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The Framework(s) of Legal Change

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ESSAY

THE FRAMEWORK(S) OF LEGAL CHANGE

Toby J. Heytens†

The Supreme Court constantly is changing what previously had been relatively settled understandings of what the law requires. Whenever that happens, the question arises: What to do about the cases that courts have already resolved using subsequently changed legal principles? In a previous article, I identified and criticized a previously underappreciated method for limiting the disruptive effects of legal change: a "forfeiture" approach that subjects criminal defendants who failed to anticipate new rulings to a narrow form of appellate review that virtually guarantees they will lose. This Essay expands that analysis in light of the Supreme Court's recent decision in Davis v. United States, *which suggests a different "remedy-limiting" approach. Although representing a substantial improvement over the flawed forfeiture approach, a remedy-limiting approach remains inferior to a return to a more straightforward "nonretroactivity" analysis as a way of grappling with the important and unique problems posed by legal change.*

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INTRODUCTION

Change happens. The Supreme Court and other reviewing courts constantly are tweaking, overhauling, or entirely rejecting lower courts', or even their own, previous understandings of what the law requires. And, whenever that happens, the same basic question arises again and again: What should we do about all those *other* cases that

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courts have *already* resolved using legal principles that were subsequently tweaked, overhauled, or rejected? In a previous article, I called situations raising that question "transitional moments."[1]

Judge-initiated legal change can create difficult transitional problems regardless of the nature of the underlying proceeding (for example, civil versus criminal), the type of legal rule at issue (for example, substantive versus procedural), or the directionality of the change (for example, pro-plaintiff or pro-defendant).[2] That said, one category of decisions has proven especially troublesome: those that alter the procedural rules governing criminal trials in ways that benefit criminal defendants. Think *Miranda*.[3] Or *Apprendi*.[4]

Decisions like these raise especially hard transitional questions for two basic reasons. First, these decisions have the potential to unsettle the outcome of an enormous number of already decided cases.[5] But, second, unlike decisions that alter the line between criminal and noncriminal conduct or categorically rule out certain kinds of punishment, a court's failure to comply with a subsequently announced procedural rule does not *necessarily* impugn either the reliability or justness of an earlier determination of guilt. How should courts weigh the benefits of ensuring that no person is incarcerated without compliance with constitutionally required procedures against the costs of revisiting previous outcomes in order to do so?

The conventional account goes something like this: Having launched twin revolutions in constitutional criminal procedure and federal postconviction review for state prisoners, the Warren-era Justices had an especially powerful incentive to find some method for

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1 Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 922 (2006).

2 *See generally* Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 247–55 (2011) (discussing potential new procedures for appellate courts deciding how to proceed with a case where a change in the law is underway or may soon occur); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1733–38 (1991) (analyzing the constitutional implications of "new" law or legal changes); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1056–58 (1997) (using equilibrium theory to provide a comprehensive analysis of general legal change); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 511 (1986) (discussing the effects of legal transitions on the markets); Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 455–61 (2001) (discussing the impact of legal changes on criminal defendants in the context of "fair warning" requirements).

3 Miranda v. Arizona, 384 U.S. 436, 444 (1966).

4 Apprendi v. New Jersey, 530 U.S. 466 (2000). *Apprendi* held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. For a discussion of *Apprendi*'s significance, see Heytens, *supra* note 1, at 934–35.

5 *See* Heytens, *supra* note 1, at 929–31.

enabling them to control and limit the backward-looking effects of the Supreme Court's law-changing decisions, to ensure both that the nation's prisons would not be emptied and that "long overdue reforms"[6] would not be inhibited by the prospect of doing so.[7] The Court initiated this approach in 1965 with *Linkletter v. Walker*, in which the Court relied on "nonretroactivity" analysis, asking whether various important decisions—including *Mapp v. Ohio*,[8] *Miranda v. Arizona*,[9] and others—should or should not "operate[ ] retrospectively upon" cases where certain events (the search or confession, the trial, or the conclusion of direct review) occurred before the new ruling was announced.[10] This approach was instantly controversial,[11] and the Supreme Court ultimately abandoned nonretroactivity in the direct-review context while maintaining a version of it in the habeas context, where it is associated with *Teague v. Lane*.[12] As a result, under current law, any defendant whose case was still pending on direct review at the time of a law-changing decision is entitled to the full benefit of that decision.

All of that is true enough except for the last sentence. As I explained in a previous article, the Supreme Court did not stop making major changes in the law when Earl Warren retired,[13] and its efforts to grapple with the disruptive effects of those changes with respect to cases still pending on direct review did not end when the Court swore off the nonretroactivity strategy in that context.[14] To the contrary, by 2006, "[f]ull retroactivity in form ha[d] degenerated into a significant amount of nonretroactivity in fact."[15] The reason was courts' increasing use of a second "forfeiture" approach for limiting the disruptive effects of legal change: a review-limiting strategy that subjected defendants who failed to raise a time-of-trial objection to a significantly more stringent standard of appellate review, even in situations where the governing law changed between the trial and the appeal.[16] Because few defendants are likely to make objections that were foreclosed by then-controlling law, I explained that forfeiture rules could

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6 Jenkins v. Delaware, 395 U.S. 213, 218 (1969).

7 *See, e.g.*, Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1355–62 (2010).

8 367 U.S. 643 (1961).

9 384 U.S. 436 (1966).

10 *Linkletter v. Walker*, 381 U.S. 618, 619 (1965).

11 *See, e.g.*, James B. Haddad, *"Retroactivity Should Be Rethought": A Call for the End of the* Linkletter *Doctrine*, 60 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 417, 417–20 (1969); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 56–58 (1965); Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 719–20 (1966).

12 489 U.S. 288, 305–10 (1989) (plurality opinion).

13 *See* Heytens, *supra* note 1, at 931–40.

14 *See id.* at 940–41.

15 *Id.* at 979.

16 *Id.* at 942–44.

be—and were being—used to "accomplish virtually the same results as nonretroactivity doctrines."[17]

The Supreme Court's June 2011 decision in *Davis v. United States* suggests yet another way that courts—while formally disclaiming a nonretroactivity analysis—can still limit the backwards-looking effects of pro-defendant rulings even in the direct review setting.[18] Until 2009, the widespread view in the lower courts was that a police officer who had lawfully arrested the driver of a vehicle could, without need for any further justification, search the entire passenger compartment of the vehicle.[19] In *Arizona v. Gant*, however, the Supreme Court rejected that position and held that such searches are permissible only if the government can show an actual and continuing threat to officer safety or a particularized need to preserve evidence related to the crime of arrest.[20]

The question in *Davis* was straightforward: What should be done about a case involving a pre-*Gant* search that was still pending on direct review when *Gant* was decided?[21] The Court's first move was to emphasize the need to separate the question of whether the Fourth Amendment was violated from the question of what consequences should flow from such violation.[22] The Court then analyzed the purposes of the remedy that Davis sought (exclusion of the incriminating evidence that the officers found in his car) and held that, in situations "when the police conduct a search in objectively reasonable reliance on binding judicial precedent," "the deterrence benefits of suppression" do not "outweigh its heavy costs."[23] In other words, the Supreme Court held that, notwithstanding the conceded constitutional *violation*, the exclusionary *remedy* was not available in Davis's case because the officers who conducted the search could reasonably have believed that it was permissible given the state of the law at the time the search was conducted.[24]

The Court's specific reasoning in *Davis* focused tightly on the Fourth Amendment and its exclusionary rule.[25] As a result, the case itself may have been viewed by the Justices (and could potentially be dismissed) as nothing more than a continuation of the arguments about the existence and scope of the so-called "good-faith exception"

17 *Id.* at 943.

18 131 S. Ct. 2419, 2434 (2011).

19 *See id.* at 2424.

20 129 S. Ct. 1710, 1723–24 (2009).

21 *See Davis*, 131 S. Ct. at 2423–24.

22 *See id.* at 2426.

23 *See id.* at 2427–28.

24 *See id.*

25 *See infra* text accompanying notes 100–03.

to the general "rule" calling for exclusion of unconstitutionally seized evidence.[26]

But *Davis* can also be viewed more broadly. The Court's general approach—that is, distinguishing between rights and remedies and asking whether it makes sense to apply a particular remedy in the changed-law context—echoed the Court's analysis in a Fifth Amendment case decided more than thirty years earlier.[27] Together, these decisions suggest the possibility of a more general approach to addressing the disruptive effects of legal change, to which I will refer in this Essay as "remedy-limiting." And because prominent scholars previously have suggested that all "issues involving the relevance of legal novelty and unpredictability are best understood as addressing a question within the law of remedies,"[28] *Davis* provides an opportunity for thinking about how a remedy-limiting approach might operate in practice and its advantages and disadvantages as compared to both forfeiture- and nonretroactivity-based approaches to the ever-present problem of legal change.

This Essay makes three essential points. *First*, courts have at their disposal multiple strategies for limiting the disruptive effects of law-changing decisions. As a result, there is a critical (but often underappreciated) distinction between saying that a given decision will apply "retroactively" and saying that defendants in earlier cases will have the full benefit of that decision.

Second, the choice among these various strategies matters. It matters both because the application of different strategies will produce different results in specific cases and, more generally, because the strategies focus on different questions in assessing whether a law-changing decision should be permitted to upset earlier outcomes.

