

# DECIDING WHEN TO DECIDE: HOW APPELLATE PROCEDURE DISTRIBUTES THE COSTS OF LEGAL CHANGE

Aaron-Andrew P. Bruhl†

*Legal change is a fact of life, and the need to deal with it has spawned a number of complicated bodies of doctrine. Some aspects of the problem of legal change have been studied extensively, such as doctrines concerning the retroactivity of new law and the question whether inferior courts can anticipatorily overrule a moribund superior court precedent. How such questions are answered affects the size and the distribution of the costs of legal change. Less appreciated is the way that heretofore almost invisible matters of appellate procedure and case handling also allocate the costs of legal transitions. In particular, this Article focuses on lower courts' discretionary decisions about when to decide the cases that come before them: Should lower courts continue to decide cases in the regular course, even when a change in law is in the offing? Or should they delay adjudication until after the dust has settled?*

*The Article has both positive and normative aspects. It begins by drawing together several bodies of doctrine in order to present a unified account of what we can call our system's "law of legal change." The Article then presents a case study of the six-month interval between *Blakely v. Washington*, which invalidated a state sentencing scheme and cast substantial doubt on federal sentencing guidelines, and *United States v. Booker*, which held *Blakely* applicable to the federal system. A majority of the federal courts of appeals that addressed the question upheld the federal guidelines during this transitional interval. Beneath the surface, however, the various courts upholding the guidelines managed cases very differently, particularly when it came to questions of timing. As a result, some circuits bore much of the cost of legal change themselves, while others shifted some of the cost to litigants and other courts. Although that episode is unusual in terms of the size and salience of the case-management problem, the same general phenomena routinely manifest themselves on a smaller scale. Having described what courts actually do, I then suggest a framework for evaluating and perhaps improving how courts process cases during transitional periods. Case-management*

---

† Assistant Professor, University of Houston Law Center. I presented earlier versions of this Article at the Quinnipiac–Yale Dispute Resolution Workshop, the Southwest/West Junior Faculty Conference at Arizona State University, the University of Houston Law Center, and the Federal Courts Junior Scholars Workshop at Michigan State University; I am grateful for the comments each of those audiences provided. I also thank Frederic Bloom, Edward Cooper, Scott Dodson, David Dow, Arthur Hellman, Brent Newton, Chad Oldfather, Joan Steinman, and Sandra Guerra Thompson for commenting on prior drafts. I thank Melissa Grobler, Andrew Hufford, and Daniel Swearingen for research assistance.

*decisions are highly context specific, which makes it difficult and perhaps undesirable to formulate general rules, but we might be able to improve courts' handling of such matters by altering the institutional environment and modifying incentives.*

INTRODUCTION .....	204
I. THE LAW OF LEGAL CHANGE.....	208
A. What Law Applies When Law Changes?.....	209
1. <i>Which Cases Are Governed by New Law?</i> .....	209
2. <i>Forfeiting the Benefit of New Law</i> .....	212
B. Which Court Is Responsible for Implementing New Law? .....	214
C. The Problem of Deciding When to Decide .....	218
II. A CASE STUDY IN APPELLATE PROCEDURE AND THE COSTS OF LEGAL CHANGE .....	221
A. Appellate Case Management in the <i>Blakeley-to-Booker</i> Interval.....	223
B. The Consequences and Costs of the Different Approaches.....	232
III. A FRAMEWORK FOR PRESCRIPTIONS AND APPLICATIONS.....	236
A. Defining the Nature of the Problem .....	237
1. <i>What Is the Goal?</i> .....	237
2. <i>Why Might Courts Fall Short?</i> .....	242
B. Reforming Appellate Courts' Decisions About Timing .....	247
C. Other Applications .....	255
1. <i>Stays of Execution During Transitional Periods</i> .....	256
2. <i>Judicial Federalism: Abeyance, Abstention, and</i> <i>Certification to State Courts</i> .....	259
3. <i>The Transition from the District Court to the Court of</i> <i>Appeals</i> .....	261
CONCLUSION .....	264

#### INTRODUCTION

It has been said that the law of the ancient Persians and Medes was timeless, unchanging.<sup>1</sup> The same is certainly not true of our law today. The law changes all the time. Legislatures enact new statutes. Administrative agencies update regulations. Courts overrule precedents old and new.

The topic of how the legal system should deal with changes in law is an important and multifaceted one. Some of the relevant questions involve matters of legislative and regulatory policy, such as when to set

---

<sup>1</sup> *Daniel* 6:15 (King James) (“[T]he law of the Medes and Persians is, [t]hat no decree nor statute which the king establisheth may be changed.”); *see also* *Hurtado v. California*, 110 U.S. 516, 529 (1884).

the effective dates of new rules and whether to compensate those who are harmed by a shift in policy. Other questions involve how the judicial system implements legal change. For example: Should courts apply current law even when that law did not yet exist when the parties engaged in the activities that generated the litigation? Should an appellate court reverse a lower court's decision in light of new law created during the pendency of an appeal? Should final judgments be reopened whenever application of changed law would command a different result? Should the answers to any of the above questions depend on whether the source of the change is legislative or judicial? On whether the case is civil or criminal?

This Article addresses one aspect of this problem, namely how courts should manage cases during periods when a change in law is underway or may soon occur. To illustrate, consider the following scenario:

One year ago, the Supreme Court issued its decision in *X v. Y*. This new decision seems hard to reconcile with one of the Court's existing precedents, *A v. B*, which was decided thirty years ago. The *X v. Y* opinion harshly criticized the old case's reasoning. Nonetheless, the Court stated that "the precise question presented in *A v. B* is not before us today, and we express no opinion on it." The two dissenters in *X v. Y* wrote that it was unclear to them how *A v. B* could survive.

