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Should Bouie Be Buoyed? Judicial Retroactive Lawmaking and the Ex Post Facto Clause (symposium)

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In *Lynce v. Mathis*,[1] the Supreme Court this past term reaffirmed that the Ex Post Facto Clause[2] bars retroactive application of legislation that either criminalizes conduct that was legal when undertaken or extends the punishment for those who have previously committed criminal acts. To alleviate prison overcrowding, Florida in the early 1980s[3] granted prisoners administrative gain time allowances[4] to expedite their release from prison. In light of adverse publicity, the legislature revisited the question in 1992 and decided to deny gain time to inmates committing certain serious crimes.[5] In striking down retroactive application of that amendment, the Court held that the Ex Post Facto Clause prohibits applying the new provision to those who committed offenses prior to adoption of the amendment. The Court acknowledged that Florida's legislature enjoyed the prerogative to adjust its gain time provisions as it deemed appropriate, and it noted no constitutional problem with exempting certain classes of defendants from the purview of gain time provisions.[6] But the Court held that the leg-

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1. 117 S. Ct. 891 (1997).

2. U.S. Const. art. I, §§ 9, 10. The Constitution prohibits both the federal government and the states from passing "any ex post facto law." *Id.*

3. *See* Correctional Reform Act of 1983, 1983 Fla. Laws ch. 83-131.

4. Some prison systems grant good time credit allowances to provide incentive for responsible behavior in prison. Because of overcrowding (among other reasons), some prison systems award credits merely based on the number of days served in prison.

5. *See* 1992 Fla. Laws ch. 89-100; *see also* 92-96 Fla. Op. Att'y Gen. 283 (1992).

6. *See Lynce*, 117 S. Ct. at 897-98.

islative purpose of the amendment was immaterial in considering the ex post facto challenge; rather, the key determinant was that the new statute "had the effect of lengthening petitioner's period of incarceration."[7]

The Supreme Court's decision in *Lynce* is consistent with a surprising body of case law rigorously protecting criminal defendants from retroactive[8] alteration of the terms and conditions of their sentences. The Court has struck down legislative efforts to apply revised sentencing guidelines retroactively even when the punishment meted out under both versions may have been the same;[9] invalidated retroactive amendment of an incentive good-time credit law that would have required any parole violator to forfeit previously accrued good time credits, even when the violator was on notice of the enhanced penalties;[10] and implied that any retroactive change in parole eligibility[11] would similarly violate the Ex Post Facto Clause.[12]

Despite the Supreme Court's strictures on retroactive law-making in the criminal context, the Court has declined to impose ex post facto restrictions on judicial decision-making. The language of the Clause apparently refers only to the legislature, for it forbids states and the federal government from "pass[ing]" any "ex

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7. *Id.* at 896.

8. By retroactivity, I refer to the commonly used definition of altering the legal status of acts completed before the new law was passed. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 269-70 (1994) (specifying that a "court must ask whether the new provision attaches new legal consequences to events completed before its enactment"); Weaver v. Graham, 450 U.S. 24, 31 (1981) (noting that the "critical question is whether the law changes the legal consequences of acts completed before its effective date"). This definition must be distinguished from retroactive effects, for most prospective legislation has a retroactive impact on previous conduct, such as investments.

9. *See, e.g.*, Miller v. Florida, 482 U.S. 423 (1987).

10. *See* Greenfield v. Scafati, 277 F. Supp. 644 (D. Mass. 1967), *aff'd per curiam*, 390 U.S. 713 (1968).

11. In *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), the Court held that the mere increase in intervals between parole hearings did not constitute an increase in punishment within the meaning of the Ex Post Facto Clause. The Court reasoned that, because the prisoners in question "ha[d] no reasonable chance of being released," *id.* at 507, and because they could have requested expedited consideration in extraordinary situations, the delay was permissible in that "there is no reason to think that such postponement would extend any prisoner's actual period of confinement," *id.* at 513.

12. *See* Warden v. Marrero, 417 U.S. 653 (1974) (stating that parole eligibility is annexed to the original sentence).

post facto law."[13] Indeed, as early as the 1798 United States Supreme Court decision in *Calder v. Bull*,[14] several Justices opined that the Ex Post Facto Clause did not apply to judicial decisions,[15] and the Court has never struck down any judicial act on that basis.

From the perspective of the criminally accused, however, it is not obvious why judicial action should be exempt from ex post facto scrutiny. Although federal courts have abjured common lawmaking in the criminal context,[16] they—like all courts—interpret and reinterpret legislative provisions bearing on criminal responsibility. Those reinterpretations can have the same effect as legislative amendments in redefining a statute to include additional prohibited conduct or in lengthening the severity of a sentence.[17] Judges presiding over a case may bend or transmute a legislative provision to ensure that the accused—especially when the anti-social act is particularly odious—receives punishment. To the extent that the Ex Post Facto Clause protects reliance interests, the identity of the governmental actor causing the injury seems irrelevant.

In light of these realities, the Supreme Court in *Bouie v. City of Columbia*[18] held that ex post facto principles as read into the Due Process Clause applied to judicial decision-making. The Court recognized that retroactive change in judicial doctrine could be as problematic as retroactive legislation. Neither courts nor legislatures can criminalize an act that was legal when undertaken nor extend the punishment of an offender after a crime has been committed. Why should the judicial power to punish be less circumscribed than that of the legislature when the effect on the individual is identical? The Court reasoned:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law . . . . If a state legislature is barred by the Ex Post Facto

13. U.S. Const. art. I, §§ 9, 10.

14. 3 U.S. (3 Dall.) 386 (1798).

15. *See infra* text accompanying notes 60-64.

16. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). Nonetheless, for a discussion of the common lawmaking that in fact exists today, despite *Hudson & Goodwin*, see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345.

17. *Cf.* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469 (1996) (addressing the impact of judicial interpretation of broadly phrased criminal provisions on individuals).

18. 378 U.S. 347 (1964).

> 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.[19]

Any unforeseeable judicial interpretation of a statute or change in common law doctrine may give rise to the same concerns underlying the Ex Post Facto Clause.

Indeed, in *Lynce*, the change in administrative gain time likely stemmed from judicial interpretation of the statute rescinding credits as opposed to legislative instigation. Florida's 1992 statute was silent as to its retroactive effect, and the Department of Corrections initially applied the provisions prospectively only, freeing those who would otherwise be due for release under the prior gain time provisions.[20] However, the Attorney General issued an opinion later that year directing that the amendment be applied retroactively,[21] and Florida's courts ultimately agreed, creating the retroactivity problem.[22] From the defendant's perspective, it should not make much difference whether the increased punishment stemmed from the legislature or from judicial reinterpretation of the legislation.

But the promise of *Bouie* has been largely illusory. Courts have resorted to a number of devices to curtail drastically the impact of applying ex post facto principles to judicial action. First, they have limited the due process inquiry to *unforeseeable* judicial

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19. *Id.* at 353-54. The Court adopted similar reasoning several years later in *Rabe v. Washington*, 405 U.S. 313 (1972). *See also* Marks v. United States, 430 U.S. 188 (1977) (holding that the Due Process Clause prevented retroactive application of a new judicial test for ascertaining pornography restrictions); Douglas v. Buder, 412 U.S. 430 (1973) (holding that the judge's construction of the term "arrest" to include traffic citation was unforeseeable); *cf.* Helton v. Fauver, 930 F.2d 1040, 1045-46 (3d Cir. 1991) (holding that New Jersey's construction of a jurisdictional statute affecting prosecution of juveniles was unforeseeable); Moore v. Wyrick, 766 F.2d 1253 (8th Cir. 1985) (holding that the state court's change in felony murder doctrine was not foreseeable).

20. *See* Lynce v. Mathis, 117 S. Ct. 891, 894 n.10. (1997).

21. *See* 92-96 Fla. Op. Att'y Gen. 283 (1992). The Attorney General's opinion was surprising in that previous amendments to the administrative gain time provisions had been held to be prospective only. *See id.* at 287-88.

22. *See* Brief of Respondent Mathis at 3, Lynce v. Mathis, 117 S. Ct. 891 (1997) (No. 95-7452); *see also* Brief for the Florida Public Defenders Ass'n, Inc., as *Amicus Curiae* in Support of Petitioner, at 4, Lynce v. Mathis, 117 S. Ct. 891 (1997) (No. 95-7452).

changes in the law.[23] In contrast, courts do not permit legislative change to be applied retroactively even when that change—as perhaps in *Lynce*[24]—can be considered foreseeable.

Second, courts have construed the foreseeability requirement generously. They have termed judicial interpretations foreseeable that departed considerably from the legislative text[25] and that reversed a settled line of precedent.[26] The foreseeability analysis seems little more than a rational basis type inquiry—courts will now reverse on *Bouie* grounds only when the judicial change seems entirely arbitrary. Courts routinely sanction judicial change that would violate the Ex Post Facto Clause if initiated by the legislature.

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23. *See, e.g.*, *Bouie*, 378 U.S. at 347. The Court in *Bouie* stressed foreseeability, and lower courts have accordingly invalidated only judicial changes that they deemed unforeseeable. *See infra* text accompanying notes 107-56.

24. Florida's legislature had revisited the question of gain time policies several times both prior to and after the petitioner's crime. The gain time provisions were rewritten in part in 1983, *see* 1983 Fla. Laws ch. 83-131, § 8; in 1987, *see* 1987 Fla. Laws ch. 87-232, § 1; in 1989, *see* 1989 Fla. Laws ch. 89-100; in 1991, *see* 1991 Fla. Laws ch.91-281, § 3; in 1992, *see* 1992 Fla. Laws ch. 89-100 (the relevant year to *Lynce*); again in 1993, *see* 1993 Fla. Laws ch. 93-406, § 26; and again in 1995, *see* 1995 Fla. Laws ch. 95-184, § 26. One could have speculated that early release of serious offenders—such as the felon convicted of attempted murder in *Lynce*—would prompt reassessment of the wisdom of such policies. Early release policies have often generated considerable political furor when an offender upon release has committed a particularly grisly offense. The famed Willie Horton incident that captured the attention of the public during the Dukakis-Bush campaign in 1988 is a prime example. *See, e.g.*, Jacob V. Lamar, *The One That Got Away*, Time, June 27, 1988, at 22, *available in* 1988 WL 2599035. The wave of sexual offender registration laws passed in the wake of the tragic murder of Megan Kanka and others presents another example. *See, e.g.*, N.J. Stat. Ann. 2c:7-1 to 7-11 (1995); Haw. Rev. Stat. § 707-743 (1995); Iowa Code Ann. 692A.2 (1995); Wash. Rev. Code 9A.44.130; Ga. Code Ann. 42-1-12 (1996); *see also* Gary Marx, *Edgar Signs a Stricter Truth-in-Sentencing Law*, Chi. Trib. Aug. 21, 1995, Chicagoland, at 1, *available in* 1995 WL 6238246 (stating that a new law was signed in part in reaction to a brutal killing of child by an individual who had been released from prison after serving time for another murder).

25. *See, e.g.*, United States v. Shannon, 110 F.3d 382 (7th Cir. 1997) (holding that violation of a statute prohibiting statutory rape, even when the relationship is consensual, must be construed as a "violent" offense for purposes of sentencing enhancement); State v. Mummey, 871 P.2d 868 (Mont. 1994) (holding that a tennis shoe satisfies the statutory definition of a weapon).

26. *See, e.g.*, Hagan v. Caspari, 50 F.3d 542 (8th Cir. 1995) (holding that a state supreme court reversal of an established line of appellate court authority was foreseeable); Dale v. Haeberlin, 878 F.2d 930 (6th Cir. 1989) (holding that reversal of a state supreme court's decision limiting evidence to be used for sentencing enhancement was foreseeable).

In Part I, I first sketch the Supreme Court's current elaboration of the ex post facto doctrine. The Court has declined to apply the Clause itself to judicial acts, but has rigorously reviewed legislative enactments to ensure that the legislature neither has criminalized an act that was permissible when completed, nor increased the punishment for an offense after the fact. I next consider the underlying principles of the Court's ex post facto doctrine, which are to prevent arbitrary governance and honor individuals' reliance interests.

In Part II, I explore the *Bouie* line of cases. Although the Supreme Court has held that ex post facto principles now apply to courts through the Due Process Clause, that precept does not reflect current judicial practice. Courts have paid lip service to *Bouie*, but by and large have refused to afford individuals significant protection from retroactive judicial change. Courts have not protected individuals' interests in reliance, nor prevented lower courts from adopting unlikely or stretched interpretations of common law precedents or statutory text. A rough empirical study confirms the sparse utilization of *Bouie* by courts, particularly in the federal system. Courts apparently remain unconvinced that ex post facto principles should limit judicial discretion in the criminal context.

In Part III, I canvas several explanations that attempt to justify the divergence between legislative and judicial retroactivity doctrine concerning criminal law issues, despite comparable impacts on the individual. The first explanation rests on a Blackstonian distinction between lawmaking and adjudication, namely that legislatures fashion new principles while courts merely "find" the law. If judges state what the law is, then applying their interpretations retroactively should not upset reliance interests, for members of society cannot reasonably rely on what was not "law." In contrast, legislators make new law, so that retroactive application, in at least some contexts, tramples upon settled expectations.

Second, a political explanation suggests instead that judges always should apply new rules retroactively as a means of restraining judicial power. Most judges will be loath to change the law if in so doing they must affect the rights not only of litigants before them but also those of countless others who relied on the former law. Indeed, federal courts now *must* apply all new constitutional rules retroactively in both the civil and criminal procedure

contexts. Mandated retroactivity reflects a conservative bias in favor of the status quo.

The third explanation focuses alternatively on the institutional differences between legislatures and courts. Judges operate interstitially by formulating rules to govern particular disputes. Judicial retroactivity does not impinge on as many interests at one time as can legislative retroactivity. Moreover, judicial retroactivity is bounded by the arguments raised by the parties in particular cases and controversies. Judicial retroactivity is therefore more inevitable and yet less threatening than retroactive application of legislatively designed rules of conduct.

Finally, I pursue an interest group explanation, which posits that legislators have more to gain than judges in singling out disfavored parties for disadvantageous treatment. Legislators too readily penalize unpopular groups in passing legislation to curry favor with both potential contributors and voters. Those subject to criminal penalties, because of their marginal position in society, rarely can influence legislators to the extent commensurate with their numbers. In comparison, judges may be better insulated from interest group pressures, and may have less reason to vent spleen against the criminally accused. State judges, however, because they are more accountable to majoritarian political pressures, arguably pose more of a risk of arbitrary and vindictive behavior than do their federal counterparts.

I conclude that, although none of these explanations is overwhelming, the interest group justification goes farthest in plausibly explaining why legislative retroactivity in the criminal context is more disfavored than lawmaking by judges. In light of the incentives facing legislators, we tolerate less legislative than judicial retroactive lawmaking, even though judges on occasion may manipulate doctrine to punish particular individuals more harshly. Political realities therefore have leavened the more abstract norm against retroactivity espoused in *Bouie*.

I. Ex Post Facto Principles

A. *Ex Post Facto Clause*

Neither Congress nor the states may pass "any ex post facto Law."[27] Within a decade after ratification of the Constitution, the Supreme Court in *Calder v. Bull*[28] addressed the Ex Post Facto Clause in depth. The Court stated that the Clause should be viewed as an "additional bulwark in favour of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation."[29] Justice Chase delineated the contexts in which the prohibition applied:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[30]

Legislatures rarely have impinged upon the first two categories set in *Calder*, which prohibit criminalizing an action that was innocent when done or increasing the severity of a crime's classification (to a felony as opposed to a misdemeanor) after the fact. Numerous controversies, however, have arisen over the last two categories. In particular, the Court vigorously has enforced the prohibition on changes in the law that have a substantial potential to increase an offender's stay in prison.[31]

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27. U.S. Const. art. I, §§ 9, 10. In contrast, the Contract Clause only applies to laws passed at the state level. *Id.* § 10.

28. 3 U.S. (3 Dall.) 386 (1798).

29. *Id.* at 390 (Chase, J.) (emphasis omitted).

30. *Id.* (emphasis omitted).

