SUPREME COURT OF THE UNITED STATES

No. 99–6218

WILBERT K. ROGERS, PETITIONER *v.* TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, WESTERN DIVISION

[May 14, 2001]

JUSTICE SCALIA, with whom JUSTICE STEVENS and JUSTICE THOMAS join, and with whom JUSTICE BREYER joins as to Part II, dissenting.

The Court today approves the conviction of a man for a murder that was not murder (but only manslaughter) when the offense was committed. It thus violates a principle– encapsulated in the maxim *nulla poena sine lege*– which "dates from the ancient Greeks" and has been described as one of the most "widely held value-judgment[s] in the entire history of human thought." J. Hall, General Principles of Criminal Law 59 (2d ed. 1960). Today's opinion produces, moreover, a curious constitution that only a judge could love. One in which (by virtue of the *Ex Post Facto* Clause) the elected representatives of all the people cannot retroactively make murder what was not murder when the act was committed; but in which unelected judges can do precisely that. One in which the predictability of parliamentary lawmaking cannot validate the retroactive creation of crimes, but the predictability of judicial lawmaking can do so. I do not believe this is the system that the Framers envisioned– or, for that matter, that any reasonable person would imagine.

I

A

To begin with, let us be clear that the law here was

altered after the fact. Petitioner, whatever else he was guilty of, was innocent of murder under the law as it stood at the time of the stabbing, because the victim did not die until after a year and a day had passed. The requisite condition subsequent of the murder victim's death within a year and a day is no different from the requisite condition subsequent of the rape victim's raising a "hue and cry" which we held could not retroactively be eliminated in *Carmell* v. *Texas,* 529 U. S. 513 (2000). Here, as there, it operates to bar conviction. Indeed, if the present condition differs at all from the one involved in *Carmell* it is in the fact that it does not merely pertain to the "quantum of evidence" necessary to corroborate a charge, *id.*, at 530, but is an actual *element* of the crime– a "substantive principle of law," 992 S. W. 2d 393, 399 (Tenn. 1999), the failure to establish which "entirely precludes a murder prosecution," *id.*, at 400. Though the Court spends some time questioning whether the year-and-a-day rule was ever truly established in Tennessee, see *ante*, at 12–15, the Supreme Court of Tennessee said it was, see 992 S. W. 2d, at 396, 400, and this reasonable reading of state law by the State's highest court is binding upon us.

Petitioner's claim is that his conviction violated the Due Process Clause of the Fourteenth Amendment, insofar as that Clause contains the principle applied against the legislature by the *Ex Post Facto* Clause of Article I. We first discussed the relationship between these two Clauses in *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964). There, we considered Justice Chase to have spoken for the Court in *Calder* v. *Bull,* 3 Dall. 386, 390 (1798), when he defined an *ex post facto* law as, *inter alia*, one that "aggravates a crime, or makes it greater than it was, when committed." 378 U. S., at 353 (emphasis deleted). We concluded that, "[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause

from achieving precisely the same result by judicial construction." *Id.*, at 353–354. The Court seeks to avoid the obvious import of this language by characterizing it as mere dicta. See *ante,* at 7. Only a concept of dictum that includes the very reasoning of the opinion could support this characterization. The *ratio decidendi* of *Bouie* was that the principle applied to the legislature though the *Ex Post Facto* Clause was contained in the Due Process Clause insofar as judicial action is concerned. I cannot understand why the Court derives such comfort from the fact that later opinions applying *Bouie* have referred to the Due Process Clause rather than the *Ex Post Facto* Clause, see *ante,* at 7–8; that is entirely in accord with the rationale of the case, which I follow and which the Court discards.

