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Caleb Hayes-Deats

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DEMONSTRATORS’ RIGHT TO FAIR WARNING

Caleb Hayes-Deats*

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

INTRODUCTION

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

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

According to four Circuit Courts of Appeals, the answer is clearly no.¹ So clearly, in fact, that demonstrators may sue officers over such arrests.² But how each court has reached that conclusion varies. The Seventh Circuit, on the one hand, has analyzed an arrest of demonstrators entirely under the Fourth Amendment, characterizing parallel First Amendment claims as “largely duplicative.”³ The Second Circuit, in contrast, has

¹ See generally Vodak v. City of Chicago, 639 F.3d 738 (7th Cir. 2011) (Posner, J.); Buck v. City of Albuquerque, 549 F.3d 1269 (10th Cir. 2008); Papineau v. Parmley, 465 F.3d 46 (2d Cir. 2006) (Sotomayor, J.); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977).
² Vodak, 639 F.3d at 646–47; Buck, 549 F.3d at 1286–87; Papineau, 465 F.3d at 61; Dellums, 566 F.2d at 183.
³ Vodak, 639 F.3d at 750.
held that even officers who have a “lawful basis to interfere with [a] demonstration” under the Fourth Amendment can nonetheless violate the “separate” requirements of the First Amendment. Moreover, in reaching these conclusions, both the Second and the Seventh Circuits relied on the Supreme Court’s decision in Cox v. Louisiana, which analyzed the issue primarily under the Due Process Clause.

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

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4 *Papineau*, 465 F.3d at 60.
5 379 U.S. 559 (1965).
6 *Id.* at 571–72 (“The Due Process Clause does not permit convictions to be obtained under such circumstances.”); *see also* Vodak, 639 F.3d at 746; *Papineau*, 465 F.3d at 60 n.6.
7 *Cox*, 379 U.S. at 574; *see also* Garcia v. Bloomberg, 865 F. Supp. 2d 478, 487 (S.D.N.Y. 2012) (citing *Cox*, *Papineau*, and Vodak for “the basic proposition that before peaceful demonstrators can be arrested for violating a statutory limitation on the exercise of their First Amendment rights, the demonstrators must receive ‘fair warning’ of that limitation, most commonly from the very officers policing the demonstration”).
8 *See Cox*, 379 U.S. at 569 (“The record here clearly shows that the officials present gave permission for the demonstration to take place across the street from the courthouse.”); *Buck*, 549 F.3d at 1283 (“[T]he evidence suggests that Defendants may have implicitly sanctioned the march not only by closing off streets to traffic, but also by directing the progress and direction of the procession.”).
9 *Papineau*, 465 F.3d at 60.
demonstrators until those demonstrators have received a reasonable opportunity to
conform their conduct to the officers’ demands. In practice, then, the right to fair
warning frequently imposes a difficult burden on officers. Before officers may deploy
their customary enforcement mechanisms, the right to fair warning requires them to
clearly communicate a message to a large mass of people and to give that mass a
reasonable opportunity to comply.

The right to fair warning is surprising. Courts most commonly refer to the
requirement of fair warning when interpreting statutes. In the cases described above,
however, the relevant statutes had provided sufficient warning, and courts instead
focused on police officers’ enforcement efforts, concluding that officers had failed to
adequately warn demonstrators of the possibility of arrest. But why should officers
enforcing a valid statute have to provide any warning at all? Many of the relevant
statutes have no mens rea requirements, and ignorance of the law usually provides no

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10 Id. (quoting City of Chicago v. Morales, 527 U.S. 41, 58 (1999)).
11 See Vodak, 639 F.3d at 746 (finding that a bullhorn was “no mechanism . . . for conveying a
command to thousands of people stretched out [over several blocks].”)
12 See Trevor W. Morrison, Fair Warning and the Retroactive Judicial Expansion of Federal
Criminal Statutes, 74 S. Cal. L. Rev. 455, 455–56 (2001) (identifying three examples: the void-for-
vagueness doctrine, the rule of lenity, and “the rule that a court may not apply a ‘novel
construction of a criminal statute to conduct that neither the statute nor any prior judicial
decision has fairly disclosed to be within its scope’” (quoting United States v. Lanier, 520 U.S. 259,
266 (1997))).
13 See Cox, 379 U.S. at 560, 568 (finding that the “lack of specificity” in the phrase “near . . . a
court of the State of Louisiana” may not “render the statute unconstitutionally vague, at least as
applied to a demonstration within the sight and hearing of those in the courthouse”).
14 Id. at 571; Vodak, 639 F.3d at 746; Papineau, 465 F.3d at 60–61.
15 See, e.g., Vodak, 639 F.3d at 741 (discussing Chi. Munic. Code § 10–8–330, which prohibits
parading without a permit); N.Y. City Admin. Code § 10–110(a) (“A procession, parade, or race
shall be permitted upon any street or in any public place only after a written permit therefor has
been obtained from the police commissioner.”). Moreover, even where statutes impose a mens
rea requirement, reasonable officers could conclude that this requirement was met based on
circumstances that fell far short of “fair warning.” For example, N.Y. Penal Law § 240.20(5), one
defense. More surprising still is the fact that courts often conclude that police officers’ conduct creates the need for fair warning. Under most circumstances, such conduct excuses an offense only where the arrestee can invoke the exceedingly narrow affirmative defense of entrapment. Thus, the requirement that officers give fair warning represents a substantial departure from the ordinary operation of the criminal law, effectively adding an element to otherwise valid criminal statutes.

of the statutes at issue in Papineau, prohibits “obstruct[ing] vehicular or pedestrian traffic” where doing so would “recklessly creat[e] a risk” of “public inconvenience.” 465 F.3d at 59. Surely, an officer who witnesses a large group of people walk down the middle of a street has probable cause to believe that they recklessly run the risk of obstructing vehicular traffic. See Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (“Probable cause exists where ‘the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” (quoting Carroll v. United States, 267 U.S. 132, 162 (1925))).

16 See Ratzlaf v. United States, 510 U.S. 135, 151 (1994) (“The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.” (quoting Cheek v. United States, 498 U.S. 192, 199 (1991))); see also Model Penal Code § 2.04 (outlining the circumstances in which ignorance or mistake of law qualifies as a defense, and providing for such a defense where an individual reasonably relies on “an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense”).

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

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

The Due Process Clause creates a defense for those who act in reliance upon an official interpretation of a law. See generally Raley v. Ohio, 360 U.S. 423 (1959). The Raley defense bears some resemblance to the defense of entrapment, and courts considering it ask whether an official, while “speaking for the State,” has “clearly told” a defendant that the law permitted certain conduct. Id. at 425–26. Nonetheless, demonstrators’ right to fair warning differs even from the defense recognized in Raley. See infra text accompanying notes 226–238.
To understand the breadth of this departure, one must know its origin. Yet, the courts enforcing the right to fair warning have not clearly grounded it in the First Amendment, the Fourth Amendment, or the Due Process Clause. The differences between these constitutional provisions are significant. While all generally balance individual liberty interests against the government’s concern for order and efficiency, each does so differently and for a distinct reason. Under the First Amendment, courts attempt to protect robust discourse from “impermissible deterrence” by considering the expressive interests of not only the individual litigant—who may concede that a given restriction appropriately enjoins her conduct—but also others whose protected speech the restriction might chill. 19 The Due Process Clause, in contrast, focuses on a particular defendant, ensuring that “no [one is] held criminally responsible for conduct which he could not reasonably understand to be proscribed.” 20 Finally, the Fourth Amendment balances two entirely different considerations: the need for “swift [police] action predicated upon . . . on-the-spot observations,” on the one hand, and the “great indignity and . . . strong resentment” that may result from “serious intrusion upon the

20 Lanier, 520 U.S. at 264 (quoting Bouie v. City of Columbia, 378 U.S. 347, 351 (1964)). Given the differences between the concerns that animate the First Amendment and the Due Process Clause, a decision to locate the right to fair warning in one provision or the other would significantly change its scope. Imagine, for example, a case in which individual litigants had received fair warning, but a reasonable observer of their interaction with the police would have believed they had not. Because courts considering First Amendment rights assess the expressive interests of third parties in addition to litigants, they might reasonably conclude that the fact that the arrests appeared arbitrary to observers could deter others from demonstrating. In order to avoid such deterrence, courts might conclude that a First Amendment right to fair warning prohibited the arrests. If grounded in the Due Process Clause, however, the right to fair warning is not seriously implicated. Instead, because each arrestee received a warning, “no [one is] held criminally responsible for conduct which he could not reasonably understand to be proscribed.” Lanier, 520 U.S. at 264. In other words, the group of people that must receive “fair warning” may change based on whether the right to such warning originates from the Due Process Clause or the First Amendment.
sanctity of the person, on the other.\textsuperscript{21} Given the differences between the concerns animating each constitutional provision, one cannot understand the precise contours of demonstrators’ right to fair warning without first determining which constitutional provision creates that right.

This Article attempts to identify the right to fair warning’s constitutional basis. Ultimately, it argues that the First Amendment provides the most plausible foundation for that right. A careful analysis of the decisions recognizing the right to fair warning indicates that courts focus on officers’ conduct in order to accommodate First Amendment concerns without subjecting the ordinances at issue to the exacting review that the First Amendment typically requires. Specifically, courts in those cases appear to attribute a valid, nondiscriminatory purpose to the ordinance in question, yet they also understand that that ordinance infringes First Amendment rights.\textsuperscript{22} Because of such infringement, ordinary First Amendment review would likely require that ordinance’s invalidation. But the mere fact that the ordinance sweeps overbroadly does not mean that the legislature can draft a narrower ordinance that accomplishes the same purpose.\textsuperscript{23} Thus, in these cases, ordinary First Amendment review appears to force courts to choose between the ordinance’s interests, on the one hand, and the First Amendment’s, on the other. The right to fair warning, in contrast, avoids such a zero-

\textsuperscript{21} Terry v. Ohio, 392 U.S. 1, 17–20 (1968).
\textsuperscript{22} Compare Cox, 379 U.S. at 564 (holding that a statute prohibiting protesting “near” courts “vindicate[s] important interests of society”), with Edwards v. South Carolina, 372 U.S. 229, 236–37 (1963) (suggesting that statutes could restrict protests only by “limiting the periods during which the State House grounds were open to the public”).
\textsuperscript{23} Cf. Vodak, 639 F.3d at 741 (“[W]hen a march is planned for the unknown date of some triggering event [such as the start of the second war with Iraq], . . . even two days’ notice is infeasible.”).
sum conflict by permitting the courts to balance the relevant interests. Effectively, the right to fair warning allows courts to review not the ordinance itself, but instead the ordinance as applied by police officers in the relevant circumstances. Thus, we can understand the right to fair warning as a narrower form of First Amendment scrutiny that accommodates First Amendment concerns without unnecessarily complicating otherwise legitimate legislative schemes.

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

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24 Cox, 379 U.S. at 571.
25 See Buck v. City of Albuquerque, 549 F.3d 1269, 1283 (10th Cir. 2008) (arguing that officers “may have implicitly sanctioned the march not only by closing off streets to traffic, but also by directing the progress and direction of the procession” (emphasis added)).
26 Specifically, the Due Process Clause protects a demonstrator only from being “held criminally responsible for conduct which he could not reasonably understand to be proscribed.” United States v. Lanier, 520 U.S. 259, 266 (1997) (quoting Bouie v. City of Columbia, 378 U.S. 347, 351 (1964)). In the absence of some explicit directive from officers, courts would likely expect demonstrators to reasonably understand that valid, sufficiently specific statutes proscribed their conduct. Cf. Raley v. Ohio, 360 U.S. 423, 425–26 (1959) (creating a defense where an official had “clearly told” a defendant that the law permitted certain conduct). Similarly, the Fourth Amendment asks only whether officers have a “reasonable ground for the belief” that an
distinguishing between explicit and implicit permission, as Fourth Amendment and
Due Process Clause jurisprudence might lead courts to do, is unsatisfying. In large
demonstrations, the vast majority of participants will not know what officers have
explicitly permitted the demonstration’s leaders or organizers to do. For the majority of
demonstrators, then, discerning whether officers have explicitly or implicitly permitted
others’ actions will be nearly impossible.27 Upholding convictions in the latter case, but
not the former, would create a distinction without a difference, at least from the
perspective of a majority of demonstrators. Focusing on First Amendment concerns,
however, resolves the problem of distinguishing between explicit and implicit
permission by leading courts to ask whether or not police conduct would have the effect
of chilling speech.28 Thus, regarding the right to fair warning as a First Amendment
right offers a compelling explanation for existing doctrine.

By abstracting from the First Amendment principles that have tacitly guided
existing doctrine, courts can generate a coherent and satisfactory framework for

quotation marks omitted). Because officers traditionally have discretion over “when and where
to enforce city ordinances,” they can reasonably believe that a decision not to enforce an
ordinance at a given time does not amount to permission to engage in certain conduct. Town of

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

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

This Article contains four parts. Part I describes the cases that have recognized the right to fair warning, noting the right’s existing contours and the questions it raises. Part II then discusses the rights protected by the First Amendment, the Fourth Amendment, and the Due Process Clause, explaining why each provision could serve as a plausible, if not wholly satisfying, basis for the right to fair warning. Finally, Part III

29 See infra text accompanying notes 398–399.
30 See infra text accompanying notes 400–402.
argues that courts should ultimately characterize the right to fair warning as a First Amendment right. As set forth below, First Amendment concerns best explain existing doctrine, and only by focusing on the interests protected by the First Amendment can courts fashion a right to fair warning that fully and coherently vindicates the principles they have identified. Nonetheless, courts need not inevitably frame the right to fair warning as a First Amendment right. As existing doctrine makes clear, the right to fair warning exists at the intersection of several different sets of constitutional concerns. The Article thus concludes with some brief reflections and suggestions for future inquiry.

I. The History of Demonstrators’ Right to Fair Warning

Because the textual foundations of demonstrators’ right to fair warning are unclear, any description of that right must begin with its history. This Part analyzes that history and then attempts to delineate the basic contours of the right that has emerged. Like many other constitutional protections, demonstrators’ right to fair warning was first recognized by the Supreme Court in a case arising from the civil rights movement: Cox v. Louisiana.\textsuperscript{31} Part I.A thus discusses Cox, describing its facts and holdings and analyzing the tensions that emerge from the interchange between the majority and the dissent. Next, Part I.B explores how Circuit Courts of Appeals have treated Cox and the right it created. Finally, Part I.C analyzes these precedents, distills the fundamental characteristics of demonstrators’ right to fair warning, and identifies the questions that remain.

\textsuperscript{31} 379 U.S. 559.
A. *Cox v. Louisiana*

Opinions describing demonstrators’ right to fair warning typically identify *Cox v. Louisiana* as the origin of that right.\(^{32}\) Cox arose from a civil rights demonstration.\(^{33}\) On December 14, 1961, police officers in Baton Rouge, Louisiana arrested twenty-three black students from Southern University for picketing stores that had segregated lunch counters.\(^{34}\) In response to those arrests, the Reverend B. Elton Cox organized a demonstration involving approximately 2,000 students.\(^{35}\) On December 15, these demonstrators proceeded from a meeting place to the state courthouse where officers were holding the twenty-three arrested students.\(^{36}\) Police officers learned of the demonstration in advance, and a number of them, including the Chief of Police, met with Cox as the march proceeded.\(^{37}\) The Chief of Police instructed Cox that “he must confine’ the demonstration ‘to the west side of the street,’” and Cox then directed the marchers to that area, which was “across the street from the courthouse, 101 feet from its steps.”\(^{38}\)

\(^{32}\) *Vođak*, 639 F.3d at 746; *Papineau*, 465 F.3d at 60–61 n.6; *Dellums v. Powell*, 566 F.2d 167, 182–83 (D.C. Cir. 1977).


\(^{34}\) *Cox I*, 379 U.S. at 538.

\(^{35}\) Id. at 538–39.

\(^{36}\) Id. at 539.

\(^{37}\) Id. at 539–41.

\(^{38}\) Id. at 541.
The demonstrators sang, prayed, and recited the pledge of allegiance. Then, Cox gave a speech in which he characterized the arrest of the twenty-three students as “illegal.” During this time, “a small crowd of 100 to 300 curious white people . . . gathered on the east sidewalk and courthouse steps.” Cox concluded his speech by encouraging the gathered demonstrators to engage in the same activities for which officers had arrested the twenty-three students. This remark angered some of those who had gathered on the courthouse steps. The sheriff then intervened. Addressing the marchers, he stated that, although they had been “allowed to demonstrate” and had been “more or less peaceful,” their present actions constituted “a direct violation of the law, a disturbance of the peace, and [needed] to be broken up immediately.” Cox instructed the demonstrators to remain in place, and officers subsequently used tear gas to disperse the march.

Police officers arrested Cox on December 16, and a jury subsequently convicted him of three offenses: disturbing the peace, obstructing public passages, and picketing before a courthouse. The Supreme Court’s opinion in *Cox* dealt only with the conviction for picketing before a courthouse. The relevant Louisiana statute—which the state had modeled after 18 U.S.C. § 1507—prohibited “picket[ing] or parad[ing] in or near a building housing a court of the State of Louisiana” with “the intent of interfering

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39 *Id.* at 542.
40 *Id.*
41 *Id.* at 541.
42 *Id.* at 542.
43 *Id.* at 543.
44 *Id.* at 543.
45 *Id.* at 544.
46 *Id.* at 538, 544.
with, obstructing, or impeding the administration of justice, or with the intent of
influencing any judge, juror, witness, or court officer.” Cox challenged his conviction
under this statute on both First Amendment and Due Process grounds.  

The majority opinion decisively rejected Cox’s challenges to the statute. First, the
Court found it unquestionable “that a State has a legitimate interest in protecting its
judicial system from the pressures which picketing near a courthouse might create.”
Then, characterizing the statute as “narrowly drawn,” the Court reasoned that this
legitimate state interest clearly outweighed the modest impact the statute had on
demonstrators’ abilities to speak. Accordingly, the majority found that the statute did
not violate the First Amendment. Nor did the majority regard the statute unduly vague,
“at least as applied to a demonstration within the sight and hearing of those in the
courthouse.” In fact, the majority would have had great difficulty avoiding these
conclusions. As Justice Clark noted in dissent, “Lousiana’s statute . . . was taken in haec
verba from . . . 18 U.S.C. § 1507,” which “was written by members of [the Supreme]
Court after disturbances similar to the one [at issue] occurred at buildings housing
federal courts.”

Nonetheless, the majority expressed concern over how officers had administered
the statute. In rejecting Cox’s vagueness argument, the majority recognized that
“demonstrators, such as those involved here, would justifiably tend to rely on . . .

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48 Cox, 379 U.S. at 560, 566.
49 Id. at 562.
50 Id. at 562–64.
51 Id. at 568.
52 Id. at 585 (Clark, J., dissenting); see id. (“It has been said that an author is always pleased with
his own work.”).
administrative interpretation of how ‘near’ the courthouse a particular demonstration might take place.”