Third, although a remedy-limiting approach is promising in certain respects, it remains inferior to a return to nonretroactivity analysis in the direct-review context. In circumstances where it is available, a remedy-limiting approach is likely to do a good job of enabling courts to ask the right sorts of questions about whether and to what extent a law-changing decision should be able to upset previous outcomes. The problem, however, is that there will be some—and, per-

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26 For an overview of the good-faith exception and citations to some of the voluminous scholarly literature, see 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 20.06, at 372–82 (5th ed. 2010).

27 *See infra* text accompanying notes 135–46 (discussing Michigan v. Tucker, 417 U.S. 433 (1974)).

28 *See* Fallon & Meltzer, *supra* note 2, at 1736; *accord* Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1131–33 (1999); Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CALIF. L. REV. 1677, 1689–90 (2007) [hereinafter Roosevelt, *Retrospective*].

haps, a great many—circumstances in which a remedy-limiting approach will not be available. And in those circumstances it is likely that, absent a return to nonretroactivity, courts will either continue to rely on the flawed forfeiture strategy that was the Rehnquist Court's favored tool for limiting the disruptive effects of legal change, or simply refrain from making rights-expanding decisions in the first place. In my view, both of those outcomes would be very bad ones, which is why courts should re-embrace nonretroactivity in the direct-review context. Legal change creates distinct problems that require distinct solutions, and a nonretroactivity approach offers the best hope for finding these solutions.

The remainder of this Essay is organized as follows. Part I sets the stage for *Davis* by providing a brief overview of the Fourth Amendment law governing traffic stops and the Supreme Court's shifting approach to the circumstances in which police officers may search the passenger compartment of a car after arresting its driver. Part II describes three possible frameworks for analyzing the extent to which law-changing decisions should be permitted to upset previous outcomes: the nonretroactivity approach favored by the Warren Court, the forfeiture approach that federal courts began using extensively during the Rehnquist era, and the sort of remedy-limiting approach recently employed by the Roberts Court in *Davis*. Part III assesses both the promise and the limitations of a remedy-limiting approach as a general solution to the problem of legal change, explaining why it is a substantial improvement over a forfeiture approach but also subject to certain limitations that make it inferior to a return to nonretroactivity analysis.

I
THE ROAD TO *DAVIS*

A person who learned everything she knew from reading Fourth Amendment decisions could be forgiven for thinking that cops do not do much besides stop and search cars, in which they invariably find drugs, guns, or both. This Part identifies the particular Fourth Amendment question that gave rise to *Davis* and explains how the Supreme Court's shifting answers to it resulted in a significant transitional moment.

Outside the automobile context, the ordinary Fourth Amendment rule is that an officer who has made an arrest may search both "the arrestee's person and the area 'within his immediate control'" "incident" to that arrest.[29] But the Supreme Court has struggled—and, more important for my purposes, reached conflicting results—

[29] Chimel v. California, 395 U.S. 752, 762–63 (1969).

when trying to figure out how to apply those principles in the traffic-stop context.

The Court's first stab at answering that question came in 1981 in *New York v. Belton*.[30] Although some Justices later insisted that lower courts had overread *Belton*'s holding,[31] the important point here is that "*Belton* was widely understood to have set down a simple, bright-line rule. . . . authoriz[ing] automobile searches incident to arrests of recent occupants, *regardless* of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search."[32] In fact, "the prevailing understanding was that *Belton*" authorized such searches "[e]ven after the arrestee had stepped out of the vehicle and had been subdued by police,"[33] and "[s]ome courts uph[e]ld such searches even when the squad car carrying the handcuffed arrestee ha[d] already left the scene."[34]

By 2004, however, a majority of Justices were clearly dissatisfied with this regime. That year, in *Thornton v. United States*, the Supreme Court rejected a Fourth Amendment challenge to a search of a car where the suspect had voluntarily pulled over and exited his vehicle before the officer made contact with him and was handcuffed in the back of a police cruiser at the time of the search that was, at least in theory, "incident" to his arrest.[35] Despite the *Thornton* outcome, however, in three separate opinions, a majority of Justices criticized the current state of the law and suggested that it was ripe for re-examination.[36]

Five years later, in *Arizona v. Gant*,[37] the Supreme Court, by a 5–4 vote, did just that. Jettisoning what it repeatedly described as the "broad reading of *Belton*,"[38] Justice Stevens' opinion for the Court announced a new, more restrictive rule. "Police may search a vehicle incident to a recent occupant's arrest," it declared, *only* if at least one of two criteria is satisfied: (1) "the arrestee is within reaching distance of the passenger compartment at the time of the search"; *or* (2) "it is reasonable to believe the vehicle contains evidence of the offense of arrest."[39] "When these justifications are absent," the majority contin-

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30 453 U.S. 454, 462–63 (1981).

31 *See* Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009).

32 Davis v. United States, 129 S. Ct. 2419, 2424 (2011) (emphasis added).

33 *Id.*

34 Thornton v. United States, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment) (citing United States v. McLaughlin, 170 F.3d 889, 890–91 (9th Cir. 1999)).

35 *Id.* at 618 (majority opinion).

36 *See id.* at 624–25 (O'Connor, J., concurring in part); *id.* at 625–32 (Scalia, J., joined by Ginsburg, J., concurring in the judgment); *id.* at 633–36 (Stevens, J., joined by Souter, J., dissenting).

37 129 S. Ct. 1710 (2009).

38 *Id.* at 1719–23.

39 *Id.* at 1723.

ued, "a search of an arrestee's vehicle will be unreasonable *unless* police obtain a warrant or show that another exception to the warrant requirement applies."[40]

Gant raises a number of questions. One could debate whether it did or did not "overrule" *Belton,* and, if so, whether there were adequate grounds for doing so.[41] One could also ask whether the pre- or post-*Gant* regime is preferable in terms of Fourth Amendment values[42] and what it may portend for further developments in Fourth Amendment law.[43] And one certainly could ponder just how much *Gant* is likely to change police practices on the ground or how many future cases are likely to come out differently as a result.[44]

From a transitional perspective, however, the more interesting question is what to do about all those pre-*Gant* searches that lower courts have *already* resolved using pre-*Gant* understandings of the Fourth Amendment. This was not an idle question. There does not, unfortunately, appear to be any direct way of determining how many still-pending cases *Gant* had the potential to affect. That said, the data from the most recent year for which it is available indicate that approximately twenty-one million people were drivers during a traffic

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40 *Id.* at 1723–24 (emphasis added).

41 *Compare id.* at 1722 n.9 (asserting that it did not overrule *Belton*), *with* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 37 (2010) (asserting that *Gant* "effectively overruled" *Belton*), *and* David L. Berland, Note, *Stopping the Pendulum: Why Stare Decisis Should Constrain the Court from Further Modification of the Search Incident to Arrest Exception,* 2011 U. ILL. L. REV. 695, 717–19 (arguing why *Gant* overruled *Belton* and why "*Belton* should not have been overruled").

42 *See, e.g.*, Michael Goodin, Arizona v. Gant*: The Supreme Court Gets It Right (Almost)*, 87 U. DET. MERCY L. REV. 115, 145 (2010) (arguing that drivers' Fourth Amendment rights are better protected under *Gant* than under the broad reading of *Belton*); Stanley T. Mortensen, Note, Gant*: Restoring Balance to the Fourth Amendment's Search-Incident-to-a-Valid-Arrest Exception,* 9 APPALACHIAN J.L. 259, 278–79 (2010) (arguing that *Gant* "restores balance" to the Fourth Amendment with regard to the search-incident-to-a-valid-arrest exception).

43 *See, e.g.*, Jana L. Knott, Note, *Is There An App for That? Reexamining the Doctrine of Search Incident to Lawful Arrest in the Context of Cell Phones,* 35 OKLA. CITY. U. L. REV. 445, 461–62 (2010) (using *Gant* to propose two new approaches to the doctrine of search-incident-to-lawful-arrest in the context of cell phones); Chelsea Oxton, Note, *The Search Incident to Arrest Exception Plays Catch Up: Why the Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant,* 43 CREIGHTON L. REV. 1157, 1159 (2010) ("[L]ower court decisions that allowed searches of cell phones incident to arrest are further incorrect in light of *Arizona v. Gant.*"); Angad Singh, Comment, *Stepping Out of the Vehicle: The Potential of* Arizona v. Gant *to End Automatic Searches Incident to Arrest Beyond the Vehicular Context,* 59 AM. U. L. REV. 1759, 1797 (2010) (arguing that *Gant* "extends to other contexts, such as searches of containers on the person and homes incident to arrest").

44 *See, e.g.*, Barbara E. Armacost, Arizona v. Gant*: Does It Matter?*, 2009 SUP. CT. REV. 275, 317 (suggesting that *Gant* "may have a significant effect on Fourth Amendment law—and on police practices on the ground—or it may not make much difference at all"); Scott R. Grubman, *Bark With No Bite: How the Inevitable Discovery Rule is Undermining the Supreme Court's Decision in* Arizona v. Gant, 101 J. CRIM. L. & CRIMINOLOGY 119, 169 (2011) (concluding that the *Gant* "decision's effect is more theoretical and scholarly than practical").

stop during the previous year and that approximately 2.4% of these people report having been arrested during that traffic stop.[45] In addition, a Westlaw search indicates that as of April 21, 2009, the day that *Gant* was decided, federal and state courts had cited *Belton* at least 3,114 times; that number presumably excludes even more cases in which the defendant decided against raising a Fourth Amendment challenge on the theory that it would be hopeless given *Belton*.[46] In terms of potentially disruptive legal change, *Gant* was no *Miranda*[47] or *Apprendi*,[48] but it was still a very big deal.[49] And the way the Supreme Court chose ultimately to deal with it in *Davis*, I will now explain, both built on the past and has important implications for the future.