31. The Court in recent years has restricted the prohibition's impact on changes in the rules of evidence and procedure. *Compare* Thompson v. Utah, 170 U.S. 343 (1898) (barring retrospective application of a state law requiring only 8 instead of 12 jurors), *and* Kring v. Missouri, 107 U.S. 221 (1883) (prohibiting retroactive repeal of a state rule treating conviction for a lesser included offense as an acquittal of greater offense), *with* Collins v. Youngblood, 497 U.S. 37 (1990) (upholding a statute authorizing state appellate court to reform unauthorized verdicts without remanding for a new trial), *and* Dobbert v. Florida, 432 U.S. 282 (1977)

The Supreme Court's decision in *Miller v. Florida*[32] is exemplary. There, the court invalidated retroactive application of Florida's change in sentencing regulations that had the effect of presumptively increasing the offender's sentence. The offender may have received the same sentence under both schemes, but the likelihood of a stiffer sentence increased with the new law. Similarly, the Court in *Lindsey v. Washington*[33] held that a state could not, without violating the Ex Post Facto Clause, retrospectively alter a discretionary sentencing range with a maximum of a fifteen-year penalty to a mandatory fifteen-year sentence.[34]

The Court has prohibited not only retroactive increases of an offender's sentence, but also any change that imposes greater legal obstacles to early release. In *Weaver v. Graham*,[35] the Court explained that a state's retroactive change in its good time credit policy violated the Ex Post Facto Clause if the change "constrict[ed] the inmate's opportunity to earn early release."[36] Because inmates under the new good time credit policy could not as easily accumulate good time credits, the Court invalidated its retroactive application. The Court in *Lynce* extended *Weaver* to apply to Florida's effort to rescind administrative gain time credits awarded for the administrative purpose of alleviating overcrowding. Thus, through the Ex Post Facto Clause the Court has prevented legislatures from applying changes in criminal penalties retroactively.

Two principles underlie the Court's ex post facto jurisprudence. The first centers on notice. The Court has stressed that the legislature must give fair notice of proscribed conduct.[37] Individu-

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(upholding retroactive alteration of a death penalty procedure changing roles of the judge and jury in sentencing).

32. 482 U.S. 423 (1987).

33. 301 U.S. 397 (1937).

34. In addition, every appellate court which has considered the issue has similarly invalidated retroactive application of the new federal sentencing guidelines. *See, e.g.*, United States v. Gerber, 24 F.3d 93 (10th Cir. 1994); United States v. Seacott, 15 F.3d 1380 (7th Cir. 1994); United States v. Morrow, 925 F.2d 779 (4th Cir. 1991); *see also* United States v. Lambros, 65 F.3d 698 (8th Cir. 1995) (invalidating application of new sentencing provisions). The guidelines, despite their name, are mandatory. *See* Mistretta v. United States, 488 U.S. 361 (1989).

35. 450 U.S. 24 (1981).

36. *Id.* at 35-36.

37. *See* Miller v. Florida, 482 U.S. 423, 430 (1987); *Weaver*, 450 U.S. at 28; Ewell v. Murray, 11 F.3d 482, 485 (4th Cir. 1993). The Ex Post Facto Clause is akin in this respect to the void for vagueness doctrine. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (holding that vague provisions "fail[ ] to give

als are entitled to rely on the law in structuring their actions. Before it can criminalize a particular assault[38] or business transaction,[39] the legislature must provide fair notice of its intent. Individuals should then be free to choose whether to transgress society's criminal prohibitions.

Similarly, individuals must have notice of the range of penalties prior to consummation of the criminal offense. As one court of appeals explained, "[p]rinciples of fairness thus require that this actor, in making his decision whether to act, be fully informed as to . . . what type of punishment one guilty of the criminal act can expect."[40] Or, as the Supreme Court has explained, an "indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment"[41] is entitled to rely on the existing legal framework. To the courts, fairness concerns dictate that individuals be afforded notice of the conduct proscribed and the potential penalty before they can be punished for their anti-social conduct.

The second and related principle is that the Ex Post Facto Clause furthers rule of law values by limiting legislative power. If the legislature could alter rules of criminal conduct and punishment retroactively, then its power could expand exponentially. In exercising that power, the legislature could single out individuals for criminal sanctions in response to news of horrifying anti-social acts. In light of these problems, the Supreme Court in *Weaver v. Graham*[42] explained that the Ex Post Facto Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation."[43] A requirement of prospectivity minimizes the

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a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute") (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)); State v. Palendrano, 293 A.2d 747 (N.J. Super. Ct. Law Div. 1972).

38. *Cf.* Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970) (holding that the killing of a fetus cannot be considered murder in the absence of notice that "fetus" fell within the legislative classification of human being).

39. *Cf.* Fogie v. Thorn Americas, Inc., 95 F.3d 645 (8th Cir. 1996) (holding that a rent-to-own business had sufficient notice that transactions were subject to penalties under the usury laws), *cert. denied*, 117 S. Ct. 1427 (1997); People v. Sobiek, 106 Cal. Rptr. 519 (Ct. App. 1973) (holding that the defendant was on sufficient notice that theft from other partners in a business partnership could be prosecuted).

40. Dale v. Haeberlin, 878 F.2d 930, 935 (6th Cir. 1989).

41. Lynce v. Mathis, 117 S. Ct. 891, 895 (1997).

42. 450 U.S. 24 (1981).

43. *Id.* at 29.

risk that legislators will use the criminal law to target individuals or groups based on prior conduct. As the Supreme Court recently stated in *Lynce*, "[t]he specific prohibition on ex post facto laws is . . . one aspect of the broader constitutional protection against arbitrary changes in the law."[44] Enforcement of ex post facto principles restrains legislative excesses and preserves a wider swath of individual liberty.

This is not to suggest that the Supreme Court's reasoning is beyond reproach. Indeed, the Court's rationale in part is deeply disturbing. Little apparent reason exists why notice should be the focal point of the ex post facto doctrine. Not only is it questionable whether we should always safeguard an offender's reliance interest, but courts have invoked the Ex Post Facto Clause even when no reliance interest is conceivably present.[45]

An offender's reliance interest is most significant when the legislature criminalizes conduct that was permissible when undertaken. Arguably, before the sale of technology overseas can be punished by criminal sanctions, those engaged in such technology transfers should at least be aware of the potential for criminal penalties. Yet the notice requirement is fictional in many respects. Most members of society do not learn the criminal code and could not in any event understand statutory or regulatory requirements without considerable legal help.[46] For example, we routinely punish individuals who had no actual notice that they were violating

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44. *Lynce*, 117 S. Ct. at 895.

45. For a more complete discussion of this point, see Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 Geo. L.J. 2143, 2160-65 (1996). For a related critique of the liberal conception of nonretroactivity, see Dan M. Kahan, *Some Realism About Retroactive Lawmaking*, 3 Roger Wms. U. L. Rev. 95 (1997).

46. *See* Herbert L. Packer, The Limits of the Criminal Sanction 83-87 (1968); John C. Jeffries, Jr., *Legality, Vagueness and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985). Justice Holmes, in *McBoyle v. United States*, 283 U.S. 25 (1931), stated:

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

Id. at 27.

convoluted IRS regulations or counterintuitive applications of the racketeering laws.[47]

Moreover, society may not wish to protect reliance in many criminal law settings. When the conduct poses a danger to others, why forego punishment even if the precise conduct previously had not been criminalized? The knowing sale of dangerous hallucinogens should not be protected even if selling a combination of prescription drugs was not prohibited.[48] In traditional criminal law jargon, ignorance of the law is no excuse if the conduct is mala in se, or wrongful in itself.[49]

Notice may be more important in mala prohibitum settings, when Congress retroactively creates a regulatory crime. If the prohibition does not reach blameworthy conduct, individuals should

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47. Criminal law doctrine in general does not demand actual notice. The Supreme Court has never asked whether an offender actually relied on a particular statutory scheme prior to committing the offense. No empirical evidence likely exists demonstrating that offenders rely on the details of a state's good time credit or parole policy before committing an offense.

And, in *Greenfield v. Scafati*, 277 F. Supp. 644 (D. Mass. 1967), *aff'd per curiam*, 390 U.S. 713 (1968), inmates were on constructive notice of the enhanced penalties for parole violation, at least before engaging in conduct violating parole. Many lower courts have followed the logic in *Greenfield* by holding that the issue of the offender's notice is totally irrelevant. *See, e.g.*, United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994); United States v. Paskow, 11 F.3d 873 (9th Cir. 1993); United States v. Parriett, 974 F.2d 523, 527 (4th Cir. 1992) ("The fact that Parriett was 'on notice' of the consequences of [violation of the conditions on supervised release] during the term of his supervised release does not serve to insulate the statutory revisions from review under the ex post facto clause."); Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989); Beebe v. Phelps, 650 F.2d 774 (5th Cir. 1981).

48. *See also* Kahan, *supra* note 16, at 415-16 (agreeing that protecting reliance interest in the criminal context is not always normatively desirable).

49. In the mala in se context, perhaps constructive notice is more relevant than reliance itself. The concern is not for the individual interest but for the systemic protections flowing from such notice. Commentators believe that the rationale underlying the principle of legality or fair notice turns on limiting the power of the police and prosecutors, *see* Jeffries, *supra* note 46, not protecting individual reliance. When the standards of criminal conduct are set before hand—and thus individuals are subject to constructive notice—administrative officials can less likely apply criminal prohibitions in an arbitrary or vindictive manner. The problem with a vague loitering statute is not so much the lack of notice to individuals as the license afforded to police officials to enforce the statute arbitrarily.

Yet, if Congress establishes the standard of criminal conduct, there is no longer the same concern for overreaching by police and prosecutors. Congressional action circumscribes the discretion of enforcement officials, as long as the standard of conduct—even if applied retroactively—is clear. The constructive notice argument, therefore, does not explain why the legislature should not enact law retroactively.

have the opportunity to avoid that activity.[50] But the ex post facto protections apply to far more than the category of regulatory crimes, and virtually no cases have arisen in the regulatory crime setting.

Stressing notice is even more tenuous in cases challenging legislative decisions to increase punishment, by far the largest category of ex post facto challenges. All offenders in such cases know, or should know, that their conduct is illegal. The only possible reliance or notice issue arises by virtue of the offender's lack of knowledge of the penalty he or she will receive if caught and convicted.[51] Few offenders, however, know or even could know the punishment that they can expect to receive, and it is doubtful whether that knowledge should in any event serve as a condition precedent to increased punishment.

With respect to knowledge, not many actors calculate potential penalties before they engage in particular prohibited conduct, or engage in conduct that risks particular prohibited results. Those intending to rob banks or trade secrets may well be punished under a myriad of overlapping criminal provisions of both the federal and state sovereign. Bank robbery might involve an assault, a trespass, a malicious wounding, as well as distinct federal offenses. Given the prosecutor's choice of charges, the labyrinthine operation of sentencing guidelines and the availability of complex good time credit programs within prisons, few offenders are likely to predict with much precision what their actual stay in prison would be. Any goal to afford fair notice of sentencing provisions, therefore, seems chimerical.

Despite the shaky rationale for notice, rule of law concerns constitute a more satisfactory explanation. Barring retroactivity in the criminal context prevents the legislature from singling out individuals for criminal sanctions in response to news of horrifying crimes. Because of pressure exerted by contributors or constituents, legislators may wish to punish offensive behavior that otherwise would escape punishment based on extant statutes. A

50. Perhaps reliance is also important in mala in se contexts because of the fear of legislative errors in making the judgment as to what is blameworthy. Yet, judicial review could help ensure that retroactive application of any new criminal prohibitions be limited to the mala in se context. *See* Kahan, *supra* note 16, at 403.

51. Even then, studies have demonstrated little correlation between the length of imprisonment and deterrence. *See* Michael Tonry, Sentencing Matters 8 (1996).

requirement of prospectivity minimizes the possibility that legislators may use the criminal law to target identifiable individuals or groups based on prior conduct.[52]

Furthermore, even if the reliance rationale does not persuasively explain why offenders should be on notice of criminal penalties *prior to* committing anti-social acts, a related rationale exists for why offenders should be able to rely on the criminal penalties assessed *after* the crime has been committed. The Ex Post Facto Clause arguably advances an interest in repose by forcing the state to exact one punishment from an offender rather than doling out penalties one measure at a time. When punishment is prescribed up front, an offender psychologically might be able to accept what is due and work toward reintegrating himself into society. A sentence can be viewed as a type of contractual quid pro quo—because of their breach of society's laws, offenders must serve a number of years in prison. The contractual model can help an offender accept the legitimacy of the loss of liberty and therefore aid rehabilitation, or at least help ensure that the offender will not commit another crime.

Pushing back the release date after sentencing departs from the quid pro quo model, potentially tarnishing the legitimacy of the punishment in the offender's eyes. A system which seemingly extends incarceration after the fact breeds cynicism and distrust.[53] An offender subject to future penalties might not be as able, because of resentment toward an arbitrary system, to channel his energies into becoming a functioning contributor to society.[54]

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52. There is undeniably less risk of arbitrary lawmaking when legislators enact new provisions to govern conduct in the future as well as that already taking place. Barring legislative changes that are *only* retroactive might more narrowly comport with the principles against retroactive lawmaking. Nonetheless, a ban against retroactive lawmaking removes the incentive that legislators might otherwise have to enact new law prospectively only to ensure that identifiable individuals receive more punishment for prior conduct. *See also infra* text accompanying note 220.

53. Judge Marvin E. Frankel made a similar observation in Criminal Sentences: Law Without Order 86-102 (1973). Judge Frankel criticized indeterminate sentences in part because prisoners could not understand the standards parole officials used in determining whom to release. The seemingly arbitrary decision to release some prisoners and not others bred distrust: "[i]t may be imagined that knowing the actual length of a prison term might serve [an inmate's] . . . searing . . . needs." *Id.* at 97.

54. Ironically, the indeterminate sentencing system, which in part was designed to rehabilitate the offender, may have impeded rehabilitation. *Cf.* An-

Thus, even though the reliance justification is questionable, combined goals of fostering rehabilitation (and preventing recidivism), furthering rule of law concerns and preserving individual freedom in the *mala prohibitum* context support the Ex Post Facto Clause. The ban prevents singling out; limits the role of emotion in criminal legislation; and may facilitate the offender's ultimate reintegration into society.

B. *Application of Ex Post Facto Clause to Judiciary*

The Supreme Court, however, never has applied the Ex Post Facto Clause to judicial acts. Part of the reason can be attributed to the language of the Clause, which prohibits both the federal government and the states from passing "any ex post facto Law."[55] The terminology strongly suggests no limit on judicial decisions. The judiciary does not "pass" laws. Judicial decisions may have the effect of making law, but without the formal power of enactment.

Moreover, a glance at the historical context provides little reason to apply the Ex Post Facto Clause to judicial acts. The events likely precipitating enactment of the ex post facto prohibitions focused on abuses by state legislatures, not judges. The state legislatures in the period under the Articles of Confederation had passed economic measures—particularly legal tender laws—which threatened the interests of prominent financial leaders.[56] The English Parliament previously had passed retrospective criminal measures in political cases.[57] The drafters may well have included the Ex Post Facto Clause therefore to quiet the fears of mercantile

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drew Von Hirsch, Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration 27-32 (1976) (examining the failure of the indeterminate system to promote rehabilitation); Lynne Goodstein & John Hepburn, Determinate Sentencing and Imprisonment 18-19 (1976).

55. U.S. Const. art. I, §§ 9, 10.

56. I borrow here from 1 William W. Crosskey & William Jeffrey, Jr., Politics and the Constitution in the History of the United States 324-51 (1953). Justice Chase, in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), adverted to parliamentary history in Great Britain when Parliament had passed laws declaring acts to be treason that were not when committed and retroactively changed the evidentiary requirements for proving crimes. *Id.* at 389.

57. *See Calder*, 3 U.S. (3 Dall.) at 389 (1798) (Chase, J.); Joseph Story, Commentaries on the Constitution of the United States §§ 677-79 (1833).

interests as well as proponents of individual liberty.[58] The Ex Post Facto Clause served to prevent either majorities or influential minorities from rashly using the legislative power to disrupt settled expectations.

