission is not an issue. In Papineau, the Second Circuit
attributed a right to fair warning to demonstrators based on their
“undeniable right to continue their peaceable protest activities, even
when some in the demonstration might have transgressed the law.\textsuperscript{378} Analyzed under the First Amendment, this extension of the right to fair warning makes perfect sense: permitting officers to forcibly disperse law-abiding demonstrators based on factors beyond those demonstrators’ control would deter expressive conduct that falls within the First Amendment’s core area of protection. Because many of the demonstrators in \textit{Papineau} had conformed their conduct to the law—and were subject to dispersal based only on the actions of a few—their belief in the legality of their actions was, even in the absence of permission, no less reasonable than the beliefs of demonstrators in \textit{Dellums}, \textit{Vodak}, and \textit{Buck}. Thus, the Second Circuit persuasively found that, in light of their equally reasonable beliefs, the demonstrators in \textit{Papineau} should receive the same protections afforded to demonstrators in other cases.\textsuperscript{379}

Once again, however, the Due Process Clause and the Fourth Amendment provide no basis for such an extension of the right to fair warning. Turning first to the Due Process Clause, the officers in \textit{Papineau} told the demonstrators nothing, and thus they certainly did not “clearly” tell the demonstrators that others’ actions would not subject the entirety of the demonstration to forcible dispersion.\textsuperscript{380} As a result, the demonstrators had no argument that the officers had induced their actions in violation of due process. The Fourth Amendment does not explain the Second Circuit’s rationale in \textit{Papineau} either. In fact, the Second Circuit conducted its analysis of the right to fair warning after explicitly assuming that the officers had “a lawful basis to interfere with the demonstration” under the Fourth Amendment.\textsuperscript{381} Thus, only the First Amendment explains the extension of the right to fair warning that the Second Circuit recognized in \textit{Papineau}.

Of the constitutional provisions that might plausibly create demonstrators’ right to fair warning, only the First Amendment provides convincing answers to the questions raised by existing doctrine. In short, where statutes and ordinances raise First Amendment problems, but cannot reasonably be narrowed, courts will examine officers’ enforcement of those statutes, requiring officers to proceed in a manner

\textsuperscript{378} Papineau v. Parmley, 465 F.3d 46, 60 (2d Cir. 2006).
\textsuperscript{379} \textit{Id.} at 60–61 & n.6.
\textsuperscript{380} \textit{Id.} at 60. \textit{See} Raley v. Ohio, 360 U.S. 423, 426 (1959).
\textsuperscript{381} Papineau, 465 F.3d at 60.
that avoids First Amendment problems. As described, the right to fair warning effectively narrows the scope of First Amendment review, applying it to officer conduct rather than to a statute. Although this account of the right to fair warning illuminates existing doctrine, explaining why courts have made decisions that might otherwise appear puzzling, it has not yet been assessed in light of the arguments that the First Amendment does not create the right to fair warning. Accordingly, the analysis now turns to such an assessment.

B. Arguments Against the First Amendment

Part II.C identified many reasons why courts might hesitate to identify the First Amendment as the basis of the right to fair warning. Specifically, Part II.C hypothesized that the fact that courts frequently apply the right to fair warning to demonstrators might simply be a coincidence, that the First Amendment might play only a background role in the analysis, and that the First Amendment might not actually require much of officers confronting demonstrators. Part III.B examines those hypotheses more closely and concludes that they need not persuade courts. Instead, the arguments for grounding the right to fair warning in the First Amendment outweigh the arguments against doing so.

1. Coincidence — Part II.C speculated that courts may have only coincidentally applied the right to fair warning first recognized in *Raley* to demonstrators. After all, the argument went, *Raley* did not involve demonstrators, and thus the right it recognized applied broadly across a variety of contexts, even if some contexts implicated it more frequently than others. But this argument is unpersuasive for the same reason that the Due Process Clause fails to explain courts’ application of the right to fair warning to demonstrators. In a number of the cases examined above, most notably *Vodak* and *Buck*, officers had only implicitly permitted demonstrators to engage in the relevant conduct. As a result, officers had not “clearly told” the demonstrators that a privilege was

382. *See supra* text accompanying notes 315–327.
385. *See supra* text accompanying notes 323–327.
available to them, and the defense recognized in Raley should not have applied. Because the Raley defense should not have applied, courts have not simply recognized the same right across a variety of contexts. Instead, something specific to demonstrators has altered how courts have reviewed officers’ behavior. As argued above, only the First Amendment convincingly explains the protections courts have extended to demonstrators. Thus, the fact that demonstrators exercise their First Amendment rights in the cases considered above is not a coincidence at all, but instead plays a critical role in courts’ analyses.