Today, the Supreme Court grants certiorari in a case in which the petitioner asks the Court to overrule *A v. B*. The Court's decision on the merits can be expected in roughly nine months.

Now suppose you are a lower court judge with a case before you that turns on the rule in *A v. B*. What should you do? A helpful agent might suppose that the best approach is to decide every case by asking, "What would the Supreme Court do?" If that is the right question to ask, you would be quite confident that you should not follow *A v. B*. All the same, you also know that the Supreme Court itself has cautioned that lower courts should not be proactive in overruling but should instead let the Court itself deal the final blow to a staggering precedent.<sup>2</sup> So, dutifully, you follow *A v. B*. Some months later, the Supreme Court inter *A v. B*.

When commentators discuss the problem described in the preceding paragraph, they typically frame the issue as whether anticipatory overruling is desirable; in more general terms, the debate

---

<sup>2</sup> *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

concerns whether lower courts should attempt to predict how the Supreme Court would decide a case or whether they must instead strictly follow existing precedents.<sup>3</sup> Those are important and interesting questions, but framing the problem in that way overlooks another dimension of the lower court's predicament and neglects other ways of handling it. For instance, rather than now ruling in either direction—following ailing precedent or anticipating its demise—the lower court could just delay its decision. That is, it can wait and see what happens in the Supreme Court, then rule accordingly. To be sure, waiting would not always be proper: there might be an independent alternative basis on which to decide the case, or the particular circumstances might demand swift action despite the risks. The point is just that the lower court has to choose not just which way to decide but, at least implicitly, *when* to decide.

I have found that many people assume that lower courts would almost always defer decision when the Supreme Court has a dispositive issue pending before it. To many outside observers, it seems like the natural choice. As it happens, sometimes courts do indeed wait. But sometimes they do not. As we will see, although judges' decisions not to wait might look strange from the outside—and might in fact be bad decisions, objectively speaking—the decisions might make sense in light of judges' institutional context and incentives. Thus, the way to improve the decisions might be to alter those circumstances and incentives.

To get a fuller sense of the stakes involved in courts' decisions about timing, one should recognize that the decision can literally be a matter of life and death. Consider, for example, a condemned inmate's challenge to an upcoming execution. Suppose the execution is lawful under circuit precedent, but the Supreme Court has granted certiorari in a separate case that involves the same legal issue. Faced with this situation, one could simply say that circuit law is circuit law and the mere grant of certiorari in another case does not change that law. That assertion seems undeniably true, as far as it goes. And yet, while admitting that a decision today must follow circuit precedent, one might be inclined to say that *any* decision at present would be improvident; the court should wait, holding the case in abeyance and staying the execution pending the Supreme Court's decision. Given the risk of irreparable harm involved, perhaps the reader would be surprised to learn that not all courts would wait.<sup>4</sup>

---

<sup>3</sup> See *infra* text accompanying notes 32–34 (discussing this issue and citing commentary).

<sup>4</sup> The scenario described in this paragraph is present in many cases. See, e.g., *In re Williams*, 359 F.3d 811, 813–14 (6th Cir. 2004); see also *infra* Part III.C.1 (discussing this scenario and citing other cases). The majority in *Williams* decided to let the execution proceed despite the grant of certiorari in another case that presented similar issues. 359

Although the examples considered so far concern situations in which the Supreme Court has already granted certiorari, the problem is far more general. Other events can also signal the potential for a change in law, such as the mere filing of a petition for certiorari, the issuance of a concurring opinion in which a Justice deems a precedent ripe for reconsideration, or even the fact that a new Justice has been appointed. To be sure, those signals are weaker and involve longer lag times than a grant of certiorari, so one would suppose that they would ordinarily not justify waiting.<sup>5</sup> The point, however, is simply to realize that the lower court is making a choice one way or the other. And, of course, changes in law do not come only from the Supreme Court. They come from legislatures, administrative agencies, state courts, and other sources as well; these situations too require choices about case management. The costs and benefits of waiting will depend on the context.

Rather than viewing these timing decisions in isolation, we can gain some valuable perspective by situating them within what we can call the law of legal change. This body of law includes heavily studied doctrines such as retroactivity and vertical precedent as well as the less examined but equally consequential issues studied here. Indeed, as we will see, the various components of our current law of legal change work together to make matters of appellate procedure and case management especially significant. Decisions about timing can affect ultimate case outcomes. Even when they do not, they have a major impact on the size and distribution of the costs of legal change—that is, the inconveniences and burdens that inevitably accompany a switch between legal regimes. The aspects of appellate procedure governing case management during periods of legal change are also notable because, for the most part, they are not addressed through formal rules.<sup>6</sup> As with other matters of case management, they dwell mostly in zones of discretion.

This Article considers how appellate courts exercise that discretion, why they exercise it the way they do, and how they might exercise it better. Part I lays out our system's doctrines and institutional arrangements for managing legal change, with emphasis on low-visibility

---

F.3d at 813–14. The dissent argued unsuccessfully that the grant of certiorari militated in favor of abeyance and a stay of execution. *Id.* at 814–16 (Moore, J., dissenting).

<sup>5</sup> *But see* United States v. Provost, 237 F.3d 934, 937 (8th Cir. 2001) (noting that the case had been held in abeyance due to the pendency of a petition for certiorari in another case raising a related legal issue).