According to the majority, the statute itself envisioned such reliance since it could best serve its goal of insulating judges from pressure by entrusting its application to the discretion of officers who would observe whether any pressure actually occurred. This discretion, however, created First Amendment concerns that the statute itself had not. Analogizing the statute to constitutionally valid restrictions on “the time, place, duration, and manner of demonstrations,” the majority noted that officials could not use their discretion “to pick and choose among expressions of view the ones [they] will permit to use the streets and other public facilities.”

On the basis of these concerns, the majority found that Cox’s arrest violated his rights under the Due Process Clause. According to the majority:

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

Given these facts, the majority concluded that sustaining Cox’s “conviction for demonstrating where [officers] told him he could ‘would be to sanction an indefensible

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53 Id. at 568–69.
54 Id.
55 Id. at 569.
56 Id. at 570–71.
sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him.”

The majority did not, however, rely entirely on the Due Process Clause. As the dissent observed, Cox did not engage only in conduct that officers had explicitly permitted; instead, he continued to demonstrate even after officers had ordered him to disperse. Addressing this point, the majority noted that the sheriff had ordered the demonstrators to disperse “not because [they were] peacefully demonstrating too near the courthouse, nor because a time limit originally set had expired, but because officials erroneously concluded that what [Cox] said threatened a breach of the peace.”

According to the majority, under the First Amendment, “this was not a valid reason for a dispersal order.” Thus, Cox had not only a Due Process right to engage in conduct that officers had permitted, but also a First Amendment right to demand that officers revoke their prior permission based only on legitimate reasons. In other words, although the text of the statute complied with both the First Amendment and the Due Process Clause, the officers’ administration of that statute ran afoul of both provisions.

Justice Black and Justice Clark, in separate dissents, each criticized the majority for finding in the officers’ conduct problems that the majority would not ascribe to the statute itself. First, both dissenters criticized the majority’s unsubstantiated claim that “the statute . . . foresees a degree of on-the-spot administrative interpretation by

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57 Id. at 571 (“The Due Process Clause does not permit convictions to be obtained under such circumstances.”).
58 Id. at 583 (Black, J., dissenting).
59 Id. at 572.
60 Id. (citing Cox I, 379 U.S. at 551, which discussed relevant First Amendment precedents).
officials charged with responsibility for administering and enforcing it.” 65 According to the dissenters, the statute clearly applied to the conduct at issue. 62 In the words of Justice Clark: “One hardly needed an on-the-spot administrative decision that the demonstration was ‘near’ the courthouse with the disturbance being conducted before the eyes and ringing in the ears of court officials, police officers and citizens throughout the courthouse.” 63 Second, because the dissenters found the statute clear, at least as applied to Cox, they accused the majority of impugning the well-established principle that “a police chief cannot authorize violations of his State’s criminal laws.” 64 Justice Clark again provided the most strident criticisms: “I never knew until today that a law enforcement official—city, state or national—could forgive a breach of the criminal laws. I missed that in my law school, in my practice and for the two years while I was head of the Criminal Division of the Department of Justice.” 65

Also problematic, from the dissenters’ perspective, was that the majority regarded discretion not as a tool that empowered officers to respond flexibly to changing

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61 Id. at 568.
62 See id. at 582 (Black, J., dissenting) (“Certainly the record shows beyond all doubt that the purpose of the 2,000 or more people who stood right across the street from the courthouse and jail was to protest the arrest of members of their group who were then in jail.”); id. at 586 (Clark, J., dissenting).
63 Id.
64 Id. at 582 (Black, J., dissenting). Justice Black cited numerous cases for this proposition, id., including United States v. Socony-Vacuum Oil Co., where the Court had stated that: As to knowledge or acquiescence of officers of the Federal government [in the charged crime], little need be said. . . . Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers.
65 Cox, 379 U.S. at 588–89 (Clark, J., dissenting).
circumstances, but instead as a mechanism for conferring rights on the demonstrators, and thus for imposing additional restrictions on the police. Under typical circumstances, so long as prosecutors and officers do not act based on certain, impermissible considerations such as race, they have broad discretion over whether to arrest or prosecute.\footnote{See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. . . . [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” (internal quotation marks omitted)); see also Town of Castle Rock v. Gonzales, 545 U.S. 748, 760–61 (2005) (describing a “well established tradition of police discretion” and noting that “[i]t is . . . simply common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.” (internal quotation marks omitted)).} As the dissenters noted, the officers did not need to rely on any impermissible consideration when they changed their minds and decided not to permit the demonstration to occur across from the courthouse. Instead, whereas telling demonstrators “to come no closer to the courthouse” may have initially struck officers as the best strategy for maintaining control over a crowd of “2,000 or more people,”\footnote{Cox, 379 U.S. at 582 (Black, J., dissenting). Justice Clark argued that any decision the officers made occurred “in the heat of a racial demonstration in a southern city for the sole purpose of avoiding what had the potentialities of a race riot.” Id. at 588. This framing of the issue, however, ignores the peaceful nature of the demonstration, Cox I, 379 U.S. at 536, and the well established principle that an audience’s reaction to speech cannot justify restricting that speech, Terminiello v. City of Chicago, 337 U.S. 1, 4–5 (1949).} the officers may have reevaluated that strategy as they became more concerned about the crowd of observers that had gathered on the courthouse steps.\footnote{Cox I, 379 U.S. at 543.} According to the dissenters, the majority’s approach prohibited officers from adapting their commands to developing circumstances, requiring police either to immediately prohibit a...
demonstration or to forfeit their right to do so. Justice Clark even went so far as to suggest that the novel “protection” the majority had recognized threatened the country’s dedication “to freedom under law” by empowering mobs to extract legal concessions from officers eager to defuse fraught confrontations.

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

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

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69 Cox, 379 U.S. at 587 (Clark, J., dissenting) (“The only way the Court can support its finding is to . . . hold—as it does sub silentio—that once Cox and the 2,000 demonstrators were permitted to occupy the sidewalk they could remain indefinitely. . . . This, I submit, is a complete frustration of the power of the state.”).
70 Id. at 589. As described above, Justice Clark’s dissent occasionally resorted to hyperbole. See supra note 67.
71 Cox, 379 U.S. at 569 (majority opinion).
72 Id. at 573.
The majority’s tepid response to the dissenters’ arguments suggests that it regarded itself as holding only, and unexceptionally, that officers enforcing statutes could not exercise discretion that the Constitution did not permit the statutes to give. 73

The majority’s brief responses to the dissents identify some of the limits of the right to fair warning, but they raise many questions about both the rationale behind that right and the ultimate basis for it. First, the majority suggests that officers will have discretion to permit otherwise illegal conduct—and thus will need to provide fair warning of what they intend to prohibit—only where they engage in a “limited administrative regulation of traffic.” 74 Because traffic patterns may vary so extensively that statutes cannot hope to cover all of the possibilities, courts and legislatures alike might reasonably choose to rely on officers’ discretion in this limited context. But the statute at issue in Cox did not regulate traffic. Instead, it protected the judicial system from “the pressures which picketing near a courthouse might create.” 75 Indeed, the majority recognized a legitimate state interest in preventing the “judicial process from being misjudged in the minds of the public,” which might attribute the outcome of cases to the “conscious[] or unconscious[] influence[]” of demonstrators. 76 In contrast to officers administering traffic, who can perceive the costs and benefits of permitting modest violations, officers confronting a demonstration can hardly know whether, at some point in the future, a court may render a judgment that “the minds of the public” will attribute to that demonstration’s conscious or unconscious influence. Thus, the

73 Id. (“Indeed, the allowance of such unfettered discretion in the police would itself constitute a[n unconstitutional] procedure.”).
74 Id. at 569.
75 Id. at 562.
76 Id. at 565.
majority appears not to have explained its rationale for relying on officer discretion. Other than stating that “it is clear that the statute . . . foresees a degree of on-the-spot administrative interpretation”—and that such interpretation is frequently permitted in traffic cases—the majority did not explain why the concededly valid and applicable statute failed to control the case.\footnote{Id. at 568.}

Similarly, although the majority clarified that officers retain the discretion to disperse demonstrators in order to prevent violence or serve a statutory purpose, it did not explain why officers could not disperse the demonstrators under the statute they later charged Cox with violating. A short example illustrates this point. Officers may, and frequently do, permit drivers to proceed through an intersection against a traffic light. If, after receiving such permission, a driver stops in the intersection and begins demonstrating, the First Amendment surely permits an officer to order her to leave and, if she fails to comply, to arrest her. The reason is simple: the officer enforces a statute that complies with the First Amendment.\footnote{See Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (“The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.”).}

Why then could the officers in Cox not order the demonstrators to disperse on the ground that their conduct, although formerly permitted, potentially frustrated the statute’s purpose of maintaining judicial independence?
Instead of answering this question, the majority noted that officials had not relied on the statute when ordering Cox to disperse.\(^7^9\) This explanation, however, is problematic, especially given that the Court apparently based its holding on the First Amendment. First, where officers have a legitimate basis for making arrests, courts have shown great unwillingness to invalidate or impugn those arrests on the ground that the officers had unlawful intentions, even when they intended to suppress speech.\(^8^0\) But that is precisely what happened in Cox. Second, a right to have officers identify the permissible reason for dispersal is not the right to engage in “uninhibited, robust, and wide-open” discourse that the First Amendment guarantees.\(^8^1\) In other words, the majority’s rationale appears to limit officers’ discretion without truly protecting First Amendment rights, requiring only that arrests conform to a script.

As described above, a careful reading of the opinions in Cox raises two important questions about the right that case recognized. First, what motivated the majority’s decision to focus on the officers’ enforcement of the statute, rather than the statute itself? The answer to this question will determine when demonstrators can invoke the right to fair warning. To put the point in somewhat circular terms, only when courts

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\(^7^9\) Cox, 379 U.S. at 572 (“He was expressly ordered to leave, not because he was peacefully demonstrating too near the courthouse, nor because a time limit originally set had expired, but because officials erroneously concluded that what he said threatened a breach of the peace.”).

\(^8^0\) See Hartman v. Moore, 547 U.S. 250, 252 (2006) (holding that a plaintiff cannot state “an actionable [claim of retaliation under] the First Amendment without alleging an absence of probable cause to support the underlying criminal charge”); Mozzochi v. Borden, 959 F.2d 1174, 1180 (2d Cir. 1992) (“An individual does not have a right under the First Amendment to be free from a criminal prosecution [that is] supported by probable cause [even if that prosecution] is in reality an unsuccessful attempt to deter or silence criticism of the government.”); cf. Devenpeck v. Alford, 543 U.S. 146, 153–54 (2004) (rejecting the argument that the justification for an arrest must be “closely related” to the offense cited by the arresting officer).

focus on officers’ actions will they inquire into whether the officers, as opposed to the statute or regulation, provided the requisite warning. Second, after officers permitted the relevant demonstration, what needed to occur before they could validly arrest the demonstrators? Answering this question will reveal the content of the right to fair warning, i.e., what having such a right permits demonstrators to demand. Before turning to these questions, however, the Article first examines how Circuit Courts of Appeals have applied Cox.

B. Cox’s Legacy

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

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82 See generally Vodak v. City of Chicago, 639 F.3d 738 (7th Cir. 2011) (Posner, J.); Buck v. City of Albuquerque, 549 F.3d 1269 (10th Cir. 2008); Papineau v. Parmley, 465 F.3d 46 (2d Cir. 2006) (Sotomayor, J.); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977).
83 In all four cases, the courts held that qualified immunity did not protect officers from liability on § 1983 claims.
84 See supra text accompanying notes 3–4.
1. Dellums v. Powell — On May 5, 1971, approximately 2,000 demonstrators met on the Mall in Washington, D.C. and planned to stage a protest against the Vietnam War at the nearby the United States Capitol.\textsuperscript{85} Several United States Congressmen, including Congressman Ronald Dellums, planned to address the demonstrators from the steps of the capitol building.\textsuperscript{86} When the protestors reached the capitol grounds, the capitol police initially stopped them, but subsequently permitted them to enter after a discussion with Congressman Dellums.\textsuperscript{87} The demonstrators assembled on the eastern steps of the Capitol, and several speeches occurred.\textsuperscript{88} After some period of time, however, “the police cordoned off the bottom of the steps, prevented anyone from leaving, and[,] over the protests of Congressman Dellums[,] began arresting members of the assemblage.”\textsuperscript{89} Congressman Dellums and a class of demonstrators sued and, after a six-week trial, the jury found in their favor, rejecting the officers’ claims that the protest was disruptive and that the chief officer had fairly warned the demonstrators by using a bull horn to order them to disperse.\textsuperscript{90}

Before the D.C. Circuit, the officers argued that they properly arrested the demonstrators under 9 D.C. Code § 124 and 22 D.C. Code § 3102.\textsuperscript{91} Section 124 prohibited “parad[ing], stand[ing], or mov[ing] in processions or assemblages in the

\textsuperscript{85} Dellums, 566 F.2d at 173.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 173–74.
\textsuperscript{89} Id. at 174.
\textsuperscript{90} Id. at 196–97; see also id. at 206 (Leventhal, J., concurring) (“A reporter testified that Chief Powell, after making his initial announcements, had turned to Chief Wilson and said that he thought many people had not heard the order to leave, and asked Wilson if he thought the order should be given again. ‘No,’ Wilson said, ‘let them tell their story in court.’”).
\textsuperscript{91} Id. at 177–78 (majority opinion).
United States Capitol Grounds,” and § 3102 forbade entering “any public or private dwelling, building or other property . . . . without lawful authority.” In contrast to Cox, however, the D.C. Court of Appeals had previously invalidated each statute, as written, on First Amendment grounds. To save § 124 from its constitutional defects, the D.C. Court of Appeals had imposed a limiting instruction, under which, if officers determined that conduct was “more disruptive . . . than that normally engaged in by tourists and others routinely permitted on the Grounds,” they could:

- bar or . . . order from the Capitol Grounds, any group which is noisy, violent, armed, or disorderly in behavior, any group which has a purpose to interfere with the processes of the Congress, any Member of Congress, congressional employee, visitor, or tourist, any group which has the effect, by its presence, of interfering with the processes of the Congress, any Member of Congress, congressional employee, visitor, or tourist; and any group which damages any part of the building, shrubbery, or plant life.

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

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92 Id. at 177 n.12.
93 Id. at 178 n.15.
94 Id. at 179–80 (citing United States v. Nicholson, 263 A.2d 56 (D.C. App. 1970)).
95 Id. at 179.
96 Id. at 179.
97 Id.
understood § 124, as interpreted by the D.C. Court of Appeals, to require officers to literally “order [demonstrators] from the Capitol Grounds” before making any arrest.\(^98\)

In the alternative, however, the Court held that Cox would have required a warning even if § 924 had not. According to the Court, because “the Capitol Police had in the past allowed persons invited to the Capitol by Members [of Congress] to come and go freely,” the officers’ decision to “step[] aside on being told [that Representative Dellums] had invited the marchers to meet with [him]” amounted to “an unwritten ‘permit’ . . . to assemble on the Capitol Grounds and steps.”\(^99\) In light of that unwritten permit, the Court interpreted Cox to require that no arrest occur “until an order to disperse had been given which was itself based on permissible considerations,” \(i.e.,\) considerations other than the demonstrators’ viewpoint.\(^100\) Because the facts of Dellums were “very similar” to those of Cox, the D.C. Circuit had no occasion to consider the constitutional origins of the right it enforced.\(^101\) Nonetheless, the Court upheld the jury’s determinations that officers had violated the demonstrators’ rights under both the First and Fourth Amendments, thereby suggesting that it regarded the right to fair warning as intertwined with those provisions.\(^102\)

2. Papineau v. Parmley — On May 18, 1997, several dozen members of the Onondaga Nation gathered on private property to protest a new tax on the sale of

\(^98\) Id. at 181 (“[A]n order to quit must precede arrests under 9 D.C. Code § 124.”). Whether officer had given such a warning before arresting the plaintiffs was a question of fact that the jury had resolved in the plaintiffs’ favor. Id. at 183–84.

\(^99\) Id. at 182 & n.34.

\(^100\) Id. at 183.

\(^101\) Id. at 182 n.35.

\(^102\) Id. at 176, 184, 195.
tobacco products. The demonstrators chose that particular location for their protest in part because the property abutted an interstate highway. In response to the demonstration, seventy state police officers gathered, all dressed in riot gear. After the protest began, a group of demonstrators attempted to enter the interstate highway in order to “distribute literature.” These actions potentially violated N.Y. Penal Law § 240.20(5), which prohibited “obstruct[ing] vehicular or pedestrian traffic” with “intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof.” Subsequently, however, other protestors persuaded those in the roadway to abandon their efforts and return to the main demonstration. After the small group of demonstrators had rejoined the main protest, the officers formed a “skirmish line,” waited “for no more than thirty-five seconds,” and then “charged into the demonstration.” After reaching the protestors, the officers allegedly “began arresting protestors . . . indiscriminately, assaulting plaintiffs, beating them with their riot batons, dragging them by their hair and kicking them.”

Considering this record, the Second Circuit held that qualified immunity would not protect the officers from the demonstrators’ claims under the First and Fourth Amendments. Unlike in Cox and Dellums, the officers Papineau did not permit any of

103 Papineau v. Parmley, 465 F.3d 46, 52 (2d Cir. 2006).
104 Id.
105 Id. The plaintiffs’ evidence suggested that some among the officers spoke of the protestors need “to get their asses kicked.” Id.
106 Id.
107 Id. at 59.
108 Id. at 53.
109 Id.
110 Id.
111 Id. at 60–61, 63.
the demonstrators to attempt to distribute literature on a highway. Instead, because officers dispersed the protest only after the group that had entered the highway had rejoined those who had not, the question was “whether a reasonable police officer would have believed that he or she could disperse the otherwise peaceable demonstration because a few [unidentifiable] individuals within that crowd had violated the law at an earlier time.”\(^{112}\) The Second Circuit, with then-Judge Sonia Sotomayor writing for the Court, first held that the transgressions of a few could not justify the officers’ decision to disperse the entire demonstration.\(^ {113}\)

But the Second Circuit also went farther, concluding that, “even if the [officers] had a lawful basis to interfere with the demonstration,” the plaintiffs “still enjoyed First Amendment protection, and absent imminent harm, the troopers could not simply disperse them without giving fair warning.”\(^ {114}\) Implicit in the requirement, the Court noted, was an opportunity for “the ordinary citizen to conform his or her conduct to the law.”\(^ {115}\) Thus, relying on Cox and Dellums, among other cases, the Second Circuit effectively held that, even where officers can interfere with a peaceful demonstration, the First Amendment entitles protestors to a warning that will permit them to voluntarily comply with the officers’ directives.\(^ {116}\)

The Second Circuit clearly grounded this right to fair warning in the First Amendment, describing the officers’ failure to warn as a “separate First Amendment

\(^ {112}\) Id. at 59–60.
\(^ {113}\) Id. at 60 (“Defendants could not . . . have reasonably thought that indiscriminate mass arrests without probable cause were lawful under these circumstances.”).
\(^ {114}\) Id.
\(^ {115}\) Id. at 60 (quoting City of Chicago v. Morales, 527 U.S. 41, 58 (1999)).
\(^ {116}\) Id. at 60–61& n.6.
violation.” Nonetheless, the right the Second Circuit described differed subtly from the right recognized in Cox and Dellums. On one hand, the Second Circuit assumed that, because some demonstrators had acted illegally, the officers had a legitimate basis for ordering the entire group to disperse. But on the other, the majority of demonstrators had violated no statute. As in Cox, then, the demonstrators could infer from context that they engaged in protected conduct. The basis for that inference, however, had changed. No longer could the Court claim that protestors were “demonstrating where [officers] told [them they] could.” In the absence of any permission, reliance on a due process right against “indefensible . . . entrapment” would have been inappropriate. Thus, although the Second Circuit analogized the facts it confronted to those in Cox and Dellums, it effectively identified a new basis for demonstrators’ justifiable belief that they acted appropriately: the demonstrators’ “undeniable right” to engage in “peaceable protest activities.”

