INTRODUCTION

Courts struggle with vague and ambiguous criminal laws. The ideal of fair warning demands that the line between criminal and non-criminal conduct be clearly defined in advance. When legislatures fail to speak clearly, courts are left to clean up the mess.

The law responds to this problem with the fair warning doctrines, most notably the void-for-vagueness doctrine and the rule of lenity.\(^1\) The doctrines’ demands are severe. They require courts to either strike statutes down or interpret them narrowly. When enforced, the fair warning doctrines thwart legislative intent and conflict with other interpretive norms.\(^2\) As a result, they are enforced irregularly.\(^3\) Though the fair warning requirement poses as a foundational rule of statutory interpretation in the criminal law,\(^4\) in practice it is often nothing but makeweight. Depending on the needs of their argument, litigants and judges either ritualistically deploy the requirement or summarily dismiss it.\(^5\)

Recognition of the doctrines’ faults has produced proposals for change. So far, none of these proposals has gained much traction in judicial practice. In this Article, I propose a different and potentially supplementary solution, one that would both incorporate some of the insights of recent scholarship and also find firm support in existing doctrine.

\(^*\) Thanks to Stephen Burt, Owen Fiss, David Fontana, Trevor Morrison, and Kevin Washburn for their helpful comments.

\(^1\) The fair warning requirement consists of several related and overlapping doctrines, including vagueness and lenity. See United States v. Lanier, 520 U.S. 259, 266-67 (1997); Paul H. Robinson, Fair Notice and Fair Adjudication: Two Kinds of Legality, 154 U. Pa. L. Rev. 335, 337 (2005); infra note 53.

\(^2\) The rule of lenity pits “courts and legislatures as antagonists, and of course is directly contrary to the avowed purpose of the judiciary to ascertain the legislatures’ meaning.” James C. Quarles, Some Statutory Construction Problems and Approaches in Criminal Law, 3 Vand. L. Rev. 531, 535 (1950).


\(^4\) See Joshua Dressler, UNDERSTANDING CRIMINAL LAW § 5.01[A], at 39 (3d ed. 2001) (describing the legality doctrine as “the first principle of American criminal law jurisprudence”) (footnote omitted).

Courts facing fair warning claims should follow the procedure established by the Supreme Court in *Saucier v. Katz.* 6 Saucier established the structure for adjudicating claims of qualified immunity in civil actions against public officials. In *Saucier,* the Supreme Court held that in “a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence.” 7 Qualified immunity rulings thus proceed in two steps.

A court required to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry. . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties’ submissions, the next, sequential step is to ask whether the right was clearly established. 8

The *Saucier* framework is meant to vindicate values of notice—the very same values that underlie the criminal law’s fair warning requirement.

To see how *Saucier* functions, consider a simple hypothetical. Imagine that Rochelle, a police officer, shoots Dan, a fleeing suspect, to end a high-speed car chase. Dan’s survivors then file suit, claiming that Rochelle violated the Fourth Amendment’s prohibition of excessive force, and Rochelle pleads qualified immunity. Under *Saucier,* a court faced with her qualified immunity claim would first face the question of constitutional interpretation: it would determine whether Rochelle’s use of deadly force violated the Constitution. If it found a constitutional violation, the court would proceed to the second question, the question of notice: it would determine whether at the time of the incident the law was clear enough that Rochelle had fair warning of the illegality of her conduct.

*Saucier* allows courts to find a violation of a right without granting a remedy. In other words, the framework produces an intentional “right-remedy gap” in constitutional law. 9 The right-remedy gap under *Saucier* allows courts to issue rulings that have only prospective application.

In the example above, a court could find that Rochelle’s use of deadly force violated the Fourth Amendment but nonetheless dismiss the suit on qualified immunity grounds. The immunity, however, would work only once. 10 If Rochelle were to use deadly force to end a similar car chase in the

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7 Id. at 200.
8 Id. at 201(citation omitted).
10 The qualified immunity doctrine gives government officials “one bite at the apple.” Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under*
future, her qualified immunity defense would fail. The plaintiff in the future case would simply point to the substantive ruling in Dan v. Rochelle as clearly establishing the contours of the Fourth Amendment right. So would any other plaintiff in a suit against any other officer in the jurisdiction. Thus, the initial substantive ruling in Dan v. Rochelle would function as a prospective interpretation of the Constitution. This potential for prospective rulings inheres in the structure of Saucier—indeed, it is the structure’s avowed purpose.

Courts interpreting vague or ambiguous criminal statutes should follow Saucier’s path. They should resolve questions of statutory interpretation independently from questions of notice, and they should issue prospective clarifications of vague or ambiguous criminal statutes. The fair warning doctrines should not be abolished, but rather than functioning as canons of statutory interpretation, they should simply function as discrete limitations on the imposition of criminal penalties. Such a function would tie the fair warning requirement more closely to its purpose. It would also eliminate the problems that the fair warning requirement now creates when it functions as an interpretive canon. Saucier’s structure would make the fair warning requirement both more moderate and more sensible.

Part I of this article sketches the historical development of Saucier’s two-part test for qualified immunity cases. Part II lays out the case for importing Saucier into the criminal law. Part III assesses the notice rationale underlying the fair warning requirement and the Saucier test. Part IV addresses some issues related to implementing Saucier in criminal cases. Part V examines several recent critiques of Saucier and explains why Saucier works even better as a framework for statutory interpretation than it does as a framework for constitutional interpretation.

I. THE DEVELOPMENT OF THE SAUCIER FRAMEWORK

The Saucier framework produces prospective rulings by imposing an ordered structure on the adjudication of claims against public officials. The framework functions by exploiting a right-remedy gap and by mandating decisions on both sides of the gap. Saucier’s two-part test requires courts to delineate the underlying constitutional right before proceeding to the qualified immunity question, which controls the availability of a remedy. The innovation of the Saucier framework was to mandate adjudication of the

right even in cases where no remedy is available, and thus where no adjudication of the right is logically necessary to the outcome.

What makes *Saucier* remarkable is its self-conscious endorsement of prospective rulings. However, the right-remedy gap itself, and its inherent potential for prospectivity, was nothing new. It developed in the earliest suits against public officials.

### A. English Common Law Practice

At common law, suits against public officers proceeded under the tort of “misfeasance of public office.” The tort generally required some additional element beyond the mere deprivation of a right. *Ashby v. White* is the foundational case for modern tort liability of public officials, and it is also the foundational case for the right-remedy gap in such suits. White was a constable who denied Ashby his right to vote in a parliamentary election. Ashby’s suit, initially rejected by the King’s Bench, was allowed to proceed by the House of Lords.

Contrary to occasional misinterpretation by American scholars, *Ashby* did not rest on the principle of *ubi jus, ibi remedium*—that for every

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13 In fact, the tort is traceable to the earlier case of Turner v. Sterling, 1 Freem. 15, 89 Eng. Rep. 13 (K.B. 1671), but *Ashby* provided “the first solid basis for this new head of tort liability.” *Three Rivers (No. 3)*, [2000] 3 All E.R. 1 at 7. Professor Jaffe described *Ashby* as a “remarkable and significant extension” of the common law action against public officers. Jaffe, supra note 11, at 14.


right, there is a remedy. Ashby was allowed to proceed because he had alleged that White “fraudulently and maliciously” deprived him of his right to vote.16 The House of Lords resolution approving Ashby’s suit read:

It is resolved by the Lords spiritual and temporal in Parliament assembled, that by the known laws of this kingdom, every freeholder, or other person, having a right to give his vote at the election of members to serve in Parliament, and being wilfully denied or hindered so to do by the officer who ought to receive the same, may maintain an action in the Queen's courts against such officer, to assert his right, and recover damages for the injury.17

As a committee report to the House of Lords stated, “it is the fraud and malice that entitles the party to the action.”18 In other words, in order to obtain a remedy, Ashby had to show both that he had a right to vote and that White acted with malice. The deprivation of a right, standing alone, was insufficient.19

Courts reaffirmed the malice requirement in subsequent cases such as Harman v. Tappenden.20 Harman reiterated that suits “arising merely from error of judgment” could not be maintained—that misprision of office could only proceed with a showing of “wilful and malicious intention.”21 Ashby, Harman, and their progeny established a right-remedy gap that has remained in the law ever since.

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16 Three Rivers Dist. Council v. Bank of England (No. 1), [1996] 3 All E.R. 558 (Q.B.) (quoting Ashby, 3 Ld. Raym. at 323). The common misinterpretation of Ashby arose from an incomplete and misleading report in Lord Raymond’s King Bench Reports. The report failed to include the final House of Lords resolution, which authorized the suit based on the malice allegation, not a broad principle that every right must have a remedy. See id.


19 As Judge Buller later explained in British Cast Plate Manufacturers v. Meredith, (1792) 100 Eng. Rep. 1306, 1307 (K.B.), “[t]here are many cases in which individuals sustain an injury, for which the law gives no action.”


B. American Practice and Qualified Immunity

Early American courts followed the same course. Citing Ashby, Harman, and other English cases, they required a showing of malice in suits against public officials. In Jenkins v. Waldron, the New York Supreme Court adopted the English rule.

[The English cases] clearly show that this action is not maintainable, without stating and proving malice express or implied on the part of the officers. . . . It would, in our opinion, be opposed to all the principles of law, justice and sound policy, to hold that officers, called upon to exercise their deliberative judgments, are answerable for a mistake in law, either civilly, or criminally, when their motives are pure, and untainted with fraud or malice.

With the exception of Massachusetts, which misread Ashby, all other American jurisdictions followed New York’s lead and demanded proof of malice in suits against public officials. For federal cases, the Supreme Court adopted the same rule.

The malice limitation eventually came to be phrased in terms of an immunity granted to public officials. The immunity was known as “good faith” or “qualified” immunity, as distinguished from the absolute immunity held by judges and certain high officials. Section 1983 and Bivens subsequently incorporated these common law immunities into federal tort

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24 In Lincoln v. Hapgood, 11 Mass. 350, 355-56 (1814), the Massachusetts Supreme Court held that a resident suing a selectman for denying his right to vote did not have to show malice. It relied on the erroneous account of Ashby from Lord Raymond’s reporter. Id. at 356 n.3 (citing Ashby v. White, (1704) 2 Lord Raym. 938 (K.B.)).

25 E.g., Swift v. Chamberlain, 3 Conn. 537, 543 (1821); McCormick v. Burt, 95 Ill. 263, 267 (1880); Carter v. Harrison, 5 Blackf. 138, 139 (Ind. 1839); Donahoe v. Richards, 38 Me. 379, 394 (1854); Reed v. Conway, 20 Mo. 22, 43-44 (1854); Wheeler v. Patterson, 1 N.H. 88, 89 (1817); Weckerly v. Geyer, 11 Serg. & Rawle 35, 39 (Pa. 1824); Rail v. Potts, 27 Tenn. 225, 229 (1847).

