UNITED STATES V. CHRYSLER: THE CONFLICT BETWEEN FAIR WARNING AND ADJUDICATIVE RETROACTIVITY IN D.C. CIRCUIT ADMINISTRATIVE LAW

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INTRODUCTION

Administrative agency regulations are perhaps the primary source of law in this country.[1] Federal agencies are often charged with the difficult task of promulgating and enforcing complicated, technical regulatory systems. Congressionally enacted statutes create agencies and authorize them to enforce statutory schemes.[2] Depending upon the specific statute, an agency can use rulemaking, adjudication, or both to complete its statutory mission.[3] When invoking its rulemaking power, an agency considers submissions from interested parties and articulates rules that apply to the entire class of regulated individuals, thereby roughly acting as a legislative body.[4] On the other hand, an agency exerting its adjudicative power interprets and applies a statute

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1 See Henry J. Friendly, New Trends in Administrative Law, Md. B.J., Apr. 1974, at 9, 9 (defining administrative law to include "the entire range of action by government with respect to the citizen or by the citizen with respect to the government, except for those matters dealt with by the criminal law [and private litigation]"). Friendly's definition is basically gospel. See 1 Kenneth Culp Davis, Administrative Law Treatise § 1:1, at 2 (2d ed. 1978) ("Probably no one can speak with more authority than Judge Friendly on this subject, and his conclusion is persuasive on its merits. The only doubt is whether 'matters dealt with by the criminal law' should be excluded.").

2 See, e.g., National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (1994) (labor-management disputes); Clean Air Act, 42 U.S.C. §§ 7401-7671g (1994) (air pollution); National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 103-272, 108 Stat. 1379 (codified as amended in scattered sections of 15, 49 U.S.C.) (highway safety).

3 See E. Donald Elliott, Re-Inventing Rulemaking, 41 Duke L.J. 1490, 1492 (1992) ("It is a fundamental principle of administrative law that these [statutory and due process] rights of participation can be properly respected in adjudication as well as rulemaking; therefore, the choice between the two procedures can and should be left to the agency."). Some agencies lack statutory authority to proceed by one method or the other. See, e.g., Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 616-18 (1944) (holding that Fair Labor Standards Act gives Wage and Hour Administrator power to engage in rulemaking but not adjudication).

4 See generally Peter L. Strauss et al., Gellhorn & Byse's Administrative Law 43-46 (9th ed. 1995) (describing rulemaking).

and/or regulations to particular facts in a fashion similar to a judicial body: It listens to arguments from the specific party or parties before it and decides those questions necessary to resolve a particular dispute.[5]

Most agencies use some mix of rulemaking and adjudication[6] and have discretion to choose between them.[7] Most commentators and courts prefer rulemaking, as the process seems more fair and is thought to lead to better decisions.[8] However, flexibility to use adjudication is necessary, especially for technical and scientific subjects, because regulations that seem clear when implemented often become ambiguous in light of experience and changed circumstances.[9] Agencies, therefore, frequently use adjudication to resolve interstitial interpretive disputes.[10]

The United States Court of Appeals for the District of Columbia is entrusted with the bulk of the work of reviewing administrative

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5 See generally id. at 46-47 (describing adjudication).

6 See Martin v. OSHRC, 499 U.S. 144, 151 (1991) (noting that typical agencies use both adjudication and rulemaking).

7 See SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 203 (1947); see also Russell L. Weaver, *Chenery II*: A Forty-Year Retrospective, 40 Admin. L. Rev. 161, 207 (1988) ("Forty years after the *Chenery II* decision, [it] has become firmly entrenched.... [M]ost courts allow agencies to exercise their adjudicatory power largely free of constraints.").

8 See Jonathan R. Siegel, Textualism and Contextualism in Administrative Law, 78 B.U. L. Rev. 1023, 1070 (1998) ("[S]cholars and courts generally agree that it is better for agencies to formulate rules via the rulemaking process."). Professor Siegel offers four reasons for this conclusion:

> First, when agencies formulate rules as incidental by-products of adjudication, other parties who may be affected by the rule have no right to participate. Unless potentially affected parties happen to become aware of the adjudication and receive permission to participate, the agency will not receive the benefit of the wider public participation that accompanies notice-and-comment rulemaking. Second, rulemaking is fairer because rules give advance notice of legal requirements, whereas an adjudication may determine the rights of parties retroactively. Third, rulemaking may yield a more detailed code that gives better notice of legal requirements than can be accomplished by the articulation of principles in adjudications. Finally, a rulemaking process that considers a subject area generally may permit an agency to articulate a better rule than a process focusing on the facts of particular cases.

Id. at 1070-71 (footnotes omitted).

9 See *Chenery II*, 332 U.S. at 202:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order.

10 See Strauss et al., supra note 4, at 430-35 (noting pressure on agencies to use rulemaking has increased steadily since 1970s but many agencies still make frequent use of adjudication).

agency decisions for constitutional and statutory validity.[11] The D.C. Circuit has applied two conflicting modes of judicial review to agency interpretations of arguably ambiguous regulations. One longstanding line of cases allows agencies to apply new interpretations of regulations retroactively.[12] In these cases, the court has reasoned that, given sufficiently important public interests, agencies may implement retroactive rules as incidental to their adjudicative power.[13] A more recent line of cases, typified by *United States v. Chrysler Corp.*,[14] reverses agency action where regulated parties do not have fair warning of the agency's interpretation of its regulations.[15]

The difference between the two rules is important. The fair warning rule protects procedural fairness by "'opening up large loopholes allowing conduct which should be regulated to escape regulation.'"[16] Given the importance of administratively promulgated law to public health, environmental protection, and nearly every other aspect of substantive law,[17] such loopholes should not be overlooked. Any written regulation contains ambiguity,[18] and it should come as no surprise if many parties obliged to obey expensive regulations attempt to avoid compliance by arguing that the regulations are not clear enough to provide fair warning.

Chrysler demonstrates that the two rules conflict because they provide different modes of analysis for, and often different conclu-

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[11] See Patricia M. Wald et al., The Contribution of the D.C. Circuit to Administrative Law, 40 Admin. L. Rev. 507, 508-14 (1988) (explaining D.C. Circuit's leadership in administrative law, including discussion of exclusive jurisdiction over many administrative appeals).

[12] See, e.g., Cassell v. FCC, 154 F.3d 478, 486-87 (D.C. Cir. 1998) (affirming retroactive interpretation of agency regulation); Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1553-55 (D.C. Cir. 1993) (same).

[13] For a detailed discussion of the retroactivity rule, see infra Part II.A.