3. Buck v. City of Albuquerque — On March 20, 2003, between five hundred and a thousand demonstrators gathered on the University of New Mexico’s campus to protest the United States’ invasion of Iraq. Although the protestors lacked a parade permit, they met with the Albuquerque Police Department before the demonstration and arranged to have officers close a street near the university bookstore. During the

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117 Id. at 60.
118 Cox, 379 U.S. at 571.
119 Id.
120 Papineau, 465 F.3d at 60.
121 Buck v. City of Albuquerque, 549 F.3d 1269, 1274 (10th Cir. 2008) (noting that the 10th Cir. had described the relevant facts in Fogarty v. Gallegos); Fogarty v. Gallegos, 523 F.3d 1147, 1150 (10th Cir. 2008).
122 Fogarty, 523 F.3d at 1150.
demonstration, the crowd began “spilling over onto” adjacent streets, causing officers to close a larger area than they had originally planned.\textsuperscript{123} The protestors began marching down the newly closed street, and officers eventually formed a skirmish line in order to halt the march’s progress.\textsuperscript{124} After being stopped, the demonstrators returned to the area around the university bookstore. As the crowd reached that bookstore, officers announced over a loudspeaker system that the demonstrators should either disperse or return to university property. Many demonstrators testified that, because of the surrounding noise—the protest included a drum circle—they could not understand officers’ “garbled and unintelligible” warnings.\textsuperscript{125} When the demonstrators did not disperse, officers fired tear gas into the crowd and began making arrests.\textsuperscript{126}

\textit{Buck} involved several plaintiffs whom officers had arrested.\textsuperscript{127} The officers argued that they had probable cause to believe that the plaintiffs had violated two laws: Albuquerque’s parade permit ordinance; and N.M. Stat. Ann. § 66-7-339, which prohibited walking “along and upon” a roadway “[w]here sidewalks are provided.”\textsuperscript{128} Although the parties did not dispute that the demonstrators had proceeded “along and upon” the streets without first obtaining a parade permit, the Tenth Circuit noted that the officers had both closed streets before the demonstrators reached them and

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\item[123] \textit{Id.} at 1151.
\item[124] \textit{Id.} The opinion in \textit{Fogarty} suggests that the demonstrators may have proceeded as many as “four blocks” from the area they originally arranged to occupy. \textit{Id.}
\item[125] \textit{Id.} The named plaintiff in \textit{Fogarty} provides an example of the type of demonstrator hypothesized in the introduction: “Fogarty, a physician and faculty member at [the University of New Mexico], was accompanied by his wife, a friend, and his friend’s fiancee. Fogarty observed that several streets had been closed and assumed that police were permitting demonstrators to march in the streets. Fogarty then joined the main group of marchers.” \textit{Id.}
\item[126] \textit{Id.} at 1151-52.
\item[127] \textit{Buck v. City of Albuquerque}, 549 F.3d 1269, 1277–79 (10th Cir. 2008).
\item[128] \textit{Id.} at 1281–82.
\end{footnotesize}
“direct[ed] the progress . . . of the procession.” The Tenth Circuit concluded that these actions “sanctioned the protestors walking along the road and waived the permit requirement.” Because officers had permitted the very violations for which they arrested the plaintiffs, the court concluded that they lacked probable cause and thus had violated the plaintiffs’ clearly established rights under the Fourth Amendment.

Although the Tenth Circuit’s opinion in *Buck* did not cite *Cox*, the reasoning applied in those two cases is strikingly similar. Each case held that officers could not constitutionally arrest demonstrators for conduct that the officers had permitted. Nonetheless, *Buck* differs significantly from *Cox*. Whereas the protestors in *Cox* demonstrated only where officers had explicitly permitted them to do so, the protestors in *Buck* exceeded the bounds of their original agreement with police. Police officers thus had not explicitly permitted the conduct at issue in *Buck*, a fact that the Tenth Circuit implicitly recognized when it stated that the officers’ conduct “may have been interpreted as sanctioning . . . the demonstration.” On the one hand, *Buck*’s analysis seems to logically extend the reasoning in *Cox*: demonstrators in large protests often will not know the scope of any agreement their leaders have made with the police and will look to officers for guidance on what is permissible. Indeed, some of the

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129 *Id.* at 1283.
130 *Id.* at 1284. The court also suggested that officers had granted “a de facto parade permit.” *Id.* at 1283.
131 *Id.* at 1286.
132 *Fogarty*, 523 F.3d at 1151.
133 *Buck*, 549 F.3d at 1285 (emphasis added).
demonstrators in question testified that they had done precisely that. Yet, focusing on the officers’ conduct magnifies the concerns that the dissenters expressed in Cox. Officers may not have voluntarily closed the streets onto which demonstrators “spill[ed],” and may instead have waited to stop the demonstrators’ progress only because they lacked the manpower necessary to comfortably do so. Thus, the Tenth Circuit may have attributed to officer discretion actions that demonstrators had effectively compelled.

4. Vodak v. City of Chicago — Like Buck, Vodak involved a protest against the United States’ 2003 invasion of Iraq. On March 20, 2003, as many as 8,000 demonstrators gathered in downtown Chicago. A city ordinance required a permit for “any march, procession or other similar activity . . . upon any public street, sidewalk, alley or other public place, which requires a street closing or otherwise requires police officers to stop or reroute vehicular traffic because the marchers will not comply with normal and usual traffic regulations or controls.” To obtain such a permit, applicants needed to specify the date and the route of the march and further to give the city two days in which to process their applications. In Vodak, however, the demonstrators wanted their march to coincide with the exact start of the war. As a result, they could not specify the date of their planned march even as few as two days in advance. In such

134 Fogarty, 523 F.3d at 1151 (“Fogarty, a physician and faculty member at UNM, . . . observed that several streets had been closed and assumed that police were permitting demonstrators to march in the streets. Fogarty then joined the main group of marchers.”).
135 Id.
136 Vodak v. City of Chicago, 639 F.3d 738, 740 (7th Cir. 2011) (Posner, J.)
137 Id. at 742.
138 Id. at 741 (citing Chi. Munic. Code § 10-8-330).
139 Id.
140 Id.
situations, the “police, as a matter of uncodified practice, [would] sometimes waive the requirement of a permit.”

Because the demonstrators had not obtained a permit from the city, they had not specified the exact route that their march would take. On the day of the march, the organizers of the demonstration informed the police that they intended to proceed north up one of Chicago’s major north-south arteries and then disperse. For unknown reasons, however, many of the demonstrators did not proceed as far north as the organizers had planned, and instead turned west. The police became concerned that the marchers’ westward progression would block another of Chicago’s north-south arteries, Michigan Avenue. To prevent this, the officers formed a barricade in front of Michigan Avenue and ordered marchers through a bullhorn not to enter that street. The marchers reversed course, proceeded five blocks south past streets that officers had barricaded, and then turned again toward Michigan Avenue on the first street that officers had not blocked. Rather than once again telling demonstrators not to enter Michigan Avenue, officers blocked the march on both sides, trapping both demonstrators and passers-by, and then made approximately 900 arrests.

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141 Id.
142 Id. at 741–42.
143 Id. at 742.
144 Id. at 743.
145 Id.
146 Id.
147 Id.
148 Id. at 740, 744.
The Seventh Circuit held that these arrests violated clearly established Fourth Amendment rights.\textsuperscript{149} According to the court, because officers had permitted the march, but had not insisted on a specified route such that they could expect demonstrators to know of that route, the officers needed to warn the demonstrators not to proceed toward Michigan Avenue before making any arrests.\textsuperscript{150} Although officers had attempted to provide such warnings through bull horns, the Seventh Circuit concluded that a bull horn “was no mechanism . . . for conveying a command to thousands of people stretched out [over several blocks].”\textsuperscript{151} Thus, this was a case in which “the police [had said] to a person go ahead and march and then, five minutes later, having revoked the permission for the march without notice to anyone, [had arrested] the person for marching without police permission.”\textsuperscript{152}

The Seventh Circuit found that the First Amendment played only a “background role” in its analysis, and it characterized the demonstrators’ claims under that amendment as “largely duplicative.”\textsuperscript{153} The background role to which the court referred consisted largely of limitations on the city’s permitting scheme. According to the court, although the First Amendment did not permit the city to “flatly ban groups of people from spontaneously gathering on sidewalks or in public parks in response to a dramatic news events,” it would not have “forbidden the Chicago police to require of the organizers . . . a clear idea of the intended march route, to hold them to it, and to prepare in advance reasonable measures for preventing demonstrators from spilling

\textsuperscript{149} \textit{Id.} at 746–47.
\textsuperscript{150} \textit{Id.} at 745.
\textsuperscript{151} \textit{Id.} at 746.
\textsuperscript{152} \textit{Id.} at 746–47.
\textsuperscript{153} \textit{Id.} at 750–51.
over the boundaries of the authorized march.” The problem, then, was simply that officers had exercised their discretion under the First Amendment poorly, permitting a spontaneous march without first requiring demonstrators to identify a route on which the officers could later insist.

Of course, whether or not officers had required them to do so, the demonstrators had informed the police of their planned route, and the police had turned out “in force” along that route. Vodak thus resembles Buck in that demonstrators’ conduct exceeded the bounds of what officers might have understood themselves to authorize. Much like in Buck, where the Tenth Circuit found that officers had, by their conduct, implicitly permitted the march’s expansion, the Seventh Circuit in Vodak faulted the officers for not clearly delineating the scope of what they would allow. In effect, by explicitly permitting something uncertain, the police had effectively permitted anything they could not emphatically proscribe at a later time. Nonetheless, whether officers’ previous insistence on a particular route would have justified the arrests in question is unclear.

The Seventh Circuit did not explain why a route that organizers had announced to officers was less likely to be known to 8,000 demonstrators than one that organizers had announced and on which officers had insisted. Moreover, that subtle difference has nothing to do with many of the states of mind that the Seventh Circuit attributed to the arrestees. According to the court, many arrestees may have “simply decided that [the

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154 Id. at 749–50.
155 See also id. at 746 (“The underlying problem is the basic idiocy of a permit system that does not allow a permit for a march to be granted if the date of the march can’t be fixed in advance, but does allow the police to waive the permit requirement just by not prohibiting the demonstration.”).
156 Id. at 742–43.
157 Id. at 746, 750.
planned route] was too long a walk,” “others may simply have been following the
crowd, thinking that it either was a proper route for the march or a way out,” and still
others “weren’t part of the march but were just trying to get home.” Official insistence
on a particular route, then, arguably would not have weakened the arrestees’ claims of
innocence.

C. The Contours of Demonstrators’ Right to Fair Warning

Despite the basic similarities between Cox, Dellums, Papineau, Buck, and Vodak,
those cases differ significantly in their analyses of arrests of protestors. Specifically,
whereas Dellums and Papineau meaningfully incorporate the First Amendment into their
analysis, Buck and Vodak do not. Moreover, while Papineau, Buck, and Vodak each subtly
broaden the right recognized in Cox, each does so differently: Papineau identifies a new
situation in which officers must warn demonstrators, Buck predicates the need for
warning on officers’ grant of implicit, rather than explicit permission, and Vodak
interprets officers to have permitted everything they did not explicitly forbid. Distilling
these disparate cases into a set of rules or principles is not an easy task. Nonetheless,
undertaking that task will help courts determine sensible boundaries for the right to fair
warning in the many situations that the future may present. This section contains two
parts. The first identifies the set of principles on which all the courts to have considered
the right to fair warning agree. The second attempts to pose the questions that courts
have not yet resolved, questions on which the remainder of the article will focus.

158 Id. at 743–45.
1. Points of agreement — Despite their differences, each of the cases discussed above shares basic similarities, and these similarities delineate the fundamental contours of the right to fair warning. First, each of the cases dealt with a statute or ordinance that raised difficult First Amendment questions, yet also promoted a legitimate governmental interest. The most obvious example is *Dellums*, in which a court had previously held that the relevant statute violated the First Amendment, but had attempted to give that statute a saving construction that would allow officers to vindicate its underlying purpose. The statutes at issue in the remaining cases also

159 Although the Supreme Court acknowledged in *Cox* that the relevant conduct was “intertwined with expression and association,” it took great pains to emphasize the validity of the statute in question, which several of its members had written. *Cox v. Louisiana*, 379 U.S. 559, 563–64 (1964). Nonetheless, the Court applied a less exacting standard of First Amendment review in *Cox* than it had in previous cases involving similar statutes. See *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963) (“[F]reedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view.” (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949)). Many contemporary commentators noticed the shift in the Court’s analysis. See Harry Kalven, Jr., The Concept of the Public Forum: *Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 9 (“As the parade leaves the State House grounds and moves down toward the courthouse, it changes from an attractive group of concerned citizens using democratic avenues of protest on public issues to a mob, heavy with the promise of anarchy, seeking to dominate.”). Moreover, the Court has since rejected the argument that a legislature may restrict speech near courthouses in order to prevent members of the public from believing that lobbying affected courts’ decisions. Specifically, in *United States v. Grace*, the federal government sought to justify a ban on the display of signs at the Supreme Court building on the basis that it “should [not] appear to the public that the Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court.” 461 U.S. 171, 183 (1983). In rejecting this argument, the Supreme Court reasoned that “[t]here is nothing to indicate to the public that the sidewalks [at issue] are part of the Supreme Court grounds or are in any way different from other public sidewalks in the city.” *Id.* Thus, the Supreme Court “seriously doubt[ed]” that viewers would draw different inferences from signs on its grounds than it would from signs displayed in other nearby public fora. *Id.*

implicated First Amendment rights, as the courts deciding those cases frequently acknowledged.\textsuperscript{161} For example, at least one Circuit Court of Appeals has concluded that the First Amendment prohibits statutes from imposing strict liability for parading without a permit, exactly what the legislative schemes at issue in \textit{Vodak} and \textit{Buck} did.\textsuperscript{162} Similarly, the Supreme Court has frequently emphasized that the First Amendment protects a wide array of expressive activity from prosecution under statutes that criminalize breach of the peace or disorderly conduct, precisely the type of statute at issue in \textit{Papineau}.\textsuperscript{163} Notwithstanding the fact that these statutes raised First Amendment concerns, however, each also promoted a governmental interest that the Supreme Court has recognized as legitimate.\textsuperscript{164} Moreover, narrower tailoring might not have prevented the statutes at issue from implicating First Amendment rights.\textsuperscript{165} Thus, the courts in each of the cases described above might have reasonably feared that the conflict at issue pitted demonstrators’ First Amendment rights against a legislative scheme that narrowly pursued legitimate interests.

\textsuperscript{161} \textit{Vodak}, 639 F.3d at 749–50.  
\textsuperscript{162} \textit{Am.-Arab Anti-Discrimination Comm. v. City of Dearborn}, 418 F.3d 600, 613 (6th Cir. 2005); see also \textit{Vodak}, 639 F.3d at 741; \textit{Buck v. City of Albuquerque}, 549 F.3d 1269, 1283 (10th Cir. 2008).  
\textsuperscript{164} See \textit{Cox}, 379 U.S. at 574 (“Nothing we have said . . . is to be interpreted at sanctioning . . . demonstrations . . . which conflict with properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the administration of justice and other essential governmental functions.”).  
\textsuperscript{165} See \textit{Vodak}, 639 F.3d at 741 (“[W]hen a march is planned for the unknown date of some triggering event, . . . even two days’ notice is infeasible . . . .”); \textit{id.} at 749 (requiring legislatures to permit people to “spontaneously gather[] on sidewalks or in public parks in response to a dramatic news event”).
Second, in each case other than Papineau, officers permitted the demonstrators to engage in at least some of the relevant conduct. Given that each of the statutes at issue implicated demonstrators’ First Amendment rights, the officers’ grants of permission suggest that they understood that the demonstrators might engage in protected conduct. While the officers’ motivations are unclear, as a matter of factual record, the courts considering their conduct noted the potential effect First Amendment considerations may have had on the officers’ actions. Indeed, in both Vodak and Dellums, the officers had adopted unwritten practices for enforcing the relevant statutes in situations that presented First Amendment concerns. In light of the First Amendment concerns at issue, the officers granting permission may not have simply exercised their discretion to allow proscribed conduct, and may instead have acknowledged and complied with legal constraints on their ability to enforce those proscriptions. Moreover, even assuming that officers had discretion over whether to permit the relevant conduct, the fact that they had granted permission suggested to the

166 Cox, 379 U.S. at 571; Vodak, 639 F.3d at 741; Buck, 549 F.3d at 1283; Dellums, 566 F.2d at 173.
167 See Vodak, 639 F.3d at 741 (“[W]hen a march is planned for the unknown date of some triggering event, so that even two days’ notice is infeasible, the police, as a matter of uncodified practice, will sometimes waive the requirement of a permit.”); id. at 749 (requiring legislatures to permit people to “spontaneously gather[] on sidewalks or in public parks in response to a dramatic news event”); id. at 751 (noting that the First Amendment played a “background role” in the case).
168 See id. at 741 (“[W]hen a march is planned for the unknown date of some triggering event, so that even two days’ notice is infeasible, the police, as a matter of uncodified practice, will sometimes waive the requirement of a permit.”); Dellums, 566 F.2d at 178 (“[S]tandard practice at the Capitol would be for [dispersal] orders to be given because it was the experience of the Capitol Police that many people were not aware of the statutes governing conduct at the Capitol and would, upon being notified of a potential violation, bring their conduct into line with the law.”); id. at 182 n.34 (“[A]ny plaintiff familiar with precedents of administration of the Capitol Grounds statute could reasonably have concluded that “permits” had been issued, since the Capitol Police had in the past allowed persons invited to the Capitol by Members to come and go freely.”).
courts that they had initially resolved the apparent conflict between the purposes of the relevant statutes, on the one hand, and the demonstrators’ rights, on the other, in favor of the demonstrators.