II
THREE STRATEGIES FOR MANAGING LEGAL CHANGE

Gant is hardly the first case in which the Supreme Court changed the law in a way that threatened to call into question a great many previous convictions and sentences. The Warren-era Court, of course, did that sort of thing all the time.[50] But the Rehnquist-era Court did it quite a few times too,[51] and now the Roberts Court has gotten into the act with *Gant*. Judges, like other umpires, just can't seem to stop themselves from fiddling with the strike zone.

Something else seems here to stay as well: judges' desire to find *some* way to limit the disruptive effects of their own law-changing decisions. Put another way, a stable majority of Justices appears commit-

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45 MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 3–5 (2007), *available at* http://www.bjs.gov/content/pub/pdf/cpp05.pdf.

46 *Belton* Citing References Search, WESTLAW, http://www.westlaw.com (enter "Sign On" information; click "Westlaw" tab; then search "453 U.S. 454" in the "Find by citation" box; then click "Citing References").

47 384 U.S. 436 (1966).

48 530 U.S. 466 (2000).

49 *Accord* Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1079 (2011) (observing that *Davis* "determines how thousands of Fourth Amendment cases will be litigated as well as whether some defendants are set free or remain in prison").

Gant created significant transitional issues for prosecutors as well as defendants. The reason is simple: It is likely that many suppression motions that formerly would have been denied based on *Belton* also *could* have been denied on other grounds as well had the police officers and prosecutors understood the need to make an appropriate record. *See id.* at 1099–1100 (discussing the inevitable-discovery, independent-source, and Fourth Amendment "standing" doctrines); Armacost, *supra* note 44, at 279–80 (noting that "*Gant* itself permits police officers to search an arrestee's vehicle if they have reason to believe that evidence of the crime of arrest will be found in the vehicle").

50 *See, e.g.*, Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 77–78 (describing the Warren Court's criminal procedure revolution).

51 *See* Heytens, *supra* note 1, at 932–40 (describing five disruptive Rehnquist Court decisions).

ted to the view that even the most foundation-shaking of decisions should not result in huge numbers of previously convicted defendants getting released or obtaining shorter sentences.[52] But, as I will now explain, the Court has used different strategies for accomplishing that aim, including the remedy-limiting approach[53] it recently utilized in *Davis*.

A. Nonretroactivity

The year is 1965. Four years ago, in *Mapp v. Ohio*,[54] the Supreme Court overruled its own previous decision in *Wolf v. Colorado*[55] and held that the federal constitution requires state courts to exclude evidence seized in violation of the Fourth Amendment.[56] The question now in *Linkletter v. Walker*[57] is whether the Court's decision in *Mapp* should be allowed to change the result of another case involving a pre-*Mapp* search and a pre-*Mapp* decision by state courts.[58]

To seven Justices—Chief Justice Warren and Justices Clark, Harlan, Brennan, Stewart, White, and Goldberg—the answer is "no."[59] To them, the until-recent existence of the "*Wolf* doctrine," under which state courts could receive evidence obtained in violation of the Fourth Amendment, was "an operative fact [with] consequences which cannot justly be ignored."[60]

Having resolved to limit the disruptive effects of *Mapp* on pre-*Mapp* cases, the question became how to do so. In *Linkletter*, the Supreme Court chose a "nonretroactivity" solution, holding that *Mapp* should not "operate[ ] retrospectively upon"[61] certain categories of pre-*Mapp* cases.[62] In reaching that conclusion, the Court cited its own

52 *See infra* Part II.A (discussing a preference among the cases for "nonretroactivity").

53 *See infra* Part II.C.

54 367 U.S. 643 (1961).

55 338 U.S. 25 (1949).

56 *Mapp*, 367 U.S. at 660.

57 381 U.S. 618 (1965).

58 *Id.* at 619.

59 *Id.* at 640 ("After full consideration of all the factors we are not able to say that the *Mapp* rule requires retrospective application.").

60 *Id.* at 636 (quoting Chicot Cty. Drainage Dist v. Baxter State Bank, 308 U.S. 371, 374 (1940)).

61 *Id.* at 619.

62 *Id.* at 640. Specifically, *Linkletter* held that the *Mapp* rule was not applicable to "cases finally decided in the period prior to *Mapp*," which the Court defined as those "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the Supreme Court's] decision in *Mapp*." *Id.* at 619–20, 622 n.5.

One of the many ironies about *Linkletter* is that although it has come to be the poster child of the repudiated aspects of the Warren Court's nonretroactivity doctrines, *see, e.g.*, Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1557–58 (1975) (describing *Linkletter*'s limited acceptance), both its distinction between direct and collateral review and its conclusion that *Mapp* should not operate retroac-

repeated endorsement of the *Wolf* rule;[63] the disruption that would be caused by requiring new hearings "on the excludability of evidence long since destroyed, misplaced or deteriorated" and new trials where witnesses would be unavailable or their memories dimmed; and the fact that the admissibility of unconstitutionally obtained physical evidence "has no bearing on guilt."[64]

After this debut in *Linkletter*, nonretroactivity analysis quickly became the Warren Court's preferred method for addressing the disruption caused by law-changing decisions, including, among others, *Miranda v. Arizona*,[65] *Katz v. United States*,[66] which involved circumstances in which a Fourth Amendment violation can occur notwithstanding the absence of a physical trespass,[67] and *United States v. Wade*[68] and *Gilbert v. California*,[69] which involved identification procedures.[70] Although *Linkletter* itself had been a habeas case and the Court had expressly limited its holding to that context,[71] the Court soon stated that it saw no "persuasive reason" for treating cases differently based on whether direct review had been completed at the time of the law-changing decision.[72] Although the Court framed the inquiry in a variety of ways, the most common test for deciding whether a new decision should operate retroactively called for consideration of "(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

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tively with respect to a case that was on collateral review when *Mapp* was handed down are perfectly consistent with current law, *see, e.g.*, Teague v. Lane, 489 U.S. 288, 295–96 (1989) (plurality opinion) (citing *Linkletter* to deny retroactivity to petitioner).

63 *Linkletter*, 381 U.S. at 637.

64 *Id.* at 637–38.

65 384 U.S. 436 (1966); *see* Johnson v. New Jersey, 384 U.S. 719, 733 (1966) (considering the retroactive effect of *Miranda* and *Escobedo v. Illinois*, 378 U.S. 478 (1964)); *see also* Jenkins v. Delaware, 395 U.S. 213, 213–14 (1969) (considering whether *Miranda* applies to "post-Miranda retrials of cases originally tried prior to that decision" (footnote omitted)).

66 389 U.S. 347 (1967).

67 *Id.* at 353; *see also* Desist v. United States, 394 U.S. 244, 254 (1969) ("In sum, we hold that *Katz* is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after [the *Katz* decision].").

68 388 U.S. 218 (1967).

69 388 U.S. 263 (1967).

70 *See* Stovall v. Denno, 388 U.S. 293, 300 (1967) ("We conclude, therefore, that the *Wade* and *Gilbert* rules should not be made retroactive."). By one count, the Supreme Court decided more than twenty-five cases involving the retroactivity of criminal-procedure decisions between 1965 and 1982. *See* Fallon & Meltzer, *supra* note 2, at 1743 & n.47 (citing 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 2.9, at 121 (1984)).

71 *See Linkletter v. Walker*, 381 U.S. 618, 619–20, 622 & n.5 (1965) ("[I]n this case, we are concerned only with whether the exclusionary principle enunciated in *Mapp* applies to state court convictions which had become final before rendition of our opinion." (footnote omitted)).

72 Johnson v. New Jersey, 384 U.S. 719, 733 (1966); *see also* Heytens, *supra* note 1, at 974 ("Beginning in 1966, rulings were held applicable only to cases in which the trial had not yet started, the tainted evidence had not yet been admitted, or the underlying unconstitutional conduct had not yet occurred." (footnotes omitted) (citing cases)).

(c) the effect on the administration of justice of a retroactive application of the new standards."[73]

B. Forfeiture

Now it is 2002. Two years ago, the Supreme Court's decision in *Apprendi v. New Jersey*[74] revolutionized the constitutional rules that govern criminal sentencing. In fact, early reports suggested that *Apprendi* may have invalidated then-prevailing sentencing practices under at least fifty-seven federal and sixteen state statutes.[75] Another case is before the Court—*United States v. Cotton*[76]—that requires it to decide what impact *Apprendi* will have on a large federal drug conspiracy prosecution where the trial court proceedings were concluded before *Apprendi* was decided and concededly did not comply with the new requirements of that decision.[77]

The nonretroactivity strategy favored by the Warren Court, however, is unavailable. In 1987's *Griffith v. Kentucky*,[78] the Supreme Court specifically swore off nonretroactivity in the direct-review context, holding that *all* "new rule[s] for the conduct of criminal prosecutions [*must*] be applied retroactively to all cases . . . pending on direct review or not yet final" at the time the new rule is announced.[79] And *Cotton* was pending on direct appeal when *Apprendi* was decided.[80]

There is, of course, more than one way to skin a cat, and perhaps the most important thing *Cotton* illustrates is that nonretroactivity is not the only strategy that courts can use to deny defendants the full benefit of law-changing decisions. Not surprisingly—given that *Apprendi* had not even been decided at that point—the defendants in *Cotton* had not made an "*Apprendi* objection" in the trial court.[81] As a result, the Supreme Court concluded that they had "forfeited" their *Apprendi* claims and thus could obtain appellate review only under the considerably more government-friendly "plain-error" standard.[82] And, applying that standard, the Court held that the defendants were not entitled to relief because they failed to demonstrate that the con-

73 *Stovall*, 388 U.S. at 297.