[14] 158 F.3d 1350 (D.C. Cir. 1998).

[15] See id. at 1357 ("Because we find that [the agency] failed to provide adequate notice of what it now believes is the appropriate pelvic body block placement when testing for compliance under Standard 210, Chrysler cannot be compelled to recall its 1995 Cirrus and Stratus cars."). The fair warning rule is discussed in depth infra Part II.B.

[16] Freeman United Coal Mining Co. v. Federal Mine Safety & Health Review Comm'n, 108 F.3d 358, 362 (D.C. Cir. 1997) (quoting Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 730 (6th Cir. 1980)). How the fair warning rule opens these loopholes is discussed infra Part III.B.

[17] See supra notes 1-2 (discussing breadth of administrative law and providing examples of administrative agencies).

[18] See Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 528 (1947):

> Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision.

sions to, the same legal issue arising from the same underlying factual circumstances. An agency resolving an ambiguity in an adjudication has a choice: It can admit that the ambiguity was present, resolve the ambiguity, and retroactively apply the clarified regulation;[19] or, the agency can argue that the regulation was sufficiently clear, and apply the clarified interpretation by saying, in effect, "that's what we meant all along."[20] The agency's choice of label does not change the formal legal effects of the agency's regulatory system, but the D.C. Circuit appears to alter the nature of judicial review significantly based on such a characterization.

In *Chrysler*, the agency never took the position that its interpretation was retroactive but rather argued that the agency's interpretation had never changed and that Chrysler did receive fair warning.[21] If the agency had characterized its interpretation as new and retroactive, the D.C. Circuit would likely have affirmed the agency action.[22] Instead, the D.C. Circuit reversed the agency's action,[23] thereby ignoring the public interest in highway safety.

Presumably, some party will present the conflict between the retroactivity and fair warning rules to the D.C. Circuit.[24] Until then, all federal agencies and parties controlled by federal administrative regulations have strong reason to question whether a given regulation is sufficiently clear. The court should resolve the tension between the rules by narrowing the scope of the fair warning rule and allowing the retroactivity rule to control borderline cases.

This Comment will analyze the fair warning rule in three Parts. Part I chronicles the *Chrysler* litigation. Part II summarizes the current state of the two competing doctrines of fair warning and retroactivity. Part III argues that the current articulation of the fair warning rule is overly broad in two ways. First, while the rule is rooted in due

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19 See, e.g., General Am. Transp. Corp. v. Interstate Commerce Comm'n, 872 F.2d 1048, 1061 (D.C. Cir. 1989) (affirming retroactive application of regulation and agreeing with agency's reasoning on retroactivity).

20 See, e.g., Letter from Ricardo Martinez, Administrator, National Highway Traffic Safety Administration, to Dale Dawkins, Director, Vehicle Compliance and Safety Affairs, Chrysler Corp. (June 4, 1996) (on file with the *New York University Law Review*) (arguing that agency's interpretation of testing procedure was "long-standing").

21 See *Chrysler*, 158 F.3d at 1355; see also supra note 20.

22 This point assumes that the public interest in automobile safety furthered by the recall outweighed Chrysler's interest in a prospective-only rule. See Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 389-90 (D.C. Cir. 1972) (establishing precise test for permissible retroactivity). *Retail, Wholesale*'s test is discussed infra Part II.A, and is applied to the facts of *Chrysler* infra text accompanying notes 57-59.

23 See *Chrysler*, 158 F.3d at 1357.

24 In *Chrysler*, the government apparently did not. See id. at 1354 (noting that government did not dispute validity of fair warning rule but instead offered incomprehensible argument that rule did not apply in this case).

process, it now extends further than due process concerns warrant.[25] The retroactivity rule, by contrast, more accurately balances the procedural concerns of regulated parties with the general public interest.[26] Second, the overly broad fair warning rule creates perverse incentives for regulated parties and administrative agencies, incentives which ultimately call into question the rule's efficacy at creating clear regulations and which hinder the efforts of agencies to pursue their statutory objectives effectively.[27] The retroactivity rule, on the other hand, fosters cooperation between agencies and regulated parties by encouraging regulated parties to seek administrative clarifications of ambiguous regulations before disputes arise.

I

UNITED STATES V. CHRYSLER CORP.

While it is not the only case applying the fair warning rule, *Chrysler* clearly exemplifies the cross-currents in the D.C. Circuit's administrative jurisprudence. The case centers around regulations issued by the National Highway Traffic Safety Administration (NHTSA), the federal administrative agency in charge of highway safety.[28] These regulations required automobile manufacturers to install seatbelts that pass certain strength tests.[29] Although the regulations and technical manuals defined the tests with some specificity,[30] there were ambiguities. For example, the tests required the use of an L-shaped "body block" to simulate a human pelvis in the safety belt as weight is applied, but the regulations did not specify exactly where the block should be placed.[31] Remarkably, for thirty years neither the agency nor any of the automobile manufacturers considered the placement of the body block; no one had any reason to believe that any particular placement of the body block would alter the test results.[32]

In a routine test, an agency engineer surreptitiously discovered that certain automobiles, one model year of both the Chrysler Concorde and Plymouth Cirrus, failed the seatbelt strength test with the body block in a particular position; the seatbelt was ripped from the floor of the car.[33] The automobiles did pass the test, however, with

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25 See infra notes 86-104 and accompanying text.

26 See infra notes 105-06 and accompanying text.

27 See infra Part III.B.1.

28 See 49 U.S.C. § 30111 (1994) (allocating authority to promulgate regulations concerning vehicle safety).

29 See *Chrysler*, 158 F.3d at 1351-52.

30 See id. (specifying weight and time requirements).

31 See id.

32 See id. at 352.

33 See id.

the body block in another position.[34] While Chrysler argued that the cars were safe, NHTSA demanded a recall in order to increase the strength of the seatbelts.[35]

After an administrative adjudication in which the agency explained its interpretation of the regulation as specifying the proper placement of the body block so as to further the regulation's purpose of increasing auto safety, the agency brought an enforcement proceeding in federal court.[36] Chrysler argued that it could not have complied with the regulation at the time the automobile was manufactured because it could not have known where the body block should have been placed.[37] NHTSA relied on broad policy statements to argue that Chrysler should have known of the agency's interpretation.[38] The D.C. Circuit, analyzing the question of whether the defendant had fair warning of the agency's interpretation of the regulation, agreed with Chrysler and therefore did not require Chrysler to recall the automobiles.[39] However, all future Chrysler automobiles, as well as cars from all other manufacturers, must comply with the clarified strength test, because the administrative adjudication and federal court proceedings serve to provide notice of the agency's interpretation.[40] This result puts the automotive industry and NHTSA in exactly the same positions they would have been in if the agency had announced its interpretation in the Chrysler administrative adjudication but decided to apply it only prospectively.