Third, in each of the cases described above, the court emphasized the demonstrators’ states of mind.\textsuperscript{169} The analysis of demonstrators’ states of mind, moreover, focused not upon the mens rea requirements of the statutes officers sought to enforce, but instead upon demonstrators’ understandings of either the permission that officers had extended or the limitations that officers sought to impose.\textsuperscript{170} Two of the courts quoted Cox’s prohibition on “convicting a citizen for exercising a privilege which the State had clearly told him was available to him.”\textsuperscript{171} In contrast, the other two focused on what demonstrators could have reasonably understood about officers’ commands.\textsuperscript{172}

Finally, at least two courts expressed concern that bystanders and passers-by might have innocently joined or become caught up in the relevant demonstrations.\textsuperscript{173} Thus, each court, independently of the statute at issue, expressed concern about whether the

\textsuperscript{169} Cox, 379 U.S. at 571; Vodak, 639 F.3d at 745–46 (“[Demonstrators] may simply have been following the crowd, thinking that it either was a proper route for the march or a way out.”); Buck, 549 F.3d at 1283 (“[A]ny action by APD officials acquiescing to an unplanned march could reasonably have been interpreted as a waiver of the parade permit requirement.”); Papineau v. Parmley, 465 F.3d 46, 60 (2d Cir. 2006) (noting that demonstrators must know the relevant law and have an opportunity to conform to it); Dellums, 566 F.2d at 192 n.34 (“[A]ny plaintiff familiar with precedents of administration on the Capitol Grounds statute could reasonably have concluded that ‘permits’ had been issued.”).

\textsuperscript{170} Cox, 379 U.S. at 571; Vodak, 639 F.3d at 745–46; Buck, 549 F.3d at 1283; Papineau, 465 F.3d at 60; Dellums, 566 F.2d at 192 n.34.

\textsuperscript{171} Vodak, 639 F.3d at 746–47; Dellums, 566 F.2d at 182.

\textsuperscript{172} Buck, 549 F.3d at 1283; Papineau, 465 F.3d at 60.

\textsuperscript{173} See Vodak, 639 F.3d at 744 (“The police then began culling the trapped herd, arresting marchers along with people who weren’t part of the march but were just trying to get home . . . . “); Fogarty v. Gallegos, 523 F.3d 1147, 1151 (10th Cir. 2008) (discussing the case of a passerby who joined a demonstration after “observ[ing] that several streets had been closed and assum[ing] that police were permitting demonstrators to march in the streets”).
arrestees could have reasonably understood that they engaged in conduct that the officers intended to prosecute.

Finally, when assessing the demonstrators’ states of mind, several courts concluded that the actions or culpability of some would not justify the arrests of many.\(^{174}\) Of course, certain types of conduct are so clearly illegal that they permit officers to impute criminal intentions to a large group of people.\(^{175}\) But where, as in the cases described above, demonstrators might misapprehend the boundary between the permissible and the impermissible, courts have exercised great care to prohibit officers from enforcing the statutes at issue too broadly.\(^{176}\)

The four similarities discussed above reveal the fundamental contours of the right to fair warning. Specifically, where statutes or ordinances impose legitimate restrictions that nonetheless implicate demonstrators’ First Amendment rights, courts will examine not only whether arrestees violated those provisions, but also whether the underlying circumstances would allow demonstrators to reasonably believe that they had engaged in legal conduct. If courts find that demonstrators reasonably, yet mistakenly believed that they acted legally—either because officers permitted certain

\(^{174}\) Vodak, 639 F.3d at 745 (“Maybe the marchers . . . should have guessed that it was a forbidden route as well, and no doubt some did, but others may simply have been following the crowd.”); Papineau, 465 F.3d at 60 (“[P]laintiffs had an undeniable right to continue their peaceable protest activities, even when some in the demonstration might have transgressed the law.”); Dells, 566 F.2d at 177, 183 (requiring officers to believe that “plaintiffs as a group were violating the law”).

\(^{175}\) See Cox, 379 U.S. at 574 (“Nothing we have said here . . . is to be interpreted as sanctioning riotous conduct in any form.”); Carr v. District of Columbia, 587 F.3d 401, 408 (D.C. Cir. 2009); Papineau, 465 F.3d at 60 (noting that, where demonstrators threaten “imminent harm,” officers need not provide fair warning).

\(^{176}\) Vodak, 639 F.3d at 746 (“[T]here was no mechanism . . . for conveying a command to thousands of people.”).
conduct or because only a small number of individuals transgressed the relevant prohibitions—then courts will analyze whether officers effectively dispelled that mistaken belief before making arrests. To dispel a reasonable, yet mistaken belief, however, police officers cannot communicate their demands only to a small fraction of demonstrators. Instead, officers must take measures to ensure that those they subject to penalties have each received the relevant warning. Thus, where circumstances raise questions about how certain, problematic statutes apply to demonstrators, the right to fair warning requires officers to provide individualized notice of what the law requires before they arrest demonstrators for engaging in conduct that the demonstrators may reasonably believe is innocent.\footnote{Although only Papineau discussed this question, the right to fair notice likely also requires that officers provide demonstrators with an opportunity “to conform [their] conduct to the law.” 465 F.3d at 60 (quoting City of Chicago v. Morales, 527 U.S. 41, 58 (1999)).}

2. Unanswered Questions — The outline of the right to fair warning described above raises as many questions as it answers. Most importantly, as described above, the courts that have vindicated the right to fair warning have attributed that right to different sources. Whereas Cox described the right as one to due process, Vodak grounded it in the Fourth Amendment’s protection from unreasonable arrests, and Papineau characterized it as an extension of demonstrators’ right to peacefully protest.\footnote{Compare Cox, 379 F.3d at 571, with Vodak, 639 F.3d at 746, and Papineau, 465 F.3d at 60.} As described below, each of these characterizations is plausible, yet each potential basis would subtly change the right’s scope. Thus, understanding the right to fair warning requires determining exactly which constitutional provision creates that right.
Next, analysis of court of appeals decisions has not answered the two questions raised by Cox. First, when and why do courts focus on officers’ exercise of their discretion, rather than the statute that officers seek to enforce? Undoubtedly, the court of appeals cases clarify when courts will take this approach. In each of the cases described above, including Cox, the court did so when the statute at issue implicated First Amendment rights. Nonetheless, the mere fact that courts shift their focus in such cases does not explain why they do so. Accordingly, the explanation for the analytical turn that the dissent in Cox found so troubling remains to be seen. Second, and similarly, the court of appeals decisions have not clarified the circumstances under which officers who have granted permission may revoke it and when, if ever, the officers may base such revocation on the statute that they have permitted demonstrators to violate.

Finally, the court of appeals decisions raise two additional questions about whether the right to fair warning applies more broadly than the Supreme Court recognized in Cox. First, does the right to fair warning apply not only where officers have explicitly permitted demonstrators to engage in certain conduct, as in Cox, but also where officers have done so implicitly, as in Buck and Vodak? Second, can demonstrators reasonably believe that they do not violate the law only when, as in Cox, they have received permission from officers charged with enforcing the law, or did Papineau appropriately recognize that demonstrators’ could form such a belief based on the fact

179 See supra note 159.
that they exercised their “undeniable right” to peacefully protest?\textsuperscript{180} As described below, the answers to these questions depend upon the origins of the right to fair warning. Accordingly, with these questions in mind, the Article now turns to an examination of each of the potential bases.

II. THE ORIGINS OF DEMONSTRATORS’ RIGHT TO FAIR WARNING

The foregoing discussion suggests that the right to fair warning, while intuitively compelling, remains underdeveloped from a theoretical perspective. Most importantly, courts have not clearly identified the constitutional origin of the right to fair warning. This Part analyzes the three obvious candidates for that origin: the Due Process Clause, the Fourth Amendment, and the First Amendment. Each subpart examines one of these provisions in turn: Part II.A considers the Due Process Clause, Part II.B the Fourth Amendment, and Part II.C the First Amendment. After describing the doctrine that has developed under the relevant constitutional provision, each subpart examines, first, why that provision might provide a plausible explanation for demonstrators’ right to fair warning and, second, the potential problems that might result from attributing the right to that provision. As described below, each constitutional provision discussed could potentially provide a credible basis for the right to fair warning, yet none perfectly explains the right courts have developed.

A. The Due Process Clause

\textsuperscript{180} Papineau, 465 F.3d at 60.
When the Supreme Court first recognized demonstrators’ right to fair warning in \textit{Cox}, it referred specifically to the “Due Process Clause” and to a line of jurisprudence it had developed under that provision.\footnote{\textit{Cox v. Louisiana}, 379 U.S. 559, 571 (1965).} The Due Process Clause protects any “person” from deprivation of “life, liberty, or property, without due process of law.”\footnote{U.S. Const. amend. V; see also U.S. Const. amend. XIV.} In the context of criminal prosecutions, which implicate citizens’ “liberty” interests, due process requires that a government provide “fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.”\footnote{\textit{McBoyle v. United States}, 283 U.S. 25, 27 (1931) (Holmes, J.).} “The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”\footnote{\textit{Bouie v. City of Columbia}, 378 U.S. 347, 351 (1964) (quoting \textit{United States v. Harriss}, 347 U.S. 612, 617 (1954)).} Ordinarily, a legislature provides the necessary fair warning simply by enacting a statute, publishing it, and giving those affected a reasonable opportunity to conform their conduct to it.\footnote{\textit{United States v. Locke}, 471 U.S. 84, 108 (1985) (“In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute’s reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements.”).}

Nonetheless, the Supreme Court has identified three related circumstances in which the existence of a statute alone does not provide fair warning.\footnote{\textit{United States v. Lanier}, 520 U.S. 259, 266 (1997).} “First, the vagueness doctrine bars enforcement of ‘a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily
guess at its meaning and differ as to its application.” Second, “the canon of strict
construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving
ambiguity in a criminal statute as to apply it only to conduct clearly covered.” Finally,
“due process bars courts from applying a novel construction of a criminal statute to
conduct that neither the statute nor any prior judicial decision has fairly disclosed to be
within its scope.” Courts considering vagueness challenges apply a more exacting
standard of review where a statute curtails the exercise of constitutional rights,
including First Amendment rights. In such circumstances, courts seek to ensure not
only that the statute has adequately warned the accused about the illegality of her
conduct, but also that the statute has not, by its vagueness, frustrated the exercise of
constitutional rights by forcing individuals to avoid a wider swath of potentially
covered conduct than the statute can legitimately proscribe.

Building on these principles, the Supreme Court has further recognized that the
actions of officials may create uncertainty about a statute’s application, thereby
depriv ing individuals of fair warning. In Raley v. Ohio, the precedent on which Cox
relied, the Supreme Court considered four Ohio residents who had appeared to testify

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188 Id.
189 Id.
190 See Reno v. ACLU, 521 U.S. 844, 871 (1997) (“Regardless of whether the CDA is so vague that it
violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage
render it problematic for purposes of the First Amendment.”); Colautti v. Franklin, 439 U.S. 379,
391 (1979) (finding lack of notice especially problematic “where the uncertainty induced . . .
threatens to inhibit the exercise of constitutionally protected rights”); Coates v. City of Cincinnati,
402 U.S. 611, 615 (1971) (“But the vice of the ordinance lies not alone in its violation of the due
process standard of vagueness. The ordinance also violates the constitutional right of free
assembly and association.”).
about “subversive activities” before the state’s “Un-American Activities
Commission.” During the course of their testimony, the Commission’s chairman
advised the witnesses that, if they believed their testimony would incriminate them,
they could invoke the Ohio Constitution’s privilege against self-incrimination. Following the witnesses’ invocation of that privilege, however, the state indicted them
for failing to answer, and the Ohio Supreme Court concluded that the privilege did not
protect them from criminal conviction. Considering this sequence of events, the
Supreme Court found a violation of the Due Process Clause. Specifically, it concluded
that, “[a]fter the Commission, speaking for the State, acted as it did, to sustain the Ohio
Supreme Court’s judgment would be to sanction an indefensible sort of entrapment by
the State—convicting a citizen for exercising a privilege which the State had clearly told
him was available to him.” In reaching this conclusion, the Court invoked the Due
Process Clause’s prohibition against convictions under “vague” or “[i]nexplicably
contradictory” statutes. But it also regarded the retraction of the immunity defense as
a more troubling violation of the Due Process Clause, finding that it involved “active
misleading.”

The due process defense recognized in Raley appears to have the following
characteristics. First, the Court’s holding implies that whoever invokes the defense must
show that the relevant official “sp[oke] for the State” and “clearly told” the defendant

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193 Id. at 429–32.
194 Id. at 432–34.
195 Id. at 425–26.
196 Id. at 438.
197 Id.
that her actions were permissible. Second, because the Due Process Clause prohibits conviction only where a defendant cannot “reasonably understand” that she has violated the law,\textsuperscript{198} those who hope to rely on official instructions must show that they had no reasonable basis for doubting that the requirements discussed above were met. Finally, because “the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law,”\textsuperscript{199} officials may prevent further reliance on their mistaken instructions by correcting those instructions and giving individuals a reasonable opportunity to conform their conduct to the newly disclosed requirements.

As described, \textit{Raley}’s due process defense resembles the defense recognized in Model Penal Code § 2.04(3)(b)(iv). Under that provision, a “belief that conduct does not legally constitute an offense is a defense” so long as an individual “acts in reasonable reliance upon an official statement of the law . . . contained in . . . an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.”\textsuperscript{200} In exploring the contours of the defense from \textit{Raley}, courts have frequently analogized that defense to the one recognized in the Model Penal Code. Courts doing so have generally concluded that the official who offers the interpretation on which a defendant hopes to rely must actually possess, rather than merely appear to possess, the responsibility

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\textsuperscript{200} Model Penal Code § 2.04(3)(b)(iv).
described by the Code. Similarly, courts have held that a defendant may not rely on statements that an officer has made to others, rather than to the defendant herself. Thus, the analogy to Model Penal Code § 2.04(3)(b)(iv) has reinforced the narrowness of Raley’s requirements that an official “speak[] for the State” and “clearly t[ell]” defendants that a privilege is available. To qualify for the defense, defendants must obtain personal guarantees about the legality of questionable conduct, and they must carefully distinguish those with apparent authority from those with actual authority, trusting only the latter.

The cases vindicating demonstrators’ rights to fair warning provide several reasons to believe that the Due Process Clause creates that right. First and foremost, as noted above, Cox specifically cited to the Raley defense when first recognizing demonstrators’ right to fair warning. More generally, in several of the cases involved, demonstrators relied on the instructions of police officers who bore “responsibility for the . . . enforcement of the law defining the offense,” and thus could arguably give an

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201 See, e.g., United States v. Gutierrez-Gonzalez, 184 F.3d 1160, 1167–68 (10th Cir. 1999) (“[W]e hold that the defense of entrapment by estoppel requires that the ‘government agent’ be a government official or agency responsible for interpreting, administering, or enforcing the law defining the offense.” (collecting cases)). Nonetheless, at least one judge has required instead that an official only appear to the defendant to have interpretive authority. See United States v. Baker, 546 F.2d 940, 954 (D.C. Cir. 1976) (Wilkey, J.) (“[A] citizen should have a legal defense to a criminal charge arising out of an unlawful arrest or search which he has aided in the reasonable belief that the individual who solicited his assistance was a duly authorized officer of the law.”). The majority of circuit courts have rejected Judge Wilkey’s rationale. See, e.g., United States v. Pitt, 193 F.3d 751, 757–58 & n.7 (3d Cir. 1999) (collecting cases and concluding that “the use of the defense of public authority [is limited] to those situations where the government agent in fact had the authority to empower the defendant to perform the acts in question”).

202 See United States v. Eaton, 179 F.3d 1328, 1332 (11th Cir. 1999) (“For a statement to trigger an entrapment-by-estoppel defense, it must be made directly to the defendant, not to others.”).

authoritative interpretation of the law under Model Penal Code § 2.04(3)(b)(iv).\footnote{Model Penal Code § 2.04(3)(b)(iv); Cox, 379 U.S. at 571 ("[T]he highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did."); Vodak v. City of Chicago, 639 F.3d 738, 741 (7th Cir. 2011) (noting that police officers could “waive the requirement of a permit”); Buck v. City of Albuquerque, 549 F.3d 1269, 1284 (10th Cir. 2008) (same); Dellums v. Powell, 566 F.2d 167, 182 n.34 (D.C. Cir. 1977) (noting that officers could issue “permits” and had in fact created “precedents of administration” governing the issuance of permits). \textit{But see Pitt,} 193 F.3d at 757–58 & n.7 (concluding that “the use of the defense of public authority [is limited] to those situations where the government agent in fact had the authority to empower the defendant to perform the acts in question").} For example, in \textit{Vodak}, the police department could “waive” the requirement of a parade permit.\footnote{\textit{Vodak}, 639 F.3d at 741.} Similarly, in \textit{Dellums}, the Capitol Police had generated “precedents of administration” for “the Capitol Grounds statute,” and the D.C. Circuit interpreted officers’ commands from the perspective of someone “familiar” with those precedents.\footnote{\textit{Dellums}, 566 F.2d at 182 n.34.} Thus, police officers frequently administer the traffic regulations that restrict demonstrators’ ability to protest, and this fact provides the foundation necessary for demonstrators to reasonably rely on officers’ commands as “official statement[s] of the law,” which give rise to a due process defense.

Second, demonstrators’ reliance on on-the-spot instructions by police officers often implicates the Due Process Clause’s vagueness concerns.\footnote{See supra text accompanying notes 187–191.} For example, in \textit{Dellums}, a court had previously invalidated the statute at issue—which largely banned parading on the Capitol Grounds—as unduly vague because the officers administering it had the power to suspend its prohibitions.\footnote{566 F.2d at 177–80 & n.12.} According to that court, the power of suspension prevented demonstrators from “knowing whether they might be in
violation of the law . . . except by . . . inquiries to . . . members of the Capitol Police Force. 209 Officers have had a similar ability to suspend parade permit requirements in several of the cases that have protected demonstrators’ rights to fair warning. 210 Thus, in these cases, as in Dellums, ambiguity exists as to what conduct an ordinance covers, 211 and demonstrators cannot determine what that ordinance prohibits without asking the officers charged with enforcing it. In Dellums, the D.C. Circuit concluded that, in order to overcome the statute’s vagueness problem, officers had to issue “an order to quit” before making any arrests. 212 In other words, because only the officers could dispel the underlying vagueness problem, the court asked not whether the officers had clearly told demonstrators that they could engage in the underlying conduct, but instead whether officers had clearly told them they could not. While such an approach does not straightforwardly apply the Raley defense invoked in Cox, it recognizes a more fundamental due-process problem: namely, the fact that demonstrators cannot reasonably discern what the law requires before they have received the benefit of an official interpretation.

Finally, the fact that the cases recognizing demonstrators’ right to fair warning all implicate First Amendment rights may only sharpen, rather than displace, the inquiry

209 Id. at 179.
210 See Vodak, 639 F.3d at 741 (“[T]he police, as a matter of uncodified practice, will sometimes waive the requirement of a permit.”); Buck, 549 F.3d at 1283 (finding that officers, by closing streets and “directing the procession,” had “essentially” granted “a de facto parade permit”); cf. Cox, 379 U.S. at 571 (“[T]he highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did.”).
212 566 F.2d at 181.
under the Due Process Clause. Where litigants challenge a statute that restricts First Amendment rights on vagueness grounds, the Supreme Court has described First Amendment concerns as “related” to those raised by the Due Process Clause. Thus, when reviewing such challenges, the Court seeks not only to ensure notice—a core due process concern—but also to avoid chilling the exercise of “basic First Amendment freedoms.” Similarly, where, as described above, officers administer permitting schemes through on-the-spot determinations, courts might worry that uncertainty about whether a parade has a permit could prevent interested citizens from joining even sanctioned marches, thus chilling protected speech. Such a concern, however, would not indicate that courts reviewed the case under the First Amendment rather than the Due Process Clause, but instead only that they applied a heightened form of due-process analysis that incorporated First Amendment principles. Thus, the Due Process Clause could very plausibly provide the basis for the right to fair warning.

