

VIRGINIA LAW REVIEW

VOLUME 101

DECEMBER 2015

NUMBER 8

ARTICLES

CHANGING THE VOCABULARY OF THE VAGUENESS DOCTRINE

*Peter W. Low** and *Joel S. Johnson***

INTRODUCTION.....	2052
I. GOVERNING PRINCIPLES	2060
A. <i>The Conduct Requirement</i>	2060
B. <i>The Correlation Requirement</i>	2064
1. <i>Courts</i>	2065
2. <i>Police</i>	2074
II. GOVERNING PRINCIPLES AS ALTERNATIVE EXPLANATIONS	2079
A. <i>Vagueness Attacks on State Laws</i>	2079
1. <i>Lanzetta v. New Jersey</i>	2080
2. <i>Papachristou v. City of Jacksonville</i>	2081
B. <i>Vagueness Attacks on Federal Laws</i>	2087
1. <i>Skilling v. United States</i>	2087
2. <i>Screws v. United States</i>	2092
III. ADDITIONAL CONTROLLING FACTORS	2096
A. <i>City of Chicago v. Morales</i>	2096
B. <i>Kolender v. Lawson</i>	2098
C. <i>Johnson v. United States</i>	2102
CONCLUSION.....	2115

* Hardy Cross Dillard Professor of Law Emeritus, University of Virginia School of Law.

** J.D. 2015, University of Virginia School of Law.

INTRODUCTION

JUSTICE Frankfurter wrote in an early vagueness case that unconstitutional indefiniteness “is itself an indefinite concept.”¹ Scholars agree.² The language of the doctrine exacerbates the problem. In *Kolender v. Lawson*, for example, the Court began its vagueness inquiry by reciting the ordinary pablum: “As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”³

The linguistic focus of “fair notice” on what “ordinary people” would understand is commonplace and has a long history. In *Connally v. General Construction Co.*, for example, Justice Sutherland said for the Court that “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, violates the first essential of due process of law.”⁴ This is language of legal fiction. As we elaborate below,⁵ what “ordinary people” actually think about a law (or might

¹ *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting). Quoting Frankfurter, Justice Thomas echoed this concern in *Johnson v. United States*, 135 S. Ct. 2551, 2572 (2015) (Thomas, J., concurring in the judgment).

² For Professor John Jeffries, “[t]he difficulty is that there is no yardstick of impermissible indeterminacy.” John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 196 (1985). He continued: “The inquiry is evaluative rather than mechanistic; it calls for a judgment concerning not merely the degree of indeterminacy, but also the acceptability of indeterminacy in particular contexts.” *Id.* In his law school note that became an instant classic, Anthony Amsterdam said that “vagueness alone, although helpful and important, does not provide a full and rational explanation of the case development in which it appears so prominently.” Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 74 (1960).

Others, too, have expressed dissatisfaction with the Court’s vagueness language. See, e.g., Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 Am. J. Crim. L. 279, 282 (2003); Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 Sup. Ct. Rev. 141, 163; Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 Cardozo Pub. L. Pol’y & Ethics J. 255, 257, 296–336 (2010). Citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), John F. Decker wrote in *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 Denv. U. L. Rev. 241, 243 (2002), that “[v]agueness is a concept that appears heavily dependent on the ‘I know it when I see it’ test.”

³ 461 U.S. 352, 357 (1983).

⁴ 269 U.S. 385, 391 (1926).

⁵ See *infra* note 61 and accompanying text.

think if they read it) has nothing to do with a vagueness conclusion. “Fair notice” and its twin, “fair warning,” actually mean something quite different.

This is less true of the “arbitrary enforcement” branch of traditional vagueness doctrine. “Arbitrary enforcement,” or the potential for arbitrary enforcement, is clearly an important, perhaps the most important,⁶ trigger of the vagueness doctrine. But standing alone, it is not enough. Any criminal statute “encourages” arbitrary enforcement to some extent because it arms police and prosecutors with powers that can be arbitrarily misused. What the law of vagueness needs is a better sense of what it is about arbitrariness or its potential that helps one decide whether a statute is unconstitutionally vague and helps explain the result in more accessible terms.

Our objective is to do just that. Our thesis is both revolutionary in the sense that we wish to change the vocabulary of the vagueness doctrine and quite modest in the sense that our ambition is not to do much by way of changing outcomes. The Supreme Court has developed two straightforward constitutional principles that we believe have significant explanatory power in understanding modern vagueness cases. These principles may not change many results, but they do a better job of explaining why a particular statute or its application is or is not unconstitutionally vague. And they bring to the surface the thinking that actually controls—and that ought to control—a vagueness challenge.

The two principles are: all crime must be based on conduct; and there must be a defensible and predictable correlation between the established meaning of a criminal prohibition and the conduct to which it is applied. The first is a substantive limitation on how a crime must be defined. The second is a process limitation speaking to the manner in which, particularly with respect to timing, the definition of a crime is implemented. Both principles must be respected for *all* punishable crimes. One consequence of ignoring them in particular instances is that the law can be challenged as unconstitutionally vague.

We call the second principle the correlation requirement, and we also refer to it in antidelegation or rule-of-law terms. It could also be de-

⁶ The Court said as much in *Kolender*, 461 U.S. at 357–58 (“[T]he more important aspect of the vagueness doctrine ‘is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.’” (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974))).

scribed as implementing the principle of legality.⁷ As such, it consists of two limitations: courts may not define criminal conduct after the fact; and the power to define punishable conduct cannot be delegated to the police for enforcement on the streets.

We trace the case law origins of these two principles in Part I and sample several decided vagueness cases in Part II to illustrate how they can be applied. They turn out, we argue, to be congruent with vagueness reasoning.⁸ These principles do a better job than conventional rhetoric of explaining the rationale for a conclusion that a statute is or is not vague.⁹ But, as we elaborate with examples in Part III, they do not necessarily control outcomes. Additional considerations collateral to the vagueness doctrine itself are often decisive.

There is a third principle that is a potential candidate for consideration alongside these two, but we think it different because it is not—or at least should not be—of independent constitutional significance.¹⁰ *Lambert v. California*¹¹ can be seen as based on the moral principle that it is unfair to prosecute for a crime if the defendant did not in fact know that the underlying behavior was illegal and a person reasonably socialized

⁷ See Jeffries, *supra* note 2, at 190 (“The principle of legality forbids the retroactive definition of criminal offenses.”).

⁸ Some scholars have recognized the relevance of one or both of these principles to the vagueness doctrine, but they have not built an explanatory theory around them. See, e.g., Decker, *supra* note 2, at 342; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *Colum. L. Rev.* 551, 601 (1997); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 *U. Pa. L. Rev.* 335, 355, 359–60 (2005); Mila Sohoni, *Notice and the New Deal*, 62 *Duke L.J.* 1169, 1173 (2013).

⁹ Some have suggested that a robust equality rationale runs through many of the vagueness cases. See Kim Strosnider, *Anti-gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 *Am. Crim. L. Rev.* 101, 121–23 (2002) (arguing that arbitrary enforcement cases were motivated in part by concerns for racial equality); Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 *Harv. C.R.-C.L. L. Rev.* 149, 152 (2011) (arguing that the vagueness doctrine reflects equal protection principles and, in some ways, is a more effective instrument than the equal protection doctrine for protecting these values). Our thesis is not inconsistent with the conclusion that *more* is involved in vagueness decisions than the contentions we advance. Our point is that they involve *at least* what we say. We agree with John Jeffries, *supra* note 2, at 213: “[A]lthough there is no necessary connection between the formal requirements of the rule of law and any substantive notion of equality, in the context of contemporary American society the two are closely linked.”

¹⁰ The observations in this paragraph are based on the analysis contained in Peter W. Low & Benjamin Charles Wood, *Lambert Revisited*, 100 *Va. L. Rev.* 1603 (2014).

¹¹ 355 U.S. 225 (1957).

to contemporary moral values would have no idea that it was wrong.¹² This is a form of fair notice that is always relevant in vagueness cases¹³ but—unlike the two constitutional requirements on which we rely—has never been an independent reason for declaring a statute or its application unconstitutional. The concept of “fair notice” as used in a vagueness case thus might *include* a lack of “fair notice” in the *Lambert* sense. But that alone is never enough. We are aware of no United States Supreme Court case where a statute has been held unconstitutionally vague *because* socialization notice was lacking.¹⁴ The absence of *Lambert* notice can be an important additional reason for declaring a statute unconstitutionally vague, but only if it is accompanied by textual defects in the governing law that violate one or both of the conduct or correlation limitations.¹⁵

Think about the vagueness doctrine another way. The Constitution contains two different types of protections for liberty and equality. At one level, concerns about liberty and equality result in the placement of special burdens of justification on government interference with special classes of rights. Liberty interests specifically identified in the Bill of Rights receive heightened protection, as do liberty interests based on independent substantive due process decisions.¹⁶ Exceptionally strong justification is required as well when government disrespects equality by

¹² See Low & Wood, *supra* note 10, at 1605 & n.4; see also Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 Rutgers L.J. 539, 555 (1988) (“[T]he criminal law cannot fairly be applied unless one’s moral signals are likely to be alerted by the context in which the behavior occurs.”).

¹³ “Street cleaning” statutes are “especially likely to involve *Lambert*-like problems.” Jeffries, *supra* note 2, at 216. In these circumstances, the *Lambert* notion of fair warning is “often factually coincident” with other concerns based on the rule of law. *Id.*

¹⁴ Indeed, we believe that the same is true of *Lambert* itself. See Low & Wood, *supra* note 10, at 1678.

¹⁵ We elaborate on this conclusion below. See *infra* text accompanying note 141. It can in part be derived from the fact that, whatever the content of the vagueness doctrine, it clearly has something to do with a defect in the manner in which a criminal prohibition is stated in the governing law. The socialization idea underlying *Lambert*, on the other hand, has nothing to do with statutory text—it has to do instead with whether the context in which behavior is proposed transmits moral warning signals to potential actors.

¹⁶ See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) (applying strict scrutiny to the regulation of content-based speech); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642–43 (1994) (applying intermediate scrutiny to the regulation of content-neutral free speech); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (reaffirming heightened protection for the right to an abortion).

placing burdens on special classes of people based on their status—race and gender being obvious examples.¹⁷

But importantly for present purposes there is an “everything else” category of rights that are also based on liberty and equality. The right to walk in the woods and smell the flowers—to go one’s course according to one’s own lights¹⁸—is also constitutionally protected against arbitrary and unjustified government interference. The liberty to be free and the right to be treated on an equal basis with everyone else are fundamental to life as we know it. The constitutional protection here, to be sure, is at a lower threshold. Government must govern, and public protection through devices like the criminal law is one of its important obligations. The doctrine is that government may burden, limit, or prohibit these general rights of any or all of us when it has a “rational basis” for doing so. And what counts as a “rational basis” is generous to a fault.¹⁹

But a low rational basis threshold does not mean no threshold at all. Criminal sanctions deprive those subjected to them of these general rights of liberty and equality. Another way to state our argument is that a law that is not based on conduct or does not satisfy the correlation principle cannot provide the “rational basis” that is required when government seeks to limit freedom of action or impose differential burdens by the use of criminal sanctions.²⁰ Importantly, this does not mean that behavior will enjoy independent substantive due process protection if a law

¹⁷ See, e.g., *United States v. Virginia*, 518 U.S. 515, 531–33 (1996) (applying intermediate scrutiny to a gender-based classification); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (applying strict scrutiny to a race-based classification).

¹⁸ See *Papachristou v. City of Jacksonville*, 405 U.S. 159, 164 (1972) (“[T]he amenities of life as we have known them . . . have been in part responsible for giving our people the feeling of independence . . .”).

¹⁹ See, e.g., *Chapman v. United States*, 500 U.S. 453, 465 (1991) (holding “that Congress had a rational basis for its choice of penalties” in a prosecution for distributing LSD); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (holding that the Equal Protection Clause is satisfied in the ordinary case so long as the classification is “rationally related to a legitimate state interest”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (holding that laws in general will not violate the Due Process Clause so long as they are rationally related to a legitimate state interest).

²⁰ We think this is what Justice Harlan had in mind in his separate opinion in *Robinson v. California*, 370 U.S. 660, 678–79 (1962) (Harlan, J., concurring). And Justice Stevens, we think, had this idea in mind when he said in *City of Chicago v. Morales*, 527 U.S. 41 (1999), that “the freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment,” *id.* at 53, and that the dissent was mistaken to think that he was talking about traditional substantive due process, *id.* at 64 n.35.

is struck down for violating these principles.²¹ Invariably, the legitimate objectives of a law that is held unconstitutionally vague can be accomplished by rewriting the law in a more targeted fashion.

This last point deserves emphasis. The two inquiries we have identified are the drivers of the vagueness doctrine. Without one or both of them, we argue, the doctrine is inapplicable. But they are the beginning of the story, not the end. Every disposition of a case on the ground of vagueness involves a values trade-off.

On one side is the array of law-enforcement interests the legislature seeks to advance by the statute in question. The criminal law is dominated by utilitarian public protection concerns of the highest order, and courts are understandably reluctant to foreclose serious efforts by a legislature to protect the public from identified evils, especially when it has made a reasonable effort and may have no clear alternatives.²² Whether these objectives can be accomplished by alternative means is always relevant, and sometimes determinative, in a vagueness analysis.²³

²¹ Some have argued that the vagueness doctrine amounts to something like substantive due process. See Livingston, *supra* note 8, at 618–20; Robert C. Post, Reconceptualizing Vagueness: Legal Rules and Social Orders, 82 Calif. L. Rev. 491, 496–98 (1994).

Based on drafts of the opinion in *Papachristou v. City of Jacksonville*, Professor Risa Goluboff has argued that Justice Douglas “did not in fact rely on vagueness alone.” Risa L. Goluboff, Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights, 62 Stan. L. Rev. 1361, 1365 (2010). “The existence of these early drafts,” Goluboff said, “gives some heft to the speculation that *Papachristou*’s reliance on vagueness hid substantive commitments,” though “the substance of the rights . . . is not entirely clear.” *Id.* at 1367; see also J. Harvie Wilkinson III & G. Edward White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563, 563, 611 (1977) (describing a post-*Papachristou* trend toward some form of constitutional protection for lifestyles).

²² See Robert Batey, Vagueness and the Construction of Criminal Statutes—Balancing Acts, 5 Va. J. Soc. Pol’y & L. 1, 1–2 (1997) (arguing that the “fair notice” and “arbitrary and discriminatory law enforcement” policies of the vagueness doctrine amount to a threshold test that precedes the balancing of other interests, such as the need for the indeterminacy to achieve the legislative goal); see also Amsterdam, *supra* note 2, at 95 (“The maintenance of order is the precondition of any freedom in a society, and where the subject matter of regulation is such as to make unfeasible modes of law administration other than those which involve *ad hoc* judgments, considerable pressures are created in favor of permitting an *ad hoc* judgment scheme.”).

²³ A good example of what Amsterdam called the “principle of necessity,” *supra* note 2, at 95, is the Court’s response to obscenity. Laws that “chill” First Amendment rights present a classic situation where the tightest vagueness standards apply. See, e.g., *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982); *NAACP v. Button*, 371 U.S. 415, 432–33 (1963). Yet the Court has consistently approved criminal prohibitions of obscenity worded in hopelessly vague language (and, indeed, measured by non-uniform

On the other side of the trade-off are concerns like *Lambert*-based fair notice and the impact of the law on identified constitutional values. Anthony Amsterdam wrote in his classic law school note that the vagueness doctrine “was born in the reign of substantive due process and throughout that epoch was successfully urged exclusively in cases involving regulatory or economic-control legislation.”²⁴ This evolved in later years, he said, into the use of vagueness to protect free speech and other First Amendment values.²⁵ Amsterdam’s ultimate thesis was that the vagueness doctrine has less to do with indefiniteness of language²⁶ and more to do with “the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms.”²⁷ It has mainly been used, he argued, in aid of substantive constitutional values, as a form of additional protection for conduct that the Constitution recognizes as essential to individual liberty.

local standards), even though speech at the periphery of obscenity is likely to be constitutionally protected and may well be “chilled.” See, e.g., *Miller v. California*, 413 U.S. 15, 36–37 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973).

Why does the Court uphold such statutes? Because no one knows how to write obscenity laws in language that is more clear and more precise. The consequence of applying normal First Amendment vagueness standards to obscenity laws would be to foreclose the legitimate legislative objective of punishing those who produce and traffic in plainly obscene materials. The vice escalates as one moves from consenting adults to nonconsenting adults, and is of special concern when children are involved.

²⁴ Amsterdam, *supra* note 2, at 74 n.38. Without citing Amsterdam, Justice Thomas has used this history in combination with his opposition to substantive due process reasoning as a basis for questioning the legitimacy of the vagueness doctrine itself. See *Johnson v. United States*, 135 S. Ct. 2551, 2566–73 (2015) (Thomas, J., concurring in the judgment). “Simply put,” he said, “our vagueness doctrine shares an uncomfortably similar history with substantive due process,” *id.* at 2564, which in his mind raised doubts about whether the doctrine is “defensible under the original meaning of ‘due process of law,’” *id.* at 2566.

²⁵ Amsterdam, *supra* note 2, at 74–75 n.38.

²⁶ *Id.* at 74.

²⁷ *Id.* at 75. Amsterdam had First Amendment values particularly in mind. Abortion rights and expanded rights of privacy could be added to this list today. For a collection of some seventy Supreme Court cases that cite the vagueness doctrine decided after Amsterdam wrote and before 1990, see Note, “*Mother of Mercy—Is This the End of Rico?*”—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO “Pattern,” 65 *Notre Dame L. Rev.* 1106, 1116–18 & nn.62–73 (1990). The author concluded that a perusal of the cases confirms Amsterdam’s observation quoted in the text. *Id.* at 1116–18. He reports that only twelve of the examined cases held a statute void for vagueness. *Id.* at 1118. Half of them involved the First Amendment, two involved abortion, and one communist activity. See *id.* at 1118–19. Of the other three, one—*Giaccio v. Pennsylvania*, 382 U.S. 399 (1966)—involved the standardless allocation of costs following misdemeanor acquittals. Note, *supra*, at 1120. The other two—*Papachristou* and *Kolender*—are discussed below. See *infra* Subsection II.A.2 (*Papachristou*) and Section III.B (*Kolender*).

Amsterdam added that some vagueness cases, such as *Lanzetta v. New Jersey*,²⁸ did not fit this pattern. He had in mind situations where recognized Bill of Rights values like freedom of speech or association were not implicated, but where statutes were nonetheless held unconstitutional because crimes were defined with intolerable indefiniteness. He did not address this second category of vagueness cases in any detail. We mean to do so here, and argue that they too primarily involve the protection of independent constitutional rights. They do so not by creating an insulating buffer zone, however, but by protecting the very core of the two constitutional principles on which we rely.²⁹

We make one final introductory comment. It is important to pay attention to the intersection of state and federal law when considering a vagueness challenge. A state court considering a vagueness challenge to a state law must first come to an understanding of what that law means. An interpretation that narrows the law to avoid the vagueness challenge is always possible. But if the meaning of the state law as read by the state courts does not eliminate the vagueness concern, a federal court that examines the matter is bound by the state court construction and can consider only the extent to which federal vagueness principles may be violated. It may not read the state law differently from the state courts and avoid the vagueness problem based on a different understanding of the state law. But a challenge to a *federal* law on vagueness grounds is an entirely different matter. Necessarily, it puts two issues to a federal court. The first is a construction of the text of the law. The federal court must determine what the federal law means, and may of course do so in a manner that avoids the vagueness problem. Or, for one reason or another, it may feel required to read the federal law in a manner that brings constitutional vagueness principles into play. Because of this difference, challenges to state laws are separated from challenges to federal laws in the discussion below.