Early cases similarly assumed that the Ex Post Facto Clause did not apply to judicial acts. In *Calder v. Bull*,[59] the ex post facto challenge arose from the Connecticut legislature's revision of a state judicial decision in a will contest. The legislature passed a resolution setting aside the probate court's decision in favor of Mrs. Calder. The probate court subsequently reconvened and awarded the land to Mrs. Bull. Mrs. Calder sought relief from Connecticut's courts and ultimately from the United States Supreme Court, arguing that the legislative decision to set aside the probate court's judgment violated the Ex Post Facto Clause.

Calder held that the Ex Post Facto Clause does not apply to civil contexts. In so doing, three of the four Justices hearing the case opined in addition that the Clause did not apply to the Connecticut legislature's decision because the legislature had acted in a judicial capacity.[60] Justice Iredell stated that the legislature's exercise of review "as in the present instance . . . is an exercise of judicial not of legislative authority."[61] Justice Cushing added that exercises of judicial authority are not "touched by the federal constitution."[62] Justice Paterson added that the judicial nature of the legislature's act "militates against the plaintiffs in error [because]

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58. As a historical matter, therefore, the Clause may well have been intended to restrain retroactive civil as well as criminal legislation. *See* Crosskey & Jeffrey, *supra* note 56, at 324-25; Story, *supra* note 57, ch. xxxii, § 679; Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 Ky. L.J. 323, 324-26 (1992-93); Oliver Field, *Ex Post Facto in the Constitution*, 20 Mich. L. Rev. 315, 322-31 (1920-21); Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. Tol. L. Rev. 301 (1996).

Nevertheless, courts currently use rational basis scrutiny in upholding retroactive legislation in the civil sphere, requiring only that the retroactive effect be rationally related to a legitimate government objective. *See, e.g.*, Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984) ("Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.").

59. 3 U.S. (3 Dall.) 386 (1798).

60. The Connecticut legislature had acted as a court of appeals in all cases until 1762. *See id.* at 395 (Paterson, J., concurring).

61. *Id.* at 398 (Iredell, J., concurring).

62. *Id.* at 400 (Cushing, J., concurring).

their counsel has contended for a reversal of the judgment, on the ground, that the awarding of a new trial was the effect of legislative act, and that it is unconstitutional, because an ex post facto law."[63] The Supreme Court has adhered to the dicta in *Calder* in subsequent cases, holding that the Ex Post Facto Clause does not constrain judicial acts.[64]

II. *BOUIE* AND ITS PROGENY

Whether because of the constitutional text, the dicta in *Calder*[65] or some unarticulated normative view, judicial decisions expanding the reach of criminal provisions or lengthening sentences have remained immune from scrutiny under the Ex Post Facto Clause.[66] The Supreme Court could not ignore, however, that the same concerns underlying the Clause can be triggered by judicial decisions. Because interpretation is not a mechanical exercise, judicial constructions—particularly of broadly worded texts[67]—seem like conventional lawmaking. Judicial interpretations that change the substantive definition of a crime can imperil liberty to the same extent as legislative change. Judges presiding over a case can alter or transmute a legislative provision to ensure that the conduct of the accused before them falls within the statutory language despite the novelty of the interpretation. Similarly, an un-

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63. *Id.* at 396 (Paterson, J., concurring).

64. *See, e.g.*, James v. United States, 366 U.S. 213, 224 (1961) (Black, J., dissenting) ("[T]he ex post facto [clause] . . . has not ordinarily been thought to apply to judicial legislation."); Ross v. Oregon, 227 U.S. 150, 161 (1913) (holding that the Ex Post Facto Clause "is a restraint upon legislative power and concerns the making of laws, not their construction by the courts").

65. *See supra* text accompanying notes 61-64.

66. In contrast, the Court applied the Contract Clause to judicial acts for a period in our history, despite the fact that the Contract Clause—like the Ex Post Facto Clause—is directed at laws passed by the state legislatures. *See* U.S. Const. art. I, § 10. Professor Barton H. Thompson, in an excellent paper, Barton H. Thompson, *The History of the Judicial Impairment "Doctrine" and its Lessons for the Contract Clause*, 44 Stan. L. Rev. 1373 (1992), details how federal courts in the mid-nineteenth century protected individuals from state judicial decisions impairing contractual rights. He argues that, although the Court did not always explicitly rely on the Contract Clause, it nevertheless relied on Contract Clause principles in striking down state judicial decisions that seemingly deprived bondholders of the benefit of their contract. In becoming embroiled in the bond controversies in the mid-nineteenth century, the Court recognized that judicial interference with contractual prerogatives could be just as devastating as legislation. *See id.* at 1383-85.

67. *See* Kahan, *supra* note 17.

expected judicial construction of sentencing guidelines can increase the punishment an offender faces just as in *Miller* and *Lindsey*. Surprising judicial decisions deprive an offender of notice to the same extent as a new legislative enactment enlarging the scope of a criminal provision.[68]

At the same time, freeing judges from the strictures of the Ex Post Facto Clause may invite too much judicial power. When confronting the accused's deeds, judges may wish to bend the law to ensure that the accused is punished severely, whether by including the objectionable conduct within a criminal enactment or expanding the reach of a sentencing provision. As with legislatures, judges may be tempted to adapt the law to fit the factual scenario before them.

Indeed, in comparison to legislative change, a court may well be more influenced by the specifics of a particular case in reaching its decision. Although judicial constructions have prospective as well as retrospective impact, judges may be swayed by the emotion of the moment to interpret a statute to prevent the release or lenient sentence for a particularly objectionable offender.[69] Preventing retroactive application of judicial changes therefore might improve judicial craft overall because statutory construction controlling future conduct would not be sullied by any vindictive purpose. Retroactive judicial, as well as legislative, decision-making in the criminal context poses a substantial risk of arbitrariness.

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68. Indeed, the concern for constructive notice may play a larger role in restraining judicial, rather than legislative, retroactivity. When the legislature changes a standard of conduct retroactively, there is no concern for augmenting the power of police and prosecutors. *See supra* note 49. In contrast, when judges fashion a new doctrine and apply it to the case at bar, police and prosecutors as opposed to legislators have already selected the particular defendant for punishment. In any common law of crimes system, prosecutors and police play a more important role than with legislatively defined crimes.

69. In recognition of that possibility, the federal sentencing guidelines permit judges, in circumscribed situations, to depart from the guidelines to increase punishment for the offender. *See* United States v. Otis, 107 F.3d 487 (7th Cir. 1997); United States v. Valentine, 100 F.3d 1209 (6th Cir. 1996); *cf.* Koon v. United States, 116 S. Ct. 2035, 2044 (1996) ("[The Sentencing Reform Act] allows district courts to depart from the applicable Guideline range [in cases that feature] 'aggravating . . . circumstance[s] of a kind, or to a degree, not adequately taken into consideration by the . . . Commission.'") (quoting 18 U.S.C. § 3553(b) (1994)). In the absence of such a safety valve, judges might be tempted to alter construction of the guidelines themselves to achieve the desired results.

Furthermore, the rehabilitation goal seemingly does not turn on whether it is the legislature or the court that imposes the increased punishment. Offenders as in *Lynce*, who finally believe that they have crossed the end line and earned release, are not likely to be able to rationalize reincarceration on the ground that it was a judicial, as opposed to a legislative, decision to lengthen the playing field. Indeed, in *Lynce*, it was not clear whether the reincarceration should have been attributed to legislative or judicial design. If we value certainty to enable offenders to reintegrate themselves better into society, then that certainty is shattered regardless of whether it is due to legislative or judicial change.

In the last two centuries, the Supreme Court has confronted the problem posed by unexpected state court decision-making in a number of contexts. In *Martin v. Hunter's Lessee*,[70] for instance, the Court feared that the Virginia Court of Appeals used creative property law interpretation to deny rights guaranteed individuals under federal law by treaty. The Court has since exercised the power to oversee whether unexpected state court interpretations of state law may deprive individuals of constitutionally protected rights.[71]

More specifically, the problem of judicial interpretive changes has loomed large. As one example, the Court struggled when confronting state judicial legerdemain during the municipal bond crisis of the mid-nineteenth century.[72] Many municipalities could not afford to pay off bondholders who had funded prior municipal projects, particularly railroad expansion. Perhaps because many of the bondholders were non-residents, local judges sided with municipalities in attempting to limit municipal debt and altered state law doctrines to prevent relief. The Court intervened to protect individuals from the unexpected doctrinal changes. In addition, by

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70. 14 U.S. (1 Wheat.) 304 (1816).

71. The Due Process Clause presents a good example. In the absence of federal court review, state courts might construe state law to deny that acts taken by state governmental officials violated property rights. Federal courts routinely separate out any state procedural limitations on property rights—irrespective of the importance the state may attach to them—in determining whether property rights exist. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (ignoring procedural limitations set by the state in determining whether state-created property entitlement exists); *cf.* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938) (rejecting the state court determination that no contract had been formed in light of contract clause protections).

72. *See supra* note 66.

the turn of the century, courts had declared that unforeseeable changes in state judicial interpretations could violate the Takings Clause.[73]

Moreover, courts expressed retroactivity concerns as part of vagueness analysis. In *Lanzetta v. New Jersey*,[74] for instance, the defendants challenged their conviction under a New Jersey statute criminalizing membership in a gang by those who had been convicted previously of particular crimes.[75] The Court stated that the term "gang" was too ambiguous to provide sufficient notice: "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."[76] The Court, however, noted that the New Jersey Supreme Court subsequently had provided a more definite construction of the statutory term. Nonetheless, the Court dismissed that narrowing construction, reasoning that "[i]t would be hard to hold that, in advance of judicial utterance upon the subject, [defendants] were bound to understand the challenged provision according to the language later used by the court."[77] Retroactive application of a more precise definition by a court would not cure the notice problem.[78]

Full consideration of application of ex post facto principles to judicial decisions, however, arrived only with the civil rights movement. State court judges resorted to surprising interpretations of state law to punish protestors and activists.[79] In light of the ensuing friction between federal and state court judges, the Supreme Court reconsidered whether ex post facto principles should apply to judicial, as well as legislative, decisions.

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73. *See* Barton H. Thompson, *Judicial Takings*, 76 Va. L. Rev. 1449, 1463-64 (1990); *cf.* Brinkeroff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930) (limiting the ability of litigants to raise takings challenges to judicial acts but considering the due process challenge).

74. 306 U.S. 451 (1939).

75. *See id.* at 452.

76. *Id.* at 453.

77. *Id.* at 456. The Court went on to note that the state supreme court's narrowing construction remained vague. *See id.*

78. Similarly, in *James v. United States*, 366 U.S. 213 (1961), the Court overruled a prior case that had excluded embezzled funds from the reach of the income tax laws. Nonetheless, in part because the Court had yet to overrule the prior case at the time of defendant's conviction for tax evasion, it set aside the conviction. *Id.*

79. *See, e.g.*, Henry v. Mississippi, 379 U.S. 443 (1965) (addressing state court application of procedural requirements during criminal trials); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (addressing new state procedural requirements to prevent the NAACP from raising constitutional claims).

A. *Bouie*

In *Bouie v. City of Columbia,*[80] the Court reversed a trespass conviction on the ground that the state conviction rested on an unexpected construction of the state trespass statute by the South Carolina Supreme Court. The state supreme court had construed a trespass statute prohibiting "[e]very entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry" to apply to African-American demonstrators at a lunch counter who entered the lunch counter premises *before* the owner asked them to leave.[81] Although the Supreme Court noted that the South Carolina Supreme Court's construction of the statute—applying it to individuals refusing to leave another's property after being so requested—was possible, it held that retroactive application of the interpretation violated due process because the statute did not "give fair warning of the conduct that it makes a crime."[82] As the Court explained in greater depth:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law . . . . If 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.[83]

Given that the state court judges apparently strained to affix some criminal liability upon the civil rights protestors, prohibiting retroactive application of unforeseeable judicial constructions may have had the salutary effect of improving future judicial decision-making. South Carolina courts might hesitate before again interpreting criminal provisions merely to ensure punishment for the offender before the court. Lower courts have extended the Supreme Court's due process analysis to unforeseeable judicial

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80. 378 U.S. 347 (1964).

81. *See id.* at 349.

82. *Id.* at 350. For a contextual analysis of *Bouie* as part of the Court's response to the civil rights movement, see Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 Yale L.J. 1520 (1968) and Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 273-76 (1991).

83. *Bouie*, 378 U.S. at 353-54; *see also supra* note 19.

changes in sentencing structure as well,[84] making the reach of the Due Process and Ex Post Facto Clauses congruent.

Bouie perhaps can be rationalized as part of the Supreme Court's strategy in the early 1960s sit-in cases of resolving the civil rights protestors' constitutional challenges on the narrowest basis possible. The Court decided other sit-in cases on insufficiency of evidence, applied equal protection, vagueness and first amendment grounds.[85] The Court may have stretched to locate some ground upon which to uphold the defendants' right to integrate the lunch counter. Whatever the pedigree, however, the Court reaffirmed the due process rationale in subsequent cases, solidifying *Bouie*'s position in the legal firmament.

For instance, no civil rights overtones existed in *Douglas v. Buder*.[86] In *Douglas*, the defendant pled guilty to manslaughter and received probation. One of the conditions for probation provided that "[a]ll arrests for any reason must be reported without delay to [defendant's] probation and parole officer."[87] After a multiple car crash, police issued the defendant a traffic citation for driving too fast under existing conditions. The defendant duly informed his probation officer of the accident at their next scheduled meeting, eleven days later. The state judge, however, subsequently decided to revoke the defendant's probation on the ground that he had failed to report his "arrest" promptly. A divided state supreme court upheld the trial court's construction of "arrest."[88] The United States Supreme Court subsequently reversed, reasoning in part that, even if Missouri henceforth defined a traffic citation "to be the equivalent of an arrest, . . . the unforeseeable application of that interpretation in the case before us deprived petitioner of due process."[89] *Bouie* thus has become enshrined in our law.

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84. *See, e.g.*, Dale v. Haeberlin, 878 F.2d 930 (6th Cir. 1989); Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982); Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980).

85. *See* Greenberg, *supra* note 82, at 1528-31.

86. 412 U.S. 430 (1973).

87. *Id.* at 430.

88. *See* State *ex rel.* Douglas v. Buder, 485 S.W.2d 609 (Mo. 1972).

89. *Douglas*, 412 U.S. at 432.

B. *Impact of* Bouie

To help assess the impact of *Bouie*, I surveyed the number of published cases addressing and granting *Bouie*-type claims in 1976, 1986 and 1996. I selected those years to get a sense of the judicial receptivity to due process claims based on *Bouie*. The results reveal a consistent judicial hostility to *Bouie* claims, and suggest that the *Bouie* doctrine has attained little practical significance, even as the Supreme Court has continued to impose significant restraints on legislatures under the ex post facto doctrine.

First, successful *Bouie* claims are few and far between. The United States Supreme Court has not upheld any *Bouie* claim for the past twenty years.[90] Consider the most recent *Bouie* challenge raised in *United States v. Lanier*,[91] decided in the same term as *Lynce*. Prosecutors alleged that the defendant state court judge assaulted several women in judicial chambers. They charged him with violating a civil rights statute, 18 U.S.C. § 242, on the ground that he had deprived the victims of "rights and privileges which are secured and protected by the Constitution and laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilful sexual assault."[92] After conviction, the defendant appealed, arguing that the federal statute did not criminalize sexual assaults by state officials, and that, if it did, then retroactive application of that novel interpretation violated his due process rights. The Sixth Circuit Court of Appeals agreed with him and set aside the conviction, reasoning that "[t]he indictment in this case for a previously unknown, undeclared and undefined constitutional crime cannot be allowed to stand."[93]

In reversing, the Supreme Court did not take issue with the defendant's assertion that application of the civil rights statute to sexual assault was entirely novel. Yet the Court held that novelty was not the key; rather, it stated 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

90. The last decision was *Marks v. United States*, 430 U.S. 188 (1977) (barring retroactive application of new obscenity standards).

91. 117 S. Ct. 1219 (1997).

92. *Id.* at 1223 (quoting the trial court indictment).