26 “In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and willful error.” Wilkes v. Dinsman, 48 U.S. 89, 131 (1849) (citing Harman v. Tappenden, 1 East at 562, 565).

27 See, e.g., Elmore v. Overton, 4 N.E. 197, 199 (Ind. 1886) (discussing the immunity granted to public officials who act with “good faith and honest purpose”); Gregory v. Bugbee, 42 Vt. 480, 482 (1869) (“[I]f [officials] act and adjudge in good faith upon matters that the law requires them to adjudge upon, they will have immunity from liability as for a wrongful act.”).

28 For discussions of the two types of immunity available to public officials, see Harlow v. Fitzgerald, 457 U.S. 800, 807-08 (1982); J. Randolph Block, Stump v. Sparkman and the History of Judicial Immunity, 1980 DUKE L.J. 879; Jaffe, supra note 11, at 221.
actions.\textsuperscript{29} The rationale remained unchanged. Two “mutually dependent rationales” justified qualified immunity: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.\textsuperscript{30} Qualified immunity was, in substance, a modern formulation of Ashby’s malice requirement.

The Supreme Court eventually shifted from a subjective test to an objective test.\textsuperscript{31} Under the modern formulation, qualified immunity turns not on a showing of malice, but on a showing that the official violated a citizen’s “clearly established constitutional rights.”\textsuperscript{32} Officials need not predict the future course of the law, but they are charged with knowledge of clearly established rights.\textsuperscript{33} The crux of the modern inquiry is whether the illegality of an official’s conduct was sufficiently clear to give her fair warning.\textsuperscript{34}

The modern formulation of qualified immunity retains a gap between rights and remedies.\textsuperscript{35} To succeed in a suit against a public official, a citizen must show not only that his rights were violated, but also that his rights were clearly established at the time of her conduct. The gap between rights and remedies has thus survived, albeit in a different shape, from Ashby to modern constitutional torts.


\textsuperscript{32} Wood, 420 U.S. at 322.

\textsuperscript{33} Id.

\textsuperscript{34} As the Court said in Anderson v. Creighton, 483 U.S. 635, 640 (1987), “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” See also NAHIMOD ET AL., supra note 29, at 463-69 (discussing the “materially similar” standard of Hope v. Pelzer, 536 U.S. 730 (2002)).

\textsuperscript{35} The right-remedy gap in qualified immunity has been strongly criticized. See, e.g., Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 812 (1994) (“The Framers would have found the current remedial regime, in which a victim of constitutional tort can in many cases recover from neither the officer nor the government, a shocking violation of first principles, trumpeted in Marbury v. Madison, that for every right there must be a remedy.”); John M. M. Greabe, Mirabile Dictum!: The Case for “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions, 74 NOTRE DAME L. REV. 403, 404 (1999) (discussing how the qualified immunity doctrine “fail[s] to honor the ubi jus, ibi remedium principle”).
C. **Prospective Rulings and Saucier**

The gap between rights and remedies contains an inherent potential for prospective rulings. In a series of cases culminating with *Saucier*, the Supreme Court began to harness that potential. The result was a remarkable doctrinal experiment with prospective constitutional adjudication.

The Court began with a seemingly uncontroversial recognition that the second prong of the qualified immunity analysis depended analytically on the first: “A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is ‘clearly established’ at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.”

The Court implied that thoughtful consideration of the notice issue required consideration of the underlying legal issue.

Then, in a footnote to *County of Sacramento v. Lewis*, the Court advised that the two prongs should be adjudicated in order. Adjudication of the underlying right should “[n]ormally” be the “first step,” even if proceeding in such a fashion meant abrogating the canon of constitutional avoidance. The *Lewis* Court described the importance of delineating the right first:

> “[If] the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional. In practical terms, escape from uncertainty would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding; in none of these instances would qualified immunity be available to block a determination of law.”

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36 Siegert v. Gilley, 500 U.S. 226, 232 (1991); see also Harlow v. Fitzgerald, 457 U.S. 800, 818 (“On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.”); Greabe, supra note 35, at 425 (discussing the “natural order” to the process by which qualified immunity issues are addressed).
38 Id. at 840-42 n.5.
Lewis held that careful definition of the underlying right was valuable—regardless of whether it was necessary to settle the case at hand—because it would guide future actors. The value of the ordered framework, in other words, lies in its prospective implications.

Lewis was ambiguous about the necessity of adjudicating the questions in order, and several lower courts read Lewis as merely suggesting a first-prong-first order. The Supreme Court soon followed with mandatory language, stating that courts “must” follow the ordered adjudication suggested by Lewis. Some circuits remained unmoved and interpreted the Supreme Court’s mandate as merely hortatory. Finally, in Saucier, the apparently annoyed Court made clear that the order of adjudication suggested by Siegert and Lewis was mandatory. Saucier set forth a framework unambiguously requiring an ordering inquiry in qualified immunity cases. “A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry.”

The Saucier Court reiterated that prospective development of the constitutional law was not just a by-product of the order. Prospectivity was the purpose, almost explicitly avowed.

In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law’s elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explana-

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40 The Court began by saying that “in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated.” Lewis, 523 U.S. at 842-43 n.5. That statement was followed by more equivocal language: that courts should “[n]ormally” proceed in order and that the order was the “better approach” to resolving qualified immunity cases. Id.
43 See Hudson v. Hall, 231 F.3d 1289, 1296 n.5 (11th Cir. 2001) (interpreting the two-step approach as optional); Kalka v. Hawk, 215 F.3d 90, 95 (D.C. Cir. 2000) (same); Horne v. Coughlin, 191 F.3d 244, 248 (2d Cir. 1999) (same); see also Hatch v. Dep’t for Children, 274 F.3d 12, 20 n.2 (1st Cir. 2001) (doubting whether the approach was mandatory); Pearson v. Ramos, 237 F.3d 881, 884 (7th Cir. 2001) (same).
tion were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.45

_Lewis_ and _Saucier_ took the right-remedy gap inherited from the common law and used it as an opportunity to promote elaboration of the constitutional law.46 Abrogation of the “settled and invariable principle . . . that every right, when withheld, must have a remedy”47 became an opportunity for development and innovation.

II. IMPORTING _SAUCIER_ INTO THE CRIMINAL LAW

Courts interpreting vague or ambiguous criminal statutes should adopt _Saucier_'s ordered framework. They should embrace prospective rulings in order to relieve the tensions that beset the criminal law’s fair warning doctrines.

A. _The Troubled Fair Warning Requirement_

The fair warning requirement has venerable roots.48 It is based largely on the fundamental ideal that “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as

45 Id.
48 See United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) (“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.”); WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 375 (2d ed. 2006) (“[T]he notion that ambiguities in criminal statutes should be construed to the benefit of the defendant is of longstanding vintage.”). For discussions of the historical development of the rule of lenity, see Jerome Hall, Strict or Liberal Construction of Criminal Statutes, 48 HARV. L. REV. 748 (1935) and Lawrence Solan, Law, Language, and Lenity, 40 W&M & MARY L. REV. 57, 86-108 (1998).
possible the line should be clear.” It is the doctrinal reflection of the principle of legality or nulla poena, which forbids retroactive criminalization of conduct. The fair warning requirement is constitutionally grounded in both the Ex Post Facto Clause and the Due Process Clause. Legal theorists have celebrated it as the foundational doctrine in the criminal law.

Courts have developed several overlapping doctrines to protect the values of notice underlying the fair warning requirement. In United States v. Lanier, the Supreme Court offered a taxonomy of the “three related manifestations of the fair warning requirement”:

First, the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Second, as a sort of junior version of the vagueness doctrine, the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. In each of these guises, 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.

Despite its important place in the history and theory of the criminal law, the fair warning requirement has been the object of extensive recent criticism. While it maintains a position of central importance in the ped-

49 McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.). In other words, “[c]itizens need to know what is prohibited . . . in order to avoid the risk of liability.” George P. Fletcher, Truth in Codification, 31 U.C. DAVIS L. REV. 745, 752 (1998).

50 The nulla poena principle—nulla poena sine lege, or no punishment without law—mandates that “no person shall be punished except in pursuance of a statute which fixes a penalty for criminal behavior.” Jerome Hall, Nulla Poena Sine Lege, 47 YALE L.J. 165, 165 (1937). The principle of legality “forbids the retroactive definition of criminal offenses.” Jeffries, supra note 5, at 190.

51 See United States v. Lanier, 520 U.S. 259, 266-67 (1997); Marks v. United States, 430 U.S. 188, 191-92 (1977); DRESSLER, supra note 4, § 501[c] at 41-42. The fair warning requirement also serves other values, such as separation of powers. See generally Lanier, 520 U.S. at 265 n.5 (discussing relationship to separation of powers); ESKRIDGE ET AL., supra note 48, at 375 (discussing fair warning, due process, and equal protection); Robinson, supra note 1, at 364, 367-68 (relating fair warning to several legal doctrines). See Solan, supra note 48, at 88-89 (noting that the rule of lenity was originally used by the judiciary to thwart legislative will).

52 As Herbert Packer said, “the prohibition against the retroactive definition and punishment of crime” is often discussed as “the first principle” of criminal law theory. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79-80 (1968). At the Founding, the anti-retroactivity principle was considered so important that it was placed in the original draft of the Constitution ahead of the Bill of Rights. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (2nd ed. 1960).

53 Lanier, 520 U.S. at 266-67 (internal quotation marks and citations omitted). The relationship between the doctrines has been described in varying formulations. See Jeffries, supra note 5, at 196; Robinson, supra note 1, at 337.
gangical canon, its continuing relevance in actual criminal practice is uncertain. The modern scholarly consensus is that the fair warning requirement is a doctrine “on the wane.” It is a doctrine that often functions in criminal litigation only as “makeweight, opportunistically invoked and just as conveniently discarded.” That common critical assessment is difficult to falsify or verify—it may hold sway simply by virtue of its frequent repetition. Regardless, it is clear that the doctrine places courts in a difficult position, and that a restructured doctrine might function better than the current doctrine.

54 Nearly all standard criminal law casebooks include substantial coverage of the fair warning requirement, usually at an early stage in the course. See, e.g., Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes: Cases and Materials 290-312 (7th ed. 2001); Cynthia Lee & Angela Harris, Criminal Law: Cases and Materials 65-98 (2005).


