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TOBY J. HEYTENS

Managing Transitional Moments in Criminal Cases

ABSTRACT. As long as some courts review the work of others, there will be situations in which governing precedent shifts during the interval between an initial decision and the underlying dispute's ultimate resolution. Although such "transitional moments" follow many appellate court decisions, several of the Supreme Court's recent criminal procedure rulings would have been especially disruptive if implemented in a maximally retrospective fashion. Focusing on direct review of federal convictions, this Article identifies and critiques one widely used method for limiting the effects of legal change: subjecting defendants who failed to raise objections that were foreclosed by controlling time-of-trial authority to a narrow form of review that virtually guarantees that their appeals will fail. The problem with applying "plain error" rules in this way is that it cannot be justified by the purposes warranting use of forfeiture rules in the direct review context. Given the unsuitability of the forfeiture approach as a means of coping with transitional moments, the Article suggests a reconsideration of the Warren Court's preferred method: nonretroactivity doctrines.

AUTHOR. Counsel, O'Melveny & Myers LLP. B.A., Macalester College; J.D., University of Virginia. This Article was written while I was a Visiting Assistant Professor at Cornell Law School. Thanks to John Blume, Jack Chin, Kevin Clermont, Walter Dellinger, Craig Green, George Hay, Sheri Johnson, Doug Kysar, Bernie Meyler, Jeff Rachlinski, Jim Ryan, Emily Sherwin, Cathie Struve, and Brad Wendel for helpful comments and suggestions. I owe special thanks to Trevor Morrison and Sarah Sawtelle. This Article is dedicated to Connie Dallman and Bill Rehnstrand—inspiring teachers and great friends.

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INTRODUCTION

Imagine the following scenario: A litigant who was unsuccessful during an initial proceeding asserts that the presiding judge violated her federally protected rights and demands either judgment in her favor or a new trial as a remedy. At the time of the alleged wrong, governing precedent compelled, blessed, or did not clearly forbid what the trial judge did. By the time the dispute reaches a reviewing court, however, new decisions have either made clear or strongly suggested that the trial court's actions violated the claimant's rights. I will call these situations "transitional moments,"[1] and this Article is about how federal courts are—and all courts should be—dealing with them in the particular context of criminal cases that are still on direct review.

Transitional moments are a structural feature of the United States legal system. The common law method of legal development through adjudication means that new rules are announced and existing ones modified on a regular basis. The structure and operation of our courts create an inevitable lag between a trial judge's initial decision and the resulting controversy's final resolution by some other tribunal.[2] Those basic realities—that law is always changing and review never immediate—will inevitably combine to produce situations in which the governing legal standards shift during the life cycle of a single dispute.

All law-changing decisions create a certain amount of disruption with respect to pending cases—in the matter in which the new rule is announced, even if nowhere else. Some new rulings, however, generate far bigger transitional problems than others. In particular, as I will explain, Supreme Court decisions that alter the constitutional law of criminal procedure in pro-defendant directions will sometimes create especially disruptive transitional moments, and may, in extreme situations, call into question the integrity of huge numbers of convictions and sentences still subject to later review.[3]

At first blush, it may be tempting to say that anyone who has suffered what now appears to have been a legal wrong is entitled to relief. A moment's

1. Transitional moments can occur in the civil or criminal law context and can be produced by legal changes authored by legislators as well as judges. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997). For analyses focusing on the civil setting, see, for example, Symposium, *Legal Transitions: Is There an Ideal Way To Deal with the Non-Ideal World of Legal Change?*, 13 J. CONTEMP. LEGAL ISSUES 1 (2003). For discussions focusing on civil rights cases, most notably constitutional tort actions, see, for example, Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091; and John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

2. *See infra* note 13 and accompanying text.

3. *See infra* Section I.A.

reflection reveals the difficulties with that position. Take the Supreme Court's 1966 decision in *Miranda v. Arizona*.[4] For one thing, truly retrospective implementation of that decision would have been impossible given the number of people who had died or completed their sentences before *Miranda* was handed down. In addition, maximizing the retrospective implementation of such a revolutionary decision would have imposed enormous costs on the criminal justice system, and society as a whole, by requiring release or retrials of thousands of already convicted individuals, even when there was no realistic doubt about the defendant's guilt or the passage of time would have made a retrial all but impossible.[5] Accordingly, a Court that viewed maximum retrospective operation as its only option would probably never have issued a ruling like *Miranda* in the first place—or, at least, would be unlikely to do so ever again.[6]

It is thus unsurprising that courts have developed a variety of methods for limiting the disruptive effects of legal change. Under current law, no serious problems are posed by cases in which a defendant's conviction has become "final" before the law-changing decision was announced—that is, cases in which the Supreme Court has already denied a petition for a writ of certiorari or affirmed the conviction on the merits on direct review, or when the time for seeking certiorari had expired.[7] The reason is that the Court has held that the vast majority of new rules should not be applied retroactively to such cases.[8] Thus, for example, if a person whose conviction became final before June 24, 2002 seeks collateral review[9] based on *Ring v. Arizona*'s[10] holding that juries, not judges, must decide whether there are any aggravating circumstances that

4. 384 U.S. 436 (1966).

5. At the time *Miranda* was decided, the dominant view was that all constitutional violations at a criminal trial required reversal. Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 83 n.16 (1988) (citing cases).

6. For earlier articulations of this point, see, for example, LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 178 (1994); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1739-40 (1991); Jeffries, *supra* note 1, at 98-99; and Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889-90 (1999). Some might deem deterrence of decisions like *Miranda* a blessing rather than a curse. *See infra* notes 346-347 and accompanying text.

7. Clay v. United States, 537 U.S. 522, 527 (2003).

8. *See infra* notes 315-320 and accompanying text.

9. In this Article, I use "collateral review" to describe both petitions for habeas corpus filed by state prisoners, 28 U.S.C. § 2254(a) (2000), and motions for post-conviction relief filed by federal prisoners, 28 U.S.C. § 2255 (2000). Unless specified, references to "habeas" encompass both forms of collateral review.

10. 536 U.S. 584 (2002).

make a defendant eligible for the death penalty, the court will deny relief on the ground that the rule announced in *Ring* does not apply to her case.[11]

Cases still on direct review, however, are a different story. In 1987, the Supreme Court held in *Griffith v. Kentucky* that all decisions regarding the conduct of criminal trials must be "applied retroactively" to all cases not yet final at the time the new ruling is announced.[12] Because finality will often not attach until long after trial and sentencing have concluded,[13] *Griffith* means that new decisions will often be applicable to cases in which the allegedly unconstitutional conduct long predated the rule's announcement.[14]

Unable to declare new rulings nonretroactive with respect to cases that were still on direct review at the time a new ruling was announced, lower courts have looked for other ways to limit the disruptive effects of legal change. Some appeals that rely on post-trial developments could be rejected on the ground that no error occurred even under the new decisions, or that any error was harmless.[15] But what about the others? Will any defendant whose trial was infected with what only later appears to have been a prejudicial constitutional violation be able to obtain relief?

In a word, no. Especially when the change in governing standards has been dramatic, the defendant will likely have forfeited her claim by failing to raise it at the time and in the manner required by the relevant jurisdiction's procedural rules.[16] Although reviewing courts are generally empowered to grant relief notwithstanding forfeiture in at least some circumstances,[17] review-restricting forfeiture rules can be, have been, and are being used to prevent many individuals from obtaining relief based on post-verdict rulings, even when a new ruling is, at least formally, fully retroactive.[18]

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11. *See* Schriro v. Summerlin, 542 U.S. 348 (2004).

12. 479 U.S. 314, 328 (1987).

13. Clay v. United States, 537 U.S. 522, 527 (2003).

14. Though it is admittedly an extreme example, I have located one federal conviction that did not become final for more than seven years. *See* Neder v. United States, 527 U.S. 1 (1999) (affirming conviction on June 10, 1999); Brief for Appellee at 2, United States v. Neder, 136 F.3d 1459 (11th Cir. 1998) (No. 92-2929) (noting that the verdict was rendered on May 1, 1992).

15. *See infra* note 101.

16. *See infra* notes 103-114 and accompanying text (describing forfeiture).

17. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5(d), at 1277 (3d ed. 2000) ("All but a few jurisdictions recognize the authority of an appellate court to reverse on the basis of a plain error even though that error was not properly raised and preserved at the trial level.").

18. *See infra* note 112.

Part I of this Article identifies some general prerequisites for an especially disruptive transitional moment and explains why several recent Supreme Court decisions have provided special urgency to the always present question of how best to address their effects. Part II critiques one of the primary methods by which federal courts have attempted to limit the disruptive effects of legal change: deeming claims that rely on intervening decisions to be forfeited on the ground that the defendant raised no objection at the time of trial, and then subjecting those forfeited claims to a highly constricted form of "plain error" review that virtually guarantees that appealing defendants will lose. As I will explain, the problem with this approach is that it rarely advances—and often frustrates—the only legitimate purposes justifying the use of forfeiture rules in the direct review setting. In fact, in situations in which controlling time-of-trial authority was clearly settled and clearly contrary to an argument that a defendant later wishes to present on appeal, the only additional obligation that should be imposed upon a defendant who failed to object at the time of trial is a duty to show that any error was "clear" or "obvious" according to the standards prevailing at the time of appeal.[19]

Finally, Part III calls for a rethinking of the now well-accepted view that all new decisions must be fully retroactive with respect to cases still pending on direct review at the time the ruling is announced. As I will argue, courts may be better off using the "selective prospectivity" variation of the general nonretroactivity approach than the flawed forfeiture strategy currently being employed. Under my proposal, new rulings would always be deemed applicable to the party in whose case they are announced, but the decision whether to apply the same rule to other pending cases would be informed by a variety of considerations, including the degree of disruption that retroactive implementation of the new rule would entail; the amount of justifiable reliance on the old standards by police, prosecutors, and other actors; and the importance of the new rule to fair and accurate adjudication.

Nonretroactivity approaches in general—and selective prospectivity in particular—are subject to a variety of objections that have been well rehearsed elsewhere. As I will explain, however, one prominent criticism can be avoided

19. It is important to note at the outset that this argument is directed at cases in which a time-of-trial objection would have been futile as opposed to those in which the issue would have been so novel that defense counsel could not reasonably have thought to raise it. Even decisions that shift controlling legal standards in dramatic ways are often anticipated by commentators or foreshadowed by lower court opinions, separate writings by Supreme Court Justices, or statements in Supreme Court majority opinions. As I will explain, however, the real challenge is not so much to identify the situations in which reasonably competent defense lawyers might think to object as it is to isolate those in which they should be encouraged to do so.

entirely once it is recalled that there is no freestanding constitutional right to a criminal appeal, much less an absolute entitlement to appellate reversal in any situation in which, according to a reviewing court's best current understanding of the law, a constitutional error occurred at the defendant's trial. Several other objections to nonretroactivity are more accurately viewed as objections to any strategy, including the use of forfeiture rules, for limiting the disruptive effects of legal change.

In addition to being less objectionable than is often supposed, the nonretroactivity approach has a number of advantages. Nonretroactivity analysis represents an honest effort to confront directly the problems posed by legal change, as well as the real costs of efforts to limit such change's disruptive effects. Not only is this candor a virtue in and of itself, but it also means that the nonretroactivity approach leads us to ask the right sorts of questions. The fact that nonretroactivity doctrines are expressly designed to deal with the particular challenges that arise when the judge's best understanding of legal requirements shift, moreover, means that rulings designed to deal with these challenges will not generate precedents that will limit relief outside of the changed-law context.

It is too late to go back and design a sensible method for dealing with the immediate aftershocks of the Supreme Court's most recent criminal procedure decisions. But transitional moments are an inevitable by-product of our legal system and the challenge of how best to address the problems posed by legal change is not going away. In addition, the fact that both the liberal Warren and conservative Rehnquist Courts issued massively disruptive law-changing rulings suggests the hazards of attempting to predict when the next significant transitional moment will occur. Taken together, these realities demonstrate the value of attempting to formulate now, rather than later, a sensible method for managing legal change in the direct review context.

I. IDENTIFYING MAJOR TRANSITIONAL MOMENTS

A transitional moment occurs whenever a judicial decision upsets previous understandings and renders outcomes that were clearly right (or at least not obviously wrong) at the time they were reached erroneous or questionable in light of the new ruling. In this Part, I identify some types of decisions likely to spawn significant transitional moments and discuss several recent decisions that have done so.

A. The Recipe for Especially Disruptive Legal Change

Not all decisions are created equal in their capacity to upset earlier outcomes. First, because they apply across substantive areas, procedural rulings will tend to be more widely applicable—and thus more potentially disruptive—than those governing the shape of primary liability.

Second, rulings that affect criminal cases will generally pose a bigger problem than decisions rendered in civil matters. At least at the constitutional level, there are far more opportunities for procedural lawmaking in criminal cases than in civil ones.[20] Criminal convictions are also appealed far more often than civil outcomes.[21] Furthermore, whereas principles of res judicata or claim preclusion generally render a final civil judgment immune from further attack,[22] a prisoner who believes her constitutional rights have been violated may seek further relief by way of a petition for habeas corpus or some other form of collateral review.[23]

Third, pro-defendant rulings will typically be more unsettling than those benefiting prosecutors. Defendants normally have numerous opportunities to attack the decisions that led to their convictions: direct appeal as of right, at

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20. Criminal cases are governed by, inter alia, the Fourth Amendment's prohibition against "unreasonable searches and seizures," the Fifth Amendment's Double Jeopardy and Self-Incrimination Clauses, and the Sixth Amendment's Speedy Trial, Public Trial, Impartial Jury, Compulsory Process, and Confrontation Clauses. None of these provisions applies in civil cases. *See* U.S. CONST. amend. V (protecting against self-incrimination "in any criminal case"); U.S. CONST. amend. VI (setting out rights that apply "[i]n all criminal prosecutions"); United States v. Janis, 428 U.S. 433, 447 & n.17 (1976) (noting that the Supreme Court has never applied the Fourth Amendment exclusionary rule "to exclude evidence from a [purely] civil proceeding, federal or state," though it has done so in suits "for forfeiture of an article used in violation of the criminal law").

21. During the twelve month period ending March 31, 2002, federal trial courts disposed of 58,844 criminal cases. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS MARCH 31, 2002, at 59 tbl.D (2002) [hereinafter, 2002 U.S. COURTS STATISTICS]. During that same period, 11,358 criminal appeals were filed, *id.* at 34 tbl.B-7, one for every 5.18 trial court dispositions. Excluding petitions for collateral review, the comparable ratio with respect to civil matters was 1:9.26. *Id.* at 53-54 tbl.C-4 (identifying 215,926 trial court dispositions, excluding rulings on motions to vacate sentence and petitions for writs of habeas corpus filed by federal detainees and state prisoners); *id.* at 34 tbl.B-7 (applying the same exclusions and identifying 23,318 appeals).

22. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 18 (1982) (setting out the general rule of merger when a personal judgment is rendered in favor of the plaintiff).

23. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1296 (5th ed. 2003) [hereinafter HART & WECHSLER] ("Unlike most collateral attacks, . . . federal habeas proceedings are not governed by the rules of res judicata and thus permit relitigation of issues that were fully and fairly litigated in state court.").

least one level of discretionary review, and at least one full round of collateral review. Each of these steps can take substantial time, increasing the odds that a law-changing decision will be handed down while a defendant's attempts to obtain relief are still pending. In contrast, the Federal Constitution's Double Jeopardy Clause bars governmental appeals after an acquittal,[24] meaning that many pro-defendant errors are not subject to later correction at all.[25] Even when prosecutors are permitted to take interlocutory appeals—for example, from rulings granting pretrial suppression motions[26]—the window during which they will benefit from a law-changing decision is likely to be considerably shorter, both because defendant-taken appeals generally do not begin until all trial court proceedings are concluded,[27] and because defendants, unlike prosecutors, may file petitions for collateral review if their direct appeals are unsuccessful.[28]

Finally, not all pro-defendant rulings in criminal cases are created equal in their capacity to upset earlier outcomes. Some will have limited, if any, binding effect because the scope of the issuing court's supervisory authority is narrow[29] or nonexistent.[30] Many appellate decisions—including some by the Supreme Court—apply well-settled standards to new facts or work only small changes in

24. U.S. CONST. amend. V; Kepner v. United States, 195 U.S. 100, 126 (1904) (applying this rule to federal trials); *see also* Benton v. Maryland, 395 U.S. 784, 795-97 (1969) (state trials).

25. For an analysis of the effects of this disparity, see Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right To Appeal*, 57 U. CHI. L. REV. 1 (1990).

26. *See, e.g.*, 18 U.S.C. § 3731 (2000) (authorizing federal prosecutors to appeal trial court decisions "dismissing an indictment or information or granting a new trial after verdict of judgment," pretrial rulings "suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding," and orders "granting the release of a person charged with or convicted of any offense, or denying a motion of, or modification of the conditions of, a decision or order granting release").

27. *See* 28 U.S.C. § 1291 (2000); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949) (discussing the final judgment rule).

28. Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 90 (noting that "habeas litigation of federal criminal procedure issues is invariably one-sided").

29. For example, decisions by the United States Court of Appeals for the District of Columbia Circuit bind only the United States District Court for the District of Columbia, *see* 28 U.S.C. § 41 (2000), which has just fifteen authorized judgeships, *id.* § 133. In contrast, the Ninth Circuit has appellate jurisdiction over more than one hundred authorized district and territorial court judgeships. *Id.* §§ 41, 133; 48 U.S.C. § 1424b(a) (2000).

30. For example, a decision by a federal district court granting collateral relief has no binding force beyond that particular case. *See, e.g.*, Gould v. Bowyer, 11 F.3d 82, 84 (7th Cir. 1993) ("A district court decision binds no judge in any other case, save to the extent that doctrines of preclusion (not stare decisis) apply.").

existing doctrine.[31] Others suppress outliers, resolving nominally open issues consistently with the majority of earlier decisions.[32] And some pro-defendant reversals involve issues that do not often arise.[33] To the extent that these sorts of decisions create transitional issues beyond the particular ruling reversed, their impact will tend to be relatively minor.

The situation will be far different, however, when an appellate tribunal with broad jurisdiction overturns settled law with regard to an issue that comes up frequently, especially if the court renders several such decisions in a short period. Such cases will tend to generate major transitional problems, calling into question large numbers of convictions and sentences still subject to later correction. As I explain in the next Section—and as participants in the criminal justice system are certainly aware—several recent developments fit that description quite well.

B. A Few Recent Examples

Although the problem of highly disruptive legal change is often associated with left-leaning judges,[34] the structural characteristics of a new ruling are more significant than the political inclinations that produced it. As the previous Section demonstrated, the magnitude of the transitional moment caused by a new decision is a function of the breadth of the ruling's applicability, the degree to which it upsets previously settled understandings, and whether it

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31. *See, e.g.*, Rompilla v. Beard, 125 S. Ct. 2456 (2005) (reversing denial of relief based on a case-specific application of the test established in *Strickland v. Washington*, 466 U.S. 668 (1984), for assessing claims of ineffective assistance of counsel).

32. *See, e.g.*, Johnson v. New Jersey, 384 U.S. 719, 731-32 (1966) (noting that only six states were "immediately affected" when *Griffin v. California*, 380 U.S. 609 (1965), barred prosecutorial comment about a defendant's failure to testify).

33. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 515 (1972) ("Although a speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution, this Court has dealt with that right on infrequent occasions." (footnote omitted)).

34. The most disruptive set of transitional moments in United States history occurred during the criminal procedure revolution of the 1960s. Between 1961 and 1966 alone, the Supreme Court ordered state courts to exclude unconstitutionally seized evidence, Mapp v. Ohio, 367 U.S. 643 (1961), and "fruits" thereof, Wong Sun v. United States, 371 U.S. 471 (1963); required states to furnish lawyers to indigent defendants in all felony prosecutions, Gideon v. Wainwright, 372 U.S. 335 (1963); and directed law enforcement officials to administer a now-familiar set for warnings before conducting a custodial interrogation, Miranda v. Arizona, 384 U.S. 436 (1966). Through these and other rulings, the Warren Court massively expanded and "radically transformed" the constitutional law of criminal procedure, calling into question thousands, if not millions, of previously rendered convictions in the process. *See* Hoffmann & Stuntz, *supra* note 28, at 77-78.

alters the law in favor of prosecutors or defendants. When measured using those metrics, a number of decisions issued by the latter-day Rehnquist Court spawned transitional moments that were, at least in some ways, even more daunting than those generated by its Warren Court predecessors. In the remainder of this Section, I describe five recent decisions that generated particularly significant transitional moments and conclude with some general observations about what exactly made them so disruptive.

1. United States v. Gaudin[35]

Gaudin may seem like an odd place to start. It is not terribly well known, and its holding applies only to a specific category of federal prosecutions. That said, *Gaudin* is important, both because it laid the substantive groundwork for several hugely disruptive decisions[36] and because much of the existing law regarding the application of forfeiture rules in the changed-law context was formulated in response to it.[37]

The Fifth and Fourteenth Amendments to the United States Constitution bar the federal or state governments from depriving any person of "liberty . . . without due process of law."[38] "In all criminal prosecutions," the Sixth Amendment further declares, "the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[39] The Supreme Court has held that, taken together, "these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[40]

This seemingly straightforward rule raises difficult problems of application. What is the proper method for determining what constitutes an "element" of a given crime? Where and how should courts draw the line between "factual" issues that must be decided by juries and "legal" questions that may (and should) be resolved by judges? Although later cases have tended to focus on the former question, *Gaudin* ultimately came down to a dispute about the latter.