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

criminal."[94] The Court counseled that, in considering whether the conduct's criminality was "reasonably clear," the Court itself need not have considered a similar claim, nor need it identify any lower court precedents involving substantially similar facts. Indeed, the Court clarified that criminal liability can attach merely if, "in light of preexisting law, the unlawfulness [under the Constitution is] apparent."[95] The Court accordingly remanded the case to the court of appeals for application of the new standard. Even if sexual misconduct by a judge or similar official had never been considered a violation of a constitutional right, the defendant could be convicted. Thus, the current burden on defendants to demonstrate a *Bouie* violation is quite substantial.

Aside from the dim prospect of prevailing on a *Bouie* claim in the Supreme Court, an admittedly imperfect survey further reveals the ostensible dearth of successful *Bouie* claims. In 1996, only two challenges relying on *Bouie* succeeded in the nation's *entire* legal system in addition to the Sixth Circuit's decision in *Lanier*.[96] Three successful challenges occurred in 1986,[97] and two in 1976.[98] The consistency is surprising. For the past twenty years, virtually no *Bouie* claims have been successful. In contrast, at least eleven successful ex post facto challenges occurred in 1986[99] as well as twenty-three in 1996.[100]

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94. *Lanier*, 117 S. Ct. at 1225.

95. *Id.* at 1228 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

96. *See* People v. Farley, 53 Cal. Rptr. 2d 702 (Ct. App. 1996); State v. Snyder, 673 So. 2d 9 (Fla. 1996). The limited number of successful claims is particularly significant given that there were twenty-six cases reported in which *Bouie* claims were raised, and likely many more cases that were not reported. In 1995, for the sake of comparison, there were *no* successful reported *Bouie* claims.

97. *See* State v. McGann, 506 A.2d 109 (Conn. 1986); State v. Anonymous, 516 A.2d 156 (Conn. Super. Ct. 1986); State v. Doe, 717 P.2d 83 (N.M. Ct. App. 1986). In comparison, there were six successful claims the prior year. *See* Moore v. Wyrick, 766 F.2d 1253 (8th Cir. 1985); United States *ex rel.* Reed v. Lane, 759 F.2d 618 (7th Cir. 1985); United States v. Yonan, 622 F. Supp. 721 (N.D. Ill. 1985); *Ex parte* Alexander, 475 So. 2d 628 (Ala. 1985); People v. Weidert, 705 P.2d 380 (Cal. 1985); People v. Martin, 184 Cal. Rptr. 346 (Ct. App. 1985).

98. *See* People v. Dempster, 242 N.W.2d 381 (Mich. 1976); Riggs v. Branch, 554 P.2d 823 (Okla. Crim. App. 1976). For the sake of comparison, there were three successful claims in 1975. *See* United States v. Potts, 528 F.2d 883 (9th Cir. 1975); United States v. Sherpix, Inc., 512 F.2d 1361 (D.C. Cir. 1975); State v. George, 362 N.E.2d 1223 (Ohio Ct. App. 1975).

99. *See* Williams v. State, 500 So. 2d 636 (Fla. Dist. Ct. App. 1986); Beahn v. State, 499 So. 2d 74 (Fla. Dist. Ct. App. 1986); Harris v. State, 498 So. 2d 1371, (Fla. Dist. Ct. App. 1986); Maldonado v. State, 498 So. 2d 1057 (Fla. Dist. Ct. App.

Second, all of the successful due process claims in 1996 and 1986 challenged state trial court interpretations on appeal in the state court systems, although successful challenges to state court rulings have occurred in federal court as well.[101] A number of variables may account for the greater likelihood of success in challenging state, as opposed to federal, convictions. As an initial matter, state trial courts are more politicized than their federal counterparts.[102] State appellate and federal courts therefore may be more suspicious of novel state trial court interpretations that disadvantage an accused. Moreover, state courts in general have been more hospitable to challenges to retroactive decisions in the civil, as well as criminal, context.[103] Although most criminal cases are tried in

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1986); Morganti v. State, 498 So. 2d 557 (Fla. Dist. Ct. App. 1986); McDowell v. State, 491 So. 2d 594 (Fla. Dist. Ct. App. 1986); Signorelli v. State, 491 So. 2d 349 (Fla. Dist. Ct. App. 1986); Taylor v. State, 351 S.E.2d 723 (Ga. Ct. App. 1986); State v. McKinstry, 722 P.2d 738 (Or. Ct. App. 1986); *Ex parte* Bonham, 707 S.W.2d 107 (Tex. Crim. App. 1986); State v. Short, 350 S.E.2d 1 (W. Va. 1986).

100. *See* United States v. Graika, 103 F.3d 134 (7th Cir. 1996); United States v. Stover, 93 F.3d 1379 (8th Cir. 1996); United States v. Beals, 87 F.3d 854 (7th Cir. 1996); United States v. McLamb, 77 F.3d 472 (4th Cir. 1996); United States v. Rosario, No. 96-5103, 1996 WL 583187 (E.D. Pa. Oct. 10, 1996); Roe v. Office of Adult Probation, 938 F. Supp. 1080 (D. Conn. 1996); Keating v. Hood, 922 F. Supp. 1482 (C.D. Cal. 1996); Doe v. Pataki, 919 F. Supp. 691 (S.D.N.Y. 1996); Eichelberger v. State, 916 S.W.2d 109 (Ark. 1996); People v. Snook, 56 Cal. Rptr. 2d 630 (Ct. App. 1996); People v. Helms, 52 Cal. Rptr. 592 (Ct. App. 1996); People v. Washington, 51 Cal. Rptr. 2d 592 (Ct. App. 1996); State v. Myers, 923 P.2d 1024 (Kan. 1996); State v. Morgan, 686 So. 2d 1048 (La. Ct. App. 1996); Lee v. State, 681 So. 2d 1020 (La. Ct. App. 1996); State v. Calhoun, 669 So. 2d 1359 (La. Ct. App. 1996); Puckett v. Abels, 684 So. 2d 671 (Miss. 1996); State v. Cookman, 920 P.2d 1086 (Or. 1996); State v. Gleason, 673 N.E.2d 985 (Ohio Ct. App. 1996); Christenson v. Thompson, 923 P.2d 1316 (Or. Ct. App. 1996); Meadows v. Schiedler, 924 P.2d 314 (Or. Ct. App. 1996); Bollinger v. Board of Parole and Post-Prison Supervision, 920 P.2d 1111 (Or. Ct. App. 1996); *In re* J.M., 685 A.2d 185 (Pa. Super. Ct. 1996); Goodman v. State, 935 S.W.2d 184 (Tex. Ct. App. 1996); Ieppert v. State, No. 05-91-00084-CR, 1996 WL 547968 (Tex. Ct. App. Sept. 19, 1996); Johnson v. State, 930 S.W.2d 589 (Tex. Crim. App. 1996); Bowers v. State, 914 S.W.2d 213 (Tex. Ct. App. 1996).

101. *See supra* note 98.

102. *See infra* text accompanying notes 226-34.

103. Unlike in the federal system, *see infra* text accompanying notes 195-202, state courts continue to overrule precedents without applying the new ruling to the case at bar. *See, e.g.*, Wal-Mart Stores, Inc. v. City of Mobile, 696 So. 2d 290 (Ala. 1996); Presley v. Mississippi Highway Comm'n, 608 So. 2d 1288 (Miss. 1992); Heins v. Webster County, 552 N.W.2d 51 (Neb. 1996); Vetter v. North Dakota Workers Comp. Bureau, 554 N.W.2d 451 (N.D. 1996); Rivers v. State, 889 P.2d 288 (Okla. Crim. App. 1994); Kincaid v. Magnum, 432 S.E.2d 74 (W. Va. 1993); Colby v. Columbia County, 550 N.W.2d 124 (Wis. 1996).

state courts, there has been a recent proliferation of federal criminal enactments, many with broadly worded provisions.[104] Nonetheless, the *Bouie* doctrine practically is moribund at the federal level, the Sixth Circuit decision in *Lanier* notwithstanding—federal judicial decisions can be applied retroactively whether in the civil[105] or criminal context,[106] free from significant due process scrutiny.

C. *Limiting* Bouie

Courts have applied the due process check against judicial retroactivity far more leniently than the ex post facto check against legislative retroactivity. The difference can be seen in judicial cases reconfiguring common law doctrines such as criminal defenses, as well as in judicial decisions construing legislative commands.

1. *Change in Common Law Doctrines*

Judges fashion criminal law doctrine in a variety of contexts. Whether general federal common law exists today is a matter of dispute.[107] But what is not controverted is that courts enjoy substantial leeway in formulating criminal defenses and interpreting such doctrines as causation. The judicial process itself contemplates that precedents evolve over time. With new fact patterns, the need to clarify or even reevaluate prior opinions arises. A strict application of ex post facto doctrine accordingly might stultify decision-making in the criminal context. Courts rarely have held that a change in common law doctrines violates the Ex Post Facto Clause.

For instance, consider the facts in a recent notorious Florida manslaughter trial. Several young adults were charged with manslaughter stemming from the uprooting of a stop sign from a

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104. *See* Kahan, *supra* note 16.

105. As discussed below, *see infra* text accompanying notes 195-202, all new interpretations in the civil context *must* be applied retroactively in the federal system.

106. *See infra* text accompanying notes 199-200.

107. *See* Kahan, *supra* note 16 (arguing that federal common law in the criminal context is widespread today given the open-ended delegations from courts). The Supreme Court, however, is convinced to the contrary, stating emphatically only recently that "[f]ederal crimes are defined by Congress, not the courts." United States v. Lanier, 117 S. Ct. 1219, 1226 n.6 (1997).

county intersection. Within thirty-six hours after numerous stop signs had been displaced, a truck rumbled through an intersection which previously had a stop sign, causing a fatal accident. The lack of a stop sign unquestionably played a role in the deaths. To convict, however, the court and the jury had to conclude that the uprooting of the stop sign "caused" the ensuing car crash. Causation is a critical element of any criminal offense.[108]

Causation in Florida, as elsewhere, generally is linked to foreseeability. Florida precedent suggests that, even when defendant's conduct is the cause-in-fact of another's death, the court will not find causation "where the prohibited result of the defendant's conduct is beyond the scope of any fair assessment of the danger created by the defendant's conduct, or where it would otherwise be unjust, based on fairness and policy considerations."[109] A traffic fatality certainly may result from theft of a stop sign, but it is hardly likely. Someone might have noted the absence of the sign and called the county for a replacement; someone might have called the county after a fender-bender or near miss; or no accident may ever have occurred. Thirty-four motorists reportedly told authorities that they had noticed that the stop sign was not standing on the day of the accident.[110] In addition, neighbors during the trial reported that the stop sign had fallen intermittently in the past.[111] Moreover, the young adults admitted stealing eighteen other signs with nary a mishap reported. Road sign theft is apparently such a common problem that, when potential jurors in the case were asked if they had ever taken a sign, half of them raised a hand.[112] Presumably, a fatality does not result every time county authorities are remiss in failing to install stop signs where needed or in ensuring that such signs remain visible.

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108. Florida, like other states, requires that causation be proven as an essential element of the prosecution's case. *See, e.g.*, Golden v. State, 629 So. 2d 109 (Fla. 1993) (overturning the defendant's conviction of murder because of insufficient evidence of causation).

109. Velasquez v. State, 561 So. 2d 347, 351 (Fla. Dist. Ct. App. 1990).

110. *See* Bruce Frankel et al., *Dead Stop for Three Friends*, People Magazine, July 7, 1997, at 65, *available in* 1997 WL 8505229.

111. *See* Mike Clary, *For Fallen Stop Sign, Vandals Face Life*, L.A. Times, June 11, 1997, at A1, *available in* 1997 WL 2219054.

112. *See id.*

Assuming that Florida had no precedent on point, and none is evident,[113] the court's conclusion that causation was met on the facts of this case may well have marked a departure from prior case law. Retroactive application of a legislative change in the causation requirement unquestionably would violate the Ex Post Facto Clause. Nonetheless, few defendants likely would even consider raising a *Bouie*-type claim to challenge trial courts' application of the causation requirement because they know that common law precedents evolve and that judges zealously guard that tradition.

In addition to the causation issue discussed above, state courts have fashioned other common law doctrines to resolve criminal cases, including those defining the actus reus of the crime[114] as well as defenses such as diminished capacity.[115] Although comparatively little common lawmaking exists today, state courts well into this century continued to define new crimes on a common law basis.[116] Indeed, the Michigan Supreme Court in 1994 decided that the State could prosecute Jack Kevorkian under a common law prohibition of assisted suicide.[117] Each common lawmaking ef-

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113. Florida courts had previously articulated a relatively demanding test for causation. *See, e.g.*, *Velazquez*, 561 So. 2d 347 (holding that the defendant, who participated in drag race with the victim, was not a "cause" of the victim's death from an ensuing crash). Similarly, in *Todd v. State*, 594 So. 2d 802 (Fla. Dist. Ct. App. 1992), the court found that the defendant's theft from a collection plate at church was not the legal cause of the victim's death. Witnessing the theft, the victim chased the defendant and suffered cardiac arrest. The court concluded that "the petty theft did not encompass the kind of direct, foreseeable risk of physical harm that would support a conviction of manslaughter." *Id.* at 806; *see also* Penton v. State, 548 So. 2d 273 (Fla. Dist. Ct. App. 1989) (holding that the victim's death during a chase of a bicycle thief cannot be attributed to the thief).

114. *See infra* notes 116-17.

115. For instance, in *Mauppin v. State*, 831 S.W.2d 104 (Ark. 1992), the Supreme Court of Arkansas considered whether to apply its decision abrogating the common law defense of self-induced intoxication. The court held that "[a]n accused is entitled to any defense that existed at the time of the commission of the crime, even if that defense was based only on a court's erroneous interpretation of the law." *Id.* at 112. The Arkansas court's view has not been charitably received by other courts. *See infra* text accompanying notes 118-19.

116. *See, e.g.*, Commonwealth v. Mochan, 110 A.2d 788 (Pa. Super. Ct. 1955) (creating the crime of making obscene telephone calls).

117. *See* People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994) (fashioning the crime of aiding and abetting suicide). The court relied on a savings statute, which provided in part that "[a]ny person who shall commit any indictable offense at the common law . . . shall be guilty of a felony." *Id.* at 739 (quoting Mich. Comp. Laws Ann. § 750.505 (West 1991) (Mich. Stat. Ann. § 28.773 (Callahan 1982)). The court

fort could violate ex post facto principles by failing to provide notice of the relevant doctrine. Most courts, however, have rejected applicability of ex post facto principles.[118] Judicial changes are permitted that would be invalidated if made by the legislature.

In short, the Florida stop sign case suggests that alterations to common law doctrines apply retroactively, despite the fact that comparable legislative changes would be proscribed by the Ex Post Facto Clause. The common law system presupposes a measure of evolution that is incompatible with stringent application of ex post facto principles, even when judges overtly act in a lawmaking capacity. Unless the common law development represents a marked departure from precedent, retroactive application is permitted. As the Seventh Circuit noted in *United States v. Burnom*,[119] *Bouie* does not apply "to the resolution of uncertainty that marks any evolving legal system."[120]

2. *Statutory Interpretation*

Judicial alteration of common law doctrines affecting culpability is relatively rare. In contrast, courts routinely apply new interpretations of statutory language to criminal defendants appearing before them, even when those interpretations are not dictated by the plain language of the statutory provision. Ex post facto principles seldom prevent courts from arriving at novel interpretations of statutory terms or from changing prior interpretations of the statutory language.

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rejected an ex post facto attack on the ground that, under a fifty-year old precedent, Kevorkian could have been convicted of murder, and thus could not complain about the new theory of liability. *See id.*

118. Courts on occasion, however, have held that retroactive common law changes would violate the Ex Post Facto Clause. For instance, in *People v. Stevenson*, 331 N.W.2d 143 (Mich. 1982), the Michigan Supreme Court abolished the common law "year and a day" rule, which provided that the death of a person which occurred more than a year and day after injury could not be linked to the earlier injury. *Id.* The court reasoned that "[i]t would be nothing if not erratic to declare for the first time . . . almost five years after the year and a day rule effectively barred a murder prosecution in this case, that such a prosecution could be maintained." *Id.* at 149. Nonetheless, other courts have permitted retroactive application. *See* State v. Sandridge, 365 N.E.2d 898 (Ohio Misc. 1977) (applying retroactively the abrogation of the year and a day rule); Commonwealth v. Ladd, 166 A.2d 501 (Pa. 1960) (same).