While the *Chrysler* decision is typical in applying the fair warning rule, the decision is aberrational in ignoring the retroactivity rule. In order to explicate the tension between the two rules, it is necessary to explain more fully their origins and scopes.

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34 See id.

35 See id.

36 See id. at 1352, 1355-56. NHTSA filed an action in the federal district court, as required by the statute, and after that court's decision, both parties appealed to the D.C. Circuit. See id. at 1352.

37 See id. at 1355.

38 See id. at 1352 ("NHTSA asserted that, pursuant to a 1991 Federal Register notice, manufacturers must pass the strength test 'with the safety belt and other vehicle features at any adjustment' whenever a standard does not indicate the specific test conditions." (quoting 56 Fed. Reg. 63,676, 63,677 (1991))).

39 See id. at 1354-57.

40 See Kenneth K. Kilbert & Christian J. Helbling, Interpreting Regulations in Environmental Enforcement Cases: Where Agency Deference and Fair Notice Collide, 17 Va. Envtl. L.J. 449, 474 (1998):

> In subsequent cases involving the same or different defendants, the regulated parties would have fair notice of the [agency's] interpretation from the published [adjudication] in the previous case. That is, the defendants could be held liable for violations occurring after the date of the previous [adjudicative] decision involving the same issue.

II
THE FAIR WARNING AND RETROACTIVITY RULES EXPLAINED

The two rules apply in a situation like *Chrysler*, where an administrative agency promulgates a regulation and seeks to enforce it against a private party in an adjudication. When ambiguity in an agency's rule becomes apparent in the adjudication, the agency may clarify its interpretation of the rule as it applies to that particular party. In analyzing this situation, the court's use of both the fair warning rule and the retroactivity rule attempt to deal with the same underlying tension between fairness to the regulated party and the public need for effective regulations. However, the rules differ in their approach and often in their outcome. Retroactive interpretations are generally allowed unless they work manifest injustice, which is measured by comparing the statutory interest in retroactivity with the burden on the private party.[41] By contrast, the fair warning rule prohibits interpretations from applying to a party that could not have had adequate notice of the agency's interpretation at the time of the conduct that violates the regulation.[42]

A. The Retroactivity Rule

Retroactive laws are generally not favored because individuals of "'ordinary intelligence [should have] a reasonable opportunity to know what is prohibited, so that [they] may act accordingly.'"[43] However, retroactivity is necessary and allowed in many circumstances. Courts developing common law, and to some extent interpreting statutes, traditionally apply new rules retroactively at least to the parties before them.[44] They must, for otherwise parties have no reason to litigate novel claims and potentially have no Article III standing.[45]

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41 See infra Part II.A.

42 See infra Part II.B.

43 John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 669 (1996) (second alteration in original) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)); accord Landgraf v. USI Film Products, Inc., 511 U.S 244, 265 (1994):

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

44 See Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 Harv. L. Rev. 1055, 1059-60 (1997) (discussing adjudicative retroactivity).

45 See, e.g., Bennett v. Spear, 117 S. Ct. 1154, 1161 (1997) (noting that, in order to satisfy Constitution's case or controversy requirement, plaintiff must demonstrate injury in

The legislature can implement retroactive laws, although only within fairly narrow constitutional constraints.[46]

Administrative agencies, in their quasi-judicial role, have retroactive policymaking power.[47] Agencies have long used adjudicatory retroactivity to further their statutory obligations.[48] It often is simply necessary:

> [R]egulatory drafters are not omniscient, and even with best efforts cannot always anticipate and provide for all possible situations which may arise. When existing statutes or regulations fail to adequately address a problem, agency personnel must do so. If there is time, they can do so by informal rule. But there is not always time. If an interpretive problem arises in a case, it may be impossible or impractical to use informal processes. . . . In many cases, the agency has little choice but to declare the new adjudicative rule. The agency must decide the case.[49]

Since prospective-only application of new legal rules in adjudications is disfavored,[50] the retroactive effect from such an administrative adjudication is generally upheld unless it works "manifest injustice."[51]

In the D.C. Circuit, a five-factor balancing test determines the precise boundaries of retroactivity for administrative agency interpretation announced in adjudications.[52] This test is designed to protect

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fact that is fairly traceable to defendant, and that plaintiff's injury is likely to be redressed by favorable decision).

46 See Fisch, supra note 44, at 1063-66 (discussing legislative retroactivity).

47 See William V. Luneburg, Retroactivity and Administrative Rulemaking, 1991 Duke L.J. 106, 106 ("Administrative agencies may make both prospective and retroactive policy because they are vested with quasi-legislative and quasi-adjudicatory powers. The legislative role correlates with prospective administrative policymaking and with agency rulemaking functions. The judicial role is evidenced by retrospective policymaking via adjudication.").

48 See, e.g., SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 207 (1947) (affirming retroactive application of rule announced by SEC in administrative adjudication).

49 Weaver, supra note 7, at 168-69 (footnotes omitted).

50 The promulgation of prospective-only rules in adjudicative proceedings effectively recreates rulemaking without the proper procedures. See NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764-66 (1969) (invalidating prospective-only adjudicative rule); see also Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 220-21 (1988) (Scalia, J., concurring) (interpreting *Wyman-Gordon* to suggest that "adjudication could *not* be purely prospective, since otherwise it would constitute rulemaking").

51 See Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) ("[W]hen as an incident of its adjudicatory function an agency interprets a statute, it may apply that new interpretation in the proceeding before it. . . . Nevertheless, a retrospective application can properly be withheld when to apply the new rule to past conduct or prior events would work a 'manifest injustice.'" (citation and internal quotation marks omitted)).

52 See Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972):

regulated parties' legitimate reliance on established legal rules.[53] Three of the factors relate to the novelty of the rule and, therefore, are proxies for reliance interests.[54] In cases such as *Chrysler*, where the agency is clarifying a heretofore undiscovered ambiguity, reliance interests are at their nadir.[55] As a result, the balancing test ultimately is resolved by comparing the remaining two factors: the burden of the defendant in complying and the statutory benefit to be gained.[56]

The *Chrysler* case is a helpful example. If the court had applied the retroactivity rule, the agency's action would likely have been upheld. Since the proper placement of the pelvic body block was an issue of first impression,[57] Chrysler had no legitimate reliance interests at stake.[58] That leaves the court to balance the burden on Chrysler in complying with the agency's interpretation of the regulation with the statutory interest in public safety to be effectuated. The penalty on Chrysler would have been an order to recall the effected automobiles, by its own admission, "relatively inexpensive and easy to accomplish."[59] Given the significant statutory interest in public safety from strengthened seatbelts, the balance seems to weigh heavily in favor of retroactive application.