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35. 515 U.S. 506 (1995).

36. *See infra* Subsection I.B.2 (discussing Apprendi v. New Jersey, 530 U.S. 466 (2000)), and Subsection I.B.4 (discussing Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 125 S. Ct. 738 (2005)).

37. *See infra* notes 140-148 and accompanying text (discussing Johnson v. United States, 520 U.S. 461 (1997)).

38. U.S. CONST. amend. V; *id.* amend. XIV.

39. U.S. CONST. amend. VI.

40. *Gaudin*, 515 U.S. at 510 (citing Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993)).

Michael Gaudin was charged with violating 18 U.S.C. § 1001, which declares it a felony to "knowingly and willfully . . . make[] any materially false, fictitious, or fraudulent statement or representation" with respect to any matter within the jurisdiction of a federal agency.[41] Before *Gaudin*, every court of appeals except the Ninth Circuit had concluded that the trial judge rather than the jury should decide whether an allegedly false statement was material.[42] The usual basis was, as the First Circuit stated, that "materiality is a matter of law for the judge to decide."[43]

The Supreme Court, however, agreed with the Ninth Circuit. The government, the Court began by noting, had acknowledged "that 'materiality' [was] an element of the offense."[44] And, having accepted that concession, the Court went on to reject the government's principal submission—that materiality was a "mixed question of law and fact" that the Constitution permitted to be resolved by a judge.[45] The Court also rejected the government's assertions that "there [was] a historical exception [to the all-elements rule] for materiality determinations in perjury prosecutions,"[46] and that stare decisis required rejection of Gaudin's claim.[47] In sum, the Court held, "[t]he trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed" his "right to have a jury determine . . . his guilt of every element of the crime with which he is charged."[48]

Other than modifying a few sentences in jury charges, *Gaudin* did not require any terribly significant changes going forward. Its rejection of nearly uniform nationwide authority, however, had the potential to cause problems with respect to already completed trials. Yet *Gaudin*'s immediate impact was comparatively minor when measured against what was to come.

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41. 18 U.S.C. § 1001 (2000).

42. United States v. Gaudin, 28 F.3d 943, 955 (9th Cir. 1994) (Kozinski, J., dissenting), *aff'd* 515 U.S. 506 (1995).

43. United States v. Corsino, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *see also* United States v. Abadi, 706 F.2d 178, 180 (6th Cir. 1983) (citing cases).

44. *Gaudin*, 515 U.S. at 509; *see id.* at 511.

45. *Id.* at 512-15.

46. *Id.* at 515; *see id.* at 515-19.

47. *Id.* at 519-22.

48. *Id.* at 522-23.

2. Apprendi v. New Jersey[49]

The cascade of transitional moments that has recently washed over the federal courts started with *Apprendi*. Before 2000, the terms of a grand jury indictment and the facts found by a petit jury often had little to do with the maximum penalty a defendant could receive. Jurors would be asked to decide a relatively narrow issue—for example, whether the defendant had distributed a detectable amount of a "controlled substance."[50] At the sentencing hearing, the trial judge would make findings regarding a variety of statutory "sentencing factors," such as the identity and quantity of drugs involved, whether the defendant's conduct had caused "death or serious bodily injury," and whether she had previously been convicted of certain specified crimes.[51] These findings could significantly impact the defendant's ultimate sentence: In the case of federal drug prosecutions, for example, they could generate statutory sentences from no imprisonment to a mandatory life term.[52] Throughout the 1990s, courts invariably sustained the validity of these procedures.[53]

Then, in the summer of 2000, the Supreme Court decided *Apprendi*. Although the decision's broader significance was easy to miss at first—in part because it was initially cast as a decision about "hate crimes" legislation[54]—*Apprendi* was a revolutionary decision. "Other than the fact of a prior conviction," Justice Stevens wrote for the *Apprendi* majority, "*any* fact that

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49. 530 U.S. 466 (2000).

50. *See, e.g.*, United States v. Cotton, 535 U.S. 625, 627-28 (2002); United States v. Barbosa, 271 F.3d 438, 448 (3d Cir. 2001) ("The District Court instructed the jury on the one count of possession with intent to distribute cocaine base charged in the indictment. However, the court submitted neither the quantity nor identity of the drugs for a factual determination.").

51. *See* Nancy J. King & Susan R. Klein, Après Apprendi, 12 FED. SENT'G REP. 331, 331-32, 340 nn.8-9 (2000).

52. *Compare* 21 U.S.C. §§ 841(b)(4), 844(a) (2000) (providing for a zero-to-one-year prison term for distribution of a "small amount of marihuana for no remuneration" by a person with no previous convictions), *with* 21 U.S.C. § 841(b)(1)(A) (2000) (providing for a mandatory term of life imprisonment for distribution of specified amounts of Schedule I drugs by a person previously convicted of two or more felony drug offenses).

53. King & Klein, *supra* note 51, at 331-32, 340 nn.8-9.

54. *See, e.g.*, Laurie Asseo, *Jury, Not Judge, Must Determine Hate Motive*, CHARLOTTE OBSERVER, June 27, 2000, at 8A; Frank J. Murray, *Supreme Court: Only Jury May Decide Crime Was Motivated by Hatred*, WASH. TIMES, June 27, 2000, at A13. Astute commentators, however, quickly perceived *Apprendi*'s broader impact. *See, e.g.*, Tony Mauro & Jonathan Ringel, *Court's* Apprendi *Hate Crime Decision May Have Broad Impact on Sentencing*, LEGAL INTELLIGENCER, June 28, 2000, at 4.

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[55]

Just as Justice O'Connor predicted in her dissenting opinion,[56] *Apprendi* sparked a massive transitional moment. According to an early estimate by Professors Nancy J. King and Susan R. Klein, the decision may have rendered unconstitutional then-prevailing sentencing practices under at least fifty-seven federal and sixteen state statutes.[57] In the five years since it was decided, *Apprendi* has been cited by courts more than thirteen thousand times.[58]

3. Crawford v. Washington[59]

"In all criminal prosecutions," the Sixth Amendment provides, "the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[60] Although the Supreme Court has long rejected the view that the Confrontation Clause guarantees only the right to cross-examine witnesses who actually testify at trial,[61] the Court has had considerable difficulty deciding exactly when it bars in-court use of out-of-court statements.

For twenty-four years, the Court's position was that the Constitution permitted any out-of-court statement to be used for its truth value against a criminal defendant so long as the statement fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."[62] During this period, lower courts routinely admitted a variety of formal, out-of-court

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55. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

56. *Id.* at 551 (O'Connor, J., dissenting) (contending that the decision threatened to generate "a flood of petitions by [previously] convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision").

57. Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1547-55 apps. B-C (2001).

58. According to a Westlaw Keycite search performed on December 8, 2005, *Apprendi* had been cited by courts 13,225 times. As of the same date, *Dickerson v. United States*, 530 U.S. 428 (2000), which reaffirmed the constitutional status of the *Miranda* warnings and was decided on the same day as *Apprendi*, had been cited by courts 575 times; *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which upheld the Scouts' claim of constitutional entitlement to expel an openly gay scoutmaster and was decided two days after *Apprendi* and *Dickerson*, had been cited by courts a mere 99 times.

59. 541 U.S. 36 (2004).

60. U.S. CONST. amend. VI.

61. *Crawford*, 541 U.S. at 57-59.

62. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *overruled in part by* Crawford v. Washington, 541 U.S. 36 (2004).

statements, including "accomplice confessions implicating the accused," plea allocutions, and grand jury testimony.[63]

In 2004, the Court announced that such practices must stop. "[W]e do not think," Justice Scalia wrote, that "the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[64] Instead, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[65] Although the Court declined to provide a precise definition of "testimonial," it stressed that "[w]hatever else the term covers, it applies . . . to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[66]

As if to emphasize the scope of its holding, *Crawford* identified twenty-two lower court opinions that had "admit[ted] core testimonial statements that the Confrontation Clause plainly meant to exclude."[67] The Court also remanded twelve lower court decisions for reconsideration in light of *Crawford*.[68] In the

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63. *Crawford*, 541 U.S. at 64-65 (citing cases).

64. *Id.* at 61.

65. *Id.* at 68-69.

66. *Id.* at 68.

67. *Id.* at 63-65. The expressly repudiated rulings included nine opinions issued by five different Federal Courts of Appeals (the Second, Fourth, Seventh, Eighth, and Ninth Circuits), three decisions by the highest courts of two states (Colorado and Kentucky) and ten other decisions issued by intermediate appellate courts in eight states (Colorado, Illinois, Michigan, North Carolina, Ohio, Oregon, Virginia, and Wisconsin). *Id.*

68. The vacated and remanded decisions included three issued by a single Federal Court of Appeals (the Second Circuit), as well as nine decisions issued by appellate courts in eight different states (Arizona, California, Florida, Kansas, New York, Ohio, Washington, and Wyoming). Of the latter decisions, two had been issued by the highest court of the relevant state (Arizona and Wyoming) and the others had been decided by intermediate appellate courts. *See* Siler v. Ohio, 125 S. Ct. 671 (2004) (mem.) (case remanded to the Ohio Court of Appeals); Watt v. Washington, 125 S. Ct. 477 (2004) (mem.) (Washington Court of Appeals); Sarr v. Wyoming, 125 S. Ct. 297 (2004) (mem.) (Wyoming Supreme Court); Wedgeworth v. Kansas, 125 S. Ct. 214 (2004) (mem.) (Kansas Court of Appeals); Calcano v. United States, 125 S. Ct. 135 (2004) (mem.) (United States Court of Appeals for the Second Circuit); LaFontaine v. United States, 125 S. Ct. 46 (2004) (mem.) (same); Varacalli v. United States, 125 S. Ct. 36 (2004) (mem.) (same); Ko v. New York, 542 U.S. 901 (2004) (mem.) (New York Supreme Court, Appellate Division); Goff v. Ohio, 541 U.S. 1083 (2004) (mem.) (Ohio Court of Appeals); Prasertphong v. Arizona, 541 U.S. 1039 (2004) (mem.) (Supreme Court of Arizona); Corona v. Florida, 541 U.S. 930 (2004) (mem.) (Florida District Court of Appeal); Shields v. California, 541 U.S. 930 (2004) (mem.) (California Court of Appeal). At least two of these remands resulted in new trials. State v. Goff, No. 21320, 2005 WL 236377 (Ohio Ct. App. Feb. 2, 2005); Sarr v. State, 113 P.3d 1051 (Wyo. 2005).

year-and-a-half since it was decided, *Crawford* has already been cited in more than eighteen hundred judicial decisions,[69] and has had a significant impact on entire categories of criminal trials.[70]

4. Blakely v. Washington[71] *and* United States v. Booker[72]

In 2004 and again in early 2005, the Supreme Court returned to the topic it had addressed in *Gaudin* and *Apprendi*: judicial factfinding. The subject this time was the validity of guidelines sentencing systems.

During the 1970s, commentators and politicians became concerned that then-prevailing sentencing practices, which tended to vest enormous discretion in individual trial judges, "inevitably resulted in severe disparities in sentences received . . . by defendants committing the same offense and having similar criminal histories."[73] In response, the federal government and numerous states established systems under which sentencing courts were directed to make various case-specific factual findings to establish a presumptive sentencing range from which they could depart only in specified circumstances.[74]

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69. A Westlaw Keycite search performed December 8, 2005 revealed 1807 judicial decisions referencing *Crawford*.

70. *See, e.g.*, Andrew J. Levander, *High Publicity Securities Cases Make Interesting Law*, *in* SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2004, at 775, 807 (Jay B. Kasner & Bruce G. Vanyo eds., 2004) ("The impact of *Crawford* on white collar and other criminal cases has been immediate and far reaching."); Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 748-50 (2005) (asserting that *Crawford* has had a "dramatic impact" on domestic violence prosecutions). *Crawford*'s effects have been more limited in some areas, where lower courts have strained to avoid characterizing statements as "testimonial." *See, e.g.*, People v. Moscat, 777 N.Y.S.2d 875, 879-80 (Crim. Ct. 2004) (finding that a 911 call was not "testimonial"). The Supreme Court is scheduled to decide during the October 2005 Term whether *Crawford* applies to an oral accusation made to an investigating officer at the scene of the crime, Hammon v. State, 829 N.E.2d 444 (Ind.), *cert. granted*, 126 S. Ct. 552 (2005) (No. 05-5705), or to an alleged victim's statements to a 911 operator, State v. Davis, 111 P.3d 844 (Wash.), *cert. granted*, 126 S. Ct. 547 (2005) (No. 05-5224).

71. 542 U.S. 296 (2004).

72. 125 S. Ct. 738 (2005).

73. *Blakely*, 542 U.S. at 315 (O'Connor, J., dissenting). For an influential expression of this view, see MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973).

74. *See Blakely*, 542 U.S. at 323-24 (O'Connor, J., dissenting) (noting that at least nine other states and the federal government had adopted guidelines systems similar to Washington's). For histories of sentencing reform efforts focusing on the federal level, see, for example, Symposium, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 WAKE FOREST L. REV. 181 (1993). For a survey of state guideline systems, see Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005).

Although guidelines systems usually operated within broad limits established by the underlying criminal statutes, in practice they exercised tremendous control over sentencing outcomes.[75]

Apprendi's broad condemnation of attaching legally operative effect to judicial factfinding raised questions about the constitutionality of sentencing guidelines,[76] but the majority in that case declined to "express [a] view" on the subject.[77] No doubt reluctant to call into doubt virtually every federal sentence imposed since 1987, the federal courts of appeals quickly and unanimously concluded that *Apprendi*'s rule did not apply to the Federal Sentencing Guidelines.[78] All but one state appellate court that considered the issue had reached the same conclusion about state guidelines systems.[79] It thus appeared for a time that *Apprendi* would have no impact on guideline sentencing.[80]

Appearances deceived. During the closing days of the 2003 Term, *Blakely v. Washington*[81] held that *Apprendi*'s rule applied to factual determinations made pursuant to Washington State's Sentencing Reform Act. In so doing, the Court emphatically rejected the core rationale for distinguishing guidelines systems from the situation presented in *Apprendi*: the difference between legislatively enacted statutes (which set statutory maxima) and administratively promulgated guidelines (which channel judicial discretion within a legislatively authorized range). "[T]he 'statutory maximum' for *Apprendi* purposes," Justice Scalia wrote for the five-Justice *Blakely* majority, "is the maximum sentence a

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75. During fiscal year 2003, for example, 69.4% of all federal defendants were sentenced within the applicable guideline range. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 57 tbl.26 (2003).

76. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 552 (2000) (O'Connor, J., dissenting); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1148, 1171-72 (2001); Andrew M. Levine, *The Confounding Boundaries of "*Apprendi-*land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 388-90 (2002).

77. *Apprendi*, 530 U.S. at 497 n.21.

78. *See* R. Craig Green, Apprendi*'s Limits*, 39 U. RICH. L. REV. 1155, 1162 & n.41 (2005) (citing cases).

79. Four state appellate courts had upheld state guidelines systems. State v. Brown, 70 P.3d 454 (Ariz. Ct. App. 2003); Ashby v. State, No. C2-01-1679, 2002 WL 977444, at *3 (Minn. Ct. App. May 14, 2002); State v. Dilts, 39 P.3d 276 (Or. Ct. App. 2002); State v. Gore, 21 P.3d 262, 275-77 (Wash. 2001). The Kansas Supreme Court had held that Kansas's guidelines were unconstitutional. State v. Gould, 23 P.3d 801 (Kan. 2001).

80. *See, e.g.*, Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending* Apprendi *To Upset Most Sentencing*, 15 FED. SENT'G REP. 79, 79 (2002) ("*Apprendi*, which once threatened the sentencing guidelines and the national trend toward determinate sentencing, is now a caged tiger.").

81. 542 U.S. 296 (2004).

judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[82]

Despite *Blakely*'s statement that "[t]he Federal Guidelines are not before us, and we express no opinion on them,"[83] the writing was on the wall.[84] A split in authority soon developed, and, on January 12, 2005, *United States v. Booker*[85] made it official: "[T]he Sixth Amendment as construed in *Blakely*," Justice Stevens wrote for a now-familiar majority, "does apply to the [Federal] Sentencing Guidelines."[86]

In one sense, *Booker* "saved" the Guidelines. In a highly unusual second majority opinion authored by Justice Breyer on behalf of the four *Apprendi-Blakely* dissenters and Justice Ginsburg, the Court concluded that the proper response to its earlier finding of unconstitutionality was to sever the statutory provision that made the Guidelines mandatory.[87] "So modified," the Court wrote, "the Federal Sentencing Act makes the Guidelines effectively advisory[,] . . . requir[ing] a sentencing court to consider Guidelines ranges, but . . . permit[ting] the court to tailor the sentence in light of other statutory concerns as well."[88]

Though preserving a role for the Guidelines going forward, this resolution only exacerbated the transitional moment unleashed by *Booker*. Had the Court followed the approach taken in *Apprendi* and *Blakely*—and advocated in dissent by Justices Stevens, Scalia, Souter, and Thomas—it would have concluded that the Guidelines could continue to operate in a mandatory fashion in cases in which the defendant admits the facts necessary to establish the relevant sentencing range or in which the calculation of that range requires no judicial factfinding.[89] Because "over 95% of all federal criminal prosecutions are terminated by a plea bargain[] and . . . in almost half of the cases that go to

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82. *Blakely*, 542 U.S. at 303.

83. *Id.* at 304 n.9.

84. The "popular consensus [was] that [*Blakely*] virtually required the Federal Sentencing Guidelines . . . to be held unconstitutional." Green, *supra* note 78, at 1155; *see id.* at 1155 n.4 (citing commentary). For two rare dissents, see *id.* at 1169-83; and Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After* Blakely*: A Former Commissioner's Perspective*, 2004 BYU L. REV. 935, 963-75.

85. 125 S. Ct. 738 (2005).

86. *Id.* at 746.

87. *Id.* at 756-57.

88. *Id.* at 757 (citations omitted).

89. *See id.* at 772 (Stevens, J., joined in relevant part by Scalia, J., and Souter, J., dissenting in part); *id.* at 795 (Thomas, J., dissenting in part) ("I agree with Justice Stevens' proposed remedy . . . .").

trial there are no sentencing enhancements,"[90] this approach would have immunized a large number of already imposed sentences from further challenge. By framing the "error" as an erroneous decision to treat the Guidelines as mandatory, however, the Court's chosen solution meant that virtually every federal sentence handed down during the last twenty years had been imposed in an illegal fashion.[91] And, once again, a flood of demands for resentencing ensued.[92]

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In most respects, the recent foment cannot hold a candle to the Warren era revolution. The aggregate amount of change is far less. In addition, whereas the Warren Court's most important decisions generally involved constitutionally mandated procedures for assessing guilt and innocence,[93] many of the Rehnquist Court's rights-expanding rulings dealt with the comparatively less significant issue of the appropriate sentence.

That said, the situation now confronting judges charged with reviewing federal criminal convictions is in many ways more daunting than that experienced by their Warren-era predecessors. There are more than twice as many federal criminal cases today than there were in the 1960s and 1970s.[94] In addition, because the Warren era revolution involved, first and foremost, a transformation of "the role of federal constitutional law in state criminal cases"[95] by incorporating various rules that had long applied in federal proceedings, it had a relatively lesser impact on federal prosecutions.[96] In

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90. *Id.* at 772 (Stevens, J., dissenting in part); *accord* BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002, at 55 (2004) (noting that, during 2002, almost ninety-six percent of federal criminal convictions were obtained by guilty plea).

91. During the interval between *Blakely* and *Booker*, a number of federal district court judges adopted a practice of announcing in each case the sentence they would impose if compliance with the Federal Sentencing Guidelines were not mandatory. *See, e.g.*, United States v. Croxford, 324 F. Supp. 2d 1230, 1252-53 (D. Utah 2004).

92. According to a Westlaw Keycite search conducted December 8, 2005, *Blakely* had been cited by courts 7627 times and *Booker* had been cited 7257 times.

93. *See supra* note 34.

94. In 1971, the federal courts disposed of 32,103 criminal cases by trial or guilty plea; in 2004, the number was 73,616. U.S. Courts, Judicial Facts and Figures tbl.3.5, http://www.uscourts.gov/judicialfactsfigures/table3.05.pdf (last visited Oct. 19, 2005) (providing data on criminal defendants disposed of by method of disposition, excluding transfers); *see also* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995).

95. Hoffmann & Stuntz, *supra* note 28, at 77.

96. *See* James B. Haddad, *"Retroactivity Should Be Rethought": A Call for the End of the Linkletter Doctrine*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 417, 420-21 (1969) (noting that although several Warren Court decisions "had sudden and significant impact upon state

contrast, the recent rulings impose new requirements on federal and state trials alike, and some new obligations apply *only* in federal prosecutions.[97] Finally, although decisions about proper sentencing practices may generally be less retrospectively disruptive than those governing the conduct of a trial, in many federal criminal prosecutions sentencing questions are the only issues in play.[98] In short, at least with respect to such prosecutions, several of the Supreme Court's recent law-changing decisions have spawned particularly significant transitional moments. In the next Part, I will identify and critique one of the primary methods that the federal courts have used to limit the effects of these decisions: forfeiture rules.