Nonetheless, the Due Process Clause cannot explain everything about the right to fair warning that courts have attributed to demonstrators. First, the Due Process Clause provides little insight into why the Supreme Court disregarded the Sheriff’s dispersal...
order in Cox. 216 Because the Court had rejected the Cox’s vagueness challenge to the statute, resting its holding instead on Cox’s defense under Raley, 217 the Sheriff’s dispersal order should have precluded Cox from prevailing. In effect, far from telling Cox that he could demonstrate, the dispersal order “clearly told” Cox that he could not, revoking officers’ earlier permission and reinstating the statute’s normal operation. 218 The Supreme Court’s stated reason for disregarding the dispersal order—namely, that the Sheriff had not expressed a “valid reason” for that order—does not resonate with the concerns that animate Due Process review. 219 As described above, the Due Process Clause prohibits holding someone “criminally responsible for conduct which he could not reasonably understand to be proscribed,” 220 it does not entitle a person who has that understanding, based on both the statute and the instructions of the officer charged with enforcing it, to an account of how their prosecution “[r]elate[s] to any policy” of the statute. 221 Moreover, although the Supreme Court has stated that the Due Process Clause forbids “arbitrary and discriminatory enforcement,” 222 reviewing the officers’

217 Id. at 568, 571.
218 The dissenters regarded this point as dispositive:

If the crowd was entitled to obstruct in order to demonstrate as the Court holds, it is nevertheless unnecessary to hold that the demonstration and the obstruction could continue ad infinitum. Here the demonstration was permitted to proceed for the period of time that the demonstrators had requested. When they were asked to disband, Cox twice refused. If he could refuse at this point I think he could refuse at any later time as well. But in my view at some point the authorities were entitled to apply the statute and to clear the streets. That point was reached here.

Id. at 593 (White, J., dissenting).
219 Id. at 572.
221 Id. at 573.
stated reasons for revoking permission, as the Court did in Cox, regulates only the appearance of such enforcement. Where demonstrators have a mere right to hear a valid reason for their dispersal, little will prevent officers from engaging in precisely the discrimination that the Due Process Clause forbids. Finally, the Court in Cox did not engage in the most basic aspects of a discrimination analysis, asking neither whether officers had treated others differently, nor whether the purpose the Court had attributed to the statute—namely, protecting “the judicial process from being misjudged in the minds of the public”—provided a legitimate, nondiscriminatory reason for the officers’ actions. Thus, whatever motivated the Court to disregard the Sheriff’s dispersal order in Cox, that decision appears to have had little to do with the Court’s invocation of the Due Process Clause.

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

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223 Cf. supra text accompanying notes 80–81.
224 Cf. Cox, 379 U.S. at 581 (Black, J., dissenting) (comparing statute’s treatment of labor unions to its treatment of other groups).
225 Id. at 565.
226 Raley v. Ohio, 360 U.S. 423, 426 (1959); see also United States v. Pitt, 193 F.3d 751, 757–58 & n.7 (3d Cir. 1999) (concluding that “the use of the defense of public authority [is limited] to those situations where the government agent in fact had the authority to empower the defendant to perform the acts in question”).
conduct or otherwise.\textsuperscript{227} Similarly, in \textit{Vodak}, the Seventh Circuit found that officers could waive the permit requirement “as a matter of uncodified practice,” which consisted entirely “in \textit{not} telling demonstrators that they need[ed] a permit.”\textsuperscript{228} Finally, in \textit{Dellums}, the statute at issue permitted only “the President of the Senate and the Speaker of the House of Representatives” to suspend its requirements, conferring authority on the “Police Board” only in their absence.\textsuperscript{229} Only a court decision interpreting that statute had given officers a meaningful role in its interpretation.\textsuperscript{230} In such circumstances, courts risk extending the \textit{Raley} defense too far. The mere fact that officers enforce a statute or regulation cannot empower them to suspend it.\textsuperscript{231} Instead, as commentators have argued, the availability of the \textit{Raley} defense must turn on legislative intent, the likelihood that the relevant official has carefully studied the scope and effect of a particular law, and the degree to which that official can be held accountable for authorizing otherwise unlawful conduct.\textsuperscript{232} As described above, however, the cases recognizing demonstrators’ right to fair warning have not considered these complicated questions, suggesting that, if they apply the \textit{Raley} defense, they do so only superficially.

\begin{itemize}
\item \textsuperscript{227} 549 F.3d 1269, 1283 (10th Cir. 2008).
\item \textsuperscript{228} 639 F.3d 738, 741 (7th Cir. 2011).
\item \textsuperscript{229} 566 F.2d 167, 177 n.12 (D.C. Cir. 1977).
\item \textsuperscript{230} \textit{Id.} at 179–80.
\item \textsuperscript{231} \textit{Cf. Pitt}, 193 F.3d at 758 (“\textsc{O}nly the Director of Customs and the Director of the Drug Enforcement Agency, in conjunction with the approval of the United States Attorney for the subject district, could sanction and authorize the type of conduct in which Pitt and Strube engaged with respect to the charged 468 kilograms of cocaine.”).
\end{itemize}
More importantly, however, the courts considering demonstrators’ right to fair warning have turned *Raley*'s second requirement on its head, asking not whether officers “clearly told” demonstrators that they could march, but instead whether they clearly told them they could not. As noted above, in *Vodak*, the officers’ grant of permission consisted only “in not telling the demonstrators that they need a permit.”

In *Buck*, the Tenth Circuit asked how demonstrators could have “reasonably . . . interpreted” officers’ actions. Thus, in each case, officers had not met the requirement that they clearly tell demonstrators that they would not require a permit, and the *Raley* defense did not apply. Neither can one explain courts’ decisions on that basis that officers’ conduct rendered the underlying regulatory regime vague.

No court appears to have held that an officer’s decision not to enforce a legal provision can render that provision vague under the Due Process Clause, and for good reason: such a holding would conflict with the “deep-rooted” tradition of “law-enforcement discretion.” As the Supreme Court has held, “[i]t is . . . simply ‘common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.’” If the decision not to enforce rendered enforcement constitutionally impermissible, then officers would have no discretion over “when . . . to enforce city ordinances.”

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233 639 F.3d at 741.
234 549 F.3d 1269, 1283 (10th Cir. 2008).
235 See supra text accompanying notes 207–212.
237 *Id.* (quoting *City of Chicago v. Morales*, 527 U.S. 41, 62 n.13 (1999)).
officers could not make an initial arrest, enforcement discretion would be eliminated altogether.\textsuperscript{238}

Moreover, if a lack of enforcement generates constitutional protection, then demonstrators can confer rights on themselves and each other, a result that is difficult to explain under the Due Process Clause.\textsuperscript{239} In \textit{Vodak}, the Seventh Circuit acknowledged that some demonstrators may not have received any instructions from officers, and instead were “simply . . . following the crowd.”\textsuperscript{240} In \textit{Buck}, the fact that demonstrators “spill[ed] over onto” adjacent crosswalks forced officers to close more streets that they had originally planned, which in turn permitted demonstrators to “flood[] into” new areas.\textsuperscript{241} In \textit{Garcia v. Bloomberg}, a district court case, officers confronted a large demonstration at the base of the part of the Brooklyn Bridge reserved for vehicles.\textsuperscript{242} The officers retreated onto the bridge, but ordered the demonstrators at the front of the crowd not to follow.\textsuperscript{243} After the demonstrators at the front defied the officers’ orders,

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\textit{Id.} at 760 (quoting 1 ABA Standards for Criminal Justice 1-4.5, commentary, pp. 1-124 to 1-125 (2d ed. 1980)). Such situations arise. In \textit{Garcia v. Bloomberg}, a small group of police officers had blocked the entrance to the Brooklyn Bridge’s vehicular roadway. 865 F. Supp. 2d 478, 482–83 (S.D.N.Y. 2012). After a large group of demonstrators gathered in front of the officers and began chanting, the officers retreated onto the bridge. \textit{Id.} The demonstrators followed and, after reinforcements arrived, the officers arrested them. \textit{Id.} at 483–84.
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\textit{United States v. Eaton}, 179 F.3d 1328, 1332 (11th Cir. 1999) (“The defense applies only when an official \textit{tells a defendant} that certain conduct is legal.” (internal quotation marks and emphasis omitted)). Moreover, this result is precisely what the dissenters in \textit{Cox} feared. \textit{Cf. Cox v. Louisiana}, 379 U.S. 559, 588 (1965) (Clarke, J., dissenting) (“Here the demonstrators were determined to go to the courthouse regardless of what the officials told them regarding the legality of their acts. Here, like the one petitioner in \textit{Raley} whose conviction was affirmed by an equally divided Court, appellant never relied on the advice or determination of the officer.”).
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\textit{Vodak v. City of Chi.}, 639 F.3d 738, 745 (7th Cir. 2011).
\textit{Fogarty v. Gallegos}, 523 F.3d 1147, 1151 (10th Cir. 2008); \textit{see also Buck v. City of Albuquerque}, 549 F.3d 1269, 1274 (10th Cir. 2008) (noting that the 10th Cir. had described the relevant facts in \textit{Fogarty v. Gallegos}).
\textit{Id.} at 482–83.
\textit{Id.}
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many others erroneously concluded that the officers had given permission to cross the bridge, and at least 700 demonstrators attempted to do so.\textsuperscript{244} These examples demonstrate that, if officers need not give explicit permission to trigger demonstrators’ rights, then the existence of constitutional protection will depend on informational dynamics that officers cannot control.\textsuperscript{245} The concern that individuals may misinterpret commands given to third parties has led courts to apply the \textit{Raley} defense only when permission is given “directly to the defendant.”\textsuperscript{246} One court has even warned that a different approach would “eviscerate the long-standing notion that ignorance of the law is no defense to a crime” since reasonable mistakes about officers’ interactions with others abound.\textsuperscript{247} Thus, courts construing demonstrators’ right to fair warning have consistently regarded that right as broader than the due process right they have recognized in other circumstances.

Finally, the Due Process Clause cannot explain the Second Circuit’s decision in \textit{Papineau v. Parmley}.\textsuperscript{248} In \textit{Papineau}, the officers did not give any instructions to the demonstrators.\textsuperscript{249} Nor did the Second Circuit characterize the statute at issue, which prohibited obstructing traffic, as vague.\textsuperscript{250} Rather, the court reasoned that officers had to give fair warning before dispersing the demonstrators because those “demonstrators

\textsuperscript{244} \textit{Id.} at 483–84.
\textsuperscript{245} Cf. Bert I. Huang, \textit{Shallow Signals}, 126 Harv. L. Rev. 2227, 2230 (2013) (describing how individuals may mistakenly imitate others, who they believe are engage in legal conduct, leading to a “spread of misconduct”).
\textsuperscript{246} \textit{United States v. Eaton}, 179 F.3d 1328, 1332 (11th Cir. 1999). In \textit{Eaton}, the defendant had relied “on the perceived pattern of Government agents allowing other missionaries to import snakes in their personal luggage.” \textit{Id.}
\textsuperscript{247} \textit{Id.}
\textsuperscript{248} 465 F.3d 46, 60–61 (2d Cir. 2006).
\textsuperscript{249} \textit{Id.} at 52–53.
\textsuperscript{250} \textit{Id.} at 59–60.
had an undeniable right to continue their peaceable protest activities, even when some in the demonstration might have transgressed the law.” In other words, while the demonstrators in Papineau had the requisite belief in the legality of their conduct, that belief originated not from uncertainty about what the law required, but instead from the First Amendment’s protections, which required solicitude even where officers had a valid basis for arresting some members of the group. Thus, while the Due Process Clause provides a plausible basis for some aspects of the right to fair warning, it fails to explain others, raising questions about whether it motivates the decisions courts have reached.

B. The Fourth Amendment

In contrast to Cox, which invalidated a criminal conviction, subsequent cases have considered demonstrators’ right to fair warning in the context of § 1983 claims alleging that officers had violated the Fourth Amendment by arresting demonstrators. Under the Fourth Amendment, an officer may arrest a suspect without first obtaining a warrant only if the officer has probable cause to believe that the suspect has committed or will commit a crime. An officer has probable cause when, viewing “the events leading up to the arrest . . . from the standpoint of an objectively reasonable police

\(^{251}\) Id. at 60.

officer,” there is a “reasonable ground for the belief of guilt.” That belief of guilt, however, must be “particularized with respect to the person to be . . . seized.”

Because the Fourth Amendment governs whether or not officers can arrest demonstrators, courts considering demonstrators’ § 1983 claims for false arrest will invoke the Fourth Amendment regardless of whether that provision provides the basis for the right to fair warning. Put differently, even if the Fourth Amendment does not require officers to provide fair warning, it will still prohibit them from making an arrest in the absence of fair warning, and thus it will play some analytical role in any case that involves arrests. As a result, the question of whether the Fourth Amendment creates the right to fair warning differs from the question of whether courts invoke the Fourth Amendment when prohibiting the arrest of demonstrators who have not received fair warning. To answer the former question, we must ask whether the requirement that officers have probable cause creates the need for fair warning in cases like those under consideration.

At least two courts have perceived a connection between the requirement of probable cause and the need for fair warning. In both cases, the courts noted that police officers had discretion to waive the permit requirements they sought to enforce.

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254 Id. at 371. Moreover, because courts view the circumstances from the perspective of a reasonable officer, the arresting officer’s state of mind “is irrelevant to the existence of probable cause,” and the offense an officer identifies when making an arrest need not be the offense that a reasonable officer would suspect. Devenpeck, 543 U.S. at 153–54.
255 See generally Vodak v. City of Chicago, 639 F.3d 738 (7th Cir. 2011) (Posner, J.); Buck v. City of Albuquerque, 549 F.3d 1269 (10th Cir. 2008).
and had in fact granted such a waiver. 256 Because police officers could waive these requirements, the crime of parading without a permit effectively had an unwritten element: the absence of a waiver from police officers. In order to have probable cause to arrest demonstrators for parading without a permit, officers needed to have a reasonable basis for believing that this unwritten element had been satisfied, *i.e.*, that they had not granted a waiver to the demonstrators. Thus, where officers had previously granted a waiver, they could not have particularized probable cause with respect to a large group of demonstrators until they had provided demonstrators with adequate notice of the revocation of that waiver. A different approach would allow officers to arrest demonstrators simply because the officers had changed their minds, a result the Seventh Circuit found utterly unacceptable in *Vodak*:

> No precedent should be necessary . . . to establish that the Fourth Amendment does not permit the police to say to a person go ahead and march and then, five minutes later, having revoked the permission for the march without notice to anyone, arrest the person for having marched without police permission. 257

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

This rationale, while persuasive, nonetheless raises many difficult questions that might lead other courts to reject it. First, the courts that have propounded this rationale

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256 *Vodak*, 639 F.3d at 741; *Buck*, 549 F.3d at 1283 (“[O]fficers’ conduct essentially amounted to the grant of a *de facto* parade permit, as the officers would have been aware.”).

257 639 F.3d at 746–47; see also *Buck*, 549 F.3d at 1283–84 (approving of the district court’s conclusion that “none of the . . . officers could have had probable cause” because “any action by . . . officers acquiescing to an unplanned march could reasonably have been interpreted as a waiver of the parade permit requirement”).
have neither explained why police officers can grant waivers nor examined what procedures they must employ when doing so. In Vodak, the Seventh Circuit admitted that waivers occurred “as a matter of uncodified practice” and consisted “just in not telling the demonstrators that they need[ed] a permit.” In Buck, the Tenth Circuit apparently took for granted that officers had the authority to grant a “de facto parade permit” through their “conduct.” Thus, skeptics might reasonably ask why these courts have excepted the parade-permitting ordinances at issue from the general rule that officers may not suspend the criminal law and that the failure to initially enforce an ordinance does not deprive officers of the discretion to do so later.

Moreover, the courts that ground the right to fair warning in the Fourth Amendment have derived their standards for determining when officers must provide such warning from other legal provisions. Officers comply with the Fourth Amendment whenever they enforce a specific criminal statute or ordinance in a reasonable manner. The reasonableness of failing to provide a warning depends not on the Fourth Amendment, but instead on the content of the underlying statute. Thus, even courts that ground the right to fair warning in the Fourth Amendment look to other sources when determining what that right entails. Vodak illustrates this point. While the Seventh Circuit argued that officers had revoked permission without notice, the officers arguably had not permitted demonstrators to depart from the organizers’ “intended

\[258\] 639 F.3d at 741.
\[259\] 549 F.3d at 1283.
\[260\] See Cox v. Louisiana, 379 U.S. 559, 588 (1965) (Clark, J., dissenting) (“I never knew until today that a law enforcement official . . . could forgive a breach of the criminal laws.”); see also supra notes 236–238 and accompanying text.
\[261\] Cf. United States v. Dotterweich, 320 U.S. 277, 284 (1943) (interpreting a statute to criminalize conduct even though “consciousness of wrongdoing be totally wanting”).
route,” and the arrests in fact occurred far away from that route. The Seventh Circuit did not address whether, under the Fourth Amendment, the officers could have reasonably concluded that they had not permitted the conduct for which they arrested the demonstrators. Instead, the court inferred broad permission from the fact that officers had not insisted that demonstrators adhere to the intended route “as a condition of waiving the permit requirement.” But the need for officers to impose such conditions derived from the interplay between the First Amendment, which required officers to permit spontaneous marches, and the parade-permitting ordinance, which empowered the officers to take measures to regulate traffic. Thus, the Seventh Circuit effectively understood the word “permission” as a term of art, construing it not in light of the Fourth Amendment’s touchstone of reasonableness, but instead based on the interplay between a specific statutory scheme and the First Amendment.

If the underlying ordinance governs the reasonableness of an arrest, then the considerations that have led courts to imply an “uncodified” exception to the ordinance should also impose the requirement of fair warning. Vodak again provides a good example. On its face, Vodak might be interpreted to suggest that the officers needed to provide warnings only because they had previously permitted the relevant conduct.

262 Vodak, 639 F.3d at 742–43, 746–47.
263 Id. at 750.
264 See id. at 749–50 (noting that, although the ordinance cannot “flatly ban groups of people from spontaneously gathering . . . in response to a dramatic news event,” it does permit officers to “hold” demonstrators to an “intended march route” as “a condition of waiving the permit requirement”).
265 See supra text accompanying notes 155–156.
266 Vodak, 639 F.3d at 741.
267 Id. at 746–47 (faulting the police for “having revoked the permission without notice to anyone”).
As noted above, however, the Seventh Circuit understood permission in light of First Amendment principles. A close analysis of the decision reveals that this understanding of permission essentially incorporated the concept of fair warning. According to the Seventh Circuit, officers could avoid granting permission only if they both insisted on a particular route and “prepare[d] in advance reasonable measures for preventing the demonstration from spilling over the boundaries of the authorized march.”\(^{268}\) In other words, officers had granted permission by failing to take sufficient steps to ensure that demonstrators understood what was forbidden. In contrast to a focus on factors that demonstrators could not perceive, such as negotiations between officers and organizers, the Seventh Circuit’s approach ensured that officers provided a warning to those demonstrators the court characterized as innocent—\(i.e.,\) those who “simply decided that the [planned route] was too long a walk,” those who were “simply . . . following the crowd,” and those who “weren’t part of the march but were just trying to get home.”\(^{269}\)

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

\(^{268}\) Id. at 750.