The Court attempts to cabin *Bouie* by reading it to prohibit only "'unexpected and indefensible'" judicial law revision, and to permit retroactive judicial changes so long as the defendant has had "fair warning" that the changes might occur. *Ante*, at 10. This reading seems plausible because *Bouie* does indeed use those quoted terms; but they have been wrenched entirely out of context. The "fair warning" to which *Bouie* and subsequent cases referred was not "fair warning that the law might be changed," but fair warning *of what constituted the crime at the time of the offense*. And *Bouie* did not express disapproval of "unexpected and indefensible changes in the law" (and thus implicitly approve "expected or defensible changes"). It expressed disapproval of "*judicial construction* of a criminal statute" that is "unexpected and indefensible *by reference to the law which had been expressed prior to the conduct in issue*." 378 U. S., at 354 (emphasis added; internal quotation marks omitted). It thus implicitly approved only a judicial construction that was an expected or defensible application of prior cases interpreting the statute. Extending this principle from statutory crimes to

common-law crimes would result in the approval of retroactive holdings that accord with prior cases expounding the common law, and the disapproval of retroactive holdings that clearly depart from prior cases expounding the common law. According to *Bouie*, not just "unexpected and indefensible" retroactive changes in the common law of crimes are bad, but *all* retroactive changes.

Bouie rested squarely upon "[t]he fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,'" *ibid. (Nulla poena sine lege.)* Proceeding from that principle, *Bouie* said that "a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result [prohibited by the *Ex Post Facto* Clause] by judicial construction." *Id.*, at 353–354. There is no doubt that "fair warning" of the legislature's intent to change the law does not insulate retroactive *legislative* criminalization. Such a statute violates the *Ex Post Facto* Clause, no matter that, at the time the offense was committed, the bill enacting the change was pending and assured of passage– or indeed, had already been passed but not yet signed by the President whose administration had proposed it. It follows from the analysis of *Bouie* that "fair warning" of impending change cannot insulate retroactive *judicial* criminalization either.

Nor is there any reason in the nature of things why it should. According to the Court, the exception is necessary because prohibiting retroactive judicial criminalization would "place an unworkable and unacceptable restraint on normal judicial processes," would be "incompatible with the resolution of uncertainty that marks any evolving legal system," and would "unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system." *Ante*, at 9. That assessment ignores the crucial difference between simply applying a law to a new set of circumstances and changing

the law that has previously been applied to the very circumstances before the court. Many criminal cases present some factual nuance that arguably distinguishes them from cases that have come before; a court applying the penal statute to the new fact pattern does not purport to *change* the law. That, however, is not the action before us here, but rather, a square, head-on *overruling* of prior law— or, more accurately, something even more extreme than that: a judicial opinion acknowledging that under prior law, for reasons that used to be valid, the accused could not be convicted, but decreeing that, because of changed circumstances, "we hereby abolish the common law rule," 922 S. W. 2d, at 401, and upholding the conviction by applying the new rule to conduct that occurred before the change in law was announced. Even in civil cases, and even in modern times, such retroactive revision of a concededly valid legal rule is extremely rare. With regard to criminal cases, I have no hesitation in affirming that it was unheard-of at the time the original Due Process Clause was adopted. As I discuss in detail in the following section, proceeding in that fashion would have been regarded as contrary to the judicial traditions embraced within the concept of due process of law.

B

The Court's opinion considers the judgment at issue here "a routine exercise of common law decisionmaking," whereby the Tennessee court "brought the law into conformity with reason and common sense," by "laying to rest an archaic and outdated rule." *Ante*, at 15. This is an accurate enough description of what modern "common law decisionmaking" consists of— but it is not an accurate description of the theoretical model of common-law decisionmaking accepted by those who adopted the Due Process Clause. At the time of the framing, common-law jurists believed (in the words of Sir Francis Bacon) that the

judge's "office is *jus dicere*, and not *jus dare;* to interpret law, and not to make law, or give law." Bacon, Essays, Civil and Moral, in 3 Harvard Classics 130 (C. Eliot ed. 1909) (1625). Or as described by Blackstone, whose Commentaries were widely read and "accepted [by the framing generation] as the most satisfactory exposition of the common law of England," see *Schick* v. *United States,* 195 U. S. 65, 69 (1904), "judicial decisions are the principal and most authoritative *evidence*, that can be given, of the existence of such a custom as shall form a part of the common law." 1 W. Blackstone, Commentaries on the Laws of England *69 (1765) (hereinafter Blackstone) (emphasis added).