II. THE FLAWED FORFEITURE STRATEGY

The most straightforward way of limiting the disruptive effects of legal change is to employ nonretroactivity – to declare that a rule announced today will govern only cases in which some event postdates the decision's announcement.[99] But courts have other ways of limiting a new decision's impact on already completed trials. The Supreme Court has it the easiest: If the Justices do not want to give a particular defendant the benefit of a new ruling, they can simply deny certiorari.[100] Although lower courts generally lack that luxury, they can usually refuse relief if the underlying error was "harmless."[101]

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criminal justice administration," federal-court defendants "had been accorded for decades the very rights which the Supreme Court had [long] denied, as a matter of constitutional requirements, to state-court defendants").

97. *See, e.g.*, United States v. Cotton, 535 U.S. 625, 627 (2002) (holding that, in federal criminal cases, the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires that facts that will enhance the maximum available sentence "must also be charged in the indictment").

98. This is especially true in drug prosecutions, which account for a large percentage of federal criminal cases. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 90, at 55 (noting that, during 2002, forty-two percent of all federal felony convictions were for drug offenses). As I noted earlier, *see supra* note 50, before *Apprendi*, juries were frequently asked to decide no more than whether a defendant had possessed or distributed some unspecified quantity of an undefined "controlled substance" – an issue often not subject to reasonable dispute.

99. *See infra* Part III.

100. Although vestiges of mandatory Supreme Court jurisdiction remain, none applies to review of state court decisions, HART & WECHSLER, *supra* note 23, at 468, or of federal criminal convictions, *id.* at 1580.

101. *See* Arizona v. Fulminante, 499 U.S. 279, 306 (1991) ("[M]ost constitutional errors can be harmless . . . ."). For an example of harmless error review in the changed-law setting, see United States v. McClain, 377 F.3d 219 (2d Cir. 2004) (considering a *Crawford* error). For discussions of the theory and doctrine of harmless error review, see, for example, ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970); Daniel J. Meltzer, *Harmless Error and*

In addition, as I explain in Section A, even when such a showing cannot be made,[102] reviewing courts will still often be able to deny relief on the theory that the appellant forfeited any right to rely on an intervening decision by failing to raise the underlying claim properly in the trial court.

As I explain in Section B of this Part, the forfeiture approach has become one of the dominant means by which federal courts limit the disruptive effects of legal change in the context of direct review of federal criminal convictions. Although this use of forfeiture rules is not necessarily inconsistent with the decision to declare all new rulings fully retroactive in that context (a point I explain in Section C), it is still unwarranted. Because they impose draconian consequences on criminal defendants, and because they do so based on lawyer inaction rather than client choice, forfeiture rules bear a heavy burden of justification. The problem, however, is that none of the purposes generally cited in support of forfeiture rules—avoiding error by judges, deterring sandbagging by defense counsel, and encouraging the creation of complete appellate records—can justify the way in which those rules are often applied when the legal landscape has shifted dramatically between the time of trial and appeal. Instead, as I explain in Section D, if the controlling law at the time of trial was clearly settled and clearly contrary to the defendant, the only additional requirement a court can impose on a defendant that is consistent with the purposes underlying forfeiture rules is an obligation to show that any error was "clear" or "obvious" under the law prevailing at the time of appeal.

A. Forfeiture Rules as a Means of Controlling Legal Change

"No procedural principle is more familiar," the Supreme Court declared more than sixty years ago, "than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."[103] Although the terms are often used interchangeably, waiver differs from forfeiture.[104] Waiver occurs when a person intentionally relinquishes a known right, thereby extinguishing

Constitutional Remedies, 61 U. CHI. L. REV. 1 (1994); and Stacy & Dayton, *supra* note 5. For a discussion of one of the problems with using the harmless error rules to limit the disruptive impacts of legal change, see *infra* note 324 and accompanying text.

102. *See* Chapman v. California, 386 U.S. 18, 24 (1967) (stating that "before a federal constitutional error can be held harmless" with respect to a case on direct review, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt"); *see also* Neder v. United States, 527 U.S. 1, 8-10 (1999) (discussing the concept of "structural" error).

103. Yakus v. United States, 321 U.S. 414, 444 (1944).

104. United States v. Olano, 507 U.S. 725, 733 (1993) (defining the distinction).

the right and barring later reliance on it.[105] For example, a criminal defendant who waives her right to testify may not later invoke that right as a basis for reversing her conviction—not because there is some barrier to doing so, but rather because the right has ceased to exist.[106] The only way to obtain relief based on an allegedly waived right, therefore, is to show that the waiver itself was invalid.[107]

Forfeiture works differently. Imagine a defense lawyer who believes that her client's statement to the police is inadmissible because the client was not given the *Miranda* warnings. When an officer takes the witness stand and relates the statement, however, counsel remains silent. The defendant later seeks reversal based on the putative *Miranda* violation, but the prosecutor responds that the court should not consider the claim because defense counsel forfeited it by failing to object when the evidence was proffered.[108]

What is important to see is that the basis for denying relief in the latter situation would not be that no right was violated. Absent evidence that the defendant was aware of her *Miranda* rights and directed her attorney not to assert them, there would be no basis for finding waiver. Rather, if the court declines to grant relief, it will be on the theory that, because of her attorney's inaction, the defendant has lost the right to insist on the *Miranda* claim's resolution.[109] In other words, whereas waiver requires an affirmative act and has the effect of erasing the underlying right, forfeiture occurs when a defendant fails to do something and erects a barrier between the defendant and the still-existing right she wishes to assert.[110]

Depending on how they are applied, forfeiture rules can accomplish virtually the same results as nonretroactivity doctrines. The fact that defendants—or, more accurately, defense lawyers—often fail to press even claims that would have been sure winners at the time of trial suggests that the number of "forfeitures" with respect to claims that would have been sure losers

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105. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

106. *See, e.g.*, United States v. Byrd, 403 F.3d 1278, 1282-83 (11th Cir. 2005).

107. *See, e.g.*, Ward v. Sternes, 334 F.3d 696, 705-07 (7th Cir. 2003) (granting relief on a right-to-testify claim on this basis).

108. *See, e.g.*, FED. R. EVID. 103(a)(1).

109. *See Olano*, 507 U.S. at 733 (stating that forfeiture arises through "the failure to make the timely assertion of a right").

110. *Id.* ("Mere forfeiture, as opposed to waiver, does not extinguish an 'error' . . . ."). In a handful of circumstances, however, courts have held that the absence of an objection means that there was no "error" in the first place. *See, e.g.*, Estelle v. Williams, 425 U.S. 501, 510-13 (1976) (holding that, in the absence of an objection, defendant could not establish that he had been "compelled" to stand trial while wearing clothes that were identifiably those of a prisoner).

is overwhelming.[111] Supreme Court precedent suggests that there are few, if any, constitutional limitations on the use of forfeiture rules,[112] at least if the rules are clearly announced, regularly followed, and applied in a nondiscriminatory manner.[113] In particular, the Court has made clear that there is no prohibition against deeming a defendant to have forfeited a claim even in cases in which the underlying argument would have been foreclosed by existing precedent at the time of the default.[114]

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111. Precise statistics about the number of defendants snared by forfeiture rules are hard to come by, but the number is likely significant. During the most recent four years for which data is available, the reversal rate in federal criminal appeals has never exceeded 6.4%. *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, MARCH 31, 2004, at 26 tbl.B-5 (2004) [hereinafter 2004 U.S. COURTS STATISTICS] (noting a 5.1% reversal rate); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, MARCH 31, 2003, at 27 tbl.B-5 (2003) (5.4%); 2002 U.S. COURTS STATISTICS, *supra* note 21, at 26 tbl.B-5 (5.6%); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, MARCH 31, 2001, at 28 tbl.B-5 (2001) (6.4%). These figures, however, include defendants whose appeals were dismissed due to procedural defect, rejected on the merits, or failed because any error was harmless, as well those who lost because of forfeiture rules. Though less systematic in nature, two other data points suggest the possible significance of forfeiture rules in federal criminal appeals. First, a Westlaw search performed on October 9, 2005, revealed 1717 decisions issued by federal courts of appeals during the previous three years that cited at least one of the following: (1) Federal Rule of Criminal Procedure 52(b), the provision that governs review of forfeited claims; (2) *United States v. Olano*, 507 U.S. 725, the decision that first announced the four-factor test used to review such claims, *see infra* notes 129-136; (3) *Johnson v. United States*, 520 U.S. 461 (1997), the first Supreme Court decision to discuss the proper manner of applying plain error review in the changed-law context, *see infra* notes 138-148; or (4) *United States v. Cotton*, 535 U.S. 625 (2002), which applied the *Johnson* analysis to review of forfeited claims based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *see infra* notes 149-157. Second, notwithstanding the fact that *Apprendi* was one of the most significant law-altering decisions issued by the Supreme Court during the last several decades, *see supra* Subsection I.B.2, the United States Court of Appeals for the Eleventh Circuit—which hears the third largest number of criminal appeals of any circuit in the nation, *see* 2004 U.S. COURTS STATISTICS, *supra*, at 22 tbl.B-1—appears to have never granted relief based on a "forfeited" *Apprendi* claim. *See, e.g.*, United States v. Levy, 391 F.3d 1327, 1335 n.5 (11th Cir. 2004) (Hull, J., concurring in the denial of rehearing en banc).

112. Yakus v. United States, 321 U.S. 414, 445 (1944) ("[I]t could hardly be maintained that it is beyond legislative power to make the [raise-or-forfeit] rule inflexible in all cases.").

113. *See, e.g.*, Alfred Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 953-80 (1965); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1137-45 (1986) (discussing the "inadequate state grounds doctrine").

114. *See, e.g.*, *Johnson*, 520 U.S. at 464, 466 (stating this rule in the context of direct review); Engle v. Isaac, 456 U.S. 107, 130 (1982) (collateral review).

B. Forfeiture Rules in the Direct Review Context

The previous Section introduced the concept of forfeiture and explained that forfeiture rules can render many law-changing decisions largely prospective as a functional matter. In this Section, I trace the development of forfeiture rules in the context of direct review of federal criminal convictions and explain how the forfeiture approach has become one of the primary means by which federal courts limit the disruptive effects of legal change in that setting.

Like all other jurisdictions in the United States,[115] federal courts employ a variety of rules about the proper time and manner for raising certain claims. Some issues—including requests to dismiss an indictment or suppress evidence—must be raised in a pretrial motion.[116] Objections to the admissibility of evidence must be made when the evidence is proffered.[117] Complaints about proposed jury instructions must be voiced before the jury retires to deliberate.[118] The consequence of failing to comply with any of these claim-presentation rules is the same: forfeiture.

In the context of direct review of federal criminal convictions, however, it has long been established that courts have the power to overlook forfeitures and correct certain "plain errors."[119] In 1896, the Supreme Court reversed the convictions of two ship's mates for departing from a United States port with the intent of conducting an illegal military expedition against a foreign state (Cuba) with which the nation was at peace.[120] The basis for the reversal was insufficiency of the evidence—a ground the mates had not raised during trial. Though acknowledging this failure, Chief Justice Fuller's opinion in *Wiborg v.*

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115. *See* Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. APP. PRAC. & PROCESS 521, 524 n.12 (2002).

116. FED. R. CRIM. P. 12(b)(3).

117. FED. R. EVID. 103(a)(1).

118. FED. R. CRIM. P. 30(d).

119. For an analysis of the Supreme Court's power to notice plain errors when reviewing state court judgments, see Girardeau A. Spann, *Functional Analysis of the Plain-Error Rule*, 71 GEO. L.J. 945 (1983). For discussions of plain error review in the civil setting, see Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987); and David William Navarro, Comment, *Jury Interrogatories and the Preservation of Error in Federal Civil Cases: Should the Plain-Error Doctrine Apply?*, 30 ST. MARY'S L.J. 1163 (1999).

120. Wiborg v. United States, 163 U.S. 632 (1896).

United States asserted a power to "take notice of what we believe to be a plain error" with respect to "a matter so absolutely vital to defendants."[121]

Since 1945, the power invoked in *Wiborg* has been codified in Federal Rule of Criminal Procedure 52(b).[122] In its current form, that Rule reads: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[123]

Despite this provision's long history, almost fifty years passed before the Supreme Court devoted any real attention to its meaning.[124] Opinions issued during the Rule's first two decades sometimes made passing references to it without purporting to establish a standard for the exercise of the discretion it recognized.[125] In 1975, the Court for the first time relied upon the Rule as a partial basis for reversing a lower court's grant of relief, though its opinion provided no guidance about when reviewing courts should correct forfeited errors.[126] In 1982, the Court stressed that the discretion to overlook forfeitures embodied in Rule 52(b) "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."[127] And in 1985, the Court twice relied heavily on the fact that the underlying claim had been forfeited as a basis for reversing lower court decisions that had granted relief to appealing defendants.[128]

It was not until 1993, however, that the Supreme Court finally attempted a comprehensive description of the appropriate "standard for 'plain error' review

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121. *Id.* at 658-59.

122. FED. R. CRIM. P. 52(b) advisory committee's note.

123. FED. R. CRIM. P. 52(b). Before 2002, Rule 52(b) began: "A plain error or defect that affects substantial rights . . . ." Recognizing that this formulation was "misleading to the extent that it might be read in the disjunctive," the drafters deleted the words "or defect." FED. R. CRIM. P. 52(b) advisory committee's note to 2002 amendment.

124. For a possible partial explanation, see *infra* Section III.A.

125. *See, e.g.*, Namet v. United States, 373 U.S. 179, 190-91 (1963); Giordenello v. United States, 357 U.S. 480, 484 n.2 (1958); Fisher v. United States, 328 U.S. 463, 467-68 (1946).

126. United States v. Park, 421 U.S. 658, 676 (1975). *Park*'s entire discussion of Rule 52(b) consisted of two sentences in which the Court noted that "there [had been] no request for a [particular jury] instruction," and then stated that, "[i]n light of the evidence . . . we find no basis to conclude that the failure of the trial court to give such an instruction *sua sponte* was plain error or a defect affecting substantial rights. Fed Rule Crim. Proc. 52 (b)." *Id.*

127. United States v. Frady, 456 U.S. 152, 163 n.14 (1982).

128. United States v. Gagnon, 470 U.S. 522 (1985) (reversing a Ninth Circuit decision that had granted relief based on the exclusion of the defendant from discussions between the judge and jurors); United States v. Young, 470 U.S. 1 (1985) (reversing a Tenth Circuit decision that had granted relief based on a rebuttal argument in which the prosecutor stated his opinion that the defendant was guilty and urged the jury to "do its job").

by the courts of appeals."[129] Stressing that "the authority created by Rule 52(b) is circumscribed,"[130] *United States v. Olano* announced a four-part test[131] for lower courts to apply. First, the Court observed, there must have been "error," which it defined as "[d]eviation from a legal rule."[132] Second, the error must have been "plain," which the Court said was the same as "clear" or "obvious."[133] Third, the error must have "affect[ed] substantial rights," which, the Court stated generally—though perhaps not invariably—meant that "a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial."[134] Finally, even when those requirements were met, *Olano* held that an appellate court still may not correct a forfeited error unless it "seriously affec[ted] the fairness, integrity or public reputation of judicial proceedings."[135]

Although *Olano* laid down a general test, neither it nor any of the preceding decisions addressed the proper manner for applying plain error review during a transitional moment—that is, when governing precedent changes between the time of trial and appellate review. The *Olano* opinion showed that the Court was already aware of the issue, however, stating that it "need not consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified."[136]

The Supreme Court's first occasion to address this "special case" resulted from its law-changing "materiality" decision in *United States v. Gaudin*.[137] Joyce Johnson, the defendant in the proceeding that culminated in the Supreme Court's decision in *Johnson v. United States*,[138] was charged with perjury. Following settled circuit precedent, the trial judge—without objection—told the jury that "materiality was a question for the judge to decide, and that he

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129. United States v. Olano, 507 U.S. 725, 731 (1993).

130. *Id.* at 732.

131. *Olano* described itself as laying out a three-part test with an additional equitable component. *Id.* at 732-37. Later decisions and commentators have recognized that it is more accurate to acknowledge that there are four factors. *See, e.g.*, Johnson v. United States, 520 U.S. 461, 466-67 (1997); 28 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE §652.04[1] (3d ed. 2003).

132. *Olano*, 507 U.S. at 732-33.

133. *Id.* at 734 (internal quotation marks omitted).

134. *Id.* The Court specifically flagged as a question, but declined to decide, whether there exists "a special category of forfeited errors that can be corrected regardless of their effect on the outcome," or whether there are "errors that should be presumed prejudicial." *Id.* at 735.

135. *Id.* at 736 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

136. *Id.* at 734.

137. *See supra* Subsection I.B.1.

138. 520 U.S. 461 (1997).

had determined that her statements were material."[139] After Johnson had been convicted but before her appeal was briefed, the Supreme Court decided *Gaudin*.

The *Johnson* Court unanimously affirmed the Eleventh Circuit's denial of relief,[140] but its opinion resolved few questions about the proper application of plain error review in the changed-law context. With respect to the first *Olano* factor,[141] the Court understood *Griffith v. Kentucky*'s holding—that all rulings regarding the conduct of criminal trials must be fully retroactive with respect to cases still on direct review—as mandating that the existence of "error" must be determined under current law, not the law as it existed at the time of trial.[142] The Court had somewhat more difficultly, however, and was considerably more ambiguous, with respect to the second *Olano* requirement—"plainness."

"[T]he [*Gaudin*] error is certainly clear under 'current law,'" Chief Justice Rehnquist began, "but it was by no means clear at the time of trial."[143] "[C]ontend[ing] that for an error to be 'plain,' it must have been so both at the time of trial and at the time of appellate consideration," the government insisted that Johnson "should have objected to the [trial] court's deciding the issue of materiality, even though near-uniform precedent both from this Court and from the Courts of Appeals held that course proper."[144] The Court, however, agreed with Johnson's rejoinder that employing such an approach in cases like hers "would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent."[145] Accordingly, "in a case . . . where the law at the time of trial was settled and clearly contrary to the law at the time of appeal," the Court held, "it is enough that an error be 'plain' at the time of appellate consideration."[146]

Having found "error" that was "plain," the Court assumed without deciding that the *Gaudin* error had affected Johnson's substantial rights and thus satisfied *Olano*'s third requirement. However, the Court denied relief on the grounds that the error had not "seriously affect[ed] the fairness, integrity

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139. *Id.* at 464.

140. Johnson v. United States, 82 F.3d 429 (11th Cir. 1996), *aff'd* 520 U.S. 461 (1997).

141. Before "apply[ing] Rule 52(b) . . . as outlined in *Olano*," the Court first rejected Johnson's assertion that *Gaudin* errors were "outside Rule 52(b) altogether" because they were "structural" in nature. *Johnson*, 520 U.S. at 466.

142. *Id.* at 467.

143. *Id.*

144. *Id.* at 467-68.

145. *Id.* at 468.

146. *Id.*

or public reputation of judicial proceedings."[147] The Court's analysis was terse, noting that the evidence supporting materiality was "overwhelming" and that the issue had been "essentially uncontroverted at trial and has remained so on appeal."[148]

The only other Supreme Court decision to address plain error review in the changed-law context, *United States v. Cotton*,[149] resulted from the chaos that followed *Apprendi v. New Jersey*.[150] The defendants in *Cotton* were charged with a conspiracy to distribute cocaine and cocaine base. Although the relevant statutes called for dramatically different penalties depending on the quantities involved,[151] the indictment "did not allege any of the threshold levels of drug quantity that would lead to enhanced penalties under § 841(b)," and the district court told the jury that "the amounts involved [were] not important."[152] At sentencing, however, the trial judge—consistent with then-uniform circuit precedent and without objection from the defendants—made a series of quantity findings that it used as the basis for imposing sentences far higher than those the court could have handed down otherwise.[153] While the defendants' appeals were pending, the Supreme Court decided *Apprendi*. Almost immediately, a deep circuit split developed over the proper method for analyzing the scores of forfeited *Apprendi* claims that began working their way through the system.[154]

Perhaps because it felt a need to resolve the issue quickly, the Court's unanimous opinion in *Cotton* seemed crafted to make as little new law as possible. After disposing of the argument "that the omission from the

147. *Id.* at 469 (internal quotation marks omitted). In retrospect, the reason for this approach appears to have been internal disagreement over whether *Gaudin* violations are among the group of structural errors that are not amenable to prejudice analysis. *See* Neder v. United States, 527 U.S. 1 (1999) (dividing five to four on this question).

148. *Johnson*, 520 U.S. at 470 (footnote omitted).

149. 535 U.S. 625 (2002).

150. *See supra* Subsection I.B.2.