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard

53 See NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (suggesting that judicial review is stricter when retroactive application creates new liability "for past actions . . . taken in good-faith reliance on [agency] pronouncements").

54 It is unfair to penalize a regulated party for relying on clear rules when planning its activities. By contrast, unclear legal norms predictably encourage parties to steer clear of potentially illegal activity to reduce the risk of penalty or liability. See Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 385 (1985) ("Because standards do not draw a sharp line between permissible and impermissible conduct, some risk-averse people will be chilled from engaging in desirable or permissible activities . . . ."). While this ambiguity discourages activity that might turn out to be legal, it also reduces the unfairness of penalizing a party for entering the gray area. For further discussion, see infra note 67 and accompanying text.

55 See Williams Natural Gas Co. v. Federal Energy Regulatory Comm'n, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (distinguishing cases of first impression from cases reversing settled law, and noting that retroactivity in deciding cases of first impression is much more palatable because of reduced reliance).

56 See supra note 52 (listing factors).

57 See United States v. Chrysler Corp., 995 F. Supp. 150, 157 (D.D.C. 1998) (describing case as "first instance" in which NHTSA provided explicit interpretation as to pelvic body block placement), rev'd, 158 F.3d 1350 (D.C. Cir. 1998).

58 See supra note 55 and accompanying text.

59 *Chrysler*, 995 F. Supp. at 164 (quoting Chrysler's Memorandum in Support of Summary Judgement, at 5).

The retroactivity rule, however, is not a blank check for administrative agencies. The federal courts can, and will, reverse agency action when the public interest in the retroactive application of the rule is not sufficiently clear, not sufficiently important, or outweighed by significant unfairness to the regulated party.[60] The court may send the proceeding back to the agency[61] or grant judgment to the defendant.[62] Regardless, the interpretation of the regulation is still applicable prospectively.[63] The D.C. Circuit will also reverse an agency action when the agency insufficiently explains its decision to apply a rule retroactively.[64]

Retroactivity is not without its costs. First, a party subjected to retroactive application of an agency interpretation is penalized for noncompliance with a rule that did not exist, or, more precisely, did not clearly exist at the time of the conduct that created the noncompliance.[65] This unfairness, however, may be outweighed by the statutory interest in retroactivity.[66] Second, the existence of ambiguity that might be resolved against regulated parties creates the likelihood that parties "will conform their conduct to a wide array of possible interpretations of the governing law, to avoid penalties, thereby reducing their spectrum" of choices available in planning their affairs.[67] Professor Abner Greene notes the liberty costs of such overdeterrence,[68] but the well-rehearsed case for economic efficiency lies only slightly beneath his argument.

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60 See, e.g., Consolidated Freightways v. NLRB, 892 F.2d 1052, 1058-59 (D.C. Cir. 1989) (modifying NLRB order to account for regulated party's reliance on "long-established practice"); Gilbert v. Federal Mine Safety and Health Review Comm'n, 866 F.2d 1433, 1442-43 (D.C. Cir. 1989) (reversing agency action that involved abrupt departure from settled policy, reliance interest, and unfair burden on regulated party); Natural Resources Defense Council, Inc. v. Thomas, 838 F.2d 1224, 1246-48 (D.C. Cir. 1988) (reversing EPA action because statutory interests in retroactivity were minimal and reliance interests were insufficiently addressed); Sierra Club v. EPA, 719 F.2d 436, 468 (D.C. Cir. 1983) (remanding EPA action for reformulation of new rule to take reliance interests into account).

61 See, e.g., *Sierra Club*, 719 F.2d at 468 (remanding case to EPA).

62 See, e.g., *Consolidated Freightways*, 892 F.2d at 1059 (granting modification of Board's order).

63 See, e.g., *National Resources Defense Council, Inc.*, 838 F.2d at 1247 (distinguishing between acts prior to and after announcement of regulation).

64 See Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 748 (D.C. Cir. 1986) (invalidating retroactive change in policy in absence of any explanation by FCC for change).

65 See Abner S. Greene, Adjudicative Retroactivity in Administrative Law, 1991 Sup. Ct. Rev. 261, 263-66 (considering this unfairness contrary to "rule of law" values).

66 See supra text accompanying note 56.

67 Greene, supra note 65, at 283.

68 See id. (arguing that overdeterrence unfairly impinges upon range of choices for regulated parties).

B. *The Fair Warning Rule*

The D.C. Circuit's fair warning rule is newer than the retroactivity rule and still developing. While the court gives great deference to an agency's interpretation of its own regulations, it will reverse the application of an interpretation against a particular party when the party was not provided with fair warning of the agency's interpretation.[69] This rule is typically applied when an agency's interpretation is announced in an adjudication detrimental to a party, such as a finding of a violation of a federal regulatory regime, and implemented by providing the party to that adjudication a reprieve from the new interpretation.[70] The practical effect of the fair warning rule is to allow only prospective applications of the newly clarified interpretation, because both the administrative proceeding and the judicial review warn regulated parties of the agency's interpretation.[71]

The exact boundaries of the fair warning rule are unclear, but there are a few certainties. First, the analysis focuses on the potential for the defendant, at the time of the conduct that is the subject of the proceeding, to predict the agency's interpretation of the regulation.[72] The court does not consider the magnitude of the substantive burden ultimately imposed on the defendant in complying with the regulation,[73] or the public interest in imposing the duty.[74] For example, it is ostensibly irrelevant whether the defendant is required to abandon a multibillion-dollar investment in order to achieve some minor bureaucratic goal, or whether the defendant is required to expend marginal resources to effectuate an automobile recall in order to greatly improve automobile safety.[75] Second, the analysis centers on the perspective of the defendant, not the agency, in that it only inquires into the defendant's ability to predict the agency's interpretation.[76] The

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69 See, e.g., General Elec. Co. v. EPA, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) ("In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.").

70 See, e.g., id. at 1329-34 (applying fair notice rule to reverse liability finding and imposition of fine).

71 See supra note 40.

72 See United States v. Chrysler Corp., 158 F.3d 1350, 1355-57 (D.C. Cir. 1998) (analyzing whether defendant could predict agency's interpretation).