56 Jeffries, supra note 5, at 238; see also John F. Decker, Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws, 80 Devon U. L. Rev. 241, 243 (2002) (“Vagueness challenges require a highly subjective mode of analysis that involves an unpredictable assortment of paths a court might take in arriving at a ruling.”); William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1083 (1989); (“The rule of lenity cases, in particular, strike me as capricious.”); Kahan, supra note 3, at 346 (stating that judicial enforcement of the rule of lenity is “sporadic and unpredictable”); Price, supra note 55, at 886 (“Nowadays [the rule of lenity] appears occasionally as a supplemental justification for interpretations favored on other grounds; it never stands alone to compel narrow readings.”).

57 Competing claims about the current power of the doctrine “resist[] conclusive empirical testing.” Kahan, supra note 3, at 367. Claims that the doctrine is robustly enforced rest on an untestable assumption that cases would be resolved differently in the absence of a fair warning requirement. Claims that the doctrine is underenforced rest on an untestable and normatively loaded assumption that cases would be resolved differently if the doctrine were enforced properly. In any individual case, it is difficult to isolate the role of the fair warning requirement. That difficulty is multiplied exponentially for any attempt at giving an overall assessment of the doctrine, which is applied in thousands of cases by hundreds of courts.

Judicial and academic commentators have attempted empirical and quasi-empirical assessments of the doctrine. See, e.g., United States v. Nofziger, 878 F.2d 442, 456 (D.C. Cir. 1989) (Edwards, J., dissenting); William N. Eskridge, Jr. et al., Cases and Materials on Legislation 868-69 (3d ed. 2001); Eskridge et al., supra note 48, at 379; Francis A. Allen, The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle, 29 Ariz. L. Rev. 385, 397-98 (1987); Price, supra note 55, at 901 & n.109; Note, The New Rule of Lenity, 119 Harv. L. Rev. 2420 (2006). The results are both varying and generally unsatisfying. For this Article, it is enough to say that however well the current doctrine is functioning, a doctrine restructured around Saucier would be an improvement.
The problem with practical application of the fair warning doctrines is that other considerations—political, institutional, and doctrinal—cut so strongly in the other direction. Restrictive interpretations of criminal statutes breed hostility with legislatures, who want their criminal provisions fairly enforced by the executive and fairly interpreted by courts. Indeed, the fair warning requirement often works to subvert legislative supremacy over the criminal law, thus undermining one of the values it is intended to uphold. More generally, in a political climate demanding effective enforcement of the criminal law, the fair warning doctrines have a high political cost. Courts cannot and should not be expected to swim up the political stream or to resist the operations of the other branches of government. The fair warning doctrines ask too much.

In more formal legal terms, the fair warning requirement often conflicts with other norms of statutory interpretation. The rule of lenity demands strict construction where a more neutral examination of a law’s text, history, structure, and purpose might counsel a different result. In the growing and increasingly complicated world of regulatory crimes, the rule of lenity conflicts with *Chevron* deference. Current doctrine provides no easy way to reconcile the recognized tension between the “laudable policies” of the fair warning requirement and the other “sound rules of statutory interpretation.”

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58 The tension is reflected in legislative attempts to abolish lenity. A majority of American jurisdictions have either abolished or narrowed the rule of lenity. Price, supra note 55, at 902-03 & nn.109-18 (cataloguing lenity statutes in all fifty states). The Model Penal Code has also rejected the rule, at least in its classic form. See Model Penal Code § 1.02(3) (1962).


60 See Allen, supra note 57, at 400 (“The present era affords infertile soil for restrictive readings of criminal statutes.”); see also Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665, 1685 (1987) (noting that the legality principle is in tension with “the public interest in punishing wrongdoers”).


62 Huddleston v. United States, 415 U.S. 814, 831 (quoting United States ex rel. Marcus v. Hess, 317 U.S. 537, 542 (1943) (internal quotation marks omitted); see also United States v. Wilberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (“[T]hough penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature.”).
As a canon of statutory interpretation, the fair warning requirement cuts in one direction, but other interpretive canons and more practical concerns often cut the other way. There is no determinate way to weigh the competing values. It is no surprise that courts have had difficulty applying the fair warning requirement consistently.

B. Saucier as a Solution

Saucier offers an elegant tool for relieving the tensions produced by the fair warning requirement. If courts interpreting difficult criminal laws employed Saucier’s framework, they might be able to apply the fair warning requirement in a more thoughtful, more coherent manner.63

A crossover application of Saucier already finds some implicit support in Supreme Court doctrine. In Lanier, the Court noted that the qualified immunity doctrine and the fair warning requirement are conceptual cousins, if not twins.

Lanier thus suggests that qualified immunity and the fair warning requirement have a close analytical tie. The doctrines serve the same purpose, and it makes sense that they should share the same structure.64 In qualified immunity cases, Saucier protects the notice ideal while allowing clarifica-

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63 Cf. Walter v. Schaefer, Prospective Rulings: Two Perspectives, 1982 S. Ct. Rev. 1, 24 (1982) (stating that decoupling the prospective and retroactive effects of judicial decisions “might reduce the strident pitch of the judicial decisions . . . and produce less rhetoric and more reasoning”).


65 A different attempt to apply Saucier in a different context has been rejected by the Supreme Court. In an attempt to evade the source of law limitation in the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 (1996), some circuit courts employed the Saucier framework in federal habeas cases. See Van Tran v. Lindsey, 212 F.3d 1143, 1155 (9th Cir. 2000) (citing qualified immunity cases and holding that cases under AEDPA should likewise proceed in two steps). The Supreme Court rejected that methodology in Lockyer v. Andrade, 538 U.S. 63, 69-70 (2003). See also Williams v. Taylor, 529 U.S. 362, 380 n.12 (2000) (“We will not assume that in a single subsection of an amendment entirely devoted to the law of habeas corpus, Congress made the anomalous choice of reaching into the doctrinally distinct law of qualified immunity . . . .”).
tion of the Constitution’s boundaries. In fair warning cases, Saucier could protect the anti-retroactivity principle while allowing clarification of the criminal law’s boundaries.  

Of course, official tortfeasors and criminal defendants are not similarly situated in every respect. Public officials face only monetary liability, for which their employers may indemnify them, while criminal defendants often face much graver sanctions. We might impose greater duties of legal knowledge on public officials than we do on ordinary citizens, all of whom may be subject to criminal liability. In short, there might be good reasons why criminal defendants should enjoy fair warning protection greater than that afforded to public officials facing tort claims. 

However, there are reasonable arguments to the contrary as well. There are strong public policy reasons for protecting officials from lawsuits—we do not want to discourage citizens from taking public office, and we do not want officials to be constantly distracted by suits. We may worry more about imposing liability on public officials such as police officers, who must often make split-second decisions in difficult circumstances, than we do about imposing liability on criminal defendants who engaged in deviant (if arguably legal) conduct. 

Reasonable minds may differ on this point. Lanier’s suggestion of neutrality—equal fair warning protection for public officials and criminal defendants—might be the least controversial path. In any event, the Saucier framework could accommodate different standards. Courts could make the test more or less protective depending on the standards chosen for judging the second prong. Initially, what is critical is the value of the framework itself.

C. The Framework and Its Implications

Courts presented with fair warning defenses to criminal prosecutions should follow the two-step ordered adjudication prescribed by Saucier. First, they should interpret the law according to ordinary norms of statutory interpretation. In so doing, they should resolve any statutory ambiguity or vagueness without regard to questions of notice. Courts should, in other words, “adopt the best readings of incompletely specified criminal statutes,

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66 Trevor Morrison has suggested precisely such a possibility. He has suggested that in criminal cases, courts could look to qualified immunity and follow an “analogous practice”: “construe the criminal statute first, and then to determine whether the fair warning requirement permits the application of the court's construction against the defendant.” Morrison, supra note 64, at 510. 
whether those readings are broad or narrow.”68 Second, and independently from the interpretive question, they should determine whether the defendant had fair warning that his conduct would come within the purview of the statute.

Importing *Saucier* would have several significant implications. First, the new framework would decouple questions of statutory interpretation from questions of notice.69 While the fair warning requirement would remain as a limitation on the imposition of criminal sanctions, it would no longer function as a canon of statutory interpretation.70 Consequently, the fair warning requirement would no longer conflict with other norms of statutory interpretation.71 The new framework would spare courts the trouble of trying to resolve such difficult doctrinal conflicts.

Second, importing *Saucier* would attach a more moderate remedy to the fair warning requirement. Under current doctrine, the remedy for a successful rule of lenity claim is a restrictive application of the contested statute to all past and future defendants. The remedy for a void-for-vagueness challenge is even more extreme: a total bar on enforcement.72 Under a restructured doctrine, a successful fair warning claim would only restrict application of the law to past conduct. The remedy would be both more moderate and more commensurate with the goals of the fair warning requirement. With a more moderate remedy, courts might take fair warning claims

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68 Kahan, *supra* note 3, at 397.


70 To some extent, the rule of lenity has already been displaced as a canon of statutory interpretation. Lawrence Solan has persuasively argued that the rule of lenity “narrowed dramatically over time in response to changes in the ways that courts generally interpret statutes.” Solan, *supra* note 48, at 59. As courts began to rely on legislative history and other newer means of statutory interpretation, lenity’s influence shrank. Id. at 97-108.

71 The proposal to import *Saucier* could co-exist with other proposals for reforming judicial interpretation of criminal statutes. For example, Einer Elhauge has argued that lenity functions as a preference-eliciting default rule, which is intended to force legislative response. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2194-206 (2002). If desired, courts could still adopt penalty defaults in the first *Saucier* step.

Dan Kahan has proposed that courts should give *Chevron* deference to the Department of Justice’s interpretation of criminal statutes. Kahan, *supra* note 59, at 488-506. If desired, courts could still grant such deference so long as the executive pronouncements have “purely prospective effect.” Id. at 503.

72 Under current doctrine, ambiguous statutes are upheld but narrowly construed, while vague statutes are simply struck down. 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 2.2(d) at 128 (West Group 2d ed. 2003).
more seriously, and the fair warning doctrines might better serve the constitutional value of notice.

Third, importing Saucier would allow prospective rulings.\(^{73}\) In the same way that courts currently issue prospective constitutional interpretations in qualified immunity cases, they would issue prospective statutory interpretations in fair warning cases. Courts would use the first step to clarify the scope of vague or ambiguous criminal statutes. In the second step, courts could determine that a defendant is entitled to acquittal even if his conduct fell within the scope of the now-clarified law.\(^{74}\) The court’s clarification, however, would provide fair warning to future defendants that such conduct is prohibited.