151. *Compare* 21 U.S.C. § 841(b)(1)(C) (2000) (providing not more than twenty years imprisonment for a conspiracy involving less than 500 grams of cocaine or less than 5 grams of cocaine base), *with* 21 U.S.C. § 841(b)(1)(B) (2000) (five to forty years for at least 500 grams but less than 5 kilograms of cocaine or for at least 5 grams but less than 50 grams of cocaine base), *and* 21 U.S.C. § 841(b)(1)(A) (2000) (ten years to life for 5 kilograms or more of cocaine or for 50 grams or more of cocaine base).

152. *Cotton*, 535 U.S. at 628 (internal quotation marks omitted).

153. *Id.*

154. *See* Petition for Writ of Certiorari at 18-22, *Cotton*, 535 U.S. 625 (No. 01-687) (noting the circuit split).

indictment was a 'jurisdictional' defect" that mandated automatic reversal,[155] the Court simply repeated its analysis from *Johnson*. It accepted the government's concessions that there had been error under the reasoning of *Apprendi* and that the error was plain because the "'law at the time of trial was settled and clearly contrary to the law at the time of appeal.'"[156] The Court assumed without deciding that the error had affected the defendants' substantial rights, but it nonetheless denied relief under the fourth *Olano* factor because the evidence of drug quantity "was overwhelming and essentially uncontroverted."[157]

Johnson and *Cotton* resolved one issue involving the application of plain error review during a transitional moment: the proper time for assessing "plainness" in cases in which governing precedent was clearly against the defendant at the time of the default but had become clearly favorable by the time of appellate consideration. The opinions were silent, however, with respect to a number of other questions, which have in turn generated considerable disagreement in the lower courts.

One area of debate involves the proper method for applying the third *Olano* factor in the complete-legal-turnaround scenario presented in *Johnson* and *Cotton*. The Second Circuit has held that, in such situations, the government rather than the defendant should bear the burden of persuasion with respect to impact on "substantial rights" or "prejudice." As Chief Judge Walker reasoned in *United States v. Viola*,[158] when the governing time-of-trial law is either unclear or favorable to the defense, "the defendant is on notice of the duty to object" and failure to do so "impedes the judicial process by failing to prompt the trial judge to make timely correction of the error."[159] In contrast, a defendant who fails to object in the face of firmly settled authority cannot usefully be described as forfeiting a right that did not yet exist, and treating her as if she had "would only encourage frivolous objections and appeals" and would require "an omniscience on the part of defendants about the course of the law that we do not have as judges."[160]

The Eighth Circuit has described *Viola* as "persuasive,"[161] but no other circuit has adopted it, some have rejected it,[162] and even the Second Circuit has

155. *Cotton*, 535 U.S. at 629-31.

156. *Id.* at 632 (quoting Johnson v. United States, 520 U.S. 461, 468 (1997)).

157. *Id.* at 633 (internal quotation marks omitted).

158. 35 F.3d 37 (2d Cir. 1994).

159. *Id.* at 42.

160. *Id.*

161. United States v. Baumgardner, 85 F.3d 1305, 1309 n.2 (8th Cir. 1996).

expressed doubts.[163] The best explanation for *Viola*'s tepid reception appears to be a perceived inconsistency between its burden-shifting approach and the Supreme Court's later decisions in *Johnson* and *Cotton*. Despite the fact that *Johnson* and *Cotton* were both changed-law cases, the Court's opinions said nothing to indicate that this context warranted altering the normal manner of assessing impact on "substantial rights"—although, in fairness to the Second Circuit, neither *Johnson* nor *Cotton* said much at all.

The lower courts have also sharply disagreed about how the *Olano* analysis should be applied to cases that were on direct review at the time of the Supreme Court's recent decision regarding the constitutionality of the Federal Sentencing Guidelines.[164] Because *Booker*'s "fix" was to make the Guidelines advisory rather than mandatory, both the fact of a violation and the existence of prejudice depend on what was in the judge's mind when she pronounced sentence. For example, if a judge who sentenced a defendant based on the mistaken belief that compliance with the Guidelines was mandatory would have imposed the same sentence even had she known that they were only advisory, it is difficult to see how the defendant has been harmed.

This unconventional characteristic of *Booker* error makes it almost impossible to conduct any traditional prejudice inquiry, meaning that the side that bears the burden of proof will almost inevitably lose. Short of an actual statement by the trial judge, how is a litigant to prove—or an appellate court to assess—whether and how a sentencing judge might have exercised the discretion that she did not know she possessed? Is it dispositive that the sentence imposed was or was not at the bottom of a given Guideline range? What if the judge denied a request for a downward departure? Does it matter if the defendant asked for one? What if the court rejected the government's request for a particular enhancement or an upward departure?

Perhaps not surprisingly, a deep split has emerged over how to deal with these *Booker* "pipeline" cases. A number of circuits have adhered to the normal approach, holding that defendants with forfeited *Booker* claims are required to satisfy all of *Olano*'s usual requirements to obtain a remand for resentencing.[165]

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162. *See, e.g.*, United States v. Kramer, 73 F.3d 1067, 1074 n.17 (11th Cir. 1996).

163. *See, e.g.*, United States v. Thomas, 274 F.3d 655, 668-69 n.15 (2d Cir. 2001) (en banc) (noting the government's argument that *Viola*'s burden-shifting approach had been "'implicit[ly] overrul[ed]'" by *Johnson*, but resolving the appeal on other grounds).

164. *See supra* Subsection I.B.4.

165. *See* Brief for the United States at 11-12, Rodriguez v. United States, 125 S. Ct. 2935 (2005) (No. 04-1148) (describing decisions from the First, Fifth, Eighth, and Eleventh Circuits). Despite the federal government's urging that certiorari be granted, the Supreme Court denied Rodriguez's petition on June 20, 2005. *Rodriguez*, 125 S. Ct. at 2935.

Others have dispensed with notions of forfeiture altogether, remanding for resentencing every pre-*Booker* case in which the defendant so requested.[166] Still other circuits have followed a "limited remand" approach, directing trial judges to state on the record whether they would have imposed the same sentence had they known the Guidelines were advisory, but not ordering a new sentencing hearing unless the judge indicated that the answer might have been "no."[167]

Both areas of disagreement just discussed involve situations in which governing precedent was clearly unfavorable to the defendant at the time of trial but has become clearly favorable by the time of appeal. But controversies have also erupted over the proper approach to applying the second *Olano* factor, "plain error," when the law was unclear at the time of trial.

Most courts that have addressed the issue have said that plainness should be addressed as of the time of appeal,[168] the same approach *Johnson* prescribes for cases in which the law at the time of trial was clearly unfavorable to the defendant. Other circuits, however, have endorsed a time-of-trial approach.[169] As Judge Kozinski argued in one post-*Johnson* decision, because it is far from "pointless" to object when the then-governing precedent does not conclusively resolve a particular question, both the need to encourage compliance with the contemporaneous-objection rule and the principle that district courts are not charged with being "clairvoyant" mean that plainness should be assessed as of the time of the default.[170]

Why are courts having so much trouble agreeing about the proper way of applying plain error review in the changed-law context? As I explain in the next Section, the problem is two-fold. First, a number of judges and commentators have mistakenly assumed that *Griffith v. Kentucky*[171] (a case about nonretroactivity doctrine) resolves some genuinely hard questions about the meaning of Federal Rule of Criminal Procedure 52(b) (a forfeiture rule).

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166. *See* Brief for the United States, *supra* note 165, at 15-16 (describing decisions from the Third, Fourth, and Sixth Circuits).

167. *See id.* at 13-15 (describing decisions from the Second, Seventh, and District of Columbia Circuits).

168. *See, e.g.*, United States v. Smith, 402 F.3d 1303, 1315 (11th Cir. 2005), *vacated*, 125 S. Ct. 2938 (2005) (mem.); United States v. Calloway, 116 F.3d 1129, 1136 (6th Cir. 1997); United States v. Baumgardner, 85 F.3d 1305, 1308-09 (8th Cir. 1996); United States v. Ross, 77 F.3d 1525, 1539 (7th Cir. 1996); United States v. Viola, 35 F.3d 37, 42 (2d Cir. 1994); United States v. Retos, 25 F.3d 1220, 1230 (3d Cir. 1994).

169. *See, e.g.*, United States v. Castro, 166 F.3d 728, 732 (5th Cir. 1999); United States v. Turman, 122 F.3d 1167, 1170-71 (9th Cir. 1997); United States v. David, 83 F.3d 638, 643 (4th Cir. 1996); United States v. Washington, 12 F.3d 1128, 1139 (D.C. Cir. 1994).

170. *Turman*, 122 F.3d at 1170-71.

171. 479 U.S. 314, 328 (1987).

Second, partisans on both sides have generally failed to step back and see the problem for what it is: a question about the rationale for deeming some arguments forfeited in the first place.

C. The Need for a Theory of Plain Error Review

One could argue that *Griffith* answers some or all of the questions about how to apply plain error review in the changed-law context. *Griffith* holds that all "new rule[s]" regarding the conduct of criminal trials must be "applied retroactively to all cases . . . pending on direct review or not yet final."[172] Because plain error doctrine only applies to cases pending on direct review,[173] such cases must be governed by the same "law" that was applied to benefit the litigant in whose case a new ruling was announced. Relying on this sort of syllogistic reasoning, a number of courts have concluded that *Griffith* mandates that the plainness of an error must always be assessed at the time of appellate consideration,[174] and some judges and commentators have argued that *Griffith* requires excusing forfeitures more generally when the law changes between trial and appeal.[175]

This argument, however, suffers from two significant problems. First, it glosses over one of the primary justifications for *Griffith*'s full retroactivity holding: the need to ensure equal treatment for similarly situated litigants.[176] As a number of judges and commentators have recognized, defendants who failed to raise an argument in accordance with a given jurisdiction's claim-presentation rules are not necessarily similarly situated to those who, like Randall Lamont Griffith, do object notwithstanding the absence of favorable precedent.[177] Raise-or-forfeit rules are commonplace in both the federal and

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172. *Id*.

173. *See* United States v. Frady, 456 U.S. 152, 164 (1982) (stating that the plain error standard "was intended for use on direct appeal" and is thus "out of place when a prisoner launches a collateral attack").

174. *See supra* note 168.

175. *See, e.g.*, United States v. Levy, 391 F.3d 1327, 1338-41 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc); *id.* at 1351-52 (Barkett, J., dissenting from denial of rehearing en banc); Meir Katz, Note, *Plainly Not "Error": Adjudicative Retroactivity on Direct Review*, 25 CARDOZO L. REV. 1979, 1980-82 (2004).

176. *Griffith*, 479 U.S. at 323 ("[S]elective application of new rules violates the principle of treating similarly situated defendants the same.").

177. *See, e.g.*, *Levy*, 391 F.3d at 1330-31 (Hull, J., concurring in the denial of rehearing en banc); United States v. David, 83 F.3d 638, 643 n.6 (4th Cir. 1996); Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 282 (1998). The second Justice

state systems, and lack of compliance with them is frequently deemed a sufficient basis for dividing those who may obtain relief from those who may not. Although one can question whether it is a good idea to attach much weight to this distinction in the changed-law context—I will argue later that it is not[178]—such arguments arise more from the purposes of the raise-or-forfeit rules than from *Griffith*.

The second problem with the argument that *Griffith*, by its own force, mandates modification of or excusal from forfeiture rules in the changed-law context is that such a notion overlooks the fact that those rules are themselves part of the presently existing "law" that reviewing courts must apply. Even if one accepts "a priori that it is the duty of judges to decide cases based on their best [current] understanding of the law,"[179] rules that limit a party's eligibility to gain relief based on conceded legal violations are themselves part of that understanding.[180] When a reviewing court denies relief on a forfeited claim because the appellant has failed to satisfy some requirement that has arisen as a consequence of the forfeiture, it is neither stating that the trial court's decision was correct nor declining to apply the intervening decision retroactively. Were that the case, the reviewing court could simply affirm on the ground that there was no error in the first place. A court does something different when it denies relief on the ground that any error was not plain, that the appellant has not demonstrated that the error prejudiced her, or that the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings: It declares that the appellant is not among those people whom the current law

Harlan—the progenitor of much of the Court's modern retroactivity doctrine, *see infra* notes 298-323 and accompanying text—twice suggested the same point. *See* Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in part and dissenting in part) (stating that on direct review federal courts must "adjudicate every issue of law . . . fairly implicated by the trial process below and *properly presented*" (emphasis added)); Desist v. United States, 394 U.S. 244, 260 (1969) (Harlan, J., dissenting) ("[A] reviewing court has the obligation to rule upon every decisive issue *properly raised* by the parties on direct review . . . ." (emphasis added)).

178. *See infra* Section II.D.

179. Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1118-19 (1999).

180. *See id.* at 1118-19, 1120-23. Professor Roosevelt was describing the now-common wisdom that the holding of *Teague v. Lane*, 489 U.S. 288 (1989)—that almost no "new rules" may form the basis for upsetting a conviction that became final before the law-changing decision was announced—is probably best defended as a substantive decision about what types of claims must be cognizable to satisfy the basic aims of collateral review. *See also* Fallon & Meltzer, *supra* note 6, at 1813-16; Fisch, *supra* note 1, at 1070; Joseph L. Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 192-93 (arguing that *Teague* embodies a particular theory of the purpose of federal habeas corpus review of state criminal convictions).

(that is, the law governing forfeiture) makes eligible to have a potentially winning claim considered on the merits.

In short, *Griffith* has nothing to say about the proper method for applying plain error review when judicial understandings of the law's requirements have changed between the time of trial and appellate review. Instead, such questions can be resolved "only by focusing, in the first instance, on the nature, function, and scope of the adjudicatory process in which such cases arise."[181] Without first having a conception of the purposes of this form of review—both why it exists and why it is narrower than review of preserved claims—it is impossible to resolve the difficult questions about how plain error review should work in the changed-law context. I now turn to those questions.

D. Forfeiture's Failings

As the previous Section explained, the proper application of forfeiture rules in the changed-law context cannot be discerned without reference to the reasons for deeming some claims forfeited in the first place. In this Section, I first identify those reasons and then explain why none of them can justify the narrow form of plain error review that many federal courts have employed in reviewing forfeited claims based on the Supreme Court's recent law-changing decisions.

1. Why Forfeiture?

The problem with attempting a comprehensive account of plain error review is that there is little authority to go by, and what exists is often contradictory. Rule 52(b)'s declaration that courts "may" consider "plain error[s] that affect[] substantial rights"[182] confirms the existence of discretion but supplies scant guidance as to its proper exercise. The two decisions that the Rule's drafters announced their intent to restate[183] asserted a power to correct plain errors regarding matters "absolutely vital"[184] to defendants or when necessary "to prevent a miscarriage of justice in an exceptional case, where the error is particularly harmful."[185] Although these decisions suggest that plain

181. *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in part and dissenting in part).

182. FED. R. CRIM. P. 52(b).

183. *See id.* advisory committee's note—1946.

184. Wiborg v. United States, 163 U.S. 632, 658 (1896).

185. Hemphill v. United States, 112 F.2d 505, 507 (9th Cir. 1940), *rev'd on other grounds*, 312 U.S. 657 (1941).

error reversals should be the exception, and should occur only when a violation was particularly significant, they provide little assistance in determining what factors courts should consider when deciding whether to correct a harmful but forfeited error.

The Supreme Court's recent guidance is no more helpful. The Court has at various points envisioned plain error review as a device for vindicating process values,[186] ensuring appropriate outcomes,[187] and counterbalancing the behavior of other trial participants.[188] To make matters worse, these competing conceptions often appear side-by-side.[189]

Courts need to take a step back. The bedrock question is not which forfeited errors warrant correction but rather why we should deem certain arguments forfeited at all.

The most obvious answer is that forfeiture promotes compliance with claim-presentation rules. As noted earlier,[190] the Federal Rules contain a variety of provisions addressing the proper time and manner for raising certain arguments. Forfeiture doctrines encourage adherence to claim-presentation rules by imposing a sanction when parties fail to do so.[191]

Indeed, at least with respect to direct review of federal criminal convictions, furthering compliance with claim-presentation rules may be the only valid reason for forfeiture. Although the Supreme Court has cited two other justifications—comity and finality—for refusing to overlook forfeitures when a prisoner is mounting a collateral attack on a judgment of conviction, neither applies here.

The first consideration, comity, has no relevance when one federal court is reviewing the work of another, a fact the Court itself has recognized.[192] The

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186. United States v. Atkinson, 297 U.S. 157, 160 (1936) (declaring that plain error review should be used to correct errors that "seriously affect the fairness, integrity, or public reputation of judicial proceedings"); *see also* United States v. Young, 470 U.S. 1, 15 (1985) (quoting this language).

187. *Young*, 470 U.S. at 16 n.14 (stating that plain error review exists to remedy errors that had "an unfair prejudicial impact")

188. United States v. Frady, 456 U.S. 152, 163 (1982) (calling for appellate courts to correct "particularly egregious errors," those "so 'plain' [that] the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it").

189. *See, e.g.*, *Young*, 470 U.S. at 15-16 & n.14.

190. *See supra* notes 116-118 and accompanying text.

191. Meltzer, *supra* note 113, at 1135 (arguing that "[f]orfeiture provisions supply a necessary bite to" claim-presentation rules).

192. Wainwright v. Sykes, 433 U.S. 72, 88 (1977) (recognizing the need to "respect" the right of "a coordinate jurisdiction within the federal system" to make and enforce its own procedural rules); *Frady*, 456 U.S. at 166 (observing that "considerations of comity" have restrained the

second reason the Court has given for refusing to excuse forfeitures in the collateral review context is the interest in finality. "Once the defendant's chance to appeal has been waived or exhausted," the Court has emphasized, "we are entitled to presume he stands fairly and finally convicted . . . . Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks."[193] But if the direct review mechanism is—as the Court has said—an integral component in generating this presumption of fairness and reliability in the first place, it is clear that considerations of "finality" are not relevant when determining how to treat forfeited claims in the direct review context.

Of course, even on direct review, forfeiture rules advance finality in a different sense: They ensure that some appeals will fail that otherwise would have succeeded. Yet it is difficult to count this predictable effect of forfeiture rules among their purposes. Were the aim simply to limit the number of convictions that are later overturned, other methods could do so far more directly and effectively: for example, deferential standards of review,[194] declarations that certain kinds of trial court errors will not support reversal,[195] or elimination of appeals altogether.[196] To put the point in a slightly different way, although finality interests of this sort could justify any method of limiting access to appellate review, they provide no help for deciding whether sanctioning defendants for not having made futile objections is a good way of doing so.

Because promoting compliance with claim-presentation rules is the only valid reason for restricting relief on forfeited claims in the direct review context, the availability of relief notwithstanding forfeiture should depend, in turn, on the purposes of those rules. Accordingly, the initial focus should not be on the culpability of the judge or prosecutor or even the impact of the

Court when the judgment under attack issued from a state rather than federal court). In addition, although comity may explain why the Supreme Court generally defers to state court forfeiture rulings in the direct review setting, *see* Coleman v. Thompson, 501 U.S. 722, 729 (1991), comity provides no independent support for a state court's decision to find a forfeiture in the first place.

193. *Frady*, 456 U.S. at 164-65.

194. *Cf.* 28 U.S.C. § 2254(d)(1) (2000) (listing standards for granting collateral relief to state prisoners).

195. *Cf.* Stone v. Powell, 428 U.S. 465 (1976) (holding that Fourth Amendment claims are generally not cognizable in collateral review proceedings).

196. *See infra* note 340 and accompanying text.

forfeited error on the defendant.[197] Instead, we should consider whether this was a situation in which we would have wanted the defendant to object.

Claim-presentation rules further efficiency and fairness to participants by ensuring that additional proceedings will not be required because of issues that could have been, but were not, dealt with the first time around.[198] Requiring a defendant who believes her rights are about to be violated to raise a timely objection promotes this goal in three ways. First, an objection may prevent an error from happening in the first place, either because the judge sustains the defendant's objection or the prosecutor backs off, fearing that a trial-level victory might sow the seeds for a later appellate reversal.[199] Second, requiring a timely objection discourages sandbagging, the frequently invoked but rarely documented phenomenon in which defendants "forego an objection at trial for tactical reasons, knowing that they intend[] to claim on appeal that the district court's action to which they did not object constitutes reversible error."[200] Finally, even when the judge and prosecutor disagree with the defendant's view of the law, a timely objection will sometimes yield benefits by spurring the prosecutor to supplement the record, or prompting the trial court to seek additional information, make predicate factual findings, or state on the record the basis for decisions that might otherwise go unexplained.[201]

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197. Even when the purposes of claim-presentation rules do not warrant sanctioning a defendant for not objecting, an error's impact will still likely be relevant for purposes of harmless error analysis. *See supra* note 101.

198. *Atkinson*, 297 U.S. at 159 (describing the ordinary rule that appellate courts will not consider claims that were not raised below as being "founded upon considerations of fairness to the court and to the parties and the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact"); *see also* United States v. Young, 470 U.S. 1, 15 (1985); *Frady*, 456 U.S. at 163; Meltzer, *supra* note 113, at 1134-35; Newton, *supra* note 115, at 547 & n.139.

199. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 89 (1977); United States v. David, 83 F.3d 638, 643 (4th Cir. 1996).