74 530 U.S. 466 (2000).

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

76 535 U.S. 625 (2002).

77 *Id.* at 627–28, 632.

78 479 U.S. 314 (1987).

79 *Id.* at 328. For a brief summary of *Griffith*'s rationale for rejecting nonretroactivity doctrines in the direct-review context, see Heytens, *supra* note 1, at 977–79. For my criticism of that rationale and other common arguments against nonretroactivity doctrines, see *id.* at 981–83 and *infra* text accompanying notes 162–77.

80 *Cotton*, 535 U.S. at 628.

81 *Id.* at 628–29.

82 *Id.* at 629, 631.

ceded constitutional errors in their case "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings."[83]

As I previously have explained, by 2006, "the forfeiture approach ha[d] become one of the dominant means by which federal courts limit[ed] the disruptive effects of legal change in the context of direct review of federal criminal convictions,"[84] and, as a result, "[f]ull retroactivity in form ha[d] degenerated into a significant amount of nonretroactivity in fact."[85] Although most of the action during this period occurred at the court of appeals level, the Supreme Court actively encouraged this sort of use of forfeiture rules, both through its decision in *Cotton*[86] and, even more overtly, in *United States v. Booker*.[87]

In *Booker*, the Court held that the *Apprendi* rule applied to factual determinations made under the Federal Sentencing Guidelines and that the proper response to that conclusion was to sever the statutory provision that made the Guidelines mandatory.[88] *Booker* threatened to spawn truly massive transitional problems because it suggested "that virtually every federal sentence handed down during the last twenty years had been imposed in an illegal fashion."[89]

The Supreme Court seemed keenly aware of the problems, and it devoted the last paragraph of its opinion to addressing them. Although it reiterated *Griffith*'s rejection of nonretroactivity in the direct-review context,[90] the *Booker* Court also offered a none-too-subtle direction that lower courts should make liberal use of the forfeiture strategy that the Supreme Court itself had applied in *Cotton*. Notwithstanding *Griffith*, the Court emphasized that not "every appeal will lead to a new sentencing hearing."[91] Instead, the Court explained that it "expect[ed] reviewing courts to apply ordinary prudential doctrines, *determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test*."[92]

C. Remedy-Limiting

We arrive finally at 2011 and *Davis*. Two years ago, in *Arizona v. Gant*,[93] the Supreme Court rejected broadly shared views among the lower courts about the Fourth Amendment rules governing traffic

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83 *Id.* at 632–34.
84 Heytens, *supra* note 1, at 942.
85 *Id.* at 979.
86 *Cotton*, 535 U.S. at 629–31.
87 543 U.S. 220 (2005).
88 *Id.* at 227, 245.
89 Heytens, *supra* note 1, at 939–40.
90 *Booker*, 543 U.S. at 268.
91 *Id.*
92 *Id.* (emphasis added).
93 129 S. Ct. 1710 (2009).

stops.[94] Now the Court is faced with a case involving what to do about a case that is still on direct review and involves a pre-*Gant* search that concededly did not satisfy *Gant*'s requirements.[95] This is not the only such case; to the contrary, there have already been numerous other appellate decisions involving the same issue.[96]

To make matters more complicated, the forfeiture strategy that the Court used in *Cotton*[97] offers no prospect of limiting the disruptive effect of *Gant* here. Forfeiture rules are triggered by the absence of a timely objection,[98] but Davis's lawyer, apparently having anticipated the outcome in *Gant*, filed a timely pretrial motion to suppress the evidence seized from Davis's car.[99]

As it turns out, however, that effort was not enough for Davis to get relief. Instead, the Supreme Court applied a third, remedy-limiting approach for assessing the extent to which law-changing decisions should be permitted to disrupt earlier outcomes. Echoing earlier statements that the exclusionary rule is "not a personal constitutional right"[100] of the accused and that the "use of the fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong,'"[101] the Court emphasized the need to separate the question of whether the Fourth Amendment was *violated* from the question of what *consequences* should flow from such violation.[102] And, again echoing previous cases, the Court stated that the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations," and it concluded that in situations "when the police conduct a search in objectively reasonable reliance on binding judicial precedent," "the deterrence benefits of suppression" do not "outweigh its heavy costs."[103] Davis, therefore, was denied any relief for what was, under the Supreme Court's current understanding of the Constitution, a conceded violation of his Fourth Amendment rights.

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94 *See id.* at 1722–24; Davis v. United States, 131 S. Ct. 2419, 2428 (2011).

95 *Davis*, 131 S. Ct. at 2428.

96 *See, e.g.*, United States v. Debruhl, 993 A.2d 571 (D.C. Cir. 2010); United States v. McCane, 573 F.3d 1037 (10th Cir. 2009); United States v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009), *reh'g denied*, 598 F.3d 1095 (9th Cir. 2010); State v. Daniel, 242 P.3d 1186 (Kan. 2010); People v. McCarty, 229 P.3d 1041 (Colo. 2010) (en banc); *see also* State v. Harris, 58 So. 3d 408, 409–10 (Fla. Dist. Ct. App. 2011) (citing other cases).

97 United States v. Cotton, 535 U.S. 625, 631 (2001).

98 *See id.* at 634 ("[A] constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . . ." (quoting Yakus v. United States, 321 U.S. 414, 444 (1944))).

99 *See Davis*, 131 S. Ct. at 2426.

100 Stone v. Powell, 428 U.S. 465, 486 (1976).

101 Arizona v. Evans, 514 U.S. 1, 10 (1995) (quoting United States v. Leon, 468 U.S. 897, 906 (1984)); United States v. Calandra, 414 U.S. 338, 354 (1974).

102 *Davis*, 131 S. Ct. at 2426.

103 *Id.* at 2426–28.

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So what are the lessons of this Part? I see three main ones.

The first lesson is descriptive: more than five decades of history suggest that it is inevitable that the Supreme Court will be acutely concerned about the disruptive effects of law-changing decisions on previously decided cases and that it will actively search for ways to limit those effects.

The second lesson is overtly normative and thus inevitably controversial: providing courts with tools to limit the disruptive effects of legal change is a good thing *because* it facilitates rights-expanding decisions.[104] If one believes, as I do, that decisions like *Miranda*, *Apprendi*, and *Gant* generally are a good thing, then one must be concerned that the prospect of setting free scores or more of previously convicted criminals will deter courts from making such decisions in the first place.[105]

The third lesson builds on the first two: because it is both inevitable and desirable for the Supreme Court to find some way of limiting the retrospectively disruptive effects of legal change, the question is not *whether* but *how* the Court should go about doing so. As this Part has explained, the Supreme Court has multiple potential strategies at its disposal and those strategies are, to at least some extent, substitutes for one another.[106] But, as I will now explain, the strategies are not

104 My colleague John Jeffries previously made the same point, though his focus was on doctrines that limit the availability of money damages in private suits for constitutional violations. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90–91 (1999) [hereinafter Jeffries, *Right-Remedy Gap*] (arguing that "limiting money damages for constitutional violations . . . . facilitates constitutional change by reducing the costs of innovation"); *see also* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 271–75 (2000) ("Without a limit on costs, there would be less reform.").

105 For reasons I have been unable to explain, *Miranda* provides the standard example here. *See* Jeffries, *Right-Remedy Gap*, *supra* note 104, at 98 ("In all likelihood, the Supreme Court would never have required *Miranda* warnings if doing so meant that every confessed criminal then in custody had to be set free."); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889–90 (1999) (same); *see also* LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 178 (1994) (making similar observation about the Warren Court's concerns about retroactivity); Fallon & Meltzer, *supra* note 2, at 1740 (same).

106 Under current law, one could say that the forfeiture and remedy-limiting strategies are complements that together operate as substitutes for the nonretroactivity strategy: In *Cotton* and *Booker*, the forfeiture strategy substituted for the unavailability of the nonretroactivity strategy and the remedy-limiting strategy performed the same function in *Davis*. That particular configuration is not inevitable, however. In *Linkletter*, for example, it seems that the nonretroactivity strategy may have operated as a substitute for the unavailability of a forfeiture strategy, *see* United States ex rel. Linkletter v. Walker, 323 F.2d 11, 13 (5th Cir. 1963) (noting that Linkletter "had timely objected to the introduction of this evidence"), *aff'd*, 381 U.S. 618 (1965), and the perceived unavailability of a remedy-limiting one, *see infra* note 111. And in *Davis*, of course, the remedy-limiting strategy *also* operated as a substitute for the unavailability of a forfeiture strategy.

perfect substitutes and only one—nonretroactivity—offers the prospect of consistent and coherent results across the board.

III
Back to the Future

The previous two Parts laid out the events that generated the transitional moment that gave rise to *Davis* and identified three potential methods for limiting the disruptive effects of law-changing, procriminal defendant decisions. This Part explains why the remedy-limiting approach utilized in *Davis* is superior to the flawed forfeiture approach that the Supreme Court used in *Cotton* and commended to lower courts in *Booker* but inferior to a return to the nonretroactivity approach that the Court first used in *Linkletter*.