We turn now to the development of our thesis. Section I describes the case law origins of the two principles on which our argument rests. Section II then illustrates the application of these principles to four relatively straightforward Supreme Court vagueness cases, two involving attacks on a state law and two on a federal law. Section III presents an

²⁸ 306 U.S. 451 (1939); see Amsterdam, *supra* note 2, at 85–87. *Lanzetta* is discussed extensively below. See *infra* Subsection II.A.1.

²⁹ This is not to say that they do not have explanatory power in the primary category of cases on which Amsterdam focused. We leave that issue, however, for another day.

important corollary of our thesis: Vagueness cases are often controlled by factors extraneous to the vagueness doctrine. We illustrate that proposition with two Supreme Court cases involving vagueness attacks on a state law and one involving an attack on a federal law. We then conclude.

I. GOVERNING PRINCIPLES

The two governing principles that we identify have been unanimously embraced by the Supreme Court in cases not based on the vagueness doctrine. These cases established constitutional rules that independently constrain the substance and process of crime definition.

There is a bit of a chicken-and-egg problem. The vagueness doctrine was developed first, and one could plausibly contend that the insight gained from application of that doctrine gave birth to each of the two principles. This may be so, but it is not our concern here. Our point is analytical, not historical. What is important is that the principles on which we rely are widely accepted and deeply embedded in modern constitutional law. Our contention is that the kinds of vagueness cases with which we are concerned are best understood through the filter of these principles rather than the platitudes with which the vagueness doctrine is normally described.

A. The Conduct Requirement

The first principle on which we rely is that the definition of a crime must be based on conduct occurring at a specific time and place. Crimes may not be exclusively limited to the punishment of status, reputation, predilections, intentions, or predicted conduct. Intentions and predicted conduct based on intentions may be included in the definition of a crime, to be sure, but they may not be all there is. People may be punished by the criminal law based only on their behavior, not who they are, who they may become, or what they might do someday. It follows that there must be sufficient proof of the conduct on which a conviction is based to satisfy constitutional standards.

*Robinson v. California*³⁰ stands for the unadorned proposition that it is unconstitutional to convict of a crime “where no conduct of any kind

³⁰ 370 U.S. 660 (1962).

is involved.”³¹ Robinson had been convicted under a statute providing that “[n]o person shall use, or . . . be addicted to the use of narcotics.”³² Conviction was by a general verdict that, in the Court’s words, meant that the jury believed “either that he was of the ‘status’ or had committed the ‘act’ denounced by the statute.”³³ The Court held that this result was unconstitutional because it permitted punishment for the status of being an addict and famously added that “[e]ven one day in prison would be” unconstitutional “for the ‘crime’ of having a common cold.”³⁴

The State’s brief unabashedly defended punishment on the basis of Robinson’s status. The summary of argument said explicitly that the statute was “not violative of the Fourteenth Amendment merely because it punishes the existence of a *status*, addition [sic] to narcotics, rather than an act or omission. Punishment of a status has always been an accepted concept of English and American jurisprudence.”³⁵ The brief also advanced the proposition that “[t]he fact that addiction to narcotics may

³¹ The quote is from Justice Black’s concurrence in *Powell v. Texas*, 392 U.S. 514, 542 (1968). The Court was divided in *Powell* about the implications of *Robinson*. See *id.* at 533–34. But all of the Justices in *Powell* proceeded from the premise that *Robinson* at least required that crime be based on conduct. See Eric Luna, The Story of *Robinson*: From Revolutionary Constitutional Doctrine to Modest Ban on Status Crimes, in *Criminal Law Stories* 47, 81–82 (Donna Coker & Robert Weisberg eds., 2013). The Luna essay is a fascinating and comprehensive discussion of the *Robinson* litigation and its aftermath.

“Conduct,” as we use the term, and as we believe *Robinson* meant for it to be used, would of course include omission where there is a legal duty to act and possession. See Model Penal Code § 2.01 (1985).

³² *Robinson*, 370 U.S. at 660 n.1 (codified in § 11721 of the California Health and Safety Code of the day).

³³ *Id.* at 663. Conviction by general verdict, of course, meant that the conviction had to be valid under either alternative. See *Yates v. United States*, 354 U.S. 298, 312 (1957) (applying the rule that a verdict must be set aside when it “is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected”).

Justice White read the jury instructions differently. In his view, the jury was told that “addiction” in the statute meant “habitual use,” and “habitual use” was defined as using drugs “often or daily.” *Robinson*, 370 U.S. at 686 & n.2 (White, J., dissenting). For him, therefore, the case involved a prosecution for use or lots of use and did not raise a question of punishment for status.

The Court disagreed: “[T]he California courts have not so construed this law.” *Id.* at 665 (majority opinion). Although the Court did not cite California cases in support of this conclusion, such cases did exist. See *People v. Ackles*, 304 P.2d 1032, 1033 (Cal. Dist. Ct. App. 1956).

³⁴ *Robinson*, 370 U.S. at 667.

³⁵ Brief of Appellee at 8, *Robinson*, 370 U.S. 660 (No. 554).

be a mental and physical illness does not result in constitutional immunity from punishment.”³⁶

The majority’s response to these claims is clear enough at one level. Robinson was not convicted for what he did, but for who—or perhaps better, what—he was. That, the Court said, would not do. But, as Justice White added in his dissent, “the Court’s opinion bristles with indications of further consequences.”³⁷ An ethical premise of the criminal law is that punishment is justified for free choices that result in prohibited behavior. If the Constitution requires that crime be based on conduct, it follows, morally, that constraints on the choices that lead to such conduct—derived, for example, from involuntariness due to physical incapacity, mental illness, or duress—ought to be recognized in at least some circumstances as an exonerating or mitigating defense. Predictably, *Robinson* engendered debate about how much of this moral argument was to be enforced by the Constitution. The case birthed an avalanche of scholarly speculation about the future directions that its holding might take.³⁸

The speculation was quashed six years later in *Powell v. Texas* when the Court upheld the punishment of a chronic alcoholic for being drunk

³⁶ Id. The body of the brief relentlessly assaulted the Court with similar assertions. See *id.* at 11–14.

The brief by Robinson’s attorney consisted of forty pages of rambling statements. The two pages and change devoted to the punishment of status consisted of citations to several state cases, irrelevant quotes from two Supreme Court cases, and additional unhelpful remarks. Appellant’s Opening Brief at 10–12, *Robinson*, 370 U.S. 660 (No. 554).

Robinson’s lawyer was Lambert’s lawyer in *Lambert v. California*, 355 U.S. 225 (1957). He made such a mess of his brief in that case that the Court ordered reargument and appointed an amicus to present argument on behalf of Lambert, something that so far as we can tell has happened neither before nor since. See Low & Wood, *supra* note 10, at 1609 n.21.

Robinson died before the jurisdictional statement in his case was filed in the Supreme Court, but his lawyer told the Court during oral argument that Robinson was on probation. The Court denied rehearing after it learned that it had been misled. Robinson’s lawyer was subsequently disbarred for independent misconduct. See *id.* at 1607–09.

³⁷ *Robinson*, 370 U.S. at 688 (White, J., dissenting).

³⁸ For a summary of some possibilities, see Luna, *supra* note 31, at 65–68. For examples of speculative *Robinson* literature, see Ozro William Childs IV, Intoxicated Confessions: A New Haven in *Miranda?*, 20 Stan. L. Rev. 1269, 1279 (1968) (speculating that, after *Robinson*, confessions made by an intoxicated person might be involuntary for *Miranda* purposes); Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635, 645–50 (1966) (speculating that the *Robinson* rationale could be anything from a simple distinction between a status and an act to a full blown involuntariness defense that might extend to many drug addicts); Note, The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense, 74 Yale L.J. 942, 943, 946 n.22 (1964) (relying on a *Robinson* conduct requirement in support of an argument that the Constitution dictates the entrapment defense).

in public.³⁹ A plurality⁴⁰ held that lines between defenses or mitigations based on constrained choices and protection of the public from harmful behavior should be left to each jurisdiction as a matter of its own internal policy. Powell could be convicted because the statute punished conduct and he engaged in that conduct. Any involuntariness caused by his chronic alcoholism did not raise an issue of constitutional dimension.⁴¹

The basic concern of the *Powell* plurality was that the precise contours of defenses based on constrained moral choices have always been, and should continue to be, the product of tough compromises between the goals of the criminal law and principles of personal accountability. It was inappropriate for all sorts of reasons for the Court to draw these lines as a matter of constitutional compulsion. But adoption of a constitutional principle that crime be based on conduct does not raise the *Powell* concerns. It establishes a constitutional protection that is fundamental to individual fairness and liberty⁴² without intruding on the resolution of everyday policy conflicts that arise as the criminal law is implemented at the federal level and from state to state. A requirement that the criminal law be based on conduct does not interfere with the ability of legislatures to accomplish public protection goals. Legislatures need the power

³⁹ 392 U.S. 514, 536–37 (1968).

⁴⁰ Justice Marshall's opinion was joined by Chief Justice Warren and Justices Black and Harlan. *Id.* at 516 (plurality opinion of Marshall, J.). Joined by Justice Harlan, Justice Black concurred separately. *Id.* at 537 (Black, J., concurring).

⁴¹ Five Justices disagreed. Speaking for himself and Justices Douglas, Brennan, and Stewart, Justice Fortas dissented. *Id.* at 554 (Fortas, J., dissenting). Justice White agreed with the majority result. He thought that *Robinson* (from which he had dissented) meant that the Constitution forbade criminal conviction for an act over which the defendant had no control, but he found no evidence that Powell lacked control over the "in public" part of his behavior. *Id.* at 548–49 (White, J., concurring in the judgment).

The view of these five Justices has gone nowhere in the forty-plus years since the *Powell* decision, and rightly so. For an interesting account of the evolution of the Marshall opinion written by one of Chief Justice Warren's law clerks at the time, see Earl C. Dudley, Jr., *An Interested Life* 160–63 (2009). Dudley recounts that the Fortas dissent was originally written for a five-person majority. Two things then happened. A dissent written in Chief Justice Warren's chambers morphed into the opinion ultimately published under Justice Marshall's name. And Justice White switched his vote and wrote a separate concurring opinion joining the Marshall result. *Id.* at 162–63.

⁴² The fundamental nature of requiring conduct as the basis for criminal punishment is longstanding and well established. See, e.g., Herbert Packer, *The Limits of the Criminal Sanction* 73–75 (1968); Glanville Williams, *Criminal Law: The General Part* 1 (2d ed. 1961); John C. Jeffries, Jr. & Paul B. Stephan, Jr., *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 *Yale L.J.* 1325, 1371 n.130 (1979). The conduct requirement is honored as a matter of policy in all crimes that form the grist of modern criminal codes.

to punish people based on conduct. They do not need authority to punish people for who or what they are.⁴³

It is a reasonable corollary of *Robinson* that the prosecutor must at least produce some evidence that the required conduct actually occurred. It is not surprising that the Supreme Court has so held: “Just as ‘[c]onviction upon a charge not made would be sheer denial of due process,’ so is it a violation of due process to convict and punish a man without evidence of his guilt.”⁴⁴ The difficult next step is *how much* evidence is needed to cross the due process threshold. That question was addressed in *Jackson v. Virginia*.⁴⁵ The Court’s answer was “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁴⁶

B. The Correlation Requirement

The second constitutional constraint on which we rely, to which we now turn, is based on the principle of legality. There must be a correlation between the definition of a crime and the established facts of the situations to which it is applied. Based on the text of the law and other legal sources relevant to the interpretation of that text, it must have been predictable and defensible *ex ante* that the elements of the crime would fit the facts as proved.

⁴³ Perhaps the most curious aspect of *Robinson* is not the result but the choice of the Cruel and Unusual Punishment Clause as its basis. Prior to *Robinson*, no case had held that the Cruel and Unusual Punishment Clause applied to the states. Today, *Robinson* is the case that is cited for the proposition that it does. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991).

Justice White accused the Court of disguising a substantive due process holding in cruel and unusual punishment clothing. See *Robinson*, 370 U.S. at 689 (White, J., dissenting). For an argument that *Robinson* should be understood as based on the Due Process Clause rather than the Eighth Amendment, see Martin R. Gardner, Rethinking *Robinson v. California* in the Wake of *Jones v. Los Angeles: Avoiding the “Demise of the Criminal Law”* By Attending to “Punishment,” 98 J. Crim. L. & Criminology 429, 432 (2008) (arguing that understanding *Robinson* as a due process case better cabins it to the simple proposition that “without a criminal act there can be no punishment”).

⁴⁴ *Thompson v. Louisville*, 362 U.S. 199, 206 (1960) (footnotes omitted) (citing *De Jonge v. Oregon*, 299 U.S. 353 (1937)). Justice Black wrote the opinion for a unanimous Court.

⁴⁵ 443 U.S. 307 (1979).

⁴⁶ *Id.* at 319. The Court extrapolated this principle from *In re Winship*, 397 U.S. 358 (1970), rather than *Thompson v. Louisville*. *Jackson*, 443 U.S. at 320 & n.14.

In most prosecutions, this will be clear once the facts are established. Most murders, robberies, and burglaries will not present difficult issues about whether it could have been predicted that the facts as proved fit the established meaning of the applicable law. But in some prosecutions a judgment will be required. Statutory language is always indeterminate to some extent.⁴⁷ The resolution of statutory indeterminacy can be based on all legally relevant sources—the text of the law and related laws, relevant precedent, legislative intent, discernable policy based on the text of the law or apparent legislative purposes, and the like. These sources may make it relatively easy to decide that it was predictable and defensible to conclude that the facts fit the definition of the crime, or the judgment may be a close and difficult one.⁴⁸

In some cases, however, the available legal sources will make it clear that the law punishing the defendant's behavior was, in effect, established after the fact rather than before. A person familiar with all of the relevant legal sources and educated in what they mean could not have guessed in advance that behavior sought to be punished would be included in the relevant prohibition. Such cases are prime candidates for a conclusion of unconstitutional vagueness. They can arise as a limitation on behavior by courts or by the police. Both situations are considered in turn below.

1. Courts

*Bouie v. City of Columbia*⁴⁹ is the Supreme Court's clearest statement of the correlation principle. Although the context suggests more rigorous application than otherwise might have been expected,⁵⁰ the result in *Bouie* was controlled by an important constitutional principle based on the rule of law.⁵¹ The defendants were engaged in a sit-in demonstration

⁴⁷ For example, is a viable fetus a "human being" for purposes of a murder prosecution? Does partnership property satisfy the "property of another" element in a theft? Is reaching through an open window a "breaking" that will satisfy the "breaking and entering" component of burglary? Must a "serious injury" for purposes of aggravated assault be life-threatening? Courts answer questions like this all the time, and must do so for the system to operate. For discussion of these sorts of issues, see Jeffries, *supra* note 2, at 226–34.

⁴⁸ See *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015) ("[E]ven clear laws produce close cases . . .").

⁴⁹ 378 U.S. 347 (1964).

⁵⁰ See *infra* note 52.

⁵¹ We mean by this a "limited and quite conventional" use of the term that "signifies the constraint of arbitrariness in the exercise of government power." Jeffries, *supra* note 2, at

in the restaurant department of a South Carolina drug store. They were convicted of trespass because they refused to leave without being served. The law under which they were convicted punished persons who entered the property of another after notice prohibiting entry. No such notice was given. Instead, the defendants were convicted for failing to leave after being asked to leave. The South Carolina Supreme Court affirmed the convictions, and the United States Supreme Court reversed.

The demonstrators hoped the Supreme Court would decide the case in their favor on the equal protection ground that they could not be excluded from places of public accommodation based on their race. But the Court avoided the equal protection question,⁵² focusing instead on a different argument made by the demonstrators: “These convictions either offend the due process clause under the doctrine of *Thompson v. Louisville* . . . or else the law has been so unfairly expanded by construction that it fails to warn”⁵³ The demonstrators were right that there was no evidence that they entered the restaurant after having received notice not to enter. But the *Thompson* argument was inapplicable, the United States Supreme Court concluded, because the South Carolina Supreme

212. Like Jeffries, we do not wish to explore the deeper meanings that philosophers and legal theorists have found in the rule-of-law concept.

⁵² As pointed out in Monrad G. Paulsen, *The Sit-In Cases of 1964: “But Answer Came There None,”* 1964 Sup. Ct. Rev. 137, 137–38, five sit-in cases decided during the Court’s 1963 Term were resolved on narrow grounds that avoided the equal protection question sought to be raised by the demonstrators. Because *Bouie* was an avoidance decision, Paulsen concluded that “[i]t is not to be expected that the Court will be diligent in applying the *ratio decidendi* of *Bouie* to other cases.” *Id.* at 141.

We disagree. We think *Bouie* is of central importance to the integrity of the criminal law. We do agree with Paulsen, however, that the principle was applied with a special strictness that would not have been warranted in an ordinary trespass conviction. It was clear by the time the cases were decided that the 1964 Civil Rights Act would be enacted and that it would solve by statute most of the issues raised by the demonstrators, as indeed it did. See *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). The Court was therefore faced with an incentive to reverse the convictions and to avoid decision of what was then an unnecessary (and difficult) constitutional question. For an analysis of the Court’s back-and-forth on the constitutional question based on internal Court documents, see Brad Ervin, Note, *Result or Reason: The Supreme Court and the Sit-In Cases*, 93 Va. L. Rev. 181 (2007).

Candor requires acknowledgment that one of the authors of this Article was a law clerk for Chief Justice Warren at the time *Bouie* and its companion sit-in cases were decided.

⁵³ Brief for Petitioners at 60, *Barr v. City of Columbia*, 378 U.S. 146 (1964) (No. 9), and *Bouie*, 378 U.S. 347 (No. 10) (briefing issues in both cases).

Court construed the statute to apply to trespassers who refused to leave when asked.⁵⁴ This reading of the statute led to the winning argument:

Petitioners contend . . . that by applying such a construction of the statute to affirm their convictions in this case, the State has punished them for conduct that was not criminal at the time they committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits. We agree with this contention.⁵⁵

The “fair warning” the Court invoked is clearly premised on a constitutionally required version of the rule of law, the need for which is readily apparent. The institutional position of courts is that they act *ex post*, that is, they apply law to situations that have already occurred. Courts have the power—and sometimes have exercised it⁵⁶—to manipulate the law to create, after the fact, a new principle that neither existed prior to the manipulation nor could have been predicted based on any reasonable interpretation of previously stated law. The *Bouie* Court concluded that this is exactly what the state court had done. The principle derived from this conclusion is based on the need for a standard by which to distinguish such excesses from acceptable exercises of the normal responsibility of courts to apply law to fact.⁵⁷ After noting that “the required criminal law must have existed when the conduct in issue occurred,”⁵⁸ the Court articulated the standard as “[i]f a judicial construction of a criminal statute is ‘*unexpected and indefensible by reference to the law which*

⁵⁴ The brief for the demonstrators characterized the South Carolina Supreme Court as “holding, in effect, that ‘entry’ means ‘remaining a short while,’ or, in the alternative, that ‘after’ means ‘before.’” *Id.*

⁵⁵ *Bouie*, 378 U.S. at 350.