2. A background role — Next, Part II.C considered whether, as the Seventh Circuit suggested in Vodak, the First Amendment might play only a “background role” in the analysis. As discussed above, however, what the Seventh Circuit characterized as a “background role” was in fact quite prominent. Because the First Amendment required officers to create exceptions to the applicable parade-permitting requirement, it also logically prohibited officers from acting in a way that would deter demonstrators from availing themselves of those exceptions. Thus, even when the Seventh Circuit appeared to assess the reasonableness of officers’ actions under the Fourth Amendment, it based its understanding of reasonableness on First Amendment considerations, such as the need to avoid deterring expressive conduct. In short, far from playing only a background role, the First Amendment permeated the Seventh Circuit’s entire analysis.

3. The feeble First Amendment — Finally, and most troublingly, Part II.C hypothesized that the First Amendment may not create demonstrators’ right to fair warning because it imposes only weak constraints on the regulation of demonstrations. As noted, the First Amendment does not compel legislatures to adopt “the least restrictive or least intrusive means” of regulating the flow of traffic, and courts will consider the abstract interests of parties not before them only in cases of “substantial” overbreadth. Nonetheless, the First Amendment imposes

389. Vodak v. City of Chi., 639 F.3d 738, 751 (7th Cir. 2011).
390. See supra text accompanying notes 271–276.
one very important requirement on local governments: namely, that they permit spontaneous demonstrations in response to developing events. This requirement, although simple in theory, becomes quite complicated in practice. Indeed, any official action that would deter a reasonable demonstrator from exercising her right to spontaneously demonstrate arguably qualifies as a substantial infringement, and courts' analyses of officers' conduct demonstrate a sensitive awareness to that possibility. Thus, the First Amendment's requirements with respect to demonstrations do not appear feeble at all. Instead, the First Amendment appears to impose exactly those requirements that courts have attributed to demonstrators' right to fair warning.

Upon reexamination, the arguments that the First Amendment does not create demonstrators' right to fair warning appear unpersuasive. Thus, because the First Amendment best explains existing doctrine, it provides the most likely constitutional foundation for the right that courts have recognized. Having reached this conclusion, analysis now turns to what it means to characterize the right to fair warning as a First Amendment right.

C. Fair Warning as a First Amendment Right

Why not conclude that the Due Process Clause, the Fourth Amendment, and the First Amendment work in concert to produce the right to fair warning? As described above, courts apply a more exacting form of due process review in cases that implicate the First Amendment. Moreover, many of the cases enforcing the right to fair warning involve the arrest of demonstrators, and only the Fourth Amendment addresses when officers may reasonably believe that demonstrators' conduct justifies an arrest?

393. See supra note 288.
394. See Vodak, 639 F.3d at 741, 749–50.
395. See supra text accompanying notes 310–312.
396. See supra text accompanying notes 227–229.
Practical considerations counsel against this approach. Specifically, courts charged with enforcing the right to fair warning need guidance on how to apply it, and the most difficult questions arise when the principles underlying the Due Process Clause, the Fourth Amendment, and the First Amendment come into conflict. The above analysis suggests that when conflicts emerge—most notably in cases where officers have only implicitly permitted demonstrators' actions—courts focus on the requirements of the First Amendment. Accordingly, this Part concludes by discussing how courts should give effect to First Amendment principles when enforcing demonstrators' right to fair warning.

Only a narrow class of cases will implicate the First Amendment right to fair warning. Specifically, courts will consider that right only when a statute or ordinance raises First Amendment problems, but the traditional remedy of invalidation appears unsatisfactory. Most commonly, invalidation will dissatisfy courts because the statute cannot reasonably be narrowed. As described above, courts avoid invalidation by focusing on how officers enforce a statute. To vindicate First Amendment principles, courts must ask whether the officers have, through their enforcement actions, resolved the statute's First Amendment problems. Put somewhat differently, courts must ask if officers have enforced a statute as though it were a narrower provision that complied with the First Amendment's requirements.

The cases in which courts have already considered demonstrators' right to fair warning identify at least two factors that courts should keep in mind when answering these questions. First and foremost, courts must ask whether officers' actions chill the exercise of First Amendment rights that the statute infringes. The threat of a chilling effect is particularly acute in cases that implicate the right to fair warning because the applicable statutes appear, albeit illegitimately, to prohibit conduct that demonstrators have a First Amendment right to undertake. In such circumstances, uncertainty about the legality of certain conduct, especially when combined with such serious sanctions as arrest or forcible dispersal, will encourage demonstrators to err on the side of caution, refraining from the exercise of their First Amendment rights. The threat caused by uncertainty potentially explains why the Seventh

397. See supra text accompanying notes 332–335.
Circuit in *Vodak* insisted that officers clearly explain exactly what they had forbidden, interpreting them to have permitted anything they had not unambiguously proscribed. Officers can avoid uncertainty, and thus any chilling effect, by acting in a manner that gives demonstrators a reasonable opportunity to conform their conduct to officers' demands. Fair warning gives such an opportunity almost by definition, and its suitability for that purpose perhaps explains why Courts of Appeals have adopted the language of fair warning, which evokes the Due Process Clause, while enforcing a First Amendment right. Given the likelihood of uncertainty in cases that implicate the First Amendment right to fair warning, courts considering that right must ask whether officers have truly resolved a statute's First Amendment problems or whether they have instead, by chilling the exercise of First Amendment rights, merely replaced a formal ban with an informal one.