73 The court has considered, as a threshold matter, whether the sanction in particular cases is sufficient to trigger the protections of the fair warning rule, see supra notes 86-88 and accompanying text, but has not applied a different notice standard depending upon the severity of the sanction.

74 See *Chrysler*, 158 F.3d at 1355-57.

75 Recall that in *Chrysler*, the recall would not have been difficult or expensive for Chrysler to implement. See supra note 59 and accompanying text.

76 See *Chrysler*, 158 F.3d at 1354-57.

rule does not ask whether the agency could have foreseen and corrected the ambiguity at the time the regulation was drafted.[77]

Other aspects of the fair warning rule are less than settled. First, the precise relevance of unofficial statements about the agency's interpretation is unclear. In one case, the court mentioned conflicting advice given from different divisions of an agency as a factor leading the court to conclude that the defendant did not have fair warning of the agency's interpretation.[78] Clearly, each piece of advice (since conflicting) could not have been binding on the agency. However, the D.C. Circuit also has refused to consider statements from outside the agency with respect to the agency's interpretation.[79] The court has clarified, though, that "pre-enforcement efforts to bring about compliance," such as a statement that a party must seek a permit before undertaking some activity, can provide notice.[80]

A second unresolved aspect of the fair warning rule is the degree of ambiguity required for a regulation to violate the fair warning rule. One case appeared to say that if a regulation is susceptible to two reasonable interpretations, then the agency could not enforce either interpretation without additional warning.[81] This statement of the rule is incredibly broad, since many technical regulations contain at least latent ambiguities.[82] Other cases seem to imply that the existence of two reasonable interpretations is a necessary but not sufficient condition for the regulated party's victory under the fair warning rule.[83] These cases imply that to show the absence of fair warning, the agency's interpretation must also be so distant from the obvious or most natural reading of the regulation as to be unpredictable.[84] This seems to mean that the agency's interpretation must be "beyond the

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77 See id.

78 See General Elec. Co. v. EPA, 53 F.3d 1324, 1332 (D.C. Cir. 1995) (noting fact that different divisions of EPA disagreed on interpretation of regulation as "yet more evidence" that regulation did not provide fair notice).

79 See Gates & Fox Co. v. OSHRC, 790 F.2d 154, 157 (D.C. Cir. 1986) (finding citation from nonagency safety inspector insufficient to meet notice requirement).

80 See *General Elec.*, 53 F.3d at 1329.

81 See Satellite Broad. Co. v. FCC, 824 F.2d 1, 3-4 (D.C. Cir. 1987) (finding insufficient notice where both agency's and defendant's interpretations were reasonable).

82 See supra text accompanying note 49.

83 See, e.g., *General Elec.*, 53 F.3d at 1330-33 (reversing finding of liability where, in addition to other factors, agency's interpretation of regulations was permissible).

84 Compare United States v. Chrysler Corp., 158 F.3d 1350, 1357 (D.C. Cir. 1998) ("Chrysler might have satisfied NHTSA with the exercise of extraordinary intuition or with the aid of a psychic, but these possibilities are more than the law requires.") with Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 585 (D.C. Cir. 1997) (noting that "[a]nyone considering" regulation "should have thought that it might imply" agency's interpretation and thus concluding that regulation provided sufficient notice).

pale" or near the outer edges of reasonableness before the fair warning rule kicks in.

In addition, the Circuit has not clearly articulated whether it is relevant that a party could have sought clarification of the regulation from the administrative agency. The court has rejected an argument that the defendant should have asked the agency its interpretation with the following reasoning: Since the agency did not internally agree on the proper interpretation, there is no guarantee that the defendant would have received the correct answer to any query.[85] This holding certainly leaves open the possibility that defendants could be required to make good faith efforts to clarify the agency's position through normal regulatory processes, although the court has not addressed this argument again.

A final ambiguity in the fair warning rule concerns the kind of liability or penalty that triggers the rule's protections. The D.C. Circuit has analyzed the sanction imposed in each case to determine whether it is sufficient. Criminal fines clearly trigger the rule,[86] as do civil penalties.[87] *Chrysler* held that a civil order forcing significant expenditures was the effective equivalent of a fine and therefore the fair warning rule applied.[88] Since the court analyzes the sanction in each case, there appears to be some line below which no notice is required. Since the court has yet to find a case where the rule did not apply, it is impossible to tell how low that line is drawn, or if it really exists at all.

The fair warning and retroactivity rules, then, are similar in several ways, but differ in important respects. They both apply to the same factual circumstance, but presently the D.C. Circuit appears to choose between the rules based on how the agency characterizes its action: as an admittedly new but retroactive rule or as a clarified explication of a rule previously laid down. Because the rules differ completely in their analysis, and often yield disparate results, the D.C. Circuit must eventually resolve the conflict between them.

III
THE FAIR WARNING AND RETROACTIVITY RULES COMPARED

The primary question when choosing between the fair warning and retroactivity rules is whether the Constitution requires either of them. Both rules deal with the same policies that underlie much due

[85] See Rollins Envtl. Serv. Inc. v. EPA, 937 F.2d 649, 654 (D.C. Cir. 1991) (expressing concern with imposing serious penalty based on "such fortuity").

[86] See Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986).

[87] See *General Elec.*, 53 F.3d at 1328-29.

[88] See *Chrysler*, 158 F.3d at 1354-55.

process jurisprudence. However, the Constitution requires the fair warning rule only in a narrow set of cases. In nonconstitutional cases, the D.C. Circuit should apply whichever rule, as a matter of policy, best effectuates those policies. An analysis of the incentives provided by the rules reveals that the retroactivity rule better encourages agencies and regulated parties toward optimal behavior.

A. Due Process

Historically and legally, the fair warning rule started with the Due Process Clause's void-for-vagueness doctrine. Since then, however, the fair warning rule has expanded, so that the current articulation of the fair warning rule reaches cases beyond this constitutional scope.

The D.C. Circuit has not spoken with one voice about the current relationship between the fair warning rule and due process. An opinion by then-Judge Scalia, which first brought the fair warning rule to the Circuit, clearly found the rule to be required by the Due Process Clause.[89] The court has since articulated the role of due process in the development of the fair warning rule differently, but has backpedaled from the conclusion that a violation of the fair warning rule is necessarily unconstitutional.[90] Judge Silberman has written that the rule is a "[t]raditional concept[ ] of due process incorporated into administrative law."[91] Chief Judge Edwards has argued that the rule is a nonconstitutional principle of "basic hornbook law in the administrative context . . . the breach of which is so egregious that the courts have gone so far as to hold that a lack of notice may offend the [D]ue [P]rocess [C]lause."[92]

Traditional due process doctrine holds that "an enactment is void for vagueness if its prohibitions are not clearly defined."[93] However, the fair warning rule is well beyond the scope of the constitutional void-for-vagueness doctrine on several counts. Two rationales are given for the vagueness rule: "*first*, that notice be given to those who may run afoul of the enactment and, *second*, that the enactment channel the discretion of those who enforce it."[94] The first reason clarifies

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89 See *Gates & Fox*, 790 F.2d at 156.