⁵⁶ This was what happened in *Barr*, 378 U.S. at 148–50, *Wright v. Georgia*, 373 U.S. 284, 291 (1963), and *NAACP v. Alabama*, 357 U.S. 449, 454–58 (1958), all of which were cited in *Bouie* as examples of such manipulation in the adequate and independent state ground context.

⁵⁷ See *Bouie*, 378 U.S. at 352 (“There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.”).

As this language illustrates, the affinity between *Bouie* and vagueness on which we rely was close to the surface in *Bouie* itself. The Court drew a number of explicit parallels by, for example, citing a number of vagueness cases. See *id.* at 351 (quoting Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 *Vand. L. Rev.* 533, 541 (1951)); *id.* at 353 (citing *Amsterdam*, *supra* note 2, at 73–74 & n.34).

⁵⁸ *Id.* at 354 (quoting Jerome Hall, *General Principles of Criminal Law* 58–59 (2d ed. 1960)).

had been expressed prior to the conduct in issue,' it must not be given retroactive effect."⁵⁹ A construction that fails this test can be adopted prospectively but cannot be applied in pending litigation. But if the construction is predictable and defensible based on prior law—as will be the case with most interpretations and applications of precedent—then the rule of law has been followed and the decision will be consistent with this constitutional filter.

It is worth emphasis that the Court's use of the concept of "fair warning" in *Bouie* had nothing to do with whether the sit-in demonstrators in that case (or any other ordinary citizens contemplating such action) would actually or potentially have been surprised by a trespass conviction. It had nothing to do with what the defendants personally would have discovered had they read the law prior to their behavior. The statement was not about them. It was about the process for reaching the conclusion that their conduct was punishable.⁶⁰

There is much talk in Justice Brennan's *Bouie* opinion about how potential defendants will be misled when precise statutory language is given an unpredictable effect.⁶¹ But such talk does not explain the decision and, though appealing rhetoric, is not meant to be descriptive. The Court was not concerned with whether actual or potential defendants might be misled by the legal meaning of the words of the statute. Persons without legal training can hardly be expected to read statutes with care or to be aware of—let alone understand—the complex background case law interpreting a statute that may (to the lawyer) give it perfectly predictable application to the situation at hand. Indeed, Justice Brennan spent a good

⁵⁹ *Id.* (emphasis added) (citations omitted) (quoting Hall, *supra* note 58, at 61). The Court had previously analogized the situation to several vagueness cases, specifically *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), and *Connally v. General Construction Co.*, 269 U.S. 385 (1926). *Bouie*, 378 U.S. at 351.

⁶⁰ Justice Brennan's opinion for the Court said explicitly that:

We think it irrelevant that petitioners at one point testified that they had intended to be arrested. The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants.

Bouie, 378 U.S. at 355 n.5.

⁶¹ For example:

When a statute on its face is narrow and precise . . . it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction.

Id. at 352.

portion of his *Bouie* opinion analyzing prior South Carolina trespass law in order to demonstrate that the interpretation applied to the *Bouie* defendants could not have been predicted in advance.⁶² If the prior South Carolina cases had yielded a basis for interpreting the trespass law to encompass failure to leave on request, the convictions would not have been reversed on the Court's *Bouie* rationale even if such an interpretation would have required subtle analysis that would challenge the most sophisticated of lawyers. Application of the *Bouie* standard—"unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue"—requires meticulous dissection of statutory text and prior interpretative case law, not casual or even careful reading by the lay public.⁶³ The ultimate absurdity of focusing the fair notice idea on whether the lay public might be misled is that even if an ordinary person actually did undertake the inquiry and even if, as is likely, that person did not or could not "understand what conduct is prohibited,"⁶⁴ that lack of understanding most likely would not be an excuse. Ignorance or misunderstanding of the criminal law, except in the rarest of cases, is not a defense to a criminal prosecution.

The use of "fair notice" in *Bouie*, therefore, does not state a principle of individual fairness, and does not invoke the socialization principle that underlies *Lambert v. California*.⁶⁵ Unlike its use in *Bouie*, "fair notice" as used in *Lambert* concerns the potential that individual defendants may be surprised when prospective behavior leads to criminal sanctions.⁶⁶ A lack of fair notice in the *Lambert* sense is not derived from analysis of statutory language or careful dissection of prior judicial interpretations. It has to do instead with moral common sense, with

⁶² See *id.* at 356–62.

⁶³ We are indebted to Professor Kenneth S. Gallant for initiating an email discussion in response to an earlier draft of this Article that led us to an alternative formulation of what we mean by the correlation requirement. Based on established legal sources, a sophisticated lawyer ought to be able to state the governing legal rule and predict the possibility of its application in a manner that would guide the behavior of an ordinary member of the public before the behavior is undertaken. This is the essence of the principle of legality.

⁶⁴ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The quote appears in context above. See *supra* text accompanying note 3.

⁶⁵ 355 U.S. 225 (1957); see *supra* text accompanying note 11.

⁶⁶ *Lambert* failed to register as a convicted felon and claimed that she had no idea she was required to do so. *Id.* at 227. The Court held that due process required "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply." *Id.* at 229.

whether one is likely in context to be warned by normal moral signals that proposed behavior might lead to conviction of a crime.

As noted above, at least one scholar thought that *Bouie* was a one-off decision, motivated by the desire to avoid a complex constitutional question and not likely to have significant long-term effect.⁶⁷ The prediction proved wrong. In *Rogers v. Tennessee*, the Court unanimously embraced the *Bouie* standard.⁶⁸

The Tennessee Supreme Court had declined to apply the “year-and-a-day rule”⁶⁹ to a murder conviction even though it recognized that the rule was part of Tennessee law at the time the defendant acted and the victim had died more than a year and a day after the murderous act.⁷⁰ The court abolished the rule retroactively, an action it regarded as consistent with *Bouie*.⁷¹ By a vote divided five-to-four,⁷² the United States

⁶⁷ See *supra* note 52.

⁶⁸ See 532 U.S. 451, 461 (2001) (majority opinion); *id.* at 467 (Stevens, J., dissenting); *id.* at 470–71 (Scalia, J., dissenting); *id.* at 482 (Breyer, J., dissenting). For a subsequent application of *Bouie* upholding a Michigan conviction in a federal habeas corpus proceeding, see *Metrish v. Lancaster*, 133 S. Ct. 1781, 1786–92 (2013).

⁶⁹ As paraphrased from Coke’s rendition in the 17th century, murder had been defined in the early common law as: “When a man of sound memory and of the age of discretion unlawfully kill[s] . . . any reasonable creature in being . . . and under the King’s Peace, with malice aforethought, either express[] . . . or implied by Law . . . the death taking place within a year and a day . . .” See 3 Edward Coke, *Institutes* *47; Royal Comm’n on Capital Punishment 1949–1953, Report 26 (Greenwood Press 1980) (cmd. 8932, 1953); 2 Am. Law Inst., *Model Penal Code and Commentaries*, § 210.2, at 14 n.1 (1980) [hereinafter *Model Penal Code and Commentaries*].

⁷⁰ See *State v. Rogers*, 992 S.W.2d 393, 394–95 (Tenn. 1999). There were substantial arguments that the year-and-a-day rule was not part of Tennessee law at the relevant time. It had been mentioned only in dicta in several prior cases, and no case had ever relied on it as the rule of decision. *Id.* at 396. Moreover, Tennessee had adopted a code revision based on the Model Penal Code in 1989 (well before the acts in *Rogers* occurred) and had not incorporated the rule in its newly written law. The Model Penal Code itself had not adopted the rule because it was based on outmoded medical assumptions. See *Model Penal Code and Commentaries*, *supra* note 69, at 9–10. One could easily have predicted based on the Model Penal Code antecedents of the new Tennessee law (we would have) that its newly adopted law would not be construed to carry forward the year-and-a-day rule.

⁷¹ See *Rogers*, 992 S.W.2d at 402. The court said that abrogation of the rule was “not an unexpected judicial construction that is indefensible by reference to prior law.” *Id.* It was not unexpected because the rule had been abolished by every court that had recently faced the issue and its validity had been questioned based on the 1989 revision of the criminal code. *Id.* It was defensible because abolition of the rule did not allow a conviction based on less proof nor did it permit criminal punishment for conduct that would have been innocent if the rule had remained in place. *Id.*

⁷² The division did not fit the usual pattern. Justice O’Connor wrote for the Court, joined by Chief Justice Rehnquist and Justices Kennedy, Souter, and Ginsburg. The dissenters—

Supreme Court upheld the conviction and agreed that the *Bouie* principle was not violated.⁷³

Justice O'Connor's opinion for the Court concluded—correctly, in our view, but not only for the reasons she recited—that the due process limitations on courts were different from the *ex post facto* limitations on legislatures.⁷⁴ This is necessarily the case in our view because of the different institutional postures of the two bodies. Legislatures are required by the Ex Post Facto Clause to enact criminal legislation prospectively, to state rules of general application to be applied to situations yet to arise. Courts, in contrast, always act retrospectively in at least one sense—the routine of their job is to apply law to actual situations that arose out of specific past events. One can adopt a rule that flatly forbids passage of retroactively applicable criminal laws without interfering with the public protection responsibilities of legislatures. But a rule forbidding courts from engaging in the retrospective application of law would put them out of business. It would destroy their primary function.

This is not to say that courts cannot engage in inappropriate retrospective lawmaking. Of course they can. Indeed, this is precisely what the United States Supreme Court thought the South Carolina Supreme Court had done in *Bouie*.⁷⁵ As we argued above,⁷⁶ a standard is needed to determine whether a court decision has faithfully applied prior law or has manufactured new law. The majority in *Bouie* developed such a stand-

Justices Stevens, Scalia, Thomas, and Breyer—were fragmented in their reasoning. There were three separate dissenting opinions.

⁷³ *Rogers*, 532 U.S. at 466–67. There was a sideline debate about the relationship of the Ex Post Facto Clause to the due process issue before the Court, based on what the Court characterized in *Rogers* as dicta from *Bouie*, *id.* at 459, and what Justice Scalia's dissent characterized as “[o]nly a concept of dictum that includes the very reasoning of the opinion,” *id.* at 469 (Scalia, J., dissenting). Justice Scalia argued that what the Tennessee Supreme Court did would have violated the Ex Post Facto Clause if the legislature had done it, and that it followed that the Due Process Clause was violated—courts in this context, he said, cannot do what a legislature could not have done. *Id.*

⁷⁴ Justice O'Connor defended the necessity for a difference between a due process standard for courts and the *ex post facto* limitation on legislatures based on the need for flexibility characteristic of the common law. “Strict application of *ex post facto* principles” to the judiciary, she said, “would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system,” *id.* at 461, and, as she had previously noted, would “place an unworkable and unacceptable restraint on normal judicial processes,” *id.*

⁷⁵ See *Bouie*, 378 U.S. at 362.

⁷⁶ See *supra* text accompanying note 56.

ard, and the majority in *Rogers* applied that standard to uphold the defendant's conviction of second-degree murder.⁷⁷

The O'Connor opinion reasoned that the state court's abolition of the year-and-a-day rule was not "unexpected and indefensible" for basically three reasons: the rule was an outmoded relic of a prior era; the vast majority of other states that had addressed the problem had rejected the rule; and the rule had been mentioned in only three prior Tennessee cases but never applied.⁷⁸ It concluded that:

There is, in short, nothing to indicate that the Tennessee court's abolition of the rule in petitioner's case represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect. Far from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense.⁷⁹

We have a basic problem, however, with the Court's application of the *Bouie* standard in *Rogers*. *Bouie* is premised on the proposition that courts must apply existing law to criminal defendants. They may not make new law, as the South Carolina courts had done, for retroactive application to previously occurring conduct. Had the Tennessee Supreme Court held in *Rogers*, as the Tennessee Court of Criminal Appeals had done,⁸⁰ that the year-and-a-day rule had been abolished by the 1989 code revision,⁸¹ the conclusion would not have been controversial and *Bouie* plainly would not have been offended. That result was both

⁷⁷ Importantly, Justice Scalia did not disagree that such a standard was necessary and endorsed *Bouie* as stating the correct inquiry. He said near the end of his dissent:

A court . . . [is] free to apply common-law criminal rules to new fact patterns . . . so long as that application is consistent with a fair reading of prior cases. It . . . [is] free to conclude that a prior decision or series of decisions establishing a particular element of a crime was in error, and to apply that conclusion retroactively (so long as the "fair notice" requirement of *Bouie* is satisfied).

Rogers, 532 U.S. at 481 (Scalia, J., dissenting). Justice Scalia's dissent was joined by Justices Stevens and Thomas. *Id.* at 467. Justice Breyer dissented separately, but joined the part of Justice Scalia's dissent from which the above quotation is taken. *Id.* He thought the Court applied the right standard but reached the wrong result. See *id.* at 481–82 (Breyer, J., dissenting). The Court was thus unanimous that *Bouie* stated the correct limiting principle on judicial interpretations.

⁷⁸ *Id.* at 462–67.

⁷⁹ *Id.* at 466–67.

⁸⁰ See *State v. Rogers*, 992 S.W.2d 393, 394 (Tenn. 1999).

⁸¹ See *supra* note 70.

predictable and defensible. But this is not what the Tennessee Supreme Court did. It held that the rule was still in effect at the time Rogers acted, and that the time had come to adopt a new rule.⁸²

The Tennessee Supreme Court was right that Rogers was not unfairly treated.⁸³ And the United States Supreme Court majority was also right when it agreed with this conclusion.⁸⁴ But this is not the point. *Bouie* does not turn on case-by-case determinations of unfair treatment to particular defendants, but on a structural principle essential to the principle of legality. Criminal laws are to be made *before* the conduct to which they are applied, not *after*. It should not matter whether it was “predictable” and “defensible” that one law would be abolished and replaced with another. What should matter is when the law was made and whether a new law is being retroactively applied.

Justice Scalia’s eye was on the ball. The primary burden of his dissent was to argue for a due process rule⁸⁵ that flatly forbade all retroactive judicial *changes* in the law, just as would occur if a legislature changed the law and sought to apply the change retroactively.⁸⁶ As noted above,⁸⁷ Scalia was fine with the *Bouie* standard as the criterion by which judicial *interpretations and applications* of prior law would be judged. But *changes* in the law by judicial decision were, for him, a different matter. In the end Scalia came up with a simple rule:

To decide this case, we need only conclude that due process prevents a court from (1) acknowledging the validity, when they were rendered, of prior decisions establishing a particular element of a crime; (2) changing the prior law so as to eliminate that element; and

⁸² *Rogers*, 992 S.W.2d at 394–95.

⁸³ Its rationale, see *supra* note 71, at least leads us to this conclusion.

⁸⁴ The rule had nothing to do with the primary conduct that led to Rogers’s conviction, and there was no indication in the Tennessee court’s decision “of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect.” *Rogers*, 532 U.S. at 467.

⁸⁵ This was in character. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180–87 (1989) (advocating for clear, general rules rather than loose, fact-specific standards).

⁸⁶ *Rogers*, 532 U.S. at 469.

⁸⁷ See *supra* note 77.

(3) applying that change to conduct that occurred under the prior regime.⁸⁸

This, in a nutshell, is exactly what *Bouie* held. A court should not be permitted to change the elements of a crime and apply that change retroactively.

The importance of *Rogers* for us, in any event, is that all nine Justices endorsed the view that the Constitution requires a rule-of-law correlation between the established meaning of a criminal law and its application to specified conduct. Prior interpretations and applications can be considered, to be sure, but due process is denied if, based on all available legal sources, it is “unexpected and indefensible” to apply the law to a particular situation. This much one can comfortably derive from *Bouie* and *Rogers* taken together. And it is no small matter to conclude that this principle states an important component of the individual liberty and equality protected by the Constitution. The triumvirate developed thus far—the criminal law must be based on conduct, convictions for engaging in that conduct need to be supported by actual evidence, and the conduct on which the conviction is based must have been identified in previously established law—states a powerful and fundamental set of constitutional limits on the power of the state to define and punish crimes.

2. *Police*

If it violates a constitutionally protected rule-of-law principle for courts to make the criminal law in an unforeseeable and retroactive manner, it should follow that the same limit applies to the police.⁸⁹ “Law by cop,” that is, police invention and enforcement of new crimes on the streets, should be a violation of due process under a version of the *Bouie* principle.

⁸⁸ *Rogers*, 532 U.S. at 480–81 (Scalia, J., dissenting). This portion of Justice Scalia’s dissent was joined by the other three dissenters (Justices Stevens, Thomas, and Breyer). *Id.* at 467.

⁸⁹ As John Jeffries has argued:
The power to define a vague law is effectively left to those who enforce it, and those who enforce the penal law characteristically operate in settings of secrecy and informality . . . and [are] rarely constrained by self-conscious generalization of standards [T]he wholesale delegation of discretion naturally invites its abuse, and an important first step in constraining that discretion is the invalidation of indefinite laws. Jeffries, *supra* note 2, at 215.

There are differences, of course. Police do not interpret and apply the law in the same authoritative manner as courts. They enforce the written law and, in doing so, are measured by a significant array of constitutional limitations. Police may arrest, for example, only if they have probable cause to believe the defendant guilty of a crime, a standard that is measured by the relationship of police information to prohibited conduct previously defined by the criminal law. This constitutional limitation would break down if police had the authority to observe behavior, make up a crime to cover it, and then make an arrest because they had probable cause that the invented crime occurred in their presence. This, in a nutshell, is exactly what happened in *Shuttlesworth v. City of Birmingham*.⁹⁰

The case involved a civil rights activist⁹¹ who was arrested on a sidewalk for failing to obey a police order to move on. The arrest occurred in the context of a boycott of downtown department stores in Birmingham, Alabama.⁹² A police officer had observed Shuttlesworth standing

⁹⁰ 382 U.S. 87 (1965).

⁹¹ Confirmation of the civil rights context is provided by the fact that Shuttlesworth was represented in the Supreme Court by Jack Greenberg, who succeeded Thurgood Marshall as Director of the NAACP Legal Defense Fund. See LDF Director-Counsels, NAACP Legal Def. & Educ. Fund, <http://www.naacpldf.org/history>, archived at <http://perma.cc/CN9Z-Q3FF> (last visited Sept. 20, 2015). Interestingly, Anthony Amsterdam was also on the brief.

The Greenberg brief was careful to remind the Court with whom they were dealing: “Shuttlesworth is a Negro and a ‘notorious’ civil rights leader in Birmingham, Alabama. And however convincing to a state court may be Patrolman Byars’ protestations that he did not recognize Shuttlesworth when he . . . arrest[ed] him, any non-racial explanation for the ultimate result in this prosecution is delusive.” Brief for the Petitioner at 19, *Shuttlesworth*, 382 U.S. 87 (No. 5).

Shuttlesworth was already well known to the Supreme Court. He had been involved in quite a number of other cases. See, e.g., *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963); *In re Shuttlesworth*, 369 U.S. 35 (1962) (per curiam); *Shuttlesworth v. Birmingham Bd. of Educ.*, 358 U.S. 101 (1958) (per curiam). And there was at least one more case yet to come. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

For general background on Shuttlesworth’s activities during the 1950s and 1960s, see Andrew M. Manis, *A Fire You Can’t Put Out: The Civil Rights Life of Birmingham’s Reverend Fred Shuttlesworth* (1999). Among other things, Manis credits Shuttlesworth’s central role in Birmingham demonstrations in 1963 with persuading President Kennedy to introduce the civil rights legislation that eventually became the Civil Rights Act of 1964. *Id.* at 5. The Birmingham International Airport was renamed the “Birmingham-Shuttlesworth International Airport” in July of 2008. See History, Birmingham-Shuttlesworth Int’l Airport, <http://www.flybirmingham.com/aboutbhm-history.html>, archived at <http://perma.cc/H83F-GDG2> (last visited Aug. 18, 2015).