*Cox* identified a second factor that courts must bear in mind when enforcing the right to fair warning. Courts considering the First Amendment have traditionally shown great skepticism towards any exercise of enforcement discretion, believing that officers may discriminate between different points of view and therefore slant or stifle the public discourse. Thus, the First Amendment right to fair warning, somewhat ironically, adopts as a remedy the type of selective enforcement that courts have long regarded as a source of constitutional concern. Given the potential of discretionary enforcement to create, rather than rectify, First Amendment problems, courts must vigilantly review such enforcement. As in *Cox*, such review may require courts to analyze officers' motivations in order to ensure that officers have not acted based on the content of speech, rather than for legitimate reasons. More generally, however, courts may limit the extent of the discretion officers exercise by encouraging the police to adopt procedures that clearly display, to demonstrators and courts alike, how officers intend to promote the legitimate purposes of the statutes they enforce. For example, in *Vodak*, the Seventh Circuit encouraged officers

---

400. *Cox II*, 379 U.S. at 573.
401. *Id.* at 572 (“Appellant correctly conceived . . . that this was not a valid reason for a dispersal order.”).
to demand that demonstrators provide "a clear idea of the march route, to hold them to it, and to prepare in advance reasonable measures for preventing the demonstration from spilling over the boundaries of the authorized march."\textsuperscript{402} Such procedures, if enacted, would have ensured that officers enforced the statute based on reasons that the First Amendment regarded as legitimate.

Thus, a First Amendment right to fair warning has a broad scope, albeit in a narrow class of cases. Rectifying a statute's First Amendment problems is no easy task. Not only must officers dispel uncertainty about what is and is not permissible; they must do so in a manner that does not appear to involve the exercise of undue discretion. How these principles will play out in future cases is unclear. Nonetheless, the First Amendment right to fair warning imposes significant burdens on officers. Such burdens indicate the principal difference between a right to fair warning grounded in the First Amendment and one based on either the Due Process Clause or the Fourth Amendment. Unlike the Due Process Clause and the Fourth Amendment, which focus on preventing officers from taking certain unconstitutional actions, the First Amendment attempts to foster demonstrators' abilities to undertake expressive activity. By demanding that officers accommodate such activity, the First Amendment right to fair warning creates a presumption in favor of permitting expression, elevating that presumption above even the enforcement discretion that officers traditionally enjoy.

CONCLUSION

This Article has argued that the First Amendment, rather than the Due Process Clause or the Fourth Amendment, provides the constitutional basis for the right to fair warning that numerous courts have attributed to demonstrators. Courts enforce the right to fair warning where they feel reluctant to invalidate a statute or an ordinance that raises First Amendment problems. Typically, the problematic provision serves a legitimate purpose that no narrower provision could accomplish. In such circumstances, courts focus on how officers have enforced the relevant provision, effectively asking whether officers have resolved the problems the provision creates. Thus, the right to fair warning functions

\textsuperscript{402} Vodak v. City of Chi., 639 F.3d 738, 750 (7th Cir. 2011).
as a narrowed form of First Amendment review. By applying First Amendment principles to officers’ enforcement of a statute, courts attempt to vindicate demonstrators’ First Amendment rights without disturbing the underlying legislative regime.

The right to fair warning demands more attention. Locating the right to fair warning in the First Amendment raises numerous questions. For example, does framing a First Amendment right in seemingly procedural terms, rather than terms that guarantee some substantive right to speak, alter how courts understand First Amendment protections? The uncertainty about the right’s constitutional origin also raises interesting questions. What does it mean to have a constitutional right for which courts have not identified a clear constitutional origin? Does the existence of such a right deserve consideration in the ongoing debate between those who would emphasize constitutional text and those who interpret the Constitution in light of some animating purpose? Can an originalist interpretation of the Constitution explain demonstrators’ right to fair warning? Finally, what might the analytical confusion concerning the origin of the right to fair warning tell us about how judges on Circuit Courts of Appeals approach their tasks? Are these judges attempting to faithfully apply Cox, or do they instead feel motivated by the right’s intuitive appeal to overlook the difficult issues that skeptical Justices on today’s Supreme Court would surely raise? In questions such as these, the search for the basis of the right to fair warning reflects and illuminates the deeper search for our ever-shifting constitutional identity.

403. For a discussion of this issue, see JOHN HART ELY, DEMOCRACY & DISTRUST (1980).

404. For a fascinating historical account of the right to spontaneously assemble in the streets, see El-Haj, supra note 277.