A. Remedy-Limiting v. Forfeiture

Any strategy for limiting the backward-looking effects of legal change requires some method for separating those who will benefit from a new decision from those who will not. The fundamental problem with a forfeiture approach is that it relies too heavily on a single variable that is ill-suited to permit courts to think sensibly about the unique problems posed by legal change. As *Davis* illustrates, a remedy-limiting approach does not share that problem and, at least by comparison, looks quite promising.

1. Under a forfeiture approach, the critical question is whether the defendant's attorney made an objection before the law-changing decision was announced.[107] True, *Griffin*'s rejection of nonretroactivity in the direct review context means that all law-changing decisions are, as a formal matter, *applicable* to every defendant's case that was not yet final when they were announced. But, as *Cotton* illustrates, a court applying a forfeiture approach essentially reintroduces the very distinction that *Griffin* at first appears to reject—that is, one between defendants who will obtain the *full benefit* of a law-changing decision and those who will not—and the sole criterion it uses for doing so is whether the defendant made a time-of-trial objection.

In one sense, using the lack of a time-of-trial objection to limit the effects of law-changing decisions makes perfect sense. As I previously have argued, "[t]he 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 is overwhelming."[108] For that reason, forfeiture rules are likely to be a

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[107] *See* Heytens, *supra* note 1, at 942–44.
[108] *Id.* at 943–44.

brutally *effective* way of ensuring that many defendants will be unable to obtain the full benefits of law-changing decisions and thus limiting the disruptive effects of legal change. But there are other strategies for accomplishing the same end, including nonretroactivity and remedy-limiting approaches, deferential standards of review,[109] or even eliminating appeals altogether.[110] As a result, the relevant question is not whether a forfeiture approach has the effect of limiting some of the disruptive effects of legal change. Instead, it is whether a forfeiture approach helps us identify *which* defendants should get the full benefit of law-changing decisions and which should not. The answer is no.

The most fundamental problem with using a forfeiture strategy for addressing the problems posed by legal change is that it does not provide courts with the tools to think sensibly about whether a particular case is one where the outcome *should* change as a result of an intervening law-changing decision.[111] Sometimes this fact will help defendants. Sometimes it will hurt them. But the problem always exists.

Davis exemplifies a situation in which the limits of a forfeiture approach short-circuit the analysis in a way that benefits defendants. Under a forfeiture approach, once the defendant's attorney objects, the fact that the legal rules have changed during the life of the defendant's case becomes irrelevant and, at least for forfeiture purposes, the defendant is without any further consideration treated the same as if those rules had remained constant all along. But why? It cannot be because we want to encourage such objections because, as I explained in a previous article, we generally do not.[112] And there does not seem

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109 *Cf.* 28 U.S.C. § 2254(d)(1) (2006) (listing standards for granting federal habeas corpus relief to state prisoners).

110 *See* Heytens, *supra* note 1, at 982 (explaining that "[t]hough 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").

111 As I discussed in a previous article, there are a variety of other problems with using forfeiture rules in the changed-law context as well. *See* Heytens, *supra* note 1, at 962 (arguing that "sanctioning defendants for not making objections that their trial judges would have been bound to reject will predictably harm defendants" by, among other things, "divert[ing] [limited attorney] resources from other tasks . . . in a world where criminal defense lawyers tend to be chronically underfunded"); *id.* at 987 (noting the "public perception problems" created "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"); *id.* at 988–89 (explaining that a client's normal remedies for poor attorney performance—an ineffective-assistance-of-counsel claim or a malpractice action—are especially unlikely to be available in situations where time-of-trial law was against the defendant's position).

112 Briefly, the only legitimate purpose of forfeiture rules in the direct-review context is to enforce compliance with claim-presentation rules (such as, for example, the principle that objections to the admissibility of evidence must be made at the time the evidence is offered). But the efficiency-enhancing purposes of claim-presentation rules are not fur-

to be any other reason to believe that the presence of a then-futile objection will do a very good job of helping us identify the particular cases in which law-changing decisions *should* be permitted to alter an earlier outcome.[113]

On the other hand, *Cotton* illustrates a situation in which a forfeiture approach automatically skews the analysis to benefit the government. At the time of the trial court proceedings in *Cotton*, controlling circuit precedent squarely rejected the very claim that the defendants sought to raise post-*Apprendi*.[114] At least under those circumstances, an objection would not have furthered any of the valid purposes of claim-presentation rules *and* would have risked a variety of other undesirable consequences, including diverting defense attorney time and attention from other tasks and risking alienating the trial judge.[115] As a consequence, "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."[116]

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thered by encouraging attorneys to make objections that trial judges will be bound by controlling time-of-trial law to reject. To the contrary, such objections undermine the smooth and efficient operation of judicial proceedings by requiring judges and lawyers to expend time addressing matters that have no prospect of altering the trial-level outcome. To the extent a forfeiture approach is successful at limiting the disruptive effects of legal change in some cases (that is, those where there *is* a law-changing decision between the time of trial and the time of appeal), therefore, it does so at the cost of generating at best pointless and at worst affirmatively harmful objections in others (that is, those where there ends up *not* being an intervening law-changing decision). For a fuller articulation of this argument, an explanation of how forfeiture rules should operate in situations involving various states of time-of-trial and time-of-appeal law, as well as a response to the argument that encouraging objections helps courts identify precedents that may be ripe for re-examination, see Heytens, *supra* note 1, at 956–72.

113 It is true that competent defense attorneys are more likely to make then-futile objections in situations where there is reason to believe that the legal standards may be about to change. *See, e.g.*, *supra* text accompanying notes 35–36 (describing the state of the Supreme Court's Fourth Amendment jurisprudence in the period immediately preceding *Davis*). Of course, not all attorneys are competent, and there are costs to making objections that trial judges would be bound to reject. *See infra* text accompanying note 116. In addition, there is no need for courts to use rough proxies to identify the relative foreseeability of a law-changing decision when they can just ask the question directly via either a remedy-limiting approach or a nonretroactivity analysis.

114 *See* United States v. Uwaeme, 975 F.2d 1016, 1018 (4th Cir. 1992) ("Under the drug abuse prevention statutes at issue here, 21 U.S.C. §§ 841, 952 and 960, the quantity of a drug is not a substantive element of any of the crimes involved.").

115 Heytens, *supra* note 1, at 959–62.

116 *Id.* at 962. In most situations, of course, it does make sense to subject defendants who did not object at the time of trial to a less favorable standard of appellate review. *See id.* at 969–72 (discussing situations where time-of-trial law was unclear). Accordingly, one could argue that whether the law has "changed" between the time of trial and appeal should be *irrelevant* under a forfeiture analysis because that is the only way to prevent courts from having to make hard decisions about what it means for an objection to be "futile" and whether whatever standard the courts adopt is satisfied in a particular case. The narrow doctrinal response is that the Supreme Court has *already* incorporated an in-

That, however, is exactly what current law does. Even a defendant who failed to object at trial is still generally eligible for relief under the "plain error" standard, and it is true that two of the three additional factors that at least federal courts must consider before granting relief under that standard—that is, whether the error was "clear" or "obvious" and whether the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings"[117]—*could* potentially be applied in ways that took into account whether the governing legal standard changed between the time of the missed objection and appellate consideration.[118] But even if courts were to do that, a defendant seeking relief under the plain-error standard still must satisfy an additional requirement that takes no account of any change in the legal standard: whereas ordinary "harmless error" principles place the burden of persuasion on the government, the defendant who did not object at the time of trial must affirmatively demonstrate prejudice from any error.[119] And, in any event, there is simply no getting around the fact that a forfeiture approach to the problem of legal change (a) necessarily encourages defendants to make objections that we do not want them to make by penalizing them when they do not and, equally troubling, (b) in no way helps courts limit the disruptive effects of legal change in cases where defendant *do* make such objections.

2. At least when compared to a forfeiture approach, a remedy-limiting approach is a far more promising method for addressing the disruptive effects of legal change. As *Davis* illustrates, a remedy-limiting approach sorts defendants by the *type* of their claims rather than

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quiry into whether the governing legal standards changed between the time of trial and appeal into its forfeiture analysis. *See* Johnson v. United States, 520 U.S. 461, 467–68 (1997) (considering the issue for purposes of the "plainness" prong of the "plain-error" test). And, more generally, unless one is willing to conclude that even a defendant whose failure to object is explained by the presence of a seemingly secure, on-all-fours precedent of the Supreme Court itself should still be subject to a less favorable standard of appellate review—and I am not—courts will face line-drawing problems in any event.

117 *See* United States v. Cotton, 535 U.S. 625, 629–32 (2002) (listing preconditions for relief under the plain-error standard).

118 *See* Roosevelt, *Retrospective, supra* note 28, at 1688 (suggesting that "courts can use forfeiture to prevent broad disruption while also using plain error analysis to grant relief in appropriate cases").