119. 27 F.3d 283 (7th Cir. 1994).

120. *Id.* at 284.

a. *Limitation of Foreseeability Requirement*

Courts have latched onto foreseeability as the key to the *Bouie* inquiry, upholding judicial alterations in statutory interpretation as long as the changes were foreseeable. The foreseeability inquiry tracks the traditional distinction between legislative and judicial action. When courts make law, retroactive application should be as unjust as in the legislative context, but when courts rather engage in the evolutionary interpretive process, their decisions are foreseeable, and thus should be applied retroactively without concern for the individual's rights at stake.

All interpretations not dictated by precedent can be less favorable than those anticipated or desired by an offender. Courts obviously cannot be constrained by the subjective expectation of offenders as to how the law will be applied. An objective standard of foreseeability must govern instead.

Consider, for instance, the Fifth Circuit's decision in *United States v. Zuniga*.[121] In *Zuniga*, the defendant challenged his conviction under 18 U.S.C. § 924(c)(1), which penalizes any defendant who "during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm." Zuniga asserted that his conduct fell outside the statutory language because he did not "use" a firearm, but rather attempted to barter drugs for firearms.[122] From the language of the provision, the defendant's argument was quite compelling. Receiving a firearm in trade cannot be equated with its use. Had Zuniga consulted the statutory text, therefore, he had sound reason to believe that he would not be punished under 18 U.S.C. § 924(c)(1).

However, the Fifth Circuit previously had signaled an intent to construe "use" broadly as a term of art. In *United States v. Blake*,[123] the court stated that the statutory language was satisfied if the "weapon involved could have been used to protect, facilitate, or have the potential of facilitating the operation, and the presence of the weapon was in some way connected with the drug trafficking."[124] Anyone familiar with *Blake*, therefore, might have anticipated the extension of its reasoning to cover a barter situation.

121. 18 F.3d 1254 (5th Cir. 1994).
122. *Id.* at 1257.
123. 941 F.2d 334 (5th Cir. 1991).
124. *Id.* at 342.

Though in no way preordained, the *Zuniga* court's rationale was objectively foreseeable through the lens of precedent, even if not necessarily foreseeable from the statutory language itself. Indeed, the Supreme Court later upheld the Fifth Circuit's position.[125] If the judicial interpretation can be anticipated from an objective perspective, then the judicial act does not violate the Due Process Clause.[126] The offender, in other words, is not entitled to rely on his or her own subjective expectations as to how the statutes prohibiting certain conduct and imposing punishment operate. Particular judicial decisions can be anticipated if one considers the language of the statute (where applicable), dicta from prior opinions, precedent from other jurisdictions and prior administrative interpretation.

The stress on foreseeable judicial changes marks a critical departure from the Court's ex post facto jurisprudence because so many judicial changes can be, and have been, viewed as foreseeable. No comparable foreseeability analysis applies to legislatures even though legislation also is preceded by a mixture of events. Journalistic exposes, bills introduced into the legislature, committee reports and developments in other jurisdictions all signal that legislative change may be forthcoming.

For example, prior to enactment of the federal sentencing guidelines[127] or various state truth-in-sentencing laws,[128] change

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125. *See* Smith v. United States, 508 U.S. 223 (1993).

126. The change in *Zuniga* was thus foreseeable because of the prior decision suggesting a broad interpretation of "use."

127. Legislation to create a Sentencing Commission was first introduced in Congress by Senator Edward Kennedy (D-Mass.) in 1975. S. 2699, 94th Cong., 1st Sess. 1975. In that same period, numerous articles and books explored the need for sentencing reform. *See, e.g.*, American Friends Service Comm., Struggle for Justice: A Report on Crime and Punishment in America (1971); Frankel, *supra* note 53, at 103-24; Von Hirsch, *supra* note 54. Minnesota first experimented with a determinate sentencing system five years later. *See* Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After*, 75 Minn. L. Rev. 727 (1991). The congressional committees' various debates and bills during the 1975-1984 period were widely noted in the press. *See generally* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223 (1993) (assessing the ten years of legislative activity culminating in the passage of the federal sentencing guidelines).

128. The Illinois truth-in-sentencing law was signed in August, 1995. *See* Pub. Act No. 89-404, § 40. The measure principally limits the options that certain categories of prisoners previously enjoyed for early release.

The informed observer in Illinois could well have predicted legislation in that direction. The state legislature had enacted several revisions starting in 1973

was in the air. In *Lynce* itself, given the volatility in Florida's prison system, it may well have been foreseeable that Florida's legislature would revisit the question of affording administrative gain time credits. Informed observers may not have been able to predict the precise statutory language ultimately enacted, but they could have predicted the direction that the legislature would take. Legislation, like precedents, evolves over time, and some areas—such as penalties for insider trading[129] and tax legislation[130]—are re-

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designed to make sentences more predictable. *See* Pub. Act. No. 77-2097. Additional clarifications were added in 1978, 1981, 1985, 1987, 1992 and 1994. *See* Gregory W. O'Reilly, *Truth in Sentencing: Illinois Adds Yet Another Layer of "Reform" to Its Complicated Code of Corrections*, 27 Loy. U. Chi. L.J. 986, 999-1000 (1996). Enhancements for gang involvement were passed in 1989, 1993, 1994 and again in 1995. *See id.* at 1004-05. The legislature also cut back the availability of certain good time credits in 1993. *See id.* at 1010-11. Given the national trend toward truth in sentencing laws, *see, e.g.*, U.S. Dep't of Justice, Combatting Violent Crime: 24 Recommendations to Strengthen Criminal Justice 7-10 (July 28, 1992), and given congressionally provided incentives, *see, e.g.*, 42 U.S.C. § 13702 (1994) (authorizing grants to states that meet federal standards in meeting truth-in-sentencing laws), the 1995 change cannot be considered surprising.

129. For instance, Congress enacted the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677, after years of debate within and without Congress. Congress tinkered with the statute of limitations several years later in response to controversy generated by the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). *See* 15 U.S.C. § 78aa-1 (1994). Congress once more addressed the area in 1995, carving out certain categories of insider trading from the purview of RICO. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

130. For instance, Congress has constantly tinkered with the tax rules for depreciating business and investment property. Since the 1954 Code, major or minor changes have appeared in several statutes. *See, e.g.*, Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755; Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106; Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342; Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494; Technical Corrections Act of 1982, Pub. L. No. 97-448, 96 Stat. 2365; Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097; Subchapter S Revision Act of 1982, Pub. L. No. 97-354, 96 Stat. 1669; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324; Black Lung Benefits Revenue Act of 1981 Pub. L. No. 97-119, 95 Stat. 1635; Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172; Revenue Act of 1978, Pub. L. No. 95-6000, 92 Stat. 2763; Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174; Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520; Revenue Act of 1971, Pub. Law. No. 92-178, 85 Stat. 497; Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487; Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960; Technical

vised frequently. Thus, foreseeability by itself does not distinguish the judicial from the legislative context.

b. *Malleability of Foreseeability Inquiry*

Perhaps more importantly, courts have construed the objective foreseeability requirement quite laxly. Courts have considered a wide range of factors in determining that a judicial change was foreseeable, stressing the ambiguity of a statute or regulation,[131] precedents from other jurisdictions,[132] prior administrative interpretation of the statute[133] and whether the Supreme Court had granted certiorari in a similar case.[134] No one indicator is dispositive, leaving wide room for the courts to deny a *Bouie* challenge. Courts, in other words, have acted as if judges almost never make new law, but rather as though each new interpretation had been foreshadowed by prior developments in the common law system.

For instance, in *State v. Mummey*,[135] the defendant assaulted a man outside a bar in part by bludgeoning him with tennis shoes. Under the pertinent assault statute, the defendant could only be convicted if he used a weapon, which was defined as an instrument "readily capable of being used to produce death or serious bodily injury."[136] The court held that tennis shoes so qualified, and that the defendant should have anticipated such a construction of the statute. The conclusion of foreseeability is perplexing—tennis shoes in the public eye are not weapons, let alone "readily capable of being used to produce death or serious bodily injury." An explicit legislative amendment of the statute to expand the definition of weapon would be barred under the Ex Post Facto Clause.

Consider as well the Tenth Circuit's decision in *Lustgarden v. Gunter*.[137] In *Lustgarden*, the court rejected a prisoner's due pro-

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Amendments Act of 1958, Pub. L. No. 85-866, 72 Stat. 1606. We all should be on notice that the depreciation rules may change again.

131. *See* McSherry v. Block, 880 F.2d 1049 (9th Cir. 1989).

132. *See* Hagan v. Caspari, 50 F.3d 542 (8th Cir. 1995); State v. Mummey, 871 P.2d 868 (Mont. 1994).

133. *See, e.g.*, Lustgarden v. Gunter, 966 F.2d 552 (10th Cir. 1992).

134. *See* United States v. Russotti, 780 F. Supp. 128 (S.D.N.Y. 1991) (holding that the change in the interpretation of the criminal statute was foreseeable because the Supreme Court had granted certiorari in a case raising a similar interpretive question before the defendant had committed the crime).

135. 871 P.2d 868.

136. Mont. Code Ann. § 45-2-101(76) (1994).

137. 966 F.2d 552 (10th Cir. 1992).

cess challenge to the Colorado Supreme Court's construction of a parole statute that limited parole opportunities for certain sexual offenders. The statute targeted "any person sentenced for conviction of a sex offense, as defined in section 16-13-202(5) . . . [and] any person sentenced as a habitual offender."[138] The Colorado Parole Board had construed that statute to apply to habitual offenders and only those sexual offenders sentenced under the Sex Offenders Act, of which section 16-13-202(5) was a part.[139] The state supreme court later disagreed, however, reading the statute to cover anyone convicted of any charge within the broader category of sexual offenses.[140] The Tenth Circuit conceded an ambiguity in the statute, namely whether the reference to section 16-13-202(5) was intended to limit the impact to those convicted under the Sexual Offenders Act or rather, as the state supreme court determined, just to furnish a definition of "sex offense." The federal court held, however, that the state supreme court's change was not unforeseeable given that it accorded with the most logical construction of the statute. Perhaps so, but it seems to blink reality to suggest that an inmate is not entitled to rely upon the official articulated position of the state parole authority with respect to the construction of a statute that it is charged with administering. In any event, if the legislature had enacted the change wrought by the state supreme court, then retroactive application would have been blocked by the Ex Post Facto Clause.

The argument against foreseeable change is likely greatest when courts explicitly overrule precedent. In that context, courts act more overtly like legislatures in changing the law directly. Although some statutory interpretation is less foreseeable than overruling precedent, one would have thought that criminal defendants were entitled to rely on existing case law, as they are entitled to rely on existing legislation. Courts, however, have held that reversal of prior case law does not necessarily make the decision unforeseeable.

In *Dale v. Haeberlin*,[141] the Sixth Circuit rejected a due process challenge to the Kentucky Supreme Court's decision in *Dale v.*

138. *Id.* at 554 (quoting Colo. Rev. Stat. § 17-2-201(5)(a) (1989)).

139. Colo. Rev. Stat. §§ 16-13-201 to -216 (1989).

140. *See* Thiret v. Kautzky, 792 P.2d 801 (Colo. 1990).

141. 878 F.2d 930 (6th Cir. 1989).

Commonwealth,[142] which upheld the prosecution's use of the same felony both to prove underlying guilt (felon in possession of a weapon charge) and then to enhance his sentence for armed robbery as a persistent felony offender. The Sixth Circuit acknowledged that *Dale* overruled a prior Kentucky Supreme Court decision, but concluded that the offender had fair warning that his sentence for robbery could have been twenty-five years, even if the same prior felony could not have been used at the time to establish one charge and enhance the other. Whether Dale could have anticipated a twenty-five year sentence or not, however, is beside the point. He arguably should not have anticipated the state supreme court's abrupt change as to whether the same prior felony could be used both at the liability and enhancement stages. Certainly, the Ex Post Facto Clause would have blocked retroactive application of any legislative overruling[143] of the prior Kentucky Supreme Court decision.[144]

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142. 715 S.W.2d 227 (Ky. 1986).

143. *See* Lindsey v. Washington, 301 U.S. 397 (1937) (holding that the Ex Post Facto Clause was violated if the sentence, even if possible under the old sentencing framework, was likely more severe because of the sentencing change); Kring v. Missouri, 107 U.S. 221 (1883) (holding that the Ex Post Facto Clause bars retroactive application of repeal of the rule treating conviction for a lesser included offense as an acquittal of greater offense).

144. More generally, courts have held that litigants should anticipate that courts will overrule prior precedents from lower courts. For instance, in *Hagan v. Caspari*, 50 F.3d 542 (8th Cir. 1995), the petitioner argued that the Missouri Supreme Court's rejection of his double jeopardy claim was unforeseeable. He had been charged both with second degree robbery for forcibly grabbing the keys to a van and then for stealing the van. *See id.* at 544. He argued that the two crimes merged because of Missouri's single larceny rule, which defined the stealing of several articles of property during the same scheme or course of conduct as a single offense under section 570.050 of the Missouri Revised Statutes. *See id.* at 546. Under similar facts, a Missouri appellate court had found that conviction on both a robbery and theft charge would violate the Double Jeopardy Clause. *See* State v. Lewis, 633 S.W.2d 110 (Mo. Ct. App. 1982). Therefore, the petitioner argued that, in overruling the appellate court's interpretation of Missouri's larceny statute, the state supreme court violated *Bouie*. *See Hagan*, 50 F.3d at 547.

The Eighth Circuit disagreed, holding that the change was foreseeable largely because the appellate court's reasoning was plainly wrong. *See id.* at 546-47. The larceny statute may have prevented conviction on two separate stealing charges, but not for the distinct robbery and theft charges. Thus, the Double Jeopardy Clause did not bar conviction of the two charges. The court further commented that "[w]e have some doubt whether a state supreme court's overruling of an intermediate appellate court decision ever can constitute a change in state law for due process purposes." *Id.* at 547.

In *United States v. Rodgers*,[145] the United States Attorney charged the defendant with making a false statement to the FBI and Secret Service in a "matter within the jurisdiction of any department or agency of the United States."[146] The defendant allegedly apprised the FBI that his wife was involved in a plot to assassinate the President and that she had been kidnaped.[147] The defendant moved to dismiss the indictment on the basis of a prior Eighth Circuit decision that construed the language "within the jurisdiction of any department or agency" to refer only to areas in which the agency had the power to make final or binding determinations, such as for monetary awards.[148] On that authority, the district court and Eighth Circuit dismissed the indictment because the defendant's comments merely triggered a criminal investigation.[149]

The Supreme Court reversed, holding that the language "within the jurisdiction of any department or agency" was to be read broadly, including any matters pertaining to criminal investigations.[150] The defendant argued, however, that the more expansive construction, even if adopted, could not be applied to him retroactively given his reliance on the prior Eighth Circuit precedents.[151] The Supreme Court disagreed due to "the existence of conflicting cases from other courts of appeals [which] made review of that issue by this Court . . . reasonably foreseeable."[152] The undoing of a precedent, therefore, may be foreseeable.[153] Defendants

145. 466 U.S. 475 (1984).

146. *Id.* at 476 n.1 (quoting 18 U.S.C. § 1001 (1994)).

147. *See id.* at 476. He evidently made the statement in order to recruit the FBI into helping him find his wife, who had fled their relationship. *See id.* at 477.

148. *Id.* at 477-78 (citing Friedman v. United States, 374 F.2d 363 (8th Cir. 1967) (quoting 18 U.S.C. § 1001 (1994)).

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

150. *Rodgers*, 466 U.S. at 479.

151. *See id.* at 484.

152. *Id.* The limits of the Court's analysis are not apparent. The Court itself, for example, recently agreed to rehear and revise the results in a case it had decided ten years previously. *See* Agostini v. Felton, 117 S. Ct. 1997 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985)). No precedent, therefore, is sacrosanct.

153. The Ninth Circuit has held that defendants may not rely upon any judicial opinion that is subject to rehearing on review or certiorari. *See* United States v. Ruiz, 935 F.2d 1033 (9th Cir. 1991) (holding that defendants were not entitled to rely on a prior appellate opinion which was withdrawn by the Ninth Circuit after the plea agreement had been reached); United States v. Kincaid, 898 F.2d 110 (9th Cir. 1990) (holding that defendants could not rely upon the fact that federal sen-

may not be entitled to rely on the construction of a statute adopted by an appellate court because those precedents can always be overturned.