Blackstone acknowledged that the courts' exposition of what the law was could change. *Stare decisis*, he said, "admits of exception, where the former determination is most evidently contrary to reason . . . ." *Ibid.* But "in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." *Id.*, at *70. To fit within this category of bad law, a law must be "manifestly absurd or unjust." It would not suffice, he said, that "the particular reason [for the law] can at this distance of time [not be] precisely assigned." "For though [its] reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration." *Ibid.*[1] By way of example, Blackstone pointed to the seemingly unreasonable rule that one cannot inherit the estate of one's half-brother. Though he accepted that the feudal reason behind the law was no longer obvious, he wrote "yet it is not

[1] Inquiring into a law's original reasonableness was perhaps tantamount to questioning whether it existed at all. "In holding the origin to have been unreasonable, the Court nearly always doubts or denies the actual origin and continuance of the custom *in fact*." C. Allen, Law in the Making 140 (3d ed. 1939) (hereinafter Allen).

in [a common law judge's] power to alter it." *Id.*, at *70–*71 (emphasis added).[2] Moreover, "the unreasonableness of a custom in modern circumstances will not affect its validity if the Court is satisfied of a reasonable origin." Allen 140–141. "A custome once reasonable and tolerable, if after it become grievous, and not answerable to the reason, whereupon it was grounded, yet is to be . . . taken away by act of parliament." 2 E. Coke, Institutes of the Laws of England *664 (1642) (hereinafter Institutes); see also *id.*, at *97 ("No law, or custome of England can be taken away, abrogated, or adnulled, but by authority of parliament"); Of Oaths before an Ecclesiastical Judge Ex Officio, 12 Co. Rep. *26, *29 (1655) ("[T]he law and custom of England is the inheritance of the subject, which he cannot be deprived of without his assent in Parliament").

There are, of course, stray statements and doctrines found in the historical record that– read out of context– could be thought to support the modern-day proposition that the common law was always meant to evolve. Take, for instance, Lord Coke's statement in the Institutes that "the reason of the law ceasing, the law itself ceases." This maxim is often cited by modern devotees of a turbulently changing common law– often in its Latin form (*cessante ratione legis, cessat ipse lex*) to create the impression of

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[2] The near-dispositive strength Blackstone accorded *stare decisis* was not some mere personal predilection. Chancellor Kent was of the same view: "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have *a right* to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it." 1 J. Kent, Commentaries *475–*476 (emphasis added). See also Hamilton's statement in The Federalist: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, p. 471 (C. Rossiter ed. 1961).

great venerability. In its original context, however, it had nothing to do with the power of common-law courts to change the law. At the point at which it appears in the Institutes, Coke was discussing the exception granted abbots and mayors from the obligation of military service to the King which attached to land ownership. Such service would be impracticable for a man of the cloth or a mayor. But, said Coke, "if they convey over the lands to any naturall man and his heires," the immunity "by the conveyance over ceaseth." 1 Institutes *70. In other words, the service which attached to the land would apply to any subsequent owner not cloaked in a similar immunity. It was in describing this change that Coke employed the Latin maxim *cessante ratione legis, cessat ipse lex*. It had to do, not with a changing of the common-law rule, but with a change of circumstances that rendered the common-law rule no longer applicable to the case.