<sup>6</sup> I use “appellate procedure” broadly here to mean the doctrines and arrangements governing the activities of and relationships between different levels of courts in a multi-tiered judicial system. In other words, I do not mean only or even primarily the contents of the Federal Rules of Appellate Procedure, which govern certain aspects of litigation practice in the federal intermediate appellate courts.

matters such as courts' decisions about when to decide cases. Part II presents a case study in the appellate procedure of legal change, drawing on the experiences of appellate courts in the tumultuous six-month period between two major United States Supreme Court criminal sentencing decisions: *Blakely v. Washington*<sup>7</sup> and *United States v. Booker*.<sup>8</sup> One lesson from that otherwise much-studied period is that even courts that reached the same substantive outcomes made very different procedural choices, and those choices distributed costs quite differently. Taking a broader perspective, Part III evaluates how well courts handle these situations, considers some institutional factors that might lead to suboptimal decisions, and explores methods for improving the appellate procedure of legal change. These suggestions are necessarily tentative because, as we will see, the problem confronting courts is surprisingly complicated; as a result, it is quite hard to know what counts as optimal decision making and whether courts are achieving it. Part III also considers applications and extensions to some related domains, including district court decision making and judicial federalism doctrines such as abstention.

A final introductory note: The discussion will mainly concern the behavior of the federal courts, with particular emphasis on the federal courts of appeals. Nonetheless, the basic problems are quite general, and many of the points would also apply to state courts, though with some modification.

## I

### THE LAW OF LEGAL CHANGE

The ancient Persians and Medes notwithstanding, it is hard to imagine a system in which the law could not and did not change. In our system, the law changes all the time. One expects a newly elected presidential administration to overturn some of its predecessor's regulatory initiatives—that is part of the point of having elections. Legislatures can change the law essentially whenever and with whatever frequency they like (which is not necessarily to say that changes will apply retroactively, as we will soon discuss). Judicially initiated legal change is constrained by the familiar doctrine of stare decisis, but that doctrine is hardly absolute.<sup>9</sup> Further, the strictures of stare decisis do

---

<sup>7</sup> 542 U.S. 296 (2004).

<sup>8</sup> 543 U.S. 220 (2005).

<sup>9</sup> See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). In saying that the doctrine is not absolute, I am referring to horizontal precedent—the binding effect of a court's own prior decisions. Vertical precedent—the binding effect of a superior court's decisions on its judicial inferiors—is more absolute. See *Hutto v. Davis*, 454 U.S. 370, 374–75 (1982); see also *infra* text accompanying notes 32–34 (discussing rule against anticipatory overruling by lower courts). The literature on stare decisis is vast. For work that focuses on the relationship between stare decisis and transition costs, see, for example, Jill E. Fisch, *The Implica-*

not prevent a superior court from overturning longstanding and widespread lower court case law, even though doing so can create as much disorder as overruling one of its own decisions. Despite much talk of minimalism and restraint in recent years, the Supreme Court remains very much willing to issue highly disruptive rulings in civil and criminal contexts alike.<sup>10</sup>

Any regime in which the law can change must then have a set of doctrines and institutional practices that govern the implementation of these changes.<sup>11</sup> We can call this set of norms and arrangements *the law of legal change*. This Part of the Article describes our particular system's law of legal change. To some extent this discussion is simply necessary background for what comes later, but it should also have some independent value inasmuch as these matters are not usually considered together as a cohesive system for dealing with legal change. Further, although some of these doctrines are well known, others are not. We begin with the relatively more familiar aspects, in particular the rules determining what law courts apply during transitional periods. We then turn to the less appreciated matters of the institutional mechanisms and procedures for implementing changed law. Notably, we will see that various choices our system has made work together to attach great importance to otherwise unglamorous matters of case management that affect the timing of courts' decisions.

## A. What Law Applies When Law Changes?

### 1. Which Cases Are Governed by New Law?

An initial issue, which generally travels under the label of “retroactivity doctrine, concerns when to apply new law and when to apply

---

*tions of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93 (2003); and Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643 (2000).

<sup>10</sup> See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–63, 570 (2007) (modifying pleading standards applicable in every federal civil suit); *United States v. Booker*, 543 U.S. 220, 226–27, 245 (2005) (holding the federal Sentencing Guidelines unconstitutional if treated as mandatory); *Crawford v. Washington*, 541 U.S. 36, 60–69 (2004) (overruling precedents allowing frequent use of hearsay evidence in criminal trials); see also *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543, 2549–50, 2555–61 (2009) (Kennedy, J., dissenting) (decrying the disruptive effects of the Court's decision extending *Crawford* to testimonial use of forensic reports); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (arguing that *Twombly* and later pleadings decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), have “destabilized the entire system of civil litigation”). Needless to say, calling a case disruptive does not mean that it is wrong.

<sup>11</sup> Another fact of life is that facts change, sometimes during the course of appellate proceedings. For an insightful examination of the problems posed by changing facts, see Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269 (1999).

old law. A system's approach to retroactivity (in concert with other aspects of the system's law of legal change) helps to determine the disruptive potential of changes in law. At one extreme, one can imagine a system in which a change in law applies to every past transaction, as if it had been the law all along. In terms of the judicial system in particular, this scheme would mean that every judgment, no matter how old, could retroactively become erroneous in the future. At the opposite end of the spectrum would be a regime of pure prospectivity. In such a system, a new rule would apply only to subsequent conduct and would not call any prior transactions into question.<sup>12</sup>

Briefly described, our own system occupies an intermediate position between full retroactivity and pure prospectivity, with the details depending on the context. Initially, our law of legal change distinguishes between new statutes and new judicial decisions. New statutory law is usually prospective in that it does not govern events that occurred before the statute's effective date. When it comes to criminal law in particular, the Constitution's Ex Post Facto Clauses forbid retroactive criminal liability.<sup>13</sup> On the civil side, the constitutional limitations on retroactivity are today very limited, but prospectivity is still the norm for civil statutes: legislators often choose it because of fairness and other concerns, and judicial interpretive canons presume it if the legislature's choice is unclear.<sup>14</sup> Nonetheless, the legislature is usually permitted to insist on retroactive application of new civil statutes if it drafts clearly enough.<sup>15</sup>

---

<sup>12</sup> Obviously, the statements in the text are simplifications that ignore other possibilities and glide over some ambiguities. See generally Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373 (1977) (examining retroactivity and the difficulty of defining it). A rule may have a delayed effective date, for instance, or take effect only gradually over a period of years. Further, a prospective change in law may affect past transactions in a way that feels retroactive in practice. For example, when assets have been acquired based on incentives provided by existing law, even a prospective change in law will affect the value of those assets. To ameliorate such effects, it may be appropriate to use grandfathering or other forms of transitional relief. There is a substantial and sophisticated literature on such matters. See, e.g., DANIEL SHAVIRO, WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY (2000); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997); Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47 (1977); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986); Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657 (1999).