\(^{269}\) Id. at 743–45. The Tenth Circuit discussed similar examples. See supra notes 121, 125.
ordinance. By implication, then, the concept of fair warning incorporated into that understanding of permission also derives from those same, competing requirements. Thus, the “background role” the Seventh Circuit attributed to the First Amendment—i.e., the fact that the First Amendment required the alteration of the parade-permitting ordinance at issue—permeated the entirety of the court’s analysis, informing even the concept of “notice” that the court ascribed to the Fourth Amendment.

The apparent prominence of the First Amendment in the Seventh Circuit’s Fourth Amendment analysis is no coincidence. Whether an officer has reasonably arrested a demonstrator will depend on courts’ expectations about how officers should interact with demonstrators. Courts, in turn, form these expectations by reference to the legal provisions that govern such interactions, most notably the First Amendment. Thus, the First Amendment may pervade courts’ thinking in such cases, and those seeking the source of the right to fair warning have reason to doubt that the Fourth Amendment alone can suffice. In short, since reasonableness depends on context, the Fourth Amendment’s requirement of reasonableness may create a right to fair warning only where the context demands it.

C. The First Amendment

All of the cases in which courts have protected the right to fair warning have involved statutes or ordinances that implicate demonstrators’ right to communicate their views in public fora. The Supreme Court has long recognized that “streets and

270 See supra text accompanying notes 263–264.
271 Vodak, 639 F.3d at 746–47.
parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

Nonetheless, the right to communicate in the streets is “relative,” rather than “absolute,” and legislatures may regulate it to promote “peace,” “good order,” “comfort,” and “convenience.” Legislatures may not, however, “in the guise of regulation,” “abridge[ ]” or “den[y]” First Amendment rights.

In general, courts permit legislatures to regulate demonstrators’ access to the streets through nondiscriminatory limitations on the “time, place and manner” of demonstrations. In the words of Henry Kalven, time, place, and manner restrictions are justified by “the unbeatable proposition that you cannot have two parades on the same corner at the same time.”

Exactly what level of scrutiny the Supreme Court applies to time, place, and manner restrictions is unclear. While the Court has characterized the government’s ability to impose such a “prior restraint” on speech in public fora as “very limited,” it has recognized a great number of governmental interests that may justify time, place, and manner restrictions. Furthermore, although


273 Id.

274 Id.


276 Kalven, supra note 159, at 25.


the Court has required legislatures to narrowly tailor time, place, and manner restrictions to the governmental interests they promote, it has clarified that a prohibition “need not be the least restrictive or least intrusive means of” accomplishing a legitimate purpose, but instead will pass muster so long as the legitimizing purpose “would be achieved less effectively absent the regulation.”279

The Supreme Court has further held that time, place, and manner restrictions must “leave open ample alternative channels of communication.”280 Courts have not fully resolved what this entails for public demonstrations, but many have recognized that “[s]taged demonstrations—capable of attracting national or regional attention in the press and broadcast media—are for better or worse a major vehicle by which those who wish to express dissent can create a forum in which their views may be brought to the attention of a mass audience.”281 Given the importance of demonstrations, courts have consistently concluded that ordinances requiring parade permits—although generally permissible as time, place, and manner restrictions282—must include an exception for spontaneous demonstrations that respond to emerging events.283 The

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281Dellums v. Powell, 566 F.2d 167, 195 (D.C. Cir. 1977); see also id. (“It is facile to suggest that no damage is done when a demonstration is broken up . . . simply because . . . the demonstration might be held at another day or time.”).
283See Church of Am. Knights of Ku Klux Klan v. City of Gary, 334 F.3d 676, 682 (7th Cir. 2003) (“[G]iven that the time required to consider an application will generally be shorter the smaller the planned demonstration and that political demonstrations are often engendered by topical events, a very long period of advance notice with no exception for spontaneous demonstrations
courts imposing this requirement reason that, because demonstrations often seek to attract immediate attention to contemporaneous developments, even short delays may leave only inadequate alternative channels of communication. Based on these concerns, many local governments have endeavored, either formally or informally, to incorporate exceptions for spontaneous demonstrations into their permitting schemes.

unreasonably limits free speech.”); see also Sullivan v. City of Augusta, 511 F.3d 16, 38 (1st Cir. 2007) (“Notice periods restrict spontaneous free expression and assembly rights safeguarded in the First Amendment.”); Am.-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 605 (6th Cir. 2005) (“Any notice period is a substantial inhibition on speech.”); Douglas v. Brownell, 88 F.3d 1511, 1523–24 (8th Cir. 1996) (“We are convinced, however, that the five-day notice requirement is not narrowly tailored.”); NAACP v. City of Richmond, 743 F.2d 1346, 1355 (9th Cir. 1984) (“[T]he delay inherent in advance notice requirements inhibits speech. By requiring advance notice, the government outlaws spontaneous expression.”); cf. Boardley v. U.S. Dep’t of Interior, 615 F.3d 508, 523 (D.C. Cir. 2010) (invalidating a permitting scheme that “effectively forb[a]d[e] spontaneous speech” by small groups).

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

285 See Fort Wayne, Ind., Code of Ordinances § 101.03(D) (1996) (“This chapter shall not apply to . . . ”); spontaneous events occasioned by news or affairs coming into public knowledge within three days of such public assembly, provided that the organizer thereof gives written notice to the city at least 24 hours prior to such public assembly, parade, neighborhood association parade or block party.”); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1045 (9th Cir. 2006) (“Santa Monica’s spontaneous events exception provides that ‘[s]pontaneous events which are occasioned by news or affairs coming into public knowledge less than forty-eight hours prior to such event may be conducted on the lawn of City Hall without the organizers first having to obtain a Community Event Permit.”’ (quoting local ordinance)); City of Dearborn, 418 F.3d at 612 (“Other cities such as Omaha, Nebraska, exempt spontaneous political demonstrations entirely from their parade ordinances.”); City of Gary, 334 F.3d at 682 (“The City does have an unwritten policy of waiving the permit requirement for a ‘spontaneous’ demonstration, but only if the demonstration is ‘not planned.’”).
Thus, even though statutes may generally restrict the time, place, and manner of
demonstrations, the First Amendment’s guarantee of “ample alternative channels of
communication” forecloses any absolute prohibition on protestors’ ability to speak here
and now.

Laws criminalizing disorderly conduct also implicate First Amendment rights. In
the words of the Supreme Court: “[A] function of free speech under our system of
government is to invite dispute. It may indeed best serve its high purpose when it
induces a condition of unrest, creates dissatisfaction with conditions as they are, or even
stirs people to anger.” Accordingly, the hostile reaction of a crowd to protestors’
unpopular views cannot render protestors guilty of disorderly conduct. Instead,
legislatures can categorize speech itself as disorderly conduct only where the speaker
both intends to incite “imminent lawless action” and is likely to succeed. Moreover,
even where disorderly conduct statutes focus on the obstruction of traffic, rather than
on speech, courts endeavor to ensure that the statutes circumscribe officers’ discretion
and do not, through their vagueness, permit discriminatory enforcement. For
example, a statute cannot allow officers to permit some protestors to obstruct traffic
unless it contains detailed standards that apply equally to all. Thus, because protected
speech so often confronts and challenges listeners, the First Amendment requires
disorderly conduct statutes to operate neutrally, clearly, and within narrow boundaries.

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290 Id. Courts’ treatment of parade-permit requirements strongly suggests that a complete ban on
the obstruction of traffic, with no exception for expressive conduct, would violate the First
Amendment. See supra text accompanying notes 280–285.
In applying the substantive law described above, courts often consider how statutes affect not only the particular litigants before them, but also others who engage in indisputably protected conduct. This approach, called overbreadth review, originates from an understanding that a “statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”  

When a statute is overbroad, courts need not attempt to foresee every type of legitimate speech that it may “chill,” and can instead strike the statute down in its entirety. Because overbreadth review permits litigants to seek the complete invalidation of a statute based on its unconstitutional application to others, it constitutes a departure both from “traditional rules of standing,” which require each plaintiff to demonstrate personal injury, and from “traditional rules governing constitutional adjudication,” which require a court to consider only the particular circumstances before it. In light of these

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291 Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). Some scholars, including Professor Henry Paul Monagan, argue that overbreadth review, rather than shielding third parties from impermissible deterrence, protects litigants’ right to “insist on the application of a constitutionally valid rule.” Monaghan, supra note 19, at 4; see also Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853, 867 (1991) (describing the differences between two prevailing theories of overbreadth). The scholarly dispute over the origins of overbreadth review does not, however, change the analysis of whether the First Amendment creates demonstrators’ right to fair warning. Monaghan’s understanding of overbreadth review acknowledges that courts must consider other potential applications of a law when determining whether that law is “constitutionally valid.” Monaghan, supra note 19, at 9–10. Moreover, Monaghan argues that First Amendment concerns require increased scrutiny of such applications by limiting courts’ abilities to sever problematic legislative provisions from permissible ones. Fallon, supra, at 871–72. Thus, according to either understanding, First Amendment overbreadth review requires probing analysis of a law’s application to potentially protected conduct. To the extent that courts conduct the same analysis when protecting demonstrators’ right to fair warning, see infra text accompanying notes 305–310, they suggest that First Amendment principles inform that right.


293 Broadrick, 413 U.S. at 613; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (requiring that “the party seeking review be himself among the injured” (quoting Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972))).
departures, courts have characterized overbreadth review as “strong medicine,” using it “sparingly and only as a last resort.” For a court to apply overbreadth review, the potential for unconstitutional application of a statute to third parties “must not only be real, but substantial as well.” Moreover, when the parties challenging a statute themselves engage in protected conduct, courts retain their discretion to apply a limiting construction, declaring the statute “invalid to the extent that it reaches too far, but otherwise [leaving it] intact.” Thus, while overbreadth review provides courts with a strong tool to deploy in defense of First Amendment values, courts often seek to avoid using it precisely because of its strength. Both the Supreme Court and lower courts have subjected time, place, and manner requirements and other restrictions on demonstrators to overbreadth review.

Numerous considerations potentially indicate that, when courts enforce the right to fair warning, they consciously or unconsciously invoke the First Amendment. First, a concern over vagueness and unbounded officer discretion is critical to the inquiry under both the First Amendment and the right to fair warning. The First Amendment requires time, place, and manner restrictions to prescribe “narrow, objective, and

294 Broadrick, 413 U.S. at 613.
295 Id. at 615.
297 See Forsyth v. Nationalist Movement, 505 U.S. 123, 129–30 (1992); Broadrick, 413 U.S. at 612–13 (“Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct.”); Cox I, 379 U.S. 536, 551 (1965) (“The [breach of peace] statute at issue in this case . . . is unconstitutionally vague in its overly broad scope.”); Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle, 550 F.3d 788, 794 (9th Cir. 2008) (“[B]oth the Supreme Court and we have repeatedly allowed plaintiffs to bring facial challenges to permitting schemes that regulate expressive activity.”).
definite standards” for the officials charged with applying them.288 Such standards prevent officials from discriminating based on the content of speech, and thus from effectively acting as censors.299 Moreover, as the Supreme Court has made clear, vague standards inhibit free speech by forcing demonstrators to avoid areas of legal uncertainty and “restrict[] their conduct to that which is unquestionably safe.”300 Thus, definite standards both prevent content-based discrimination and permit demonstrators to confidently exercise the full scope of their First Amendment rights.

The right to fair warning also prevents censorship and promotes transparency. First, where officers have the discretion to permit or forbid demonstrations—and can even change their minds—the danger arises that they may discriminate based on the content of speech. The possibility of such discrimination generates a need for courts to impose narrow, objective standards on officers. Thus, in Cox, a dispersal order that was “unrelated to any policy of [the relevant] statutes” did not provide demonstrators with the necessary free warning.301 In the words of the Court, “the allowance of such unfettered discretion in the police would itself constitute a procedure” that violated the First Amendment.302 Similarly, in Dellums, the D.C. Circuit required a dispersal order to precede any arrest because officers’ “contradictory and uncertain” administrative precedents had created a vagueness problem.303 In the absence of a dispersal order, “it would be impossible for anyone to tell when his otherwise constitutionally protected

299 Id.
302 Id.
behavior (or that of his group) had become” impermissible.\textsuperscript{304} These two examples indicate that, when courts review officer conduct to ensure fair warning, they focus on the same concerns—specifically, limiting officer discretion and promoting transparency—that animate their First Amendment review of statutes. This similarity between the two forms of review plausibly suggests that the right to fair warning simply extends First Amendment protections into a novel context.

Second, courts enforcing the right to fair warning exhibit the same concern for the protection of potentially innocent conduct as courts engaged in overbreadth review. As described above, courts applying such review worry that broadly worded statutes will deter demonstrators from engaging in expressive conduct that the First Amendment protects.\textsuperscript{305} This concern causes courts to review the application of the statute to hypothetical individuals who are not parties and whose cases, as a result of the statute’s deterrent effect, may never arise.\textsuperscript{306} Courts enforcing the right to fair warning also frequently hypothesize the existence of undeniably innocent demonstrators in the process of explaining why the demonstrators before the court had not received the requisite warning. For example, in Vodak, the Seventh Circuit supposed that some of the demonstrators whom officers had arrested “may simply have been following the crowd, thinking that it either was a proper route for the march or a way out,” and that still others “weren’t part of the march but were just trying to get home.”\textsuperscript{307}

Similarly, in Buck, the Tenth Circuit found that the officers’ actions “could reasonably

\textsuperscript{301} Id.
\textsuperscript{305} Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (“[T]he statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”).
\textsuperscript{306} Id.
\textsuperscript{307} Vodak v. City of Chicago, 639 F.3d 738, 744–45 (7th Cir. 2011).
have been interpreted as a waiver of the parade permit requirement,” without asking whether those before the court had so interpreted those actions. Finally, in *Dellums*, the D.C. Circuit inferred official permission from the fact that “any plaintiff familiar with precedents of administration of the Capitol Grounds statute could reasonably have concluded that ‘permits’ had been issued.” Of course, the decisions in these cases made no reference to overbreadth review. Moreover, because the plaintiffs in *Vodak* and *Dellums* purported to bring class actions, the potentially innocent demonstrators to whom the courts referred could eventually become parties. Nonetheless, the courts’ reasoning bears a striking resemblance to overbreadth review: where officers have

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308 *Buck v. City of Albuquerque*, 549 F.3d 1269, 1283 (10th Cir. 2008); see also *Fogarty v. Gallegos*, 523 F.3d 1147, 1151 (10th Cir. 2008) (discussing the case of a passerby who joined a demonstration after “observ[ing] that several streets had been closed and assum[ing] that police were permitting demonstrators to march in the streets”). One could also argue that courts consider demonstrators’ reasonable beliefs in the process of applying the relevant qualified immunity analysis. Officers do not face liability if, at the time of an arrest, they had a reasonable belief that an arrestee had committed a crime. *Saucier v. Katz*, 533 U.S. 194, 199–201 (2001), overturned in part on other grounds by *Pearson v. Callahan*, 555 U.S. 223 (2009). Where officers make mass arrests, however, they will know about a particular arrestee only what they know about the demonstration as a whole. Thus, courts might analyze whether an officer could have reasonably believed that the typical demonstrator had received notice that, for example, a march was unpermitted. In practice, such analysis might resemble overbreadth review because it focuses on whether an officer’s knowledge can justify the scope of her actions. Nonetheless, courts considering qualified immunity defenses typically give significant deference to officers’ judgments, and thus they would focus on potentially innocent demonstrators only if reasonable officers could not help but understand that their actions would generate unjustified arrests. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (noting that the defense protects “all but the plainly incompetent or those who knowingly violate the law”). The cases at issue are not so clear cut. For example, the officers in *Vodak* might reasonably have understood themselves to permit only marching along the intended route, and thus they could have reasonably concluded that those who departed from that route were marching both without a permit and without permission. *See supra* note 262 and accompanying text. Thus, courts’ focus on innocent, rather than individual demonstrators most likely derives from the underlying right, and not from the framework courts use to determine whether an officer faces liability for violating that right. *Cf. Papineau v. Parmley*, 465 F.3d 46, 60 (2d Cir. 2006) (“[P]laintiffs had an undeniable right to continue their peaceable protest activities, even when some in the demonstration might have transgressed the law.”).

potentially arrested many who did not receive a warning, courts will regard the warnings in their entirety as insufficient. This focus on the hypothetically, rather than the demonstrably, innocent—which courts adopt even at the expense of allowing potentially unmeritorious cases to proceed—suggests that courts enforcing the right to fair warning worry about the deterrence of protected conduct. Such a concern most plausibly originates from the First Amendment.

Finally, the same First Amendment considerations that require local governments to permit demonstrators to access the streets presumably apply with no less force to officers’ and demonstrators’ interactions in the streets. As described above, numerous courts have held that the First Amendment requires local parade-permitting schemes to permit spontaneous demonstrations. A right to enter the streets would mean little, however, if officers enforcing traffic and disorderly conduct ordinances could immediately direct demonstrators to leave. Thus, the right to fair warning might apply the same restrictions to officers that the First Amendment applies to statutes and ordinances. This component of the right to fair warning potentially explains why officers must not only warn demonstrators of their orders, but must also base those orders on a “valid reason” that is independent from enforcement of the underlying statute or ordinance. Simply put, if the officers’ grant of permission resolves a problem with the underlying statute, then the statute cannot justify revocation of that

310 See Vodak, 639 F.3d at 745 (“Maybe the marchers . . . should have guessed that it was a forbidden route as well, and no doubt some did, but others may simply have been following the crowd, thinking that it either was a proper route for the march or a way out.”).
311 See supra notes 280–285 and accompanying text.
312 Cox v. Louisiana, 379 U.S. 572 (1965); see also id. at 573 (holding that “the allowance of unfettered discretion in the police would itself constitute a prodecure” that violated the First Amendment).
grant without recreating the original problem. Thus, one might reasonably conclude that First Amendment concerns animate courts’ articulation the right to fair warning, rendering the right to fair warning itself, at least in part, a First Amendment right.

Nonetheless, many other considerations suggest that the First Amendment does not provide the basis for demonstrators’ right to fair warning. First, if the right to fair warning protects demonstrators only from the “indefensible sort of entrapment” described in Cox—i.e., later conviction for an action officers had portrayed as legal—then the fact that courts often vindicate this right in cases involving protected expression is merely coincidental.\footnote{Cox v. Louisiana, 379 U.S. 559, 571 (1965).} In fact, as described above,\footnote{See supra text accompanying notes XX–YY.} the Supreme Court first discussed “indefensible . . . entrapment” in a case that did not consider First Amendment rights, but instead the applicability of a state’s constitutional privilege against self-incrimination.\footnote{Raley v. Ohio, 360 U.S. 423, 425–26 (1959).} Thus, demonstrators may receive only the same protection from entrapment that all people enjoy, whether or not they engage in protected speech.\footnote{For example, if a non-demonstrator was told by an officer that she could jaywalk, and then was arrested for jaywalking, a court surely would not permit a conviction and would instead find a rights violation.} Because the right presumably always has the same constitutional foundation, its application in the absence of protected expression precludes the First Amendment from providing that foundation.