200. *David*, 83 F.3d at 643 (citing *Sykes*, 433 U.S. at 89). For critiques of the sandbagging justification, see, for example, *Sykes*, 433 U.S. at 103-04 (Brennan, J., dissenting); Jack A. Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617, 692-96 (1984); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 896-98 (1984); and Peter W. Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 STAN. L. REV. 1, 43-46 (1978).

201. *See, e.g.*, Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 457 n.1 (3d Cir. 1982) (stating that the raise-or-forfeit rule "gives the adversary the opportunity . . . to present a reasoned defense of the trial court's action; and it provides the trial court with the alternative . . . of ordering a more fully developed record for review").

2. *The Problem with Plain Error*

Focus on the purpose of claim-presentation rules leads to the conclusion that some forfeitures should not be sanctioned. In particular, the standards for plain error review should be configured to avoid penalizing defendants for not objecting when (1) then-governing precedent would have required the trial judge to overrule any objection and (2) the validity of the defendant's claim does not depend on the facts of her particular case. Moreover, although the aims of claim-presentation rules do warrant penalizing defendants who fail to object when the law was unclear at the time of trial, the reviewing court's assessment of whether any error was "plain" (that is, clear or obvious) should still be made as of the time of appeal.

a. Clearly Unfavorable to Clearly Favorable

Requiring a defendant to object in the face of clear and controlling precedent will rarely further the purposes of claim-presentation rules. The first aim—avoidance of error—will almost never be implicated. Trial judges have no power to sustain objections foreclosed by then-existing law. Likewise, prosecutors are unlikely to discard a consciously chosen strategy that is supported by clear precedent just because the defendant objects. Finally, even when a prudent prosecutor may be inclined to retreat,[202] accommodating the defendant's request might be inconsistent with then-controlling authority.[203]

Nor can sanctioning defendants for not asking trial judges to disregard clear law be justified by the interest in deterring sandbagging. As Professor

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202. For example, even a then-futile objection might cause a reasonable prosecutor to withdraw her request to admit a certain piece of evidence or her request for a particular jury instruction if the prosecutor (1) is aware that the Supreme Court has granted review with respect to the underlying question and (2) does not view the challenged evidence or instruction as critical to her case. What is important to see, however, is that in this example both the prosecutor's initial choice to act and her later decision to retreat may well have been influenced by current forfeiture doctrine, because only that doctrine appears to explain why the presence or absence of a futile time-of-trial objection should materially alter the prosecutor's risk calculation.

203. For example, before 2000, it would have been error in many jurisdictions for a judge to ask a jury to decide certain issues that *Apprendi* now requires be so submitted. *See, e.g.*, United States v. Moreno, 899 F.2d 465, 473-74 (6th Cir. 1990) (holding that, in federal drug prosecutions, "the sentencing judge, not the jury, has the prerogative to make a determination of the quantity of the drugs involved in the scheme and to sentence accordingly" and remanding for resentencing in a case in which the trial judge had submitted the issue of drug quantity to the jury and then treated the jury's determinations as binding).

Daniel J. Meltzer has explained, there are two situations in which the absence of forfeiture rules might give defendants in federal proceedings an incentive to withhold claims at the trial court level. First, there may be some arguments whose acceptance would not meaningfully increase the odds of an acquittal but whose rejection could form the basis for an appellate reversal.[204] Second, there may be instances in which, "if a conviction is overturned on the basis of a withheld claim, the prosecution would have more difficulty convicting the defendant at a second trial," such as when "testimony available at a first trial will be unavailable or less persuasive in the future."[205]

What is critical to see is that, in both of these situations, the risk against which the defendant who does not object is protecting herself is the possibility that the trial court might resolve the issue in her favor, thus preventing her from raising the issue on appeal. Accordingly, worries about sandbagging do not warrant sanctioning a defendant who does not object when the then-existing law would have required the trial court to reject her claim.

In most cases, therefore, directing defendants to object in the face of clearly contrary authority does not further the policies underlying claim-presentation rules, other than encouraging prosecutors to supplement the record when appropriate and prompting prosecutors and judges to supply reasoned justifications for their actions.[206] As I explain in more detail below,[207] however, even those purposes are insufficient to justify the shape of current plain error doctrine as it applies to situations in which the controlling legal standards have changed dramatically between the time of trial and appeal.

Not only would a rule that encouraged defendants to object in the face of clear and controlling authority rarely further the purposes underlying claim-presentation rules, it is also difficult to see any other legitimate function that

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204. *See* Meltzer, *supra* note 113, at 1196 & n.340. Because most constitutional errors are subject to harmless error review, Arizona v. Fulminante, 499 U.S. 279, 306 (1991), this category is likely limited to so-called structural errors. The two cases in which the Supreme Court first appears to have expressed concerns about sandbagging involved precisely this sort of claim: allegations of race discrimination in the composition of a grand jury. *See* Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233, 240-41 (1973); *see also* Vasquez v. Hillery, 474 U.S. 254 (1986) (holding that such errors are not susceptible to harmless error analysis).

205. Meltzer, *supra* note 113, at 1196-97.

206. Applying forfeiture rules in the same way even when the law has changed also decreases administrative costs by simplifying a court's task on appeal. This justification relates not to the purposes of the underlying claim-presentation rules, but rather to the facilitation of the method chosen for their enforcement. In addition, there are countervailing costs associated with telling defendants that they should object even in the face of clearly unfavorable precedent. *See infra* notes 211-213 and accompanying text.

207. *See infra* note 243 and accompanying text.

such a rule would reliably serve. One might argue that having legions of defendants continuously protesting seemingly well-settled authority might demonstrate to the Supreme Court that there is a serious problem warranting its attention. This claim, however, is subject to two serious objections. First, it rests on the questionable view—at least to my mind—that the Justices' decision to reconsider a particular issue is influenced in any significant way by the raw number of litigants who are pressing a given argument.[208] Second, even if signaling of this sort may sometimes have a beneficial effect, the question remains to which court the signals should be sent. Because lower courts are not empowered to revisit higher court authority,[209] it seems clear that the signaling justification cannot explain a doctrine that punishes defendants for not lodging futile objections at the trial court level.[210]

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208. Although it seems plausible that the Court has granted some petitions it would have denied had it viewed the issues presented as idiosyncratic or rarely arising, two recent examples cast doubt on the claim that its decision to consider an issue is significantly affected by the sheer number of petitions that raise it. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), a five-Justice majority held that it is constitutionally acceptable to increase a defendant's maximum sentence based on a judge's finding that she was previously convicted of a crime. *Id.* at 239-47. Two years later, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), rejected *Almendarez-Torres*'s underlying theory, *id.* at 491-94, criticized its reasoning, *id.* at 489 n.15, and suggested that "it is arguable that *Almendarez-Torres* was incorrectly decided," *id.* at 489. Justice Thomas—whose assent had been necessary to the outcome in *Almendarez-Torres*—went even further, disavowing his own previous vote and flatly stating that *Almendarez-Torres* had come out the wrong way. *See Apprendi*, 530 U.S. at 520-21 (Thomas, J., concurring). During the more than five years since *Apprendi* was decided, scores of defendants have argued that its reasoning abrogates *Almendarez-Torres* and urged the Supreme Court to revisit the issue; no lower court has accepted the invitation, and the Supreme Court has repeatedly denied certiorari. *See* Brief for the United States at 45-46 n.16, Shepard v. United States, 125 S. Ct. 1254 (2005) (No. 03-9168) (citing cases). Something similar happened with respect to the Federal Sentencing Guidelines. As noted earlier, *see supra* Subsection I.B.4, *Apprendi* raised obvious questions about their constitutionality, and defendants started raising such arguments almost immediately after it was decided. *See, e.g.*, United States v. Doggett, 230 F.3d 160 (5th Cir. 2000). The Supreme Court, however, studiously ignored the issue for more than four years, only granting certiorari after *Blakely v. Washington*, 542 U.S. 296 (2004), "produc[ed] one of the quickest, most robust circuit conflicts on record." Green, *supra* note 78, at 1164.

209. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

210. Although the Supreme Court has refused to recognize a "futility" exception to the general rule that a federal court considering a petition for collateral review may not grant relief on any claim that was forfeited on direct review, *see* Engle v. Isaac, 456 U.S. 107, 130 (1982), neither of the Court's reasons is relevant here. Because a federal district judge has no power to reconsider a ruling by the Supreme Court or the relevant court of appeals, *see Rodriguez de Quijas*, 490 U.S. at 484, the Court's statement that "[e]ven a . . . court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid," *Engle*, 456 U.S. at 130, is simply inapplicable. *Engle* also stressed that serious comity concerns would arise if "criminal defendants [could] deprive the state courts of [an]

To make matters worse, sanctioning defendants for not making objections that their trial judges would have been bound to reject will predictably harm defendants. Because attorney time and budgets, briefing pages, and judicial hearings are all limited, encouraging defense attorneys to make then-futile objections will tend to divert resources from other tasks—a diversion that should be especially troubling in a world where criminal defense lawyers tend to be chronically underfunded.[211] Even if the direct costs of making an additional argument are relatively low, judges rarely tire of reminding litigants that making claims that will be perceived as weak lessens the force of stronger ones.[212] Finally, pressing arguments viewed as frivolous at the time will sometimes expose counsel to direct sanctions, such as fines, and indirect sanctions, such as alienating the trial judge or provoking an admonishment in front of the jury.[213] In short, there is little to be gained and much to be lost by subjecting defendants who did not object in the face of clearly settled law at the trial level to a dramatically less favorable standard of review on appeal.[214]

The Supreme Court appeared to have grasped at least some of these points when it first grappled with how to apply plain error review in the changed-law

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opportunity" to pass on a claim and go straight to federal court based on an assessment that the state courts "will be unsympathetic to the claim." *Id.* As explained earlier, notions of comity have no relevance in the context of direct review of a federal criminal conviction. *See supra* notes 191-192 and accompanying text. For an argument that the Court should modify its approach to futility in the collateral review context, see Newton, *supra* note 115.

211. For a discussion of the substitution effects created by various criminal procedure doctrines, see William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 31-45 (1997).

212. *See, e.g.*, Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 327.

213. Newton, *supra* note 115, at 523.

214. One could argue that having defense lawyers raise futile objections at the trial court level might simplify the task of appellate courts later charged with deciding which defendants should benefit when governing legal standards have shifted during the interim. Because defense lawyers are generally rational actors, the argument would go, they will object only if they believe that the underlying issue matters for a particular client. Accordingly, the lack of an objection by the interested party closest to the situation at the time of trial might be seen as a rough but useful mechanism for sorting out cases in which what is only later deemed to have been a legal violation mattered from those in which it did not.

Although this argument has a certain force, I am unpersuaded. First, appellate courts already have a technique that is expressly designed to sort consequential from nonconsequential errors: harmless error analysis. Second, whereas the marginal benefits that the approach described above envisions would be realized only in the relatively rare circumstance when the law changes between the time of trial and appeal, the costs of forcing defense attorneys to raise futile objections that are set forth in the previous paragraph will still be incurred even when the law remains the same.

context, but Chief Justice Rehnquist's opinion in *Johnson v. United States*[215] failed to press the analysis through to its logical conclusion. The Court was certainly right that employing a categorical rule of withholding relief on forfeited claims unless a trial court's error was plain "both at the time of trial and at the time of appellate consideration"—thus telling defendants that they should object even in the face of "near-uniform precedent"—would simply encourage "long and virtually useless laundry list[s] of objections to rulings that were plainly supported by existing precedent."[216] What the Court's analysis missed, however, is that there are other important differences between the way appellate courts review preserved claims and the usual standards for plain error review that will, unless modified, continue to generate powerful incentives for defendants to object notwithstanding entrenched precedent.

To see why, imagine two defendants, Ann and Bill, who went on trial before the same judge shortly before *Crawford v. Washington*[217] was decided. In both cases, the prosecutor sought to introduce a plea allocution by one of the defendant's former compatriots—a practice that almost certainly[218] violates the Confrontation Clause as construed in *Crawford* but was widespread under the pre-*Crawford* regime.[219] At Ann's trial, defense counsel raised an objection, which the annoyed judge promptly overruled in light of a directly on-point precedent from the relevant appellate court holding that such statements were sufficiently reliable to satisfy the requirements of the Confrontation Clause. Fully aware of the relevant decision and not wanting to antagonize the judge or jury, Bill's lawyer did not object. Both defendants were convicted, and, while their appeals are pending, the Supreme Court decides *Crawford*.

Johnson notwithstanding, Ann is in a far better position than Bill. Following *Griffith v. Kentucky*'s holding that all "new rule[s]" must be fully retroactive with respect to cases on direct review,[220] the reviewing court will apply the *Crawford* rule to the facts of Ann's case, find error in the trial judge's reliance on reliability, and grant relief, unless the government can demonstrate beyond a reasonable doubt that the error was harmless.[221]

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215. 520 U.S. 461 (1997); *see supra* notes 138-148 and accompanying text.

216. *Johnson*, 520 U.S. at 467-68.

217. 541 U.S. 36 (2004); *see also supra* Subsection I.B.3.

218. *See infra* notes 239-240 and accompanying text.

219. *See Crawford*, 541 U.S. at 63-64.

220. Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

221. *See* Chapman v. California, 386 U.S. 18, 24 (1967).

In contrast, Bill's appeal will be governed by Rule 52(b) as construed in *Olano*.[222] Per *Johnson*, Bill will likely have no trouble satisfying the first two *Olano* requirements: that there was "error" and that it was "plain" as of the time of appeal.[223] Bill will have to do much more, however. At least in most circuits, he will also need to demonstrate that the error affected his substantial rights by prejudicing the outcome of his trial, meaning that Bill, unlike Ann, will lose if the error's significance is unclear or difficult to assess.[224] Even if he gets over the substantial-rights hurdle, Bill will also need to persuade the reviewing court that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings"[225]—a standard that cannot be satisfied simply by showing that the error was prejudicial[226] or even "structural" in nature.[227] Finally, even if Bill makes all those showings, *Johnson* and *Olano* indicate that the appellate court still might exercise its discretion and decline to correct the forfeited *Crawford* error.[228]

Johnson's limited modification of the usual requirements for plain error relief, in short, does little to remove the powerful incentives that the standard formulated in *Olano* gives defendants to make objections that are clearly foreclosed by existing precedent. Nor does the modification appear to be terribly effective, as was demonstrated in dramatic fashion in recent years. After *Apprendi v. New Jersey*[229] was decided in June 2000, defendants immediately began arguing that the principle it announced applied to the Federal Sentencing Guidelines.[230] Though these efforts were consistently

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222. United States v. Olano, 507 U.S. 725, 731 (1993).

223. *But see infra* notes 239-240 and accompanying text (explaining why, based solely on the facts stated above, it is not entirely clear that admission of the plea allocution violated Bill's rights).

224. *See supra* note 134 and accompanying text.

225. *Olano*, 507 U.S. at 736 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

226. *Id.* at 737 (stating that "a plain error affecting substantial rights does not, without more," warrant correction).

227. Johnson v. United States, 520 U.S. 461, 466, 468-70 (1997) (assuming that the failure to submit an offense element to the jury was a structural error, but holding that the error was nonetheless ineligible for plain error relief because the defendant did not satisfy the final *Olano* factor).

228. *Compare id.* at 467 (holding that if all four *Olano* criteria are satisfied, "an appellate court may then exercise its discretion to notice a forfeited error"), *with Olano*, 507 U.S. at 736 ("The court of appeals should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." (internal quotation marks and citation omitted)).

229. 530 U.S. 466 (2000); *see also supra* Subsection I.B.2.

230. *See, e.g.*, United States v. Doggett, 230 F.3d 160, 162 (5th Cir. 2000).

rebuffed by every court of appeals until more than four years later,[231] that did not stop scores more defendants from making objections that their trial judges were duty-bound to reject. Even if some of these defendants and their lawyers were unaware that governing precedent required rejection of their pleas, others objected for the express purpose of preserving their claims in case the Supreme Court later applied *Apprendi* to the Guidelines.[232] This tactic—though tremendously wasteful, especially when its effects are aggregated—has proved quite wise, as demonstrated by the difficulty that the courts of appeals had in figuring out how plain error analysis should be applied to the unconventional right recognized by the Supreme Court in *Booker*.[233]

If plain error doctrine is to create the proper incentives, a further reworking is necessary for cases in which an objection would have been clearly foreclosed by then-controlling law. First, consistent with the Second Circuit's conclusion in *United States v. Viola*,[234] the government rather than the defendant should bear the burden of persuasion with respect to whether the error impacted the defendant's substantial rights (i.e., was prejudicial). Second, the requirement that the defendant also demonstrate that the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings'"[235] should be eliminated. Third, the Supreme Court should make clear that a reviewing court has no discretion to withhold relief if all prerequisites are met. For reasons I explained earlier,[236] neither the goal of avoiding errors when possible nor the interest in deterring sandbagging can justify treating defendants worse for not asking their trial judges to disregard binding authority. And although the interest in creating a complete appellate record can sometimes justify doing so, I will now demonstrate that that interest can be fully served simply by retaining *Olano*'s "plainness" requirement in all cases in which the defendant did not object.

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231. *See* United States v. Booker, 375 F.3d 508 (7th Cir. 2004), *aff'd*, 125 S. Ct. 738 (2005).

232. *See, e.g.*, United States v. Smith, 82 F. App'x 950, 950 (5th Cir. 2003) (per curiam) ("[Smith] argues that under *Apprendi v. New Jersey*, the district court erred in holding her responsible for a larger amount of cocaine base for relevant conduct purposes than the amount alleged in the indictment and found by the jury in her first trial. She acknowledges that this argument is foreclosed by [circuit precedent], but she states that she is raising it to preserve it for possible Supreme Court review." (citation omitted)).

233. *See supra* Subsection I.B.4; *supra* notes 164-167 and accompanying text.

234. 35 F.3d 37, 42 (2d Cir. 1994); *see also supra* notes 158-160 and accompanying text.

235. United States v. Olano, 507 U.S. 725, 736 (1993) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

236. *See supra* notes 202-205 and accompanying text.

As I explained earlier, one purpose of claim-presentation rules is to provide prosecutors and trial judges with a chance to explain the reasons for a given course of action, and to supplement the record if necessary.[237] By failing to object, a defendant deprives them of this opportunity. Accordingly, the consequences of any ambiguity at the time of appeal about whether the defendant's rights were violated should be borne by the defendant who forfeited her claim, and the best way to do so is to require the defendant who did not object at trial to show that the error was clear or obvious as of the time of appeal.[238]

To see why this is so and how it would work, return to the earlier example about Bill, the defendant who forfeited his Sixth Amendment claim by not objecting when his former confederate's plea allocution was introduced at his trial. Under *Crawford*, this action violated Bill's Confrontation Clause rights if (1) the statements were "testimonial"; and (2) they were used to prove the truth of matters asserted in the statements.[239] The first question is easy because *Crawford* clearly singled out plea allocutions as paradigm testimonial statements.[240] Suppose, however, that it is hard for the appellate court to determine whether the statements were used for their truth value—a question that can bristle with complexity. The underlying legal rule is clear, but its application to Bill's case is not, either because of gaps in the record or because this is a genuinely close call. Who should bear the costs of that uncertainty?

None of the solutions is terribly satisfying, but the purposes underlying claim-presentation rules suggest that the better answer is Bill. Had Bill objected, the prosecutor might have argued that the statements had relevance independent of their truth or even proffered additional evidence to substantiate or bolster such an assertion.[241] In addition, the trial judge might have accepted the prosecutor's argument, a decision that would have been reviewed under a

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237. *See supra* note 201 and accompanying text.

238. Of course, a certain amount of ambiguity will exist whenever the judge or prosecutor could have done something to avoid the objection. For an explanation of why this is unlikely to be a serious concern, see *supra* note 203 and accompanying text.

239. Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004).

240. *See id.* at 63-64.

241. One could argue that the prosecutor could just as easily offer the alternative justification while the case is pending on appeal. *See, e.g.*, United States v. Purkey, 428 F.3d 738, 752 (8th Cir. 2005) (stating, in the context of an appeal from various evidentiary rulings, that an appellate court "may affirm on any ground supported by the record, even if that ground was not relied on by the district court"). The prosecutor will not, however, be able to introduce additional evidence at the appellate stage. In addition, if the issue is discussed for the first time on appeal, the prosecutor will lose the opportunity to obtain a favorable trial court ruling, a decision to which an appellate court might owe substantial deference.

deferential standard on appeal.[242] Accordingly, because his failure to object deprived the prosecutor and judge of the opportunity to make a record that might have convinced the appellate court that there was no cause to reverse notwithstanding the change in law, Bill should be deemed responsible for any ambiguity.[243]

Admittedly, this approach would mean that a defendant who objects in the face of clear time-of-trial precedent will sometimes end up better off than one who fails to do so. And this, in turn, means that my approach would not eliminate all of the ways in which existing law encourages defendants to object in the face of clearly unfavorable precedent. This problem, however, is unlikely to be serious and may well not be a problem at all. First, as explained above, a defendant would be worse off for not objecting only when, notwithstanding the intervening change in law, the existence of error was still not clear at the time of appeal—a situation unlikely to arise often, especially given the Court's recent penchant for bright-line rules rather than fact-intensive standards.[244] Second, if a defendant's ability to prevail even under her own view of the law depends on case-specific considerations, the purposes of claim-preservation rules suggest that she should be encouraged to object, even in the face of contrary law.[245]

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242. *See, e.g.*, Surfvivor Media, Inc. v. Survivor Prods., 406 F.3d 625, 630 (9th Cir. 2005) (noting that "rulings regarding the relevance of evidence" are reviewed for abuse of discretion).