⁹² See *Shuttlesworth*, 382 U.S. at 101 (Fortas, J., concurring) (explaining that on the date of the arrest, “the Negroes of Birmingham were engaged in a ‘selective buying campaign’—

on a sidewalk outside a department store with about a dozen others. The officer ordered the group to leave, and everyone but Shuttlesworth quickly complied. After three such requests, Shuttlesworth was told he was under arrest. Shuttlesworth then entered the store, at which point he was placed in custody. He was convicted of violating a municipal ordinance that made it “unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on.”⁹³

The Alabama intermediate appellate court read this language to require the blocking of free passage.⁹⁴ The rub came because this construction was adopted *two years after* Shuttlesworth’s conviction. Although the United States Supreme Court was prepared to hold the ordinance constitutional as construed,⁹⁵ it reviewed Shuttlesworth’s conviction on the assumption that the provisions of the ordinance were taken literally by the trial court.⁹⁶

The ordinance was unambiguously clear—it stated, simply, that it was “unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on.”⁹⁷ But Shuttlesworth’s attack on the conviction, authored in part by the person whose name has been synonymous with the vagueness doctrine since 1960,⁹⁸ followed a classic vagueness analysis. The ordinance was said to be “[v]ague and [o]verbroad in [v]iolation of the First and Fourteenth Amendments” because “[t]he circumstances under which an order to move on may be made by a policeman are in no way defined or restricted. The ordinance simply puts a citizen’s right to be on the side-

an attempted boycott—of Birmingham’s stores for the purpose of protesting discrimination against them”); Brief for the Petitioner, *supra* note 91, at 5.

⁹³ *Shuttlesworth*, 382 U.S. at 88. He was sentenced (can you believe it?) to *180 days at hard labor* and an additional 61 days at hard labor should he not pay a \$100 fine and costs. Brief for the Petitioner, *supra* note 91, at 4. His conviction was affirmed by the intermediate court of appeals and the state supreme court declined review. *Shuttlesworth*, 382 U.S. at 88.

⁹⁴ *Shuttlesworth*, 382 U.S. at 91.

⁹⁵ *Id.* Interestingly, Justice Brennan, the author of *Bouie*, added in a separate opinion that he thought it would be acceptable to apply the narrowing construction to *Shuttlesworth* on a retrial “because this construction delimits the statute to ‘the sort of “hard-core” conduct that would obviously be prohibited under any construction.’” *Id.* at 99 (Brennan, J., concurring). The new construction, in other words, would not in Justice Brennan’s opinion have been unexpected and indefensible based on the law as it existed at the time of Shuttlesworth’s conduct.

⁹⁶ *Id.* at 92.

⁹⁷ See *supra* text accompanying note 93.

⁹⁸ See *supra* notes 2, 91.

walks of Birmingham in the unfettered discretion of the police.”⁹⁹ “[T]he effect of the regulation,” the argument continued, “is to make the citizen guess under threat of criminal penalty the boundaries of his constitutional freedom to use the streets.”¹⁰⁰ It “gives no fair notice”¹⁰¹ and “invit[es] arbitrary, autocratic and harassing uses by the police.”¹⁰²

The Supreme Court fully bought Shuttlesworth’s argument:

Literally read . . . this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.¹⁰³ It “does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.” *Cox v. Louisiana*, 379 U.S. 536, 579 (separate opinion of Mr. Justice Black). Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state.¹⁰⁴

This is classic Amsterdam “buffer zone” reasoning.¹⁰⁵ Shuttlesworth was not speaking on a street corner or actively engaged in picketing. But the

⁹⁹ Brief for the Petitioner, *supra* note 91, at 14.

¹⁰⁰ *Id.* at 16.

¹⁰¹ *Id.*

¹⁰² *Id.* The brief elaborated:

[T]he vice of the ordinance is that it cannot mean what it purportedly says . . . and no principle to limit what it purportedly says sufficiently intelligible to accord fair notice and assure non-arbitrary application appears. When this deficiency is coupled with the vagueness of the ordinance as to the circumstances under which a policeman may make an order to move on, [the ordinance] becomes little more than a snare.

Id. at 18 (footnote omitted).

¹⁰³ The Court included a footnote at this point that read: “*Thornhill v. Alabama*, 310 U.S. 88, 97; *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 435; *Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 75–81, 96–104. Cf. *Smith v. California*, 361 U.S. 147, 151; *Baggett v. Bullitt*, 377 U.S. 360, 371.” *Shuttlesworth*, 382 U.S. at 90 n.5. *Thornhill*, *Button*, and *Smith* were First Amendment cases. See *NAACP v. Button*, 371 U.S. 415, 428 (1963); *Smith v. California*, 361 U.S. 147, 152 (1959); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). *Baggett* was a vagueness decision with First Amendment overtones. *Baggett v. Bullitt*, 377 U.S. 360, 373–74 (1964).

¹⁰⁴ *Shuttlesworth*, 382 U.S. at 90–91. The Court included a second footnote at this point that read: “*Lovell v. City of Griffin*, 303 U.S. 444, 451; *Kunz v. New York*, 340 U.S. 290, 293; *Schneider v. State*, 308 U.S. 147, 163–164.” *Shuttlesworth*, 382 U.S. at 91 n.6. All three of these cases involved the First Amendment. See *Kunz v. New York*, 340 U.S. 290, 293 (1951); *Schneider v. State*, 308 U.S. 147, 160 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

¹⁰⁵ See *supra* text accompanying note 27. At least one commentator has argued that the Court’s First Amendment concerns were compounded by concerns for equality. See Daniel

ordinance was struck down on its face because of its potential application in such a context and, reading between the lines, because there was no law enforcement need to arm police with such open-ended authority as they performed their legitimate duties on the streets of Birmingham.

Vagueness reasoning was thus used to strike down an ordinance that was written in crystal clear language.¹⁰⁶ The problem was the authority granted to the police, not the clarity with which the law was expressed. Standing or loitering on a public street was not the evil at which this law was aimed. The law was not intended to outlaw *all* pedestrian traffic, only *some*.¹⁰⁷ Its flaw was that it failed to say *when* police should exercise the authority it granted. The law enabled the police to decide for themselves when people could loiter and when they could not. The police wrote the law on the street, and then enforced it.

We would characterize the Court's decision denying them that authority as *Bouie* applied to police behavior. Plainly there are cases where police should be permitted to require pedestrians to move on.¹⁰⁸ But this law did not identify those situations. It did not limit the police to enforcement of a valid prohibition that was predictable and defensible based on criteria established in previously stated law. The Court's references to the First Amendment, in our view, did no real work here. Or, in the alternative, they do all of the work all of the time. This law of course

P. Tokaji, First Amendment Equal Protection: On Discretion, Inequality, and Participation, 101 Mich. L. Rev. 2409, 2440–41 (2003) (arguing that *Shuttlesworth* rests on a “First Amendment Equal Protection” rationale insofar as the Court closely supervised government discretion and “demanded the formulation of strict boundaries to ensure that officials’ prejudices did not result in expressive inequality”).

¹⁰⁶ Although the Court did use the word “broad,” see *supra* text accompanying note 103, it did not explicitly call the ordinance “vague” even though the case was argued in vagueness terms and its reasoning calls to mind the vagueness doctrine. Only one of the cases cited in its penultimate paragraph, see *supra* notes 103–04, was decided on vagueness grounds.

¹⁰⁷ This is not a situation, like speeding, where speeding *is* the evil at which the law is aimed. In that case the law purports to make an entire class of conduct illegal and, as will be true of many crimes, in practice entrusts the police with enforcement discretion. A law that prohibited *all* loitering on public streets would engender its own set of problems, but would not offend the *Shuttlesworth* holding. Unlike the speeding law, the *Shuttlesworth* ordinance authorized the police to identify the evil and then make arrests for it. The discretion granted to the cop with a radar gun is limited to the choice between enforcement and non-enforcement; the discretion granted to the cop by the *Shuttlesworth* ordinance extends not only to enforcement and non-enforcement but also to crime definition.

¹⁰⁸ See *City of Chicago v. Morales*, 527 U.S. 41, 69–70 (1999) (Kennedy, J., concurring in part and concurring in the judgment) (“Illustrative examples include when the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team, or to protect a crime scene, or to secure an area for the protection of a public official.”).

could be used to suppress First Amendment activity,¹⁰⁹ but the same is true of *any* law that open-endedly authorizes police to make their own rules on the streets. The whole point of such a law—or at least its effect—is to allow the police to do what they want when they want. The heart of the defect is the “law by cop” nature of the ordinance. If it sounds better to say that “law by cop” in this sense is intolerable because the authority it grants can be used to limit protected speech or religious activity, then so be it. But we think the *Shuttlesworth* ordinance is equally offensive because of its impact on general rights of liberty and equality,¹¹⁰ on the rights of ordinary citizens to walk the streets and loiter in front of store windows in their own good time for their own good reasons.¹¹¹ Just as courts should not be permitted to make up a criminal law and apply it retroactively, police on the streets should be denied the same authority.

II. GOVERNING PRINCIPLES AS ALTERNATIVE EXPLANATIONS

We proceed now to illustrate how our analysis can be applied to cases that were decided under the traditional rubric. Because vagueness attacks on federal laws involve different considerations, we discuss cases involving state laws separately from cases involving federal laws.

A. Vagueness Attacks on State Laws

We have chosen two plain vanilla cases to make our point about the application of the vagueness doctrine to attacks on a state law. The first—*Lanzetta v. New Jersey*—involves an unadorned violation of the *Robinson* conduct requirement. The second—*Papachristou v. City of Jacksonville*—can be explained as an application of both of our organizing principles.

¹⁰⁹ *Shuttlesworth* did not claim in the Supreme Court that he was engaging in specifically protected First Amendment activity at the time of his arrest, but his brief did argue that “persons exercising their First-Fourteenth Amendment freedoms of expression in many classic forms: handbill distributors, soapbox speakers, peaceful demonstrators, religious evangelists requesting audience of passers-by” would “fall[] within its broad and undifferentiated grant of regulatory power to the police.” Brief for Petitioner, *supra* note 91, at 15.

¹¹⁰ See *supra* text accompanying note 18.

¹¹¹ As Justice Kennedy stated eloquently in another context, “Liberty comes not from officials by grace but from the Constitution by right.” *Maryland v. Wilson*, 519 U.S. 408, 424 (1997) (Kennedy, J., dissenting); see also *supra* note 18 and accompanying text (discussing this concept of liberty).

*I. Lanzetta v. New Jersey*¹¹²

Lanzetta illustrates the substantive prong of our theory. The Court relied on a vagueness rationale, but struck down a statute because it failed to identify punishable conduct. The statute in *Lanzetta* provided:

Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster¹¹³

The Court's opinion is opaque at best. It includes a nod to traditional vagueness rhetoric: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."¹¹⁴ But the rest of the opinion meanders around until stumbling upon the essence of the matter in its concluding paragraph: "The challenged provision *condemns no act or omission*; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."¹¹⁵

In the end, the deficiency of the *Lanzetta* statute is its failure to identify any conduct in which those who are said to violate it must engage. It is a quintessential punishment for status, not action—punishment for who one is, not what one does. *Robinson* was decided many years later. But the vice in *Lanzetta* is exactly the vice in *Robinson*, and the cure is the same in both cases—the Constitution requires that criminal prosecutions be based on conduct.¹¹⁶

¹¹² 306 U.S. 451 (1939).

¹¹³ *Id.* at 452. The potential penalty was serious—a fine of up to \$10,000 and/or imprisonment for up to twenty years. *Id.* The actual sentences in *Lanzetta* were serious too. The defendants were sentenced to prison terms at hard labor for not more than ten years and not less than five. *Id.*

¹¹⁴ *Id.* at 453.

¹¹⁵ *Id.* at 458 (emphasis added).

¹¹⁶ Professor John Decker has also suggested that the *Lanzetta* Court found the statute void for vagueness in part because it criminalized status rather than conduct. See Decker, *supra* note 2, at 340 ("[T]his measure's criminalization . . . of a person's status contributed to the Court's finding that the statute was void for vagueness."). Decker identifies the *Robinson* principle as one of many rules of thumb that trigger the vagueness doctrine. See *id.* at 342 ("[W]here a measure is challenged on vagueness grounds, if it is largely directed at a person's status rather than the person's conduct, that may well tilt the balance in favor of a void

Reconsider the language of the statute. At no point does it identify any present conduct in which those alleged to violate it must engage. It applies to “[a]ny person not engaged in any lawful occupation.” No proscribed conduct there.¹¹⁷ And it applies if the person is “*known to be* a member of any gang consisting of two or more persons.” Again, no proscribed conduct. And the statute applies to a person “who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State.” These phrases incorporate past conduct for which the defendant may already have been punished, but make no reference to proof of present conduct. And that’s it—such a person is declared to be a “gangster” and subject to severe punishment.

Both *Lanzetta* and *Robinson* protect individual liberty by requiring that criminal statutes punish identifiable conduct, albeit by different theoretical routes. That result can be reached by calling the statute “unconstitutionally vague” or it can be reached by holding that the statute imposes “cruel and unusual punishment.” The trigger in either event is the same: the failure of a statute to focus on punishable conduct. *Lanzetta* is a straightforward application of the first of the two limitations that explain the vagueness doctrine.

2. *Papachristou v. City of Jacksonville*¹¹⁸

Papachristou illustrates both limitations. The case involved multiple defendants. Some of the convictions were based on status, not conduct. The rest were based on conduct that was neither mentioned in the governing law nor derived from a reasonable construction of that law. The street value of the law was the authority it granted to arrest, prosecute, and convict for activities inconsistent with the dominant middle-class norms of the time and place.¹¹⁹

for vagueness finding.”). We make a stronger claim: *Robinson* is not merely a factor to be considered. It is decisive.

¹¹⁷ Nor is there a general—or any relevant specific—legal duty to engage in a lawful occupation.

¹¹⁸ 405 U.S. 156 (1972).

¹¹⁹ Much of the Supreme Court’s modern consideration of the vagueness doctrine came in the context of constitutional challenges to vagrancy and loitering laws. Those challenges, and the development of vagueness doctrine, accelerated during the 1960s. For a history of the constitutional transformation of vagrancy laws, see Risa L. Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (forthcoming 2016) (on file with authors).

There were eight defendants before the Supreme Court.¹²⁰ All parties agreed to stipulated facts.¹²¹ Ignoring the traditional language of the vagueness doctrine for now, we would analyze *Papachristou* as follows.

Heath was charged with being a common thief, a charge that “was selected . . . because he was reputed to be a thief.”¹²² No basis for this conclusion is stated in the stipulated facts. Campbell was arrested as he approached his home by car early in the morning. He had been speeding, the officer said, but no speeding charges were filed. The officer admitted that he had gone to the vicinity because “Campbell lived there.”¹²³ No explanation was given for why Campbell was charged with “vagrancy—common thief.”¹²⁴ Henry and Smith were charged with “vagrancy—vagabonds.” Henry was acquitted because he “had no previous arrest

¹²⁰ A ninth (Henry) was charged but not convicted. See *infra* text accompanying note 125. The city ordinance under which the eight were convicted read:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

Papachristou, 405 U.S. at 156 n.1.

The ordinance was based on a Florida statute in identical language, Fla. Stat. § 856.02 (since repealed), that carried the title “Vagrants.” See 1972 Fla. Laws 113, 414–16; *Johnson v. State*, 202 So. 2d 852, 853–54 (Fla. 1967) (Ervin, J., concurring in part and dissenting in part). Technically, the Jacksonville law on which the conviction was based was an assimilative crimes ordinance making the commission of any Florida misdemeanor a crime against the City. See Brief for Petitioner at 3, *Papachristou*, 405 U.S. 156 (No. 70-5030). The *Johnson* case was appealed to the United States Supreme Court on vagueness grounds, but overturned based on the “no evidence” rationale of *Thompson v. Louisville*. *Johnson v. Florida*, 391 U.S. 596, 596–98 (1968) (per curiam).

The Supreme Court remanded a companion case involving a conviction under § 856.02 for reconsideration in light of *Papachristou*. *Smith v. Florida*, 405 U.S. 172, 172 n.1, 173 (1972). The Florida Supreme Court then reversed the conviction. *Smith v. State*, 261 So. 2d 150, 151 (Fla. 1972) (per curiam).

¹²¹ The recitations below of the factual basis for the charges are taken from the petitioner’s brief. The City’s brief explicitly accepted these statements as accurate. See Brief for Respondent at 8, *Papachristou*, 405 U.S. 156 (No. 70-5030).

¹²² Brief for Petitioner, *supra* note 120, at 9.

¹²³ *Id.*

¹²⁴ See *id.*

record.”¹²⁵ Smith was convicted after being “administered a tongue lashing about his character, his ‘open adultery,’ his ‘bastard children,’ his [prior] arrests, and his general demeanor.”¹²⁶

The problem with the convictions of Heath, Campbell, and Smith is straightforward. They are clear violations of the principles underlying *Robinson* and *Lanzetta*. There was no identifiable contemporaneous conduct on which any of their convictions was based.¹²⁷

Papachristou, Calloway, Melton, and Johnson were convicted for “vagrancy—prowling by auto.”¹²⁸ They were two black males and two white females who had been driving together on a main thoroughfare. The foursome had eaten at a restaurant and was en route to a nightclub. All four were arrested because they had stopped near a used car lot that had been broken into several times. There was no evidence of a break-in or any other illegal activity on the night in question.¹²⁹

These convictions were based on conduct, to be sure, but they are classic violations of the correlation requirement. The problem is that “prowling by auto” is nowhere mentioned in the ordinance¹³⁰ and “vagrancy” is not a self-executing term. It is hardly consonant with the *Bouie* rule-of-law correlation principle to convict people for crimes based on conduct that is not even mentioned in the governing law. There was no effort to demonstrate, moreover, that any of the words of the Jacksonville ordinance could reasonably and predictably have been construed based on prior law to criminalize any conduct in which these four defendants were proved to have engaged. The convictions, to borrow a

¹²⁵ *Id.* at 8.

¹²⁶ *Id.*

¹²⁷ Decker makes a similar point. See Decker, *supra* note 2, at 341 (suggesting that the *Papachristou* Court’s vagueness ruling “reflected status criminality overtones”). Others have noted the absence of conduct. See Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 Rutgers L. Rev. 1289, 1308 (1999) (recognizing that the statute in *Papachristou* was problematic because it “criminalized status as such”); Livingston, *supra* note 8, at 601 (noting that *Papachristou* could have been decided on the basis of *Robinson* rather than the vagueness doctrine).

We suppose one could read the “common thief” provision as a proxy for multiple acts of theft, but there was no pretense in *Papachristou* that any of the defendants were caught in the act of stealing or that any of them had ever been arrested, prosecuted, or convicted for theft. There was, in *Thompson v. Louisville* terms, “no evidence” in the record to prove these allegations, even assuming that they were fact-based requirements that were subject to proof.

¹²⁸ Brief for Petitioner, *supra* note 120, at 5.

¹²⁹ *Id.* at 6–7.