The *Rodgers* and *Dale* courts may have stretched foreseeability analysis in recognition of the fact that precedents at times flatly misstate legislative intent. Why deny courts the ability to rectify errors wherever possible? The Seventh Circuit, for instance, has emphasized that the fact "[t]hat courts have rendered decisions later deemed erroneous by higher authority does not entitle criminal defendants to the benefits of these mistakes."[154] However, legislation as in *Lynce* may be "wrong" as well, and in the civil context the Court has supported legislative retroactivity to correct past mistakes.[155] Nonetheless, unlike in the civil context, criminal defendants are entitled to rely upon the "mistakes" of prior legislatively fashioned law. *Rodgers* suggests that offenders should be able to foresee that courts will overrule precedents in a variety of contexts, but evidently not—in light of the Court's application of the Ex Post Facto Clause—that legislatures periodically will review criminal statutes.

The foreseeability inquiry therefore has been manipulated substantially. Courts have rationalized that litigants should have expected the new or changed judicial interpretation. The more a judicial decision was foreseeable, the more that it fits within the evolutionary framework of the common law as opposed to legislation.[156] Courts have sufficient leeway to permit retroactive appli-

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tencing guidelines had been invalidated within the circuit at time of sentencing, because the guidelines were later reinstated by the Supreme Court).

154. United States v. Burnom, 27 F.3d 283, 284 (7th Cir. 1994).

155. *See, e.g.*, United States v. Carlton, 512 U.S. 26 (1994); Fleming v. Rhodes, 331 U.S. 100, 107 (1947); Paramino Lumber Co. v. Marshall, 309 U.S. 370 (1940); *see also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 703-06 (1960) (describing the courts' approval of retroactive civil legislation to cure prior mistakes).

156. Professor Jill Fisch's theory of equilibrium is similar. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055 (1997). She argues that most common lawmaking—as opposed to legislation—should be considered foreseeable because the common law reflects an unstable equilibrium that can be moved with the slightest tug in any direction. Thus, litigants cannot justifiably rely on any particular common law position. The only exception she notes is for when the Supreme Court overturns its own precedents. *See id.* at 1107-08. In that context, adjudication more closely resembles legislation and may disrupt a stable equilibrium upon which litigants are entitled to rely. *See id.* at 1108. *But see supra* note 152.

cation of new statutory interpretation in the criminal context by dint of the foreseeability analysis. Unexpected construction of statutory language can *ex post* be justified on the basis of the general evolution of the common law.

c. *The Lack of Salience of the Foreseeability Inquiry*

Aside from problems of malleability, however, the foreseeability inquiry is troubling for a more fundamental reason. Whether a new judicial interpretation is expected or foreseeable seems strangely unrelated to the purposes underlying the ex post facto doctrine.

First, concerns for reliance are as dubious in the judicial criminal lawmaking context as they are with retroactive criminal legislation generally.[157] Defendants generally do not rely on existing judicial interpretations when deciding whether to undertake certain actions. The defendant in *Mummey* unlikely acquainted himself with the vagaries of the assault statute prior to his inebriated brawl, and the defendants in the stop sign case did not rely on the existing legal framework before engaging in the pranks. The civil rights protestors in *Bouie* likely had consulted the law prior to the sit-in, but their very purpose in conducting the sit-in was to provoke a response from police authorities. Similarly, offenders rarely consult sentencing provisions prior to committing anti-social acts. The defendant in *Lynce* in no way relied on the good time credit system prior to committing his offense. Given the arcana of sentencing provisions and the unpredictability of good time credit provisions, few defendants can know the precise range of penalties prior to committing anti-social acts.[158]

Moreover, even if individuals and firms relied on existing law prior to acting, there is little reason to encourage reliance when the conduct is plainly blameworthy as in *Mummey*.[159] The defendant in *Mummey* knew—contingent on his level of inebriation—that re-

157. *See supra* text accompanying notes 45-51.

158. Even if some defendants calculate the range of penalties prior to undertaking anti-social acts, we may not wish to protect that kind of cost-benefit analysis.

159. *See also* Warner v. Zent, 997 F.2d 116, 127 (6th Cir. 1993) (holding that statutes prohibiting unauthorized transfers of a "draft . . . or other written instrument" foreseeably include a wire transfer). *But see* Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970) (barring application of unforeseeable judicial construction of a homicide statute which would have included fetus as "human being").

peatedly hitting someone with a tennis shoe was wrongful even if he was not aware that a tennis shoe could be considered a weapon under the terms of the assault statute. Similarly, the defendant in *Zuniga* recognized that drug trafficking was wrongful, irrespective of the amount of punishment he ultimately would receive.[160]

When the judicial change expands the reach of a mala prohibitum or regulatory crime, the case for foreseeability is stronger. *Bouie* would be exemplary had the trespass not been part of an orchestrated civil rights campaign, because the protestors arguably committed no inherently wrongful act by remaining in the store after being asked to leave. Notice protects only the private ordering that society hopes to encourage. If courts alter their construction of an environmental regulation, then businesses should be afforded notice to enable them to steer clear of the prohibitions.

Thus, from a reliance perspective, the fact that courts have manipulated the foreseeability inquiry under *Bouie* should not be lamented, except in the mala prohibitum context. Yet, it is difficult to reconcile the courts' treatment of judicial foreseeability with their stress on reliance in the legislative retroactivity context. One would think that, if courts discarded the reliance rationale in one context, then they would do so in the other.

Second, the foreseeability inquiry in *Bouie* is also unrelated to the offenders' conceivable interest in repose. Irrespective of whether change in interpretation of parole or good time credit provisions is foreseeable, permitting additional increments in punishment transgresses the offenders' interest in repose. *Bouie* and its progeny thus do not further any rehabilitative (or anti-recidivist) notion. Offenders cannot rely on one certain measure of punishment.

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160. Moreover, there is something quite circular about the foreseeability prong applied to judicial changes in criminal statutes—the change is foreseeable as long as the individual has reason to know that judges may change their minds. In the tax context, the Supreme Court in *United States v. Darusmont*, 449 U.S. 292 (1981), stated that "[n]obody has a vested right in the rate of taxation, which may be retroactively changed at the will of Congress." *Id.* at 298 (quoting Cohan v. Commissioner, 39 F.2d 540, 545 (2d Cir. 1930) (Hand, J.)). Similarly, increased frequency of changed interpretations in the criminal context would undermine any due process claim on the ground that the individual was not entitled to rely on the interpretation embraced in any judicial opinion. The foreseeability inquiry begs the question of whether offenders *should* be able to rely on judicial construction of criminal enactments.

Instead of protecting reliance interests or fostering rehabilitation, however, the foreseeability analysis may further rule of law values in limiting governmental power. The foreseeability inquiry may constitute a sorting mechanism to separate those instances of judicial interpretation that represent conventional common law-making or statutory construction, from those that are fueled by animus towards the offender. According to traditional analysis, the Ex Post Facto Clause protects against arbitrary governance as well as safeguarding the offender's reliance interest.[161] Judges may interpret common law doctrines, statutes or regulations in order to increase the severity of the punishment for one particular odious offender. Perhaps no direct way to police judicial bias exists, but if a construction is foreseeable, then that foreseeability makes it less likely that animus was a determining factor.

Thus, on balance, *Bouie* is best understood as a means of limiting judicial vindictiveness rather than protecting offenders' reliance interests or ensuring repose. The foreseeability analysis acts as a crude filter to separate judicial reinterpretations animated by retributive impulses from the more familiar common law evolutionary process.

Indeed, a survey of recent appellate decisions addressing *Bouie* claims suggests that *Bouie* has been applied to those ends. The real inquiry is not whether the judicial change was foreseeable, but rather whether the change was motivated by impermissible reasons.

The Fifth Circuit's decision in *United States v. Insco*[162] is perhaps representative. There, an unsuccessful Republican candidate for Congress was convicted of violating federal election law for printing and distributing bumper stickers during his 1972 congressional campaign. Insco hoped to capitalize on Senator McGovern's unpopularity by distributing McGovern-Gunter bumper stickers.[163] Insco's Democratic opponent, Gunter, had attempted to distance himself from McGovern. The stickers, however, did not reveal that Insco's campaign paid for the stickers.[164] The government theorized that the lack of attribution violated the rule against anonymous campaign materials. The district court judge

161. *See supra* text accompanying notes 42-44.
162. 496 F.2d 204 (5th Cir. 1974).
163. *See id.* at 205.
164. *See id.*

rejected a due process challenge, reasoning that the bumper stickers constituted campaign materials, and that such a possibility was covered by the plain language of the statute.[165]

On appeal, the Fifth Circuit reversed, in part on the ground that the defendant had inadequate notice that the use of unattributed bumper stickers violated the statute.[166] The court noted that many other federal candidates had used unattributed bumper stickers, and that this was the first recorded prosecution.[167] Because "the harsh consequences . . . are being visited upon an individual who lacked authoritative guidance at the time he acted," the court set aside the conviction.[168] To the court, the prosecutor and district court judge's determinations to authorize prosecution on the facts of the case were arbitrary, and conceivably politically motivated. *Bouie* served as a means to restrain prosecutorial excesses.

The Supreme Court's decision in *Douglas v. Buder*,[169] previously discussed, is to similar effect. In *Douglas*, the Supreme Court intervened to stop the apparent arbitrary determination of a Missouri state court judge to reincarcerate an individual who was on probation. The probationer had not immediately reported a traffic citation, as would be required for an arrest.[170] The Court signaled its disbelief that the court would ever have determined that a traffic citation constituted an arrest but for the court's evident animus against the probationer.[171] Irrespective of whether the trial court's interpretation was foreseeable, *Bouie* allows reviewing courts to rein in lower courts when they appear influenced by vindictive or arbitrary aims.[172]

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165. *See* United States v. Insco, 365 F. Supp. 1308, 1310 (M.D. Fla. 1973).
166. *See Insco*, 496 F.2d at 208.
167. *See id.*
168. *Id.* at 209.
169. 412 U.S. 430 (1973).
170. *See id.* at 430-31.
171. *See id.* at 431-32. Indeed, the probation officer and prosecutor in the case had argued that the probationer should not be reincarcerated. *See id.* at 431.
172. Several courts applied *Bouie* in the obscenity context to protect defendants from application of harsher standards. Appellate courts stepped in to protect defendants from the possible parochialism of state trial courts. For instance, in *United States v. Sherpix*, 512 F.2d 1361 (D.C. Cir. 1975), the defendants were charged with violating obscenity laws for distributing and exhibiting the film "Hot Circuit." At trial the government persuaded the court to instruct the jury with respect to a standard of obscenity that was less stringent than the one in existence at the time the film was shown. *See id.* at 1365. In 1973, the Supreme Court in

In contrast, courts have denied *Bouie* claims when the underlying conduct was plainly wrongful, discouraging judicial sympathy for the defendant. The Eighth Circuit's decision in *Knutson v. Brewer*[173] is representative. In *Knutson*, the defendant was charged and convicted of numerous offenses including kidnaping for ransom, stemming from an incident when he forced himself into the victim's car, drove to a secluded spot and forced her to commit sodomy. The kidnaping charge required proof that the defendant had the intent to receive "any money, property, or thing of value as a ransom or reward."[174] Despite the lack of precedents,[175] the circuit court upheld the kidnaping conviction on the ground that the sodomy robbed the victim of a "thing of value." The court concluded that, because the defendant's conduct was immoral, he was not entitled to rely on a narrow construction of the statutory term.[176]

Miller v. California, 413 U.S. 15 (1973), altered the definition of obscenity to include those works, which "taken as a whole, lack[ ] serious literary, artistic, political, or scientific value." *Sherpix*, 512 F.2d at 1365. The prior *Roth* obscenity standard pertained to works "utterly without redeeming social value." A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 418 (1966). The D.C. Circuit later reversed, reasoning that, "[a]t the times appellants distributed and exhibited the film, they could expect to escape conviction . . . . Nothing existed to give them notice that their activities were . . . criminal if the film merely lacked serious literary, artistic, political, or scientific value." *Sherpix*, 512 F.2d at 1366. The United States Supreme Court upheld the approach in *Marks v. United States*, 430 U.S. 188 (1977), reasoning that *Miller* marked a significant departure from the prior obscenity standard and that defendants "had no fair warning that their products might be subjected to the new standards." *Id.* at 195. The conclusion, however, is difficult to reconcile with subsequent decisions such as *State v. Mummey*, 871 P.2d 868 (Mont. 1994) and *Dale v. Haeberlin*, 878 F.2d 930 (6th Cir. 1989), finding new judicial constructions to be foreseeable. Indeed, two courts of appeals had disagreed with *Sherpix, see* United States v. Friedman, 528 F.2d 784 (10th Cir. 1976); United States v. Marks, 520 F.2d 913 (6th Cir. 1975), and there could be little surprise that the Court would revisit the question. Given that defendant was "engaged in the dicey business of marketing films subject to possible challenge," *Marks*, 430 U.S. at 195, the change in standards could not have been that much of a surprise. Rather, reviewing courts presumably were concerned that state trial judges could selectively use the new standard to penalize unpopular speech in the past.

173. 619 F.2d 747 (8th Cir. 1980).

174. *Id.* at 748-49 (quoting Iowa Code § 706.3 (1971)).

175. *See id.* at 749.

176. *See id.* at 750. The Supreme Court's decision in *Rose v. Locke*, 423 U.S. 48 (1975), can be understood in the same vein. *Id.* (holding that cunnilingus could be punished retroactively because it fell within the statutory term "crime against nature").

Similarly, courts denying *Bouie*-type challenges to increases in punishment also have stressed that the defendants in no way relied upon the former law. For instance, in *Dale* the court rejected the *Bouie* claim in part because defendant faced the same maximum punishment whether sentenced under the new or discarded interpretation of the statute.[177] To the Court, the fact that an increased likelihood of a greater sentence existed under the new interpretation was irrelevant.[178]

Thus, in applying *Bouie*, courts have departed from the ex post facto paradigm, respecting reliance interests only where they are normatively compelling. Courts seem to determine whether barring retroactive application of a new interpretation is needed to restrain judicial overreaching. The *Bouie* inquiry is admittedly ad hoc, but serves as a last line check against prosecutorial and judicial overreaching.

On balance, therefore, the different treatment afforded legislative and judicial retroactive interpretations remains striking. The *Bouie* foreseeability analysis as applied is far more open-ended than the Supreme Court's current ex post facto jurisprudence, which focuses on the impact of the change on the individual charged with a crime. In contrast, courts protecting due process concerns pursuant to *Bouie* in effect look to the underlying intent of the judicial change.

III. JUSTIFYING THE DIVERGENCE BETWEEN JUDICIAL AND LEGISLATIVE RETROACTIVE LAWMAKING IN THE CRIMINAL CONTEXT

Numerous explanations exist to explain, if not justify, *Bouie*'s desuetude. Judicial retroactivity differs from legislative retroactivity in important respects. Whether any rationale justifies the courts' crabbed implementation of *Bouie* principles, however, is more problematic.

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177. *Dale*, 878 F.2d at 975.

178. *Id.*; *cf.* Prater v. United States Parole Comm'n, 802 F.2d 948, 953 (7th Cir. 1986) (en banc) ("The decision whether to commit a crime (or which crime to commit) is unlikely to be much influenced by the details of the criminal justice system . . . ."). The courts' decisions seem to conform to what Professor Kahan describes as "pattern recognition." Kahan, *supra* note 45, at 113-14.

A. *Formalist View of Judicial Decision-making*

One explanation for the courts' reluctance to limit judicial retroactivity may stem from a belief that judges find, rather than make, law. This view seems at best quaint today, but jurists as well as commentators until relatively recently rationalized judicial power by explaining that judges were only stating what the law always was rather than fashioning new principles out of whole cloth. Even when judges changed their minds, they were only stating what the law should have been all along. If judges do not make law, then no impediment exists to judicial retroactivity, for judges should apply what they now understand the law to have always been to resolve cases and controversies.