<sup>13</sup> See U.S. CONST. art. I, § 9, cl. 3; *id.* at art. I, § 10, cl. 1; *Carmell v. Texas*, 529 U.S. 513, 521–22 (2000).

<sup>14</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265–68, 280 (1994). It is sometimes said that an opposite presumption in favor of retroactivity should apply to “procedural” legislation, but that suggestion may simply reflect confusion over what we mean by retroactivity and what event the legislation is regulating. See *id.* at 290–92 (Scalia, J., concurring in the judgments).

<sup>15</sup> See *id.* at 265–68 (majority opinion).

Things are quite different regarding new judicial decisions, where our system shades more toward retroactivity. The traditional Blackstonian notion was that courts did not make new law but simply discovered or declared what had been the law all along (even when, previously, everyone had been wrong about what the law was).<sup>16</sup> This understanding would suggest that judicial decisions should have at least some retroactive effect on prior conduct—for the new law *was* the law even before the courts so announced. After some moves toward prospectivity by the Supreme Court in the mid-twentieth century, the Blackstonian position on retroactivity (if not necessarily the whole mindset) has reasserted itself in recent decades.<sup>17</sup> Today, accordingly, the general rule is that new decisions apply retroactively, at least to all cases that are still pending on appeal.<sup>18</sup> Thus, even if a trial court perfectly applies then-existing precedent, it may be reversed if, during the course of the appeal, the precedents have changed.<sup>19</sup>

Although our system has embraced the theory of adjudicative retroactivity, that commitment is balanced against values like finality and repose, which counsel leaving prior decisions undisturbed. Accordingly, we do not regard every old judgment as susceptible to reopening whenever the law changes. One has to draw the line somewhere, and our system typically draws the line at the conclusion of the direct appellate process, which occurs when the period for filing a petition for certiorari expires or, if a petition is filed, when the Supreme Court disposes of it.<sup>20</sup> At that point we say the judgment is “final,” and opportunities for revisiting it thereafter are much more limited. This restriction is particularly strong in civil cases.<sup>21</sup> A final judgment is no

---

<sup>16</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES \*69–70 (stating that, when departing from precedent, “the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation”).

<sup>17</sup> For more detailed treatments of the Supreme Court’s shifts on this subject, see, among many others, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738–49 (1991); Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1348–67 (2010); Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1081–97 (1999); Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL’Y 811, 816–36 (2003); and 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, 210–25 (1998). It should be noted that one can endorse retroactivity without embracing the Blackstonian notion that new law was the law all along. See *Mackey v. United States*, 401 U.S. 667, 677 (1971) (Harlan, J., concurring in part and dissenting in part).

<sup>18</sup> See *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 95–97 (1993) (civil cases); *Griffith v. Kentucky*, 479 U.S. 314, 320–28 (1987) (criminal cases).

<sup>19</sup> The reasons for saying “may be reversed” will become apparent later in this Article. See discussion *infra* Part I.A.2.

<sup>20</sup> *Clay v. United States*, 537 U.S. 522, 527 (2003).

<sup>21</sup> See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991) (opinion of Souter, J.) (“[R]etroactivity in civil cases must be limited by the need for finality; once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the

less final because it is wrong, whether it was always wrong or just newly wrong. Although Rule 60 of the Federal Rules of Civil Procedure permits reopening of final judgments in certain circumstances, the mere incorrectness of a prior judgment in light of new legal developments is ordinarily not enough.<sup>22</sup>

In criminal cases, there is greater opportunity for collateral attack on final judgments, such as through habeas corpus. Changes in substantive law (i.e., new law restricting the kinds of conduct that are criminal or the kinds of punishments that are permissible) support relief even in post-finality collateral proceedings.<sup>23</sup> Far more common, however, are new rules of criminal procedure, and these rules do not apply retroactively to collaterally invalidate final judgments.<sup>24</sup>

## 2. *Forfeiting the Benefit of New Law*

As I have said, new law rather than old law applies to all cases that are still pending on direct review when the new law is announced. Thus, an appellate court uses current law to determine whether the court below erred. Yet, that does not mean that an appellate court will have to reverse a case that the lower court tried under now-de-

---

door already closed.” (citation omitted)); *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375–78 (1940).

<sup>22</sup> Rule 60(b)(5) permits a district court to vacate a judgment that was “based on an earlier judgment that has been reversed or vacated,” FED. R. CIV. P. 60(b)(5), but that language only contemplates reopening judgments that were based on the *preclusive effect* of a since-invalidated judgment; the rule does not provide relief when a case relied on *as precedent* has been reversed. See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2863 (2d ed. 1995). Rule 60(b)(5) also provides relief when “it is no longer equitable that the judgment should have prospective application.” *Id.* This provision allows relief in some cases involving continuing injunctions, but most judgments do not involve the requisite prospective effect within the meaning of the rule. See *id.* n.14 (citing cases where prospective effect was not found). Rule 60(b)(6) has sometimes been used to provide relief based on a change in law, but in most courts the rule is limited to extraordinary cases; a mere change in law rendering the judgment wrong is insufficient. See, e.g., *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 397 F.3d 334, 337–40 (5th Cir. 2005); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272–75 (2d Cir. 1994); see also 12 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 60.48[5] (3d ed. 2010) (calling the more generous minority view “clearly erroneous”).