119 *See* United States v. Olano, 507 U.S. 725, 734–35 (1993). In a 1994 decision, a Second Circuit panel suggested that "[w]hen a supervening decision alters settled law, . . . the burden of persuasion as to prejudice [under the plain-error standard] is borne by the government, and not the defendant." United States v. Viola, 35 F.3d 37, 42 (2d Cir. 1994). This holding, however, has been criticized by numerous other circuits and has not been adopted by any of them, *see, e.g.*, United States v. Pelisamen, 641 F.3d 399, 404–05 (9th Cir. 2011) ("This circuit has not adopted the *Viola* burden-shifting rule and contrary to Defendant's assertion, the framework has not been adopted in other circuits either." (citing cases)), and later Second Circuit panels have questioned whether it remains good law even in that circuit, *see, e.g.*, United States v. Williams, 399 F.3d 450, 457 n.7 (2d Cir. 2005).

the *(in)actions* of their attorneys.[120] As a result, a remedy-limiting approach does not add to the bad incentives or the doctrinal incoherence created by use of a forfeiture approach. To the contrary, a remedy-limiting approach could help eliminate those problems if used in lieu of a forfeiture approach.

In addition, the second part of the inquiry under the sort of remedy-limiting approach that the Supreme Court applied in *Davis*—essentially, whether the upsides of applying a given remedy in a particular situation outweigh any costs of doing so[121]—seems reasonably well-designed to permit courts to grapple honestly with the unique problems posed by legal change. In particular, a remedy-limiting approach expressly encourages courts to think hard about the purposes served by various remedies (something that the forfeiture approach has failed to do with respect to the purpose of claim-presentation rules), whether they would be served by applying them in situations where the constitutional "violation" appears to have been the product of a change in the law between the time of the challenged conduct and later appellate consideration, and whether the rights-violation at issue generates concerns about the accuracy of the result of the trial-court proceedings.[122] All of those seem like good and important questions to ask.

B. Remedy-Limiting's Limitations

So why not tell courts to scrap forfeiture as a means of addressing the backwards-looking effects of legal change and instead to use a remedy-limiting approach exclusively? This Section explains why. In short, a remedy-limiting approach will not always be available and the most plausible way of expanding the number of situations in which it will be available does so at the cost of making it less well-equipped to address the unique problems posed by legal change. As a result, even a strong embrace of the remedy-limiting approach is unlikely to be enough to persuade courts to abandon the flawed forfeiture strategy or to refrain from seeking yet another solution to the difficulties posed by legal change.

1. A remedy-limiting approach is an inherently *incomplete* method for addressing the challenges posed by legal change. As its name suggests, the threshold step for a court applying a remedy-limiting approach is to ask whether it is possible to separate the underlying right from its usual remedy.[123] If the court concludes that no such separa-

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120 *See* Davis v. United States, 131 S. Ct. 2419, 2428–29 (2011).

121 *Id.* at 2427 ("For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.").

122 *See id.* at 2426–29.

123 *See id.* at 2426–28.

tion is possible, then the analysis under a remedy-limiting approach is complete, and the defendant must receive the full benefit of the law-changing decision. In this way, the ability to separate rights and remedies operates as the same kind of hard on/off switch under a remedy-limiting approach as the presence or absence of a time-of-trial objection under a forfeiture approach.

This threshold right-remedy analysis was fairly straightforward in *Davis* itself. At various points until the 1970s, the Supreme Court had sometimes seemed to characterize the exclusionary rule as an inherent corollary to the Fourth Amendment and to have viewed the exclusion of unlawfully obtained evidence as justified by, among other things, the need to prevent the courts themselves from becoming party to lawless government conduct.[124] But the Court gradually abandoned that approach and the shift was complete by the time the Court considered *Davis*. As a result, the *Davis* Court was able to cite numerous earlier cases for the propositions that the exclusionary rule is "not a personal constitutional right" of the accused but rather a "judicially created remedy," and that the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations."[125]

Not only had the Supreme Court insisted on a strict separation between rights and remedies in the Fourth Amendment context before *Davis*, it had affirmatively relied on that separation numerous times as a basis for withholding the exclusionary rule remedy in situations the Fourth Amendment violation was undisputed. The Court had used precisely that reasoning in holding, for example, that suppression is unnecessary in situations where a Fourth Amendment violation occurred notwithstanding a police officer's objectively reasonably reliance on a facially valid warrant,[126] a statute that authorized such searches but was later declared unconstitutional,[127] or facially valid reports about information contained in court or law-en-

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124 *See, e.g., id.* at 2427 (noting that "[a]s late as [its] 1971 decision in *Whitely v. Warden*, the Court 'treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule.'" (citation omitted) (quoting Arizona v. Evans, 514 U.S. 1, 13 (1995))).

The state of Fourth Amendment law as of 1965 may explain why the Court apparently never considered using a remedy-limiting approach in *Linkletter*. Under current law, *Linkletter* may have been an even easier case under a remedy-limiting approach than *Davis* because whereas *Davis* involved the backward-looking effect of a decision (*Gant*) that at least involved the substantive meaning of the Fourth Amendment, *Linkletter* involved the backward-looking effect of a decision (*Mapp*) that itself involved only the *remedy* for Fourth Amendment violations. *See supra* text accompanying notes 54–73.

125 *Davis*, 131 S. Ct. at 2426–27 (quoting Stone v. Powell, 428 U.S. 465, 486 (1976), Arizona v. Evans, 514 U.S. 1, 10 (1995), United States v. Calandra, 414 U.S. 338, 348 (1974), and citing the additional cases cited *infra* notes 126–29).

126 *See* United States v. Leon, 468 U.S. 897, 922 (1984); Massachusetts v. Sheppard, 468 U.S. 981, 981–82 (1984).

127 *See* Illinois v. Krull, 480 U.S. 340, 352–53 (1987).

forcement databases.[128] The Court also applied similar reasoning in holding that suppression is unnecessary in certain *kinds* of proceedings[129] or for particular *categories* of Fourth Amendment violations.[130] As a result, the *Davis* Court's emphasis on the need to separate rights and remedies in the Fourth Amendment context flowed fairly seamlessly from both the Court's earlier statements and its earlier holdings.

The relative ease with which the *Davis* Court was able to deal with the threshold rights-remedies question, however, should not obscure the difficulties of expanding a remedy-limiting approach outside the Fourth Amendment context. The distinction between rights and remedies is perfectly common in constitutional criminal procedure: consider, for example, the harmless-error rule and various well-established waiver and forfeiture doctrines.[131] It is likewise familiar that a civil plaintiff who has suffered a constitutional deprivation is not necessarily entitled to any remedy; indeed, that is the very point of sovereign, absolute, and qualified immunity doctrines.[132] But what seems decidedly uncommon, at least outside the Fourth Amendment context, is saying that a criminal defendant who has suffered a violation of a particular constitutional right is not necessarily entitled to *any* remedy, no matter how significant an effect that violation had on the defendant's trial or sentencing and no matter how timely and persistent the defendant was in asserting his or her rights. At minimum, then, any expansion of the remedy-limiting approach outside the Fourth Amendment context, would require the Court to think hard about the relationship—and the distinction—between various "rights" and "remedies," as well as the source and scope of its discretion to grant or withhold certain remedies.

2. There is at least one direction in which a remedy-limiting approach might expand without requiring extensive modifications to existing doctrine. But there would still be numerous areas in which the remedy-limiting approach would provide no assistance at all, and any such expansion would come at the cost of making the remedy-limiting approach less sensitive to the distinct problems posed by legal change.

a. The Supreme Court has described some of its constitutional criminal-procedure decisions as creating "prophylactic" rules to safe-

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128 *See* Herring v. United States, 555 U.S. 135, 145–47 (2009); *Evans*, 514 U.S. at 10, 14–16.

129 *See* Pa. Bd. of Probation & Parole v. Scott, 524 U.S. 357, 364–69 (1998) (parole-revocation proceedings); INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (immigration proceedings); *Stone*, 428 U.S. at 494 (federal habeas corpus proceedings); United States v. Janis, 428 U.S. 433, 459–60 (1976) (federal civil tax proceedings where the evidence was seized by state officials); *Calandra*, 414 U.S. at 347–52 (grand jury proceedings).

130 *See* Hudson v. Michigan, 547 U.S. 586, 590–99 (2006) (violations of constitutional "knock-and-announce" rule).

131 *See* Heytens, *supra* note 1, at 941–43.

132 *See, e.g.*, Jeffries, *Right-Remedy Gap*, *supra* note 104, at 91–94.

guard the underlying constitutional guarantees.[133] In addition, the Court has on several occasions relied on the distinction between core constitutional guarantees and prophylactic rules as a basis for limiting the remedies that are available for violations of prophylactic rules.[134] From there, it seems like it would be a relatively short walk to saying that the fact that the underlying legal rules have changed supports limiting (or even withholding) the remedies for a violation of a "mere" prophylactic rule.

b. In fact, the decision that is in many ways *Davis*'s most direct predecessor employed just that sort of reasoning. The prototypical "prophylactic" rules are the warning requirements associated with *Miranda v. Arizona.*[135] In 1974, the Supreme Court heard a case involving a pre-*Miranda* interrogation that, unsurprisingly, had failed to comply with *Miranda*'s subsequently announced requirements.[136] The specific question in *Michigan v. Tucker*[137] was whether this fact required the exclusion of the testimony of another witness whose identity the officers learned about during their interrogation of the defendant.