Moreover, individuals can only justifiably rely on what the law is, not on erroneous judicial pronouncements. Individuals can expect judicial errors to be fixed. Judicial statements cannot be equated with law.

The writings of Blackstone reflect such a view. In his commentaries, Blackstone described the judicial function as a power "not delegated to pronounce a new law, but to maintain and expound the old one."[179] If a judicial precedent "is most evidently contrary to reason . . . or contrary to divine law," then a judge overruling the prior decision would "not pretend to make a new law, but to vindicate the old one from misrepresentation."[180] Even when a "former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*."[181] Judges find law, not make it, and judicial change is necessary to correct prior mistakes. Blackstone's approach implies retroactive application of judicial decisions. This is not to suggest that Blackstone believed that judges never "made" law,[182] but for a variety of reasons—whether based on jurisprudence or politics—he believed that we should maintain bright lines to separate the judicial from the legis-

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179. 1 William Blackstone, Commentaries *69.

180. *Id.* at *69-70.

181. *Id.* at *70.

182. *See* Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1, 37 (1996) (arguing that Blackstone's prescription was "a fiction designed to indicate continuity with the past even when innovation had plainly occurred"). Professor Grant Gilmore noted that "[a]s anyone who has the slightest familiarity with late eighteenth century case law knows, the judges were quite consciously aware of what they were doing: they were making law, new law, with a sort of joyous frenzy." Grant Gilmore, The Ages of American Law 6-7 (1977).

lative craft. Understanding adjudication to be backwards looking confers legitimacy upon the judicial function—retroactivity therefore can be seen as an inevitable byproduct of judging.

The influence of Blackstone should not be underestimated. Over the years, many legal thinkers have embraced the Blackstonian notion.[183] Justice Holmes, for instance, defended judicial retroactivity on the ground that "[j]udicial decisions have had retrospective operation for near a thousand years."[184] More recently, Justice Scalia has indicated fidelity to this tradition. In *James B. Beam Distilling Co. v. Georgia*,[185] the Court confronted the question whether courts must apply new constitutional rules retroactively.[186] Concurring in the judgment, Justice Scalia defended retroactive application of the new rule in that civil context on a

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183. The constitutional theorist Thomas Cooley wrote that "it is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases." Thomas M. Cooley, Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (Boston, Little, Brown & Co. 1868); *see also* Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936) (analyzing how the ancient principle that laws should only take effect upon future transactions became part of the system of constitutional limits on the government's power).

184. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). Justice Holmes rejected any mechanical account of jurisprudence, but still stressed the importance of viewing judges as working within a prescribed system of rules, including retroactivity. *See id.*

185. 501 U.S. 529 (1991).

186. The Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), held that the Court could apply a new rule prospectively only, or apply the new rule to the case at bar while withholding additional application until cases were filed after the new principle was announced. The Court established a balancing test to aid courts in making that determination. The Court stated:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . [look] to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally we have weighed the inequity imposed by retroactive application.

Id. at 106-07 (citations omitted).

The Court had followed a tack of selective prospectivity, which applied the new rule in the case at bar but applied the old rule to all cases that antedated the Court's statement of the new rule, in some criminal procedure cases. *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967). The Court overruled *Chevron Oil* in *Harper*

separation of powers ground. The Article III judicial power "must be deemed to be the judicial power as understood by our common-law tradition. That is the power 'to say what the law is,' not the power to change it."[187] Justice Scalia in the next breath acknowledged that "I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law."[188] However, he continued that judges make law *"as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed* to, or what it will *tomorrow* be."[189] In other words, for reasons of tradition and constitutional limitation, Justice Scalia argued that we should treat judicial decisions as "finding" the law. From that perspective, retroactive application is to be welcomed, not avoided.

The Blackstonian explanation for evisceration of the *Bouie* doctrine suffers from numerous drawbacks. First, the explanation cannot easily account for the very existence of *Bouie*. If judges merely find the law, then individuals should be subject to the law even when such individuals have interpreted or "found" law incorrectly on their own. The foreseeability inquiry would be irrelevant, for the new "correct" judicial interpretation would be foreseeable almost by definition. It would be the rare case in which the current law would not be at least foreseeable. Thus, the Blackstonian view can help explain why we embrace judicial retroactivity, but not the limited *Bouie* doctrine that exists.

Second, the Blackstonian explanation for judicial retroactivity is problematic because it ignores individual interests, as Blackstone himself may have realized. If individuals in society cannot "find" the law for themselves, even through diligent inquiry, then permitting judges to impose punishment based on their discovery of the law seems quite harsh. The Blackstonian notion simply rejects the relevance of reliance. The individual interest to be free from punishment is sacrificed for the sake of preserving some formal distinction between judging and legislating.

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v. Virginia Department of Taxation, 509 U.S. 86 (1993), which held that new rules of federal law must be given full retroactive effect in all pending, non-final cases.

187. *James B. Beam*, 501 U.S. at 549 (Scalia, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

188. *Id.*

189. *Id.*

Third, the Blackstonian explanation is difficult to accept because the Court in other contexts has adopted a positivist approach to judicial decision-making. For instance, in *Teague v. Lane*,[190] the Court held that federal courts must reject all habeas corpus petitions based on "new law," which covers all claims not "dictated" by precedent.[191] The Court has applied the "new law" prohibition stringently, rejecting habeas claims that appeared closely related to prior decisions.[192] That view of judicial decision-making is hard to reconcile with the Blackstonian notion.[193] The reasoning in *Teague* and its progeny stands in sharp contrast to recent decisions considering *Bouie* claims. The judicial doctrines considered "new law" under *Teague* almost would certainly be considered foreseeable changes if considered as part of a *Bouie*-type challenge.[194]

Finally, the Blackstonian fiction is difficult to accept because it ignores not only the reality of judicial lawmaking, but the very real possibility of arbitrary or vindictive judicial decisions. There is no room in Blackstone's account for judicial politics and ideology. In contrast, the lesson of *Bouie* is that judges may interpret law to guarantee a particular result in a given case. The Blackstonian explanation founders on the very fallibility of judges.

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190. 489 U.S. 288 (1989).

191. *Id.* at 300.

192. *See, e.g.*, O'Dell v. Netherland, 117 S. Ct. 1969 (1997); Gray v. Netherland, 116 S. Ct. 2074 (1996); Caspari v. Bohlen, 510 U.S. 383 (1994); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990). The new law prohibition has now been codified by Congress in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C. § 2254(d) (1996)).

193. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731 (1991); Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (with an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 Nw. U. L. Rev. 1046 (1994); Linda Meyer, *"Nothing We Say Matters": Teague and New Rules*, 61 U. Chi. L. Rev. 423 (1994).

194. Similarly, the Court has reflected a dynamic view of the courts' lawmaking powers in elaborating official immunity doctrine, under which public officials discharging administrative tasks can claim immunity unless they violate a clearly established constitutional right of which they should have been aware. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982). The Court's doctrine recognizes that courts fashion new law as a matter of course and accordingly shield officials from the logical consequences of the evolutionary common law system. *See also* Fallon & Meltzer, *supra* note 193, at 1749-53 (criticizing the Court's elaboration of the immunity doctrine in part because it impedes the evolutionary growth of substantive constitutional law doctrines).

B. *Instrumental Concerns for Judicial Decision-making*

Courts' receptivity to judicial retroactivity instead might be attributed to a related conservative impulse to restrain judicial power. Retroactive application of all new judicial rulings raises the price of change, for judges must be willing to alter the rights not only of the parties before them, but of all similarly situated litigants. When judges recognize that any departure from the status quo has problematic consequences, then they may be more chary of change.

Justice Scalia invoked this institutional rationale in the *James B. Beam* case. He stressed that requiring judges to apply all new rulings retroactively would have the salutary impact of imposing "one of the understood checks upon judicial law making" because permitting prospective application of new rules would "render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches."[195] He expanded on that rationale in *Harper v. Virginia Department of Taxation*,[196] labeling prospective decision-making "a practical tool of judicial activism."[197] He lauded the requirement of retroactive application as an "inherent restraint" on the Court to prevent it from entering more blatantly into the field of lawmaking.[198] Given the backdrop of the Warren Court's judicial activism, forcing judges to apply all new rulings retroactively seemed a sound way to restrain jurists bent on changing the law.

The instrumental rationale echoes the justification for other contemporary doctrines limiting judicial power. For example, in *Griffith v. Kentucky*,[199] the Court held that all rulings of criminal procedure must be fully retroactive to pending cases that were not as of then final.[200] In disclaiming the power to engage in selective prospectivity, the Court reasoned that the power to disregard cur-

195. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring, joined by Blackmun & Marshall, JJ.).

196. 509 U.S. 86 (1993).

197. *Harper*, 509 U.S. at 107.

198. *Id.*

199. 479 U.S. 314 (1987).

200. *See id.* *Griffith* involved the retroactivity of *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause prohibits a prosecutor from exercising peremptory challenges to exclude potential jurors on the basis of their race).

rent law "is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation."[201] The Court therefore mandates retroactive application of all new rules on direct appeal in both the criminal and civil context.[202] As in *Griffith*, courts might be too prone to change the law if they could direct that the new law apply prospectively only.

That justification for full retroactivity, however, misses the point in the criminal law context. Little reason exists to think that judges will be reluctant to fashion new common law doctrines or interpretations of statutory language affecting the rights of criminal offenders due to a requirement of applying all new rulings to similarly situated offenders. Indeed, the opposite is true. Judges may be tempted to change interpretations precisely in order to achieve a retroactive effect and punish particular offenders more harshly.

To be sure, some judges might feel more free to interpret criminal provisions less favorably to criminal offenders if they knew that their interpretations did not apply to the particular defendants before them.[203] The sympathetic plight of particular defendants might prompt judges to maintain the status quo even when they believe that the precedent governing liability or punishment is incorrect. However, I suspect that such cases will be the exception. On balance, judges are more likely to apply new rulings retroactively that disadvantage, as opposed to benefit, offenders.[204] The instrumental justification, therefore, does not explain why

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201. *Griffith*, 479 U.S. at 323 (quoting Mackey v. United States, 401 U.S. 667, 669 (1971)).

202. *See id.* The Court in turn relied on *Griffith* to limit its review in habeas cases. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court curtailed habeas remedies by adopting a rule of nonretroactivity. The Court reasoned in part that, in light of the rule of mandated retroactivity on direct appeal, the only new rules to be recognized on habeas should be those that the Court was prepared to apply to *all pending cases*, as opposed to only the petitioner at bar. *See id.* at 305-10. If the court was not prepared to apply the new rules to all similarly situated parties, then the court, as a threshold, should dismiss the petition. As with *Griffith*, *Teague* restrained judicial power by limiting the occasions for federal judicial constitutional lawmaking. *See, e.g.*, Fallon & Meltzer, *supra* note 193.

203. In light of the characteristics of certain defendants, federal judges have attempted to depart from the strictures of the Sentencing Guidelines in order to be more lenient. *See, e.g.*, Koon v. United States, 116 S. Ct. 2035 (1996) (finding downward departure justified); United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990) (same).

204. *See also supra* note 69.

courts have permitted much judicial retroactive lawmaking that would be invalidated if enacted by a legislature.

C. *Nature of the Judicial Function*

The difference in retroactivity doctrines may turn instead on some of the widely accepted functional differences between adjudication and legislation. Even if judges make law, they do so interstitially. Judges cannot avoid making law given their tasks of law interpretation and application. In comparison to the legislature, however, judges' power to make law is bounded far more significantly.

First, judges (at least at the federal level) only can act in the context of cases and controversies—they cannot set their own lawmaking agenda.[205] Judges must await concrete disputes before implementing their view of the law. Even then, a desired change may backfire unless another provision—outside the case or controversy—is also altered. Judges, in other words, cannot mandate systemic change.

Second, courts must justify their rulings by reference to either the statutory text or some common law doctrine. Commentators have not always concurred as to the extent that interpretive principles constrain judicial power, but the need to rationalize judicial decisions likely imposes considerable restraint, particularly among lower court judges who face potential reversal. The fact that opinions are written and widely circulated enhances the prospect of constraint.

Third, court judgments bind only the parties before the court. In contrast to a change in judicial lawmaking, legislation causes far less immediate impact. The opinions of lower court judges may not even have stare decisis effect. In addition, because most judicial decisions are binary, judges must fashion relief only with an eye to doing justice between the two parties, irrespective of the impact on society as a whole.

Fourth, even if judicial lawmaking differs from that of the legislature only in degree, line-drawing problems remain. All judicial decisions include some interpretation. Differentiating between in-

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205. The case or controversy requirement restrains state judges to a lesser extent. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Regulation of Supreme Court Reasoning and Result*, 35 S.C. L. Rev. 353 (1984).

terpretations that in effect change the law and those which only build upon precedent is notoriously difficult. Thus, because judges inescapably fashion law when exercising an interpretive function, permitting retroactive application of new law may be necessary due to the administrative line-drawing problem.

The interstitial nature of judicial lawmaking therefore supports the differential treatment afforded to judicial, as opposed to legislative, retroactivity. The limitations on judicial lawmaking suggest that we should not fear judicial as much as legislative retroactive lawmaking. In addition, the discretion inherent in interpretation also points out the difficulty in distinguishing lawmaking from interpretation. Nonetheless, these considerations do not help explain why the *Bouie* doctrine exists, or how to understand what type of claims are successful under *Bouie*. The argument that judicial lawmaking threatens liberty less than legislation, though apt, thus has little to say about demarcating permissible from impermissible retroactive application of new or changed judicial doctrine.

D. *Interest Group Analysis*

Alternatively, judges may impose more rigorous checks on legislative retroactivity in the criminal context because of their fear of interest group pressure on legislators.[206] Judges may mistrust legislative retroactivity because of the concern that legislators may vote for retroactive criminal law measures either to pander to the baser instincts of the electorate or to placate organized interest groups such as local law enforcement lobbies.[207]

Those who have been previously convicted of crimes have little clout in the legislature.[208] Criminal offenders throughout history

206. For an overview of the interest group account, see Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction (1991) and Dennis C. Mueller, Public Choice II (1989).

207. For a more complete discussion of this account, see Krent, *supra* note 45, at 2168-73.

208. The ex post facto doctrine also protects against criminalizing conduct that was lawful when undertaken. Although individuals who have committed acts which the legislature now wishes to criminalize may lack financial resources with which to mount an effective lobbying campaign, they have every incentive to lobby the legislature to ensure that any criminal prohibition is, at the most, prospective in operation. Such individuals may enjoy somewhat more access than those previously convicted of crimes, even though the proposed legislation may inhibit organizational activities because of the threatened stigma. Because (perhaps not

have tended to be poor[209] and disproportionately comprised of minorities,[210] thereby minimizing their ability to affect legislation. That comparative lack of political power is compounded by the inability of many felons to vote.[211] For a variety of reasons, therefore, felons rarely can form coalitions with other groups seeking influence in the political process. Thus, when legislators decide whether to apply harsher punishments retroactively as in *Lynce* or

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coincidentally) legislatures have not criminalized conduct that was innocent when undertaken, I focus in this section primarily on legislation that increases the penalties for crimes previously committed.

209. *See* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 Ind. L.J. 363, 379 n.102 (1993); Jeffrey R. Rutherford, Comment, Dziubak v. Mott *and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 Minn. L. Rev. 977, 986 n.48 (1994).

When law enforcement measures proposed in Congress affect monied interests, however, then the political process affords substantial opportunity for protest. For instance, Congress in 1986 required law enforcement agents to obtain a judicial order prior to imposing a pen register, *see* 18 U.S.C. § 3121 (1986), not because of privacy concerns in general, but rather because of the lobbying of telephone companies which wished to limit law enforcement authorities' unbridled discretion to order pen registers and thereby force the telephone companies to expend resources. Similarly, Congress passed the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (1980), to forbid searches of only one influential group, newspaper offices, unless the police can demonstrate that a subpoena would be ineffective—no other third party such as accountants, physicians, or neighbors—were protected. *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 Syracuse L. Rev. 1079, 1083-85 (1993). Indeed, the inability of those who are poor to affect legislation concerning punishments has long been recognized. *Cf.* Skinner v. Oklahoma, 316 U.S. 535 (1942) (striking down an Oklahoma law mandating sterilization for those committing three or more crimes, but exempting those committing financial or political crimes).