D. Rethinking Rogers v. Tennessee

Seen through a different lens, the argument for importing Saucier simply reflects recognition that courts make law, at least interstitially,\(^{75}\) and that the prohibition against retroactive criminalization should apply to judge-made law.\(^{76}\) The proposal to adopt Saucier thus implicitly rejects the result reached in Rogers v. Tennessee.

In Rogers, the Tennessee Supreme Court abolished the common law “year and a day” doctrine—and it did so retroactively.\(^{77}\) The United States Supreme Court upheld the retroactive expansion against a due process challenge. The Court ruled that while “limitations on ex post facto judicial decisionmaking are inherent in the notion of due process,” the Due Process Clause does not incorporate the Ex Post Facto Clause “jot-for-jot” against

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\(^{73}\) Prospective judicial rulings are highly controversial for several reasons. For reasons described below, however, the type of prospectivity proposed here should be far less controversial than prospectivity in other contexts. See infra notes 165-69 and accompanying text. For an argument that courts should only overrule prior precedent prospectively if doing so expands criminal liability, see Morrison, supra note 64, at 512.

\(^{74}\) Of course, not all interpretations under the Saucier framework would be purely prospective. In cases where the contours of the criminal statute had already been defined with sufficient clarity to give a defendant fair warning that his conduct was illegal, he would fail both prongs of the test.

\(^{75}\) See Hall, supra note 50, at 174; Notes and Comments, Prospective Overruling and Retroactive Application in the Federal Courts, 71 YALE L.J. 907, 911 (1961).

\(^{76}\) “When judges announce new rules of law they are making new law for their time, and it should be no more applicable retroactively . . . than when new statutes are enacted by a legislature.” Robert Leflar, Appellate Judicial Innovation, 27 OKLA. L. REV. 321, 342 (1974).

courts.\textsuperscript{78} It held, in other words, that a less stringent anti-retroactivity principle applied against courts.

The Court offered no reason why retroactive judicially created crimes are any less objectionable than retroactive legislatively created crimes. Rather, the Court explained why it was forced to apply a relaxed rule: “Strict application of ex post facto principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system.”\textsuperscript{79} The Court saw an irreconcilable conflict between the anti-retroactivity principle and courts’ common law powers. The majority held that the anti-retroactivity principle had to give way, while the dissent, penned by Justice Scalia, argued the contrary.\textsuperscript{80}

Neither majority nor dissent saw the third way. Neither side saw the possibility of maintaining both anti-retroactivity and common law decisionmaking. Prospective rulings of the sort available under \textit{Saucier} would dissolve the apparent conflict. \textit{Saucier}’s framework points to a result much more palatable than the one reached in \textit{Rogers}.

Legislatures occasionally draft vague or ambiguous criminal laws, leaving it to courts to fill in the details.\textsuperscript{81} Courts need not always reject that implicit delegation. They should issue clarifying rulings, but they should do so in a way that respects the fair warning requirement. \textit{Saucier}’s framework would allow them to do both.

III. \textsc{Notice Reassessed}

The argument for importing \textit{Saucier} assumes that notice matters and that notice works. The argument rests, in other words, on two premises about notice. The normative premise is that the state should attempt to provide citizens advance notice that certain conduct is illegal. The descriptive premise is that court cases actually do provide some amount of advance notice to citizens.

The normative premise is firmly grounded in the Ex Post Facto Clause, and current Supreme Court doctrine firmly supports both prem-
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ises. 82 However, both premises are controversial, and both run against the grain of modern commentary. Many critics have argued that the notice rationale of the fair warning requirement is a fiction because formal law does not actually provide notice to citizens. 83 Some critics have gone further and questioned the moral value of fair warning—they have suggested that the state should not give advance notice even if it can.

The simplest response to the critics is a response internal to current doctrine: “The Supreme Court disagrees, and so does the Constitution.” But such a response, while potentially useful for litigators and courts bound by current doctrine, is unsatisfying. The force of the criticism has already undermined current doctrine. Courts who under-enforce the fair warning requirement do so in part because they doubt the value of notice. Notice must be reassessed and rehabilitated, both to justify importing Saucier and to shore up the current fair warning requirement.

A. Fair Warning as a Procedural Right

The first step in rehabilitating notice is recognizing that fair warning and anti-retroactivity are procedural rights, not substantive rights. Critics have argued that notice cannot be the fair warning requirement’s true rationale because courts enforce the rule with no concern for actual notice. 84 That argument, however, mistakes a procedural right for a substantive right.

By way of analogy, consider the Sixth Amendment’s guarantee of confrontation and cross-examination. The goal of the Confrontation Clause is to produce truthful and reliable testimonial evidence at criminal trials, but the rule does not always fit the rationale. Some testimony is reliable even though it is not subjected to cross-examination. Some testimony is unreliable despite confrontation—cross-examination cannot always expose prob-

82 In Lanier, the Court stated that judicial decisions can supply fair warning: “clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute.” 520 U.S. at 266. See also Bouie v. City of Columbia, 378 U.S. 347, 353 (1964) (noting that a notice problem arising out of vagueness “could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss.” (quoting Paul A. Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 541 (1951))).
83 See, e.g., Jeffries, supra note 5, at 205-07 (“[T]he kind of notice required is entirely formal.”); Price, supra note 55, at 886 (“The theory is flawed because criminals do not read statutes, and because even if they did it would not be clear that the legal system should reward their efforts to skirt the law’s borders.”); Solan, supra note 48, at 134; (“Notice to defendants is, of course, largely fictional.”); Note, supra note 57, at 2424 (stating that the notice rationale “does not fit neatly with the rule of lenity because the ‘notice’ it guarantees is largely fictional”).
84 See Jeffries, supra note 5, at 206-10.
lems of perception, memory, and sincerity. Relative to its rationale, the rule of the Confrontation Clause is both underinclusive and overinclusive.

However, the imperfect fit between the rule and its rationale does not undermine the validity of the right. As Justice Scalia explained in *Crawford v. Washington*, the right is procedural, not substantive:

To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.85

The same is true of the fair warning requirement. It is a procedural rather than a substantive guarantee. It commands not that citizens have actual notice of criminal laws, but that criminal laws be promulgated in a manner that makes notice possible. The Ex Post Facto Clause reflects a judgment not only about the desirability of advance notice, but about the means of producing advance notice.

The fair warning requirement and its rationale do not always fit neatly together. However, the same can be said of all manner of procedural rules. Noting some lack of congruence between a rule and its rationale does not show that the rule is invalid or that the rationale is fictional. It simply shows that the rule in question is procedural.

B. *The Value of Imperfect Notice*

Nonetheless, for a procedural guarantee to make sense, there must be at least some meaningful fit between the rule and its rationale. Some critics have suggested that there is no fit at all between the fair warning requirement and its notice rationale. Citizens, the critics argue, do not know the law, and statutes and court cases do not provide any sort of actual notice to those who may be punished.86 To the extent that they suggest that the anti-

85 541 U.S. 36, 61 (2004); *see also* Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (“[The majority’s] reasoning abstracts from the right to its purposes, and then eliminates the right.”).

86 *See* Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1553 (2005) (“Universal ignorance of the law, however, appears to be almost complete, except for the most rudimentary notions of what is illegal and hazy ideas about what some of the details might be.”); John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC’Y REV. 165, 167 (2001) (“[P]eople do not have a clue about what the laws of their states hold on . . . important legal issues.”).
retooling principle does nothing to provide notice, such arguments are overstated.

Citizens’ knowledge of the criminal law is incomplete and often incorrect. Most citizens probably do not know, for example, whether their jurisdiction imposes a duty to retreat before deadly force may be used in self-defense.87 However, limited knowledge is different from no knowledge. Most citizens probably do know, for example, that it is legal to ingest coffee but not cocaine. Ambient public knowledge of the criminal law is limited and imperfect, but not nonexistent. And public knowledge of the criminal law is greater than it would be in a society without an anti-retroactivity principle.

Critics point out that ordinary citizens do not read statutes (or appellate court opinions). While that is certainly true as a general matter, it is also true that formal law is more accessible to laypeople than it has ever been in the past, and it will become more accessible still in the future. Searchable statutory compilations are available for free on the Internet.88 So are appellate court opinions—along with briefs, oral argument transcripts, and even oral argument webcasts.89 Formal law is easily available to citizens in a way that it never has been in the past.

Fair warning critics respond that the law’s arcane complexity prevents effective notice—citizens do not bother to read criminal laws or cases, and if they did, they could not understand them. But this response rests on an impoverished view of knowledge transmission in society. Citizens gain most of their knowledge of the law not from reading statutes directly but from various intermediaries.

Print and electronic media report some legislative enactments and court cases. Citizens learn something about the criminal law when the local news reports a criminal case, and even when Law & Order portrays one.90

87 See Darley et al., supra note 86, at 170-71.
90 Recent literature examining the interaction of law and popular culture shed light on how people receive messages from the law. Citizens have some direct experience with the law, when, for example, they pay taxes, file for divorce, go to small claims court, and so on. Stewart Macaulay, Popular Legal Culture: An Introduction, 98 YALE L.J. 1545, 1548 (1989). Citizens also learn the law through interme-
The Internet has produced an explosion of legal information accessible to laypeople. Compilations and commentary are freely available—anyone with even moderate Google competence can, in a matter of seconds, find the penalty for possessing an ounce of marijuana in Georgia. In some cases, states themselves work to ensure that citizens know the law by publicizing, for example, drunk driving provisions.

In short, statutes and court cases can still provide fair warning even if citizens do not read them. Formal law most often provides notice not directly, but indirectly, through intermediaries. Formal lawmaking, whether by legislature or courts, can initiate a process of public education about what the criminal law forbids. The process is imperfect, to be sure. The fit between the fair warning requirement and its notice rationale is imperfect, to be sure. Nonetheless, there is still a fit: The anti-retroactivity principle and its related clarity doctrines do something to ensure that citizens have fair warning.

The argument for importing Saucier does not assume that court cases provide perfect notice. The argument does not assume that ordinary citizens regularly read and understand appellate court opinions. The argument simply assumes that a system with a procedural rule requiring advanced definition of criminal laws will better serve the value of fair warning than a system without such a rule. Even if advance specification in statutes or appellate court opinions including “[p]rofessors, newspaper columnists, politicians and lawyers . . . ” id. at 1550. And in addition, “most Americans read mystery novels or watch films or television that deal with dramatic aspects of the legal system.” Id. at 1552.


“[I]n many activities men observe the law, not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves. In this way knowledge of the law by a few often influences indirectly the actions of many.” Lon L. Fuller, The Morality of Law 51 (1964).