90 See Rollins Envtl. Serv. Inc. v. EPA, 937 F.2d 649, 655 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part) (arguing that fair warning rule is not necessarily constitutional but "simple principle of administrative law"); see also *General Elec.*, 53 F.3d at 1328 (citing Edward's opinion in *Rollins* for proposition that fair warning "principle is not constitutional").

91 Satellite Broad. Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987).

92 *Rollins*, 937 F.2d at 649, 654 n.1, 655 (Edwards, J., dissenting in part and concurring in part).

93 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

94 United States v. Thomas, 864 F.2d 188, 194 (D.C. Cir. 1988).

that there are definite due process concerns underlying the fair warning rule. As will be shown, the second rationale does not apply in the agency context because the fair warning rule only marginally acts to channel agency discretion.

Professor John Manning has argued that broad agency power to interpret its own regulations "might mask arbitrary treatment behind plausible but disingenuous distinctions."[95] However, the control of agency discretion by judicial review is not substantively altered by the fair warning rule, as an agency can still create its regulatory regime and receive deference as to its meaning; at best, the fair warning rule restrains discretion of agencies in that it requires the procedural step of clarifying the regulations before enforcement actions. The void-for-vagueness rule restrains discretion of law enforcement officials by prohibiting enactments that effectively allow officials to arbitrarily select individuals as subject to the constraints of the enactment based on unreviewable, subjective evaluations.[96] In fair warning cases, however, regardless of the clarity of a regulation ex ante, defendants have not argued that the agency's selection of the defendant for enforcement was based on unbridled discretion or nonobjective criteria. Rather, defendants have argued that they could not have predicted what the objective interpretation of the regulation would be at the time of the conduct that gave rise to the proceeding.[97]

Another reason that the fair warning rule is not required by its void-for-vagueness underpinnings is that the vagueness doctrine is substantially more lax in economic and regulatory affairs than in the realm of personal liberty. The Supreme Court stated in *Village of Hoffman Estates v. The Flipside, Inc.*:[98]

> The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to

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[95] Manning, supra note 43, at 674.

[96] See *Grayned*, 408 U.S. at 108-09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."); see also Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972) ("Another aspect of the [vagrancy] ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the Jacksonville police.").

[97] See, e.g., General Elec. Co. v. EPA, 53 F.3d 1324, 1332 (D.C. Cir. 1995) (accepting defendant's argument that it could not have predicted, at time of conduct, EPA's later interpretation of regulation).

[98] 455 U.S. 489 (1982) (upholding drug paraphernalia law against facial challenge).

> consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.[99]

The D.C. Circuit has taken the first half of this statement to heart; fair warning doctrine has presumed a fairly sophisticated "reasonable person," as can be expected in the business regulatory context.[100] However, the D.C. Circuit has not taken seriously the Court's admonition that regulated enterprises can and should seek to clarify ambiguities in the regulatory structure.[101]

A third way in which the fair warning rule exceeds the scope of due process is by ignoring the seriousness of the penalty in calculating the required precision of the regulation. Modern due process analysis weighs the private party's interest in a particular procedure with the government's burden in establishing it.[102] In the void-for-vagueness arena, that principle takes the shape of a sliding scale, whereby more severe penalties require more clear enactments.[103] For example, criminal statutes require the most clarity,[104] while the tax code is famously incomprehensible.[105] Despite this clear doctrine, the D.C. Circuit's

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99 Id. at 498 (footnotes omitted).

100 See, e.g., *General Elec.*, 53 F.3d at 1330-33 (analyzing regulations in minute detail and noting that even EPA was unclear of regulations' meaning).

101 The court, at least, has not factored the potential for regulated parties to seek clarification of agency regulations into its fair warning analysis; neither has the court firmly rejected the possibility. See supra notes 81-85 and accompanying text.

102 See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976):

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

103 See *Flipside*, 455 U.S. at 498-99 ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

104 See id.

105 See Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65, 68 (1983) (citing tax code as example of "convoluted" regulatory system). Justice White, in understated form, put it this way: "The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." Cheek v. United States, 498 U.S. 192, 199-200 (1991). While violations of the tax code can lead to criminal penalties, that is generally only the case for willful nonpayment of taxes, which requires specific intent to violate a tax provision, see id. at 200, which in turn requires that the defendant understand the tax provision in the first place. See generally Jon Strauss, Nonpayment of Taxes: When Ignorance of the Law *Is* an Excuse, 25 Akron L. Rev. 611 (1992).

fair warning rule purports to require some objective level of specificity regardless of whether the proceeding is criminal or civil in nature, or whether the penalty attached is great or small.[106]

Given that the fair warning rule has expanded beyond the scope of its constitutional origins, Judges Silberman and Edwards are clearly correct that the current rule is not constitutionally required,[107] hence leaving open the question of the source of the modern rule. No opinion has claimed that another constitutional doctrine or statutory scheme requires the broader notice rule. Without a constitutional or statutory basis, the expansive fair warning rule is unmoored common law, legally unstable, and suitable for such modification as experience demonstrates is appropriate. Indeed, Professor John Duffy has argued that judge-made administrative law not required by statute or the Constitution should be rejected generally.[108]

The retroactivity rule, by contrast, more closely parallels the due process interests involved. It inquires into how unclear the regulation was before clarification and probes the defendant's reliance interest in any previous rule.[109] It directly weighs the substantive costs and benefits as required by modern due process jurisprudence, instead of looking at a procedural requirement of clarity as a proxy. In sharp contrast to the fair warning rule, the retroactivity test "attempts to reconcile the interests of the litigants with the overall public interest in effectuation of a statutory scheme . . . [and] is specifically adapted to the unique circumstances of agency attempts to retroactively apply a new policy announced in an administrative adjudication."[110] Therefore, the retroactivity rule is a superior way to address the underlying concerns of the fair notice rule.

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106 The court has decided that small property losses qualify a party for the protection of the fair warning rule. See supra notes 86-88 and accompanying text. The fair warning rule's bite, however, does not decrease with the declining significance of the property deprivation.