The same is true of the similar quotation from Coke: *"[R]atio legis est anima legis, et mutata legis ratione, mutatur et lex"*—reason is the soul of the law; the reason of the law being changed, the law is also changed. This is taken from Coke's report of *Milborn's Case*, 7 Co. Rep. 6b, 7a (1587), a suit involving a town's responsibility for a murder committed within its precincts. The common-law rule had been that a town could be amerced for failure to apprehend a murderer who committed his crime on its streets during the day, but not a murderer who struck after nightfall, when its citizens were presumably asleep. Parliament, however, enacted a statute requiring towns to close their gates at night, and the court reasoned that thereafter a town that left its gates open could be amerced for the nocturnal homicide as well, since the town's violation of the Act was negligence that facilitated the escape. This perhaps partakes more of a new right of action implied from legislation than of any common-law rule. But to the extent it involved the common law, it assuredly did

not *change* the prior rule: A town not in violation of the statute would continue to be immune. *Milborn's Case* simply held that the rule would not be extended to towns that wrongfully failed to close their gates– which involves no overruling, but nothing more than normal, case-by-case common-law adjudication.

It is true that framing-era judges in this country considered themselves authorized to reject English common-law precedent they found "barbarous" and "ignorant," see 1 Z. Swift, A System of the Laws of the State of Connecticut 46 (1795) (hereinafter Swift); N. Chipman, A Dissertation on the Act Adopting the Common and Statute Laws of England, in Reports and Dissertations 117, 128 (1793) (hereinafter Chipman). That, however, was not an assertion of *judges'* power to *change* the common law. For, as Blackstone wrote, the common law was a law for England, and did not automatically transfer to the American Colonies; rather, it had to be adopted. See 1 Blackstone *107–*108 (observing that "the common law of England, as such, has no allowance or authority" in "[o]ur American plantations"); see also 1 Swift 46 ("The English common law is not in itself binding in this state"); *id.*, at 44–45 ("The English common law has never been considered to be more obligatory here, than the Roman law has been in England"). In short, the colonial courts felt themselves perfectly free to pick and choose which parts of the English common law they would adopt.[3] As stated by Chipman, at 128, "[i]f no reason can be assigned, in support of rules, or precedents, *not already adopted in practice*, to adopt such

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[3] In fact, however, "most of the basic departures [from English common law] were accomplished not by judicial decision but by local statute, so that by the time of the American Revolution one hears less and less about the unsuitability of common law principles to the American environment." 1 M. Horwitz, Transformation of American Law 1780–1860, p. 5 (1977).

rules, is certainly contrary to the principles of our government" (emphasis added). This discretion not to adopt would not presuppose, or even support, the power of colonial courts subsequently to change the accumulated colonial common law. The absence of belief in *that* power is demonstrated by the following passage from 1 M. Horwitz, The Transformation of American Law 1780–1860, p. 5 (1977) (hereinafter, Horwitz): "Massachusetts Chief Justice Hutchison could declare in 1767 that 'laws should be established, else Judges and Juries must go according to their Reason, that is, their Will.' It was also imperative 'that *the Judge* should never be the *Legislator*: Because, then the Will of the Judge would be the Law: and this tends to a State of Slavery.'" Or, as Judge Swift put it, courts "ought never to be allowed to depart from the well known boundaries of express law, into the wide fields of discretion." 2 Swift 366.

Nor is the framing era's acceptance of common-law crimes support for the proposition that the Framers accepted an evolving common law. The acknowledgment of a new crime, not thitherto rejected by judicial decision, was not a *changing* of the common law, but an *application* of it. At the time of the framing, common-law crimes were considered unobjectionable, for "'a law founded on the law of nature may be retrospective, because it always existed,'" Horwitz, at 7, quoting *Blackwell* v. *Wilkinson*, Jefferson's Rep. 73, 77 (Va. 1768) (argument of then-Attorney General John Randolph). Of course, the notion of a common-law crime is utterly anathema today, which leads one to wonder why that is so. The obvious answer is that we now agree with the perceptive chief justice of Connecticut, who wrote in 1796 that common-law crimes "partak[e] of the odious nature of an ex post facto law." 2 Swift 365–366. But, as Horwitz makes clear, a widespread sharing of Swift's "preoccupation with the unfairness of administering a system of judge-made criminal law