¹³⁰ The Court noticed this. See *Papachristou*, 405 U.S. at 168 n.11 (“[P]rowling by auto’ . . . is not even listed in the ordinance as a crime.”).

phrase from *Shuttlesworth*, were not based on “government by clearly defined laws, but rather [on] government by the moment-to-moment opinions of a policeman on his beat.”¹³¹

At the end of the day, indeed, the conviction of these four defendants can be regarded as involving exactly the same problem as *Shuttlesworth*. Justice Douglas said as much when he quoted from *Shuttlesworth* near the end of his *Papachristou* opinion.¹³² The police in Jacksonville were given unbridled authority to make up a crime on the streets and then arrest people for committing it. “Prowling by auto” was not prohibited by the law they invoked. But, most likely motivated by the mixed-race composition of the car’s occupants, the police saw it happen, did not like it, made arrests, and secured convictions.¹³³

Papachristou is entirely consistent with our thesis that vagueness decisions of the type we mean to address can be explained as applications of the two principles we have identified. The case could easily have been decided based on *Robinson*, *Bouie*, and *Shuttlesworth* without ever mentioning the vagueness doctrine.

The Court’s unanimous¹³⁴ opinion, of course, did not proceed in this fashion, relying instead on a typical vagueness approach. But both the conduct and the correlation principles lay just below the surface of the

¹³¹ 382 U.S. 87, 90 (1965) (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (separate opinion of Justice Black)); see also *supra* text accompanying note 104.

¹³² Justice Douglas wrote:

Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. . . . It results in a regime in which the poor and the unpopular are permitted to “stand on a public sidewalk . . . only at the whim of any police officer.”

Papachristou, 405 U.S. at 170 (quoting *Shuttlesworth*, 382 U.S. at 90).

¹³³ Heath was also convicted of “vagrancy—loitering.” Brief for Petitioner, *supra* note 120, at 9. The eighth defendant, Brown, was convicted of “vagrancy—disorderly loitering on street” and “disorderly conduct—resisting arrest with violence.” *Id.* at 10. These convictions are subject to the same analysis. None of these offenses were mentioned in the ordinance, nor was there any effort to construe any term of the ordinance to include Heath’s or Brown’s behavior. See Brief for Respondent, *supra* note 121, at 15–16.

¹³⁴ Justice Douglas wrote the Court’s opinion. Justices Powell and Rehnquist did not participate. *Papachristou*, 405 U.S. at 156. They had joined the Court after the argument and, as is the normal practice, did not participate in the decision.

There has been at least some dissent from the *Papachristou* result. Joined by Chief Justice Rehnquist and Justice Scalia, Justice Thomas has said, without elaboration, that it is a “doubtful proposition” that *Papachristou* was correctly decided. *City of Chicago v. Morales*, 527 U.S. 41, 105–06 (1999) (Thomas, J., dissenting).

Court's opinion. Douglas used the phrase "rule of law" four times.¹³⁵ He quoted from a Frankfurter opinion that criticized another statute in which "[d]efiniteness is designedly avoided so as . . . to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution"¹³⁶ and added that the law was "not fenced in by the text of the statute or by the subject matter."¹³⁷ Douglas also analogized the ordinance to a "direction by a legislature to the police to arrest all 'suspicious' persons"¹³⁸ and said that it placed "unfettered discretion . . . in the hands of the Jacksonville police."¹³⁹

The Court began its "fair notice" discussion with the traditional bow to the proposition that people "are entitled to be informed as to what the State commands or forbids."¹⁴⁰ It soon transitioned to the *Lambert* socialization principle,¹⁴¹ saying at one point that "[t]he Jacksonville ordinance makes criminal activities which by modern standards are normally innocent"¹⁴² and at another that the language of the ordinance "may be a trap for innocent acts."¹⁴³ Several pages were devoted to ways in which the ordinance could be applied to restrict "activities [that] are historically part of the amenities of life as we have known them."¹⁴⁴ Typically, the Court added to its fair notice discussion the rule of law or antidelegation principle underlying *Bouie*: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."¹⁴⁵ "Here the net cast is large,"

¹³⁵ *Papachristou*, 405 U.S. at 162, 171.

¹³⁶ *Id.* at 166 (quoting *Winters v. New York*, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting)).

¹³⁷ *Id.*

¹³⁸ *Id.* at 169.

¹³⁹ *Id.* at 168.

¹⁴⁰ *Id.* at 162 (quoting *Lanzetta*, 306 U.S. at 453).

¹⁴¹ See *supra* text following note 11. The Court did not mention *Lambert*, to be sure, but the Court plainly had its underlying socialization principle in mind.

¹⁴² *Papachristou*, 405 U.S. at 163.

¹⁴³ *Id.* at 164.

¹⁴⁴ *Id.* This almost sounds in substantive due process. On the basis of archival research, Risa Goluboff points out that the Court in *Papachristou* "came closer to the brink of substantive due process than [many] have realized." Goluboff, *supra* note 21, at 1365. In the end, Douglas seems to have been persuaded to think in general liberty terms instead. See *supra* text accompanying note 19.

¹⁴⁵ *Papachristou*, 405 U.S. at 165 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)).

Douglas continued, “not to give the courts the power to pick and choose but to increase the arsenal of the police.”¹⁴⁶

One could read *Papachristou* as a “buffer zone” decision¹⁴⁷ concerned with protection of the values underlying the Fourth Amendment. Douglas referred to the probable cause requirement before an arrest can be made,¹⁴⁸ added that arrests are not permissible based on suspicion of past criminality or the possibility of future criminality,¹⁴⁹ and concluded that a “vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest.”¹⁵⁰ Be this as it may, the case came down to a balance of law enforcement necessity against the need for limitations on police discretion.¹⁵¹ The Court said:

The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But . . . [v]agrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible.¹⁵²

There was no serious law enforcement need underlying Jacksonville’s ordinance, in other words, that could not have been served by more narrowly drawn legislation that was more fair, less arbitrary, and less invasive of the general liberties all citizens should enjoy.

¹⁴⁶ Id. The Court returned to this theme later in its opinion, in what could be called the “arbitrary enforcement” part of its analysis:

Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. . . . It results in a regime in which the poor and the unpopular are permitted to “stand on a public sidewalk . . . only at the whim of any police officer.”

Id. at 170 (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965)); see supra text accompanying note 104.

¹⁴⁷ See supra text accompanying note 27.

¹⁴⁸ *Papachristou*, 405 U.S. at 169.

¹⁴⁹ Id.

¹⁵⁰ Id. He added that vagrancy statutes should not be available as a fallback in cases where “there is not enough evidence to charge the prisoner with an attempt to commit a crime.” Id. at 170 (quoting *Frederick Dean*, (1925) 18 Crim. App. 133 at 134 (Eng.)).

¹⁵¹ See supra text accompanying note 22.

¹⁵² *Papachristou*, 405 U.S. at 171.

B. Vagueness Attacks on Federal Laws

Our approach to vagueness applies to attacks on federal laws as well, although there is an added dimension when an act of Congress is involved. There is always the option in such a case of avoiding the problem by a narrowing interpretation if a federal law is attacked on vagueness grounds in a federal court.¹⁵³ Indeed, this is the usual result. We consider two illustrative cases below.

*I. Skilling v. United States*¹⁵⁴

There is one sentence in *McNally v. United States* that captures the ultimate rationale for that decision and provides the underlying basis for the views of all of the Justices in *Skilling*: “Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [the federal mail fraud statute] as limited in scope to the protection of property rights.”¹⁵⁵ At issue in *McNally* was the so-called “intangible rights” or “honest services” theory of federal mail fraud prosecutions under which, in essence, state and local government officials—as well as private employees and corporate officers—could be convicted of mail (or wire) fraud for failure to adhere to fiduciary obligations to the public, to stockholders, to employers, and the like.¹⁵⁶ *McNally* itself concerned a self-dealing scheme under which public officials in Kentucky funneled to themselves a large portion of the premiums paid by the state for workman’s compensation insurance.¹⁵⁷ *Skilling* involved a self-enrichment scheme based on misrepresentation of a corporation’s financial performance.¹⁵⁸

¹⁵³ See Amsterdam, *supra* note 2, at 86.

¹⁵⁴ 561 U.S. 358 (2010).

¹⁵⁵ 483 U.S. 350, 360 (1987). The Court has, however, been generous in its interpretation of “property” in this context. See *Carpenter v. United States*, 484 U.S. 19, 25 (1987).

¹⁵⁶ See *McNally*, 483 U.S. at 355 (noting that McNally’s conviction was based “on a line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government”). The theory was developed entirely by the lower federal courts, and had never been endorsed by the Supreme Court. It was well-entrenched and had a long pedigree. For a survey of the kinds of cases beginning in the early 1940s and burgeoning in the 1970s and 1980s in which the theory was applied, see *id.* at 362–64 & nn.1–4 (Stevens, J., dissenting).

¹⁵⁷ *Id.* at 352–53.

¹⁵⁸ *Skilling*, 561 U.S. at 368–69.

The mail fraud statute, enacted in 1872, was originally designed to combat “large-scale swindles, get-rich-quick schemes, and financial frauds” in a growing national economy¹⁵⁹ by prohibiting the use of the mails to execute any “scheme or artifice to defraud,”¹⁶⁰ language that persists to this day. The relevant portion of the current statute applies to “[w]hoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do” engages in various acts involving use of the mails or private interstate carriers.¹⁶¹ After *McNally* limited the phrase “scheme or artifice to defraud” to the protection of property rights, Congress broadened the meaning of the term by enacting a one-sentence statute that essentially reestablished pre-*McNally* law. The phrase “scheme or artifice to defraud,” Congress said, should henceforth be taken to “include[] a scheme or artifice to deprive another of the intangible right of honest services.”¹⁶² The issue in *Skilling* was how the Court should react to congressional rejection of the *McNally* interpretation, and more specifically, whether the language Congress had forced upon it was unconstitutionally vague.¹⁶³

On one view of the matter, the statute is clearly not vague. The “honest services” doctrine could still be applied as Section 1346 directs. By the time of *Skilling*, there was a substantial body of case law in the lower federal courts that could have been fairly applied consistently with the *Bouie* principle.¹⁶⁴ Yet there were plenty of rough edges and substantial grounds for debating whether this or that application of the statute could survive a *Bouie* challenge.¹⁶⁵ Given the history of the honest services

¹⁵⁹ Jed S. Rakoff, The Federal Mail Fraud Statute (Part I), 18 Duq. L. Rev. 771, 772, 780 (1980).

¹⁶⁰ Id. at 783.

¹⁶¹ 18 U.S.C. § 1341 (2012).

¹⁶² Id. § 1346.

¹⁶³ *Skilling*, 561 U.S. at 402–03. *Skilling* was convicted of conspiracy to commit wire fraud. Id. at 359. The wire fraud statute, 18 U.S.C. § 1343, contains the same “scheme or artifice to defraud” language as the mail fraud statute, 18 U.S.C. § 1341. Section 1346 is applicable to both. See 18 U.S.C. § 1346 (“for the purposes of this chapter”).

¹⁶⁴ The statute will be applied to *conduct*, so there is not likely to be a *Robinson* problem. The question in each application of the doctrine would be whether the law had sufficiently crystallized with respect to the particular conduct proved to have occurred such that its prosecution was defensible and predictable based on the prior law. Surely in many cases, the answer to this question would be “yes.”

¹⁶⁵ For examples of the rough edges, see the debate between the majority and the dissent in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc).

doctrine and the volume of prior cases giving it effect, the task of applying the doctrine in a fair and acceptable manner would have been time-consuming and difficult, but doable.

The Supreme Court (rightly in our view) had no stomach for this task and, for the reason it had previously stated in *McNally*, unanimously thought it was an inappropriate burden for the federal courts to assume.¹⁶⁶ The Court was not convinced that “setting standards of disclosure and good government for local and state officials”¹⁶⁷ (or the counterpart job for corporate executives and private employees) was an appropriate role for cooperative behavior between the Justice Department and the federal courts—especially, one could add, when the applicable statute carries a twenty-year maximum sentence and serves as a predicate for the application of RICO.¹⁶⁸ At the very least, there were enough open questions around the edges of the honest services theory to require significant sharpening that would entail an overview of the appropriate purposes of federal law enforcement in this arena and the resolution of numerous thorny questions of policy.¹⁶⁹ Congress itself, of course, could undertake the task of resolving these questions to the extent warranted by its constitutional authority. But it was inappropriate, the Court clearly thought, for Congress to delegate the job to the executive or the courts without clearly identifying the nature of the federal interest and at least some detail about the policies to be implemented. It was inappropriate both as a matter of separation of powers—Congress should do the job if it is to be done—and as a matter of federalism—regulation of both state and local government officials and private employees in this arena falls on the state side of the federal-state balance in the absence of clear direction from Congress.¹⁷⁰

¹⁶⁶ Compare the conclusion following discussion of an especially far-reaching intangible rights case in *Jeffries*, *supra* note 2, at 242: “The crucial error, as I see it, was . . . the failure to appreciate the dangers in this context of judicial reversion to the methodology of the common law. The essential problem is the significant and largely unnecessary insult to the values of the rule of law.”

¹⁶⁷ *McNally*, 483 U.S. at 360. The opinion is quoted more fully above. See *supra* text accompanying note 155.

¹⁶⁸ See 18 U.S.C. §§ 1341, 1961(1)(B) (2012).

¹⁶⁹ To take just one example, is it appropriate for the federal mail fraud statute to criminalize unsavory behavior by state officials that does not violate *state* criminal law or is not otherwise illegal under *state* law? See *McNally*, 483 U.S. at 361 n.9.

¹⁷⁰ See George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis*, 82 *Cornell L. Rev.* 225, 227–29 (1997) (describing the federalism concern underlying the judicial curtailment of the mail fraud statute in *McNally*).

It would make sense given these concerns to raise the vagueness flag and then construe the statute in a sufficiently narrow manner to avoid the problem. This is exactly what Justice Ginsburg's opinion for the Court did by limiting the coverage of the statute to bribes and kickbacks, arenas in which there was a clear consensus that the "honest services" doctrine should apply.¹⁷¹

Joined by Justices Thomas and Kennedy, Justice Scalia wrote separately to express his conclusion that the statute was unconstitutionally vague.¹⁷² We attribute his position to two concerns. The first was the text of the statute.¹⁷³ While there are clear situations to which the honest services doctrine can be applied, *none* of them can be defended as an *interpretation* of the statutory language. The entire doctrine is a product of lower court imagination. It is one thing for "scheme or artifice to defraud" to be used in the context of theft of property. There, at least, the objective is to use deception to deprive another of property interests. The fact that all the deceptive means sufficient for fraud are not set out clearly in advance—and that they cannot be derived simply from "interpretation" of the words of the statute—seems less critical because of the clearly illegal overall objective of obtaining property to which one is not entitled. There is, moreover, a substantial body of common law dealing with the fraudulent appropriation of another's property. Where the objective of the fraud is defined as depriving citizens or voters or stockholders of "the intangible right of honest services," on the other hand, both the means and the objective are left to judicial imagination. No aspect of the offense is clearly rooted in the text of the statute or the traditions of the common law.¹⁷⁴

¹⁷¹ *Skilling*, 561 U.S. at 404 ("Confined to these paramount applications, § 1346 presents no vagueness problem.").

The Court reversed *Skilling*'s conviction for conspiracy to commit wire fraud but remanded for resolution of the Government's argument that the error was harmless because the same evidence supported a valid conviction for securities fraud. See *id.* at 414–15; Brief for the United States at 52–53, *Skilling*, 561 U.S. 358 (No. 08-1394). On remand, the U.S. Court of Appeals for the Fifth Circuit held that the error was harmless. See *United States v. Skilling*, 638 F.3d 480, 481 (5th Cir. 2011). The Supreme Court then denied certiorari. *Skilling v. United States*, 132 S. Ct. 1905 (2012) (mem.).

¹⁷² *Skilling*, 561 U.S. at 415 (Scalia, J., concurring in part and concurring in the judgment).

¹⁷³ See *id.* at 415–16.

¹⁷⁴ See Justice Scalia's comments in the oral argument of a companion case to *Skilling*: "The problem with the bribe or kickback explanation . . . is that there's no basis in the statute for limiting it to that. . . . [T]here is nothing in the text of the statute that would enable you to

The closely related second ground for Justice Scalia's position is the same separation-of-powers and federalism theme that we have attributed to the *Skilling* majority.¹⁷⁵ Scalia revealed his position in this respect in a dissent from the denial of certiorari in *Sorich v. United States*.¹⁷⁶ He spoke there of "two concerns voiced by this Court in *McNally*."¹⁷⁷ The first was "the prospect of federal prosecutors' (or federal courts') creating ethics codes and setting disclosure requirements for local and state officials."¹⁷⁸ The second, citing *Bouie*, was the Court's long recognition of "the 'basic principle that a criminal statute must give fair warning of the conduct that it makes a crime.'"¹⁷⁹ "It is simply not fair," he added, "to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail."¹⁸⁰ He repeated these themes in his *Skilling* concurrence, concluding that *Skilling*'s conviction should be reversed because "§ 1346 provides no 'ascertainable standard' for the conduct it condemns."¹⁸¹

At bottom, the *Skilling* situation is analytically straightforward. The majority saw a *Bouie* problem if the statute was left unconstrued and gave it a narrow construction that made it consistent with a long line of cases punishing bribery and kickbacks. The dissent rejected this construction on separation-of-powers and federalism grounds. Having done so, the dissent was left with a completely open-ended statute—in effect saying that public officials and private employees should not do "dishonest" things—that plainly would violate the *Bouie* rule-of-law principle if implemented. It was wrong, Justice Scalia concluded, for the federal courts to invent content for the completely indeterminate text, and without invented content there could be no predictable and defensible

limit it to kickbacks and . . . bribes." Transcript of Oral Argument at 9, 13, *Black v. United States*, 561 U.S. 465 (2010) (No. 08-876).

¹⁷⁵ See *Skilling*, 561 U.S. at 422–23.

¹⁷⁶ 555 U.S. 1204, 1204 (2009) (Scalia, J., dissenting). And he tipped his hand in a comment he made in the oral argument in a companion case to *Skilling*:

[Y]ou speak as though it is up to us to write the statute. We can make it mean whatever . . . would save it or whatever we think is a good idea, but that's not our job.

. . . [I]f all [the statute] does is refer us to the pre-*McNally* cases, . . . I'm at sea.

Transcript of Oral Argument, supra note 174, at 45–46.

¹⁷⁷ *Sorich*, 555 U.S. at 1207 (Scalia, J., dissenting).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (citing *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964)).

¹⁸⁰ *Id.*

¹⁸¹ *Skilling*, 561 U.S. at 424 (Scalia, J., concurring in part and concurring in the judgment) (quoting *United States v. L. Cohen Grocery Co.*, 225 U.S. 81, 89 (1921)).

application of the text to individual convictions. In a sentence, the majority saved the statute by making it satisfy the *Bowie* principle and Justice Scalia would have invalidated the statute because it violated that principle.

2. *Screws v. United States*¹⁸²

The statute under which three police officers were prosecuted in *Screws*, now Title 18, Section 242 of the United States Code, punished any person who “under color of any law . . . willfully subjects . . . any inhabitant of any State . . . to the deprivation of any rights . . . secured or protected by the Constitution . . . of the United States”¹⁸³ The problem was that “rights . . . secured or protected by the Constitution” will often become clear only after protracted litigation and sometimes then only after a five-to-four vote by the Supreme Court. A literal application of the statute would put public officials in an awkward situation. It is clear in many contexts that constitutional rights *may* be implicated but far from clear whether they actually are. Such situations could invite risk-averse behavior that undermines the public good. And it rightly seems unfair to prosecute a public official for the crime of failing to anticipate Supreme Court opinions that break new ground.