<sup>23</sup> See *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004); *Penry v. Lynaugh*, 492 U.S. 302, 329–30 (1989). The discussion here includes both true habeas proceedings, which concern state prisoners, as well as proceedings for federal prisoners under 28 U.S.C. § 2255.

<sup>24</sup> See *Summerlin*, 542 U.S. at 352; *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion). There is an exception for “watershed rules” of criminal procedure that substantially improve the accuracy of the truth-finding process, but this exception is a virtual nullity. See *Tyler v. Cain*, 533 U.S. 656, 666 n.7 (2001); see also *Mungo v. Duncan*, 393 F.3d 327, 333–35 (2d Cir. 2004) (noting uncertainty regarding whether the exceptions to the *Teague* nonretroactivity rule apply after the amendments to 28 U.S.C. § 2254). Note that the discussion in the text concerns federal court proceedings. States are free to provide broader retroactive effect in postconviction proceedings in their own courts. See *Danforth v. Minnesota*, 552 U.S. 264, 288–90 (2008).

funct law. There are various factors that dampen the effect of new law, notably including forfeiture rules.

Litigants are supposed to present all their arguments to the district court in the first instance, and if they fail to do so, then they will face restrictions on their ability to use unobjected-to errors to secure a reversal. In particular, in a criminal appeal, alleged errors that the appellant did not raise below are subject to the affirmance-friendly plain error standard of review. Under this standard, an appellate court may reverse on the basis of an error not raised below only if the error was “plain” (i.e., obvious), affected the defendant’s substantial rights, and seriously affected the fairness, integrity, or public reputation of the proceedings.<sup>25</sup> Ordinarily, there are a number of good reasons for applying harsh forfeiture rules, but doing so can produce odd results in cases where the law has changed between the trial and the appeal. Perhaps the reason the point of error was not raised below is that, at that time, there was no error. And it does not seem fruitful to encourage attorneys to raise a raft of futile arguments that the district judge has no choice but to reject. Nonetheless, the courts hold that the plain error standard applies even in changed-law circumstances.<sup>26</sup> In civil cases, the rules governing consideration of issues not raised below are also strict, perhaps stricter.<sup>27</sup> As a practical matter, the application of plain error review in the changed-law context significantly erodes our theoretical commitment to applying new law retroactively to pending cases.<sup>28</sup> What retroactivity giveth, plain error often taketh away.

What is less widely understood is that, in some courts, rules like plain error are supplemented by harsh appellate-procedure forfeiture rules. Just as objections must be timely brought to the trial court’s attention, so too must they be timely raised on appeal, usually by in-

---

<sup>25</sup> FED. R. CRIM. P. 52(b); *United States v. Olano*, 507 U.S. 725, 731–32 (1993).

<sup>26</sup> See, e.g., *Johnson v. United States*, 520 U.S. 461, 466–68 (1997); *United States v. Recio*, 371 F.3d 1093, 1100 (9th Cir. 2004) (citing *Johnson* and explaining that “the four-part plain error test . . . applies on direct appeal even where an intervening change in the law is the source of the error”); *United States v. Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996) (reaching the same conclusion in a pre-*Johnson* case); cf. *United States v. Thomas*, 274 F.3d 655, 668 n.15 (2d Cir. 2001) (en banc) (citing and questioning continued validity of prior Second Circuit cases that, in the changed-law context, had employed a modified plain-error analysis that shifted the burden of disproving prejudice to the government).

<sup>27</sup> See, e.g., *Martinez v. Tex. Dep’t of Criminal Justice*, 300 F.3d 567, 573–75 (5th Cir. 2002); *Fashauer v. N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1289 (3d Cir. 1995); 19 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 205.05 (3d ed. 2010). See generally Mitchell J. Waldman, *When Will Federal Court of Appeals Review Issue Raised by Party for First Time on Appeal Where Legal Developments After Trial Affect Issue*, 76 A.L.R. FED. 522 (1986).

<sup>28</sup> See Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 979–80 (2006); see also Meir Katz, Note, *Plainly Not “Error”: Adjudicative Retroactivity on Direct Review*, 25 CARDOZO L. REV. 1979, 1980–82 (2004) (criticizing use of forfeiture rules in the changed-law context).

cluding them in the appellant's opening brief.<sup>29</sup> Like the rule requiring objections at trial, this rule ordinarily makes much sense. But what if the appellant omitted the argument from the brief because the law changed—and made the argument promising—only *after* the filing of the brief? Although many courts would allow the appellant to expand the scope of the issues on appeal through a supplemental brief, petition for rehearing, or some other instrument, other courts would not.<sup>30</sup> In other words, new issues not included in the initial brief would not be considered *at all*, whether or not they had been preserved below. Again, then, it is one thing for new law to apply to all pending cases in theory but quite another for litigants to obtain the benefit of new law in practice. The varying approaches to forfeiture can create striking disparities, as we will see later in the discussion of the *Booker* aftermath.<sup>31</sup>

\* \* \*

The discussion above concerns the interplay of doctrines of retroactivity and forfeiture. What those doctrines have in common is that they affect the substantive content of the law governing a particular appeal. The part of our system's law of legal change that is even more important for our purposes, however, is the *institutional* dimension—who implements new law, when, and through what mechanisms? We now turn to those matters.

## B. Which Court Is Responsible for Implementing New Law?

Not all changes in law are authorized. Although our system permits legal change, we limit the legal actors who are allowed to initiate it. Lower courts are supposed to follow Supreme Court precedents even when their foundations have become “wobbly” and “moth-

---

<sup>29</sup> Cal. Gas Transp., Inc. v. NLRB, 507 F.3d 847, 852 n.3 (5th Cir. 2007); Stump v. Gates, 211 F.3d 527, 533 (10th Cir. 2000).