It may well be that the criminal law should seek to provide better notice, or that the constitutional fair warning doctrine should require more. See Jeffries, supra note 5, at 207 (wondering why “no further obligation is ever considered”). However, this is no reason for abandoning the formal notice that the doctrine now requires.

For a similar argument defending the fair warning requirement, see Morrison, supra note 64, at 498-501.
late cases is not always sufficient to produce actual notice, it is necessary. We should require at least that much from the state.

C. The Moral Value of Advance Notice

The normative question remains: Should we maintain the ideal of fair warning? Why should we withhold punishment of deviant conduct simply because the law failed to anticipate its possibility and clearly define is impermissibility in advance?

Fair warning critics in both the Natural Law and Legal Realist schools have questioned the ideals of nulla poena and anti-retroactivity. The critics argue that citizens already know from non-legal sources, either natural law or consensus morality, that certain conduct is morally impermissible. If a citizen engages in immoral conduct, then the law is justified in punishing him regardless of whether the conduct was clearly defined as illegal. Even without illegality, immorality justifies criminal punishment—constructive notice of immorality may substitute for constructive notice of illegality. The critics thus propose that the fair warning requirement should apply to malum prohibitum offenses but not malum in se offenses.

These arguments cannot be easily dismissed, but the argument for importing Saucier retains a categorical commitment to the anti-retroactivity

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95 See Elhauge, supra note 71, at 2200-01 (“Where conduct is clearly wrongful, notice of the obvious is unnecessary, concerns about deterring desirable activity are misplaced, and enforcement discretion requires no curbing because of a societal consensus that the conduct is wrongful.”); Dan M. Kahan, Some Realism About Retroactive Criminal Lawmaking, 3 ROGER WILLIAMS U. L. REV. 95, 100 (stating that a defendant’s “knowledge that [his acts] are immoral is enough to justify punishing him whether or not he realized they were illegal”); Cristóbal Orrego, H. L. A. Hart’s Arguments Against Classical Natural Law Theory, 48 AM. J. JURIS. 297, 323 (2003) (stating that “punishing whoever acts against natural law is not unjust” even if it violates the nulla poena principle); Note, supra note 57, at 2438 (“[T]he very fact that these defendants’ actions are malum in se makes their fair notice claims less compelling because the nature of their conduct provides notice of potential criminality.”). These arguments are not new. See Hall, supra note 50, at 171-72.

96 That claim, of course, runs against the grain of traditional criminal theory, which holds that “[t]he fact that conduct is immoral or harmful does not mean . . . that it is criminal and punishable.” DRESSLER, supra note 4, § 5.01[A], at 39; see also Calvin Woodard, Thoughts on the Interplay Between Morality and Law in Modern Legal Thought, 64 NOTRE DAME L. REV. 784, 791-93 (1989).

97 See Kahan, supra note 95, at 101; Note, supra note 57, at 2421; see also Eskridge, supra note 56, at 1029 (“[T]he rule is applied most generously when the questioned conduct is accepted by general social norms and least frequently when the questioned conduct is widely considered horrible.”); cf. Dan M. Kahan, Ignorance of the Law is an Excuse—But Only for the Virtuous, 96 MICH. L. REV. 127, 128 (1997) (arguing that the defense of mistake of law should only apply for malum prohibitum crimes); Michael L. Travers, Note, Mistake of Law in Mala Prohibita Crimes, 62 U. CHI. L. REV. 1301, 1321 (1995) (same).
principle—for reasons more practical than moral. The moralist argument for retroactive punishment of malum in se offenses assumes that there are moral principles, defined either by natural law or social consensus, that are discoverable by judges. It assumes, in other words, that judges are generally able to differentiate between malum in se and malum prohibitum offenses.

That assumption is tenuous. Bentham long ago derided the malum in se/malum prohibitum distinction: “being so shrewd, and sounding so pretty, and being in Latin, [it] has no sort of occasion to have any meaning to it: accordingly it has none.” Two centuries later, the distinction still lacks even rudimentary definitional coherence. Further, what it lacks in co-
ceptual rigor, it does not make up in ease of application. It has “bedeviled” courts,\(^\text{102}\) whose attempts to classify crimes have led to varying tests and inconsistent results.\(^\text{103}\) The proposals to mandate fair warning only for malum prohibitum crimes rest on a dubious distinction.

They also rest on a slippery application of that distinction. Traditionally, the distinction has been used to classify crimes—certain crimes are wrong in themselves, other crimes are not. However, fair warning cases present claims around the edges of crimes. Deciding that the crime is malum in se tells us nothing about whether the defendant should have known that his conduct was immoral because the very premise of a fair warning claim is that the statute did not clearly cover the conduct. The moralist proposal must therefore instruct courts to examine whether particular instances of conduct are “wrongs in themselves.” Such an inquiry, however, is hopelessly dependent on insoluble framing questions.

Conduct can always be characterized at varying levels of generality,\(^\text{104}\) and different characterizations will produce different results. In Keeler v. Superior Court,\(^\text{105}\) for example, a jealous ex-husband kicked his wife in the stomach to end her pregnancy by another man. The California Supreme Court had to determine whether the murder statute protected fetuses.\(^\text{106}\) If the application of the fair warning requirement turned on the malum in se/malum prohibitum distinction, the court would have been required to classify the conduct. Should the conduct in question be described as “killing a fetus” or “killing a fetus without the mother’s consent”? The latter characterization sounds like malum in se conduct, but the former characterization is far less clear.

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\(^{103}\) In attempting to apply the distinction, courts have used a wide variety of definitions producing varying results. See Wolfe, supra note 101, at 132-36; see also Gray, supra note 100, at 1382 (“[C]ourts often confuse, or at least disagree over which actions constitute malum in se activity and which constitute malum prohibitum activity.”).


\(^{105}\) 470 P.2d 617 (Cal. 1970).

\(^{106}\) At the time, the statute in question simply prohibited unlawfully killing a human being. See id. at 620 (citing Cal. Penal Code § 187 (West, Westlaw through Ch. 910 of 2006 Reg.Sess.).
In *United States v. Kozminski*, 107 a Michigan farm family failed to pay two mentally retarded workers. The Supreme Court had to determine whether the anti-slavery criminal statute applied to the farmers. 108 Should the conduct in question be described as “holding another in involuntary servitude” or “pressuring someone, through non-physical means, to work without pay” or “using psychological coercion and verbal abuse to force a mentally retarded person to work without pay and live in squalid conditions”? The first and third characterizations sound intrinsically immoral, while the second does not. Each characterization is loaded in its own way.

Moreover, courts can always finesse the distinction by shifting between actual and hypothetical conduct. In determining whether the offense is malum in se, should courts look only at the conduct at issue in that case, or other conduct arguably covered by the statute? In *Kozminski*, the Court applied the rule of lenity not because the actual conduct in that case was innocent, but because the Court was concerned that a broader interpretation would criminalize innocent conduct such as “coerce[ing] an adult son or daughter into working in the family business by threatening withdrawal of affection.” 109

Application of the distinction thus depends too heavily on questions of framing for which there are no nonarbitrary answers. And even if we could decide in any particular case whether the conduct at issue were intrinsically immoral, we would still face an insurmountable problem in assessing the degree of culpability. Criminality is not binary. 110 Even if we take immorality as given and assume that punishment is therefore justified, we need to decide how much punishment should be applied. The anti-notice argument holds that immorality justifies legal punishment, but it surely cannot hold that immorality justifies infinite punishment. 111 When the question at issue is about the degree of sanction to be imposed, the anti-notice argument is no help.

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109 487 U.S. at 949.
111 The anti-retroactivity principle governs the amount of punishment as well as the definition of the crime. The Ex Post Facto Clause forbids not only law that makes innocent conduct guilty retroactively but also “law that aggravates a crime, or makes it greater than it was, when committed” and “law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” Calder v. Bull, 3 U.S. 386, 390 (1798).
Consider *People v. Noel*, the San Francisco dog mauling case. The primary issue in the case is whether one of the defendants, Marjorie Knoller, is guilty of second-degree murder or voluntary manslaughter. The formal legal question is whether the Court of Appeals retroactively expanded the definition of second-degree murder in violation of the fair warning requirement. Assume for a moment that Knoller’s conduct was intrinsically immoral. According to the anti-notice argument, this assumption justifies criminal punishment even if the law did not give her fair warning. However, this assumption tells us nothing about how much she should be punished. The anti-notice argument, in other words, does nothing to settle the actual legal question presented in that case—or, indeed, in any case where the fair warning claim goes to the degree of punishment rather than the bare fact of guilt.

At an abstract level, the argument that people who commit immoral acts should not benefit from the fair warning requirement has some intuitive appeal. The appeal is simple: they knew they were doing wrong. But in practical terms, the proposal that the fair warning requirement should only apply to malum prohibitum crimes raises a variety of difficult questions. For these reasons, if not for more overtly moral ones based on intuitive abhorrence to retroactive criminal punishment, we should maintain a uniform commitment to the ideal of fair warning. A fair warning requirement structured around *Saucier* would further that idea better than the current doctrine.

**IV. LOGISTICS AND IMPLEMENTATION**

Importing *Saucier* into the criminal law would create several issues of implementation. This Part will address several of them and offer some proposed solutions to potential problems.

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112 28 Cal. Rptr. 3d 369 (2005), review granted, 116 P.3d 475 (Cal. 2006).

113 More specifically, the legal question is whether implied malice in California requires subjective awareness of the risk of death, or whether subjective awareness of a risk of serious bodily injury suffices. *Id.* at 410-15. Knoller argues that the Court of Appeals expanded the definition of malice to include risk of injury and, thus, that the decision violated the fair warning prohibition against retroactive expansion of criminal statutes. *Id.*

114 The same argument could be made, for example, in *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970), discussed above. Clearly, the jealous ex-husband was guilty of some crime—namely aggravated assault—but the difficult question was whether his conduct also constituted the greater crime of murder. *Id.*
A. Source of Law

A United States Supreme Court opinion interpreting a criminal statute has a much greater notice-conferring effect than an unpublished trial court order interpreting the same statute. As we move higher up the judicial hierarchy, the case for importing \textit{Saucier} gets stronger, because the interpretive rulings issued are more authoritative. Unfortunately, because high courts only hear a small number of cases, we cannot rely on them to perform all of the yeoman’s work of clarifying statutory boundaries.

In the qualified immunity realm, federal courts have adopted an intermediate solution. In general, when adjudicating the existence of “clearly established law,” courts look only to published in-circuit precedent.\textsuperscript{115} After importing \textit{Saucier}, the criminal law should follow the same path. In determining whether a defendant had fair warning, courts should look to published appellate opinions.