107 See supra text accompanying notes 91-92.

108 See John F. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 121-52, 212-15 (1998). The fair warning rule might well be based in the Administrative Procedures Act's prohibition of arbitrary and capricious agency action. See 5 U.S.C. § 706 (1994) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."); Manning, supra note 43, at 670 n.281 (advancing this interpretation of D.C. Circuit fair warning rule). That vague language, of course, does not statutorily require the fair warning rule in its current form. If, as this Comment argues, the retroactivity rule better addresses the concerns underlying the fair warning rule, then the retroactivity rule would be the more appropriate mechanism to police constitutional but arbitrary agency action.

109 See supra Part II.A (describing retroactivity rule).

110 Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n, 826 F.2d 1074, 1093 (D.C. Cir. 1987) (en banc) (Mikva, J., dissenting).

B. Incentives

The fair warning rule, in its current form, is clearly beyond the scope required by due process and less precisely enacts the policies behind due process than the retroactivity rule. The obvious question, then, is whether some overriding policy goal justifies the fair warning rule's scope and imprecision. To answer that question, it is helpful to examine what incentives the fair warning rule provides for administrative agencies and regulated parties. It is not at all clear that the rule will, in fact, lead to clearer regulations in every instance. Ultimately, the fair warning rule may well encourage agencies to draft broader, less specific regulations. It also may encourage agencies to adopt less concrete interpretations of those regulations, as well as restrain agencies from issuing informal advice or tentative interpretations. Most important, the fair warning rule may discourage regulated parties from seeking clarification of vague regulations, preventing cooperation between agencies and those they regulate toward their shared goal of a clear set of rules. The retroactivity rule, by contrast, encourages clear rules and cooperation with regulated parties.

1. The Fair Warning Rule

Presumably, agencies will want to avoid violations of the fair warning rule, for they create effective gaps in regulation as well as waste the resources resulting from the difficulty and expense of bringing a proceeding against a defendant. In order to avoid such violations, the obvious choice for agencies is to issue crystal clear regulations explaining the duties of regulated parties. However, super-specific regulations invite regulated parties to walk the line between the prohibited and the permissible, and therefore permit effective loopholes in regulation.[111] For example, suppose that the EPA perceives a need to prohibit a certain family of carcinogenic chemical compounds. The EPA can choose between publishing a list of specific chemicals and publishing a broader, more inclusive description of the family of chemicals. The problem with the former course of action is that firms might invent or discover other compounds that are not listed but share the harmful characteristics of the specified chemicals. The problem with the latter course of action is that there will be disputes about whether a particular compound is within the class of pro-

[111] See Laurence H. Tribe, American Constitutional Law § 12-31, at 1033 (2nd ed. 1988) ("[T]he legislature [or presumably an administrative agency] confronts a dilemma: to draft with narrow particularity is to risk nullification by easy evasion of the legislative purpose; to draft with great generality is to risk ensnarement of the innocent in a net designed for others.").

hibited chemicals (and about whether firms had fair warning of whether a chemical is prohibited).[112] Ambiguities are inevitable and often unforeseeable, especially in technical regulations.[113]

How will agencies attempt to balance these competing concerns? Presumably, they will be encouraged to draft the regulations as broadly as possible within the constraints of the notice rule.[114] The most plausible reading of the fair warning rule, forbidding agency interpretations that are far afield from the most plausible interpretation,[115] would actually encourage broader, more ambiguous regulations. Such regulations would provide fair warning of a broader range of agency interpretations, and therefore, by drafting a vague regulation, an agency can leave itself room to maneuver as ambiguities and hypertechnical loopholes become apparent. For example, in the EPA example discussed above, if the agency promulgated a general statement of the type of compounds prohibited, a broad statement is more likely to provide warning that a particular compound is prohibited than a narrow statement. In many circumstances, the fair warning rule will encourage more ambiguous and broader regulations instead of clearer and narrower ones.

The fair warning rule also encourages agencies to provide less concrete interpretations of their regulations once promulgated. Indeed, the more specific the interpretation, the more easily a defendant can argue that it could not have predicted the agency's interpretation beforehand.[116] Therefore, the agency could achieve a higher likelihood of winning a particular enforcement proceeding by articulating a less-specific interpretation at the cost of providing less notice to future defendants. This fact also might encourage agencies to articulate disingenuous interpretations in the course of a proceeding, knowing that they could clarify the interpretation after the litigation surrounding

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112 This is simply another repetition of the age-old standard versus rule controversy. See Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1687-1713 (1976) (collecting arguments for both rules and standards).

113 See supra text accompanying note 49.

114 See Harold J. Krent, Reviewing Agency Action for Inconsistency with Prior Rules and Regulations, Chi.-Kent L. Rev. 1187, 1213-15 & nn.156-58 (1997) (noting that agencies respond to judicial review by taking action to prevent reversal and collecting sources).

115 The D.C. Circuit has not clearly chosen between a fair warning rule forbidding regulations with more than one reasonable interpretation and a rule forbidding nearly unreasonable interpretations, but the latter is more likely. See supra notes 81-85 and accompanying text.

116 For example, in *Chrysler*, the court found that Chrysler could not have predicted the agency's interpretation of the required specific placement range for the pelvic body block. See United States v. Chrysler Corp., 158 F.3d 1350, 1356-57 (D.C. Cir. 1998). Based on the court's language, it seems fair to conclude that an interpretation that only required a "reasonable" or "realistic" placement of the body block would have been affirmed.

the particular proceeding is finished. For example, in the *Chrysler* litigation, the agency lost, at least in part, because its interpretation was too specific;[117] the agency rationally might have articulated an interpretation optimized for that particular proceeding, and then expressed its real interpretation at a later date. Again, the fair warning rule creates disincentives for clear and consistent regulations.

The fair warning rule also counsels against an agency's issuing policies of which it is uncertain. Already, uncertain advice has come back to haunt agencies in fair warning litigation.[118] If approached by a regulated party about an ambiguity, an agency giving informal guidance might well be taken to task by the D.C. Circuit for giving "conflicting and confusing" advice. Certainly, agencies should be encouraged to give thoughtful predictions of what their final interpretations will be, even if not finalized. Regulated parties would certainly appreciate some information rather than none in planning their affairs.[119]

The fair warning rule additionally discourages agencies and regulated parties from working together toward the common goal of clear regulations. Because enterprises want to avoid violating statutes and regulations, they have strong incentives to seek clarification of ambiguities from administrative agencies. However, the fair warning rule rewards ignorance, at least to the extent that it allows parties to escape the control of regulations of which the parties could not have predicted the application.[120] The regulated parties at least should be on notice of ambiguity in regulations and thus can reasonably be expected to inquire about ambiguities absent the fair warning rule's disincentive to do so. Combined with an agency's fear of misspeaking

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117 See id. at 1356-57.