<sup>30</sup> The Eleventh Circuit has become particularly strict on this point. See, e.g., United States v. Levy, 416 F.3d 1273, 1274–76 (11th Cir. 2005) (refusing to consider a new issue raised in a petition for rehearing, despite intervening developments); United States v. Nealy, 232 F.3d 825, 830–31 (11th Cir. 2000) (same, for a new issue in supplemental brief); see also United States v. Hernandez-Gonzalez, 405 F.3d 260, 261–62 (5th Cir. 2005) (similar rule in Fifth Circuit); Christopher R. Prior, Note, *Not Too Little, But a Little Too Late: The Eleventh Circuit's Refusal to Consider New Issues Raised by Supplemental Authority*, 15 J.L. & POL'Y 249, 252–79 (2007) (describing and criticizing the Eleventh Circuit's approach). For more forgiving approaches, see, for example, United States v. Freeman, 166 F. App'x 96, 97 (4th Cir. 2006) (per curiam); United States v. Ameline, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc); United States v. Vázquez-Rivera, 407 F.3d 476, 487–88 (1st Cir. 2005); and United States v. Macedo, 406 F.3d 778, 789 (7th Cir. 2005). Even the Eleventh Circuit allows litigants to rely on new authorities that relate to an existing issue properly raised in the appeal; the bar is on raising a new *issue* based on the new authority. See *Nealy*, 232 F.3d at 830–31.

<sup>31</sup> See *infra* text accompanying notes 112–14.

eaten,” leaving the role of overruling them to the Supreme Court.<sup>32</sup> Put in more general terms, our inferior courts are not supposed to predict what the Supreme Court will do in the future or act as if they had the Supreme Court’s own power to overrule.<sup>33</sup> Only the Supreme Court is authorized to change decisional law that it has created.<sup>34</sup> Even more clearly, no court can deem existing statutory law defunct based on a prediction that the legislature is about to change it.

When a change in law has indeed occurred, which court is in charge of reacting to the change? The crude answer is, generally

---

<sup>32</sup> *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (quoting Judge Posner’s opinion below); see also *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

<sup>33</sup> Some have argued that the Supreme Court’s stand against prediction is misguided. See, e.g., C. Steven Bradford, *Following Dead Precedent: The Supreme Court’s Ill-Advised Rejection of Anticipatory Overruling*, 59 *FORDHAM L. REV.* 39 (1990); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 *TEX. L. REV.* 1 (1994); see also *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W. Va. 1942) (refusing to follow a Supreme Court decision because a majority of justices had questioned it), *aff’d*, 319 U.S. 624 (1943). But see Michael C. Dorf, *Prediction and the Rule of Law*, 42 *UCLA L. REV.* 651, 679–89 (1995) (arguing that the prediction approach undermines the rule of law). To be precise, the prevailing law embraces two distinct but related propositions: (1) lower courts cannot rule based upon predictions of changes in law, and (2) when assessing the content of *current* law, lower courts should follow on-point superior court precedents even when later rulings discredit those precedents’ rationales. The second proposition is more of a restriction on recognizing implicit overrulings than it is a ban on prediction. See Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 *FORDHAM L. REV.* 53, 57 (1982) (distinguishing between *anticipatory* overruling and the recognition that an *implicit* overruling has already occurred); see also Dorf, *supra*, at 676 n.87 (similar). A legal system could adopt proposition (1) and yet reject proposition (2). If so, that would somewhat reduce the number of cases in which the timing of a lower court decision mattered, because lower courts would have somewhat more ability to anticipate the Supreme Court’s actions. As a practical matter, it is often hard to say whether some particular precedent has actually been overruled or is merely on its last legs. This uncertainty allows room for *sub rosa* predictive rulings.

The rules are somewhat different when it comes to determining the content of state law. Here, it is often said that federal courts are supposed to decide the case as the state’s highest court would. See *id.* at 695 & n.151. Ordinarily, that means applying existing state precedents, but the federal courts enjoy some predictive flexibility that they do not possess when applying Supreme Court law. See *id.* at 699–700 (noting the potential difference between how lower courts determine the content of federal law versus state law). A federal court might disregard an older, on-point holding of the state high court in favor of more recent dicta or in favor of more recent holdings in analogous circumstances. In rare cases, it might anticipate the overruling of an old precedent. See generally 19 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 4507 (2d ed. 1996) (discussing how federal courts ascertain the content of state law).

<sup>34</sup> Lower courts can of course change their own decisional law, though there may be restrictions on how this can be accomplished. In the federal courts of appeals, en banc rehearing is usually required to overrule circuit precedent, though some circuits employ informal substitutes whereby a panel can overrule a prior panel if the overruling decision is circulated to the court membership and no judge objects. See 18 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 134.02[1][c] (3d ed. 2010).

speaking, whichever court then has the case in front of it. The principle that the court having charge of the case should respond to new law may seem simple, even obvious, but complications and procedural choices lie beneath the surface. When exactly does the handoff occur? And beyond recognizing that the governing law has changed, what must the court do to implement the new law?

I explore in more detail later the transition from the district court to the court of appeals,<sup>35</sup> but for the moment, the next handoff—from the court of appeals to the Supreme Court—illustrates the complications. To begin, when exactly does the power shift? Certainly the case is still within the court of appeals' power if a change in law occurs while a petition for rehearing is pending and, even in the absence of such a petition, before the appellate court has issued its mandate.<sup>36</sup> But issuance of the mandate need not put an end to the court of appeals' involvement; the court has the power, to be used sparingly, to recall its mandate so as to revisit the decision.<sup>37</sup> Further, the mere filing of a petition for certiorari does not formally prevent the court of appeals from acting; it could still revise its decision, if it wished.<sup>38</sup> Nonetheless, for better or worse, courts of appeals do not use this power often. Instead, the filing of a petition for certiorari is, in practice, often treated as transferring responsibility to the Supreme Court and putting the Court in charge of implementing any change in law that follows the court of appeals' decision.<sup>39</sup>

---

<sup>35</sup> See *infra* Part III.C.3.

