Rogers v. Tennessee: An Assault on Legality and Due Process

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INTRODUCTION 317
I. *ROGERS V. TENNESSEE* AND THE YEAR-AND-A-DAY RULE 319
A. Rogers v. Tennessee 319
B. *The Year-and-a-Day Rule* 320
II. SUBSTANTIVE LAW 321
A. *Legality* 321
B. Ex Post Facto *Clause* 325
C. Bouie v. City of Columbia 327
III. *ROGERS V. TENNESSEE* UNDERMINES LEGALITY AND LIMITS *BOUIE* 330
A. *The Court's Misinterpretation of* Bouie 332
B. *The Court's Misapplication of* Bouie 342
C. *Scalia's Dissent* 343
IV. THE IMPACT OF *ROGERS* 346
CONCLUSION 354

INTRODUCTION

In *State v. Rogers*,[1] the Tennessee Supreme Court held that the year-and-a-day rule, which requires that for murder, "the victim's death must occur within a year and a day after the fatal blow was delivered,"[2] was the law in Tennessee.[3] In the same opinion, the court decided the rule was outdated, abolished it, and applied the abolition retroactively to the defendant.[4] By doing so, the Tennessee Supreme Court upheld a conviction of murder that otherwise would have been criminal attempt to commit murder.[5] The United States Supreme Court, in a 5–4 decision authored by Justice O'Connor, upheld the murder conviction and held that the retroactive abolition of the year-and-a-day rule did not violate the defendant's due process rights.[6]

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1. 992 S.W.2d 393 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001).
2. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.1(e) (1986).
3. *Rogers*, 992 S.W.2d at 396, 400.
4. *Id.* at 402.
5. *See* State v. Rogers, No. 02C01-9611-CR-00418, 1997 Tenn. Crim. App. LEXIS 1044, at *1 (Tenn. Crim. App. Oct. 17, 1997) (stating that the issue on appeal is whether the conviction should be reduced to criminal attempt to commit murder).
6. Rogers v. Tennessee, 532 U.S. 451, 466–67 (2001).

Justice O'Connor's majority opinion undermines the notions of legality and due process and upholds an improper use of judicial power.

The United States Constitution states that "[n]o State shall . . . pass any . . . ex post facto Law . . . ."[7] The Supreme Court has held numerous times that the *Ex Post Facto* Clause applies only to legislative acts, not to judicial rulings.[8] In *Bouie v. City of Columbia*,[9] however, the Court stated, "[I]f a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."[10] The Supreme Court in *Bouie* recognized that a court's retroactive application of a new law could disadvantage a defendant in much the same way as the legislative enactment of an *ex post facto* law.[11] Since it decided *Bouie*, however, the Court has been loath to uphold *Bouie*-type due process claims by criminal defendants to prevent them from going unpunished.[12] By loosening the due process restrictions on judicial construction, the Court in *Rogers v. Tennessee*[13] further curtailed the legal protections of criminal defendants.

Rogers is a case-study in how judges can and do undermine legality and due process, two foundational principles of American criminal law. Part I of this Comment will provide the factual and procedural background of *Rogers*.[14] Part II will discuss the *Ex Post Facto* Clause, the *Bouie* decision and its constitutional underpinnings, and their interplay with the principle of legality.[15] Part III will critique the holding in *Rogers* and will demonstrate how both the Tennessee Supreme Court and the United States Supreme Court inappropriately interpreted *Bouie* and limited defendants' due process rights.[16] Part IV will examine the state of the law after *Rogers* and assess the effect *Rogers* is having on the outcome of due process claims under *Bouie*.[17]

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7. U.S. CONST. art. I, § 10, cl. 1.

8. Frank v. Mangum, 237 U.S. 309, 344 (1915); Ross v. Oregon, 227 U.S. 150, 161 (1913); *see* Bouie v. City of Columbia, 378 U.S. 347, 362 (1964).

9. 378 U.S. 347 (1964).

10. *Id.* at 353–54.

11. *See id.* at 353–55.

12. *See infra* notes 91–98 and accompanying text.

13. 532 U.S. 451 (2001).

14. *See infra* notes 18–38 and accompanying text.

15. *See infra* notes 39–98 and accompanying text.

16. *See infra* notes 99–210 and accompanying text.

17. *See infra* notes 211–70 and accompanying text.

I. *ROGERS V. TENNESSEE* AND THE YEAR-AND-A-DAY RULE

A. Rogers v. Tennessee

The facts of *Rogers v. Tennessee* are straightforward.[18] In 1994, Wilbert K. Rogers stabbed James Bowdery in the heart with a knife.[19] During surgery, Bowdery's heart stopped beating, and the resulting loss of oxygen to his brain caused cerebral hypoxia, leaving him in a vegetative state.[20] He remained in a coma for fifteen months until he succumbed to a kidney infection, a common problem for comatose patients.[21]

The jury convicted Rogers of second degree murder.[22] He appealed his conviction to the Court of Criminal Appeals of Tennessee (Court of Criminal Appeals), arguing that under the common law year-and-a-day rule, a conviction of murder requires that the victim die within a year and a day of the assault.[23] The Court of Criminal Appeals affirmed the conviction, holding that the Tennessee legislature had abolished the year-and-a-day rule when it enacted a comprehensive statutory criminal code in 1989.[24] The Tennessee Supreme Court, in a unanimous decision, upheld the conviction on different grounds.[25] It held that the Tennessee legislature had not abrogated the year-and-a-day rule, and therefore the rule was the law at the time Rogers stabbed Bowdery.[26] It then abrogated the rule itself and held Rogers guilty of murder. The court reasoned that the rule was obsolete and that its decision to apply the abrogation retroactively did not violate due process because it was not "an unforeseeable judicial enlargement of a criminal statute."[27]

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18. State v. Rogers, 992 S.W.2d 393, 395 (Tenn. 1999) (stating that the facts are not disputed), *aff'd*, 532 U.S. 451 (2001).

19. *Id.*

20. *Id.*

21. *Id.*

22. State v. Rogers, No. 02C01-9611-CR-00418, 1997 Tenn. Crim. App. LEXIS 1044, at *1 (Tenn. Crim. App. Oct. 17, 1997), *aff'd*, 992 S.W.2d 393 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001).

23. *Id.* (stating that the only issue on appeal is whether the common law year-and-a-day rule applies to reduce the conviction to criminal attempt to commit murder).

24. *Id.* at *3. The court relied on its reasoning in *State v. Ruane*, 912 S.W.2d 766, 774 (Tenn. Crim. App. 1995), decided after the defendant committed his acts.

25. *Rogers*, 992 S.W.2d at 394–95.

26. *Id.* at 394 (holding that the 1989 Criminal Sentencing Reform Act did not abolish the year-and-a-day rule).

27. *Id.* (stating that "we hereby abolish the now obsolete common law year-and-a-day rule"). The Tennessee Supreme Court did state, however, that "the rule has never served as the ground of decision in any Tennessee case" and that there is "uncertainty surrounding the continuing viability of the rule." *Id.* at 402. These statements arguably

The United States Supreme Court affirmed the conviction 5–4 and held that the Tennessee Supreme Court's retroactive abolition of the year-and-a-day rule did not violate due process.[28]

B. *The Year-and-a-Day Rule*

This Comment does not address whether the year-and-a-day rule should remain a part of the law. Almost uniformly courts or legislatures who have encountered the rule have abrogated it.[29] The Tennessee Supreme Court correctly assessed the obsolescence of the rule.[30] This Comment seeks to address the question to whom abolition of the rule should apply.

To fully understand the decisions of the Tennessee courts and the United States Supreme Court, a brief discussion of the year-and-a-day rule is necessary. The Tennessee Supreme Court defined the rule as follows: "in murder, the death must be proven to have taken place within a year and a day from the date of the injury received."[31] Whether the rule should be classified as a substantive principle of criminal law,[32] a criminal law defense,[33] or a rule of evidence,[34]

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demonstrate that the court, rather than abrogating the rule, actually found that it was not the law. *See id.* A thorough analysis of the court's opinion refutes this argument and demonstrates that it specifically held that the year-and-a-day rule was, until *Rogers*, part of the common law of Tennessee. *See id.* at 400–02 (stating that the court "has 'not hesitated to *abolish* obsolete common-law doctrines' ") (quoting Dupuis v. Hand, 814 S.W.2d 340, 345 (Tenn. 1991) (emphasis added)). The court's discussion of the weak foothold of the rule in the Tennessee common law was in the context of its determination of whether retroactively abolishing the rule was a due process violation—it engaged in this discussion to validate its abolition, not to imply that the rule was no longer a part of the law at the time Rogers committed his crime. *Id.* at 402. By finding that the rule was a weak part of Tennessee law, the court was able to justify its decision that abrogation was not "unexpected and indefensible." *Id.*; *see infra* notes 86, 204–06 and accompanying text.

28. Rogers v. Tennessee, 532 U.S. 451, 461–63 (2001).

29. LAFAVE & SCOTT, *supra* note 2, § 3.12(i) (Supp. 2002).

30. *Id.* (discussing how advanced medical science has rendered the rule unnecessary).

31. Percer v. State, 103 S.W. 780, 783 (Tenn. 1907) (quoting FRANCIS WHARTON, THE LAW OF HOMICIDE 18 (3d ed. 1907)).

32. *See, e.g.*, United States v. Chase, 18 F.3d 1166, 1172–73 (4th Cir. 1994) (holding that the rule is a conclusive presumption and thus a substantive rule of law and finding that more recent commentators and many state courts have held it to be a substantive rule of law); State v. Moore, 199 So. 661, 663 (La. 1940) (stating that "if the death occurred more than a year and a day from the time of the injury the person who inflicted it is not criminally responsible for the homicide"); LAFAVE & SCOTT, *supra* note 2, § 3.12(i) (Supp. 2002) (describing the year-and-a-day rule as "an absolute rule of law"); PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 105(h) (1984) (stating that the rule is "a bar to prosecution for homicide offenses"); Donald E. Walther, Comment, *Taming A Phoenix: The Year-and-a-Day Rule in Federal Prosecutions for Murder*, 59 U. CHI. L. REV. 1337, 1360 (1992) (examining the history of the federal year-and-a-day rule and concluding that

however, is unclear. The ambiguity surrounding the categories themselves further complicates classification of the rule.[35] In *Rogers*, the defendant argued that the rule was not a defense to murder but rather a substantive principle of criminal law. The state conceded this point.[36] Thus, under the common law in Tennessee, the state could not prove causation in a murder trial unless it could prove that the victim died within a year and a day of the injury.[37] In Tennessee, at least, the rule was more than a defense—it was a bar to prosecution.[38]

II. SUBSTANTIVE LAW

The relevant law underlying the decision in *Rogers v. Tennessee* is the historic principle of legality, the United States Constitution's *Ex Post Facto* Clause, and the application of this clause's rationale to the courts in *Bouie* through the Due Process Clause.

A. Legality

The principle of legality is a "basic premise" of criminal law.[39] Generally defined, legality means that "conduct is not criminal unless forbidden by law which gives advance warning that such conduct is

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it is a rule of evidence that "is best understood as a conclusive presumption that is, practically speaking, a rule of substantive law").

33. State v. Gabehart, 836 P.2d 102, 103 (N.M. Ct. App. 1992) (stating that "a majority of jurisdictions which have considered the rule's efficacy have determined that it constitutes a valid common-law defense to a charge of homicide"); State v. Robinson, 335 N.C. 146, 148–49, 436 S.E.2d 125, 127 (1993) (describing the rule as a "defense" that raised "a presumption that if the death of the victim occurred more than a year and a day after the assault, defendant's actions were not the cause of death").

34. 40 AM. JUR. 2D *Homicide* § 13 (1999) (stating that the "rule has been described as a rule of evidence rather than an element of the offense of murder") (citing Jones v. Dugger, 518 So. 2d 295 (Fla. Dist. Ct. App. 1987)).

35. In *Gabehart*, the New Mexico court described the rule as a defense. *Gabehart*, 836 P.2d at 103–04. But *Chase* cited *Gabehart* for the proposition that the year-and-a-day rule is a substantive rule of law. *Chase*, 18 F.3d at 1172.

36. State v. Rogers, 992 S.W.2d 393, 399 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001).

37. *Id.* at 400 (stating that "[w]hile similar in some respects to a defense in the sense that it precludes a conviction, the year-and-a-day rule is even more powerful than a defense because it entirely precludes a murder prosecution").

38. *Id.*

39. LAFAVE & SCOTT, *supra* note 2, § 3.1.

criminal."[40] Implicit in this principle is a prohibition against the retroactive application of criminal laws.[41]

Although in present day legal systems statutes define most crimes,[42] at common law defendants were held criminally responsible based on the common law as applied by judges.[43] Judges create (discover) common law crimes in two ways, based either on a "specific precedent" or a "general doctrine."[44] If a judge finds a criminal violation based on specific precedent, he only partially violates the doctrine of legality because, theoretically, the accused has been given warning of the illegality of his conduct.[45] A judge who finds a violation based on general doctrines, however, completely violates the principle of legality by depriving the defendant of virtually any possibility of knowing his conduct is criminal.[46] When judges create new crimes based not on "specific precedent," but instead to stop anti-social conduct, they deprive defendants of fair

40. *Id.*; *see* STANISLAW POMORSKI, AMERICAN COMMON LAW AND THE PRINCIPLE NULLUM CRIMEN SINE LEGE 25 (2d ed. 1975) (arguing that this principle protects the defendant from the whims of the prosecutor). Pomorski examines the role of common law criminal adjudication in the United States and how it undermines the principles of legality, especially *nullum crimen sine lege*. POMORSKI, *supra*, at 1–9.