There was, of course, an easy fix. The statute could be construed to apply only to constitutional rights that had been clearly established prior to the defendant’s behavior. Such a prosecution, in today’s terms, would satisfy the conduct requirement of *Robinson* and the rule-of-law requirement of *Bowie*. This was surely the case on the facts of *Screws* itself. The police conduct there clearly and unmistakably denied due process of law.¹⁸⁴ This is likely to be the case, moreover, in situations where the Justice Department can be persuaded to prosecute state actors.

¹⁸² 325 U.S. 91 (1945).

¹⁸³ *Id.* at 92, 93 (plurality opinion) (quoting 18 U.S.C. § 242 (2012) (formerly 18 U.S.C. § 52 (1946))). There was a vigorous side debate, important for its day but not relevant here and now settled, about whether “under color of law” included only conduct that was commanded or authorized by state law or whether it also included conduct in violation of state law. *Id.* at 107–13, 138–48. The Court split six-to-three on this point, holding that conduct in violation of state law was included within the statute. *Id.* at 112–13. Justices Roberts, Frankfurter, and Jackson dissented on this question. *Id.* at 138 (Roberts, Frankfurter & Jackson, JJ., dissenting). *Screws* settled the issue for criminal cases and *Monroe v. Pape*, 365 U.S. 167 (1961), resolved it later for civil cases brought under 42 U.S.C. § 1983.

¹⁸⁴ The case involved a sheriff, a policeman, and a special deputy who arrested a young black man and beat him for 15 to 30 minutes with a solid-bar blackjack weighing about two

The Court took exactly this approach, although the Douglas opinion for the Court got there in a roundabout manner. The key, Douglas appeared to say, lay in interpretation of the word “willfully.” “The requirement that the act must be willful or purposeful,” Douglas said, “relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware.”¹⁸⁵ He called this “a specific intent to deprive a person of a federal right,”¹⁸⁶ and a casual reader may be led to assume that this is what saved the statute from unconstitutional vagueness.

But this is quite wrong, as Douglas himself recognized.¹⁸⁷ What saved the statute was not its *mens rea* but the clarification of its *actus reus*. “[T]he presence of a bad purpose or evil intent alone may not be sufficient,” Douglas added, but it is “a requirement of a specific intent to deprive a person of a federal right *made definite by decision or other rule of law* [that] saves the Act from any charge of unconstitutionality on the grounds of vagueness.”¹⁸⁸ Once a decision establishes that specified be-

pounds. They threw him in jail and called an ambulance, but their victim died within the hour. *Screws*, 325 U.S. at 92–93 (plurality opinion). “Previously they had threatened to kill him, fortified themselves at a near-by bar, and resisted the bartender’s importunities not to carry out the arrest.” *Id.* at 113 (Rutledge, J., concurring in the result). There was conflicting evidence about whether a warrant for the arrest was obtained prior to the arrest or after it occurred. *Id.* at 113 n.1.

¹⁸⁵ *Id.* at 102.

¹⁸⁶ *Id.* at 103.

¹⁸⁷ As did the dissenters when they said that “the definition of the outlawed act is not derived from the state of mind with which it must be committed.” *Id.* at 156 (Roberts, Frankfurter & Jackson, JJ., dissenting). They added: “[W]illfully’ never defines the physical conduct or the result the bringing of which to pass is proscribed. ‘Willfully’ merely adds a certain state of mind as a prerequisite to criminal responsibility for the otherwise proscribed act.” *Id.* at 154.

¹⁸⁸ *Id.* at 103 (plurality opinion) (emphasis added). Justice Douglas repeated the substance of the italicized phrase numerous times during the course of his vagueness discussion. See *id.* at 104–05.

Justice Douglas was writing for four Justices. *Id.* at 92. His disposition was to remand for a new trial under proper jury instructions. *Id.* at 113. Two other Justices would have affirmed the convictions under essentially a “no harm-no foul” rationale. For Justice Murphy, application of the statute to the defendants was not problematic because their behavior was such a clear violation of the Constitution. *Id.* at 134–38 (Murphy, J., dissenting). Justice Rutledge read the statute to apply only to officials whose “action exceeds honest error of judgment and amounts to abuse of their office and its function.” *Id.* at 129 (Rutledge, J., concurring in the result). He would have affirmed the convictions because that standard was so clearly satisfied, but voted with the Douglas plurality in order to form a Court. See *id.* at 134. The result, in the end, is that a six-to-three majority held that the statute covered violations of the Constitution that were well-established at the time the state officials acted.

havior is a violation of the Constitution, in other words, it then becomes predictable and defensible, in *Bowie* terms, that it would fit the language of the civil rights statute at issue in *Screws*.¹⁸⁹

That the Supreme Court now understands *Screws* in this manner is confirmed by its unanimous decision in *United States v. Lanier*.¹⁹⁰ Lanier was a state trial judge who was prosecuted for various sexual assaults committed “under color” of his office. The issue before the Supreme Court was the standard for determining whether the acts for which Lanier was convicted had been prohibited by prior constitutional decisions. The Court said that “the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s *conduct* was criminal,” adding that “*Screws* limited the statute’s coverage to rights fairly warned of, having been ‘made specific’ by the time of the charged *conduct*.”¹⁹¹ The standard for definiteness required to provide fair notice in criminal prosecutions brought under Title 18, Section 242 of the United States Code, the Court concluded, is the same as the standard required for qualified immunity in civil cases brought under Title 42, Section 1983.¹⁹²

¹⁸⁹ One early commentator saw this point. See Robert L. Hale, Unconstitutional Acts as Federal Crimes, 60 Harv. L. Rev. 65, 106 (1946) (arguing that Justice Douglas’s construction of “willfully” was not “required . . . to save the statute from vagueness”). “If construed as requiring an intention to do an act, which act deprives a person of a constitutional right *already* made definite,” he continued, “the statute would not punish unascertainable crimes, even though the unconstitutional effect of the act was no part of the defendant’s purpose.” *Id.*

This is not to say that the mens rea required for a crime is never relevant to the vagueness inquiry. See, e.g., *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 502 (1982) (holding that deliberate display of drug paraphernalia in a manner that encourages illegal drug use saved statute from vagueness).

As *Flipside* illustrates, confirmatory conduct accompanied by a purpose to engage in a clearly identified criminal objective can defeat a vagueness argument. Indeed, this combination is what saves the crime of attempt from a vagueness attack. The “conduct” component of the crime of attempt is not specified in advance. Viewed on its own terms in the absence of the required intent to commit an object offense, the open-ended nature of the conduct component of an attempt could easily subject the offense to a vagueness attack. A jury determination of “how much conduct was enough” unavoidably identifies the actus reus of the offense after the fact and, absent the specific intent to complete the course of action by engaging in behavior clearly proscribed by the criminal law, could readily be seen as the kind of retroactive lawmaking forbidden by the vagueness doctrine.

¹⁹⁰ 520 U.S. 259 (1997).

¹⁹¹ *Id.* at 267 (emphasis added) (quoting *Screws*, 325 U.S. at 104).

¹⁹² *Id.* at 270–72. The limitation of criminal prosecutions for violations of § 242 to previously established rights and the provision of qualified immunity for § 1983 civil suits per-

The dissenters in *Screws* treated the case just as Justice Scalia treated *Skilling*. For them, it was not appropriate to construe the statute any narrower than its literal text. The motivation of the dissenters is clear from the face of their opinion. Their interpretation of the “color of law” portion of the statute¹⁹³ was informed by their view that the federal charge was based on a “patently local crime” for which state responsibility to prosecute was not only primary but should have been exclusive.¹⁹⁴ In light of constitutionally required principles of federalism, it was at least unclear to the dissenters that Congress had the power under its authority to enforce the Fourteenth Amendment to criminalize the behavior at issue in *Screws*. And it was completely clear, they continued, that even if such power existed, Congress did not mean to exercise it in this statute.¹⁹⁵ From this perspective, it was not acceptable for the Court to affirm the conviction or, worse yet, to decide the case in a manner that strengthened applications of the statute in future prosecutions.

A natural corollary of this line of reasoning was a text-based separation-of-powers argument. The Court’s role was to take the statute as written, not to write a new one. As written, the statute was vague on its face in the view of the dissenters because, taken literally, it punished a range of conduct that could not possibly be identified in advance. For the dissenters, the Court was presented with a bipolar choice: either tolerate a statute of completely open-ended and uncertain application, or strike it down for vagueness.

In the end, therefore, *Screws* is a direct parallel to *Skilling*, with one major difference. The parallel is that application of the literal text to specific situations would violate the *Bouie* principle, and that the statute could be fixed by narrowing the range of conduct to which it applied. The dissenters in both cases rejected the fix, essentially on federalism and separation-of-powers grounds.

The difference is that the federalism and separation-of-powers argument was strong in *Skilling* and weak in *Screws*. There is a definite role for the federal government in the enforcement of federal constitutional rights, and for the Supreme Court in identifying the content of those rights. All the fix required was for the Court to say that state officials

form the same function. Both preclude liability for official acts not previously held unconstitutional.

¹⁹³ See supra note 183.

¹⁹⁴ See *Screws*, 325 U.S. at 139–49 (Roberts, Frankfurter & Jackson, JJ., dissenting).

¹⁹⁵ See id. at 148–49.

could be prosecuted only for violating constitutional rights that had already been clearly established. The text of the law plainly covered at least that behavior, and there were good *Bouie*-type reasons for so confining it. *Skilling*, in contrast, involved highly debatable federal prosecutions in arenas normally left to state law based on federal policies that were nowhere stated by Congress, that had nothing to do with constitutional concerns, and that were entirely left to invention by the federal courts. There is no reason the Supreme Court would want to engage in such policymaking, and there are all kinds of reasons why it should not do so. Analytically the two situations are close. In federalism and separation-of-powers terms, they are worlds apart.

III. ADDITIONAL CONTROLLING FACTORS

We have described the analytical origins of our theory in Part I based on the decisions in *Robinson*, *Bouie*, *Rogers*, and *Shuttlesworth*. And we have illustrated its application in Part II by examining two cases presenting vagueness challenges to a state law and two to a federal law.

We turn now to another central aspect of our claim. Often, vagueness decisions, no matter what the theory, are not only about vagueness. Frequently, other controlling factors enter the mix. To a large extent this was true in our two federal examples in Part II. Both involved Supreme Court adoption of a narrowing construction that made the vagueness problem go away. We included them in Part II, however, because vagueness challenges to a federal law in a federal court always involve this preliminary inquiry and normally result in a narrowing interpretation.

We proceed in this Part to illustrate how controlling factors collateral to the vagueness doctrine can affect the outcome by considering two cases involving challenges to state law. We conclude with a federal example that presents some additional twists to the application of vagueness doctrine to a federal law.

A. *City of Chicago v. Morales*¹⁹⁶

Morales involved a Chicago ordinance designed to regulate public loitering by street gangs:

¹⁹⁶ 527 U.S. 41 (1999).

Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.¹⁹⁷

The ordinance was motivated by serious and legitimate concerns about increases in violent and drug-related crimes, as well as intimidation of people seeking to go about everyday life.¹⁹⁸

The Illinois Supreme Court held the ordinance unconstitutionally vague,¹⁹⁹ and in a fractured set of opinions, the United States Supreme Court agreed.²⁰⁰ The Illinois Supreme Court held that “loitering” was the triggering actus reus of the offense,²⁰¹ and that the ordinance provided “absolute discretion to police officers to decide what activities constitute loitering.”²⁰² The United States Supreme Court majority thought this dispositive, essentially because it violated the version of the *Bouie* principle that we have attributed to *Shuttlesworth*.²⁰³ As Justice O’Connor said, “Any police officer in Chicago is free, under the Illinois Supreme Court’s construction of the ordinance, to order at his whim any person standing in a public place with a suspected gang member to disperse.”²⁰⁴

¹⁹⁷ Id. at 47 n.2. “Loiter” was defined as “to remain in any one place with no apparent purpose.” Id.

¹⁹⁸ As the state supreme court said:

Of particular concern [were] the problems gang members cause by loitering in public. Witnesses testified how gang members loiter as part of a strategy to claim territory, recruit new members, and intimidate rival gangs and ordinary community residents. Testimony revealed that street gangs are responsible for a variety of criminal activity, including drive-by shootings, drug dealing, and vandalism.

City of Chicago v. Morales, 687 N.E.2d 53, 57–58 (Ill. 1997).

¹⁹⁹ Id. at 62–64.

²⁰⁰ Justice Stevens wrote for the Court, but was joined only by Justices Ginsburg and Souter in three of the six parts into which his opinion was divided. Joined by Justice Breyer, Justice O’Connor concurred in part and concurred in the judgment. Justices Kennedy and Breyer wrote separately to the same effect. Justice Scalia wrote a solo dissent, and along with Chief Justice Rehnquist joined a dissent by Justice Thomas.

²⁰¹ See *Morales*, 687 N.E.2d at 60.

²⁰² Id. at 63.

²⁰³ See supra Subsection I.B.2.

²⁰⁴ *Morales*, 527 U.S. at 65–66 (O’Connor, J., concurring in part and concurring in the judgment). Compare the quotation from *Shuttlesworth*, supra text accompanying note 104. Justice O’Connor did not cite *Shuttlesworth*, but in the part of his opinion joined by only two other Justices, Justice Stevens thought it “indistinguishable.” Id. at 58 (plurality opinion of Stevens, J.). The Illinois Supreme Court agreed: “The proscriptions of the gang loitering ordinance are essentially the same as the *Shuttlesworth* ordinance.” *Morales*, 687 N.E.2d at 62.

Viewed in this manner, *Morales* is an easy case, a straightforward application of the principles we derive from *Bouie* and *Shuttlesworth*. But, undoubtedly motivated by the strong public-protection rationale underlying the ordinance, Justice Scalia took a different view. He described the “absolute discretion” part of the state supreme court’s opinion as merely a “*characterization*” of the ordinance.²⁰⁵ It was “not a construction of the language (to which we are bound) but a legal conclusion (to which we most assuredly are not bound).”²⁰⁶ Freed from the bondage of the state court’s “absolute discretion” language, he was able to read the ordinance as punishing the act of disobeying an order to disperse²⁰⁷ that was bounded by sufficient qualifying criteria as not to offend vagueness standards.²⁰⁸

The Supreme Court opinions in *Morales* are more about the meaning of the state law than they are about the scope or meaning of the vagueness doctrine. In our terms, the majority thought the Chicago ordinance so open-ended that it violated the *Bouie-Shuttlesworth* rule-of-law principle by delegating discretion to the police first to make up a law and then to enforce it. The dissenters thought the ordinance a narrow prohibition punishing the failure to disperse following a justifiable police order that was bounded by adequate limiting criteria. The vagueness doctrine itself, whether in our vocabulary or the traditional rhetoric, does not settle whether the majority or the dissenters viewed the state law through the right lens.

B. *Kolender v. Lawson*²⁰⁹

Kolender involved a stop-and-identify statute:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . Who loiters or wanders upon the streets or from place to place without apparent reason or business

²⁰⁵ *Morales*, 527 U.S. at 92 (Scalia, J., dissenting).

²⁰⁶ *Id.*

²⁰⁷ See *id.* at 89–90.

²⁰⁸ *Id.* at 92–93. Joined by Chief Justice Rehnquist and Justice Scalia, Justice Thomas essentially read the Chicago ordinance the same way. See *id.* at 98–115 (Thomas, J., dissenting).

²⁰⁹ 461 U.S. 352 (1983). *Kolender* was a civil suit in federal court brought under 42 U.S.C. § 1983 seeking a declaratory judgment that a California statute was unconstitutional and an injunction against its enforcement. The statute was attacked “on its face” without the background facts of a particular stop or arrest. *Id.* at 353–55.

and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.²¹⁰

The identification requirement could be triggered only after a police officer had made a valid *Terry* stop.²¹¹ The California courts had also limited it by construction to require an identification that was “credible and reliable,” which in turn meant “carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself.”²¹² In addition, a person who was stopped was required to “account for his presence . . . to the extent that it assists in producing credible and reliable identification.”²¹³

Joined by Chief Justice Rehnquist, Justice White in dissent made a good case for concluding that the statute was not vague on its face.²¹⁴ He did so, essentially, by showing (in our terms) that the statute could be applied defensibly and predictably in a sufficient number of situations so as not to warrant striking it down in anticipatory civil litigation. But the majority, in an opinion by Justice O’Connor that focused on the “credible and reliable” construction of the statute as the offending language, said without elaboration that the statute “contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a ‘credible and reliable’ identification,”²¹⁵ and that it “vests *virtually complete discretion* in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.”²¹⁶ People are “entitled to continue to walk the public streets,” the Court said, “*only at the whim* of any police officer.”²¹⁷ “It is clear,” it continued, “that the full discre-

²¹⁰ Id. at 353 n.1.

²¹¹ As described by Justice Brennan in his separate opinion in *Kolender*, the so-called “stop and frisk” power conferred by *Terry v. Ohio*, 392 U.S. 1 (1968), permits “a police officer with reasonable suspicion of criminal activity, based on articulable facts, [to] detain a suspect briefly for purposes of limited questioning and, in so doing, . . . conduct a brief ‘frisk’ of the suspect to protect himself from concealed weapons.” *Kolender*, 461 U.S. at 363 (Brennan, J., concurring).

²¹² Id. at 357 (majority opinion) (quoting *People v. Solomon*, 108 Cal. Rptr. 867, 872–73 (Cal. Ct. App. 1973)).

²¹³ Id. (quoting *Solomon*, 108 Cal. Rptr. at 872) (emphasis omitted).

²¹⁴ Id. at 369–74 (White, J., dissenting).

²¹⁵ Id. at 358 (majority opinion) (emphasis added).

²¹⁶ Id. (emphasis added).

²¹⁷ Id. (quoting *Shuttlesworth*, 382 U.S. at 90) (emphasis added).

tion accorded to the police to determine whether the suspect has provided a ‘credible and reliable’ identification necessarily ‘entrust[s] lawmaking “to the moment-to-moment judgment of the policeman on his beat.”’²¹⁸

This is ipse dixit reasoning—reasoning that announces the result but makes no effort to provide *any* support for its conclusion beyond mere assertion. It consists entirely of undefended question-begging statements. Considering only the argumentation on the face of the majority and dissenting opinions, we would side with the dissent. Justice O’Connor’s defense of her position is not persuasive. She read the statute as construed to delegate unbridled authority to the police to decide when an identification was sufficient and when it was not. She said, in effect, that the law was as broad as the one the Court struck down in *Shuttlesworth*. It was not. The statute as construed was bounded by carefully crafted criteria that at least made the vagueness issue more difficult than she admitted. Justice White’s dissent was more plausible than the Court recognized. On its own terms, it deserved a better answer than it got.

But *Kolender* was not about all this. *Brown v. Texas*,²¹⁹ which we would characterize as a Fourth Amendment counterpart to *Shuttlesworth*,²²⁰ had held that refusing a police request for identification following a stop that did not satisfy Fourth Amendment standards could not be punished as a crime.²²¹ This is why the California courts construed the *Kolender* statute to require a valid *Terry* stop prior to asking for the identity of the suspect. But neither *Brown* nor *Terry* dealt with how far the police could go in questioning a person who had been validly stopped. Neither addressed the scope of police authority to require that identification be provided as part of a *Terry* stop. Forcing a person to answer identification questions in that context clearly raises potential Fifth Amendment self-incrimination and Fourth Amendment privacy con-

²¹⁸ *Id.* at 360 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

²¹⁹ 443 U.S. 47 (1979).