was a distinctly *post-revolutionary* phenomenon, reflecting a profound change in sensibility. For the inarticulate premise that lay behind Swift's warnings against the danger of judicial discretion was *a growing perception that judges no longer merely discovered law; they also made it*." Horwitz 14–15 (emphases added). In other words, the connection between ex post facto lawmaking and common-law judging would not have become widely apparent *until* common-law judging *became* lawmaking, not (as it had been) law declaring. This did not happen, see *id.*, at 1–4, until the 19th century, *after* the framing.

What occurred in the present case, then, is precisely what Blackstone said– and the Framers believed– would not suffice. The Tennessee Supreme Court made no pretense that the year-and-a-day rule was "bad" law from the outset; rather, it asserted, the need for the rule, as a means of assuring causality of the death, had disappeared with time. Blackstone– and the Framers who were formed by Blackstone– would clearly have regarded that *change* in law as a matter for the legislature, beyond the *power* of the court. It may well be that some common-law decisions of the era in fact changed the law while purporting not to. But that is beside the point. What is important here is that it was an undoubted point of principle, at the time the Due Process Clause was adopted, that courts could not "change" the law. That explains why the Constitution restricted only the legislature from enacting *ex post facto* laws. Under accepted norms of judicial process, an *ex post facto* law (in the sense of a judicial holding, not that a prior decision was erroneous, but that the prior valid law is hereby retroactively *changed*) was simply not an option for the courts. This attitude subsisted, I may note, well beyond the founding era, and beyond the time when due process guarantees were extended against the States by the Fourteenth Amendment. In an 1886 admiralty case, for example, this Court said the following: "The

rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule." *The Harrisburg*, 119 U. S. 199, 213–214 (1886), overruled by *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970).

It is not a matter, therefore, of "[e]xtending the *[Ex Post Facto]* Clause to courts through the rubric of due process," and thereby "circumvent[ing] the clear constitutional text," *ante,* at 8. It is simply a matter of determining what due judicial process consists of– and it does not consist of retroactive creation of crimes. The *Ex Post Facto* Clause is relevant only because it demonstrates beyond doubt that, however much the acknowledged and accepted role of common-law courts could evolve (as it has) in other respects, retroactive revision of the criminal law was regarded as so fundamentally unfair that an alteration of the judicial role which permits *that* will be a denial of due process. Madison wrote that "*ex-post-facto* laws . . . are contrary to the first principles of the social compact, and to every principle of social legislation." The Federalist No. 44, p. 282 (C. Rossiter ed. 1961). I find it impossible to believe, as the Court does, that this strong sentiment attached only to retroactive laws passed by the legislature, and would not apply equally (or indeed with even greater force) to a court's production of the same result through disregard of the traditional limits upon judicial power. Insofar as the "first principles of the social compact" are concerned, what possible difference does it make that "[a] court's opportunity for discrimination" by retroactively changing a law "is more limited than a legislature's, in that it can only act in construing existing law in actual litigation"? *Ante,* at 9 (internal quotation marks and citation omitted). The injustice to the individuals affected is no less.