41. The principle of legality is based on "four independent, though strictly connected rules." POMORSKI, *supra* note 40, at 24. The first is the principle of *nullum crimen sine lege*, *id.*, literally translated "no crime without [a] law." Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 462 n.27 (2001). The second rule is the prohibition of retroactively criminalizing conduct. POMORSKI, *supra* note 40, at 26. Without a prohibition on retroactive laws, the principle of legality would offer no protection. *Id.* The third rule is *nulla poena sine lege*, meaning "no punishment without law." *Id.* at 28. *See generally* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937) (thoroughly examining the principle of *nulla poena sine lege*). This principle currently operates to prevent the imposition of a heavier penalty than authorized by statute. POMORSKI, *supra* note 40, at 28. The fourth rule is the prohibition against the retroactive imposition of more severe penalties than previously authorized. *Id.* at 28–29.

42. LAFAVE & SCOTT, *supra* note 2, § 2.1.

43. *Id.* § 2.1(b).

44. POMORSKI, *supra* note 40, at 139. A raging debate over the nature of common law decision-making continues; that is, whether judges discover the common law that was already there or whether they actually create new law through their decisions. *See id.* at 35–38. This issue was debated by Justice O'Connor and Justice Scalia and is analyzed further *infra* notes 195–203 and accompanying text.

45. POMORSKI, *supra* note 40, at 139.

46. LAFAVE & SCOTT, *supra* note 2, § 2.1(f); *see* POMORSKI, *supra* note 40, at 139–40 (stating that the application of general doctrines to penalize the accused "leave[s] ample room for the courts to make new laws and . . . to create appearances that 'old rules are applied to new facts' "). An example of general doctrine is that anti-social behavior should not be tolerated. LAFAVE & SCOTT, *supra* note 2, § 2.1(b). Thus, a judge could determine that an accused's behavior, though not specifically proscribed by any current criminal statutes or existing common law precedent, was anti-social, and then create a new common law crime to ensure that the "criminal" was punished. *See id.*

warning of whether such conduct is criminal.[47] Of course, with the ever increasing body of statutes and cases construing those statutes, it is now virtually impossible for everyone truly to be on notice of whether his conduct is criminal—"the maxim that everyone is presumed to know the law" is, therefore, a legal fiction.[48]

The crucial, underlying command of legality is that judges must fairly apply criminal statutes and must refrain from creating common law crimes, or overturning common law defenses, based only on general principles. Pomorski explains that when a court convicts the accused on the basis of a common law crime, it violates *nullum crimen sine lege* because there is no "underlying legislation" to support its decision.[49] He makes it clear, however, that a judge who creates a common law crime based on precedent does not seriously violate the broader principle of legality because the accused had notice of the "criminal character of the punished act."[50] But as Professor Hall notes, this distinction between *nullum crimen* and legality is merely a technical one.[51] He argues that England and the United States historically have implemented this principle in a different manner than continental Europe, by relying on "detailed precedents" and "a vast body of case-law."[52] Thus, the difference between *nullum crimen* and legality is not crucial. What is crucial is that judges violate

47. LAFAVE & SCOTT, *supra* note 2, § 2.1(f). Justice Holmes explained the value of fair notice, stating that "[a]lthough it is not likely that a criminal will carefully consider the text of the law before he murders or steals, . . . fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." McBoyle v. United States, 283 U.S. 25, 27 (1931). Although *McBoyle* dealt with an ambiguous statute, the reasoning is just as applicable to common law criminal adjudication. LAFAVE & SCOTT, *supra* note 2, § 2.1(f).

48. LAFAVE & SCOTT, *supra* note 2, § 5.1(d).

49. POMORSKI, *supra* note 40, at 8.

50. *Id.*

51. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 52 (2d ed. 1960). "The principle *nullum crimen sine lege* comes to the forefront; at its core is the understanding that the legislative act is the only force determining the elements which constitute a punishable act." POMORSKI, *supra* note 40, at 24. As discussed *supra*, the reason that common law crimes violate this principle is that they make the law uncertain. *See* LAFAVE & SCOTT, *supra* note 2, § 2.1(f).

52. HALL, *supra* note 51, at 52. Pomorski argues that *nullum crimen sine lege* requires that all crimes be codified by the legislature. POMORSKI, *supra* note 40, at 8 (arguing that *nullum crimen* is violated when a defendant is convicted based on precedent and not statutory law). LaFave and Scott, however, seem to use the term "legality" interchangeably with the phrase *nullum crimen sine lege, nulla poena sine lege.* LAFAVE & SCOTT, *supra* note 2, § 3.1. They argue that the principle of legality is supported by abolishing "open-ended common law crimes." *Id.* Thus, under either definition of *nullum crimen sine lege*, common law criminal adjudication violates the principle because it allows the criminalization of conduct that was not previously prohibited either by statute or by the existing common law.

legality when they convict defendants by applying general principles instead of specific precedents or legislation.

The codification of criminal codes and the abolition of common law crimes help to realize the ideal of legality.[53] In 1989, Tennessee revamped its criminal code.[54] While retaining certain common law concepts, the code is now primarily statutorily based and thus, by design, promotes the principle of legality.[55]

The principle of legality is only partially protected by the United States Constitution.[56] The Constitution prohibits both Congress[57] and state legislatures[58] from passing *ex post facto* laws, but does not prevent the imposition of common law crimes.[59] Chief Justice Marshall long ago defined an *ex post facto* law as a law that "renders an act punishable in a manner in which it was not punishable when it

53. *See supra* notes 49–52 and accompanying text.

54. Sections 39-1-101 to 39-6-1804 were repealed and replaced by sections 39-11-101 to 39-17-1703, which remain in force. Act of June 12, 1989, ch. 591, sec. 1, 1989 Tenn. Pub. Acts 1169, 1169–1302 (codified as amended at TENN. CODE ANN. §§ 39-11-101 to 39-17-1703 (1997 & Supp. 2001)).

55. *See* TENN. CODE ANN. § 39-11-101(2) (1997) (stating that one of the new criminal code's objectives is to "[g]ive fair warning of what conduct is prohibited, and guide the exercise of official discretion in law enforcement, by defining the act and the culpable mental state which together constitute an offense"); *id.* § 39-11-102(a) (1997) (stating that "conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute"); State v. Rogers, 992 S.W.2d 393, 399–400 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001). Interestingly, the Tennessee Supreme Court quoted these statutes but ignored their underlying principle, the principle of legality. *See id.*

56. *See* U.S. CONST. art. I, § 10, cl. 1. (*Ex Post Facto* Clause).

57. *Id.* art. I, § 9, cl. 3.

58. *Id.* art. I, § 10, cl. 1.

59. *See* LAFAVE & SCOTT, *supra* note 2, § 2.1(e) (discussing the authority to create and impose common law crimes in America).

was committed."[60] This constitutional prohibition only applies to criminal statutes.[61]

B. Ex Post Facto *Clause*

The United States Supreme Court has held that the prohibition of *ex post facto* laws only applies to the legislature, not the judiciary.[62] The framers of the Constitution placed this specific prohibition in the Constitution to protect the citizenry from the legislature.[63] During the eighteenth century, the legislature was perceived to be the chief threat to liberty, while the common law judges were perceived to be the guardians of liberty.[64] At that time, judges were viewed as protectors of the rule of law and not as instruments of social change.[65] The clause is based upon five core principles: "fair warning" and reliance,[66] "fundamental justice,"[67] the prevention of "arbitrary and potentially vindictive legislation,"[68] "separation of powers,"[69] and, ultimately, legality.[70]

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60. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810). In *Calder v. Bull*, Justice Chase laid the foundation for *ex post facto* jurisprudence by listing the four types of *ex post facto* laws:

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

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis omitted). This opinion is "the cornerstone for all subsequent judicial interpretation." H. FRANK WAY, CRIMINAL JUSTICE AND THE AMERICAN CONSTITUTION 15 (1980).

61. Harisiades v. Shaughnessy, 342 U.S. 580, 594–95 (1952).

62. Frank v. Mangum, 237 U.S. 309, 344 (1915); Ross v. Oregon, 227 U.S. 150, 161 (1913); *see* Bouie v. City of Columbia, 378 U.S. 347, 362 (1964); *supra* note 8 and accompanying text.

63. POMORSKI, *supra* note 40, at 22–23.

64. *Id.*

65. *Id.* at 23. The role of judges at the time of the framing is hotly contested. *See id.* at 35–38. This debate is one of the key differences between the positions of Justice O'Connor and Justice Scalia in *Rogers* and is analyzed further *infra* notes 195–203 and accompanying text. While writers such as Blackstone argued that judges were merely "finding" the law, it is apparent that they could (and did) create new common law crimes. POMORSKI, *supra* note 40, at 35–38 (discussing "the substantiated and crushing criticism [of] the declaratory theory," the theory that judges were merely "finding" the law).

66. Carmell v. Texas, 529 U.S. 513, 531 n.21 (2000) (citing Miller v. Florida, 482 U.S. 423, 430 (1987)).

67. *Id.* at 531.

68. *Id.* at 566 (Ginsburg, J., dissenting) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)). A legislature acts vindictively when it singles out a person or group who is

While the *Ex Post Facto* Clause appears to be relatively straightforward, the inconsistencies in the Supreme Court's *Ex Post Facto* Clause jurisprudence have caused one commentator to state that the "numerous decisions in the area have amounted to an incoherent muddle."[71] The recent case of *Carmell v. Texas*[72] illustrates the difficulties the justices have encountered when interpreting the clause.[73] In *Carmell*, the Court, in a 5–4 decision, held that the Texas Court of Appeals's application of a new rule of evidence violated the *Ex Post Facto* Clause, thereby reaffirming *Calder v. Bull*'s[74] four-prong definition of an *ex post facto* law.[75] *Carmell* turned on a dispute over whether a new law enacted by Texas governed the sufficiency of the evidence or the competency of the witnesses.[76] The majority held that the law related to the sufficiency of the evidence because it regulated the level of corroboration of the victim's testimony necessary to sustain a conviction.[77] It therefore reasoned that the application of the law violated the *Ex Post Facto* Clause because it fell within Justice

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engaging in lawful activity, decides it wants to punish that group, and then enacts retroactive legislation to criminalize its conduct. *See* Mark Strasser, Ex Post Facto *Laws, Bills of Attainder, and the Definition of Punishment: On* Doma, *the Hawaii Amendment, and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227, 237 (1998) (citing Cal. Dept. of Corr. v. Morales, 514 U.S. 499, 519–20 (1995)).

69. *Carmell*, 529 U.S. at 531 n.21 (citing Weaver v. Graham, 450 U.S. 24, 29 n.10 (1981)).

70. *See* HALL, *supra* note 51, at 58–64 (discussing the *Ex Post Facto* Clause's role in upholding the principle of legality by prohibiting retroactive criminalization).

71. Wayne A. Logan, *The* Ex Post Facto *Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1268 (1998).

72. 529 U.S. 513 (2000).

73. A thorough discussion of the Supreme Court's *Ex Post Facto* Clause jurisprudence, or even a detailed analysis of *Carmell*, is outside the scope of this Comment. *Carmell* illustrates the Court's disagreement in this area and the effect of that disagreement on *Rogers*. For a more thorough discussion of *Carmell*, see *The Supreme Court, 1999 Term: Leading Cases*, 114 HARV. L. REV. 179, 190–99 (2000). At least one noted scholar has supported the decision. *See* Laurence H. Tribe, *Professor Laurence Tribe's Response*, 28 PEPP. L. REV. 537, 538 (2001) (stating that "*Carmell* is a rather well argued and closely reasoned case that makes one feel proud of the Court"). *But see* Jonathan D. Varat, *Jonathan D. Varat's Response*, 28 PEPP. L. REV. 633, 636–37 (2001) (stating that the justices should not have "invalidat[ed] [the] perfectly sensible law[]" at issue in *Carmell*); Danielle Kitson, Note, *It's an* Ex Post *Fact: Supreme Court Misapplies the* Ex Post Facto *Clause to Criminal Procedure Statutes*, 91 J. CRIM. L. & CRIMINOLOGY 429 (2001) (arguing that the majority in *Carmell* was incorrect).

74. 3 U.S. (3 Dall.) 386 (1798).

75. *Carmell*, 529 U.S. at 521–25, 552–53; *Calder*, 3 U.S. (3 Dall.) at 390; *see supra* note 60.

76. *Carmell*, 529 U.S. at 547–48.