243. Had Bill objected, there is a good chance that the prosecutor would simply have noted that his claim was inconsistent with controlling authority and that the judge would have overruled the objection on that basis. In that situation, however, responsibility for the ambiguity could not reasonably be said to rest with Bill.

244. *See supra* Section I.B; *see also* Kyllo v. United States, 533 U.S. 27, 40 (2001) ("Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."); Jeffrey L. Fisher, *A* Blakely *Primer: Drawing the Line in* Crawford *and* Blakely, CHAMPION, Aug. 2004, at 18, 18 (arguing that recent decisions suggest that criminal defense lawyers should "reconsider the utility and equity of advocating bright line rules, at least under certain circumstances").

245. One potential objection to my approach is that it may preserve an incentive for savvy defense lawyers to raise a litany of futile objections to guard against the possibility that a later-announced rule might have some factual component or employ a fact-dependent safety valve. The only way to guard against this risk, however, would be to remove the plainness requirement entirely, something that could not be done without a legislative amendment to Rule 52(b), and that would, in any event, undermine one of the purposes that underlies claim-presentation rules in the first place. *See supra* notes 237-243 and accompanying text. Ultimately, to the extent the two conflict, I am more concerned with not making some defendants worse off when there is no defensible justification for doing so than I am with treating others somewhat better than the purposes of claim-presentation rules might warrant.

Skeptics may argue that, whatever its merits as a prescriptive matter, my proposal cannot be squared with Rule 52(b) and is inconsistent with controlling Supreme Court precedent. The former concern is unfounded. The Rule reads, in its entirety: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[246] The Rule says nothing about when plainness must be assessed; the words "affects substantial rights" need not be read to require that a defendant invariably prove prejudice; and the words "may be considered"[247] are not followed by "but only if the error seriously affect the fairness, integrity, or public reputation of judicial proceedings."

Nor is my approach inconsistent with what little is known about the intentions of the Rule's drafters. *Olano*'s four-factor test appears nowhere in the two decisions that the Advisory Committee's note indicates the Rule was meant to "restate."[248] Although the Supreme Court has asserted that the Rule codified "the standard laid down in *United States v. Atkinson*,"[249] the decision that first employed the "seriously affect[s] the fairness, integrity or public reputation" language,[250] there is no evidence to support that claim. In addition, the actual standard recited in *Atkinson* is fully consistent with my approach.[251]

My proposal does suggest that the Supreme Court identified the wrong basis for its denials of relief in *Johnson v. United States*[252] and *United States v. Cotton*.[253] Both cases might still have come out the same way under my approach, however. In *Johnson* and *Cotton*, the Court assumed without deciding that failure to submit an offense element to a jury—a petit jury in the former, a grand jury and a petit jury in the latter—was the sort of structural error that per se affects substantial rights.[254] Two years after *Johnson*, a sharply divided Court squarely rejected that view with respect to petit juries, holding that a trial judge's failure to include an offense element in a jury charge was

246. FED. R. CRIM. P. 52(b).

247. *Id.*

248. FED. R. CRIM. P. 52(b) advisory committee's note (citing Wiborg v. United States, 163 U.S. 632 (1896); Hemphill v. United States, 112 F.2d 505 (9th Cir. 1940), *rev'd*, 312 U.S. 657 (1941)).

249. United States v. Young, 470 U.S. 1, 7 (1985).

250. United States v. Atkinson, 297 U.S. 157, 160 (1936).

251. *See id.* (holding that appellate courts may notice forfeited errors "if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings").

252. 520 U.S. 461 (1997); *see also supra* notes 138-148 and accompanying text.

253. 535 U.S. 625 (2002); *see supra* notes 149-157 and accompanying text.

254. *Cotton*, 535 U.S. at 632; *Johnson*, 520 U.S. at 469.

subject to conventional harmless error analysis.[255] Although the Court has not specifically so held with respect to the omission of an element from a grand jury indictment, its resolution of the petit jury issue seems to leave little doubt about how a majority would resolve it. Given the Court's statements in *Johnson* and *Cotton* that the evidence with respect to the relevant issues was "'overwhelming'" and "'essentially uncontroverted,'"[256] it appears that the defendants in both cases could have also lost on the ground that the errors were harmless.

b. Unclear to Clearly Favorable

The previous Subsection considered the proper method for dealing with cases in which governing precedent was clearly unfavorable to the defendant at the time of trial but has become clearly favorable by the time of appeal. This Subsection explores how reviewing courts should deal with cases in which intervening higher-court decisions have shifted the law from unclear to clearly favorable to the defendant.

Strict adherence to the purposes of claim-preservation rules would suggest that relief should be categorically barred in such circumstances. When time-of-trial law is not clearly against the defendant, all three purposes of claim-presentation rules—avoiding error, deterring sandbagging, and creating a complete record[257]—suggest that defendants should be encouraged to object. A rule of total forfeiture would maximize incentives to do so.[258] This approach would also be fully consistent with Rule 52(b)'s text, which states that plain errors affecting substantial rights "may be considered," not that all such errors must be corrected.[259]

Nonetheless, the suggestion that reviewing courts should apply a rule of absolute forfeiture to cases in which governing law was unclear at the time of

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255. Neder v. United States, 527 U.S. 1 (1999). The Supreme Court will decide this Term whether violations of the Sixth Amendment right announced in *Blakely v. Washington*, 542 U.S. 296 (2004), are amenable to harmless error review. State v. Recuenco, 110 P.3d 188 (Wash.), *cert. granted*, 126 S. Ct. 478 (2005) (No. 05-83) (granting review to consider "[w]hether error as to the definition of a sentencing enhancement should be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement").

256. *Cotton*, 535 U.S. at 633 (quoting *Johnson*, 520 U.S. at 470).

257. *See supra* notes 198-201 and accompanying text.

258. Fining or otherwise sanctioning defense lawyers who fail to make proper objections might be more effective and just, but no reliable method for doing so has been devised.

259. FED. R. CRIM. P. 52(b).

trial is too broad. The first hint comes from *Johnson*. By holding that defendants may sometimes obtain relief when the challenged action was compelled by then-existing authority,[260] the Supreme Court has rejected the view that plain error relief is per se inappropriate unless the trial judge's conduct "deserves rebuke."[261]

The same is true of the Court's decisions about when a federal court entertaining a petition for collateral review should consider a claim on the merits notwithstanding the petitioner's failure to raise it properly at trial or on direct review. There too the Court has not imposed an absolute rule that the conduct forming the basis for the forfeited claim must have been clearly unlawful at the time it was committed. At least one decision establishes just the opposite, holding that a petitioner could be excused from his default if the underlying claim would clearly have failed at the time of trial.[262] Because the Court has stated that the standards for overcoming forfeiture in the collateral review context should be "significantly higher" than those used on direct review,[263] the fact that habeas petitioners are sometimes entitled to have defaults excused in situations in which a trial court's decision was not clearly wrong when made counsels against any general time-of-trial plainness requirement in the direct-review context.

The task still remains to identify the circumstances in which relief should be available on a forfeited claim when raising the claim would not have advanced the purposes of the underlying claim-presentation rules. For the reasons just stated, conventional merits review should be available in any case where a habeas petitioner would be able to overcome a procedural default. In other words, plain error relief should be available if the default was the result of ineffective assistance of counsel,[264] the claim would have been so "novel" at the time of trial that it would not have been "reasonably available,"[265] or the

260. *Johnson*, 520 U.S. at 468 (stating that when "the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration").

261. United States v. Ross, 77 F.3d 1525, 1539 (7th Cir. 1996).

262. Bousley v. United States, 523 U.S. 614, 616, 623-24 (1998).

263. *See, e.g.*, United States v. Frady, 456 U.S. 152, 166 (1982).

264. Murray v. Carrier, 477 U.S. 478, 486-87 (1986).

265. Reed v. Ross, 468 U.S. 1, 16 (1984). Because the standard for showing that a claim was not "reasonably available" is high, *see* Engle v. Isaac, 456 U.S. 107, 131-33 (1982) (stating that the "novelty" standard is not satisfied unless defense counsel "lacked the tools to construct" the relevant claim), this basis for overlooking a forfeiture will rarely, if ever, be applicable in the direct review setting.

appellant can demonstrate that, under the current best view of the law, she is immune from liability or the imposition of a particular punishment.[266]

There is also good reason to believe that plain error relief should be available in circumstances that are broader still. As noted earlier,[267] the Supreme Court's explanation for the firmness of its forfeiture rules in the collateral review context has rested heavily on finality—the strong presumption of fairness and reliability that attaches once "a final judgment [has been] perfected by appeal."[268] But if the strong presumption of finality that attaches upon the conclusion of direct review itself rests in part on a defendant's ability to gain relief from trial errors on direct review, it seems logical that relief should always be available on direct appeal in situations that could call the basic fairness of the trial or the reliability of its result into question. Although one could disagree about the precise articulation of the standard, or on which side of the line various cases might fall, *Olano*'s approach of asking whether a forfeited error "'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings'"[269] strikes me as basically sound. For this approach to work, however, it is necessary that *Olano*'s second requirement, plainness, always be assessed as of the time of appellate consideration.

It is true that many of the cases that satisfy the "fairness, integrity, or public reputation" standard will involve conduct that was clearly unlawful even at the time of trial. For example, a judge's decision to sit by while a prosecutor violates clearly established law will often raise questions about the integrity of the proceedings, and may, depending on the nature of the objectionable conduct, implicate their public reputation as well.[270] In addition, a defense lawyer's failure to object to a then-obvious violation of her client's rights suggests ineffectiveness (in conventional terms, even if not constitutional ones), which may call into doubt the fairness of the trial as a means for resolving fundamental questions of guilt or innocence.[271]

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266. *See Bousley*, 523 U.S. at 623-24; Sawyer v. Whitley, 505 U.S. 333, 338-50 (1992).

267. *See supra* note 193 and accompanying text.

268. *Frady*, 456 U.S. at 164.

269. United States v. Olano, 507 U.S. 725, 736 (1993) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

270. *See* United States v. Young, 470 U.S. 1, 10 (1985) ("[T]he trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; 'the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.'" (quoting Quercia v. United States, 289 U.S. 466, 469 (1933))).

271. As others have pointed out, rules that permit courts to grant relief notwithstanding forfeitures often operate as subconstitutional ineffective assistance of counsel doctrines, facilitating relief in cases in which attorney error does not rise to the level necessary to make out a freestanding constitutional claim. *See, e.g.*, Meltzer, *supra* note 113, at 1187.

But intervening decisions may themselves raise questions about whether a particular trial wrong is one that the legal system is prepared to tolerate. Take, for example, a situation in which an intervening decision makes clear that a given piece of evidence was inadmissible and, without that evidence, the government's proof would have been constitutionally insufficient to support a conviction.[272] In cases such as these, I submit, a forfeited error warrants correction, even if the defendant might not have been entitled to relief had she sought it at the time of trial. Put another way, if it is plain at the time of appeal that a defendant's rights were violated, the focus should be on whether the forfeited error calls into question the basic justice of the proceedings that led to her conviction, not the peripheral issue of whether the trial judge's actions, when taken, would have merited criticism.

III. A RETURN TO NONRETROACTIVITY

As I explained in the previous Part, forfeiture rules are a poor mechanism for controlling the backwards-looking impact of law-changing decisions in the direct review context. In this Part, I suggest that courts, commentators, and (perhaps) legislatures should reconsider turning to nonretroactivity approaches in general, and selective prospectivity in particular.

A. Nonretroactivity's Rise and Fall[273]

The traditional rule, often associated with Chief Justice Marshall's opinion in *United States v. Schooner Peggy*,[274] was that a reviewing court was required to resolve a case based on its best current understanding of the law, with no exception for developments occurring between the time of a challenged action and its later decision.[275] So well-entrenched was this notion that Justice

272. *See, e.g.*, United States v. Bruno, 383 F.3d 65, 77-80 (2d Cir. 2004) (finding a *Crawford* violation).

273. For earlier tellings of this story, see, for example, Fallon & Meltzer, *supra* note 6, at 1738-49; Roosevelt, *supra* note 179, at 1081-97; Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 816-32 (2003); and Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance, and Stare Decisis*, 48 SYRACUSE L. REV. 1515, 1517-58 (1998).

274. 5 U.S. (1 Cranch) 103 (1801).

275. *Schooner Peggy* dealt with the effect of a subsequently ratified treaty, but its rule was generally understood as applying to judicial decisions as well. Initially, this conclusion was based on a view that the later ruling demonstrated "not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law." Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 211

Holmes could declare in 1910 that "[j]udicial decisions have had retrospective operation for near a thousand years."[276]

Although the Supreme Court rejected the view that the Federal Constitution barred state courts from making their own rulings purely prospective in 1932,[277] the Court did not squarely address its own power to do so until more than thirty years later.[278] The impetus was *Mapp v. Ohio*,[279] which held that the Federal Constitution mandates the exclusion of unconstitutionally seized evidence in state court trials. Because the Court had already, without comment, applied *Mapp*'s rule to other cases that had been pending on direct review when it was decided,[280] the issue in *Linkletter v. Walker*[281] was whether *Mapp* should also govern collateral review proceedings commenced by prisoners whose convictions had become final before that date.[282]

The answer to this question, *Linkeletter* held, was "no."[283] Even more important that this holding, however, was *Linkletter*'s emphatic assertion of the Court's power to declare that its own constitutional holdings would have less than full retrospective effect. "[T]he Constitution," the Court wrote, "neither prohibits nor requires [that new decisions be given] retrospective effect."[284]

(1863) (Miller, J., dissenting); *see also* WILLIAM BLACKSTONE, 1 COMMENTARIES *69 (stating that a court's role is not to "pronounce a new law, but to maintain and expound the old one"). Later decisions framed the issue in terms sounding more directly in retroactivity. *See, e.g.*, Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543 (1941) ("[Federal courts sitting in diversity] should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.").

276. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting).

277. Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 363-64 (1932).

278. Roosevelt, *supra* note 179, at 1083-89 (discussing "intimations of prospectivity" spanning from the mid-nineteenth through the early twentieth centuries and "flickers of prospectivity" during the 1950s).

279. 367 U.S. 643 (1961).

280. *See, e.g.*, Stoner v. California, 376 U.S. 483 (1964).

281. 381 U.S. 618 (1965).

282. *Id.* at 619-20.

283. *Id.* at 639-40.

284. *Id.* at 629. For persuasive arguments that *Linkletter* misread precedent, see, for example, James B. Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus*, 79 NW. U. L. REV. 1062, 1064-66 (1985); and Roosevelt, *supra* note 179, at 1090-91. For arguments that *Linkletter*'s result could have been justified on other grounds, see, for example, Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 57, 77-92 (1965).

Instead, the decision whether to make a particular ruling nonretroactive required "weigh[ing] the merits and demerits in each case."[285]

In the years following *Linkletter*, the lure of making new decisions less than fully retroactive proved impossible to resist, both for Justices anxious to contain the harms of what they saw as badly flawed decisions[286] and those wanting to ensure that "long-overdue reforms" would not be inhibited.[287] The Court soon cast aside the finality line, stating that it saw no "persuasive reason" for treating cases differently based on whether direct review had been completed at the time of a law-changing decision.[288] Beginning in 1966, rulings were held applicable only to cases in which the trial had not yet started,[289] the tainted evidence had not yet been admitted,[290] or the underlying unconstitutional conduct had not yet occurred.[291] In 1967's *Stovall v. Denno*, the Court announced a general test for deciding whether and to what extent a new ruling should operate retroactively, stating that it would depend on "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[292]

Warren-era majorities occasionally asserted the Court's power to make new rulings purely prospective—that is, to announce a new rule without applying it even to the parties whose case was before the Court.[293] In practice, however, the Court invariably employed selective prospectivity—applying newly declared rules to benefit the litigants in whose cases they were announced but

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285. *Linkletter*, 381 U.S. at 629.

286. *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 303 (1967) (White, J., joined by Harlan & Stewart JJ., concurring) (stating that "I perceive no constitutional error in the identification procedure to which petitioner was subjected," but that "I concur in the result and in that portion of the Court's opinion which limits application of the new Sixth Amendment rule" announced in *United States v. Wade*, 388 U.S. 218, 250 (1967)).

287. Jenkins v. Delaware, 395 U.S. 213, 218 (1969) (Warren, C.J., joined by Brennan, Stewart, White & Marshall, JJ.); *see also* Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1564 (1975) (noting the "strange alliances" that produced the Warren Court's nonretroactivity decisions).

288. Johnson v. New Jersey, 384 U.S. 719, 733 (1966).

289. *See, e.g.*, *id.* at 733 (considering the rules of *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966)).

290. *See, e.g.*, Fuller v. Alaska, 393 U.S. 80 (1968) (per curiam) (considering the rule of *Lee v. Florida*, 392 U.S. 378 (1968)).

291. *See, e.g.*, *Stovall*, 388 U.S. at 293 (applying the rules of *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967)).

292. *Id.* at 297.

293. *Johnson*, 384 U.S. at 733; Linkletter v. Walker, 381 U.S. 618, 622 n.3 (1965).

deferring until a later time the decision about whether to apply the rule to other cases in the same procedural posture. For example, although the Supreme Court applied the rule announced in *Miranda v. Arizona*[294] to vacate the convictions of Ernesto Miranda and three other defendants whose cases had been consolidated with his, one week later it declined to apply the same rule to benefit eighty others who were identically situated in all relevant respects.[295] Seeking to defend this disparity of treatment, the Court described it as "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum" and the need to preserve "the incentive of counsel to advance contentions requiring a change in law."[296]

The Warren Court's nonretroactivity decisions were controversial from the start,[297] but, at least in retrospect, the first important crack appeared in 1969. That year, the second Justice Harlan, who had signed on to many of the Court's earlier rulings, declared that he had had enough. Dissenting alone in *Desist v. United States*,[298] Harlan denounced the "incompatible rules and inconsistent principles" that had emerged from the Court's recent decisions.[299] "'Retroactivity,'" he proclaimed, "must be rethought."[300]

Justice Harlan's chosen solution, which he first set forth in *Desist* and explained in greater detail in another solo opinion in 1971's *Mackey v. United States*,[301] was quite similar to an approach originally proposed by Professor Paul J. Mishkin.[302] Like Professor Mishkin, Justice Harlan's first move was to divide the universe of criminal cases into two categories: cases still on direct review and those in which the only remaining method of attack consisted of

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294. 384 U.S. 436 (1966).

295. *See* Desist v. United States, 394 U.S. 244, 255-56 (1969) (Douglas, J., dissenting) (discussing the Court's disposition of the cases pending at the same time as *Miranda*); *Johnson*, 384 U.S. at 731.

296. *Stovall*, 388 U.S. at 301.

297. Justices Black and Douglas dissented in *Linkletter* and continued to express their disagreement in subsequent cases. *See, e.g.*, Jenkins v. Delaware, 395 U.S. 213, 222 (1969) (Black, J., joined by Douglas, J., dissenting); *see also* Mishkin, *supra* note 284, at 77-92 (arguing that new decisions should be applicable to all cases still on direct review, but generally inapplicable to cases in which the conviction had become final before the new decision was handed down); Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 720 (1966) (asserting that "all newly declared constitutional rights should be given retroactive effect").

298. 394 U.S. at 255 (Harlan, J., dissenting).

299. *Id.* at 258.

300. *Id.*

301. 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part).

302. Mishkin, *supra* note 284, at 77-92.

some form of collateral proceeding. Having drawn that line, Justice Harlan urged that the ability to obtain relief based on "new rules" should generally depend upon which side of the line a given defendant was on at the time the law-changing rule was announced.[303]

With respect to cases on direct review, Justice Harlan argued that appellate courts must apply their best current understanding of the law, including decisions issued after a conviction was rendered. A largely unstated but critically important premise for this argument was that the Court could not employ "pure prospectivity," that is, announce a new rule without applying it to the litigants in the case before it.[304] Building on that foundation, Justice Harlan asserted that it was unacceptable to apply newly announced rules to only a subset of cases that were in the same procedural posture. The Court, Justice Harlan stressed, was not empowered to "release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case."[305] Having made such a finding with regard to one defendant, he continued, the Court "must grant the same relief" to all others "similarly situated" or else "give a principled reason for acting differently."[306] To do otherwise would suggest that the Court "appl[ies] and definitively interpret[s] the Constitution . . . not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise"—a view that rested on nothing less than an assertion "that our constitutional function is not one of adjudication but in effect of legislation."[307]

But collateral review, Justice Harlan argued, was fundamentally different from direct review: "While the entire theoretical underpinnings of judicial review and constitutional supremacy dictate that federal courts having

303. *Mackey*, 401 U.S. at 675-77 (Harlan, J., concurring in part and dissenting in part); *Desist*, 394 U.S. at 258, 260 (Harlan, J., dissenting).