The Supreme Court said "no" by an 8–1 vote.[138] Justice White would have denied relief for a reason unrelated to the transitional moment. In his view, *Miranda* should not be understood "to bar the

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133 *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2401 (2011) (describing *Miranda* as having "adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination"). This approach is not without controversy. *Compare, e.g.*, Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. REV. 100 (1985), *with* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

134 *See, e.g.*, Michigan v. Harvey, 494 U.S. 344, 348–50 (1990) (holding that violation of the prophylactic rule associated with *Michigan v. Jackson*, 475 U.S. 625 (1986), did not bar use of resulting evidence to impeach defendant's trial testimony); Oregon v. Elstad, 470 U.S. 298, 307–08 (1985) (holding that prior *Miranda* violation does not "taint" subsequent voluntary statements obtained in compliance with *Miranda*); Michigan v. Tucker, 417 U.S. 433 (1974) (discussed *supra* text accompanying notes 135–46; Harris v. New York, 401 U.S. 222, 225–26 (1971) (holding that statements obtained in violation of *Miranda* may be used to impeach the defendant's testimony at trial). It appears that all of these decisions remain good law despite their obvious tension with the Supreme Court's subsequent holding in *Dickerson v. United States* that *Miranda* was a "constitutional decision." 530 U.S. 428, 432 (2000); *see* 1 DRESSLER & MICHAELS, *supra* note 26, § 24.06[B], at 463–67.

135 384 U.S. 436 (1966).

136 *See Tucker*, 417 U.S. at 462. The interrogating officer had done pretty well, all things considered. The officer asked the defendant whether he knew the crime for which he was being held, whether he knew his constitutional rights, and whether he wanted an attorney; the officer also had advised the defendant that any statements he made could be used against him in court. What the officer had not done, however, was inform the defendant that he would be provided with an attorney free of charge if he could not afford one. *See Miranda*, 384 U.S. at 436.

137 *Tucker*, 417 U.S. at 450.

138 The Supreme Court was unable to rely on a forfeiture strategy in *Tucker*. Although the *interrogation* had occurred before *Miranda*, the *trial* occurred after, at which point defense counsel lodged a predictable objection. *See id.* at 437.

testimony of third persons even though they have been identified by means of admissions that are themselves inadmissible under *Miranda*."[139] In contrast, Justices Brennan and Marshall would have denied relief on nonretroactivity grounds.[140]

A five-Justice majority, however, chose a different course. The Court began by emphasizing the need to separate the question of whether the defendant had been "deprive[d] . . . of his privilege against compulsory self-incrimination as such" as opposed to simply having not received "the full measure of procedural safeguards associated with that right since *Miranda*."[141] Having concluded that only the latter occurred in Tucker's case,[142] the Court framed the issue for decision as "how sweeping the judicially imposed consequences of this disregard shall be."[143]

Declining to decide "the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place," the Court chose instead to "place [its] holding on a narrower ground" that expressly took into account the fact "that the officers' failure to advise [Tucker] of his right to appointed counsel occurred prior to the decision in *Miranda*."[144] The Court emphasized that the state courts had excluded Tucker's own statements, and it concluded that "[w]hatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness [whose testimony had been derived from those statement] as well."[145] The *Tucker* Court also concluded that exclusion of the witness's in-court testimony was unnecessary to protect "the courts from reliance on untrustworthy evidence," noting both that there was "no reason to believe that [the witness's] testimony [was] untrustworthy simply because [Tucker] was not advised of *his* right to appointed counsel" and that the witness was subject to cross-examination by the defense at trial.[146]

c. In many respects, *Tucker* sounds a lot like *Davis*. The Court emphasized the need to separate the question of whether a given rule has been violated from an assessment of the consequences of that violation; relied expressly on the fact that the governing legal rules changed between the time of the challenged conduct and the later judicial decision about the remedy; and carefully considered whether

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139 *See id.* at 461 (White, J., concurring in the judgment).
140 *See id.* at 453–60 (Brennan, J., concurring in the judgment).
141 *Id.* at 444 (majority opinion).
142 *See id.* at 444–45.
143 *Id.* at 445.
144 *Id.* at 447.
145 *Id.* at 448.
146 *Id.* at 448–49.

the purposes of the requested remedy would be served by its application in that particular situation.[147]

At the same time, however, *Tucker* also illustrates the drawbacks of an approach that relies on the "prophylactic" nature of the underlying rule. Like both forfeiture rules and the narrow remedy-limiting approach that the Supreme Court employed in *Davis*, a broader *Tucker*-style analysis still has a hard on/off switch—that is, a court's ability to characterize the violated rule as "prophylactic" in nature.[148] This, in turn, creates two problems.

First, the question of whether a given rule is "prophylactic" or not appears to have at best a limited and indirect connection to a sensible analysis of whether the announcement of that rule should be permitted to upset earlier outcomes. On the one hand, it may be true that violations of what courts think of as "real" constitutional rights are more likely to call into question the accuracy or integrity of an earlier outcome than violations of "mere" prophylactic rules. On the other hand, even this link may not be terribly strong because one of the classic justifications for adopting prophylactic rules is that courts may otherwise have too hard of a time detecting whether the core constitutional principle was violated in a particular case.[149] In addition, the prophylactic/not prophylactic distinction has no particular connection to all sorts of other questions that it seems should weigh in the calculus, including how predictable or unpredictable the new decision was; how many earlier decisions the newly announced rule threatens to affect and how disruptive it would be to require the new rule's application to those cases; and whether the purposes of the newly announced rule would be served by applying it to conduct that occurred before it was announced.[150]

Second, even if the remedy-limiting approach were expanded to cover violations of "prophylactic" rules, there still are likely to be numerous situations in which it would provide no help to courts looking to limit the disruptive effects of legal change. To give just two recent examples that spawned significant transitional moments, consider the prohibition against admitting out-of-court "testimonial" statements associated with *Crawford v. Washington*[151] or a violation of the jury-trial and proof-beyond-a-reasonable-doubt requirements associated with the *Apprendi* line of cases.[152] The Supreme Court has never even

147 Davis v. United States, 131 S. Ct. 2419, 2430–31 (2011).

148 *See Tucker*, 417 U.S. at 439–46 (devoting nine pages to that issue).

149 *See, e.g.*, Strauss, *supra* note 133, at 200.

150 *See* Heytens, *supra* note 1, at 927.

151 541 U.S. 36, 68–69 (2004).

152 *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (stating that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

hinted that these rules are "prophylactic" in nature, and it seems difficult to imagine it concluding that they are.[153] It thus appears that even a broadened remedy-limiting approach would offer no assistance to judges looking to limit the disruptive effects of legal change in those contexts.

3. Some might argue that these characteristics of a remedy-limiting approach are a feature—or, at least, not a bug. For one thing, in situations involving violations of what we would (at least now) think of as a defendant's "core" constitutional rights and where "remedies" are difficult to separate from their accompanying "rights," there certainly is a decent argument to be made that the defendant should get relief without regard to whether it took courts too long to come to what we now perceive as the "right" answer.

Despite its initial attraction, that argument is seriously flawed. If remedy-limiting analysis fails to supply courts with the tools necessary to impose some limits on the backwards-looking effects of non-"prophylactic" decisions, the predictable effect will *not* be for courts to take a deep breath and grant relief in all such cases. Instead, the history recounted in Part II suggests that courts will do one of two things instead. The first option is to find some *other* way to limit the disruptive effects of those law-changing decisions, such as continuing with the flawed forfeiture approach that the federal courts used to limit the disruptive effects of their *Apprendi* and *Crawford* lines of decisions. Failing that, the second option is to make fewer such decisions in the first place.

Another argument is that even if a remedy-limiting approach is not a *complete* solution to legal change, that is not a serious problem because the *combination* of the remedy-limiting and forfeiture approaches is sufficient to do the job. There are at least two problems with the view. First, it will not always be true—for example, in situations where the defendant made a timely objection (which renders a forfeiture strategy unavailable) and where the underlying right cannot easily be separated from its accompanying remedy (which knocks out the remedy-limiting strategy). Second, just as importantly, I believe for the reasons I previously have explained that courts should *abandon* the forfeiture strategy as a means of controlling legal change, which means that it should not be used to backstop a remedy-limiting strategy.

In short, even though remedy-limiting doctrines may have a role to play in particular circumstances, a remedy-limiting strategy is too limited to be used alone. Something else is needed—a framework that

[153] *See, e.g.*, *Crawford*, 541 U.S. at 63 (describing the "unpardonable vice" of the previous Confrontation Clause regime as being "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude").

permits courts to grapple with the problems posed by legal change without the sort of hard on/off switch that characterizes both the forfeiture and remedy-limiting approach. Fortunately, the solution already exists: nonretroactivity.

C. A Return to Nonretroactivity

My defense of the proposition that courts should return to using a nonretroactivity approach for addressing the disruptive effects of legal change in the direct-review context is relatively modest. I do not claim that a nonretroactivity approach is without its problems nor do I take a position here on *which* new decisions should upset previous outcomes.[154] Instead, my more limited claims are that (1) a nonretroactivity approach provides a *better* mechanism for considering the unique problems posed by legal change than either a forfeiture approach or a remedy-limiting one; (2) many of the most prominent objections to nonretroactivity doctrines are more accurately seen as objections to *any* mechanism—including forfeiture rules and remedy-limiting doctrines—that operate to limit the backwards-looking effects of legal change; and (3) one of the central insights of the remedy-limiting approach helps refute one of the classic objections to nonretroactivity doctrines.