B. Subjective Tests and Mistake of Law

As explained above, the fair warning requirement is a procedural requirement, not a substantive requirement of actual notice. In other words, the test of fair warning is an objective test, not a subjective test. \textit{Saucier} therefore does not create any new mistake of law doctrine—importing \textit{Saucier} would leave the mistake of law doctrine untouched.

\textsuperscript{115} Generally, only in-circuit, appellate precedent can create the clearly established law needed to overcome immunity. Campbell v. Peters, 256 F.3d 695, 701 (7th Cir. 2001); Hansen v. Saldenwagner, 19 F.3d 573, 578 n. 6 (11th Cir. 1994); Morrison, \textit{supra} note 64, at 488 & n.179.

Several federal courts have held, moreover, that unpublished opinions generally do not create clearly established law. See Bell v. Johnson, 308 F.3d 594, 611 (6th Cir. 2002); Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002); Cerrone v. Brown, 246 F.3d 194, 202 (2d Cir. 2001); Hogan v. Carter, 85 F.3d 1113, 1118 (4th Cir. 1996). \textit{But see} Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003) (“In the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts.”) (internal quotation marks omitted).

\textsuperscript{116} In general, subjective ignorance or mistake of law is no defense to a criminal prosecution. \textit{Cheek v. United States}, 498 U.S. 192, 199 (1991); \textit{LAFAVE & SCOTT, supra} note 72, § 5.6, at 394.
C. Questions for Judge and Jury

The Supreme Court has referred to qualified immunity as an “essentially legal question.”\textsuperscript{117} Moreover, in the interest of protecting public officials from the burden and expense of trial, the Court has suggested that qualified immunity claims should be settled at the summary judgment phase, if not earlier.\textsuperscript{118} Qualified immunity is, the Court has held, “an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.”\textsuperscript{119}

However, qualified immunity is in an important sense not like an absolute immunity because the availability of qualified immunity depends, in part, on the official’s conduct. Determining the “state of the law at the time of the challenged conduct” is a legal question appropriate for judicial resolution.\textsuperscript{120} A judge must also determine, however, whether an official’s conduct violated that clearly established law, and in many cases, there will be a dispute about what exactly the official did. Determining what happened is a factual question appropriate for jury resolution. Qualified immunity is, in many cases, a hybrid question of law and fact.\textsuperscript{121}

In settling a qualified immunity claim where the facts are disputed, a judge must make some assumptions about what happened. Because the Supreme Court treats qualified immunity as a claim to be decided before trial, it applies the usual summary judgment standard: “Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?”\textsuperscript{122}

\begin{itemize}
  \item \textsuperscript{118} See Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1986); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
  \item \textsuperscript{119} Forsyth, 472 U.S. at 526.
  \item \textsuperscript{120} Crawford-El, 523 U.S. at 590; accord Kerman v. City of New York, 374 F.3d 93, 109 (2d Cir. 2004). In Hunter v. Bryant, the Court rejected the practice of giving immunity claims to the jury: “immunity ordinarily should be decided by the court long before trial.” 502 U.S. 224, 228 (1991). The “good faith” immunity at common law left the question of malice to juries, but the modern qualified test does not allow a plaintiff to reach a jury with a mere “allegation of maliciousness.” See Malley v. Briggs, 475 U.S. 335, 341 (1986). The modern test is designed to “permit the resolution of many insubstantial claims on summary judgment,” thus taking immunity out of the hands of the jury. \textit{Id.} (quoting Harlow, 457 U.S. at 818).
  \item \textsuperscript{122} Saucier v. Katz, 533 U.S. 194, 201 (2001).
\end{itemize}
result would be under-enforcement of fair warning claims.\textsuperscript{123} In some cases, immunity would not be available with the facts viewed in the light most favorable to the plaintiff, but it would be available on some different set of facts actually found by the jury. Absent judicial access to the findings, a meritorious immunity claim might remain hidden in the jury’s black-box liability finding.

The Supreme Court has, so far, done little to address this problem. Several federal circuit courts, however, have been more proactive. In cases where unresolved factual issues prevent resolution of immunity on summary judgment, these courts have allowed the use of special interrogatories. Where unresolved factual issues prevent resolution of an immunity claim on summary judgment, a judge should obtain specific factual findings from the jury, and then revisit the immunity issue after trial.\textsuperscript{124} The use of special interrogatories is not widespread, and it remains controversial.\textsuperscript{125} However, such a flexible practice offers one reasonable way to address the inherently mixed questions of law and fact that immunity claims often present.

The criminal law should follow the same course. When the defendant raises fair warning claims prior to trial, a judge should view the facts in the light most favorable to the government and determine whether the defendant’s conduct, so viewed, violated a clearly established criminal law. Where factual disputes prevent pretrial resolution, a judge should consider special interrogatories, and then revisit the fair warning claims after trial. As the doctrine in this area develops, the criminal law should continue to monitor the successes and failures of the experiments in the parallel world of qualified immunity.

D. \textit{Vagueness and Ambiguity}

Importing \textit{Saucier} would provide an opportunity to eliminate the distinction between the vagueness doctrine and the rule of lenity. Currently, the former applies to vague statutes while the latter applies to ambiguous

\textsuperscript{123} See Chen, supra note 121, at 69 (arguing that qualified immunity is inherently fact-based and thus “conceptually irreconcilable with traditional summary judgment doctrine”); Henk J. Brands, Note, \textit{Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury}, 90 \textit{COLUM. L. REV.} 1045, 1051-56 (1990) (discussing the difficulties in allocating responsibility between judge and jury in qualified immunity cases).

\textsuperscript{124} Kerman, 374 F.3d at 109; St. Hilaire v. City of Laconia, 71 F.3d 20, 24 n.1 (1st Cir. 1995); Oliveira v. Mayer, 23 F.3d 642, 649 (2d Cir. 1994); Sims v. Metropolitan Dade County, 972 F.2d 1230, 1241 (Brown, J. dissenting) (11th Cir. 1992); Warlick v. Cross, 969 F.2d 303, 305-06 (7th Cir. 1992).

\textsuperscript{125} See Act Up!/Portland v. Bagley, 988 F.2d 868, 876 n.2 (9th Cir. 1993) (Norris, J., dissenting) (arguing that Fed. R. Civ. P. 49 does not authorize such a use of special interrogatories).
statutes. The distinction between the two doctrines, however, is hazy. It reflects the haziness of the underlying linguistic distinction.

Vagueness and ambiguity are two different types of statutory under-specification. Linguistically, ambiguity arises when a word has more than one meaning, while vagueness arises when the borders of a concept are indistinct. However, the “contrast between vagueness and ambiguity is obscured by the fact that most words are both vague and ambiguous.” In the law, the distinction is even less clear. “[N]o exact borderline . . . can be drawn between a statute which is merely ambiguous and one which is unconstitutionally vague.”

Doctrinally, the most important current distinction concerns the different remedies available: an impermissibly vague statute is struck down, while an impermissibly ambiguous statute is read narrowly. It is in that sense that the rule of lenity is “a sort of junior version of the vagueness doctrine.” If courts in criminal cases followed Saucier, the difference in remedy would disappear, and thus there would be no need to distinguish between vague and ambiguous statutes. When faced with an unclear statute—regardless of whether the lack of clarity is caused by vagueness, ambiguity, or some other malady—courts would use the first step to clarify, and the second step to address fair warning concerns.

There might remain some need for a fallback vagueness doctrine. In certain cases, statutes might be so hopelessly underspecified that no clarifying judicial gloss would be possible. In such cases, courts would void the statute rather than employing Saucier. For most cases, however, Saucier would provide a structural solution for addressing both statutory vagueness.

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128 LAFAVE & SCOTT, supra note 72, § 2.2(d), at 128; see also Decker, supra note 56, at 261 (discussing the hazy distinction between vagueness and ambiguity); Jeremy Waldron, Vagueness in Law and Language: Some Philosophical Issues, 82 CAL. L. REV. 509, 513 (1994) (stating that the “void-for-vagueness” doctrine often covers “both vagueness in the strict sense and ambiguity”).

and statutory ambiguity. Underspecification in whatever form could be addressed and cured—prospectively—by courts following Saucier.

V. ADDRESSING SAUCIER’S CRITICS

One of the difficulties with importing Saucier into the criminal law is that Saucier is embattled even within its own sphere. As the Supreme Court began to develop the two-step framework in cases like Siegert and Lewis, resistance developed in the circuit courts.\(^\text{130}\) Saucier issued a rebuke to the defiant lower courts—“This must be the initial inquiry”—but even then, some circuits disobeyed. The Second Circuit responded to Saucier with a droll evasion:

In Saucier, the Supreme Court made plain that a sequential two-step analysis of qualified immunity claims is not simply recommended but required. We are, of course, bound to implement that decision, and fully expect to do so in the vast majority of qualified immunity cases that come before us.\(^\text{131}\)

It went on to ignore Saucier’s requirement. Other circuits have expressed misgivings as well.\(^\text{132}\)

The Supreme Court might have responded more angrily had not the justices themselves grown uneasy with Saucier. In Saucier itself, Justices Ginsburg, Stevens, and Breyer disagreed with the two-part test.\(^\text{133}\) Dissenting from a denial of certiorari in Bunting v. Mellon, Justice Scalia and Chief Justice Rehnquist—both members of the original Saucier majority—expressed doubts about the Saucier framework.\(^\text{134}\) Thus, at the end of the

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\(^{130}\) See supra note 41.

\(^{131}\) Ehrlich v. Town of Glastonbury, 348 F.3d 48, 56-57 (2d Cir. 2003); see also Santana v. Calderon, 342 F.3d 18, 29-30 (1st Cir. 2003) (declining to follow Saucier in a qualified immunity case); Koch v. Town of Brattleboro, 287 F.3d 162, 166 (2d Cir. 2002) (“Although we normally apply [Saucier’s] two-step test... we retain the discretion to refrain from determining whether, under the first step of the test, a constitutional right was violated at all.”).


Rehnquist Court, it appeared that at least five justices were prepared to abandon the ordered adjudication, at least insofar as it was mandatory.\textsuperscript{135}

Perhaps most tellingly, in\textit{ Brosseau v. Haugen},\textsuperscript{136} the Court refused to follow its own “mandatory” rule. Faced with a highly controversial excessive force question, the Court declined to reach the constitutional merits and proceeded directly to the second\textit{ Saucier} prong. The Court’s explanation, given in passing, that\textit{ Saucier} is only mandatory for lower courts,\textsuperscript{137} can best be described as euphemistic.