77. *Id.*

Chase's fourth example of a prohibited *ex post facto* law,[78] being a "law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*."[79] The dissent reasoned that the new law merely related to witness competency and, therefore, was not proscribed under *Calder v. Bull*.[80] Though the decision in *Carmell* concerned a statute rather than a judicial decision, it is relevant to understanding the justices' positions in *Rogers*. The 5–4 split in *Carmell* is the same as the split in *Rogers*, except that in *Rogers*, Justice Souter switched sides and joined the members of the *Carmell* dissent to uphold the Tennessee Supreme Court's ruling.

C. Bouie v. City of Columbia

Recognizing that the courts could also run afoul of the principle of legality and make decisions that are as unjust as *ex post facto* laws, the Supreme Court in *Bouie* applied the principle of legality and the *Ex Post Facto* Clause to the courts through the Fourteenth Amendment's Due Process Clause.[81] In *City of Columbia v. Bouie*,[82] the South Carolina Supreme Court upheld the trespass convictions of Simon Bouie and Talmadge Neal, two black students who refused to leave an Eckerd's lunch counter.[83] To uphold the convictions, the South Carolina Supreme Court had to change the meaning of the state's trespass statute.[84] The United States Supreme Court

78. *Id.* at 552–53.

79. *Calder*, 3 U.S. (3 Dall.) at 390.

80. *Carmell*, 529 U.S. at 553 (Ginsburg, J., dissenting).

81. Bouie v. City of Columbia, 378 U.S. 347, 362 (1964). *Bouie* was one of five sit-in cases collectively known as the "Sit-In Cases of 1964." *Recent Decisions: Sit-In Cases of 1964—A Constitutional Right to Public Accommodations?*, 53 GEO. L.J. 226, 226 (1964).

82. 124 S.E.2d 332 (S.C. 1962), *rev'd*, 378 U.S. 347 (1964).

83. *Id.* at 332–33.

84. *See Bouie*, 378 U.S. at 356 ("The interpretation given the statute by the South Carolina Supreme Court in the *Mitchell* case, . . . so clearly at variance with the statutory language, has not the slightest support in prior South Carolina decisions."). Section 16-386 of the South Carolina Code defined trespass as "[e]ntry on lands of another after notice prohibiting same." S.C. CODE ANN. § 16-386 (Michie Supp. 1960). The Eckerd's, however, did not post a notice stating its policy of discrimination until after the defendants had taken their seats. *Bouie*, 378 U.S. at 348. But the South Carolina Supreme Court construed the statute to prohibit remaining on property after being asked to leave. *See id.* at 333 (citing City of Charleston v. Mitchell, 123 S.E.2d 512 (S.C. 1961), *rev'd per curiam*, 378 U.S. 551 (1964)). In *Mitchell*, the South Carolina Supreme Court construed the trespass statute at issue in *Bouie* to require someone, even if he had legally entered the property, to leave upon being asked by the owner. City of Charleston v. Mitchell, 123 S.E.2d 512, 516–19 (S.C. 1961), *rev'd per curiam*, 378 U.S. 551 (1964).

overturned the petitioners' convictions, holding that the South Carolina Supreme Court's enlargement of the trespass statute violated the defendants' due process rights to notice and fair warning and therefore operated exactly like an impermissible *ex post facto* law.[85] The Court went on to hold that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."[86]

Bouie thus used the Due Process Clause to uphold the principle of legality.[87] The Supreme Court recognized that the South Carolina Supreme Court's strained interpretation of the trespass statute worked as much injustice to the defendants as the South Carolina legislature would have if it had changed the meaning of the statute and applied the new meaning retroactively.[88] The Court in *Bouie* did not take issue with the South Carolina Supreme Court's

85. *Bouie*, 378 U.S. at 350–54, 362 ("If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of *ex post facto* laws would clearly invalidate the convictions."). The scope and meaning of the Supreme Court's holding is a source of heated debate between the majority and the dissent in *Rogers*. Justice O'Connor, writing for the majority, holds that *Bouie*'s reference to the *Ex Post Facto* Clause is dictum and not necessary for its decision. Rogers v. Tennessee, 532 U.S. 451, 459–60 (2001). Justice Scalia, writing the primary dissent, counters that this language is part of *Bouie*'s holding. *Id.* at 469 (Scalia, J., dissenting); *see infra* notes 117–53 and accompanying text.

86. *Bouie*, 378 U.S. at 354 (quoting HALL, *supra* note 51, at 61). The interpretation of this language is the source of another bitter difference between O'Connor and Scalia. O'Connor reasons that it allows the Court to change the law if the defendant has fair warning that it will change the law. *Rogers*, 532 U.S. at 466–67. Scalia sharply disagrees, asserting that *Bouie* does not allow judges to retroactively change the common law, but merely to interpret *statutes* in a manner consistent with existing precedent. *Id.* at 469–70 (Scalia, J., dissenting).

87. *See Bouie*, 378 U.S. at 354. The Court couches its decision in *Bouie* on the grounds of due process, not legality, because it needs a firm constitutional basis on which to overturn the South Carolina Supreme Court's decision. *See generally* POMORSKI, *supra* note 40, at 182–83, 191–92 (discussing the constitutionalization of the principle against retroactive penalization by courts). The Court explicitly stated, however, that "[t]he fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures," thus making it clear that it was thinking about legality. *See Bouie*, 378 U.S. at 354 (citation omitted) (citing HALL, *supra* note 51, at 58–59). Contrary to the principle of *nullum crimen sine lege*, however, the Supreme Court does not forbid state courts from changing the plain meaning of the law through judicial construction, but forbids the constructions being given retroactive effect. *See* POMORSKI, *supra* note 40, at 191–92 (stating that after *Bouie*, courts can still use analogy to expand punishability, but may not apply the expanded laws retroactively).

88. *See Bouie*, 378 U.S. at 354; *see also* FRANCIS A. ALLEN, THE HABITS OF LEGALITY, CRIMINAL JUSTICE AND THE RULE OF LAW 77 (1996) (noting that "[t]he interpretive function of appellate courts in the United States is crucial to rule-of-law concerns in criminal cases").

interpretation of the trespass statute, but with the retroactive application of that interpretation.[89] The Supreme Court also recognized that state courts need latitude to construe state law.[90]

Since it decided *Bouie* in 1964, the Supreme Court has been extremely hostile to due process claims brought under *Bouie*.[91] In fact, the Court last upheld a *Bouie* claim in a criminal case in 1977.[92] Since then, it has positively cited *Bouie* only in civil cases[93] and limited it in *Rogers v. Tennessee*.[94] Often the Court bases its decision on other grounds, either to avoid invoking *Bouie* or because it disagrees with the *Bouie* claim.[95] In other cases, the Court appears

89. *Bouie*, 378 U.S. at 362 (stating that South Carolina's interpretation of the statute could be "valid for the future" but "may not be applied retroactively").

90. *See id.* at 354. The Court in *Bouie* adopts the "unexpected and indefensible" language from Jerome Hall's criminal law treatise. *Id.* at 354; *see supra* note 86 and accompanying text. Professor Hall explains that, in essence, all judicial decisions operate retroactively because it is necessary for judges to interpret existing precedents and apply them to new facts. HALL, *supra* note 51, at 61. Hall recognizes the necessity of interpretation, but argues that there must be limits on retroactive application of judicial decisions. *See id.* The critical inquiry is whether a conviction is appropriate based on existing precedent. *Id.* A decision that is "unavoidab[ly]," but correctly, retroactive is one in which the court "reaches back into time and places the authoritative stamp of criminality upon the prior conduct." *Id.* What is inappropriate is for the court to apply a decision that is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Id.*; *see also* ALLEN, *supra* note 88, at 78 (stating that judicial interpretation of statutes is unavoidable).

91. Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the* Ex Post Facto *Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 60 (1997) (concluding, in an exhaustive article on *Bouie* and its impact on American jurisprudence, that "the *Bouie* doctrine practically is moribund at the federal level").

92. Marks v. United States, 430 U.S. 188 (1977). The author examined all twenty-nine Supreme Court cases that cite *Bouie v. City of Columbia*. *See also* Krent, *supra* note 91, at 57 (stating that *Marks* was the last criminal case in which a *Bouie* claim succeeded).

93. *See* Bush v. Gore, 531 U.S. 98, 115 (2000) (per curiam) (Rehnquist, C.J., concurring) (citing *Bouie* as giving the Supreme Court the authority to construe state law to determine whether the state court's construction comports with the U.S. Constitution); BMW of N. Am. v. Gore, 517 U.S. 559, 574 & n.22 (1996) (citing *Bouie* for the proposition that BMW did not have fair notice that the state would impose such a large punitive damages award and holding that this lack of notice violated the "[e]lementary notions of fairness enshrined in our constitutional jurisprudence").

94. *See infra* notes 99–190 and accompanying text.

95. In *Osborne v. Ohio*, 495 U.S. 103 (1990), the Court rejected the defendant's *Bouie* claim that he did not have notice that his conduct was illegal. *Id.* at 116–17. *Osborne* involved a state pornography statute that was overbroad on its face but had been narrowed by the state court's interpretation of the statute, thus rendering it constitutional. *Id.* at 113–15. The U.S. Supreme Court remanded the case for a determination of whether the defendant had been convicted based on the overly broad or the permissibly narrow interpretation of the statute. *Id.* at 125–26. In the case of In re *Primus*, 436 U.S. 412 (1978), the Court specifically stated that it did not need to decide whether the *Bouie* claim was valid. *Id.* at 421 n.13. In this case, the petitioner, a lawyer, was reprimanded for improperly soliciting business. *Id.* at 418–21. The Supreme Court overturned the

hostile to criminal defendants who engaged in activity that, while perhaps not fitting precisely within the criminal statute, was immoral.[96] Thus, although the Court has never overruled *Bouie*, it broadly construes the definition of fair notice[97] and narrowly construes the protections the case provides to criminal defendants.[98]

III. *ROGERS V. TENNESSEE* UNDERMINES LEGALITY AND LIMITS *BOUIE*

Although the Supreme Court historically has been averse to *Bouie* claims, *Rogers* further erodes *Bouie*'s protections.[99] In *Rogers*, the Supreme Court upheld the Tennessee Supreme Court's retroactive abolition of the year-and-a-day rule.[100] Justice O'Connor

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reprimand under the First and Fourteenth Amendments. *Id.* at 439. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Supreme Court held that Maine's rule allocating to the defendant the burden of proof on whether he committed homicide in the heat-of-passion violated the Constitution's command that the state prove beyond a reasonable doubt all facts necessary to support a conviction. *Id.* at 703–04. The Court, in this case, did not rely on *Bouie* to overturn the conviction. In fact, it held that there was no *Bouie* violation, but that discussion was dictum. *See id.* at 690 n.10. Another example of the Court using alternative grounds to support a decision is *Douglas v. Buder*, 412 U.S. 430 (1973). *See infra* note 155 (discussing how the Court in *Douglas* based its decision on a lack of evidentiary support, not on *Bouie*).

96. The cases seem to indicate that the Supreme Court does not wish to use *Bouie* to assist criminal defendants whose actions are reprehensible. *See* Krent, *supra* note 91, at 76 (stating that courts reject *Bouie* claims when the defendants' actions were clearly immoral). In *United States v. Lanier*, 520 U.S. 259 (1997), the Court refused to find a Tennessee criminal statute unconstitutionally vague. *Lanier* involved the conviction of a state judge under 18 U.S.C. § 242 for criminally violating the constitutional rights of five women by sexually assaulting them. *Lanier*, 520 U.S. at 261. The judge argued that the statute was unconstitutionally vague and did not provide fair notice that his actions were criminal. *Id.* The Court of Appeals agreed, but the United States Supreme Court vacated the Court of Appeals's decision and remanded, holding that "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267; *see also* Krent, *supra* note 91, at 57–58 (discussing *Lanier*). In *Rose v. Locke*, 423 U.S. 48 (1975) (per curiam), the Court rejected the defendant's argument that the statute in question was unconstitutionally vague so as not to give him fair notice his conduct was illegal. *Id.* at 53. The defendant violated a Tennessee statute outlawing "crime[s] against nature" by breaking into his neighbor's home and forcing her at knifepoint to allow him to perform cunnilingus. *Id.* at 48. The Court distinguished *Bouie* as being inapplicable. *Id.* at 53.

97. Krent, *supra* note 91, at 67–72 (discussing how the courts have loosely interpreted *Bouie*'s foreseeability requirement to the detriment of criminal defendants); *see supra* note 96 and accompanying text.

98. *See supra* notes 91–97 and accompanying text.

99. For a good discussion of the implications and problems with *Rogers*, see *The Supreme Court, 2000 Term: Leading Cases*, 115 HARV. L. REV. 306, 316–26 (2001) [hereinafter *2000 Term: Leading Cases*]. The article argues that "[t]he [C]ourt ... undermined the foundational principle of legality." *Id.* at 317.