1. A nonretroactivity approach is better than a forfeiture or remedy-limiting one for at least three reasons. First, nonretroactivity doctrines are *tailored* to the legal-change context. A court applying a nonretroactivity analysis will not be distracted by difficult questions—such as whether a given requirement is "prophylactic" or whether the violation a particular right necessarily *requires* a particular remedy—whose resolution may have consequences outside the changed-law context. Instead, as *Linkletter* demonstrates, a nonretroactivity approach enables courts to grapple directly with the distinctive problems posed by legal change, including the extent to which permitting defendants to benefit from law-changing decisions would upset settled expectations and impose unreasonable costs on courts, prosecutors, and others and whether the intervening decision calls into question our confidence in the reliability of the defendant's earlier trial or sentence.[155] It may be that other questions should be considered as well. But the broader point is that nonretroactivity analysis enables courts to ask these questions directly.

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154 In particular, I do not mean "to embrace the extraordinarily pro-government nonretroactivity jurisprudence that the Supreme Court has developed in the collateral review context." Heytens, *supra* note 1, at 993.

155 *See* Linkletter v. Walker, 381 U.S. 618 (1965); *supra* notes 57–64, 112 and accompanying text.

A nonretroactivity approach also provides a *complete* approach to the distinct problems posed by legal change. Unlike a remedy-limiting approach, nonretroactivity analysis allows courts to consider the appropriate consequences of legal change regardless of the particular constitutional context in which that change occurs. For example, the nonretroactivity doctrine associated with *Teague v. Lane*[156] allowed the Supreme Court to consider whether defendants whose convictions became final before *Crawford* and one of *Apprendi*'s follow-on decisions should be able to obtain relief based on those cases, questions that the Court answered in the negative.[157] As a result, the adoption of a nonretroactivity approach in the direct-review context holds out the realistic prospect of persuading courts to abandon the flawed forfeiture strategy as a means of limiting the disruptive effects of legal change.

Finally, nonretroactivity offers the prospect of a more *unified and coherent* approach to legal change. Just two years after abandoning a nonretroactivity approach for the direct-review context in *Griffith*,[158] the Supreme Court embraced and expanded on its use in the habeas context in *Teague*.[159] Although federal habeas courts also apply forfeiture rules and remedy-limiting doctrines,[160] nonretroactivity doctrines have long provided the primary mechanism through which they address the distinct issues posed by legal change.[161] A return to a nonretroactivity approach in the direct-review context would thus enable courts to consider the problem of legal change through a single lens, but also to think carefully and openly about the distinction between direct and collateral review.

2. Nonretroactivity doctrines, of course, are subject to a number of prominent and oft-repeated objections. But many of those objections rest on an unstated (and false) assumption: that an embrace of *full retroactivity* means that all defendants will necessarily get the *full benefit* of law-changing decisions. As I explained earlier, however, that

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156 489 U.S. 288, 292 (1989) (plurality opinion).

157 *See* Whorton v. Bockting, 549 U.S. 406, 409 (2007) (addressing the retroactivity of *Crawford*); Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (addressing the retroactivity of *Ring v. Arizona*, 536 U.S. 584 (2002)).

158 Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final").

159 Teague v. Lane, 489 U.S. 288, 300–10 (1989) (plurality opinion) ("[N]ew constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

160 *See* Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977) (forfeiture); Stone v. Powell, 428 U.S. 465, 494–95 (1976) (remedy-limiting).

161 In the habeas context, the Court has expressly declined a remedy-limiting approach to *Miranda* violations. *See* Withrow v. Williams, 507 U.S. 680, 683 (1993). I am unaware of any decision since *Engle v. Isaac*, 456 U.S. 107, 130 (1982)—which was decided seven years before *Teague*—in which the Court relied on a forfeiture strategy in the changed-law setting.

simply is not the case. Courts have other tools at their disposal for limiting the disruptive effects of legal change, and the evidence suggests that a rejection of a nonretroactivity approach will simply lead courts to adopt one of those other strategies. And, as I will now explain, some of the most common objections to a nonretroactivity approach apply to the use of those other tools as well, including remedy-limiting doctrines.

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."[162] But this criticism applies equally to remedy-limiting (and, of course, forfeiture-based) approaches as well. After all, the fundamental holding of the Supreme Court's decision in *Davis* was that Willie Gene Davis got no remedy whatsoever for what was, under its own best current understanding of the law, a conceded violation of his Fourth Amendment rights.[163]

Nonretroactivity doctrines, we also are told, are the "handmaid of judicial activism"[164] because they make it easier for judges to change the law without requiring the legal system to absorb the full backwards-looking costs of legal innovation. This objection, of course, dissolves entirely if one rejects (as I do) "the contestable premise that judicial innovation is a bad thing,"[165] and it becomes an argument in nonretroactivity's favor if one believes (as I do) that "constitutional change is right and necessary."[166] But, even on its own terms, this argument applies to *any* mechanism that decreases the costs of legal change, including forfeiture and remedy-limiting approaches.

The same holds true with respect to other criticisms of nonretroactivity analysis as well. Like nonretroactivity strategies, remedy-limiting strategies increase judicial decision costs because they require some mechanism for figuring out whether a given situation is one in which remedy-limiting based on a change in law may be appropriate.[167] And remedy-limiting strategies, like nonretroactivity ones, risk creating public-perception problems for the judiciary because "conscious confrontation of the question of" whether courts should withhold a remedy because the legal standards have changed serve to "highlight[ ] the fact that the court has changed the law."[168]

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162 Heytens, *supra* note 1, at 985 n.345 (citing Haddad, *supra* note 11, at 428–30; Schwartz, *supra* note 11, at 747–48).

163 Davis v. United States, 131 S. Ct. 2419, 2423–24 (2011).

164 Harper v. Va. Dep't of Taxation, 509 U.S. 86, 105 (1993) (Scalia, J., concurring).

165 Heytens, *supra* note 1, at 985.

166 Jeffries, *Right-Remedy Gap*, *supra* note 104, at 97.

167 *See* Heytens, *supra* note 1, at 985 n.345 (citing 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, 256–82 (1998)).

168 Mishkin, *supra* note 11, at 64–66.

3. That said, the Supreme Court's (so-far limited) development of a remedy-limiting approach is useful for one other reason: it helps answer one of the most fundamental—but generally unstated—objections to the use of nonretroactivity doctrines in the direct review context. As I previously have explained, "[i]t 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."[169]

That view of an appeal's role, however, is neither inevitable nor constitutionally compelled. Appellate reversal of a criminal conviction *is itself a remedy*,[170] and it is not one to which defendants have any freestanding constitutional entitlement.[171] The central insight of the remedy-limiting approach is that it is possible to separate the question of whether a particular constitutional guarantee was violated from the question of what consequences should flow from that violation, and there are already numerous doctrines that govern the conduct of criminal appeals that rest on precisely that distinction. The harmless-error rule limits the remedy of appellate reversal to cases involving a particular subset of constitutional violations—that is, those that had a detrimental effect on the outcome of the defendant's trial.[172] Forfeiture rules withhold the remedy of appellate reversal in situations where defendants failed to raise a timely objection at trial,[173] and other rules do so when defendants failed to seek appellate review in a timely fashion.[174]

For the same reason, it is hard to see how there is any valid *constitutional* objection to using a nonretroactivity framework to limit availability to appellate reversal to situations where the trial court's initial decision, or the underlying police conduct, was consistent with then-prevailing constitutional norms.[175] One could plausibly defend such a

169 Heytens, *supra* note 1, at 981 (citing sources).

170 *See* Fallon & Meltzer, *supra* note 2, at 1770–71 (making the same point).

171 *See* Halbert v. Michigan, 545 U.S. 605, 610 (2005) ("The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions.").

172 *See supra* text accompanying note 119.

173 *See* United States v. Cotton, 535 U.S. 625, 634 (2002).

174 *See, e.g.*, FED. R. APP. P. 4(b)(1)(A) ("In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal.").

175 *See* Heytens, *supra* note 1, at 981. There may, however, be a statutory objection, if, for example, the failure of the relevant statutes and rules governing direct review of criminal convictions to say anything about limiting relief in the way suggested in the text is properly understood as precluding courts from doing so. It is worth noting here, however, that the Supreme Court neither cited this justification when it rejected nonretroactivity in the direct-review context, *see Griffith v. Kentucky*, 479 U.S. 314, 320–28 (1987), nor identified any particular statutory authorization when it embraced a nonretroactivity approach in

limitation on the ground that because "an appeal is not a second trial but rather a trial of the first one,"[176] it is inappropriate to set aside a trial-court outcome simply because of events that occur during the "inevitable lag between a trial judge's initial decision and the resulting controversy's final resolution by some other tribunal."[177]

CONCLUSION

Potentially disruptive judge-initiated legal change is not going away, and as *Gant* shows, it is hard to predict when the next change will happen. The sort of remedy-limiting approach that the Supreme Court applied in *Davis* is a far *better* way of addressing the unique problems posed by legal change than the flawed forfeiture approach that the federal courts primarily used to address the last significant set of transitional moments. But a remedy-limiting approach is no panacea; it offers neither the realistic prospect of convincing courts to scrap the flawed forfeiture approach nor the hope of providing a comprehensive approach to addressing the unique problems posed by legal change. Nonretroactivity analysis, however, does, and that is why courts should return to it.

the habeas context, *see Teague v. Lane*, 489 U.S. 288, 298–99 (1989) (plurality opinion). And even if one believed that courts may or should not resume applying a nonretroactivity approach in the direct-review context absent a more express statutory authorization, I would simply argue that Congress should amend the appropriate statutes.

176 Heytens, *supra* note 1, at 982.

177 *Id.* at 924.