<sup>36</sup> See, e.g., *Satcher v. Honda Motor Co., Ltd.*, 993 F.2d 56, 57 (5th Cir. 1993) (vacating the court's prior opinion based on a new case decided during pendency of petition for rehearing); *United States v. Craigo*, 993 F.2d 1086, 1087 (4th Cir. 1993) (vacating a prior decision where, while the court's mandate was stayed, the Supreme Court reversed circuit precedent that had supported the prior decision and explaining that "the stay of our mandate leaves our judgment within the control of this court"). *But cf.* *Bell v. Thompson*, 545 U.S. 794, 804 (2005) (holding that court of appeals abused its discretion when, after denial of certiorari and without notice to the parties, it long delayed the issuance of the mandate and then reversed its prior decision); *supra* note 30 (noting that some courts, such as the Eleventh Circuit, would not consider a new issue raised for the first time on rehearing, even where there are intervening developments). The deadline for filing a petition for rehearing is ordinarily fourteen days after the judgment (forty-five days in civil cases in which the United States is a party). FED. R. APP. P. 35(c), 40(a). The mandate issues seven days after the time for seeking rehearing expires; if a petition for rehearing is filed, the mandate issues seven days after denial of the petition. FED. R. APP. P. 41(b).

<sup>37</sup> See *Calderon v. Thompson*, 523 U.S. 538, 549 (1998); *infra* notes 184–85 (citing cases that recall a mandate in light of intervening developments and cases that refuse to do so). See generally 16AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3986 (4th ed. 2008) (discussing power to recall the mandate); 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3938 (2d ed. 1996) (discussing considerations bearing on decision to recall the mandate).

<sup>38</sup> See *Brewer v. Quarterman*, 474 F.3d 207, 210 (5th Cir. 2006) (Dennis, J., dissenting); *United States v. Sears*, 411 F.3d 1240, 1241–42 (11th Cir. 2005).

<sup>39</sup> See, e.g., *Richardson v. Reno*, 175 F.3d 898, 899 (11th Cir. 1999).

The conclusion that a particular court is in charge of responding to a change in law does not tell us exactly what it must do. If a case is before the court of appeals when the law shifts, that court might apply the new law itself, or it might ask the district court to make the initial attempt.<sup>40</sup> Similarly, once a case has passed into the Supreme Court's hands, that transfer does not mean that the Court must actually consider all of the pending cases through full-dress argument and opinion. Instead, the Court typically responds to changed circumstances through the "GVR" procedure: *granting* certiorari, *vacating* the decision below, and *remanding* the case for further consideration by the lower court.<sup>41</sup> The GVR permits the lower court to consider the impact of the intervening developments and, if necessary, to revise its decision.<sup>42</sup> In issuing a GVR, the Court does not determine that the intervening event necessarily changes the outcome in the case, just that it reasonably might.<sup>43</sup> The virtue of the GVR is that it keeps cases alive on direct review without requiring the Court to definitively resolve the merits of each case under the new law. The Supreme Court issues dozens or, in several recent terms, hundreds of these orders each year.<sup>44</sup>

None of the choices described above is inevitable. Even treating as fixed certain choices like retroactivity for nonfinal cases, other systems might implement that choice through different institutional arrangements. For example, instead of issuing GVRs (which do not reach the ultimate merits of the decision below), the Supreme Court could summarily reverse those decisions that become wrong in light of a new precedent handed down while the petition was pending.<sup>45</sup> That approach requires more effort from the Court. Alternatively, the Court could deny certiorari in all such cases with the understanding that the denial was without prejudice to a later filing in the district

---

<sup>40</sup> See *infra* text accompanying note 222.

<sup>41</sup> The large majority of GVRs arise from situations in which the ruling below might be affected by one of the Court's recently issued decisions. GVRs can also stem from other new developments, such as the enactment of a new statute or the Solicitor General's concession that the lower court erred. See Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711, 712 (2009). See generally Arthur D. Hellman, "Granted, Vacated, and Remanded"—*Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389 (1984) (discussing the GVR practice).

<sup>42</sup> See Bruhl, *supra* note 41, at 712.

<sup>43</sup> See Lawrence *ex rel.* Lawrence v. Chater, 516 U.S. 163, 167 (1996) (explaining that the Court issues a GVR when there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity"); see also Tyler v. Cain, 533 U.S. 656, 666 n.6 (2001) (rejecting litigant's attempt to read a GVR as a ruling on the merits).

<sup>44</sup> Bruhl, *supra* note 41, at 719–23.

<sup>45</sup> Indeed, that was sometimes done in the past. See Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 822–23 (1983) (reporting that the Warren Court issued over one hundred summary reversals containing a bare citation to intervening precedent).

court seeking relief from the judgment in light of changed law. In short, there are a number of institutional arrangements for implementing any particular version of retroactivity doctrine. In Part III, I suggest that some of our current arrangements are not ideal.

### C. The Problem of Deciding When to Decide

The different doctrines and practices that compose the law of legal change interact as a system. Choices made in one area can make other parts of the system more or less consequential. Our own system has made certain choices that conspire to confer special importance on the precise date that courts issue their decisions. In particular, our retroactivity doctrine means that the law governing a pending case is always liable to shift abruptly with a new development, even though the events underlying the lawsuit occurred years ago. And because of the rule against anticipation, existing precedent governs lower courts until the moment it is overruled, even if our confidence in its demise has been mounting for years. Thus, it can matter greatly whether a court decides a case today or instead tomorrow.