100. Rogers v. Tennessee, 532 U.S. 451, 467 (2001).

reasoned that because the rule was obsolete,[101] was not firmly grounded in Tennessee law,[102] and had been abolished in nearly every jurisdiction,[103] *Bouie* should not prevent the Tennessee Supreme Court from abolishing the law.[104] The Supreme Court characterized the Tennessee Supreme Court's decision as "a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense."[105] It thus held that the retroactive abolition of a substantive rule of common law by a state supreme court does not violate due process if the defendant had fair notice that the court would abolish the rule.[106] By broadly construing what constitutes fair notice[107] and refusing to follow much of *Bouie*'s underlying reasoning, the Court limited accuseds' due process protections.[108]

Both the majority opinion and Scalia's dissent are incorrectly reasoned. The majority opinion is flawed in two significant ways, and each operates to disadvantage defendants. First, the Supreme Court's analysis of *Bouie*'s holding is incorrect, and as a result the Court wrongfully curtails *Bouie*'s protections. *Bouie* constitutionalized the protections of legality, and the Court should apply its holding in a manner consistent with that purpose.[109] Second, the Court, as illustrated by its very reasoning in *Rogers*, should not have used *Rogers* as the case in which it decided to curtail *Bouie*. *Bouie* and the line of cases since *Bouie* deal with statutory construction, not common law decision-making. This Comment will discuss both flaws in the Court's reasoning. It will then analyze Scalia's dissent and discuss how it too provides inadequate protections to the accused.

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101. *Id.* at 462–63.
102. *Id.* at 464–65.
103. *Id.* at 462.
104. *Id.* at 466–67.
105. *Id.* at 467.
106. *Id.* at 466–67.
107. *See id.*
108. *See id.*
109. As previously discussed, punishing prior innocent conduct or imposing harsher penalties for criminal conduct that previously warranted lower penalties violates the principle of legality. *See supra* notes 39–61 and accompanying text. In *Rogers*, the defendant's actions were clearly illegal under Tennessee law. *See* State v. Rogers, No. 02C01-9611-CR-00418, 1997 Tenn. Crim. App. LEXIS 1044, at *1 (Tenn. Crim. App. Oct. 17, 1997), *aff'd*, 992 S.W.2d 393, 400 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001); *supra* note 5 and accompanying text. When Rogers stabbed his victim, however, and the victim did not die within a year and a day, Rogers was not guilty of murder under Tennessee law as it existed at the time of his offense. *See* State v. Rogers, 992 S.W.2d 393, 400 (Tenn. 1999) (holding that the 1989 revision of Tennessee's criminal code did not abolish the rule), *aff'd*, 532 U.S. 451 (2001); *supra* note 27.

A. *The Court's Misinterpretation of* Bouie

The Court's first error in analyzing *Bouie* is its misinterpretation of *Bouie*'s "unexpected and indefensible"[110] language. The Court construed this phrase to allow a court to change the law, as long as the revision is expected.[111] As Justice Scalia correctly notes, however, this reading of *Bouie* is incorrect.[112] He reiterates that *Bouie* "expressed disapproval of a '*judicial construction* of a criminal statute' that is 'unexpected and indefensible *by reference to the law which had been expressed prior to the conduct in issue.*' "[113] The majority disregards the following syllogism: The Tennessee Supreme Court held that the year-and-a-day rule was the law of Tennessee but then eliminated it retroactively.[114] In *Bouie*, the South Carolina Supreme Court interpreted a trespass statute in a manner that changed the plain meaning of that statute retroactively, and that interpretation violated due process.[115] Retroactively eliminating the year-and-a-day rule deprives a defendant of his due process rights in the same way that retroactively changing the plain meaning of a statute deprives a defendant of those rights.[116] Therefore, the Tennessee Supreme Court violated Rogers's due process rights by retroactively abolishing the rule.

The Court then sheared away *Bouie*'s application of *ex post facto* principles to the judiciary by labeling that part of the opinion

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110. Bouie v. City of Columbia, 378 U.S. 347, 354 (1964) (internal quotations omitted); *see supra* notes 86, 90, and accompanying text.

111. *Rogers*, 532 U.S. at 467 (holding that "[f]ar from a marked and unpredictable departure from prior precedent, the Tennessee court's decision was a routine exercise of common law decisionmaking in which the court . . . [laid] to rest an archaic and outdated rule"). *See generally* Brief for Petitioner at 18–21, Rogers v. Tennessee, 532 U.S. 451 (2001) (No. 99-6218) (discussing the Tennessee Supreme Court's misapplication of *Bouie*).

112. *Rogers*, 532 U.S. at 470 (Scalia, J., dissenting) (reasoning that "[a]ccording to *Bouie*, not just 'unexpected and indefensible' retroactive changes in the common law of crimes are bad, but *all* retroactive changes").

113. *Id.* (Scalia, J., dissenting) (quoting *Bouie*, 378 U.S. at 354) (emphasis added by Scalia, J.) (internal citations omitted).

114. *Rogers*, 992 S.W.2d at 394–95; *see supra* notes 25–27 and accompanying text.

115. *Bouie*, 378 U.S. at 356; *see supra* notes 82–86 and accompanying text.

116. This part of the syllogism implies that *Bouie*, which discusses statutory interpretation, should control *Rogers*, which governs common law decision-making. This Comment later argues that *Bouie* is distinguishable from *Rogers*, but that the principles of legality enshrined in *Bouie* still should apply to common law decision-making. Regardless of whether one believes *Bouie* should control *Rogers*, because the Supreme Court decided that it does, the Court should have interpreted *Bouie* correctly. In addition, while the author concedes that the United States Supreme Court's characterization of the Tennessee Supreme Court's abolition of the year-and-a-day rule as common law decisionmaking is correct, he disagrees with its characterization as "routine." *See Rogers*, 532 U.S. at 467.

dictum.[117] The *Rogers* majority states that *Bouie* does not apply the *Calder ex post facto* definition to the courts through the Due Process Clause.[118] The majority holds that "[t]o the extent petitioner argues that the Due Process Clause incorporates the specific prohibitions of the *Ex Post Facto* Clause as identified in *Calder*, petitioner misreads *Bouie*."[119] The Court then characterizes the three passages from *Bouie* to the contrary as "expansive,"[120] "suggestive,"[121] and, ultimately, dicta.[122] The categorization of this language is the source of a bitter dispute between Justice Scalia and Justice O'Connor. Justice Scalia states that this language is not dictum, but is actually part of *Bouie*'s holding.[123] With its narrowing of *Bouie*, the Court undermined the principle of legality[124] and created a slippery slope for future decisions.

In characterizing this language as dictum, the majority in *Rogers* made two critical errors. First, it misinterpreted why the *Bouie* majority used the *ex post facto* language that it characterized as dictum. *Bouie* used this language to explain that the clause rested on the principle of legality, and it specifically held that the prohibition on retroactive lawmaking "must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures."[125]

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117. *Id.* at 459.

118. *Id.* at 458.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 459. The language of *Bouie* made three significant references to the *Ex Post Facto* Clause, each of which Justice O'Connor characterized as dictum. First, O'Connor quoted the *Bouie* language stating that " '[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing . . . a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.' " *Id.* at 458 (quoting Bouie v. City of Columbia, 378 U.S. 347, 353–54 (1964)). Second, she quoted the *Bouie* language stating that " '[a]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law.' " *Id.* (quoting Bouie v. City of Columbia, 378 U.S. 347, 353 (1964)). And finally, she characterized as dictum the *Bouie* language stating that " '[t]he Due Process Clause compels the same result' as would the constitutional proscription against *ex post facto* laws 'where the State has sought to achieve precisely the same [impermissible] effect by judicial construction of the statute.' " *Id.* at 458–59 (quoting Bouie v. City of Columbia, 378 U.S. 347, 362 (1964)).

123. *Id.* at 469 (Scalia, J., dissenting). Justice Scalia makes the further point that the *Bouie* decision rested on the principle of legality. *Id.* at 470 (Scalia, J., dissenting) (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)) (" '[T]he required criminal law must have existed when the conduct in issue occurred . . . .' ") (internal quotations omitted). This principle is partially encapsulated by the *Ex Post Facto* Clause. *See* U.S. CONST. art. I, § 10, cl. 1; *supra* notes 62–70 and accompanying text.

124. *See Rogers*, 532 U.S. at 468–70 (Scalia, J., dissenting).

125. Bouie v. City of Columbia, 378 U.S. 347, 354 (1964).

Thus, the majority correctly concluded that *Bouie* did not apply the specific *Calder* categories of the *Ex Post Facto* Clause to the judiciary.[126] The majority opinion erred, however, by holding that *Bouie* only rests on the concepts of "notice, foreseeability, and, in particular, the right to fair warning."[127] *Bouie* rests on the principle of legality, which includes, but is not limited to, the concepts of notice, foreseeability, and fair warning.[128] At the core of legality is the idea that retroactively changing the law to criminalize previously innocent conduct, or retroactively increasing the penalty for criminal conduct, is "unjust."[129] It is thus more protective than the due process concepts on which the majority in *Rogers* says *Bouie* is based. The majority in *Rogers* was concerned that this "expansive" language in *Bouie* would operate to prevent courts from engaging in common law decision-making and therefore categorized it as dictum.[130] But *Bouie* did not sweep so far as to prevent courts from interpreting the law. Its prohibitions only extended to prohibit courts from retroactively changing the law.

The second error, which naturally follows from the first, was to characterize this language as dictum.[131] Properly interpreted as clarifying that *Bouie* rests on the principle of legality, this language is not dictum. An analysis of the term dictum will demonstrate that this language is part of *Bouie*'s holding. *Black's Law Dictionary* defines obiter dictum as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)."[132] This definition, while appearing to be simple and straightforward, is often quite difficult to apply in

126. *Rogers*, 532 U.S. at 459.

127. *Id.*

128. *See Bouie*, 378 U.S. at 353–54; *see also* HALL, *supra* note 51, at 58–64 (discussing the principle of legality as a core concept of criminal law whose roots are broader than ensuring adequate notice of what conduct is criminal).

129. HALL, *supra* note 51, at 61.

130. *Rogers*, 532 U.S. at 458–59, 460–62.

131. This Comment will thoroughly analyze whether this language is dictum. The Harvard Law Review also argued, more briefly, that this language was part of *Bouie*'s holding. *See 2000 Term: Leading Cases*, *supra* note 99, at 321–22.

132. BLACK'S LAW DICTIONARY 1100 (7th ed. 1999) ("Often shortened to *dictum* or, less commonly, *obiter*."). The definition of *ratio decidendi* is closely related to the definition of dictum. In fact, they are really two sides of the same coin. *See* POMORSKI, *supra* note 40, at 43 ("The concept of dictum is closely connected with the concept of *ratio*. Starting from a negative assumption it may be said that any general proposition of law contained in the decision of the court which is not *ratio* is *dictum*."). *Ratio decidendi* is the holding of a case. *Id.* at 39.

practice.[133] Judge Posner surveyed several reported definitions of dictum and concluded that "the definitions [of dictum] ... are somewhat inconsistent, somewhat vague, and somewhat circular."[134] Therefore, he observed that "instead of asking what the word 'dictum' means we can ask what reasons there are against a court's giving weight to a passage found in a previous opinion."[135] The basic question is whether the court "fully considered" the language in question.[136] Judge Posner listed some of the many reasons why a court should not give weight to language in an earlier opinion. All of these reasons involve the question of whether the language in the earlier opinion was "fully considered."[137] Posner adopted a four-factor test for analyzing whether the language was dictum. If the language was not crucial to the outcome of the case, if it could be stripped from the court's reasoning without significantly affecting the case's rationale, if it was not grounded in the facts, or if it was not an issue in the case and therefore not adequately argued by the parties, then it should not be relied upon.[138]

An application of Posner's "fully considered" factors demonstrates that Justice Brennan, writing the majority opinion in *Bouie*, fully considered the *ex post facto* passages he included in his opinion.[139] First, this language is crucial to *Bouie*'s outcome. By applying the principle of legality to the Due Process Clause, the Court in *Bouie* prohibited the South Carolina Supreme Court from changing the meaning of its trespass statute.[140] As discussed *supra*, the concept of legality prohibits retroactively criminalizing conduct.[141] The concepts of notice, foreseeability, and fair warning, as defined in *Rogers*, would alone not have been adequate to protect Talmadge Neal and Simon Bouie from the South Carolina Supreme Court. In *Bouie*, the plain meaning of the South Carolina trespass statute indicated that the defendants were technically not trespassing.[142] But under *Rogers*'s rationale that fact would not be dispositive for the following two reasons. First, the defendants also had to contend with

133. *See* United States v. Crawley, 837 F.2d 291, 292–93 (7th Cir. 1988).
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. Bouie v. City of Columbia, 378 U.S. 347, 353, 362 (1964).
140. *Id.* at 363.
141. *See supra* notes 39–61, 125–30 and accompanying text.
142. *See Bouie*, 378 U.S. at 356; *supra* note 84 and accompanying text.

the common law prohibitions against trespassing.[143] The dissent in *Bouie* asserted that the common law of South Carolina prohibited the defendants' actions.[144] Further, under *Rogers*, even if the common law of South Carolina did not prohibit this conduct, the defendants should have been on notice that the South Carolina Supreme Court could have modified the common law to prohibit this conduct if it determined that the prior common law rule was out of date for dealing with protesters.[145] Second, under *Rogers*, the South Carolina Supreme Court would have had more latitude in construing the trespass statute. If other states had similar statutes and had construed them in a similar fashion, the defendants would have been on notice that South Carolina might have construed its statute in the same manner.[146] North Carolina had a similar trespass statute and had construed it to prohibit the very acts Neal and Bouie committed.[147] The principle of legality is crucial to the decision in *Bouie* because it provides the mechanism that prevents the South Carolina Supreme Court from changing the law of trespass, either by modifying the common law or by relying on precedents from other jurisdictions to justify its construction of the state's trespass statute.