304. A possible explanation for this gap in Justice Harlan's argument relates to the target of his attack: the Court's decision in *Stovall v. Denno*, 388 U.S. 293 (1967), which held that the rules announced in *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), would not be applied to police-conducted identification procedures that took place before those decisions were announced, even though the Court had applied those rulings to benefit Wade and Gilbert themselves. *See Stovall*, 388 U.S. at 300-01. Having chosen to train his fire on *Stovall*—which employed a selective prospectivity approach and itself could be read as disavowing pure prospectivity, *see id.* at 301—it is not surprising that Justice Harlan did not directly consider the possibility that the unfairness he identified could be fixed by making a new ruling purely prospective.

305. *Desist*, 394 U.S. at 258 (Harlan, J., dissenting).

306. *Id.*

307. *Mackey*, 401 U.S. at 679 (Harlan, J., concurring in part and dissenting in part).

jurisdiction on direct review adjudicate every issue of law . . . fairly implicated by the trial process below . . . federal courts have never had a similar obligation on habeas corpus."[308] Rather, modern collateral review served two limited purposes: providing an "additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards,"[309] and "assur[ing] that no [one] has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[310] Because applying new rules to cases in which direct review had concluded by the time they were announced would never further the former goal and rarely advance the latter, Justice Harlan argued that courts considering petitions for collateral review should generally "apply the law prevailing at the time a conviction became final."[311] Though acknowledging that his solution rested on a contestable weighing of competing values[312] and would itself pose difficult problems of application,[313] Justice Harlan argued that it would be far better than the "free-wheeling approach" then being practiced by the Court.[314]

Though his pleas went unheeded at the time, the Supreme Court eventually adopted Justice Harlan's distinction between direct and collateral review and the broad outlines of his approach to new rules in each area. The shift occurred first and was most complete in the direct review context. In *Griffith v. Kentucky*, a six-Justice majority expressly embraced Justice Harlan's view, holding that all "new rule[s] for the conduct of criminal prosecutions

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308. *Id.* at 682.

309. *Desist*, 394 U.S. at 262-63 (Harlan, J., dissenting).

310. *Id.* at 262.

311. *Mackey*, 401 U.S. at 689 (Harlan, J., concurring in part and dissenting in part). Justice Harlan stressed that he would make two exceptions to this general rule of nonretroactivity. The first was for new substantive rules—i.e., those "that place . . . certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 692. Justice Harlan described the second exception in two ways. In *Desist*, he argued that habeas courts should retroactively apply all "'new' constitutional rules which significantly improve the pre-existing fact-finding procedures." 394 U.S. at 262 (Harlan, J., dissenting). In *Mackey*, he suggested an exception that would cover only decisions announcing new "procedures that . . . are 'implicit in the concept of ordered liberty.'" 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

312. *Mackey*, 401 U.S. at 688-89 (Harlan, J., concurring in part and dissenting in part).

313. *Desist*, 394 U.S. at 263-68 (Harlan, J., dissenting) (discussing the problems inherent in attempting to identify "new" rules).

314. *Mackey*, 401 U.S. at 702 (Harlan, J., concurring in part and dissenting in part).

[are] to be applied retroactively to all cases . . . pending on direct review or not yet final."[315]

The Court's adoption of Justice Harlan's views about retroactivity was slightly slower and significantly less complete in the collateral review context. In *Teague v. Lane*,[316] the Court endorsed the broad outlines of Justice Harlan's approach, though with several important modifications.[317] Most pertinent here, *Teague* held that, in general, federal courts may not apply new rules in the collateral review context or use cases on collateral review as a vehicle for announcing such rules. Were a habeas court to declare a new rule, the Court reasoned, the prohibition against advisory opinions would require the rule's application to the petitioner in that case.[318] Such a step, however, would create "inequitable" results, because, under the general rule the Court had just decreed, others whose cases were pending on collateral review would not get the same benefit.[319] Accordingly, the Court deemed it best to "refuse to announce a new rule in a given case unless the rule would be applied retroactively to . . . all others similarly situated."[320]

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315. 479 U.S. 314, 328 (1987). *Griffith* was the culmination of two earlier decisions. In 1982, a five-Justice majority expressed considerable sympathy with Justice Harlan's argument that all decisions must be fully applicable to cases still on direct review, though it felt constrained by precedent to make an exception for decisions representing "a clear break with the past" and to state "no view on the retroactive application of decisions construing any constitutional provision other than the Fourth Amendment." United States v. Johnson, 457 U.S. 537, 549, 562 (1982). In 1985, the same five Justices extended the *Johnson* approach to decisions construing the Fifth Amendment. Shea v. Louisiana, 470 U.S. 51, 59 (1985).

316. 489 U.S. 288 (1989).

317. The lead opinion was written by Justice O'Connor and joined by three other Justices. Justice White wrote a brief opinion, stating that he regretted the course of the Court's recent retroactivity decisions but deemed the plurality's approach "an acceptable application in collateral proceedings of the theories embraced by the Court in cases dealing with direct review." *Id.* at 317 (White, J., concurring). "Decisions subsequent to *Teague* made clear," however, "that a majority of the Court (including Justice White) endorsed the approach of the plurality opinion." HART & WECHSLER, *supra* note 23, at 1327. For descriptions and criticisms of the manner in which *Teague* modified Justice Harlan's suggested approach—both by broadening his conception of new rules and narrowing the scope of the second exception to the general rule of nonretroactivity—see YACKLE, *supra* note 6, at 180-81; Fallon & Meltzer, *supra* note 6, at 1746-49, 1816-17; and Joseph L. Hoffmann, *Retroactivity and the Great Writ: How Congress Should Respond to* Teague v. Lane, 1990 BYU L. REV. 183, 188, 210-14.

318. *Teague*, 489 U.S. at 315.

319. *Id.* at 315-16.

320. *Id.* at 316. In 1996, Congress added another wrinkle to retroactivity in the collateral review context when it enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

Teague has spawned more critical commentary,[321] but *Griffith* has had far more significant effects on the federal courts' ability to limit the disruptive impact of major legal changes. If *Teague* had never been decided, much of the work that it accomplishes in the collateral review context could have been performed by forfeiture rules—that is, the "procedural default" doctrine that the Supreme Court reinvigorated in 1977's *Wainwright v. Sykes*.[322] In contrast, when *Griffith* was handed down, there were essentially no rules governing review of forfeited claims in the context of direct review of federal criminal convictions, and the Court had never said anything about the proper manner for applying plain error review in the changed-law scenario.[323] Although attempting to deduce causation from correlation is always a risky business, the recent explosion in plain error cases may well be the result of *Griffith*'s rejection of the approach that the Warren Court relied upon to control the disruptive impacts of legal change.

B. Nonretroactivity's (Relative) Virtues

"The problem of retroactivity," Professor Alfred Hill has written, "is a difficult one, and should be dealt with forthrightly."[324] Reasonable people can certainly disagree about whether and under what circumstances new decisions should be allowed to upset outcomes that were consistent with existing precedent when rendered. But what we now have with respect to criminal cases on direct review is in many ways the worst of all worlds. The Supreme Court has solemnly declared that all decisions must be fully retroactive with respect to cases in that procedural posture, but then encouraged and permitted lower courts to apply relief-restricting forfeiture rules in a manner that ensures a great many defendants who might benefit from *Griffith*'s holding will still lose.[325] Full retroactivity in form has degenerated into a significant amount of nonretroactivity in fact.[326]

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321. For citations to some of the leading articles criticizing *Teague*, see HART & WESCHLER, *supra* note 23, at 1334-35 & nn.5-7.

322. 433 U.S. 72, 87-88 (1977); *see* Yin, *supra* note 177, at 232-97 (advocating this approach).

323. *See supra* notes 124-136 and accompanying text.

324. Alfred Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1079 n.160 (1978). Professor Hill was criticizing the Supreme Court's suggestion in *Hankerson v. North Carolina*, 432 U.S. 233, 244 n.8 (1977), that state courts could use forfeiture rules to prevent defendants from later obtaining relief in federal habeas proceedings based on decisions that the Court had held were fully retroactive in that context.

325. *See, e.g.*, United States v. Booker, 125 S. Ct. 738, 769 (2005) (stating that although *Griffith* mandates application of the *Booker* holding "to all cases on direct review," this does not

The problem with using plain error review in this manner extends beyond a lack of candor. As I have already explained,[327] plain error review is an exceptionally poor method for addressing the challenges posed by legal change. Nor is the damage limited to the changed-law context, because when courts use plain error doctrines and other indirect methods to control the retrospectively disruptive impacts of new decisions, they create precedents that will also restrict relief outside the changed-law context.[328]

At least by comparison, the nonretroactivity approach looks promising. Nonretroactivity doctrines represent a forthright attempt to deal with the problems posed by legal change and an honest acknowledgment that defendants are not always accorded relief based on intervening decisions. Nonretroactivity doctrines are also flexible, allowing courts to (1) make case-by-case assessments about whether a new decision is sufficiently important to fair and accurate adjudication that permitting it to upset earlier outcomes is worth the cost,[329] and (2) control the degree of backwards-looking impact by choosing various trigger points.[330] The fact that nonretroactivity doctrines apply only in changed-law situations, moreover, means that decisions designed to deal with the unique problems these doctrines present will not spill over to affect cases in which the law has not changed.

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mean that "every appeal will lead to a new sentencing hearing" because "reviewing courts [should] apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test").

326. *See supra* note 111.

327. *See supra* Section II.D.

328. When the Supreme Court denies relief in the changed-law setting on the ground that the error did not "seriously affect the fairness, integrity or public reputation of judicial proceedings," *see, e.g.*, United States v. Cotton, 535 U.S. 625, 629 (2002); Johnson v. United States, 520 U.S. 461, 470 (1997), or holds that the absence of an objection means that there was no "error" in the first place, *see supra* note 111, it establishes a precedent that will govern plain error review in situations in which the law has not changed. The same is true when a court expands the definition of "harmless" as a means of limiting the disruptive impact of new decisions. *See, e.g.*, Neder v. United States, 527 U.S. 1, 8-15 (1999) (holding, in a decision resulting from *United States v. Gaudin*, 515 U.S. 506 (1995), that the failure to instruct a jury on an element of the offense is not a "structural" error and is thus amenable to harmless error analysis); *see Neder*, 527 U.S. at 39 (Scalia, J., concurring in part and dissenting in part) ("The recipe that has produced today's ruling consists of one part self-esteem, one part panic, and one part pragmatism."). Finally, all defendants are harmed when the Court cuts back on a new decision as a means of controlling its retrospectively disruptive impacts. *See, e.g.*, Patterson v. New York, 432 U.S. 197 (1977) (narrowing the scope of the rule first announced in *Mullaney v. Wilbur*, 421 U.S. 684 (1975)).

329. *See supra* note 292 and accompanying text.

330. *See supra* notes 288-289 and accompanying text.

In addition, the function of direct review could easily be conceptualized in a way that would justify use of a nonretroactivity approach even in the direct review setting. It is frequently assumed without serious examination that an appeal's purpose is to obtain from a reviewing tribunal a statement about whether, according to its own current best view of the law, an error was committed at the defendant's trial.[331] This sort of notion lurks just below the surface of Justice Harlan's opinion in *Desist*,[332] and is stated even more overtly in Harlan's *Mackey* opinion[333] and the Court's opinion in *Griffith v. Kentucky*.[334] If the purpose of direct review is understood in this way, then *Griffith*'s principle of full retroactivity follows almost as a matter of course, because a reviewing court's current best view of the law will necessarily be informed by developments that occur after the challenged trial court action but before the reviewing court's final decision.[335]

The function of direct review may be viewed differently, however, and such a shift in perspective would, in turn, generate different intuitions about the

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331. For a particularly stark academic expression of this view, see Roosevelt, *supra* note 179, at 1120, which states that, "[o]n direct review, an appellate court re-examines contested issues according to the best current understanding of the law. Thus, affirmance on direct review calls for repetition: An affirmed decision has the authority of the affirming court behind it."

332. *See* Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting) (invoking "the truism that it is the task of this Court . . . to do justice to each litigant on the merits of his own case").

333. *See* Mackey v. United States, 401 U.S. 667, 679-81 (1971) (Harlan, J., concurring in part and dissenting in part) (asserting the Court's obligation to apply "current law," to decide cases before it "in accordance with those legal principles governing at the time we are possessed of jurisdiction," and to "apply the law as it is at the time, not as it once was").

334. *See* Griffith v. Kentucky, 479 U.S. 314, 326 (1987) (invoking "the principle that this Court does not disregard current law[] when it adjudicates a case pending before it on direct review").

335. Something similar happened in the collateral review context. Justice Harlan's view that new rules should not be applied in habeas proceedings unless they implicated the defendant's legal culpability or the basic reliability of the procedures used for determining factual guilt flowed directly from his view that the purposes of collateral review were, primarily, deterring trial courts from transgressing constitutional norms and, secondarily, protecting the innocent. *See supra* notes 299-301, 308-314 and accompanying text. If the aims of collateral review are understood as being limited to these two purposes—an issue about which there is considerable disagreement—*Teague*'s basic rule and the general content of its exceptions make a good deal of sense. It is thus not surprising that, before adopting the broad outlines of Justice Harlan's preferred approach to dealing with questions of retroactivity, the *Teague* Court first paused to note that it "agree[d] with Justice Harlan's description of the function of habeas corpus." Teague v. Lane, 489 U.S. 288, 308 (1989). *But see* Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 175 (1994) (contending that "hindsight now reveals that [*Teague*'s] deterrence argument was little more than a makeweight").

permissibility of the nonretroactivity technique.[336] As I noted at the outset, one of the central characteristics of our judicial system as it is presently constituted is that there is inevitably a delay—often a long one—between a trial judge's initial decision and the resulting controversy's final resolution by some other tribunal. The basic fact that review is never immediate is what generates the risk that governing law will change between the time of an initial decision and the underlying dispute's ultimate resolution.

Based on these realities, it would be possible to develop an alternative conception of the aims of direct review. Drawing on the notion that an appeal is not a second trial but rather a trial of the first one, an appeal could be viewed, at least primarily, as a device for ensuring that the trial judge conducted the proceedings in accordance with the *then-prevailing* understandings of law's requirements.[337] If the basic function of direct review were conceived of in this way, it would be difficult to see any valid objection to a general presumption of nonretroactivity, even if courts sometimes felt it necessary to make exceptions in the service of other values, such as a desire to promote development in legal standards,[338] or a need to bring past outcomes in line with presently existing notions of fundamental justice.[339]

There appears to be no constitutional barrier to thinking about the purpose of direct review in this way. Though it may be surprising to many, settled Supreme Court precedent makes clear that—at least outside the death penalty context—the Federal Constitution guarantees no right to an appeal.[340] Nor

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336. *See* Resnik, *supra* note 200, at 855-57 (identifying seven discrete purposes for empowering some judicial decisionmakers to overturn the earlier rulings of others).

337. By offering this account, I do not mean to suggest that this view of an appeal's purpose is the exclusive or even necessarily the best one. Rather, my more limited aim is to demonstrate that nonretroactivity doctrines are not per se inconsistent with any premise that necessarily underlies the decision to have a system of appellate review in the first place.

338. *See infra* note 344 and accompanying text.

339. The classic example here is the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that the Federal Constitution requires states to provide free lawyers to indigent defendants in felony trials. *Gideon* itself arose out of a petition for a writ of habeas corpus, *see id.* at 337, and there never appears to have been any serious doubt that the Supreme Court's ruling would be fully retroactive with respect to all cases still subject to any form of later correction. *See* Haddad, *supra* note 96, at 424 (noting that "little consideration of the prospective-only possibility is in evidence" with respect to *Gideon*). Seeking to explain this outcome later, the Court has invoked the "watershed" nature of the *Gideon* rule, *see, e.g.*, Saffle v. Parks, 494 U.S. 484, 495 (1990), and stressed that it altered the Court's "understanding of the *bedrock procedural elements* essential to the fairness of a proceeding," Beard v. Banks, 542 U.S. 406, 418 (2004) (internal quotation marks omitted).

340. *See* Halbert v. Michigan, 125 S. Ct. 2582, 2586 (2005) (citing the holding of *McKane v. Durston*, 153 U.S. 684, 687 (1894), that "[t]he Federal Constitution imposes on the States no

would a return to nonretroactivity necessarily violate the maxim that judges must always apply their own best view of the law. As is the case when a reviewing court declines to grant relief on a forfeited claim or on the basis of new law in the collateral review context, an appellate court that denied relief based on a conception of an appeal's purpose like that set forth above would not be required to bless or agree with the trial judge's earlier actions or conclusions. Instead, the reviewing court would simply declare that the substantive prerequisites for overturning a conviction had not been satisfied and decline to disturb it for that reason.

C. The Case for Selective Prospectivity

If courts are committed to finding ways to limit the retrospectively disruptive impacts of new decisions—which I suspect they are—the most honest way of doing so would be to reconsider *Griffith v. Kentucky*'s holding that all new decisions must be fully retroactive as to cases still on direct appeal.[341] The specific type of nonretroactivity doctrine I have in mind is the one employed by the Warren Court, criticized by Justice Harlan, and firmly rejected in *Teague*: a selective prospectivity approach under which new rules are always applied to benefit the litigant in whose case they are announced, but not necessarily to others whose appeals are in the same procedural posture.[342]

My reasons for advocating selective prospectivity are two-fold. First, this approach avoids one of the most frequently cited objections to nonretroactivity doctrines: that for a court to declare a rule of law without applying it in the case before it is unconstitutional, either because of the nature of judicial decisionmaking or because it would represent an advisory opinion.[343] Second—

obligation to provide appellate review of criminal convictions"); Abney v. United States, 431 U.S. 651, 656 (1977) ("[I]t is well settled that there is no constitutional right to an appeal."). For arguments questioning this position, see Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992); Harry G. Fins, *Is the Right of Appeal Protected by the Fourteenth Amendment?*, 54 JUDICATURE 296 (1971); and David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518 (1990).

341. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

342. *See* Fallon & Meltzer, *supra* note 6, at 1811 (making the same proposal).

343. *See* Teague v. Lane, 489 U.S. 288, 315-16 (1989); United States v. Desist, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) ("This Court is entitled to decide constitutional issues only when the facts of a particular case *require* their resolution for a just adjudication on the merits."); *see also* Roosevelt, *supra* note 179, at 1111-12 (arguing that pure prospectivity is unconstitutional, but making no such argument with respect to selective prospectivity); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 930-33 (1962) (same). My desire to avoid these objections does not mean that I find all of

and to my mind more important—applying new rules in the cases in which they are announced is necessary to promote development in the law. Although a truly occasional resort to pure prospectivity would not necessarily deter litigants from seeking expansions of existing law, any regular use of the technique would pose serious risks of doing so, at least with respect to non-repeat-player litigants who lack systematic interests in obtaining favorable rules.[344]

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them convincing. In particular, as Professors Fallon and Meltzer have explained, the argument that federal courts "should decide constitutional questions only as a matter of strict necessity cannot be reconciled with a variety of established doctrines," Fallon & Meltzer, *supra* note 6, at 1799, including the ability of a reviewing court to (1) decide whether there was error before turning to whether it was harmless, *see*, *e.g.*, Crawford v. Washington, 541 U.S. 36, 42 n.1, 68-69 (2004); (2) determine whether a warrant was invalid before considering whether the evidence should nonetheless be admitted because the police acted in good faith reliance upon it, *see, e.g.*, United States v. Leon, 468 U.S. 897, 926 (1984); (3) assess whether a civil rights plaintiff's constitutional rights were violated before considering whether relief should be denied because the defendant is entitled to qualified immunity, *see, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998); and (4) render alternative holdings, Fallon & Meltzer, *supra* note 6, at 1801. *See also* Beytagh, *supra* note 287, at 1576 (asserting that the "concern about [A]rticle III as a limitation on pure prospectivity cannot be taken seriously").

344. *See* Mishkin, *supra* note 284, at 60-61 & nn.20-21; Walter V. Schaefer, *Prospective Rulings: Two Perspectives*, 1982 SUP. CT. REV. 1, 22-23; *see also* James v. United States, 366 U.S. 213 (1961) (overruling one of the Court's own decisions and adopting a more pro-government reading of "gross income" for the purposes of the Internal Revenue Code, but declining to uphold the conviction before the Court based on this new reading on the theory that, given the prior state of the law, the defendant's violation of the statute could not have been "willful"). The fact that a selective prospectivity approach would preserve incentives for defendants to raise novel claims could be seen as a bad thing in the sense that it, like existing plain error doctrine, might encourage defendants to bombard the courts with futile objections to clearly established precedent. Although this would almost certainly be a problem to some degree, a selective prospectivity approach would be far superior to existing law in at least two respects. First, once the forfeiture paradigm is discarded and the issue becomes how best to promote the development of new legal standards, it becomes even more clear that defendants should not generally be required to press arguments before courts that are powerless to adopt them. *See supra* notes 203-213 and accompanying text. Second, when courts applying a selective prospectivity approach determine that a new decision should be partially or fully retroactive, a given defendant's ability to obtain the benefit of that ruling would not turn on whether her lawyer made an argument that would reasonably have been viewed as futile at the time. To put the point a slightly different way, whereas current law tells defendants that they should find as many ways as possible to ask trial courts to do things that they clearly lack the authority to do, a selective prospectivity approach, properly implemented, would encourage defendants to craft arguments for new law that they have reason to believe might actually be accepted and to present them to tribunals that would be empowered to adopt them.