²²⁰ The reason we make the *Shuttlesworth* analogy to *Brown* is that the law at stake in *Brown* authorized the police to stop a person whenever they wished with no constraint based on probable cause or any other Fourth Amendment standard. The law then authorized police to require identification on pain of criminal penalty. It was not constrained by limiting criteria. Nor did it “provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.” See *supra* text accompanying note 104.

²²¹ *Brown*, 443 U.S. at 51–53.

cerns. It was not until twenty-one years after *Kolender* that the Court had an occasion to address these concerns on the merits.²²²

Consider the consequences if the Court had upheld the *Kolender* statute. It would have upheld a law that permitted police to require identification following a *Terry* stop without resolving these difficult constitutional questions. The statute would immediately have become a model around the country for an enhancement of police authority in conjunction with *Terry* stops.

The Court was faced with a trilemma. It could decide the Fourth and Fifth Amendment questions in the abstract on the basis of a cold record; it could ignore them and by upholding the law run the risk of widespread Fourth or Fifth Amendment violations until the matter could be settled; or it could find a way to dispose of the case that (a) did not uphold the statute, (b) did not forecast results on the Fourth and Fifth Amendment issues, and (c) did not say anything that would get it in trouble down the road if it turned out that the Fourth and Fifth Amendments permitted a statute like this one.

It is no surprise that the Court chose the latter course. For this purpose, the O'Connor opinion for the Court was perfect, indeed brilliant. It precluded use of the statute as a national model. It said nothing. It included no reasoning that could possibly come back to haunt the Court in a later case. It concluded by saying that “this is not a case where further precision in the statutory language is either impossible or impractical,”²²³ presumably meaning that the Court stood ready to uphold a statute modeled on this one if slight changes in wording were made and the Fourth and Fifth Amendments turned out not to stand in the way.

Ultimately, *Hiibel* addressed the Fourth and Fifth Amendment issues in the context of a statute that was not—and could not have been—attacked for vagueness. So at least for now the problem is somewhat resolved.²²⁴ And *Kolender*, as we believe the Court planned, did not get in

²²² See *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004). There were two dissents. See *id.* at 191 (Stevens, J., dissenting); *id.* at 197 (Breyer, J., dissenting). Justices Souter and Ginsburg joined the Breyer dissent. Justice Brennan concluded that the statute violated the Fourth Amendment in a separate opinion in *Kolender* itself. See *Kolender*, 461 U.S. at 362–69 (Brennan, J., concurring).

²²³ *Id.* at 361 (majority opinion). There was no suggestion as to what kinds of changes might serve as a cure.

²²⁴ We say “somewhat” because important issues remain open. *Hiibel* approved a statute that was limited to determining the suspect’s identity after a valid *Terry* stop. The validity of a statute that required the stopped person to provide additional information—as the *Kolender*

the way. *Kolender* is therefore much like *Bowie*. The Court applied a real and valid set of constitutional principles more tightly than it otherwise would in order to avoid a series of difficult constitutional issues it was not ready to decide.

C. *Johnson v. United States*²²⁵

The issue in *Johnson* was whether a 2007 state conviction for possession of a short-barreled shotgun²²⁶ counted for sentence enhancement along with two other offenses in a 2012 federal conviction for possession of a different firearm.²²⁷ Normally, the crime for which Samuel Johnson was convicted carried a maximum sentence of ten years.²²⁸ But he was sentenced to a mandatory minimum term of fifteen years under the Armed Career Criminal Act (“ACCA”), Title 18, Section 924(e) of the United States Code,²²⁹ because the trial judge determined that he had three previous convictions for a “violent felony,”²³⁰ a term defined in Section 924(e)(2)(B):

“[V]iolent felony” means any crime punishable by imprisonment for a term exceeding one year . . . that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another

statute did—would not necessarily be controlled by *Hiibel*. The Court also left the door open to a possible Fifth Amendment limitation in some contexts. See *Hiibel*, 542 U.S. at 189–91.

²²⁵ 135 S. Ct. 2551 (2015).

²²⁶ See *United States v. Johnson*, 526 F. App’x 708, 709–10 (8th Cir. 2013) (unpublished per curiam).

²²⁷ *Id.* at 709; *Johnson*, 135 S. Ct. at 2556. The FBI undertook an investigation of Johnson in 2010 because he was thought to be involved in dangerous activities. In time, he revealed several planned acts of terrorism to undercover agents, and showed them an AK-47 rifle and several other weapons. He pleaded guilty to a violation of 18 U.S.C. § 922(g) (possession of a firearm by a felon). *Id.*; see also *Johnson*, 526 F. App’x at 709 (“[Johnson] founded the Aryan Liberation Movement . . . [for which] he manufactured napalm, silencers, and other explosives.”).

²²⁸ See 18 U.S.C. § 924(a)(2) (2012).

²²⁹ The ACCA raises the penalty for a violation of 18 U.S.C. § 922(g) to a minimum of 15 years and a maximum of life. 18 U.S.C. § 924(e)(1); see *Johnson*, 135 S. Ct. at 2555.

²³⁰ *Id.* at 2556.

Johnson's short-barreled shotgun conviction clearly did not fit within subsection (i), nor was it one of the listed crimes in subsection (ii). It could qualify, therefore, only if it fit the so-called "residual clause," that is, only if it "otherwise involves conduct that presents a serious potential risk of physical injury to another."²³¹

The prior conviction resulted from possession of the shotgun during a drug sale.²³² As Justice Alito argued in his *Johnson* dissent, "[d]rugs and guns are never a safe combination," the nature of the gun "elevated the risk of collateral damage," and the location of the crime in a public parking lot "significantly increased the chance" that innocent bystanders would be harmed.²³³ With these facts on the table, one could easily conclude that Johnson's crime fit the residual clause definition of a "violent felony."

But these facts were not on the table. The Court had previously held in *Taylor v. United States*²³⁴ that the federal courts must take a "categorical approach" in determining whether a crime counts as a "violent felony" under Subsection (B)(ii).²³⁵ A sentencing court may "look only to the fact of conviction and the statutory definition of the prior offense"²³⁶ and may not "delv[e] into particular facts disclosed by the record of conviction."²³⁷ The Court based this conclusion on the statutory text,

²³¹ The Court initially heard argument on the question of statutory interpretation, and later directed new briefing and argument on the question "[w]hether the residual clause in the [ACCA] . . . is unconstitutionally vague." *Johnson v. United States*, 135 S. Ct. 939 (2015) (mem.).

²³² *Johnson*, 526 F. App'x at 709; see also *Johnson*, 135 S. Ct. at 2584 (Alito, J., dissenting) ("According to the record in this case, Johnson possessed his sawed-off shotgun while dealing drugs.").

²³³ *Johnson*, 135 S. Ct. at 2584.

²³⁴ 495 U.S. 575 (1990).

²³⁵ The question in *Taylor* was how the term "burglary" as used in Subsection (B)(ii) should be defined. The lower court held that it meant "however a state chooses to define it." *Id.* at 579. The Supreme Court disagreed, holding unanimously that "burglary" for this purpose should be defined in the "generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598. It then listed the elements that state burglary offenses must contain in order to qualify for an ACCA sentence enhancement. *Id.* Justice Scalia wrote separately in *Taylor* to disassociate himself from the Court's reliance on legislative history. *Id.* at 603 (Scalia, J., concurring in part and concurring in the judgment).

²³⁶ *Id.* at 602 (majority opinion).

²³⁷ *Shepard v. United States*, 544 U.S. 13, 17 (2005) (citing *Taylor*, 495 U.S. at 602). As the Court expressed it in *Johnson*, "Under the categorical approach, a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" *Johnson*, 135 S. Ct. at 2557 (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)).

legislative history, and practical considerations involving the difficulty and the impropriety of re-trying the factual basis for a prior conviction in subsequent sentencing proceedings, especially if it was the result of a guilty plea.²³⁸ The Court has since added that this conclusion is partly derived from *Apprendi* concerns.²³⁹

The fact that Johnson possessed the short-barreled shotgun during a drug transaction was irrelevant in light of *Taylor*. Because Johnson's prior offense punished only simple possession,²⁴⁰ the question was how to determine—based on the elements of the offense alone—whether that act should be considered a “violent felony.”

Justice Scalia's opinion for the Court began its vagueness analysis with the traditional pabulum, paraphrasing *Kolender*,²⁴¹ that a criminal law is unconstitutionally vague when “it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement.”²⁴² The opinion then isolated two features of the residual clause that “conspire to make it unconstitutionally vague.”²⁴³

²³⁸ See *Taylor*, 495 U.S. at 600–02.

²³⁹ See *Shepard*, 544 U.S. at 25–26. *Apprendi v. New Jersey* held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. 466, 490 (2000) (emphasis added). The source of the italicized exception is *Almendarez-Torres v. United States*, 523 U.S. 224, 244 (1998), where the Court held that a prior conviction used for sentence enhancement was not an element of the crime on which the sentence was based. It accordingly need not have been alleged in the indictment nor proved to a jury beyond a reasonable doubt. *Id.* at 239. But this does not necessarily mean, as the Court strongly indicated in *Shepard*, that sentencing courts would be free to resolve disputed factual issues about the context and circumstances of prior offenses that are used in subsequent sentencing proceedings. *Shepard*, 544 U.S. at 22. *Almendarez-Torres* dealt only with “the fact of an earlier conviction,” not with the manner in which the underlying crime was committed. 523 U.S. at 226.

²⁴⁰ The applicable Minnesota statute punished “whoever . . . possesses . . . a short-barreled shotgun.” Minn. Stat. § 609.67, subdiv. 2 (2014).

²⁴¹ See *supra* text accompanying note 3.

²⁴² *Johnson*, 135 S. Ct. at 2556. The *Johnson* Court also echoed *Kolender* in its conclusion: “We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” *Id.* at 2557.

²⁴³ *Id.* The vote was six to three. Justice Alito dissented from the Court's vagueness holding. See *id.* at 2573–84 (Alito, J., dissenting). Justices Kennedy and Thomas wrote separately to make other points, but noted their agreement with Alito's vagueness reasoning. See *id.* at 2563 (Kennedy, J., concurring in the judgment); *id.* (Thomas, J., concurring in the judgment).

First, the residual clause “leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.”²⁴⁴ By definition the crimes considered under the residual clause will not include violence or use of force as an element.²⁴⁵ They therefore leave entirely to judicial imagination the information base on which the “violent felony” judgment must be made. No help is provided by the text of the law defining the prior offense or the facts underlying the prior conviction. “The residual clause offers no reliable way to choose between . . . competing accounts of . . . ‘ordinary’”²⁴⁶ occurrences of the offense in question.

Second, “the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction.”²⁴⁷ Once judges have the imagined information, in other words, they are left at sea as to how they should determine the degree of risk of violence required by the statutory provision. The provision does, the Court’s opinion added,²⁴⁸ refer to four specific crimes and require that the offense under consideration “otherwise” present “a serious potential risk” of injury. This suggests that these other offenses are somehow relevant to the required judgment. But they are of little help.²⁴⁹ In the end:

By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more un-

²⁴⁴ *Id.* at 2557. “[P]icturing the criminal’s behavior is not enough . . .” *Id.* The inquiry is “detached from statutory elements,” and “seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out.” *Id.* at 2557–58.

²⁴⁵ If they did, they would be included in 18 U.S.C. § 924(e)(2)(B)(i) as crimes that have “as an element the use, attempted use, or threatened use of physical force against the person of another.”

²⁴⁶ *Johnson*, 135 S. Ct. at 2558.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Justice Scalia explained:

These offenses are “far from clear in respect to the degree of risk each poses.” Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information?

Id. (citation omitted) (quoting *Begay v. United States*, 553 U.S. 137, 143 (2008)).

predictability and arbitrariness than the Due Process Clause tolerates. . . .

. . . Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise. . . . Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.²⁵⁰

The *Johnson* result can readily be explained through the lens we have proposed. There is no *Robinson* problem because the underlying crime was based on conduct—possession of a firearm—and the proposed enhanced sentence would be based on the conduct of prior possession of a different firearm. But there is a clear *Bouie* rule-of-law problem. There is nothing in the text of the law or a fair interpretation of its words that will lead to predictable and defensible case-by-case conclusions down the road. The combination of an imprecise informational base and an indeterminate measure of the required risk made application of the residual clause wholly conjectural.

In *Skilling* and *Screws*, the Court responded to the *Bouie* problem by adopting a narrowing construction of the statute that allowed its continued application in a predictable and defensible manner.²⁵¹ But, given *Taylor*, the Court could not so easily cure the *Bouie* problem in the ACCA residual clause. By the time of *Johnson*, the Court had already attempted to interpret the residual clause in a series of four cases that produced a total of twelve majority, concurring, and dissenting opinions.²⁵² About all that could be said with confidence about these cases was that two offenses were in and two were out.²⁵³ When the issue re-

²⁵⁰ *Id.* at 2558, 2560. Presumably this conclusion will have retroactive effect, requiring resentencing of all offenders currently serving prison sentences under the residual clause. See *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (“New *substantive* rules generally apply retroactively.”). Collateral attacks on such sentences will be asserted under 28 U.S.C. § 2255, which is the counterpart to habeas corpus for federal prisoners. See Peter W. Low et al., *Federal Courts and the Law of Federal-State Relations* 828–29 (8th ed. 2014).

²⁵¹ Echoing *Bouie*, Justice Scalia described this possibility for the residual clause in *James v. United States*, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting): The Court could “try to figure out a coherent way of interpreting the statute so that it applies in a relatively predictable and administrable fashion to a . . . subset of crimes.”

²⁵² See *infra* note 253 (citing the cases).

²⁵³ The Court said that its “repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy.” *Johnson*, 135 S. Ct. at 2558. “All in all,” it concluded, the prior cases “failed to establish any generally

turned for a fifth time in *Johnson*, with the prospect of numerous repeat performances in the years ahead,²⁵⁴ the Court gave up the effort to provide an administrable solution.²⁵⁵

Justice Scalia had raised the possibility that the residual clause might be unconstitutionally vague in *James*, the first case in the series.²⁵⁶ And he concluded in *Sykes*, the fourth in the series, that it was.²⁵⁷ Recognizing that the Court's prior decisions were a major part of the problem, he said that the four cases collectively demonstrate "that the clause is too vague to yield 'an intelligible principle'" and that each new effort by the Court to apply the statute "is less predictable and more arbitrary than the last."²⁵⁸ He later characterized the Court's prior efforts to establish a

applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition." *Id.* at 2559.

The prior cases were decided over a four-year period between 2007 and 2011. See *James*, 550 U.S. at 211–12 (attempted burglary counts); *Begay*, 553 U.S. at 139 (DUI does not); *Chambers v. United States*, 555 U.S. 122, 123 (2009) (failure to report for penal confinement does not); *Sykes v. United States*, 131 S. Ct. 2267, 2270 (2011) (vehicular flight from a law enforcement officer counts).

The Court also talked about circuit splits in *Johnson*, concluding that:

The most telling feature of the lower courts' decisions is not division about whether the residual clause covers this or that crime (even clear laws produce close cases); it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider.

Johnson, 135 S. Ct. at 2560.

Justice Scalia had previously summarized four divergent circuit court cases on the residual clause issue in a dissent to the denial of certiorari, one of which he described as holding that Oliver Twist would have been a "violent felon." *Derby v. United States*, 131 S. Ct. 2858, 2859 (2011) (mem.) (Scalia, J., dissenting from denial of certiorari). For citations to the confusing mélange of circuit court decisions on other potentially included crimes, see Evan Tsen Lee et al., Which Felonies Pose a "Serious Potential Risk of Injury" for Federal Sentencing Purposes?, 26 Fed. Sent'g Rep. 118, 119–23 (2013).

²⁵⁴ Justice Scalia said in his *Sykes* dissent that "[t]he residual-clause series will be endless, and we will be doing ad hoc application of ACCA to the vast variety of state criminal offenses until the cows come home." *Sykes*, 131 S. Ct. at 2287 (Scalia, J., dissenting); see also *id.* at 2295 (Kagan, J., dissenting) (quoting Scalia's dissent in *Sykes*).

²⁵⁵ Justice Alito opened his dissent in *Johnson* with the observation that "[t]he Court is tired of the Armed Career Criminal Act of 1984 (ACCA) and in particular its residual clause. Anxious to rid our docket of bothersome residual clause cases, the Court is willing to do what it takes to get the job done." *Johnson*, 135 S. Ct. at 2573 (Alito, J., dissenting).

²⁵⁶ *James*, 550 U.S. at 229–31 (Scalia, J., dissenting).

²⁵⁷ *Sykes*, 131 S. Ct. at 2284–88 (Scalia, J., dissenting).

²⁵⁸ *Id.* at 2287–88 (citation omitted). He added that "[i]t is not the job of this Court to impose a clarity which the text itself does not honestly contain," but admitted that "even if that were our job, the further reality is that we have by now demonstrated our inability to accomplish the task." *Id.* at 2287. He concluded that "[i]nsanity, it has been said, is doing the same thing over and over again, but expecting different results. Four times is enough. We should

formula as “incomprehensible to judges” and observed that “[h]ow we would resolve [such cases] if we granted certiorari would be a fine subject for a law-office betting pool.”²⁵⁹

Given this view of the matter, the residual clause could be called unconstitutionally vague because counting a crime within this category for enhancement purposes would be, as *Bouie* said, “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.”²⁶⁰ Indeed, Justice Scalia’s prior dissents had used parallel language in his description of the vagueness problem inherent in Section 924(e). He said in *James* that the Court should seek to provide a “principled, predictable application”²⁶¹ of the residual clause and in *Sykes* that the Court’s failure is that it “has not made the statute’s application clear and predictable.”²⁶² This puts the vagueness problem, as we do, exactly in terms of the principle at stake in *Bouie*.

The Court continued the *Bouie* theme in its discussion of *stare decisis*. In both *James* and *Sykes*, the Court had explicitly rejected Justice Scalia’s suggestions that the residual clause was unconstitutionally vague.²⁶³ *Johnson* overruled this aspect of *James* and *Sykes*,²⁶⁴ reasoning that “[t]he doctrine of *stare decisis* allows us to revisit an earlier decision

admit that ACCA’s residual provision is a drafting failure and declare it void for vagueness.” Id. at 2284.

²⁵⁹ *Derby v. United States*, 131 S. Ct. 2858, 2859–60 (2011) (mem.) (Scalia, J., dissenting from denial of certiorari).

²⁶⁰ See supra text accompanying note 59.

²⁶¹ *James*, 550 U.S. at 230 (Scalia, J., dissenting).

²⁶² *Sykes*, 131 S. Ct. at 2287 (Scalia, J., dissenting). Recall, moreover, that Justice Scalia cited *Bouie* in his description of the counterpart problem in a dissent from the denial of certiorari in a case that raised the *Skilling* issue. See supra text accompanying note 179.

²⁶³ In *James*, the Court said in a footnote that while the statute “requires judges to make sometimes difficult evaluations of the risks posed by different offenses, we are not persuaded . . . that the residual provision is unconstitutionally vague.” *James*, 550 U.S. at 210 n.6. It is not, the Court added, “so indefinite as to prevent an ordinary person from understanding what conduct it prohibits.” Id.

And in *Sykes*, it added that the residual clause “states an intelligible principle and provides guidance that allows a person to ‘conform his or her conduct to the law’” and that the statute “is within congressional power to enact.” *Sykes*, 131 S. Ct. at 2277 (quoting *Morales*, 527 U.S. at 58).