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143. *Bouie*, 378 U.S. at 366 (Black, J., dissenting) (stating that under the common law of South Carolina, "a person who enters upon the property of another by invitation becomes a trespasser if he refuses to leave when asked to do so"). *But see id.* at 357–58 (holding that civil trespass and criminal trespass were distinct at common law, such that though someone who entered with permission could be forced to leave, his mere refusal to leave would not subject him to criminal penalties).

144. *Id.* at 366 (Black, J., dissenting); *see supra* note 143.

145. *See* Rogers v. Tennessee, 532 U.S. 451, 461 (2001) ("In the context of common law doctrines (such as the year and a day rule), there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves."). One can easily imagine the public safety arguments the South Carolina Supreme Court in *Bouie* could have used to "justify" such "routine . . . common law decisionmaking." *See id.* at 467 (using the phrase "routine exercise of common law decisionmaking").

146. *See id.* at 463–64. The majority in *Rogers* held that because nearly all other jurisdictions had abrogated the year-and-a-day rule, Rogers should have been on notice that the Tennessee Supreme Court would abolish it. *Id.* This reasoning seems to conflict with *Bouie*, which stated that "[i]t would be a rare situation in which the meaning of a statute of another State sufficed to afford a person "fair warning" that his own State's statute meant something quite different from what its words said." *Bouie*, 378 U.S. at 359–60. In his analysis of *Bouie* jurisprudence, Krent found that even before *Rogers*, lower courts were using decisions from other jurisdictions to find fair notice. Krent, *supra* note 91, at 67. *Rogers* places the Supreme Court's stamp of approval on this seemingly flawed reasoning.

147. *See* City of Charleston v. Mitchell, 123 S.E.2d 512, 516–17 (S.C. 1961) (South Carolina partially relied on North Carolina's interpretation of its statute to uphold the defendants' convictions in *Mitchell*, the case on which *Bouie* relied), *rev'd per curiam*, 378 U.S. 551 (1964).

An analysis of Posner's second factor indicates that stripping the *ex post facto* language from *Bouie* significantly affects the Court's rationale. The opinion in *Bouie*, as Justice Scalia notes, is based on the principle of legality.[148] This principle is embodied in the *Ex Post Facto* Clause.[149] The *Bouie* Court enforced the principle of legality by applying the principles of the *Ex Post Facto* Clause to the South Carolina Supreme Court's decision via the Due Process Clause.[150]

An examination of Posner's third factor demonstrates that the language was clearly grounded in the facts. The South Carolina Supreme Court changed the meaning of the trespass statute to convict the defendants, and its interpretation therefore operated exactly like a prohibited *ex post facto* law.[151] The correct application of the Due Process Clause to the South Carolina legislature was clearly an issue in *Bouie*, thus satisfying Posner's fourth factor.[152] Because the *ex post facto* language embodied the principle of legality, it was both necessary to *Bouie*'s outcome and fully considered by Justice Brennan, and is therefore not dictum.[153]

The majority attempts to buttress its claim that the *Bouie* language is dictum by citing other cases that it said construed *Bouie* as a due process case based only upon notice and foreseeability.[154] A closer examination of these cases, however, shows that they do not support the majority's use of them. Two of these cases dealt with statutes that were held void for vagueness.[155] They are

148. *Rogers*, 532 U.S. at 470 (Scalia, J., dissenting).

149. *See* U.S. CONST. art. I, § 10, cl. 1; *supra* note 70.

150. *See Bouie*, 378 U.S. at 353–54. The preceding discussion of Posner's first and second factors indicates that the two can be viewed as two sides of the same coin. The language in question is crucial to *Bouie*'s decision because it significantly affects *Bouie*'s rationale.

151. *Id.* at 362.

152. *Id.*

153. *See* POMORSKI, *supra* note 40, at 39 ("The precedent (*ratio decidendi*) is, according to the 'classical theory,' only that portion of the decision which formulates a general proposition of law, if this was the proposition employed by the court in deciding a concrete case and if the formation of it was necessary for the decision."). *Bouie* meets these criteria. The *Ex Post Facto* Clause language was a proposition of law. *See Bouie*, 378 U.S. at 353–54, 362. There was a concrete case: the South Carolina Supreme Court, through judicial interpretation, changed the South Carolina trespass statute and applied the change retroactively to the defendants. *See id.* at 362. Their convictions were upheld based on this interpretation, and they appealed to the United States Supreme Court. *See id.*

154. Rogers v. Tennessee, 532 U.S. 451, 459–60 (2001).

155. United States v. Lanier, 520 U.S. 259, 261, 271–72 (1997) (vacating the conviction of a state judge under 18 U.S.C. § 242 for criminally violating the constitutional rights of five women by sexually assaulting them and remanding the case to the lower court to determine if the statute in question was unconstitutionally vague); Rabe v. Washington,

distinguishable from *Bouie* because the due process violation in *Bouie* was not that the trespass statute was void for vagueness, but that the South Carolina Supreme Court's interpretation of that statute violated due process.[156] One of the cases specifically quoted the language in *Bouie* that the majority in *Rogers* characterized as dictum.[157]

The Court's citation of *Rose v. Locke*[158] appears, at least superficially, to be correct.[159] The majority states that *Rose* upheld the "defendant's conviction under a statute prohibiting 'crimes against nature' because, unlike in *Bouie*, the defendant '[could] make no claim that [the statute] afforded no notice that his conduct might

405 U.S. 313, 316 (1972) (holding "that a State may not criminally punish the exhibition at a drive-in theater of a motion picture where the statute, used to support the conviction, has not given fair notice that the location of the exhibition was a vital element of the offense"). Oddly, *Rabe* does not even cite *Bouie*. Another case actually found a due process violation based on a lack of evidentiary support, not a lack of fair warning. Douglas v. Buder, 412 U.S. 430, 432 (1973) (holding "that the finding that petitioner had violated the conditions of his probation by failing to report 'all arrests . . . without delay' was so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment"). Thus, the discussion of *Bouie* in that case is dictum, so Justice O'Connor, by her own admission, should not be relying on it. In *Douglas*, the Court only discussed *Bouie* after resting its decision on a due process violation based on lack of sufficient evidence. *Id.* at 432. The Court then went on to counter the state's argument that the state supreme court had construed arrest to encompass the traffic citation and that the Supreme Court should therefore defer to the state court's interpretation of state law. *Id.* The United States Supreme Court reasoned that the state supreme court did not make a finding that an arrest included a traffic citation. *Id.* The Court went on to state that under *Bouie*, if the state supreme court had made such a finding, it would have to reject such a construction of the law as being a violation of due process. *Id.* Because the Supreme Court held that the state court did not make a specific finding that a citation constituted an arrest, its discussion of *Bouie* is dictum, because it is not based on facts before the court. *See id.*; *supra* note 138 and accompanying text.

156. *Bouie*, 378 U.S. at 362–63; *see supra* notes 85–86 and accompanying text.

157. Marks v. United States, 430 U.S. 188, 192 (1977) (quoting *Bouie*, 378 U.S. at 353–54) (stating that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids"). The *Marks* opinion quoted *Bouie*'s statement that " '[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.' " *Id.* (quoting *Bouie*, 378 U.S. at 353–54). The Court in *Marks* does say, however, that there was a due process violation in *Bouie* because the South Carolina Supreme Court's construction of the statute was "unexpected." *Id.* But by immediately following that statement with the *ex post facto* quotation from *Bouie*, *Marks* appears to state that this language is the reason why the South Carolina Supreme Court's actions violated due process. *See id.* Thus, *Marks* significantly undermines Justice O'Connor's holding that the *Bouie* language is dictum. *See* Brief for Petitioner at 4–5, Rogers v. Tennessee, 532 U.S. 451 (2001) (No. 99-6218).

158. 423 U.S. 48 (1975) (per curiam).

159. *Rogers*, 532 U.S. at 459–60 (quoting *Rose*, 423 U.S. at 53).

be within its scope.' "[160] While the citation is technically a correct statement of *Rose*'s holding, it does not persuasively support Justice O'Connor's statement that *Bouie* was grounded only on principles of notice and foreseeability. In *Rose*, the defendant violated a Tennessee statute outlawing "crime[s] against nature" by breaking into his neighbor's home and forcing her at knifepoint to allow him to perform cunnilingus.[161] The Court rejected the defendant's argument that the statute was unconstitutionally vague so as not to give him fair notice his conduct was illegal.[162] It held that the respondent had fair warning his conduct was illegal because the Tennessee Supreme Court had previously held that the statute should be interpreted broadly and other jurisdictions construed a "crime against nature" to include the acts that he had performed.[163] The Court decided there was no due process violation based not on *Bouie*, but on other cases, which dealt with statutes that were unconstitutionally void for vagueness.[164] The Supreme Court distinguished *Bouie*, stating that "there is no possibility of retroactive lawmaking here."[165] *Rose* thus does not support the reading of *Bouie* to which O'Connor ascribes it.

After failing to establish that *Bouie*'s application of the clause to the judiciary was dictum, Justice O'Connor reasons that applying the *Ex Post Facto* Clause to the judiciary "circumvent[s] the clear constitutional text."[166] The majority opinion in *Rogers* again overstates the purpose of *Bouie*'s *ex post facto* language, which was not to apply the *Ex Post Facto* Clause per se to the judiciary, but to apply the principle of legality to the judiciary. Even if *Bouie* were trying to apply the clause directly to the judiciary, O'Connor's reasoning would be invalid because the Due Process Clause involves rights fundamental to liberty.[167] One of the rights fundamental to liberty is the principle of legality embodied in the *Ex Post Facto* Clause.[168] Therefore, although the clause itself does not apply to the courts, the underlying principle of legality does.[169]

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160. *Id.* (quoting *Rose*, 423 U.S. at 53).

161. *Rose*, 423 U.S. at 48–49; *see supra* note 96.

162. *Rose*, 432 U.S. at 52–53.

163. *Id.*

164. *Id.*

165. *Id.* at 53 (quoting Bouie v. City of Columbia, 378 U.S. 347, 352 (1964)).

166. Rogers v. Tennessee, 532 U.S. 451, 460 (2001).

167. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, *liberty*, or property, without due process of law.") (emphasis added).

168. *See id.* art. I, § 10, cl. 1 (*Ex Post Facto* Clause); Marks v. United States, 430 U.S. 188, 191 (1977) (stating that "the principle on which the [*Ex Post Facto*] Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty"). Legality is

The majority then makes the interesting observation that a court's abolition of a substantive common law rule should be less constitutionally restrained than its interpretation of a state statute.[170] The Court appears to have it backwards. Legal interpretation is necessary, abolition of constitutional laws is not. The Court's point is further undermined because "common law decisionmaking" will allow the abolition of laws that protect defendants. In light of this power, the application of *ex post facto* principles to the judiciary is even more necessary than their application to the legislature. Judges, personally affected by the gruesome facts of a particular case, are more likely to change the law.[171] Of course, the majority's response to this argument is that judges need the leeway to interpret, refine, and ultimately to change the common law.[172] While this is undoubtedly true, the courts' ability to change the law should be restrained by the principle of legality. To allow a court the power to engage in retroactive common law decision-making at the expense of protections for criminal defendants seems, on balance, to be an improper weighing of the competing interests.[173]

By stripping the *ex post facto* language from the opinion, the Court in *Rogers* holds that *Bouie* is based only on notice and foreseeability, limiting it to a fair warning case.[174] To make matters

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an underlying principle of the *Ex Post Facto* Clause. *See* POMORSKI, *supra* note 40, at 26 (stating that the prohibition of retroactive criminalization is crucial to the principle of legality); *supra* notes 125–30.

169. Brief for Petitioner at 16, Rogers v. Tennessee, 532 U.S. 451 (2001) (No. 99-6218). Rogers's attorney makes a strong case for this proposition. He argues that "[t]he principles on which the *Ex Post Facto* Clause is based, i.e., fundamental justice, fair warning, and the prevention of arbitrary and vindictive laws, are core concepts of constitutional liberty." *Id.* Therefore, he argues that "the Due Process Clause of the Fourteenth Amendment prevents courts from applying judicial rulings in ways which impinge upon these same principles. Where *ex post facto* laws are by their nature fundamentally unfair when enacted by a legislature, they are likewise 'fundamentally unfair' as the result of judicial rulings." *Id.* This argument is based ultimately on *Bouie v. City of Columbia*, 378 U.S. 347 (1964), which held that Bouie and Neal were "deprived of *liberty* and property without due process of law in contravention of the Fourteenth Amendment." *Id.* at 363 (emphasis added).