210. *See, e.g.*, U.S. Bureau of the Census, Statistical Abstract of the United States 198 (113th ed. 1993); *Developments in the Law: Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1495-96 (1988); Douglas A. Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. Crim. L. & Criminology 234 (1984); *see also* Kay L. Schlozman & John T. Tierney, Organized Interests and American Democracy 250-251 (1986) (examining the lack of representation of minorities, and poor, in PACs); Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look*, 142 U. Pa. L. Rev. 1145 (1994) (arguing that disenfranchisement of felons dilutes minority voting power).

211. Many states have disenfranchised felons. *See, e.g.*, Ala. Const. art. VIII, § 182; Ariz. Const. art. 7, § 2; Del. Const. art. V, § 2; Fla. Const. art. 6, § 4; Iowa Const. art. 2, § 5; Ky. Const. § 145; Md. Const. art. I, § 4; Miss. Const. art. 12, § 241; Nev. Const. art. 2, § 1, N.H. Const. pt. I, art. 11; N.M. Const. art. VII, § 1; Tenn. Const. art. I, § 5; Utah Const. art. IV, § 6; Va. Const. art. II, § 1; Wyo. Const. art. 6, § 6.

Weaver, or to penalize conduct which was legal when committed, the political process in a sense malfunctions, warranting more exacting judicial review.[212]

That malfunction is particularly disturbing in light of legislative incentives. Legislators may impose new sanctions against offenders to curry the favor of constituents or contributors. Legislators recognize that their ability to be reelected may hinge on the public's perception of their toughness against crime.[213] If voters and contributors are uncertain how to tackle the root causes of crime, then they may well react by applauding every effort to deal with offenders more harshly. The popularity of three strikes-and-you're-out legislation can be explained by legislators' pandering to public perception.[214] Indeed, federal legislators' eagerness to federalize state crimes such as carjacking[215] or drive by shootings[216] similarly evince, at least in part, legislative efforts to cater to the public's desire for vigorous action against crime. The fact

212. In addition, legislators, as well as their constituents, will identify far more readily with victims of crime than with perpetrators. *Cf.* Dripps, *supra* note 209, at 1079 (making a similar point regarding the need for judicial review of law enforcement investigative techniques approved by the legislatures).

213. As Representative Bill McCollum (R-Fla.) recently explained, "[f]requent news reports of vicious crimes shock and frighten the public and send policy makers searching for new solutions." Bill McCollum, *The Struggle for Effective Anti-Crime Legislation—An Analysis of the Violent Crime Control and Law Enforcement Act of 1994*, 20 U. Dayton L. Rev. 561, 561 (1995). Such news reports inflate the public's perception of the extent of crime. *See* Sara Sun Beale, *What's Law Got to Do with it: The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 Buff. Crim. L. Rev. 23 (1997); *see also* Charles B. Wise, The Dynamics of Legislation: Leadership and Policy Change in the Congressional Process xi, xii (1991) (addressing how news stories in the popular press lead to criminal legislation); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. Kan. L. Rev. 503, 504-08 (1995) (same).

In January 1994, more than 40% of Americans surveyed identified crime as the most critical problem facing the nation. *See* Stephen Braun & Judy Pasternak, *A Nation with Peril on its Mind; Crime Has Become the Top Concern of Many People*, L.A. Times, Feb. 13, 1994, at A1, *available in* 1994 WL 2134263.

214. California and Washington recently have enacted such legislation, as has Congress in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. Most doubt the effectiveness of such laws to reduce crime, and many fear the cost. *See, e.g.*, *infra* note 217.

215. *See* 18 U.S.C. § 2119 (1994); *see also* Stephen Chippendale, Note, *More Harm than Good: Assessing Federalization of Criminal Law*, 79 Minn. L. Rev. 455, 464-65 (1994) (addressing the federal car jacking statute).

216. 18 U.S.C. § 36(b)(2)(A) (1994).

that Congress enacted some sixty death penalty provisions[217] in the recent Crime Control Act, many of which are overlapping,[218] is further testament to this same interest in gaining votes and contributions.[219]

Even though all criminal legislation may suffer from a potential political process defect, the dangers of retroactive lawmaking are greater. A requirement of prospectivity ensures that the legislature at a minimum will impose punishment on a larger group of people whose members are not easily identifiable. The generality of the provision helps to prevent singling out particular offenders for punishment, and diminishes to some extent the role of emotion underlying legislative enactment of new crimes or increases in punishment for crimes already on the books.[220] The legislature cannot enact such laws with the purpose of punishing individuals that have committed anti-social acts.

In addition, when legislating prospectively, legislators likely act with greater caution and deliberation. Legislators must be willing to risk overdeterring productive social activity due to the enhanced penalties.[221] Moreover, when legislators extend or authorize incarceration for an unknown number of individuals, they may be constrained by financial concerns that are not as pressing when imposing punishment only on the comparatively fewer individuals targeted by retroactive measures.

Nonetheless, courts routinely have struck down legislation under the Ex Post Facto Clause without any evidence of legislative vindictiveness or antipathy directed towards any particular individuals or groups. The good time credit policy in *Weaver* applied to

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217. *See* David Johnson & Steven A. Holmes, *Experts Doubt Effectiveness of Crime Bill*, N.Y. Times, Sept. 14, 1994, at A16, *available in* 1994 WL 12730832.

218. For instance, the death penalty is authorized for killings arising out of destruction of both maritime navigational facilities, *see* 18 U.S.C. § 2280(a)(1)(E) (1994), and maritime fixed platforms, *see id.* § 2281(a)(1).

219. Although I focus on access to the legislature, the executive shapes legislation as well. Little evidence exists that those convicted of crime have any more influence in that forum than they do in the legislature.

220. *See* Lon L. Fuller, The Morality of Law 46-49, 51-55 (1964). Congress still may create a new crime, as with carjacking, but at least those previously committing the crimes will not be offered as a sacrifice to the public's demand for crude vengeance.

221. Although the legislature need not worry about over-deterring murderers, valid concern may exist for chilling the conduct of corporations in the regulatory crimes context.

all falling within the categories enumerated within Florida's penal system.[222] The sentencing changes in *Miller* and in *Lindsey* affected a broad array of individuals committing particular crimes. Moreover, all the changes applied prospectively as well, muting much of the concern for the singling out problem. Still, banning retroactivity might be salutary even in the context of across-the-board change. The legislature may increase punishment only to ensure greater punishment for particular individuals based on prior acts. Although the checks of generality and prospectivity minimize that chance, the Ex Post Facto Clause prevents legislators from enacting prospective legislation to punish particular individuals for past conduct. Drawing the line to prevent additional punishment (or criminalization of previously legal conduct), therefore, is a sensible idea, even if prospective legislation on occasion may be just as arbitrary.

Thus, the courts' activist review under the Ex Post Facto Clause can be justified in part by a process defect. We do not trust majoritarian political processes when criminal penalties are applied to identifiable individuals, despite the fact that those committing anti-social acts *should* often lose in the political process. Rather than examine each legislative enactment to ascertain whether it trenches upon the values underlying the Ex Post Facto Clause, the Court has created a prophylactic restraint against legislative overreaching to counteract the inadequacies of the political process to prevent arbitrary or vindictive legislation.

In contrast, judges trust themselves, and arguably should, not to give vent to vindictiveness in construing particular criminal enactments. Less reason exists to fear judicial than legislative antipathy towards offenders. Federal judges, at least, need not face electoral disapproval. Thus, they are insulated to a considerable degree from the pressure confronting legislators to be tough on crime.[223] Judges certainly are not immune from the same retributivist impulses shared by many individuals in society—and hanging judges undoubtedly exist. Judges, however, need not pander to

222. The restriction of administrative gain time credits addressed in *Lynce*, however, was targeted at those who committed serious crimes, such as the attempted murder in *Lynce* itself. 117 S. Ct. at 894. Thus, there was more of a singling out problem than in *Weaver*.

223. *See* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. Rev. 941, 965 (1995) ("[T]he decision-maker should be insulated from influences that would frustrate application of [legal] rules.").

others' rage as a means to retaining their jobs. Indeed, any vengeful drive may be tempered in some judges by a desire for prestige[224] or alternatively, because of the judicial ethos of remaining as objective as possible.[225] In short, no special reason may exist to be suspicious of retroactive judicial construction of federal criminal statutes.

We may be more wary, however, about state trial court judges. The data cited earlier confirm that almost every successful *Bouie* claim has arisen out of state court changes in criminal law doctrine.[226] Successful challengers have targeted state trial courts in particular for their unexpected construction of state statutes or unforeseeable changes in common law doctrine. Federal judges scrutinize state judges' retroactive application of new interpretations more closely than their own.

At least two reasons exist for the skepticism. First, federal judges on the whole may have greater technical competence than their state counterparts.[227] Part of the reason may stem from the greater resources (e.g., law clerks, computerization) at their disposal.[228] Part of the reason also may stem from greater experience.[229] In light of such disparities, federal courts—and indeed state supreme courts as well—may cast a critical eye on state judicial decision-making which enlarges criminal liability or punishment.[230]

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224. *Cf.* Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 Pub. Choice 107, 129 (1983) (stating that judges are motivated by desire for prestige).

225. *See* Richard A. Posner, Overcoming Law 130-131 (1995) (stating that judges benefit from following rules of judicial impartiality); Cass, *supra* note 223, at 978.

226. The empirical finding undoubtedly is due in part to the comparative dearth of federal criminal statutes. However, part of the answer lies in federal court mistrust of state judicial processes.

227. *See* Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1121-24 (1977); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. Rev. 329, 337 (1988).

228. *See* Richard A. Posner, The Federal Courts: Challenge and Reform 38 (1996).

229. *See* Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DePaul L. Rev. 797 (1995).

230. For an empirical analysis revealing modest differences between federal and state judicial decisionmaking, see Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 Hastings Const. L.Q. 213 (1983). Part of the reason for en-

Second, federal courts implicitly may fear that interest groups wield greater influence over state than federal judges. Without question, state courts are more politically accountable than courts within the federal system. Most state court judges are directly responsible to the public through elections.[231] The electorate can mobilize to defeat any judge who is deemed insufficiently deferential to the state legislature. Judges have been voted out of office due to public outcry over their decisions.[232] Moreover, state court decisions are more subject to state constitutional amendment than are federal decisions.[233] The barriers to amendment under state constitutions are lower, and empirical studies have borne out the comparative frequency with which states have amended their constitutions.[234]

To be sure, many criminal law cases are low salience in that resolution of such cases do not appear on the public's radar screen. Controversial death penalty decisions,[235] however, and even routine suppression motions,[236] at times garner public attention. The risk of appearing soft on crime or insensitive to crime victims pervades all decision-making. On balance, therefore, state court judges, because of their interest in reelection, are more prone to

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hanced federal court scrutiny of state judicial decision-making may stem as well from an elitist bias on the part of federal judges.

231. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 725-26 (1995).

232. *See id.* at 737. Three supreme court justices from California, for instance, lost reelection bids in 1986 principally because of their opposition to the death penalty. *See* Philip E. Johnson, *The Court on Trial: The California Judicial Election of 1986* (Supreme Court Project 1985). One Tennessee Supreme Court justice similarly lost an election in 1996 that became a referendum on application of the death penalty. *See* Stephen B. Bright, *Hanging the Judge: Demagogues, Politicians Chip Away at U.S. Court System*, Arizona Republic, June 8, 1997, at H1, *available in* LEXIS, News Library, Curnws File. The impact of voter accountability on death penalty decision-making has also been studied in Louisiana. *See* Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. Pol. 1117 (1987).

233. *See* Williams, *supra* note 205, at 381.

234. *See, e.g.*, Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 Publius: J. Federalism 153, 169-79 (1987).

235. *See supra* note 232.

236. The recent controversy surrounding President Clinton and former Senator Dole's attack on federal district court Judge Harold Baer for granting a suppression motion provides a case in point. *See* Abner J. Mikva, *Open Season on Judges*, American Lawyer 5 (June 4, 1997).

the same kind of influences that arguably justify stringent judicial review of *legislative* retroactivity under the Ex Post Facto Clause.

The interest group analysis therefore helps solve the puzzle of why courts scrutinize retroactive legislation closely in the ex post facto context, but seemingly sanction so much retroactivity in the *Bouie*-type cases. The key to the Court's ex post facto jurisprudence lies not in reliance, but in the potential for vindictive or arbitrary lawmaking. The comparative ability of interest groups to capture the legislature's ear explains why courts more strictly oversee legislative, as opposed to judicial, retroactive lawmaking. Although the judicial system clearly is not immune from interest group pressure,[237] legislators are more likely to make policy with an eye toward the next election. Criminal offenders usually do not vote and have comparatively little influence in the political arena. In contrast to federal judges, state judges often are more susceptible to political pressure.[238]

Thus, judges' relative insulation from the political marketplace explains to some extent why courts have declined to afford the *Bouie* doctrine much play. For a mixture of reasons, judges are far more suspicious of legislators' motives than those of their peers. Nevertheless, judges recognize that state trial judges in particular can be swayed by popular prejudice and the need for constituent approval. Therefore, they have retained a kernel of the *Bouie* doctrine by reserving the power to set aside retroactive decisions which seem motivated by animus or caprice. The seemingly random cases in which *Bouie* challenges prevail can only be understood as a reaction—though, far from consistent or coherent—to the potential harm from arbitrary judicial decision-making. Thus,

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237. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L.J. 31 (1991) (sketching the advantages that interest groups possess in litigation). Nonetheless, courts may be more responsive to those underrepresented in the political process. *See* John Hart Ely, Democracy and Distrust (1980); Martin Shapiro, Freedom of Speech: The Supreme Court and Judicial Review 2, 17-25 (1966).

238. The interest group analysis does not shed light upon the offender's arguable interest in repose. The concern for repose should be just as acute whether the legislature or judiciary threatens increased punishment. From an offender's perspective, there is an understandable grouping of all actors together as integral parts of the governmental system. Judicial rulings that have the effect of lengthening the time of incarceration interfere with a rehabilitative ideal to the same extent as retroactive application of legislative decisions. Current application of the *Bouie* doctrine does not respect the offender's interest in repose.

although the *Bouie* doctrine has never been overruled, courts over time implicitly have narrowed its rationale and sharply reduced its scope.

CONCLUSION

Judicial retroactivity remains the norm in our system, even in criminal cases. Although the Supreme Court held in *Bouie* that ex post facto principles govern judicial decision-making through the Due Process Clause, courts widely have ignored *Bouie* in application. Despite the absence of notice to the offender, courts routinely have concluded that new interpretations of statutory text or common law precedents apply retroactively.

The courts' approach plausibly can be explained by recognizing that the rationale for the Ex Post Facto Clause has shifted away from protecting reliance interests per se to protecting more amorphous rule of law concerns. Notwithstanding language in various opinions to the contrary,[239] courts currently recognize that the solicitude for notice has been overstated, given that increases in punishment so rarely interfere with reliance interests, and then seldom interfere with reliance interests we wish to protect as a normative matter. Rather, courts applying the Ex Post Facto Clause attempt to prevent legislators from catering to constituents and contributors by retroactively punishing or imposing harsher punishments on those least able to safeguard their own interests in the legislative arena. Legislative incentives may too readily point toward enhancing the punishment of known offenders, or criminalizing conduct that has outraged constituents. Because they are marginalized, those subject to such legislation cannot band together effectively to wield influence upon legislators to the extent their numbers would otherwise suggest possible. Prohibiting retroactivity helps prevent enactment of prospective legislation merely to ensure that a particular offender receives greater punishment.

In contrast, because judges are not as prone to be tough on criminals for the sake of career advancement, checks on retroactive lawmaking are not as critical. Judges trust other judges not to give vent to retributive urges in construing legislation or past precedents. Retroactive application therefore is the norm, with the

239. *See supra* text accompanying notes 37-41.

Bouie doctrine serving as a crude tool to permit appellate judges to intervene in egregious contexts to prevent arbitrary or vindictive rulings. Unfortunately, application of the truncated *Bouie* doctrine may at times itself seem arbitrary, but the doctrine as implemented may well be worth preserving as a way of reminding judges that judicial interpretations should not be motivated by any desire to enhance the punishment of an especially objectionable offender.