None of the other Justices joined Justice Scalia’s vagueness argument in *Sykes*. “[E]ight Members of the Court [in *Sykes*] found the statute capable of principled application.” *Johnson*, 135 S. Ct. at 2575 (Alito, J., dissenting).

²⁶⁴ *Johnson*, 135 S. Ct. at 2563 (majority opinion). Justice Alito responded that “[n]othing has changed since our decisions in *James* and *Sykes*—nothing, that is, except the Court’s weariness with ACCA cases.” Id. at 2575 (Alito, J., dissenting).

where experience with its application reveals that it is unworkable.”²⁶⁵ A vagueness challenge that is rejected in error, the Court added, manifests itself in “the inability of later opinions to impart the predictability that the earlier opinion forecast.”²⁶⁶ Stare decisis is a “vital rule of judicial self-government,”²⁶⁷ but it

does not matter for its own sake. It matters because it “promotes the evenhanded, predictable, and consistent development of legal principles.” Decisions under the residual clause have proved to be anything but evenhanded, predictable, or consistent. Standing by *James* and *Sykes* would undermine, rather than promote, the goals that *stare decisis* is meant to serve.²⁶⁸

This again is the language of *Bouie*.

But *Johnson* remains an unusual decision. It is rare that federal statutes are declared void for vagueness rather than construed, as in *Skilling* and *Screws*, in a manner that will save them from that fate.²⁶⁹ Three Justices in *Johnson* were prepared to live with the prior cases. They voted to reject the conclusion that the residual clause was unconstitutionally vague and to apply it as previously construed to the *Johnson* situation.²⁷⁰ But the majority took the position, correctly in our view, that the residual clause precedents did not speak for themselves. They did not establish interpretative guidance that satisfied the constraints of *Bouie*.

Given this conclusion, the narrow-construction solution adopted in *Skilling* and *Screws* was not as readily available in *Johnson*. There was no obvious way to read the residual clause that did not involve significant Supreme Court policymaking that would trespass, we guess, on the Court’s separation-of-powers vision of its function. *Screws* approved an enforcement mechanism for constitutional rights. The requirement that

²⁶⁵ Id. at 2562 (majority opinion).

²⁶⁶ Id.

²⁶⁷ Id. at 2563.

²⁶⁸ Id. (citation omitted).

²⁶⁹ But not unknown. See *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92–93 (1921) (striking down as unconstitutionally vague a section of the Food Control Act that attached liability to “any unjust or unreasonable rate or charge in handling or dealing in or with any necessities”).

²⁷⁰ Justice Thomas thought that possession of a sawed-off shotgun did not fit within the residual clause as previously interpreted. See *Johnson*, 135 S. Ct. at 2564–66 (Thomas, J., concurring in the judgment). Justice Kennedy agreed. See id. at 2563 (Kennedy, J., concurring in the judgment). Justice Alito thought that the possession offense did fit within the clause. See id. at 2582–84 (Alito, J., dissenting).

the rights be clearly established before the defendant acted served as the narrowing factor that saved the statute from a vagueness attack. *Skilling* saved the intangible rights doctrine by limiting it to the enforcement of two traditional, well-established crimes. Again, there was a body of law external to the contested statute that served as the narrowing factor and saved it from a vagueness attack.

In *Johnson*, by contrast, there was no external body of law that could confine the meaning of the residual clause—no established doctrine external to the statute that could be called upon for clarification. Given the vagaries of the text and the indeterminacy of previous interpretations, the Court was left to its own devices. A narrow construction that would have saved the residual clause from vagueness would have required an inventive solution that would implicate the same sorts of separation-of-powers limitations that motivated the Court’s decision in *Skilling*.²⁷¹

Justice Alito’s solution—he was alone on this point—was that the Court’s vagueness concerns could be handled by abandoning the categorical approach of *Taylor* for residual clause issues.²⁷² The statute provides that a crime must be considered for sentence enhancement if it “otherwise involves *conduct* that presents a serious potential risk of physical injury to another.”²⁷³ “Conduct” here can be read to refer “to things done during the commission of an offense that are not part of the elements needed for conviction. Because those extra actions vary from case to case, it is natural to interpret ‘conduct’ to mean real-world conduct, not the conduct involved in some Platonic ideal of the offense.”²⁷⁴ Alito also argued that standards of the sort contained in the residual clause “almost always appear in laws” calling for decisions by triers of fact²⁷⁵ and that the difficulty in applying the categorical approach sug-

²⁷¹ See Justice Scalia’s observation in an oral argument related to *Skilling*: “[Y]ou speak as though it is up to us to write the statute. . . . [B]ut that’s not our job.” Transcript of Oral Argument, supra note 174, at 45. See supra note 176 and accompanying text for reproduction of this comment in context and discussion of the separation of powers issue in *Skilling*.

Scalia made the same point in support of his conclusion in *Sykes* that the residual clause was unconstitutionally vague: “It is not the job of this Court to impose a clarity which the text itself does not honestly contain.” *Sykes v. United States*, 131 S. Ct. 2267, 2287 (2011) (Scalia, J., dissenting). This quotation appears in context above. See supra note 258.

²⁷² He said that “the reasons that persuaded the Court to adopt the categorical approach in *Taylor* either do not apply or have much less force in residual clause cases.” *Johnson*, 135 S. Ct. at 2579 (Alito, J., dissenting).

²⁷³ 18 U.S.C. § 924(e)(2)(B)(ii) (2012) (emphasis added).

²⁷⁴ *Johnson*, 135 S. Ct. at 2578 (Alito, J., dissenting).

²⁷⁵ *Id.*

gests that it may not be what Congress intended. “[W]hy,” he asked, “should we assume that Congress gave the clause a meaning that is impossible—or even, exceedingly difficult—to apply?”²⁷⁶

This part of Justice Alito’s opinion correctly identified a feature of *Johnson* that is unusual, if not unique. The unconstitutional vagueness that led to the demise of the residual clause is a product not of the language of Congress, but of its interpretation by the Supreme Court. Without the *Taylor* categorical approach as its operating premise, the Court’s vagueness analysis would have been significantly different. The *Johnson* majority, as Alito observed, would have upheld the clause if it had involved a fact-specific inquiry.²⁷⁷ Because the clause could readily be interpreted to require (or at least permit) such an approach, Alito concluded, it is the Court’s interpretation that is unconstitutionally vague, not the residual clause itself.²⁷⁸

²⁷⁶ Id. To the extent that practical considerations justify the *Taylor* approach, he argued that the difficulty of recreating at sentencing the factual context of a crime committed years before would burden the prosecutor, not the defendant, and therefore would not increase the unfairness of the situation. Finally, he noted that a fact-specific approach may involve *Apprendi* concerns, but they could be addressed by relying on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), or by trying the issues to a jury. See *Johnson*, 135 S. Ct. at 2580 (Alito, J., dissenting).

The Court defended retention of the *Taylor* approach on three grounds. First, the Government had not sought the abandonment of *Taylor*. Second, the statute referred to three prior “convictions,” not three prior felonies. This indicated that Congress meant to refer only to the fact of conviction, not the facts underlying the conviction. Third, it is impractical to require a sentencing court to recreate the facts underlying a prior conviction long after the event, particularly where the conviction resulted from a guilty plea. “‘The only plausible interpretation’ of the law, therefore, requires use of the categorical approach.” Id. at 2562 (majority opinion) (quoting *Taylor*, 495 U.S. at 602).

²⁷⁷ See id. at 2577 (Alito, J., dissenting). The majority said in this connection: “As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct.” Id. at 2561 (majority opinion).

²⁷⁸ The “ACCA . . . makes no reference to ‘an idealized ordinary case of the crime.’ That requirement was the handiwork of this Court in *Taylor v. United States*.” Id. at 2577 (Alito, J., dissenting) (citation omitted). While Justice Alito was ready to abandon *Taylor*, at least as applied to the residual clause, he was willing to do so in the name of saving the statute from unconstitutionality. This, perhaps, serves to defend his willingness to depart from the stare decisis effect of *Taylor* in residual clause cases even though he strongly criticized the Court’s refusal to follow that doctrine when it came to the Court’s rejection of the vagueness challenge in *James* and *Sykes*. See id. at 2575–76.

Although it is collateral to our main thesis, one more aspect of *Johnson* deserves comment.²⁷⁹ Each of the vagueness decisions we have considered, save *Johnson*, involved the acceptability of a crime definition that was questioned on vagueness grounds. *Johnson* involved a vagueness attack on a sentencing provision. Does the vagueness doctrine apply with full force to sentencing?²⁸⁰

Justice Alito argued that the vagueness “bar is even higher for sentencing provisions,”²⁸¹ but the majority said without qualification or elaboration that vagueness “principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences.”²⁸² We think that the key phrase here, for reasons we will explain, is “statutes fixing sentences.”

The tradition is that sentencing decisions have not been subject to the same rule-of-law constraints that apply to the elements of a crime.²⁸³ It

²⁷⁹ We decline the opportunity to address the on-its-face versus as-applied debate as it arose in *Johnson*, and specifically—as Justice Alito argued—whether a single instance of clear application of a law saves it from vagueness even though the law remains unclear in other potential applications. See *id.* at 2561 (majority opinion); *id.* at 2580–82 (Alito, J., dissenting). Doing so would open a Pandora’s box that would take us far afield from our thesis.

We can say, however, that our view is that much of the debate is smokescreen for other concerns. See Richard H. Fallon, Jr., Commentary, As-Applied and Facial Challenges and Third Party Standing, 113 Harv. L. Rev. 1321, 1324 (2000) (“[T]he availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable *substantive* tests of constitutional validity.”); Alex Kreit, Making Sense of Facial and As-Applied Challenges, 18 Wm. & Mary Bill Rts. J. 657, 659 (2010) (“[C]ategorizing constitutional cases into ‘facial’ and ‘as-applied’ challenges, and relying on these categories to shape doctrine and inform case outcomes, is an inherently flawed and fundamentally incoherent undertaking.”). Both of these articles are good sources for the voluminous additional literature on the topic. See also *Skilling v. United States*, 130 S. Ct. 2896, 2940 (2010) (Scalia, J., concurring in part and concurring in the judgment) (arguing that the rationale for applying a vagueness conclusion to *Skilling* would apply to other defendants by operation of *stare decisis*).

²⁸⁰ For general consideration of the extent to which constitutional questions should be considered at sentencing, see Carissa Byrne Hessick & F. Andrew Hessick, Recognizing Constitutional Rights at Sentencing, 99 Calif. L. Rev. 47 (2011).

²⁸¹ *Johnson*, 135 S. Ct. at 2577 (Alito, J., dissenting).

²⁸² *Id.* at 2557 (majority opinion). The Court cited *United States v. Batchelder*, 442 U.S. 114, 123 (1979), for this proposition, where the Court said that “vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.” *Id.* The question in *Batchelder* was whether the defendant could be sentenced under the harsher of two separate statutes both of which clearly covered the same factual situation. See *id.* at 125–26. It did not present a serious question of vagueness.

²⁸³ See *United States v. Booker*, 543 U.S. 220, 233 (2005) (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.” (citing *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000); *Williams v. New York*,

would be revolutionary to conclude that sentencing considerations as applied on a daily basis must satisfy the vagueness doctrine or, in our terms, the requirements of *Robinson* and *Bouie*. The implications would be enormous.

General concerns of the sort listed in the requirements governing federal sentencing are highly relevant to the determination of an appropriate sentence in both state and federal courts.²⁸⁴ A sentencing court in applying criteria like those required by federal law must think in status terms, focusing on offense conduct to be sure but also on what the defendant has done in the past and might do in the future. Who the defendant is (a five-time loser as opposed to a first offender) and what the defendant might do (dangerous? a likely recidivist?) are often determinative in sentencing decisions. And sentencing courts must also consider a host of other issues related to the public good. Judgments about the sentence that would provide a just desert for the underlying offense or how long the sentence must be to provide adequate general deterrence, to pick just two examples, are grist for the sentencing mill. If decisions based on such factors were subject to a vagueness attack, either in our terms or in traditional terms, the world of sentencing could look quite different.

The answer, we propose, is that it is not only acceptable but desirable for the vagueness doctrine to apply to laws that define crimes, to laws that divide them into degrees, and to laws that establish maximum and minimum sentencing parameters based on statutorily described conditions. The vagueness doctrine, as Justice Scalia says in *Johnson*,²⁸⁵ should be applicable to “*statutes fixing sentences.*” Individualized sentencing decisions, by contrast, should not be subject to attacks based on vagueness if they are made by juries or judges within the limits established by such laws.²⁸⁶ This approach permits consideration of whether

337 U.S. 241, 246 (1949)). *Booker* was unanimous on this point. The key to the Court’s remedial opinion in *Booker* was the same thought—transforming the federal sentencing guidelines from mandatory requirements to discretionary considerations. See *id.* at 244–68.

²⁸⁴ See 18 U.S.C. § 3553(a) (2012), which establishes the sentencing parameters a judge must consider, including the need for an imposed sentence

to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; . . . to afford adequate deterrence to criminal conduct; . . . to protect the public from further crimes of the defendant; and . . . to provide the defendant with needed . . . correctional treatment in the most effective manner.

²⁸⁵ See *supra* text accompanying note 282 (emphasis added).

²⁸⁶ We mean only to say that the vagueness doctrine is too blunt an instrument for bringing the rule of law to sentencing decisions, not that there should be no controls on sentencing discretion. The enactment of sentencing guidelines, the requirement that judges state reasons

the residual clause in Section 924(e)(2)(B)(ii) is unconstitutionally vague without raising the possibility that ordinary sentencing criteria such as those stated in federal law²⁸⁷ could be challenged for vagueness. And it seems right, moreover, that legal questions with consequences of the sort involved in *Johnson*—an increase from 0–10 years as the sentencing range to a minimum of 15 years and a maximum of life²⁸⁸—should be subject to the same rule-of-law protections against arbitrary resolution as apply to questions of law that control the elements of a crime.²⁸⁹

In any event, as we say in our discussion of *Morales* and *Kolender*, understanding the vagueness doctrine in our terms does not provide litmus-paper certainty for the resolution of issues associated with vagueness claims. It does not explain why the Court in *Johnson* chose to strike down the residual clause for vagueness rather than reject the *Taylor* cat-

for their choice of sentence, and the possibility of appellate review are important modern developments that address the pervasive problem of sentencing disparity. See Richard J. Bonnie et al., *Criminal Law* 996–1000 (4th ed. 2015). Criteria mandated for individualized capital sentencing decisions, of course, raise completely different considerations. See, e.g., *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (“Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment . . .”).

²⁸⁷ See supra note 284 and accompanying text.

²⁸⁸ Our intuition is that the sentence “[i]nvolving so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution’s guarantee of due process” in the Court’s opinion, see supra text accompanying note 250, was motivated at least for some Justices by the severe consequences of moving *Johnson* from one sentencing category to another. The rule of law should govern consequences of such magnitude.

²⁸⁹ There is a parallel here to the *Apprendi* line of decisions, but the stakes are quite different. *Apprendi* and its progeny concern whether questions of *fact* involved in sentencing decisions should be resolved by the jury or the judge and proved beyond a reasonable doubt. As that issue relates to *Johnson*, it implicates *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

The recidivist exception to *Apprendi* adopted in *Almendarez-Torres*, see supra note 239, has been in trouble for some time. Four Justices dissented in *Almendarez-Torres*, 523 U.S. at 248 (Scalia, Stevens, Souter & Ginsburg, JJ., dissenting), and Justice Thomas (who had joined the majority in *Almendarez-Torres*) backed away from it in *Apprendi*, see *Apprendi v. New Jersey*, 530 U.S. 466, 520–21 (2000) (Thomas, J., concurring). Thomas has been arguing for some time now that *Almendarez-Torres* should be overruled. See, e.g., *Shepard v. United States*, 544 U.S. 13, 27–28 (2005) (Thomas, J., dissenting).

Almendarez-Torres can perhaps be justified on the ground that the *facts* underlying previous convictions will have already been determined consistently with the requirements of *Apprendi*. See *Apprendi*, 530 U.S. at 487–88, 496. But whatever the fate of *Almendarez-Torres*, the outcome will be consistent with a holding that the question of *law* involved in *Johnson* must comply with the predictability standard of *Bouie*.

egorical approach to its interpretation²⁹⁰ or contrive a way to live with the stare decisis effect of its prior interpretive precedents.²⁹¹ Nor does it explain how the vagueness doctrine ought to apply to sentencing. Our approach does not simplify collateral complexities that can accompany potential applications of the vagueness doctrine. But thinking about vagueness as we do restates the doctrine in a way that helps explain a vagueness conclusion in a manner that is, and we intend the pun, much less vague than the traditional vocabulary. We find it informative to think about the *Johnson* issues in *Bouie* terms, and we find it helpful to explain the Court's conclusion with the *Bouie* standard at the front of the line.

CONCLUSION

The usual “tests” for vagueness—fair notice to ordinary citizens from the language of the statute and fear of arbitrary enforcement—provide superficial explanations for applications of the vagueness doctrine. We believe that the *Robinson* conduct requirement and the *Bouie-Shuttlesworth* correlation requirement have significantly greater explanatory power in supporting a conclusion that a statute is or is not unconstitutionally vague. Attention to these principles can provide meaningful insight into whether a statute has transgressed acceptable vagueness limits. They are not, of course, mechanical or coldly analytical. Judgment is still required, in part to take into account countervailing factors such as the necessity of the chosen means to accomplishment of the legislative objective and the legitimacy and seriousness of that objective. And additional considerations beyond the four corners of the vagueness doctrine, how-

²⁹⁰ The centrality of the *Taylor* categorical approach to the Court's vagueness reasoning may well have collateral consequences for other statutes. See, e.g., *United States v. Naughton*, No. 13-4816, 2015 WL 5147399, at *8 n.4 (4th Cir. Sept. 2, 2015); *United States v. Fuentres*, No. 13-4755, 2015 WL 4910113, at *9 n.5 (4th Cir. Aug. 18, 2015). Both cases involved the similarly but not identically worded residual clause in 18 U.S.C. § 924(c)(3)(B) (punishing various forms of using a firearm in furtherance of a “crime of violence,” defined in part as a felony “that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense”). Both cases noticed the potential *Johnson* issue, but did not address it on the merits. See also Evan Tsen Lee, *Why California's Second-Degree Felony-Murder Rule Is Now Void for Vagueness*, 43 *Hastings Const. L.Q.* (forthcoming 2015, available at <http://papers.ssrn.com/abstract=2674747>) (arguing that the California second-degree felony-murder rule is infected with the same malady that led to the result in *Johnson*).

²⁹¹ We say “contrive” a way to live with its precedents for the separation-of-powers reasons discussed above. See *supra* text following note 270.

ever it is explained, will often be determinative of the outcome. In any event, we submit, explicit consideration of the two principles we have advanced will give much more fulsome content to the vagueness doctrine than is revealed by the traditional manner in which it is described. Thinking about vagueness in this manner may not change outcomes or make hard cases any easier, but it will assist deliberation and will provide a more convincing rationale once a conclusion is reached.

The vagueness doctrine serves important rhetorical purposes. It is embedded in more than a century of litigation that for the most part has led to defensible results. Our claim is that analytical clarity can be achieved and that more meaningful exposition will occur if the traditional analysis is employed with the conduct requirement of *Robinson* and the correlation requirement of *Bouie* more transparently in mind. The rest we would leave as it is.