170. *See Rogers*, 532 U.S. at 460–62.

171. Krent argues that "freeing judges from the strictures of the *Ex Post Facto* Clause may invite too much judicial power." Krent, *supra* note 91, at 52. He ultimately concludes, however, that restraints on retroactive lawmaking by the legislature are more important than those on the judiciary. *Id.* at 93–94.

172. *Rogers*, 532 U.S. at 461–62.

173. Of course, ultimately this conclusion is the opinion of the author.

174. *Rogers*, 532 U.S. at 459. The Court fails to recognize that the reasons underlying legality are broader than just fair notice. *See* HALL, *supra* note 51, at 63 (arguing that the principle of legality necessarily goes beyond a requirement of fair warning); Krent, *supra*

worse for criminal defendants, *Rogers* endorses an expansive definition of fair warning. The requirement of fair warning has always been easy to meet when rejecting *Bouie* claims,[175] and after *Rogers* it is much easier for two reasons. First, *Rogers* permits courts to change the law retroactively, even if the change is unexpected, as long as it is not indefensible.[176] Justice Scalia asserts that under *Bouie* the Court could not change the law at all, prospectively or retrospectively.[177] *Rogers* allows courts to change the law retroactively, unless the defendant does not have "fair warning" that the court will change it.[178] This reading of *Bouie* gives courts much more discretion to find fair notice because now they can find fair notice not only when they think the defendant should have known a court would interpret a law in a certain way, but also when he should have known that the court would change the law. Thus, the defendant is held to a much higher standard under *Rogers* than under *Bouie*; he must be able to anticipate what the law is and also what the court might change it to be.[179] Ultimately, under *Rogers*, a court is bound by a lower due process standard, because it can change the law if it believes that the defendant had fair notice of the change.[180]

The second reason that it is easier to find fair notice under *Rogers* is that the Supreme Court has made it clear that the actions of other jurisdictions can provide fair warning to defendants.[181] The majority holds that the abolition of the rule by most jurisdictions helped provide Rogers fair notice that the Tennessee Supreme Court

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note 91, at 46 n.49 (discussing how the principle of legality guards against vindictive governmental action).

175. *See supra* notes 91–98 and accompanying text.

176. *See Rogers*, 532 U.S. at 469 (Scalia, J., dissenting) (asserting that "[t]he Court attempts to cabin *Bouie* by reading it to prohibit only unexpected and indefensible judicial law revision, and to permit retroactive judicial changes so long as the defendant had fair warning that the changes might occur") (citing *Rogers*, 532 U.S. at 462) (internal quotations omitted). The term "indefensible" is not defined in *Bouie* or in *Rogers*. As discussed *supra* notes 86 and 90, however, the Court in *Bouie* adopted this language from Professor Hall's treatise. In the paragraph following his use of the term "indefensible," Professor Hall argued that punishing a defendant more severely than the law allowed when the defendant committed the crime is "unjust." HALL, *supra* note 51, at 61. As discussed *supra*, that is what occurred in *Rogers*. Hall would tolerate retroactive decisions that were "unavoidable"—that is, those that involved necessary statutory construction. *Id.*; *see supra* note 90. It does not seem that he, nor the Court in *Bouie* that adopted his language, would tolerate a retroactive abolition of a substantive rule of criminal law.

177. *Rogers*, 532 U.S. at 470 (Scalia, J., dissenting).

178. *Id.* at 466–67.

179. *See id.* at 479–80 (Scalia, J., dissenting).

180. *See id.* (Scalia, J., dissenting).

181. *See id.* at 463–64 (discussing the relevancy of other states' abolition of the rule to the issue of Rogers's constructive knowledge); *supra* note 146.

would abolish it.[182] Justice Scalia persuasively counters that the actions of courts in other states are irrelevant to fair notice.[183] He also notes that even if the decisions of other states are relevant, most other states confronting this issue did not abolish the rule retroactively.[184] In fact, the Court in *Bouie* addressed the impact of other states' laws on fair notice and concluded that in nearly all situations, the laws of other states would be irrelevant.[185]

B. The Court's Misapplication of Bouie

This Comment argues that the principle of *Bouie*, the constitutionalization of legality and its application to the judiciary, should be extended to common law decision-making. A judge can equally disadvantage a criminal defendant by overturning a common law rule or broadly construing a statute to prohibit conduct. The majority in *Rogers*, however, correctly notes that common law decision-making is different from statutory construction.[186] It therefore limits *Bouie* to preserve judges' ability to construe the common law.[187] Limiting *Bouie* is incorrect for two reasons. First, the majority's interpretation of *Bouie*, as discussed earlier, is inaccurate.[188] But perhaps just as problematic is that the majority's interpretation of *Bouie* is unnecessary to its decision.[189] *Bouie*, and the cases that follow *Bouie*, deal with statutory construction, not common law adjudication. To affirm the Tennessee Supreme Court's holding, the majority did not even need to interpret *Bouie*. It could have merely distinguished it as a statutory construction case and held it to be inapplicable. Having distinguished *Bouie*, the majority could have rested its holding on traditional due process notions of notice

182. *Rogers*, 532 U.S. at 463–64.

183. *Id.* at 479–80 (Scalia, J., dissenting). Requiring citizens to apprise themselves of the statutory and common law of a state, as well as a court's propensity to change the law, would appear to be too much. To then add a requirement that they also become familiar with other states' laws would seem to violate Justice Holmes's mandate in *McBoyle v. United States*, 283 U.S. 25, 27 (1931). *See supra* note 47.

184. *Rogers*, 532 U.S. at 479 (Scalia, J., dissenting).

185. Bouie v. City of Columbia, 378 U.S. 347, 359–60 (1964). The Court specifically stated that "it would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said." *Id.*

186. *See Rogers*, 532 U.S. at 461–62.

187. *See id.* at 466–67.

188. *See supra* notes 110–85 and accompanying text.

189. *See 2000 Term: Leading Cases*, *supra* note 99, at 321 (stating that "[t]his reinterpretation of *Bouie* was neither necessary to protect the process of common law adjudication, nor essential to respect the differing institutional roles played by courts and legislatures").

and foreseeability. By reinterpreting *Bouie* to ensure it would not conflict with the Courts' power to modify the common law, the Court cured the disease by killing the patient. *Rogers* is a case about common law decision-making, not statutory construction. But in deciding this case, the Court curtailed not only protections from retroactive common law decision-making, but also retroactive statutory construction, even though the case does not implicate the latter concern. Why the Court was motivated to write such a broad opinion on such a narrow set of facts is unclear. This action could represent a lack of careful reasoning or a conscious effort to limit a disfavored doctrine.[190] In either event, the Court's reasoning is overbroad and unduly limits defendants' due process protections.

C. *Scalia's Dissent*

Justice Scalia's dissenting opinion more accurately discusses *Bouie* and shows how the majority's opinion does not withstand scrutiny. Justice Scalia correctly points out that the majority misinterpreted *Bouie*,[191] that the Tennessee Supreme Court retroactively changed the law, violating due process and the principle of legality,[192] and that even if legality is irrelevant, the defendant had no fair warning that the Court would abolish the year-and-a-day rule.[193] His opinion, however, does not provide adequate support for the principle of legality. His analysis, like the majority's, retains powers for judges in opposition to the principle *nulla poena sine lege* ("no punishment without law") that he cited approvingly in his dissenting opinion.[194] Justice Scalia's deference to the declaratory theory of common law decision-making motivates this retention of power.[195] Though the declaratory theory has been "fiercely criticized,"[196] some American and English judges still adhere to this view of judicial decision-making.[197] The declaratory theory is problematic because it is merely a fiction that allows judges to avoid

190. On the other hand, the Court's extension of *Bouie* to *Rogers* does mean that *Bouie*'s fair notice standard now explicitly constrains common law decision-making. Perhaps the majority wanted to extend the doctrine to common law decision-making in general, albeit in a less potent form, but did not want to let Rogers go free to do it.

191. *Rogers*, 532 U.S. at 469–71 (Scalia, J., dissenting).

192. *See id.* (Scalia, J., dissenting).

193. *See id.* at 477–80 (Scalia, J., dissenting).

194. *See id.* at 470 (Scalia, J., dissenting).

195. *See id.* at 472–78 (Scalia, J., dissenting).

196. POMORSKI, *supra* note 40, at 37.

197. *Id.*

responsibility for their actions.[198] Instead of acknowledging that they are making law, they claim they are discovering the law.[199] Thus, they can retroactively apply new law without really appearing to do so.[200] Justice Scalia states that he would allow a court to retroactively overturn prior precedent if it concluded the precedent was incorrect so long as the decision satisfied *Bouie*'s "fair notice" requirement.[201] The problems with Scalia's reasoning are derived from his adherence to the declaratory theory of the law. Whether a court was previously mistaken is irrelevant to fair notice and, more importantly, legality. A defendant can rely only on the law as declared, or, more accurately, made, by earlier decisions. A mistaken court's decision is still precedent.[202] Allowing courts to retroactively change the law because they were "mistaken" stands in sharp contrast to the principle of legality because a court could in effect criminalize conduct that it had previously found to be innocent.[203]

Scalia's critique of the majority opinion is also problematic. Scalia reasons that the majority improperly construed Tennessee law to reach its decision, stating that the Tennessee Supreme Court's decision that the year-and-a-day rule was the law in Tennessee is

198. *Id.* at 38 (noting that judges adhere to the declaratory theory "to evade the responsibility for the content of the law they make"); *see* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 660 (1999) (stating that "the classic declaratory theory left ample room for departing from precedent under the fiction that prior decisions were not law in and of themselves but were merely evidence of it"). No less an authority than Justice Holmes has criticized the declaratory theory of law. Thomas R. Lee & Lance Lehnhoff, *The* Anastasoff *Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135, 155 n.96 (2001) (citing S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)). Holmes stated that "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified." S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); *see also* Albert Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal*, 17 A.B.A. J. 180, 180–81 (1931) (stating that "it is universally conceded that the Declaratory theory is not only a fiction but also that it is a fiction which when taken seriously often produces bad results").

199. POMORSKI, *supra* note 40, at 38 ("A new precedent, according to the declaratory theory, does not really make a new law but only 'discovers,' 'declares,' and 'authenticates' the existing law, hence the question of retroactivity of the new laws made by the courts does not arise."); *see supra* note 198 and accompanying text.

200. POMORSKI, *supra* note 40, at 38; *see supra* notes 198–99 and accompanying text.

201. Rogers v. Tennessee, 532 U.S. 451, 481 (2001) (Scalia, J., dissenting).

202. POMORSKI, *supra* note 40, at 36 (stating that beginning in the nineteenth century, precedent became the basis of the common law, replacing the "customary law of the court").

203. *Id.* at 26–27 (stating that without a prohibition on retroactivity, "a person committing an act not prohibited by law could never be sure that in the future he or she would not be held responsible on grounds of a retroactive law").

binding on the United States Supreme Court.[204] This reasoning has much superficial appeal and seems to favor the correct outcome in this case. While O'Connor does engage in an analysis of how "firmly entrenched" the year-and-a-day rule was in Tennessee common law, she engaged in this analysis primarily in the context of determining whether there was a due process violation.[205] The justices in *Bouie* had to independently construe the South Carolina trespass statute and the state courts' prior constructions of that statute to determine if the South Carolina Supreme Court's construction of the statute violated due process.[206] Similarly, the United States Supreme Court had to construe the Tennessee Supreme Court's ruling in *Rogers* and the Tennessee courts' earlier constructions of the year-and-a-day rule independently to determine whether the Tennessee Supreme Court abolished the rule.

The following question illustrates the necessity of allowing the Court to construe state law: "What if the Tennessee Supreme Court concluded that the year-and-a-day rule had never been the law in Tennessee, and just decided that the prior opinions, being dicta, misstated the rule?" Would Rogers then have any recourse? Under Scalia's reasoning, he would not, for two reasons. First, Scalia would allow a court to retroactively overrule prior decisions that it determined "misstated" the law.[207] Second, because Scalia would strip the Supreme Court of the power to independently review the state supreme court's holding regarding the validity of a common law rule, the Court would be prevented from determining if the state court's abolition or modification of that rule violated due process.[208] There would be no way to determine if abolition or modification truly occurred, unless the state court admitted that it did. The unstated theme of Scalia's reasoning, however, is correct. The United States

204. *Rogers*, 532 U.S. at 468–69 (Scalia, J., dissenting).

205. *See id.* at 464–66.

206. In *Bouie*, the Court held that "[t]he interpretation given the statute by the South Carolina Supreme Court ... has not the slightest support in prior South Carolina decisions." It therefore found that the South Carolina Supreme Court violated the defendants' due process rights. Bouie v. City of Columbia, 378 U.S. 347, 356 (1964).

207. *Rogers*, 532 U.S. at 481 (Scalia, J., dissenting); *supra* notes 201–03 and accompanying text.