Of course, nonretroactivity approaches in general (and selective prospectivity in particular) are subject to several other serious objections.[345] Although I will not attempt to address all of them here, I do wish to make a more basic point: The use of forfeiture rules to control the retrospectively disruptive effects of legal change is subject to many of the same sorts of criticisms.

One prominent objection to nonretroactivity relates to its impact on judge's incentives.[346] Proponents of this view argue that legal innovation, at least of the nonincremental kind, should be viewed with considerable skepticism. Requiring that new rulings be given immediate effect in all pending cases, they argue, has the salutary effect of slowing the pace and decreasing the magnitude of change by forcing judges to weigh the advantages of a new rule against the disruption its immediate full implementation would entail. In contrast, because it decreases the cost of legal innovation, nonretroactivity is seen by its critics as the "handmaid of judicial activism."[347]

Even if one accepts the contestable premise that judicial innovation is a bad thing,[348] this flaw is not unique to nonretroactivity doctrines. Instead, this criticism could be lodged against any device that is designed—or can be configured—to ensure that the system will not be required to bear the full

345. For example, one of the most basic criticisms of nonretroactivity doctrines is that they denigrate the significance of rights by permitting some violations to go unredressed. *See, e.g.*, Haddad, *supra* note 96, at 428-30; Schwartz, *supra* note 297, at 747-48. This criticism is not specific to nonretroactivity doctrines. It could be lodged against any doctrine—including, for example, forfeiture and harmless-error rules—that permits courts to withhold relief notwithstanding conceded legal violations. Others suggest that express judicial consideration of whether and to what extent a new decision should operate retroactively undermines the distinction between adjudication and legislation. *See, e.g.*, Mishkin, *supra* note 284, at 65-66; Shannon, *supra* note 273, at 836-37. Professor Herman Schwartz has suggested that a policy of full retroactivity might promote reformation of police practices by encouraging "state courts—and, perhaps, even local police forces—to try to anticipate future Supreme Court decisions in order to avoid large scale losses of convictions." Schwartz, *supra* note 298, at 753-54. Finally, nonretroactivity approaches require some mechanism for determining which sorts of decisions trigger retroactivity considerations in the first place. *See, e.g.*, Yin, *supra* note 177, at 256-82 (describing the difficulty of making this determination).

346. *See, e.g.*, Harper v. Va. Dep't of Taxation, 509 U.S. 86, 105-109 (1993) (Scalia, J., concurring); Mishkin, *supra* note 284, at 70-72; and Note, *supra* 343, at 932.

347. *Harper*, 509 U.S. at 105 (Scalia, J., concurring).

348. *But see* Fallon & Meltzer, *supra* note 6, at 1804 (contending that "it is implausible that there is a uniquely correct pace of constitutional change"); Jeffries, *supra* note 1, at 97 (arguing that "constitutional change is right and necessary").

backwards-looking force of legal change.[349] As I explained in Section II.A, that category emphatically includes forfeiture rules.

Another prominent objection to nonretroactivity doctrines focuses on public perceptions of the judicial process.[350] There is a "strongly held and deeply felt belief," Professor Mishkin argued in his *Harvard Law Review* foreword, "that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance."[351] Professor Mishkin acknowledged that this perception is largely "symbolic," but he countered that "symbols constitute an important element in any societal structure" and contended that this one "is a major factor in securing respect for, and obedience to, judicial decisions."[352] The problem with nonretroactivity doctrines, Professor Mishkin concluded, is that they are at "war[] with this symbol" both because "conscious confrontation of the question of an effective date" for a newly announced principle "smacks of the legislative process" and because "explicit treatment of that question . . . highlights the fact that the court has changed the law."[353]

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349. *Cf.* Fallon & Meltzer, *supra* note 6, at 1803 (noting that a "wide range of judge-made rules may increase the pace of [legal] change," including rulings "that broadly authorize suit," those that extend standing or "related justiciability doctrines," and those that utilize relief-restricting doctrines such as qualified immunity).

350. This argument was most famously made by Professor Mishkin. *See* Mishkin, *supra* note 284, at 62-70; *see also* Note, *supra* note 343, at 931-32.

351. Mishkin, *supra* note 284, at 62.

352. *Id.*

353. *Id.* at 64-66.

Although there are bases for criticizing this argument on its own terms,[354] it is important to see that the use of forfeiture rules to mitigate the effects of legal change creates public perception problems of its own. As Professor Mishkin noted, "another element of the symbolic view of judge-made law is that it embodies 'Justice'."[355] Notions of justice are inevitably slippery, but it seems difficult to swallow the idea that it is furthered when courts deny relief for conceded constitutional violations because a lawyer did not anticipate a ruling that did not yet exist and failed to lodge a seemingly futile objection.[356]

To my mind at least, the most troubling aspects of nonretroactivity doctrines all involve fairness to defendants. By nature and design, nonretroactivity doctrines deny relief to some people who have, at least under current views of the law, winning constitutional claims. Nonretroactivity approaches also create deeply unfair distinctions between defendants. All of these doctrines require selection of a trigger point—a way of separating those who will benefit from a new decision from those who will not—which will almost invariably make a claimant's eligibility for relief depend on something over which she had little, if any, control.[357] Selective prospectivity compounds

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354. As Professor Mishkin himself recognized, "only a small fraction of the lay public comes into any immediate, regular contact with court decisions and opinions." *Id.* at 63. Accordingly, the argument depends on the notion that a judicial embrace of nonretroactivity will adversely affect judges and lawyers, whose disillusionment will disperse into the broader community. In addition, although the notion that the public's view of the Supreme Court as a "judicial" rather than a "political" actor might be in real danger probably seemed quite plausible during the height of the Warren Court revolution (when Professor Mishkin's article was written), recent history has shown it to be surprisingly durable. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1829 (2005) ("*Bush v. Gore* has had almost no impact on 'diffuse support' for the Court, notwithstanding critics' predictions. The Court apparently possesses a reservoir of trust that is not easily dissipated." (footnotes omitted)); *see also* Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1722 (2001) (arguing "that history's verdict on a Supreme Court ruling depends more on whether public opinion ultimately supports the outcome than on the quality of the legal reasoning or the craftsmanship of the Court's opinion").

355. Mishkin, *supra* note 284, at 66.

356. *Cf.* JOHN C. TUCKER, MAY GOD HAVE MERCY: A TRUE STORY OF CRIME AND PUNISHMENT 36-48, 190-91 (1997) (explaining that the Supreme Court declined to review the merits of a habeas petition from Roger Keith Coleman, who was facing execution for a murder that he claimed he did not commit, in large measure because his lawyers filed a particular document one day late).

357. For example, the finality trigger that the Court currently employs means that a defendant's ability to gain relief will often "depend on such frustratingly inconsequential matters as the congestion of trial dockets and attorneys' schedules." Schwartz, *supra* note 297, at 764; *accord* Walter V. Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 645 (1967) (criticizing the use of a finality trigger because "[t]oo many

the unfairness by generating different answers for litigants in identical procedural postures. Finally, nonretroactivity doctrines also create disparities between defendants and prosecutors. It is well-established, for example, that all procedural rulings benefiting prosecutors will be implemented in a fully retroactive fashion, even to the point of denying relief to defendants whose trials were clearly unconstitutional as measured against the law that prevailed at the time.[358]

What is important to see, however, is that use of forfeiture rules as a mechanism for controlling the impacts of legal change is subject to the same sorts of criticisms. First, to the extent they have any independent effect, forfeiture rules, like nonretroactivity doctrines, withhold relief from litigants whose claims would otherwise prevail under then-existing law.

Second, because they punish defendants for the mistakes of their lawyers, forfeiture rules also create distinctions between defendants that seem difficult, if not impossible, to justify. To state the obvious, there is no reason to believe that a lawyer's brains, skill, or dedication are in any sense a proxy for whether her client deserves relief. The general rule that a principal is bound by the conduct of her agent—the Supreme Court's preferred justification[359]—is problematic at best in the criminal justice context. Many defendants did not choose their agent and generally have no ability to discharge their lawyer and obtain another.[360] Defendants will usually lack the practical ability, and will always lack the legal right, to supervise their lawyers in a meaningful manner.[361] The high standard for showing ineffective assistance of counsel means that defendants cannot obtain release or new trials based on mere mistakes.[362] And malpractice suits—even when available—cannot shift the

irrelevant considerations, including the common cold, bear upon the rate of progress of a case through the judicial system").

358. *See, e.g.*, Lockhart v. Fretwell, 506 U.S. 364, 371-73 (1993); Fallon & Meltzer, *supra* note 6, at 1744-46. The Federal Constitution's Due Process Clauses impose limitations on retrospective operation of new rulings that expand the scope of substantive criminal liability. *See* Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 480, 483 (2001).

359. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 488 (1986); Estelle v. Williams, 425 U.S. 501, 512 (1976).

360. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1080 (1977); Meltzer, *supra* note 113, at 1210.

361. *See, e.g.*, Morris v. Slappy, 461 U.S. 1, 6 (1983) (describing how an appointed lawyer advised the court, over the client's objections, that he was prepared to start trial).

362. *See, e.g.*, *Carrier*, 477 U.S. at 486-87 (stating that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute" ineffective assistance of counsel); *see also* Strickland v. Washington, 466 U.S. 668, 694 (1984) (stating that a defendant seeking to prove ineffective assistance of

most important forms of criminal liability (incarceration or execution) from the client to the lawyer. Finally, as others have noted, there is reason to worry whether criminal defense lawyers will always be fully faithful agents.[363] Given all this, it is difficult to see how tying a particular defendant's ability to take advantage of a new ruling to the status of her case when the rule is announced is any more unfair than linking it to whether her lawyer made an objection that would have been a sure loser at the time.

Third, forfeiture rules, like nonretroactivity doctrines, almost invariably benefit prosecutors. The government urges affirmance far more often than reversal,[364] and an appellee may generally defend a judgment on any basis supported by the record.[365] When prosecutors find themselves attacking a trial court decision, it is usually because the judge granted a suppression motion over their opposition, a situation in which questions about preservation are unlikely to arise. Finally, despite its apparent willingness to punish defendants for failing to object to well-entrenched precedent in the lower courts, the Supreme Court has been unwilling to impose the same requirements on federal prosecutors. In a line of cases beginning in 1991, the Court has afforded full merits consideration to arguments that the government failed to press in the lower courts.[366] In so doing, however, the Court has been careful to frame the standard in such a way that it will only benefit the government, stating that it may review

> an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand,

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counsel "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

363. Caseload and financial pressures, as well as a desire to maintain smooth working relationships with prosecutors, may skew defense lawyers' incentives toward quick plea bargains, even when detailed factual investigations and extensive pre-trial motions may be in an individual client's best interest. In addition, in the rare instance in which cases are tried, lawyers may refrain from making (and thus preserving) certain kinds of arguments out of a desire to avoid alienating judges before whom they regularly appear. Cover & Aleinikoff, *supra* note 360, at 1081-83; Meltzer, *supra* note 113, at 1186 n.295, 1200-01; Stuntz, *supra* note 211, at 33-35.

364. BUREAU OF JUSTICE STATISTICS, *supra* note 90, at 79 (noting that in 2002, only four percent of appeals in federal criminal cases were filed by the government).

365. *See, e.g.*, United States v. Agnew, 407 F.3d 193, 196 (3d Cir. 2005) (stating that a court of appeals may affirm a district court's denial of a suppression motion "on any ground supported by the record"); United States v. Purkey, 428 F.3d 738, 752 (8th Cir. 2005) (stating, in the context of an appeal from various evidentiary rulings, that an appellate court "may affirm on any ground supported by the record, even if that ground was not relied on by the district court").

366. *See, e.g.*, United States v. Williams, 504 U.S. 36, 40-45 (1992).

> it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent.[367]

Because it is difficult to imagine a situation in which a criminal defendant would have been party to the earlier proceedings that announced the rule that governed her case, it is clear that forfeiture rules—like nonretroactivity doctrines—almost invariably operate in a pro-prosecution direction.

As Professor Kermit Roosevelt has argued, selective prospectivity "is terribly hard to justify," because its use will sometimes make the difference between relief and no relief turn on who "get[s] to the Court first."[368] The fact that the disparity will be temporary and the number of beneficiaries small is certain to be no consolation to those who do not benefit. We live, however, in a world of imperfect alternatives. Unless courts are prepared to grant full retrospective effect to all new decisions, a method must be created for dividing those who will benefit from those who will not. Every way of doing so creates distinctions that are subject to serious fairness objections; the only question is which method has the fewest shortcomings.[369] For the reasons I have just explained, my own view is that it may well be best for courts to return to the practices of the Warren era and once again embrace nonretroactivity in general and selective prospectivity in particular.

D. The Possibility of a Legislative Response

Griffith v. Kentucky divided the Court when it was decided.[370] Despite the chaos their recent decisions have unleashed, however, the Justices have shown no interest in revisiting *Griffith*'s holding that all decisions must be fully retroactive with respect to cases still on direct review, at least in the criminal context.[371] In this Section, I briefly explore the possibility that Congress could do so.

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367. *Id*. at 44-45 (footnote omitted).

368. Roosevelt, *supra* note 179, at 1108.

369. *See* Fallon & Meltzer, *supra* note 6, at 1776 ("It is not a strong objection that a distinction produces problematic cases, so long as it is the right cases that are made problematic, and the means of resolution focus attention on the appropriate factors.").

370. 479 U.S. 314, 315 (1987). *Griffith* was decided by a vote of six to three. The majority consisted of Justices Brennan, Marshall, Blackmun, Powell, Stevens, and Scalia. The dissenters were Chief Justice Rehnquist and Justices White and O'Connor.

371. In *United States v. Booker*, Justices Stevens and Souter suggested that the Court's "remedial" holding need not be retroactive with respect to individuals for whom the application of mandatory sentencing guidelines had not resulted in a Sixth Amendment violation. 125 S.

The development of both nonretroactivity doctrines and forfeiture rules from the 1960s through the present has been remarkable in the degree to which it has been judge-dominated.[372] Without any affirmative direction from Congress, the Justices of the Warren Court fundamentally altered the traditional rules regarding the retrospective effect due their own decisions,[373] as well as the weight that should be attached to forfeitures at trial or on direct appeal.[374] Their successors launched a counterrevolution, reorienting approaches to retroactivity,[375] devising strict forfeiture rules for cases on collateral review,[376] and converting Rule 52(b)'s statement that "plain error[s] . . . affect[ing] substantial rights may be considered"[377] from an open-ended authorization to a sharply prescribed limitation[378]—all without any legislative direction.

Undoubtedly, one reason that the Court felt free to take these actions was that the governing statutes and rules said almost nothing about these questions.[379] Under the circumstances, the Court appears to have seen itself as free to engage in common law rulemaking.[380] To craft sensible (or even coherent) rules, however, the Court also needed to supply its own account of the purposes of each form of judicial inquiry and the importance of the values arrayed on each side of the table.

Within constitutional limitations, however, questions regarding the aims of a given form of judicial review are ultimately subject to legislative control, as demonstrated in dramatic fashion by the 1996 enactment of the Antiterrorism

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Ct. 738, 788 n.17 (2005) (Stevens, J., joined by Souter, J., dissenting in part). No other Justice showed any interest in even that limited retreat.

372. For earlier pieces making this same point, see, for example, Hoffmann & Stuntz, *supra* note 28, at 74-75; John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 707-09 (1990); and Meltzer, *supra* note 113, at 1166.

373. *See supra* Section III.A.

374. *See, e.g.*, HART & WECHSLER, *supra* note 23, at 1358-63.

375. *See supra* Section III.A.

376. *See, e.g.*, HART & WECHSLER, *supra* note 23, at 1363-83.

377. FED. R. CRIM. P. 52(b).

378. *See supra* Section II.B.

379. Hoffmann & Stuntz, *supra* note 28, at 74-75; Jeffries & Stuntz, *supra* note 372, at 707-09.

380. *Cf.* Meltzer, *supra* note 113, at 1133 (arguing that the Court's procedural default jurisprudence is "best understood as [a] federal common law doctrine[]"). *See generally* Henry J. Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964) (discussing the concept of federal common law); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (same).

and Effective Death Penalty Act (AEDPA).[381] For decades, judges and commentators engaged in a spirited debate about the purposes of habeas jurisdiction and the weight that should be accorded various underlying values.[382] Based on their answers, the participants proposed ways of dealing with a variety of issues that were simply not addressed by general statutory provisions that said little more than that federal judges were authorized to issue "[w]rits of habeas corpus."[383]

In AEDPA, however, Congress specifically addressed a number of matters that had previously been governed by judge-made rules.[384] Perhaps most significantly, AEDPA established a statutory test for collateral review in cases in which a prisoner's claims had already been rejected on the merits by a state court. In such circumstances, Congress decreed, a federal court should not grant relief unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . [or] was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[385]

Not only does this provision establish standards for granting relief, it also suggests a congressional judgment about the purposes of collateral review for state prisoners. Whatever else this form of federal review is about, Congress seems to have decreed, it should not be used to upset state court judgments that were reasonable when entered.

AEDPA did not address every issue previously governed by judge-made rules,[386] and many of its provisions are far from clear.[387] Yet its enactment changed the nature of the judicial task. Absent a holding that the statute is

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381. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

382. The pre-AEDPA habeas literature is enormous. For an overview of the debates and citations to various leading articles, see HART & WECHSLER, *supra* note 23, at 1309-19.

383. 28 U.S.C. § 2241(a) (2000).

384. For example, AEDPA imposed a statute of limitations on habeas petitions. *Id.* § 2244(d). It also modified existing law regarding exhaustion of state remedies, *id.* § 2254(b)(2)-(3); the decision to hold a federal evidentiary hearing, *id.* § 2254(e); and the ability of a petitioner to file a second or successive petition, *id.* § 2244(b). *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 386-93 (1996).

385. 28 U.S.C. § 2254(d).

386. Most significantly, the statute contains no provisions addressing procedural defaults, such as how federal courts should identify them, when (if ever) courts should excuse them, and, if so, what standards for granting relief should be applied.

387. *See* Lindh v. Murphy, 521 U.S. 320, 336 (1997) ("[I]n a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting.")

itself unconstitutional,[388] federal courts are no longer, at least in any direct sense, in the business of determining the purposes of habeas jurisdiction and formulating rules accordingly. Rather, they are charged with construing and applying standards that Congress has decreed.

What all this suggests is that Congress could also modify the judge-made doctrines that govern direct review, including *Griffith*'s holding that all rules must be fully retroactive in that context. Assuming that there really is no constitutional right to a criminal appeal,[389] and subject to the familiar caveat that even an institution to which there is no freestanding constitutional right can be configured in a way that violates other constitutional requirements,[390] there appears to be nothing to prevent a lawmaking body from declaring that the purposes of an appeal are limited to those described above, and that, accordingly, convictions should not be upset based on decisions that issued after they were returned, except as necessary to give litigants an incentive to raise new constitutional arguments or to vindicate other identified aims.

CONCLUSION

By advocating either a judicially or legislatively initiated return to the selective prospectivity approach in the context of direct review of criminal convictions, I do not intend to endorse its widespread use, much less to embrace the extraordinarily pro-government nonretroactivity jurisprudence that the Supreme Court has developed in the collateral review context.[391] Denying relief to victims of constitutional violations is always something to be regretted, as is the creation of artificial distinctions between litigants who are otherwise similarly situated. Although there are competing considerations—

388. The Ninth Circuit is currently considering that question. *See* Irons v. Carey, 408 F.3d 1165, 1165 (9th Cir. 2005) (mem.) (directing parties to file supplemental briefs discussing the constitutionality of 28 U.S.C. § 2254(d)(1) (2000), which describes the standards federal courts should apply when deciding whether to grant habeas relief to state prisoners).

389. *See supra* note 340 and accompanying text.

390. *Compare* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that the Constitution creates no fundamental right to a free public education), *with* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that, having created a system of public schools, states may not segregate them by race). This distinction has been especially important in the right-to-appeal context. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963) (holding that states must furnish lawyers to indigent defendants during their first appeal as of right); Griffin v. Illinois, 351 U.S. 12 (1956) (holding that states may not condition the right to appeal upon payment of the costs of preparing a complete record without providing an exemption for defendants too poor to pay the fee).

391. *See supra* notes 364-367 and accompanying text.

such as the costs associated with additional proceedings; a desire not to upset the legitimate expectations of law enforcement officials, prosecutors, and judges; and a fear that too much retroactivity would deter rights-expanding rulings from being made in the first place—my own inclination is that that balance should most often tip in favor of granting relief.

But the real issue, as I have tried to explain, is not whether and to what extent a particular new ruling should be allowed to upset previous outcomes. Rather, the threshold question is what framework courts should use for making those decisions. For all their flaws, nonretroactivity doctrines are an honest attempt to deal with the special problems posed by legal change, and they lead us to ask the right sorts of questions. Although that may not be a lot, it is far more than can be said for forfeiture rules.