\textit{Saucier} now stands as only shaky precedent in qualified immunity cases. Depending on the views of the Court’s new members, it may not survive. But regardless of its continued viability in constitutional tort suits, courts interpreting vague and ambiguous criminal statutes should adopt\textit{ Saucier}. Some of the arguments leveled against\textit{ Saucier} have little force to begin with, and others have less force in the criminal statutory cases than they do in constitutional cases.

A. \textit{Constitutional Avoidance}

One of the primary critiques of\textit{ Saucier} is that it runs afoul of the canon of constitutional avoidance.\textsuperscript{138} The canon advises courts “not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be dis-

\textsuperscript{135} Lyons v. City of Xenia, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring) (“A majority of the Justices have questioned the value of this strict requirement in recent years.”).

\textsuperscript{136} 543 U.S. 194 (2004).

\textsuperscript{137} \textit{Id.} at 198 n.3; \textit{see also id.} at 201 (Breyer, J., concurring) (“I join the Court’s opinion but write separately to express my concern about the matter to which the Court refers in footnote 3, namely, the way in which lower courts are required to evaluate claims of qualified immunity under the Court’s decision in \textit{Saucier v. Katz}, 533 U.S. 194, 201 (2001).”).

\textsuperscript{138} \textit{See, e.g., Brosseau}, 543 U.S. at 601 (Breyer, J., concurring); \textit{Bunting}, 541 U.S. at 1019 (Stevens, J., respecting denial of certiorari); County of Sacramento v. Lewis, 523 U.S. 833, 859 (1998) (Stevens, J., concurring) (“When . . . the [constitutional] question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions.”); Ehrlich v. Town of Glastonbury, 348 F.3d 48, 56 (2d Cir. 2003); \textit{Lyons}, 417 F.3d at 581 (Sutton, J., concurring); Horne v. Coughlin, 191 F.3d 244, 246-47 (2d Cir. 1999).
posed of.”

Whatever the merit of that critique in constitutional torts, it has no force in the criminal context. If Saucier were imported into the criminal law, the problem of constitutional avoidance simply would not arise because the substantive questions at issue would be statutory, not constitutional. Prospective interpretations of criminal statutes would do nothing to enlarge the role of the courts at the expense of the other branches. Indeed, importing Saucier into the criminal law would actually allow courts to be more respectful of legislative intent.

Such a shift in interpretive norms would ease tensions with the other branches rather than aggravating them.

B. Dicta

A second criticism is that Saucier mandates the production of dicta. When cases could be decided solely on the notice prong, a decision on the merits prong is unnecessary and therefore dictum, according to the critics. Saucier, it is argued, thus violates the longstanding judicial practice of avoiding dicta.

The distinction between dicta and holding is notoriously hard to define, and the critics have not explored the difficulties underlying their argument. The critics apparently define “dicta” as any portion of an opinion that is not logically necessary to the result. That “logical necessity” test

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141 See supra notes 69-71 and accompanying text.

142 See also Benson v. Allphin, 786 F.2d 268, 279 n.36 (7th Cir. 1986) (suggesting that Article III’s case and controversy requirement “suggests that, once the court has determined that the official is immune, it should not go on to decide the merits of the plaintiff’s claim”); Melissa Armstrong, Note, Rule Pragmatism: Theory and Application to Qualified Immunity Analysis, 38 COLUM. J.L. & SOC. PROBS. 107, 123-27 (2004) (discussing whether Saucier requires the production of dicta).

143 See Greabe, supra note 35, at 422.
enjoys some support from canonical sources, but it is also grossly overbroad. Consider the following types of holdings.

(1) Alternative grounds. Defendant presents a claim on appeal. The appellate court rejects the claim on ground (a) and, in the alternative, on ground (b). Under the logical necessity test, each ground taken separately is dictum.

(2) Overdetermined grounds. Defendant presents a claim on appeal. The appellate court rejects the claim, offering (a), (b), (c), and (d) as reasons for its ruling. Any three of the reasons, taken together, would be sufficient to reach the result. Under the logical necessity test, each reason is dictum.

(3) Sequential rulings. Defendant presents a claim on appeal. The appellate court agrees that the lower court erred, but denies relief because it finds the error harmless. Under the logical necessity test, the substantive ruling is dictum.

Examples like these abound in ordinary legal practice. Judicial opinions routinely include language that is not strictly necessary to the result. Such language is not regularly classified in dicta—except in situations where judges in subsequent cases seek to avoid the implications of the prior holding.

Some scholars and judges have proposed narrower and more sensible definitions of dicta. Drawing on the law of preclusion, Michael Dorf has argued that any portion of a ruling that is “necessarily decided” should be considered a holding. Judge Kozinski, the leading judicial critic of the logical necessity test, has argued for a similar test. More recently, Michael Abramowicz and Maxwell Stearns have proposed defining a holding as including “those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment.” Under either the Dorf definition or the Abramowicz/Stearns definition of dicta, a decision in the first prong of the Saucier test counts as a holding even in those cases where it is not logically necessary to the result.

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144 Judicial definitions of dicta, when they are offered, are often derived from Black’s Law Dictionary, which adopts the logical necessity test. See Note, Implementing Brand X: What Counts as a One-Step Holding?, 119 Harv. L. Rev. 1534, 1542 (2006).
145 See Morrison, supra note 64, at 508 (calling such a definition of dicta “untenable”).
147 United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001) (Kozinski, J., concurring).
149 For a more extensive argument that even “unnecessary” merits rulings in qualified immunity cases are holdings, not dicta, see Greabe, supra note 35, at 418-26.
Justice Scalia has suggested a different response to the dicta critique. According to Justice Scalia, the background debate about the definition of dicta simply does not matter in a situation like this, where the test itself is designed to produce statements to guide future actors. A judicial decision in the first prong of the \textit{Saucier} test is not “mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases.”\footnote{Bunting \textit{v.} Mellen, 541 U.S. 1019, 1023-24 (2004) (Scalia, J., dissenting from denial of certiorari).}

Along those lines, perhaps it simply does not matter whether we call \textit{Saucier} statements “dicta” or not. Judge Calabresi was the first to argue that decisions on the first prong of the ordered qualified immunity framework are dicta, but he also argued that such statements in dicta still perform the same function of providing requisite notice to government officials.\footnote{Judge Calabresi’s argument came in the pre-\textit{Saucier} case of \textit{Wilkinson v. Russell}, 182 F.3d 89, 112 (2d Cir. 1999). According to Judge Calabresi, all statements about constitutional rights made in the \textit{Sacramento} framework (i.e., where qualified immunity exists notwithstanding the violation of a right since the right was not clearly established at the time the conduct allegedly occurred) are dicta, and hence provisional only. The significance of such \textit{Sacramento} statements must rest, therefore, not in ultimately determining what are or are not constitutional rights, for as Horne also pointed out, rights can only be established through holdings. The importance of defining rights provisionally in a \textit{Sacramento} context lies elsewhere. Its function is to place government officials on notice that they ignore such “probable” rights at their peril. The Supreme Court, moreover, said as much when it told the lower courts to issue dicta declaring that certain conduct violates a fundamental right in order to “promote[] clarity in the legal standards for official conduct.” Footnote Five of \textit{Sacramento}, as expounded in \textit{Wilson}, stands for the proposition that lucid and unambiguous dicta concerning the existence of a constitutional right can without more make that right “clearly established” for purposes of a qualified immunity analysis. \textit{Id.} at 112 (Calabresi, J., concurring) (citations omitted); see also \textit{Ehrlich v. Glastonbury}, 348 F.3d 48, 56 n.11 (2d Cir. 2003) (“[T]he Supreme Court, by the very logic of \textit{Saucier}, makes clear that such dicta is enough to put defendant state actors on notice that, if they repeat their acts, they will not have the benefit of qualified immunity . . . .”); \textit{Shannon}, supra note 46, at 848-49 (“[D]icta can communicate the contemplation of legal change, for by providing notice . . . as to the prospect of change, reliance interests might be diminished.”).}

The critique relies, often unwittingly, on a broad definition of dicta that is probably unsatisfactory given the commonly accepted norms of judicial

\footnote{The Second Circuit has suggested that first-stage \textit{Saucier} rulings are dicta that put officials on notice but do not bind subsequent courts. A subsequent court “will undoubtedly give respectful attention to the \textit{Saucier}-mandated clear dicta expressed in the earlier case. But, precisely because the earlier case expounded dicta, the second court will \textit{not} be strictly bound to follow the prior court.” \textit{Ehrlich}, 348 F.3d at 56 n.11.}
practice. Under narrower alternative definitions, *Saucier* statements are not dicta. And even if *Saucier* statements are dicta, it is hard to see why it matters. The only question that matters is whether such statements are deemed to give fair warning, and resolution of that question has little or nothing to do with the ongoing debate about dicta.

C. Insufficient Attention

A third critique is occasionally stated as part of the dicta critique. The argument is that the substantive merits prong will receive insufficient attention because it will always be overshadowed by the outcome-determinative notice prong. As anticipating that they will win or lose on the second prong, parties will give the first prong short shrift in their briefing. Courts, in turn, will address the first prong with insufficient care. The danger of erroneous rulings, it is argued, thus rises under the *Saucier* framework because courts are forced to give rulings on issues that have been insufficiently argued and considered.

This critique of *Saucier* has some theoretical appeal, but it is unclear whether experience has borne out its assumptions. Among the thousands of cases decided under *Saucier*, the critics have not yet pointed to examples of cases wrongly decided as a result of inattention.

The two prongs of the *Saucier* test are, after all, dependent and interrelated. A plaintiff cannot easily show that an official’s conduct violated a clearly established right without first showing that the conduct violated a right. In the criminal context, the state could not easily show that a defendant had fair warning of his conduct’s illegality without first showing that the conduct was illegal. As a result of the necessary (and necessarily ordered) relation between the two prongs, it is not a good strategy for parties to proceed directly to the second prong without fully briefing the first. As an empirical matter, there is little reason to believe that parties regularly or even occasionally do so. Nor is there reason to believe that judges issue sloppy rulings on the merits.

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153 Ehrlich, 348 F.3d at 56 (“A court that knows that it will rule against the plaintiff at the second stage of the inquiry may fail to be as careful in its analysis of the first question as it would if the answer to that question was determinative.”).


155 “The constitutional and non-constitutional questions in a qualified immunity case overlap, and it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be.” Lyons v. City of Xenia, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring).
Indeed, responding to the critics, one could just as well argue that *Saucier*’s required order actually forces judges to pay closer attention to their cases. Without *Saucier*, judges might regularly take the path of least resistance, disposing of their cases solely on qualified immunity grounds because it is the easiest and quickest route to an uncontroversial outcome. In so ruling, judges might fail to research and consider the complexities of the underlying law, which might, if examined closely, mandate another result. The inattention critique of *Saucier* can be turned on its head.