208. The "[Supreme] Court, however, repeatedly has held that state courts are the ultimate expositors of state law." Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). The Court stated that it would rarely engage in an independent analysis of state law, and would only do so when the state court's construction of the law "appears to be an 'obvious subterfuge to evade consideration of a federal issue.' " *Id.* at 691 n.11. The *Mullaney* Court concedes that in certain situations a federal court would need to second-guess a state court in order to decide a *Bouie* claim. *Id.* at 690 n.10.

Supreme Court should not be in the business of construing state law. But if the Court just adhered to its reasoning in *Bouie*, the problem would be adequately addressed.[209]

In *Rogers*, however, the majority erred in its analysis of the year-and-a-day rule's presence in Tennessee law by ultimately concluding that it was not so firmly rooted in Tennessee common law that its abolition would violate due process.[210] This holding was mistaken, as all of the Tennessee cases supported the rule. The problem, which Justice Scalia realizes (but does not solve), is that when the Supreme Court decides to construe state law, it can make incorrect decisions. But if it does not construe state law, at least in certain instances, it will leave defendants with no recourse from state justices who violate due process.

IV. THE IMPACT OF *ROGERS*

Rogers is already making an impact on American jurisprudence. As of September 2002, thirty-three cases had cited *Rogers v. Tennessee*. These cases indicate that, in general, *Rogers* will not significantly change *Bouie* due process jurisprudence, as courts routinely denied *Bouie* claims before the decision in *Rogers*.[211]

Interestingly, although *Rogers* stripped the *Ex Post Facto* Clause language from *Bouie*, it has often been cited as applying *ex post facto* principles to the judiciary. Several courts have quoted approvingly Justice O'Connor's statement "that limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process."[212] Thus, it appears that neither Justice O'Connor's desired wholesale rejection of *Bouie*'s *ex post facto* language nor the petitioners' desired

209. At least one commentator disagrees with this assertion. Professor Massey argues that the Supreme Court's analysis of Tennessee law "was not the best" way to determine if the Tennessee Supreme Court violated due process. Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 515 (2002). He argues that by accepting the Tennessee Supreme Court's analysis of its own law, the Court would have better protected the principles of federalism. *Id.* In his view, the Court then could have determined if the decision comported with due process. *Id.* As this Comment has argued, it would seem difficult, if not impossible, to determine whether the Tennessee Supreme Court's decision was constitutional without conducting an independent analysis of the prior law.

210. *Rogers*, 532 U.S. at 466 (holding that the Tennessee Supreme Court's abrogation of the year-and-a-day rule did not violate due process); *see supra* notes 106–08 and accompanying text.

211. *See supra* notes 91–98 and accompanying text.

212. *Rogers*, 532 U.S. at 456; *see* Sallahdin v. Gibson, 275 F.3d 1211, 1228 (10th Cir. 2002); Carter v. Gibson, 27 Fed. Appx. 934, 944 (10th Cir. 2001); Neal v. Kaylo, 2001 WL 1195879, at *7 (E.D. La. Oct. 10, 2001); Galloway v. State, 781 A.2d 851, 890 (Md. Ct. App. 2001), *cert. denied*, 122 S. Ct. 1547 (2002).

wholesale incorporation of the *Ex Post Facto* Clause will occur.[213] At least one court has cited *Rogers* (correctly) as holding that the Due Process Clause does not incorporate the *Calder* categories to the judiciary wholesale.[214]

Most cases have been decided under *Rogers* just like they would have been decided under *Bouie*—i.e., *Bouie* claims have been rejected. *Bouie*'s "unexpected and indefensible" language has always made it difficult for defendants to prevail on *Bouie* claims. In the following cases, the courts used *Rogers* merely as a modern citation of *Bouie* rather than a case that changed *Bouie*. In *State v. Garcia*,[215] an inmate in a youth detention facility was convicted of custodial assault.[216] He argued self-defense.[217] Washington had two self-defense standards, a general rule and an "arrest rule."[218] In *State v. Bradley*, decided after Garcia's acts, the court applied the arrest rule to persons already in custody,[219] and Garcia argued that the application of *Bradley* to him violated his due process rights against retroactive judicial decision-making.[220] The court rejected this claim.[221] In this case, the petitioner had a strong argument that the Washington Court of Appeals engaged in retroactive judicial decision-making because it either abolished the common law defense of self-defense, or interpreted it in an unforeseeable manner by significantly limiting the self-defense doctrine.[222] The Washington

213. In addition, some courts, either erroneously believing that *Rogers* is a case applying the *Ex Post Facto* Clause, and not the Due Process Clause, or more likely just needing a recent case to cite that discusses the *Ex Post Facto* Clause, have cited *Rogers*. *See* Griggs v. Maryland, 263 F.3d 355, 359 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 1093 (2002); United States v. Sullivan, 255 F.3d 1256, 1265 (10th Cir. 2001) (Kelly, J., dissenting), *cert. denied*, 534 U.S. 1166 (2002); *Neal*, 2001 WL 1195879, at *7; State v. Smith, 00-1935, p.3 (La. App. 5 Cir. 5/30/01), 794 So.2d 41, 42–43.

214. Janecka v. Cockrell, No. 01-21013, 2002 WL 1767185, at *6 n.11 (5th Cir. Aug. 1, 2002).

215. 27 P.3d 1225 (Wash. Ct. App. 2001).

216. *Id.* at 1226.

217. *Id.*

218. *Id.* at 1227. "The general rule allows the use of reasonable force in self defense by a person who reasonably believes he or she is about to be injured." *Id.* "The 'arrest rule' allows the use of reasonable force to resist arrest, whether lawful or unlawful, only if the 'arrestee is actually about to be seriously injured or killed.' " *Id.* (quoting State v. Bradley, 10 P.3d 358, 361 (Wash. 2000)).

219. State v. Bradley, 10 P.3d 358, 364 (Wash. 2000).

220. *Garcia*, 27 P.3d at 1227.

221. *Id.* (holding that it was not unforeseeable "[t]hat our Supreme Court would adopt the 'arrest rule' in analyzing a self defense claim against correctional officers . . . , and it was not 'unexpected and indefensible' to extend the 'arrest rule' to defendants who, while not under arrest, are incarcerated by the State").

222. *See id.*

Court of Appeals, like the United States Supreme Court, applied *Bouie*'s "unexpected and indefensible" language to permit a change in the law, not just an interpretation of existing law.[223] *Rogers* again does not appear to affect the court's analysis of the defendant's *Bouie* claim.[224]

Two *Bouie/Rogers* cases were inadvertently decided correctly, though they did not correctly analyze *Bouie* or *Rogers*.[225] Each involved statutes whose plain meanings applied to the defendants' conduct, but the courts went through a flawed legal analysis to reject the defendants' claims. In *State v. Goebel* ("*Goebel II*"),[226] the defendant argued that the court violated *Bouie* by construing a law in an indefensible manner.[227] The law required a probable cause hearing within thirty-six hours for probationers who were arrested pursuant to a court-issued warrant.[228] The court in *State v. Goebel* ("*Goebel I*"),[229] held that the probable cause requirement only applied to court-issued warrants.[230] The court in *Goebel II* rejected the defendant's arguments that its earlier construction was unexpected and indefensible and therefore violated his due process rights.[231] Because the court's interpretation adhered to the plain meaning of the statute, the justices reached the correct decisions on both the meaning of the statute and the retroactive application of the statute's construction.[232]

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223. *See id.*

224. *See id.* The court, however, could have better used *Rogers* to justify its position. *Rogers* actually gives it the authority to abolish common law defenses to bring them in line "with reason and common sense." Rogers v. Tennessee, 532 U.S. 451, 467 (2001). No strong argument that the general self-defense rule should not apply to inmates exists, so *Rogers* would apply to permit this conduct, although *Bouie* should not.

225. *See* Morgan v. Robinson, 156 F. Supp. 2d 1133, 1144 (C.D. Cal. 2001); State v. Goebel (*Goebel II*), 2001 MT 155, ¶ 20–30, 31 P.3d 340, 346–47 (Mont. 2001).

226. 2001 MT 155, 31 P.3d 340 (Mont. 2001).

227. *Id.* ¶ 14–19, 31 P.3d at 344–45. *Goebel II* decided whether the construction of the statute in *State v. Goebel* (*Goebel I*), 2001 MT 73, 31 P.3d 335 (Mont. 2001) and a companion case should be applied retroactively. *Goebel II*, 2001 MT ¶ 1–4, 31 P.3d at 341–42.

228. *Goebel I*, 2001 MT ¶ 12, 31 P.3d at 336–37 (citing MONT. CODE ANN. § 46-23-1012 (2001)).

229. 2001 MT 73, 31 P.3d 335 (Mont. 2001).

230. *Id.* ¶ 19–22, 31 P. 3d at 338–39. The court remarked that the statute was illogical because a probable cause hearing for a court-issued warrant is unnecessary, since the warrant itself must be based on probable cause. *Id.* ¶ 22, 31 P.3d at 339. The court reasoned that the legislature had made a drafting error in the statute and actually meant to apply the probable cause hearing requirement to warrantless arrests by parole and probation officers. *Id.* ¶ 23, 31 P.3d at 339.

231. *Goebel II*, 2001 MT ¶ 22, 31 P.3d at 344–45 (concluding that based on the plain meaning of the statute, its construction was not "unexpected and indefensible").

232. *See id.*; *Goebel I*, 2001 MT ¶ 13–24, 31 P.3d at 338–39.

Some of the court's discussion of *Bouie* and *Rogers*, however, is flawed. First, the court cited as precedent the passages from *Bouie* that *Rogers* characterized as dicta, thus indicating the justices' failure to closely read *Rogers*.[233] The court also interpreted *Bouie*'s "unexpected and indefensible" language incorrectly.[234] It held that its construction of the statute could not be unexpected and indefensible because it had never construed the statute before.[235] Although construing a statute to mean one thing when a consistent line of cases held it to be another would be a due process violation,[236] construing a statute in a manner that is completely at variance with the statutory language could also be a due process violation under *Bouie*.[237] Even under *Rogers*, a construction of a statute dramatically different from the statute's plain meaning could violate a defendant's interest in fair notice.[238]

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233. *Goebel II*, 2001 MT ¶ 24–27, 31 P.3d at 345. Of course, dictum is often persuasive. The decision in *Rogers*, however, indicates that the *Bouie* language it characterized as dictum should not be cited as persuasive authority. The opinion in *Rogers* called this language "expansive" and held that *Bouie* rested firmly on "notice, foreseeability, and . . . fair warning." Rogers v. Tennessee, 532 U.S. 451, 458–59 (2001); *see supra* notes 117–24 and accompanying text. Thus, *Rogers* seems to completely write this language out of *Bouie*'s reasoning.

234. *Goebel II*, 2001 MT ¶ 19–22, 31 P.3d at 345.

235. *Id.* ¶ 22, 31 P.3d at 345.

236. *See* Bouie v. City of Columbia, 378 U.S. 347, 356 (1964) (holding that "[t]he interpretation given the statute by the South Carolina Supreme Court . . . , so clearly at variance with the statutory language, has not the slightest support in prior South Carolina decisions"). *Bouie* also stated that "[w]hen a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.' " *Id.* at 354 (quoting Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678 (1930)).

237. *See id.* (quoting HALL, *supra* note 51, at 58–59) (holding that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect"). Although *Bouie* discusses the overruling of a line of cases as being indefensible, it does not limit "law" to case law. Thus, if a statute had never been interpreted before, it would be the law, and the court would have a duty to interpret it in a foreseeable and defensible manner. This author concedes, however, that the court's decision, in light of the hostility to *Bouie* and its progeny, is itself not unexpected.

238. In *Rogers*, the Court stated:

> Our decision in *Bouie* was rooted firmly in well established notions of *due process* .... Its rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct.

Rogers, 532 U.S. at 459.

Morgan v. Robinson[239] is an example of another analytically flawed case that resulted in a correct outcome. The defendant was convicted of "soliciting lewd and lascivious conduct with a fourteen-year-old."[240] He argued that the California Court of Appeals improperly construed state law and convicted him of an offense that was not present under existing law because the statutory scheme did not proscribe soliciting lewd and lascivious conduct with a fourteen-year-old, but only with someone under fourteen.[241] The district court found that the plain language of the statute prohibited the conduct in question.[242]

While this determination appears correct based on the plain language of the statute, the court made stray statements that are dangerous to the principle of legality. The court appears to hold that even if the statute did not prohibit the conduct, it would construe it in such a manner as to effect what it perceived to be the intent of the legislature.[243] This type of reasoning is a violation of *Bouie*, because it allows the creation of crimes by analogy.[244] The court did not even cite *Rogers* or *Bouie* as constricting a state supreme court's ability to construe a statute in this manner.[245] Application of *Bouie* to this situation would be especially appropriate because it specifically dealt with retroactive statutory construction.[246] The court cited *Bouie*, as interpreted by *Rogers*, as just a fair warning case[247] and merely cited *Rogers* as a case that reaffirms *Bouie*.[248] The court's analysis of *Bouie*, and thus of *Rogers*, is erroneous.[249] It cited *Bouie/Rogers* for the

239. 156 F. Supp. 2d 1133 (C.D. Cal. 2001).