118 See supra note 78 (discussing uses of tentative or conflicting agency advice to demonstrate ambiguity in regulations).

119 Consider, by comparison, how businesses might react to ambiguity in a federal statute interpreted by a federal court. For example, if there were no direct controlling legal authority, a firm in California would be interested in examining an opinion by the Seventh Circuit, even though the firm cannot be certain that the Ninth Circuit would follow its sibling's interpretation.

120 See Russell L. Weaver, Retroactive Regulatory Interpretations: An Analysis of Judicial Responses, 61 Notre Dame L. Rev. 167, 191 (1986):

> The regulated person would be discouraged from seeking interpretive guidance from the responsible agency. Until the agency or a court announced an interpretation and gave fair notice of its existence, the interpretation could not be applied to anyone. By seeking interpretive guidance, the regulated individual might alert the agency to an interpretive problem and prompt it to render an undesired interpretation.

For a related argument, see Timothy A. Wilkins, Regulatory Confusion, Ignorance of the Law, and Deference to Agencies: *General Electric Co. v. EPA*, 49 SMU L. Rev. 1561, 1561-62 (1996) (stating that fair warning rule is akin to "ignorance of the law" defense).

with respect to its ultimate interpretation, these effects could seriously undermine cooperation between agencies and regulated parties.

2. *The Retroactivity Rule*

The retroactivity rule, however, creates an entirely different set of incentives. First, because judicial review in retroactivity cases is centered on the public benefits and private harms of retroactive application,[121] agencies rationally would respond by building a record that evidences the necessity of retroactivity. The agency would have no reason to waste its resources on procedural posturing, such as choosing its interpretation of the regulation as a litigation tactic.[122]

Second, the retroactivity rule better encourages agencies and regulated parties to work together to make clear regulations. The rule does not discourage agencies from making their best attempt at writing clear regulations in the first instance, because it leaves discretion for the agency to reinterpret the regulations to accommodate important statutory interests when creative regulated parties or changed circumstances make portions of the regulations ineffective. Nonauthoritative statements from the agency are not held against it, except to the extent that regulated parties may rely on the statements, and even that difficulty may be outweighed by sufficiently grave public interests.[123]

Additionally, the retroactivity rule rewards, not punishes, regulated parties who seek administrative clarifications of regulations. By nature of their desire to plan their business affairs, these parties are in the best position to find unforeseen ambiguity in regulations. If such a party seeks, receives, and relies upon informal agency advice, that party benefits in two ways: First, the party's reliance on established law will weigh in its favor in the decision about whether to apply a new interpretation retroactively;[124] and second, the party has more information useful in predicting the agency's final interpretation.[125]

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121 See supra Part II.A.

122 By contrast, the fair warning rule encourages agencies to choose one interpretation of its regulations for the purposes of a particular proceeding, only to change that interpretation later. See supra notes 118-19 and accompanying text.

123 See supra Part II.A. (explaining application of retroactivity rule).

124 See supra notes 54-55 and accompanying text (discussing retroactivity rule's analysis of reliance interests).

125 See supra note 119 and accompanying text (discussing value of informal agency advice).

CONCLUSION: A PRESCRIPTION FOR ACCOMMODATION

The conflict between the fair warning and retroactivity rules must be resolved. The current state of the law, with outcomes turning on labels and characterizations, is desirable neither to proponents of the fair warning rule nor to advocates of the retroactivity rule. The optimal choice, however, is not one rule or the other, but rather a compromise between the two.

Agencies need to use adjudication to resolve open questions of regulatory interpretation. A strict requirement of specificity would hamper severely the agencies' efforts to fulfill their statutory obligations. By contrast, regulated parties need clear guidance so that they can plan their affairs. The ideal form of judicial review would protect constitutional norms and provide incentives to agencies and regulated parties to reach an optimal balance of free action and maximization of public good.

Such a system surely includes some form of review for fair warning. The void-for-vagueness doctrine is a well-settled due process requirement. The current form of the fair warning rule, however, extends quite beyond its constitutional origins. The balance between the private interests of the regulated parties and the statutory interests of the agency has shifted too far toward the regulated parties. The rule should be narrowed to its constitutional scope in the following ways.

First, and perhaps most important, the question of whether a regulation provides fair warning must be re-examined. Currently the D.C. Circuit has not clearly chosen between a rule forbidding regulations with more than one reasonable interpretation and a rule forbidding interpretations that are so far from the expected as to be "beyond the pale."[126] The first articulation is clearly too broad, as no agency can be expected to draft regulations that will never give rise to alternative reasonable interpretations. Thus, the court should apply the second formulation and should endeavor to make clear to agencies and regulated parties precisely what can make a regulation too ambiguous to pass muster.

Second, the D.C. Circuit should include in its fair warning analysis the possibility that the regulated party could have sought administrative clarification of the ambiguity.[127] If the regulation were so ambiguous as to give no warning of its content, then by definition it is ambiguous enough to put regulated parties on notice of its ambiguity.

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126 See supra notes 81-84 and accompanying text.

127 See supra note 85 and accompanying text (noting that D.C. Circuit has not resolved whether this possibility is relevant to fair warning).

If a regulated party receives unhelpful or no information from the agency then that party's litigation position is strengthened should the agency ever claim that the party violated the regulation. In cases where the regulation appears clear on its face but its ambiguity is demonstrated in an adjudication by experience or changed circumstances, no administrative clarification would be possible.

Third, the D.C. Circuit should recognize the relationship between the penalty imposed and the level of required fair warning.[128] In other areas of law, a greater deprivation of liberty or property means that more process is due.[129] It should follow that a lesser deprivation of property by way of administrative action requires less warning than a greater deprivation.

If all of these ambiguities in the fair warning rule are resolved as suggested, the fair warning rule and the retroactivity rule will become effectively coterminous. This Comment has demonstrated that the same concerns underlie both of the rules. The conflict that exists in the current scheme is the result of the awkward growth of the fair warning rule. If the fair warning rule evolves into a form more consistent with its due process roots, then it will be irrelevant which of the two rules is applied in a particular case. Therefore, an agency's characterization of an interpretation as "new but retroactive" or "clarified but preexisting" will not significantly alter the nature of judicial review.

[128] See supra notes 86-88 and accompanying text (explaining that this question is left open by current D.C. Circuit law).

[129] See supra Part III.B.1.