In any event, creating an exception to the mandatory order of adjudication can solve the potential problem with inattention.\(^\text{156}\) We could simply modify *Saucier*’s rule to say: Courts should ordinarily adjudicate the merits prong before proceeding to the notice prong, but in cases where the merits prong has been insufficiently brief, or where there is some other obstacle to its thoughtful consideration, courts may dispose of the case solely on notice grounds.

Some of *Saucier*’s critics have suggested precisely such a compromise.\(^\text{157}\) The compromise would entail a risk that the discretionary outs would be overused, thus hindering the development of the law and undermining the purpose of the ordered test. But given judicial discomfort with the mandatory test, and given that judges may often avoid *Saucier*’s mandate by other means anyway,\(^\text{158}\) a discretionary rule might be the best solution, both for constitutional torts and for criminal statutory interpretation.

In sum, the argument that *Saucier* leads to inattentive briefing and adjudication seems mostly speculative. If, however, that argument is confirmed by judicial experience, then the rule should be modified to make merits-first rulings discretionary rather than mandatory.

D. *Unreviewability*

A more powerful objection to *Saucier* is that it results in decisions that are “effectively insulated from review.”\(^\text{159}\) When a party loses on the first

\(^{156}\) See Greabe, *infra* note 35, at 435 (“[T]he lack of adequate briefing of the pleaded issue . . . [can] constitute cause for a court to exercise its discretion to engage in a merits bypass.”).

\(^{157}\) See, e.g., Lyons, 417 F.3d at 581-83.

\(^{158}\) Lower courts may effectively avoid *Saucier* by issuing non-precedential opinions. In general, unpublished opinions may not be considered for a determination of qualified immunity. See Wilson v. Layne, 526 U.S. 603, 624 (1999) (Stevens, J., dissenting in part) (citing Hogan v. Carter, 85 F.3d 1113, 1118 (4th Cir. 1996)); see also Lyons, 417 F.3d at 582-82 (Sutton, J., concurring) (“An unbending requirement in this area produces another oddity: The same lower-court judges that are supposed to adhere to this rule are given complete discretion over whether to publish a given decision.”).

(interpretive) prong but nonetheless prevails on the second (notice) prong, he has no incentive to appeal. In such split-prong outcomes, erroneous merits rulings may go uncorrected.

The problem only arises in split-prong outcomes. And insulated interpretive rulings are only problematic if they are erroneous—if a higher court would have reached the same result on the merits, then the lack of additional review is unimportant. The insulation problem will often be only temporary. A defendant who prevails on notice grounds will not appeal the interpretive ruling. But the interpretive ruling can be appealed in the next case, when it is applied again to a defendant without a fair warning defense. In short, the scope of the unreviewability problem is limited.

It is serious nonetheless. Erroneous and overbroad merits rulings will chill some legal conduct. Lower courts may read constitutional and criminal prohibitions on conduct too broadly, and those errors might not be corrected quickly. The subject actors—government officials acting under the Constitution and citizens acting under the criminal law—will be forced, under the erroneous and unreviewed ruling, to avoid the borderline but legal conduct. Worse still, chilling will extend the duration of the problem since fewer cases will come to court, making it harder for a higher court to produce a correction in a later case.

Higher courts could alleviate the problem, to some extent, by altering their review practices. They could allow prevailing parties to appeal160—though criminal defendants, who have no institutional interest in correcting erroneous interpretive rulings, would have no reason to do so. Better yet, reviewing courts could take steps to ensure briefing on merits questions. In split-prong outcomes, the losing party (i.e., the plaintiff in constitutional torts, the government in criminal cases) may appeal, and reviewing courts could encourage or require both parties to brief the interpretive prong.

In any event, the problem of insulation is less troublesome in criminal law than it is in constitutional law. Because the substantive questions at issue are statutory, erroneous court interpretations of criminal law are subject to another type of review: legislative override. The prospect of legislative intervention in criminal law lowers the costs of error and mitigates the potential problems created by adopting the Saucier framework.

The Saucier framework does have the effect of insulating interpretive rulings from review. But the problem is neither as broad nor as intransigent.

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160 Justice Scalia suggested this approach for qualified immunity cases. “[O]ur practice reflects a ‘settled refusal’ to entertain an appeal by a party on an issue as to which he prevailed . . . . I think it plain that this general rule should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination.” Bunting, 541 U.S. at 1023 (Scalia, J., dissenting from denial of certiorari) (citation omitted).
as some have suggested. In constitutional torts, the first few years of life under *Saucier* have not resulted in a proliferation of permanently uncorrectable lower court errors. The problem of unreviewability is not so serious that the *Saucier* experiment should be abandoned altogether. In the criminal law, it would be worth risking a few temporarily overbroad statutory rulings in order to gain a more coherent method of criminal statutory interpretation and a more sensible fair warning doctrine.

E. Political Objections

The arguments addressed above represent the primary criticisms directed at the *Saucier* framework since its adoption. One cannot help but wonder, however, whether political concerns shape the debate beneath the level of explicit argument.

Within the sphere of constitutional torts, the *Saucier* framework may well result in increasing constitutional constraints on police and other government officials. Its *raison d’etre* was to provide a “process for the law’s elaboration.”161 Put differently, *Saucier* functions by “reducing the cost of innovation,” thus “fostering the development of constitutional law.”162 “Elaboration” and “innovation” can plausibly be seen as code words for “expansion.” To the extent that *Saucier* produces expanded constitutional constraints on police and other government actors, it is sure to produce political enemies.

Even if “elaboration” really only means “clarification,” *Saucier* may operate to the detriment of police. When courts decline to rule on the substantive issue and proceed directly to the notice prong, the constitutional line remains hazy. When the constitutional line remains hazy, police cannot be held liable for borderline conduct—even borderline illegal conduct. Within the confines of a system that makes liability a function of fair warning, the mere process of clarification increases the scope of liability. Police benefit from the certainty of a clear standard,163 but on the whole, they might prefer the greater freedom that comes with a bit of haze. They might prefer a world without *Saucier*, and judicial unease with the framework might reflect that preference.164

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162 Jeffries, *supra* note 9, at 90, 98.
163 See Greabe, *supra* note 35, at 427 (“[O]fficials in jurisdictions that liberally employ the merits bypass are less likely to know whether their conduct falls within the boundaries set by the Constitution in questionable, cutting-edge situations.”).
Importing *Saucier* into the criminal law would create a different political calculus. At the simplest level, importing *Saucier* would likely lead to somewhat broader interpretations of criminal statutes. Such a change would probably not produce much political backlash or judicial unease.

F. Prospectivity

What might remain are the more general objections to prospective judicial rulings. Prospective rulings have been criticized as “foreign to the American legal and constitutional tradition” and as the “handmaid of judicial activism.” Although the *Saucier* Court never used the word “prospective,” prospectivity was both its goal and its result. *Saucier*’s critics are no doubt motivated at some level by inchoate fears of prospectivity.

Prospective rulings, however, are not foreign to the criminal law. Even some of the fiercest critics of prospectivity have recognized a traditional exception allowing prospective rulings in criminal cases involving fair warning claims. There is a long line of precedent establishing the utility—and indeed the necessity—of prospective rulings in cases expanding criminal liability.

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166 See Note, supra note 75, at 920-21 (discussing criminal law exceptions to usual rules about retroactive application of judicial decisions). There have always been criminal cases where “overruling was the rational judgment and prospective overruling was essential to preclude the injustice that retroactive application of the new rule would have entailed.” Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 50 HASTINGS L.J. 771, 780 (1999). See also BENJAMIN CARDozo, *The Nature of the Judicial Process* 146 (1921) (“[W]hen the hardship is felt to be too great or to be unnecessary, retrospective operation is withheld.”).

167 See, e.g., State v. Ikezawa, 857 P.2d 593, 598 (Haw. 1993) (“[W]here substantial prejudice results from the retrospective application of new legal principles to a given set of facts, the inequity may be avoided by giving the guiding principles prospective application only.”); State v. Jones, 107 P.2d 324 (N.M. 1940) (overruling a previous case but declaring that retroactive application of the new rule would violate the “plainest principles of justice”). State v. Bell, 49 S.E. 163, 164 (N.C. 1904) (“While we hold the law to be as stated, we are embarrassed in applying this ruling to this case.”); State v. Simanton, 49 P.2d 981, 985 (Mont. 1935) (“The judgment in the present case should not be allowed to stand by invoking the [new] rule at this time, whatever rule we may now announce for the future.”); State v. Longino, 67 So. 902, 903-04 (Miss. 1915) (“We think that a change of decisions involving the interpre-
Prospectivity is both more common and more banal that its critics recognize. The Supreme Court has, for example, encouraged (but not required) lower courts to issue prospective rulings in cases involving good faith reliance on invalid warrants.\(^{168}\) Harmless error is another frequently used method of prospective rulings.\(^{169}\) Appellate courts hold that a ruling below was error—thus creating controlling law for future cases—but deny relief to the litigant on grounds of harmlessness. No one thinks to criticize such rulings as dicta, much less “activism.”

For so long as courts have possessed the power to rule on one ground but deny relief on another, they have possessed the power to issue rulings with only prospective effect. We might describe such techniques as “de facto prospectivity” rather than “pure prospectivity”—the prospective-only effect is merely accidental rather than chosen for the sake of prospectivity alone. Saucier’s prospectivity is no less accidental. Courts rule on one
ground but deny relief on the second, all the while recognizing that the initial ruling will bind future actors. That sort of prospectivity is normal and widely accepted—Saucier stands out only for its unusual candor.

Arguments about the merits of prospective rulings recall grand debates of last century, but there is less to them than meets the eye. De facto prospectivity is a feature of judicial life. Given the demands of the fair warning requirement and the competing demands of statutory interpretation, prospectivity is the wisest path.

CONCLUSION

Qualified immunity and the fair warning requirement share common doctrinal and theoretical underpinnings. The Supreme Court developed Saucier's ordered framework so that courts deciding qualified immunity cases could both vindicate values of notice and engage in sensible constitutional interpretation. Importing the framework into the criminal law would have the same advantages. Using Saucier, Courts could interpret criminal laws in accordance with legislative intent yet still respect the constitutional limits on imposing criminal punishment where there has been no prior warning. Saucier provides an elegant structure that would allow courts to reconcile these competing values. A fair warning requirement built around Saucier would be better than the fair warning requirement we have now.