240. *Id.* at 1137.

241. *Id.* at 1141.

242. *Id.* at 1142. For the purposes of this analysis, a complete discussion of the complex statutory scheme under which Morgan was convicted is not necessary.

243. *Id.* at 1142 ("Despite any perceived inconsistencies in the statutory scheme governing sex offenses, one thing is evident: The Legislature clearly intended to broaden the reach of that scheme by enacting [P.C.] section 653f(c). Criminalizing the solicitation of lewd conduct with a 14 year old is entirely consistent with this intent.").

244. *See* POMORSKI, *supra* note 40, at 192 (stating that after *Bouie*, courts can still use analogy to expand punishability, but may not apply the expanded laws retroactively); *supra* note 87 and accompanying text.

245. The court holds that unless the state supreme court's construction of a state statute is "untenable or amounts to a subterfuge to avoid federal review of a constitutional violation," it is valid. *Morgan*, 156 F. Supp. 2d at 1142 (internal quotations omitted). While the court should defer to a state court's construction of its own law, it seems difficult to determine whether that construction violates due process without engaging in a *Bouie/Rogers* analysis.

246. Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).

247. *Morgan*, 156 F. Supp. 2d at 1144 n.5.

248. *Id.*

249. *Id.*

proposition that so long as the conduct in question could reasonably be expected to be criminal, there is no violation of *Bouie*'s fair warning requirement.[250] While *Rogers* has cabined *Bouie* as a fair warning case, *Bouie*'s protections are still broader than this court's opinion suggests. Just because conduct is reprehensible, and likely should be criminal, does not mean that defendants should be on fair notice that it actually is criminal—there must be an underlying law criminalizing the conduct.

The cases discussed above appear to show that *Rogers* has had little effect on *Bouie* jurisprudence. Courts either cite *Rogers* as merely upholding *Bouie*, without looking at what effect *Rogers* really had on the opinion, or just misinterpret *Bouie* altogether. A different picture emerges when reviewing a case that analyzed *Rogers* correctly. *State v. Redmond*[251] applied the full meaning of *Rogers*, and the result illustrates why neither Justice O'Connor's nor Justice Scalia's opinions in *Rogers* are sufficient to protect individuals from retroactive judicial lawmaking.[252] In *Redmond*, the defendant was convicted of second degree murder. He appealed, arguing that the retroactive application of *State v. Burlison*,[253] which eliminated the element of malice from the definition of murder, violated his due process rights.[254] The Nebraska Supreme Court, relying on *Rogers*'s interpretation of *Bouie*, held that the retroactive application of *Burlison* did not violate due process.[255] First, it discussed how *Rogers*'s interpretation of *Bouie* did not apply the *Ex Post Facto* Clause to the judiciary.[256] Freed from the constraints of the principle of legality, the court engaged in a due process foreseeability analysis to determine if retroactive application of *Burlison* was "unexpected and indefensible" and found that it was not.[257]

250. *Id.* at 1144.

251. 631 N.W.2d 501 (Neb. 2001), *cert. denied*, 534 U.S. 1033 (2001).

252. *See 2000 Term: Leading Cases*, *supra* note 99, at 325 n.83. In *Redmond*, the parties specifically filed additional briefs to argue the impact of the Supreme Court's decision in *Rogers* to the case. *Redmond*, 631 N.W.2d at 505.

253. 583 N.W.2d 31 (Neb. 1998).

254. *Redmond*, 631 N.W.2d at 503. In *Burlison*, the Nebraska Supreme Court overruled nearly twenty years of precedent that stated that even after the statutory revision of the homicide statute, malice was still an element of second degree murder. *Burlison*, 583 N.W.2d at 36. The court reasoned that its decisions adding the element of malice to the statute "were clearly erroneous and therefore should be overruled." *Id.* Interestingly, the court did not even address the due process implications of retroactively overturning its precedent.

255. *Redmond*, 631 N.W.2d at 506–09.

256. *Id.* at 507–08.

257. *Id.*

The court's decision, especially in light of *Rogers*, is not surprising, and it might even be a correct application of the law.[258] But the decision illustrates the flaws in *Rogers*. Because *Rogers* stopped constraining *Bouie*'s "unexpected and indefensible" test with the principle of legality as embodied in the *Ex Post Facto* Clause, courts have more leeway to retroactively construe statutes to the detriment of defendants.[259] In *Redmond*, the court retroactively abolished an element of a crime,[260] which is abhorrent to legality.[261] The court also held that its decision was not unexpected because its prior cases had been in disagreement.[262]

By removing the principle of legality from the Due Process Clause, *Rogers* has further legitimized retroactive judicial decision-making. Another disturbing aspect of this case is that Justice Scalia's dissenting opinion would probably not have protected the defendant in *Redmond*. In *Rogers*, Justice Scalia stated that "[a] court would remain free . . . to conclude that a prior decision or series of decisions establishing a particular element of a crime was in error, and to apply that conclusion retroactively (so long as the 'fair notice' requirement of *Bouie* is satisfied)."[263] In *Redmond*, the court did exactly what Justice Scalia would allow it to do—it overruled a line of cases that it determined was incorrect in finding malice to be an element of

258. *See* Rogers v. Tennessee, 532 U.S. 451, 459–60 (2001); *Redmond*, 631 N.W.2d at 506–09. The *Redmond* court, reversing prior precedent, held that because the plain language of the statute did not include malice, a decision that eliminated the malice requirement was not "unexpected and indefensible." *Redmond*, 631 N.W.2d at 508.

259. *See Rogers*, 532 U.S. at 458–60.

260. *Redmond*, 631 N.W.2d at 508–09.

261. The court's analysis is unpersuasive. It stated that "[i]ndefensible is defined as 'incapable of being maintained as right or valid' or 'incapable of being justified or excused.' " *Id.* at 508 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1147 (1993)). It went on to say that "in a case such as *Bouie*, where a court interprets a statute in a surprising manner that has little in the way of legal support, the interpretation could not be applied retroactively. Our decision in *Burlison* was not such a case." *Id.* But it was. There was no support for this construction of the state homicide statute because the Nebraska Supreme Court conceded that it had consistently held that malice was an element of murder. It seems highly unfair that a court can at once require a defendant to apprise himself of how a court interprets a statute, even if that interpretation would not be readily apparent to someone reading the statute, and to also require that same defendant to be able to predict when the court will have to overrule itself because the plain language of the statute demands another interpretation.

262. *Redmond*, 631 N.W.2d at 508–09. But the court's citations of these cases show that the cases themselves were not in disagreement, just some of the justices. *Id.* at 506 (citing a case with a dissenting opinion as evidence of a "disagreement"). Apparently, defendants will also need to be able to predict the precedential value of dissenting opinions, because under *Redmond*, they give the courts a reason to retroactively abolish the law.

263. *See Rogers*, 532 U.S. at 481 (Scalia, J., dissenting).

second degree murder.[264] Although Justice Scalia says that the court's decision would have to satisfy *Bouie*'s fair notice requirement, that has not proven to be much of a hurdle for courts to overcome.[265]

Redmond, however, is distinguishable from *Rogers* in significant ways that the Nebraska Court failed to adequately address. First, the Nebraska Court did not engage in "a routine exercise of common law decisionmaking," but instead engaged in statutory construction.[266] Justice O'Connor's opinion in *Rogers* relied heavily on the necessity of courts retaining control over the development of the common law.[267] That is not an issue in *Redmond*. Second, in *Rogers*, part of the dispute was whether the year-and-a-day rule was a substantive rule of law, a defense, a rule of evidence, or just a rule involving causation.[268] At oral argument this point was contested, and it is conceivable that certain justices might find that judicial abolition of an element of a crime violates due process.[269] Third, the requirement of malice for second degree murder is not an outdated relic of the common law. Although the Nebraska criminal code now uses more precise language, the malice requirement can still be justified on the bases of "reason and common sense."[270] The year-and-a-day rule, however, is indisputably out-of-date, which provided the Supreme Court with further justification for allowing it to be overturned.

Thus, neither the majority opinion nor Justice Scalia's dissenting opinion in *Rogers* is satisfactory because each violates the principle of legality in the contexts of both common law decision-making and statutory construction. In the common law context, the majority opinion violates the principle of legality by allowing the retroactive abolition of a common law rule. The dissenting opinion violates the principle of legality by allowing a court to retroactively abrogate a common law rule not based on precedent, but rather on "finding" the law. In the context of statutory interpretation, the majority opinion seems to undermine *Bouie*'s prohibition of unforeseeable retroactive

264. *Redmond*, 631 N.W.2d at 508–09.

265. *See supra* note 97 and accompanying text.

266. Part of the Nebraska Supreme Court's reasoning was that Nebraska's criminal code had abolished common law crimes. *Redmond*, 631 N.W.2d at 506. Thus, the court was not engaged in "common law judging." *See Rogers*, 532 U.S. at 460.

267. *See Rogers*, 532 U.S. at 461–62.

268. *See* State v. Rogers, 992 S.W.2d 393, 399–400 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001); Transcript of Oral Argument, Rogers v. Tennessee, 532 U.S. 451 (2001) (No. 99-6218), *available at* 2000 WL 1677740, at *16–18, *25–29 (Nov. 1, 2000).

269. *See* Transcript of Oral Argument, *Rogers* (No. 99-6218), *available at* 2000 WL 167740, at *16–18, *25–29.

270. *See Rogers*, 532 U.S. at 467.

statutory interpretation, but because the decision is couched in terms of "common law decisionmaking," it is unclear how *Rogers*'s limitation of *Bouie* will be applied by the judiciary. If *Redmond* is any indication of this application, protections for defendants will decrease. The dissenting opinion violates the principle of legality by allowing a court to retroactively hold that a prior line of decisions was wrong, allowing courts to change the law under the guise of correcting their own mistakes.

CONCLUSION

Judges are often in a nearly impossible predicament.[271] If they identify an outdated common law or an incorrect interpretation of a statute and abolish it retroactively, then they will violate the principle of legality.[272] If they overrule the law or the interpretation prospectively, then they are acting more like legislatures than courts and their revisions to the law are arguably dicta.[273] This Comment focuses on the former concern[274] and argues that courts should apply the principle of legality and fundamental fairness to their decisions. By applying these principles, courts will protect criminal defendants from both retroactive changes in the law and harsh, unjust decisions. In the context of the common law, courts should not retroactively abolish common law rules that protect defendants.[275] But if an obsolete common law rule disadvantages a defendant, the court should, in the interest of fundamental fairness, abrogate the rule and apply the abrogation retroactively.[276] The rules for statutory

271. *See generally* Timothy A. Baughman, *Justice Moody's Lament Unanswered: Michigan's Unprincipled Retroactivity Jurisprudence*, 79 MICH. B. J. 664 (2000) (discussing Michigan's need for a more coherent retroactivity jurisprudence).

272. *See* Transcript of Oral Argument, *Rogers* (No. 99-6218), *available at* 2000 WL 167740, at *9–11 (discussing the difficulties presented by not overruling at all, overruling incrementally, or overruling prospectively).

273. *See id.*; Baughman, *supra* note 271, at 666; *supra* note 271 and accompanying text.

274. The scholarly literature is replete with analysis of prospective versus retroactive judicial decision-making and its implications on separation of powers concerns and due process. *See, e.g.*, Baughman, *supra* note 271 (discussing Michigan's need for a more coherent retroactivity jurisprudence); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965) (analyzing the Supreme Court's retroactivity jurisprudence); Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999) (examining the complexities of judicial retroactivity and proposing a framework for handling retroactivity issues). The purpose of this Comment is to sketch some broad propositions that courts should follow to uphold the principle of legality, not to propose a new jurisprudence that addresses all of the complex issues in this area.

275. *See supra* notes 39–61 and accompanying text.

construction should be analogous. In certain situations, a court may determine that its prior decisions have incorrectly interpreted a statute. In these cases, it should only change its interpretation retroactively in situations in which the change will not disadvantage the defendant.[277] Applying these basic principles to *Redmond* would have yielded a more just outcome.

Rogers improperly construed *Bouie* and undermined the principles of legality and due process by allowing the retroactive overruling of a substantive rule of common law. Although Rogers deserves no sympathy for his actions, the citizens of the United States deserve more constraints on our judges. *Rogers* was an assault on the principles of legality and due process, principles which protect the innocent as well as the guilty.

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276. As the Tennessee Supreme Court itself said, " 'Where the reason fails the rule should not apply.' " State v. Rogers, 992 S.W.2d 393, 401 (Tenn. 1999) (quoting Brown v. Selby, 332 S.W.2d 166, 169 (Tenn. 1960)), *aff'd*, 532 U.S. 451 (2001). The Tennessee Supreme Court erred, however, in interpreting this rule to disadvantage the defendant. To protect an interest in fundamental justice, this rule should only work to protect criminal defendants.

277. To do otherwise would violate *Bouie*'s prohibition of "unexpected and indefensible" constructions. Bouie v. City of Columbia, 378 U.S. 347, 354 (1964) (internal quotations omitted).