II

Even if I agreed with the Court that the Due Process Clause is violated only when there is lack of "fair warning" of the impending retroactive change, I would not find such fair warning here. It is not clear to me, in fact, what the Court believes the fair warning consisted of. Was it the mere fact that "[t]he year and a day rule is widely viewed as an outdated relic of the common law"? *Ante*, at 11. So are many of the elements of common-law crimes, such as "breaking the close" as an element of burglary, or "asportation" as an element of larceny. See W. LaFave & A. Scott, Criminal Law 631–633, 708–710 (1972). Are all of these "outdated relics" subject to retroactive judicial rescission? Or perhaps the fair warning consisted of the fact that "the year and a day rule has been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue." *Ante*, at 11. But why not count in petitioner's favor (as giving him no reason to expect a change in law) those even more numerous jurisdictions that have chosen *not* "recently to have addressed the issue"? And why not also count in petitioner's favor (rather than *against* him) those jurisdictions that have abolished the rule *legislatively*, and those jurisdictions that have abolished it through *prospective* rather than *retroactive* judicial rulings (together, a large majority of the abolitions, see 922 S. W. 2d, at 397, n. 4, 402 (listing statutes and cases))? That is to say, even if it was predictable that the rule would be changed, it was *not* predictable that it would be changed *retroactively*, rather than in the *prospective* manner to which legislatures are restricted by the *Ex Post Facto* Clause, or in the *prospective* manner that most other courts have employed.

In any event, as the Court itself acknowledges, "[d]ue process . . . does not require a person to apprise himself of

the common law of all 50 States in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law that has not yet made its way to his State." *Ante*, at 12. The Court tries to counter this self-evident point with the statement that "[a]t the same time, however, the fact that a vast number of jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed," *ibid.* This retort rests upon the fallacy that I discussed earlier: that "expected or defensible" "abolition" of prior law was approved by *Bouie*. It was not– and according such conclusive effect to the "defensibility" (by which I presume the Court means the "reasonableness") of the change in law will validate the retroactive creation of many new crimes.

Finally, the Court seeks to establish fair warning by discussing at great length, *ante*, at 12–15, how unclear it was that the year-and-a-day rule was ever the law in Tennessee. As I have already observed, the Supreme Court of Tennessee is the authoritative expositor of Tennessee law, and has said categorically that the year-and-a-day rule was the law. Does the Court mean to establish the principle that fair warning of impending change exists– or perhaps fair warning can be dispensed with– when the prior law is not crystal clear? Yet another boon for retroactively created crimes.

I reiterate that the only "fair warning" discussed in our precedents, and the only "fair warning" relevant to the issue before us here, is fair warning *of what the law is*. That warning, unlike the new one that today's opinion invents, goes well beyond merely "safeguarding defendants against *unjustified* and *unpredictable* breaks with prior law," *ante*, at 10 (emphasis added). It safeguards them against *changes in the law after the fact*. But even

accepting the Court's novel substitute, the opinion's conclusion that this watered-down standard has been met seems to me to proceed on the principle that a large number of almost-valid arguments makes a solid case. As far as I can tell, petitioner had nothing that could fairly be called a "warning" that the Supreme Court of Tennessee would retroactively eliminate one of the elements of the crime of murder.

* * *

To decide this case, we need only conclude that due process prevents a court from (1) acknowledging the validity, when they were rendered, of prior decisions establishing a particular element of a crime; (2) changing the prior law so as to eliminate that element; and (3) applying that change to conduct that occurred under the prior regime. A court would remain free to apply common-law criminal rules to new fact patterns, see *ante*, at 9–10, so long as that application is consistent with a fair reading of prior cases. It would remain free to conclude that a prior decision or series of decisions establishing a particular element of a crime was in error, and to apply that conclusion retroactively (so long as the "fair notice" requirement of *Bouie* is satisfied). It would even remain free, insofar as the *ex post facto* element of the Due Process Clause is concerned, to "reevaluat[e] and refin[e]" the elements of common-law crimes to its heart's content, so long as it does so prospectively. (The majority of state courts that have abolished the year-and-a-day rule have done so in this fashion.) And, of course (as Blackstone and the Framers envisioned), legislatures would be free to eliminate outmoded elements of common-law crimes for the future *by law*. But what a court cannot do, consistent with due process, is what the Tennessee Supreme Court did here: avowedly *change* (to the defendant's disadvantage) the criminal law governing past acts.

For these reasons, I would reverse the judgment of the Supreme Court of Tennessee.