A second, related consideration bolsters this reasoning: where courts protect demonstrators’ right to fair warning, the First Amendment may “play[] only a
background role.\textsuperscript{317} Even if the First Amendment has shaped the legal provisions at issue in a case, courts considering the right to fair warning may nonetheless ask only how officers have applied those provisions. In other words, the mere fact that the First Amendment provides boundaries for the legal provision that officers enforce does not entail that the First Amendment constrains officers’ enforcement of it. For example, in \textit{Vodak}, the First Amendment prohibited Chicago from adopting a permitting scheme that forbade spontaneous demonstrations.\textsuperscript{318} To accommodate this First Amendment requirement, officers had an “uncodified practice” of allowing certain marches to proceed without a permit, and they had followed that practice when confronted with the demonstration against the war in Iraq.\textsuperscript{319} The Seventh Circuit emphasized, however, that the First Amendment did not require officers to permit the march in the manner they had.\textsuperscript{320} Thus, because the First Amendment had not required officers to give permission, it presumably also had not required officers to clearly revoke that permission. Instead, that requirement arose from the officers’ course of conduct: the fact that they had declared the parade legal, as the permitting scheme allowed them to do, required them to clearly announce their later decision to treat it as illegal. As the Seventh Circuit reasoned, allowing officers to change their decision about the legality of

\begin{footnotesize}
\begin{enumerate}
\item[317] \textit{Vodak v. City of Chicago}, 639 F.3d 738, 751 (7th Cir. 2011).
\item[318] 639 F.3d at 749.
\item[319] Id. at 741.
\item[320] Id. at 750 (“Nothing in either the First Amendment or local law would have forbidden the Chicago police to require of the organizers, as a condition of waiving the permit requirement in order to allow a demonstration on a date as yet uncertain, a clear idea of the intended march route, to hold them to it, and to prepare in advance reasonable measures for preventing the demonstration from spilling over the boundaries of the authorized march.”).
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the parade without notifying demonstrators would amount to “entrapment.” But the fact that officers had such discretion as a result of First Amendment considerations was merely part of the “background,” playing no meaningful role in the analysis.

The First Amendment’s background role in the cases discussed above may explain why courts so often discuss the right to fair warning in cases that involve protected expression. Specifically, because traffic regulations frequently raise difficult First Amendment questions, legislatures may often rely on officers to ensure that those regulations sweep narrowly and respect demonstrators’ legitimate interests. Thus, as in Vodak, the First Amendment’s background role often requires officers to determine what the law prohibits. Where officers change their minds on that subject, questions about the adequacy of notice will frequently arise. In other words, courts might often consider the right to fair warning in cases involving protected speech not because the First Amendment requires officers to give warning, but instead because the First Amendment creates exception-ridden legal schemes that require officers to make determinations about legality, thereby creating the need for warning. Yet, as in Vodak, the fact that the First Amendment helped to produce the underlying circumstances does not entail that it plays a meaningful role in the relevant legal analysis.

Finally, the First Amendment may not provide the constitutional foundation of the right to fair warning simply because, in the relevant context, it does not require

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321 Id. at 746–747.
322 See Garcia v. Bloomberg, 865 F. Supp. 2d 478, 486 (S.D.N.Y. 2012) (“[B]ecause of the tension between First Amendment protections and local laws aimed at preventing disruption, difficult questions frequently arise as to the applicability to protest marchers and demonstrators of laws that require parade permits or that criminalize disruption of the peace. As a result, ‘fair warning as to what is illegal’ often comes not from the legislative bodies that draft the potentially relevant laws, but instead from the executive officials who enforce them.”).
much. As described above, a parade permitting scheme “need not be the least-restrictive or least-intrusive means of” accomplishing a legislature’s purpose, and instead must only “promote a substantial government interest that would be achieved less effectively absent the regulation.” Moreover, courts generally will not consider the abstract interests of non-litigants except in cases of “substantial” overbreadth. Combining these two doctrines, one might conclude that time, place, and manner regulations will trigger exacting scrutiny only where they restrict substantially more conduct than necessary to most effectively accomplish one of the many governmental purposes that can legitimate such regulations. Thus, so long as a permitting scheme does not discriminate based on the content of speech, the First Amendment may require only that the scheme make some good faith attempt to maintain “ample alternative channels of communication.” Given that the First Amendment places only weak constraints on the laws a legislature may adopt, expecting it to impose further limitations on officers’ enforcement of those laws may make little sense.

Thus, the First Amendment, like the Due Process Clause and the Fourth Amendment, provides a plausible, yet not wholly convincing basis for demonstrators’ constitutional right to fair warning. Having discussed why each provision might and

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325 See supra note 278.


327 *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 (1983)). For example, courts have upheld permitting schemes that limit spontaneous demonstrations to one location. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1045–46 (9th Cir. 2006); see also El-Haj, supra note 272, at 550–54 (describing the “significant ways” in which “local officials may shape protests” by imposing time, place, and manner requirements).
might not create the right, analysis now turns to identifying the constitutional provision that best explains the contours of existing doctrine.

III. LOCATING THE RIGHT TO FAIR WARNING

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

\(^{328}\) See supra text accompanying notes 178–180.

\(^{329}\) See supra text accompanying notes 313–327.
and whether officers have exercised their discretion in a manner that might permit them to discriminate based on viewpoint.

A. Unanswered Questions

The review of existing doctrine undertaken in Part I generated numerous questions. Having described courts’ interpretations of the Due Process Clause, the Fourth Amendment, and the First Amendment, we can now determine whether those interpretations provide any answers. In fact, the preceding discussions have already suggested some of the answers set forth below. This Part considers each of Part I’s questions in turn and concludes that First Amendment doctrines provide the most satisfactory answers. In short, only the First Amendment’s concern for fostering “uninhibited, robust, and wide-open” discourse can justify courts’ focus on how officers enforce laws and generate coherent standards for determining what officers must do to make a valid arrest.330

1. *When and Why Do Courts Focus on Officers’ Exercise of Their Discretion? — Cox* and its progeny all raise a similar question: why do the courts considering the right to fair warning scrutinize how officers have enforced a valid statute, departing in certain respects from the tradition of judicial deference to officer discretion?331 Existing First Amendment doctrine provides a potential answer: the statutes at issue raise First Amendment problems that the available First Amendment remedies cannot

331 See supra text accompanying notes 236–238.
satisfactorily resolve. As noted above, courts have consistently held that the First Amendment creates a right to spontaneously demonstrate in response to current events. See supra notes 283–285. Both parade-permitting ordinances and bans on interfering with traffic ostensibly prohibit such demonstrations. Thus, even though courts have recognized that such ordinances serve legitimate purposes, See Cox v. Louisiana, 379 U.S. 559, 574 (1965) (permitting “properly drawn statutes” that “regulate traffic”). a straightforward First Amendment analysis—particularly one that, like overbreadth review, considers the statutes’ effects on hypothetical third parties—apparently requires their invalidation. But what would invalidation of such ordinances accomplish? If courts seek to permit spontaneous demonstrations, then one might wonder whether any ordinance can articulate standards that provide the necessary flexibility. As the Seventh Circuit explained in Vodak, “when a march is planned for the unknown date of some triggering event,” such as the United States’ invasion of Iraq, “even two days’ notice is infeasible.” 639 F.3d 738, 741 (7th Cir. 2011). Thus, revised ordinances may not cure the problems courts seek to address, and invalidating existing ordinances could only frustrate the legislature’s legitimate interest in regulating traffic.

The inability of First Amendment remedies to satisfactorily resolve the problem that courts confront indicates that courts require a narrower form of review. The right to fair warning creates an opportunity for such review. In contrast to asking whether the ordinance sweeps too broadly, the right to fair warning, by focusing attention on the officer’s enforcement of the ordinance, allows courts both to protect demonstrators’

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332 See supra notes 283–285.
334 639 F.3d 738, 741 (7th Cir. 2011).
right to spontaneously protest and to preserve the legislature’s ability to pursue its legitimate interests. As the Supreme Court reasoned in Cox, permitting officers to exercise “a degree of on-the-spot administrative interpretation” allows them, and the courts that review them, to conduct a more nuanced balancing of the competing interests than a legislature could in the abstract.\(^{335}\) Thus, existing First Amendment doctrine suggests that courts will examine whether officers have provided fair warning when, although a statute raises First Amendment problems, the traditional remedy of invalidation proves unsatisfactory.

Although courts have never explained their decisions in these terms, a close reading of the relevant cases suggests that they have unconsciously adopted this approach. While the majority in Cox did not consider the possibility of a narrower statute, it almost certainly confronted a problematic statute that it felt compelled to uphold. As noted above, the statute at issue in Cox largely copied a federal statute that Supreme Court Justices had drafted in order to protect their own court from disruptions.\(^{336}\) Thus, invalidating the statute would have required the Court both to find fault with its prior work and to undermine one of the safeguards of its own repose. This conflict of interest suggests that the Court had a motive to apply a less exacting standard of review than it had in its prior First Amendment cases. In fact, contemporary commentators claimed that the Court had done exactly that, contrasting the standard of review applied in Cox with that applied in Edwards v. South Carolina.\(^ {337}\) Nonetheless,

\[^{335}\] 379 U.S. at 568–69.
\[^{336}\] See supra text accompanying note 52.
\[^{337}\] See Kalven, supra note 159, at 9 (“As the parade leaves the State House grounds and moves down toward the courthouse, it changes from an attractive group of concerned citizens using
focusing on officers’ enforcement of the statute allowed the Court to rule in Cox’s favor, and to effectively protect his First Amendment rights, without impugning the statute’s validity. Thus, Cox appears to have been a historical accident: the Supreme Court’s unique unwillingness to invalidate a statute on First Amendment grounds led it to develop an alternative mechanism for vindicating First Amendment concerns, albeit sub silentio.

Circuit Courts of Appeals have availed themselves of the mechanism Cox created, adapting it to the new circumstances described above. Nowhere is this clearer than in Dellums. As noted above, the D.C. Court of Appeals had previously determined that the statute at issue in Dellums violated the First Amendment, and the court had imposed a limiting construction that required officers to provide fair warning. Significantly, however, the D.C. Circuit noted that Cox would have required the same result. Thus, the D.C. Circuit effectively acknowledged that the right to fair warning required of the officers at issue exactly what the First Amendment required of the statute more broadly. Similarly, the Second Circuit in Papineau held that, “even if [officers] had a lawful basis to interfere” with a demonstration—i.e., even if the statute at issue, as applied to the demonstrators, complied with the First Amendment—the First Amendment still regulated the manner in which officers interfered, requiring them
democratic avenues of protest on public issues to a mob, heavy with the promise of anarchy, seeking to dominate.”); see also supra note 159 (describing the differences between Cox and the First Amendment cases that preceded and followed it).

For a discussion of how the Court’s focus on officer discretion vindicated Cox’s First Amendment rights, see infra text accompanying notes XX–YY.

See supra text accompanying notes 85–102.

See supra text accompanying notes 94–98.

See supra text accompanying notes 99–102.
to provide fair warning.\textsuperscript{342} Finally, as described above in Part II.B, the Seventh Circuit in \textit{Vodak} implicitly derived the standards it attributed to the right to fair warning from the requirements the First Amendment imposed on the parade-permitting scheme at issue.\textsuperscript{343} Thus, Courts of Appeals have effectively, if unconsciously, treated the right to fair warning as a form of First Amendment review that applies to officer conduct, invoking it in addition to, or as an alternative to, broader First Amendment review of statutes and ordinances.

In contrast to the First Amendment, the Due Process Clause and the Fourth Amendment appear to provide no explanation for the focus on how officers enforce the statutes at issue. While the Court in \textit{Cox} invoked \textit{Raley}'s due process defense, it provided no satisfactory explanation for why that defense would apply.\textsuperscript{344} Indeed, the \textit{Cox} majority's suggestion that officers could provide binding interpretations of the law when administering traffic raises two seemingly insurmountable difficulties: first, the statute at issue did not actually regulate traffic;\textsuperscript{345} and, second, the Court acknowledged that the statute clearly applied to the demonstrators in question, thereby undercutting the need for any interpretation, much less a binding one.\textsuperscript{346} Later decisions by Courts of Appeals simply compound the problem. By invoking the right to fair warning even in cases where officers have only implicitly permitted certain actions, Courts of Appeals appear to have dispensed with \textit{Raley}'s requirement that officers “clearly” allow the

\textsuperscript{342} 465 F.3d 46, 60 (2d Cir. 2006).
\textsuperscript{343} See supra text accompanying notes 261–269.
\textsuperscript{344} \textit{Raley v. Ohio}, 360 U.S. 423, 425–26 (1959) (creating a defense whenever an officer, while “speaking for the State,” “clearly t[ells]” someone that conduct is permitted).
\textsuperscript{345} See supra text accompanying notes 75–77
conduct at issue. Indeed, if officers can “permit” conduct simply by declining to enforce a statute, then the due process defense articulated in *Raley* conflicts with the judiciary’s “deep-rooted” recognition of “law-enforcement discretion.” Thus, principles of due process appear to provide no satisfactory answer to the question of why courts enforcing the right to fair warning focus on officers’ actions, rather than the statutes the officers invoke.

Neither does the Fourth Amendment provide any answer. While the Fourth Amendment focuses courts’ attention on whether officers have acted reasonably, it does so by asking whether officers have “a reasonable ground for the belief” that a suspect violated a statute. In the vast majority of circumstances, officers do not need to provide fair warning in order to form such a belief. Moreover, even courts that invoke the Fourth Amendment when protecting the right to fair warning do not attribute the requirement of fair warning to Fourth Amendment principles, instead characterizing it as an unwritten element of the underlying statute. Because the Fourth Amendment inquiry need not analyze whether officers have provided fair warning, and does so only where contextual considerations require it, nothing suggests that Fourth Amendment principles somehow explain such analysis. Thus, only First Amendment considerations

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347 360 U.S. at 426.
348 *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005); see also *supra* text accompanying note 236–238.
351 See *supra* text accompanying notes 256–257, 266–271.
provide a convincing answer to the primary question raised by Cox and its progeny, namely, the question of why courts ask about warning in the first place.

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

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352 See supra text accompanying notes Error! Bookmark not defined.–78.
354 Id. at 564.
from unconstitutionality, the officers could not invoke the statute as a justification for broader discretion.

Later decisions by Courts of Appeals have adopted a similar reasoning, suggesting that those courts interpret *Cox* to vindicate First Amendment concerns. In *Vodak*, for example, the Seventh Circuit devoted pages to describing the First Amendment’s “background role”—*i.e.*, the limitations it imposed on the city’s ability to require parade permits.\(^{355}\) Although the Seventh Circuit discussed this “background role” only after it concluded that officers had not provided fair warning, as noted above, it incorporated into its understanding of fair warning the very restrictions that the First Amendment placed on the parade-permitting requirement at issue.\(^{356}\) For example, while the Seventh Circuit purported to require warning only where officers had permitted certain conduct, it implicitly adopted a broad understanding of permission that applied whenever officers had not imposed the types restrictions the First Amendment would have permitted.\(^{357}\) In other words, fair warning constituted a

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\(^{355}\) 639 F.3d 738, 749–51 (7th Cir. 2011).

\(^{356}\) See *supra* text accompanying notes 266–271.

\(^{357}\) *Vodak*, 639 F.3d at 750. These restrictions included insisting that demonstrators adhere to an “intended march route” and preparing “reasonable measures for preventing the demonstration from spilling over the boundaries.” *Id.* The Seventh Circuit stated only that the First Amendment permitted these restrictions, and did not claim that it required them. Nonetheless, the court evidently intended to instruct officers on how to simultaneously comply with the First Amendment’s requirement that officers permit spontaneous demonstrations and avoid having to give on-the-spot warnings to large groups of confused people. As argued below, a right to spontaneously demonstrates would have little meaning if officers could subsequently arrest demonstrators without providing fair warning. *See infra* text accompanying notes XX–YY. Demonstrators who fear arrest for exceeding boundaries of which they are unaware will not march regardless of whether they have a right to do so. The Seventh Circuit’s examples of innocent demonstrators exhibit its awareness of this possibility. *See supra* text accompanying notes 157–158, 269. Thus, one can reasonably understand the restrictions the Seventh Circuit identified as First Amendment requirements, with which officers needed to comply either through initial planning or subsequent warning.
mechanism for imposing restrictions that complied with the First Amendment, one to
which officers could resort whenever they had initially failed to impose such
restrictions. Thus, the Seventh Circuit, much like the Supreme Court in Cox, effectively
understood the right to fair warning to apply the same limitations to officers’ actions
that the First Amendment imposed on the parade-permitting ordinance.

Once again, the jurisprudence interpreting the Due Process Clause and the
Fourth Amendment, unlike that construing the First Amendment, provides no
satisfactory explanation for the limitations that Cox imposed on officers’ discretion.
Turning first to the Due Process Clause, the majority in Cox did not attempt to explain
its decision under that provision, and such an explanation would have made little
sense.358 While Cox initially had a defense under Raley because the sheriff had “clearly
told” him he could march, he should not have had any such defense after officers had
ordered him to disperse, thereby unambiguously revoking their prior permission. The
majority opinion dismissed the dispersal order on the ground that officers had not
provided “a valid reason” for it. Nonetheless, the majority did not suggest that the Due
Process Clause would have required such a reason, and it failed to explain why the
statute the officers sought to enforce would not have provided the necessary
justification.359 The Fourth Amendment provides even less support for the majority’s

358 See supra text accompanying notes 58–60 (discussing the majority opinion’s invocation of the
First Amendment).
359 Cox v. Louisiana, 379 U.S. 559, 572 (1965); see also supra text accompanying notes 78–80
(arguing that the underlying statute should have provided officers with a legitimate basis for
revoking permission, whether or not the officers explicitly relied on that basis). The majority
opinion did not indicate that officers would have needed to justify any decision to initially
prohibit Cox from marching. Cox, 379 U.S. at 568. Thus, if the Due Process Clause protected Cox
even after the dispersal order, it would not only have shielded him from “entrapment,” but
reasoning. Because the Fourth Amendment requires courts to view circumstances from “the standpoint of an objectively reasonable police officer,” analysis under that provision would have led the Cox majority to ask not whether officers had provided a valid reason, but instead whether a reasonable officer could have. Thus, only the First Amendment can plausibly explain the Cox majority’s decision to require officers to provide a valid reason for revoking the permission they had previously granted to demonstrators.

3. Does a Right to Fair Warning Exist in Cases of Implicit Permission? — Whereas Cox recognized a right to fair warning where officers had given demonstrators explicit permission, later cases, specifically Buck and Vodak, have enforced that right even where officers had only implicitly permitted the relevant conduct. The extension of the right to fair warning recognized in Buck and Vodak raises two questions. First, should the right to fair warning apply even where officers have not provided the kind of explicit permission that the Supreme Court considered in Cox? Second, if the right to fair

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361 Devenpeck v. Alford, 543 U.S. 146, 153–54 (2004) (holding that the arresting officer’s state of mind “is irrelevant to the existence of probable cause”); Mozzochi v. Borden, 959 F.2d 1174, 1180 (2d Cir. 1992) (“An individual does not have a right under the First Amendment to be free from a criminal prosecution [that is] supported by probable cause [even if that prosecution] is in reality an unsuccessful attempt to deter or silence criticism of the government.”); cf. Cox, 379 at 572 (“He was expressly ordered to leave, not because he was peacefully demonstrating too near the courthouse, nor because a time limit originally set had expired, but because officials erroneously concluded that what he said threatened a breach of the peace.”).
warning protects demonstrators who have received only implicit permission, what does that fact suggest about the right’s constitutional basis?

A simple fact about mass demonstrations answers the first question. Where an enormous crowd has gathered, officers can communicate with only a small fraction of its members, and those who do not receive direct communications can know what officers have permitted only by observing the behavior of others. In such circumstances, the vast majority of demonstrators will have no way of distinguishing between actions that officers merely tolerate and actions that they invite, i.e., between implicit and explicit permission. Thus, applying the right to fair warning in cases of explicit, but not implicit permission would amount to a distinction without a difference for the vast majority of demonstrators. Cox reinforces this point. Only after Cox was separated from the marchers and “brought to” the police chief did he receive explicit permission to demonstrate across from the courthouse. The rest of the demonstrators apparently received no communications from the officers, and they simply proceeded to an area where they were “directed by Cox.” As a result, those demonstrators may not have known whether Cox had obtained permission or had instead decided to defy

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

364 Of course, demonstrators who hear and defy warnings have received fair warning and thus cannot invoke any defense.


366 Id.
the officers, something he had done before.\textsuperscript{367} Conditioning the right to fair warning on the content of Cox’s private conversation, then, would have altered the protections the majority of demonstrators enjoyed even though they had acted based on the same information and in an identical fashion. Courts of Appeals have correctly avoided such a strained interpretation of \textit{Cox}.

Only the First Amendment explains why the right to fair warning should apply in both cases of explicit and implicit permission. As described above, the First Amendment creates a right to spontaneously demonstrate in response to emerging events, and it requires officers to craft exceptions to traffic laws that would interfere with the exercise of such a right.\textsuperscript{368} If officers could, after permitting spontaneous demonstrations, arrest demonstrators for disobeying commands of which the demonstrators had no knowledge or for engaging in actions that the demonstrators believed officers had permitted, then the right to spontaneously demonstrate would be chilled.\textsuperscript{369} In effect, fear of unforeseen or unforeseeable arrest would prevent many demonstrators from spontaneously demonstrating at all.\textsuperscript{370} The First Amendment rationale for applying the right to fair warning in cases of implicit permission is strikingly similar to the one on which the Supreme Court relied in \textit{Cox}: where courts

\textsuperscript{367} \textit{Id.} at 540 ("Kling asked Cox to disband the group . . . . Cox did not acquiesce in this request but told officers that they would march by the courthouse.").
\textsuperscript{368} \textit{See supra} sources cited in note 283.
\textsuperscript{369} \textit{See Ashcroft} v. \textit{Free Speech Coalition}, 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere.").
\textsuperscript{370} While Courts of Appeals have not articulated this rationale, they frequently analyze whether officers may have arrested those who had no reason to believe that they had violated the law, precisely the type of arrest that would deter others from spontaneously demonstrating. \textit{See supra} notes 305–310 and accompanying text.
focus on officers’ discretion in order to resolve a First Amendment problem with the statute—here, the need for parade-permitting schemes and other traffic laws to allow spontaneous demonstrations—they cannot permit officers to take actions that would create the same problem.\textsuperscript{371} If statutes cannot ban spontaneous marches, then neither can officers act in a way that deters it.

Grounding the right to fair warning in the Due Process Clause would raise severe doubts about whether the right applies to demonstrators who have received only implicit permission. In cases of implicit permission, officers have not “clearly told” demonstrators anything, and thus the \textit{Raley} defense should not apply.\textsuperscript{372} Indeed, courts have not permitted defendants to invoke Model Penal Code § 2.04(3)(b)(iv) based on the defendants’ beliefs about what officers communicated to others, holding instead that a statement “must be made directly to the defendant” in order to “trigger an entrapment-by-estoppel defense.”\textsuperscript{373} For example, in \textit{United States v. Eaton}, the Eleventh Circuit upheld a defendant’s conviction for illegally importing snakes even though the defendant testified at trial that “other missionaries had hand-carried small quantities of snakes into the United States for at least a decade with approval from customs officials.”\textsuperscript{374} Demonstrators who have received implicit permission are indistinguishable from the defendant in \textit{Eaton}: they base their claims of innocence not on what officers have communicated to them directly, but instead on their beliefs about what officers have permitted others to do. Thus, conceiving of the right to fair warning as a defense

\textsuperscript{371} See supra text accompanying notes 353–354.
\textsuperscript{373} \textit{United States v. Eaton}, 179 F.3d 1326, 1332 (11th Cir. 1999).
\textsuperscript{374} \textit{Id.} at 1331.
against entrapment, rooted in the Due Process Clause, would presumably lead courts to apply the rationale from *Eaton*, and thus to provide no protection to demonstrators who had received only implicit permission.

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

4. Do Demonstrators Have a Right to Fair Warning When They Peacefully Protest Without Permission? — Finally, *Papineau* raises the question of whether the right to fair warning can protect demonstrators even where permission is simply not an issue. In *Papineau*, the Second Circuit attributed a right to fair warning to demonstrators based

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376 See supra text accompanying notes 235–238.

377 See *Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003) (noting that the Fourth Amendment requires only that officers have a “reasonable ground for the belief of guilt”); see also supra text accompanying notes 262–263 (arguing that officers in *Vodak* could have reasonably believed that they had not permitted the conduct in which demonstrators had engaged).
on their “undeniable right to continue their peaceable protest activities, even when some in the demonstration might have transgressed the law.”\textsuperscript{378} Analyzed under the First Amendment, this extension of the right to fair warning makes perfect sense: permitting officers to forcibly disperse law-abiding demonstrators based on factors beyond those demonstrators’ control would deter expressive conduct that falls within the First Amendment’s core area of protection. Because many of the demonstrators in \textit{Papineau} had conformed their conduct to the law—and were subject to dispersal based only on the actions of a few—their belief in the legality of their actions was, even in the absence of permission, no less reasonable than the beliefs of demonstrators in \textit{Dellums}, \textit{Vodak}, and \textit{Buck}. Thus, the Second Circuit persuasively found that, in light of their equally reasonable beliefs, the demonstrators in \textit{Papineau} should receive the same protections afforded to demonstrators in other cases.\textsuperscript{379}

Once again, however, the Due Process Clause and the Fourth Amendment provide no basis for such an extension of the right to fair warning. Turning first to the Due Process Clause, the officers in \textit{Papineau} told the demonstrators nothing, and thus they certainly did not “clearly” tell the demonstrators that others’ actions would not subject the entirety of the demonstration to forcible dispersion.\textsuperscript{380} As a result, the demonstrators had no argument that the officers had induced their actions in violation of due process. Neither can the Fourth Amendment explain the Second Circuit’s rationale in \textit{Papineau}. In fact, the Second Circuit conducted its analysis of the right to

\textsuperscript{378} 465 F.3d 46, 60 (2d Cir. 2006).
\textsuperscript{379} \textit{Id.} at 60–61 & n.6 (citing \textit{Cox} and \textit{Dellums})
fair warning after explicitly assuming that the officers had “a lawful basis to interfere with the demonstration” under the Fourth Amendment. Thus, only the First Amendment explains the extension of the right to fair warning that the Second Circuit recognized in *Papineau*.

Of the constitutional provisions that might plausibly create demonstrators’ right to fair warning, only the First Amendment provides convincing answers to the questions raised by existing doctrine. In short, where statutes and ordinances raise First Amendment problems, but cannot reasonably be narrowed, courts will examine officers’ enforcement of those statutes, requiring officers to proceed in a manner that avoids First Amendment problems. As described, the right to fair warning effectively narrows the scope of First Amendment review, applying it to officer conduct rather than to a statute. Although this account of the right to fair warning illuminates existing doctrine, explaining why courts have made decisions that might otherwise appear puzzling, it has not yet been assessed in light of the arguments that the First Amendment does not create the right to fair warning. Accordingly, the analysis now turns to such an assessment.

**B. Arguments Against the First Amendment**

Part II.C identified many reasons why courts might hesitate to identify the First Amendment as the basis of the right to fair warning. Specifically, Part II.C hypothesized that the fact that courts frequently apply the right to fair warning to

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381 *Papineau*, 465 F.3d at 60.
382 See supra text accompanying notes 313–327.
demonstrators might simply be a coincidence,\textsuperscript{383} that the First Amendment might play only a background role in the analysis,\textsuperscript{384} and that the First Amendment might not actually require much of officers confronting demonstrators.\textsuperscript{385} This Part examines those hypotheses more closely and concludes that they need not persuade courts. Instead, the arguments for grounding the right to fair warning in the First Amendment outweigh the arguments against doing so.

1. Coincidence — Part II.C speculated that courts may have only coincidentally applied the right to fair warning first recognized in \textit{Raley} to demonstrators. After all, the argument went, \textit{Raley} did not involve demonstrators, and thus the right it recognized applied broadly across a variety of contexts, even if some contexts implicated it more frequently than others. But this argument is unpersuasive for the same reason that the Due Process Clause fails to explain courts’ application of the right to fair warning to demonstrators.\textsuperscript{386} In a number of the cases examined above, most notably \textit{Vodak} and \textit{Buck}, officers had only implicitly permitted demonstrators to engage in the relevant conduct. As a result, officers had not “clearly told” the demonstrators that a privilege was available to them, and the defense recognized in \textit{Raley} should not have applied.\textsuperscript{387} Because the \textit{Raley} defense should not have applied, courts have not simply recognized the same right across a variety of contexts. Instead, something specific to demonstrators has altered how courts have reviewed officers’ behavior. As argued above, only the

\begin{footnotesize}
\begin{enumerate}
\item See supra text accompanying notes 313–316.
\item See supra text accompanying notes 317–322.
\item See supra text accompanying notes 323–327.
\item See supra text accompanying notes 372–374.
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First Amendment convincingly explains the protections courts have extended to demonstrators.\(^\text{388}\) Thus, the fact that demonstrators exercise their First Amendment rights in the cases considered above is not a coincidence at all, but instead plays a critical role in courts’ analyses.

2. *A background role* — Next, Part II.C considered whether, as the Seventh Circuit suggested in *Vodak*, the First Amendment might play only a “background role” in the analysis.\(^\text{389}\) As discussed above, however, what the Seventh Circuit characterized as a “background role” was in fact quite prominent.\(^\text{390}\) Because the First Amendment required officers to create exceptions to the applicable parade-permitting requirement, it also logically prohibited officers from acting in a way that would deter demonstrators from availing themselves of those exceptions. Thus, even when the Seventh Circuit appeared to assess the reasonableness of officers’ actions under the Fourth Amendment, it based its understanding of reasonableness on First Amendment considerations, such as the need to avoid deterring expressive conduct. In short, far from playing only a background role, the First Amendment permeated the Seventh Circuit’s entire analysis.

3. *The feeble First Amendment* — Finally, and most troublingly, Part II.C hypothesized that the First Amendment may not create demonstrators’ right to fair warning because it imposes only weak constraints on the regulation of demonstrations.

\(^{388}\) *See supra* text accompanying notes 336–343, 353–357, 368–371.

\(^{389}\) *Vodak v. City of Chicago*, 639 F.3d 738, 751 (7th Cir. 2011).

\(^{390}\) *See supra* text accompanying notes 266–271.
As noted, the First Amendment does not compel legislatures to adopt “the least-restrictive or least-intrusive means” of regulating the flow of traffic, and courts will consider the abstract interests of parties not before them only in cases of “substantial” overbreadth. Nonetheless, the First Amendment imposes one very important requirement on local governments: namely, that they permit spontaneous demonstrations in response to developing events. This requirement, although simple in theory, becomes quite complicated in practice. Indeed, any official action that would deter a reasonable demonstrator from exercising her right to spontaneously demonstrate arguably qualifies as a substantial infringement, and courts’ analyses of officers’ conduct demonstrate a sensitive awareness to that possibility. Thus, the First Amendment’s requirements with respect to demonstrations do not appear feeble at all. Instead, the First Amendment appears to impose exactly those requirements that courts have attributed to demonstrators’ right to fair warning.

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

393 See supra sources cited in note 283.
394 See supra text accompanying notes 306–310.
C. Fair Warning as a First Amendment Right

Why not conclude that the Due Process Clause, the Fourth Amendment, and the First Amendment work in concert to produce the right to fair warning? As described above, courts apply a more exacting form of due process review in cases that implicate the First Amendment. Moreover, many of the cases enforcing the right to fair warning involve the arrest of demonstrators, and only the Fourth Amendment addresses when officers may reasonably make such arrests. Thus, why not argue that the Due Process Clause and the First Amendment together determine whether demonstrators have acted illegally, and that the Fourth Amendment in turn governs when officers may reasonably believe that demonstrators’ conduct justifies an arrest?

Practical considerations counsel against this approach. Specifically, courts charged with enforcing the right to fair warning need guidance on how to apply it, and the most difficult questions arise when the principles underlying the Due Process Clause, the Fourth Amendment, and the First Amendment come into conflict. The above analysis suggests that when conflicts emerge—most notably in cases where officers have only implicitly permitted demonstrators’ actions—courts focus on the requirements of the First Amendment. Accordingly, this Part concludes by discussing how courts should give effect to First Amendment principles when enforcing demonstrators’ right to fair warning.

See supra text accompanying notes 213–215.
Only a narrow class of cases will implicate the First Amendment right to fair warning. Specifically, courts will consider that right only when a statute or ordinance raises First Amendment problems, but the traditional remedy of invalidation appears unsatisfactory. Most commonly, invalidation will dissatisfy courts because the statute cannot reasonably be narrowed. As described above, courts avoid invalidation by focusing on how officers enforce a statute. To vindicate First Amendment principles, courts must ask whether the officers have, through their enforcement actions, resolved the statute’s First Amendment problems. Put somewhat differently, courts must ask if officers have enforced a statute as though it were a narrower provision that complied with the First Amendment’s requirements.

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

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

Cox identified a second factor that courts must bear in mind when enforcing the right to fair warning. Courts considering the First Amendment have traditionally shown great skepticism towards any exercise of enforcement discretion, believing that officers may discriminate between different points of view and therefore slant or stifle the public discourse. Thus, the First Amendment right to fair warning, somewhat ironically, adopts as a remedy the type of selective enforcement that courts have long regarded as a source of constitutional concern. Given the potential of discretionary enforcement to create, rather than rectify, First Amendment problems, courts must vigilantly review such enforcement. As in Cox, such review may require courts to

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398 See supra text accompanying notes 157–158.
analyze officers’ motivations in order to ensure that officers have not acted based on the content of speech, rather than for legitimate reasons. More generally, however, courts may limit the extent of the discretion officers exercise by encouraging the police to adopt procedures that clearly display, to demonstrators and courts alike, how officers intend to promote the legitimate purposes of the statutes they enforce. For example, in Vodak, the Seventh Circuit encouraged officers to demand that demonstrators provide “a clear idea of the march route, to hold them to it, and to prepare in advance reasonable measures for preventing the demonstration from spilling over the boundaries of the authorized march.” Such procedures, if enacted, would have ensured that officers enforced the statute based on reasons that the First Amendment regarded as legitimate.

Thus, a First Amendment right to fair warning has a broad scope, albeit in a narrow class of cases. Rectifying a statute’s First Amendment problems is no easy task. Not only must officers dispel uncertainty about what is and is not permissible; they must do so in a manner that does not appear to involve the exercise of undue discretion. How these principles will play out in future cases—and indeed where and when the right to fair warning will next arise—is unclear. Nonetheless, it is apparent that the First Amendment right to fair warning imposes significant burdens on officers. Such burdens indicate the principal difference between a right to fair warning grounded in the First Amendment and one based on either the Due Process Clause or the Fourth

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401 Id. at 572 (“Appellant correctly conceived . . . that this was not a valid reason for a dispersal order.”).
402 Vodak v. City of Chicago, 639 F.3d 738, 750 (7th Cir. 2011).
Amendment. Unlike the Due Process Clause and the Fourth Amendment, which focus on preventing officers from taking certain, unconstitutional actions, the First Amendment attempts to foster demonstrators’ abilities to undertake expressive activity. By demanding that officers accommodate such activity, the First Amendment right to fair warning creates a presumption in favor of permitting expression, elevating that presumption above even the enforcement discretion that officers traditionally enjoy.

IV. CONCLUSION

This Article has argued that the First Amendment, rather than the Due Process Clause or the Fourth Amendment, provides the constitutional basis for the right to fair warning that numerous courts have attributed to demonstrators. As discussed above, courts enforce the right to fair warning where they feel reluctant to invalidate a statute or an ordinance that raises First Amendment problems. Typically, the problematic provision serves a legitimate purpose that no narrower provision could accomplish. In such circumstances, courts focus on how officers have enforced the relevant provision, effectively asking whether officers have resolved the problems the provision creates. Thus, the right to fair warning functions as a narrowed form of First Amendment review. By applying First Amendment principles to officers’ enforcement of a statute, courts attempt to vindicate demonstrators’ First Amendment rights without disturbing the underlying legislative regime.
The right to fair warning demands more attention. As described above in Part II, courts enforcing the right to fair warning have invoked the Due Process Clause and the Fourth Amendment in addition to—and sometimes instead of—the First Amendment. Thus, courts need not inevitably conclude that the First Amendment provides the constitutional basis for demonstrators’ right to fair warning. The uncertainty about the right’s constitutional origin itself raises interesting questions and potentially contains important implications. What does it mean to have a constitutional right with no clear constitutional origin? Does the existence of such a right, if widely accepted, deserve consideration in the ongoing debate between those who would emphasize constitutional text and those who interpret the Constitution in light of some animating purpose? Can an originalist interpretation of the Constitution explain demonstrators’ right to fair warning, or would originalists instead regard that right as a lingering vestige of now-discredited theories of constitutional interpretation? Finally, what might the analytical confusion concerning the origin of the right to fair warning tell us about how judges on Circuit Courts of Appeals approach their tasks? Are these judges attempting to faithfully apply Cox, a binding precedent, or do they instead feel motivated by the right’s intuitive appeal to overlook the difficult issues that skeptical Justices on today’s Supreme Court would surely raise? In questions such as these, the search for the basis of the right to fair warning reflects and illuminates the deeper search for our ever-shifting constitutional identity.

403 See generally JOHN HART ELY, DEMOCRACY & DISTRUST (1980).
404 For a fascinating historical account of the right to spontaneously assemble in the streets, see generally El-Haj, supra note 272.