For example, suppose the Supreme Court has just granted certiorari in a case that will resolve a circuit split on some important question of law. We know that the Supreme Court will issue the decision by the time it closes its current term—the end of June. If the court of appeals postpones a case presenting that question until July, it can issue a decision that accords with the new law, though at the cost of some delay. If the court of appeals instead decides the case in the ordinary course in February, the decision might soon thereafter be revealed to be wrong. If the party who stands to benefit from a change in law is well counseled, the party might file a petition for certiorari and might obtain the benefit of the new decision though a GVR in which the Supreme Court directs the lower court to reconsider the case in light of the new precedent. However, that result is not guaranteed. The lower court's decision about timing will at a minimum affect the institutional mechanics of implementing new law—which court, through which devices, and at what cost to litigants and the judicial system—and it might well determine ultimate questions of property, liberty, and life.

And what determines timing? If the timing of a decision depended only on happenstance and the vagaries of scheduling, we might find that state of affairs troublingly arbitrary. In a sense, though, the problem is that timing is *not* the product of mere chance but instead depends in large part on deliberate choices. Cases do not come up for decision on a conveyor belt that the courts cannot control. On the contrary, courts have a great deal of discretionary control

over the progress of cases.<sup>46</sup> If a change in law appears to be in the offing (perhaps due to a grant of certiorari), a court can order the case held in abeyance<sup>47</sup> or, less formally, just fail to act until the Supreme Court rules.<sup>48</sup>

It is virtually impossible to say what percentage of the time courts hold cases in abeyance in anticipation of a potential change in law. The nature of timing decisions is that they have low visibility, if they are visible at all. Although a decision to defer action might be mentioned in the eventual merits opinion, the deferral might instead be reflected only in a cryptic docket entry. Even worse for the researcher, the court's internal case-scheduling choices might not be discernible from any public document at all. Likewise, if a lower court decides a case without mentioning that the Supreme Court is currently considering the same issue, that fact might reflect a conscious (though unexplained) decision to proceed, but it might simply show that the lower court was ignorant of the Supreme Court's activities. Based on anecdotal experience and searches of electronic databases, all one can say is that sometimes courts wait and sometimes they do not and that both outcomes occur with appreciable frequency.

Although certain courts may have general tendencies toward one approach or the other, the main impression one gets from reviewing the available data is that the courts' choices are often idiosyncratic or even haphazard.<sup>49</sup> When comments regarding abeyance are present in appellate decisions (our focus here), typically all one sees is a bare

---

<sup>46</sup> As the Supreme Court stated concerning the district court's power to stay proceedings, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936).

<sup>47</sup> There is no uniform terminology. Sometimes courts speak of "abeyance," while other times they enter a "stay" or "defer submission" of the appeal. I generally use the term "abeyance" to refer to a formal decision to delay adjudication.

<sup>48</sup> Although our focus here is on lower courts, it is worth noting that the same problem confronts the Supreme Court when it has granted certiorari in one case but has before it other petitions presenting the same question. In theory, it could simply deny the other petitions because the law has not yet changed. But, in practice, the Court typically holds the other petitions until after the plenary decision, thus making them eligible for the application of new law. See Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L.Q. 5, 30–32 (1983); Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1127–28 (1988); see also *infra* note 182 and accompanying text (discussing the Supreme Court's power to control the date of finality).

<sup>49</sup> See *infra* text accompanying note 136 (discussing between-court and within-court differences).

statement that the case was held<sup>50</sup> or that it was not.<sup>51</sup> Only rarely does one find extended discussion or public disagreements over how to proceed.<sup>52</sup> Courts do not act as if there exists some law of abeyances to which they must demonstrate their faithful conformity.

Courts also have at their disposal intermediate options that fall somewhere between deciding a case as usual and holding it in abeyance. In particular, a court of appeals could issue a decision but suspend the decision's finality so as to keep the case open in that court. The court could implement this approach by staying issuance of the mandate.<sup>53</sup> Whatever the precise mechanism, all of these choices partake more of discretion than of clear rules.

Yet to say that these choices about case handling are not rule-bound is not to say that there are not better and worse ways of dealing with them. One notable way in which decisions about timing can be better or worse, as we now explore in Part II, is in terms of the costs of legal change.

---

<sup>50</sup> See, e.g., *United States v. Warr*, 530 F.3d 1152, 1152 n.1 (9th Cir. 2008); *Al-Amin v. Shear*, 218 F. App'x 270, 273–74 (4th Cir. 2007); *Fisher v. Primstaller*, 215 F. App'x 430, 431 (6th Cir. 2007).

<sup>51</sup> See, e.g., *Dunlap v. Litscher*, 301 F.3d 873, 876 (7th Cir. 2002) (“The Supreme Court has granted certiorari to decide [the question involved in the appeal]. For now, we shall adhere to our rule and so proceed to the three cases before us.”); *United States v. Cole*, 31 F. App'x 235, 236 (4th Cir. 2002) (denying motion for abeyance without explanation); cf. *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 706 n.\* (4th Cir. 2010) (noting that a similar issue was involved in a pending Supreme Court case but not mentioning the possibility of abeyance). Sometimes courts simply state that they must decide cases according to current circuit law notwithstanding a grant of certiorari, which is true enough but completely ignores the temporal dimension and the possibility of waiting. See, e.g., *Laborers' Int'l Union of N. Am., Local 578 v. NLRB*, 594 F.3d 732, 736 n.2 (10th Cir. 2010); *United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.1 (5th Cir. 2008); *United States v. Aguilar*, 313 F. App'x 186, 189 n.1 (11th Cir. 2008).

<sup>52</sup> For a notable example of extended debate over whether to hold proceedings in abeyance, see the fraught opinions in a Fifth Circuit school desegregation case. Compare *United States v. Tex. Educ. Agency*, 467 F.2d 848, 889–90 (5th Cir. 1972) (Godbold, J.) (“The highest standards of judicial administration demand that pending further action by the Supreme Court of the United States this appeal be held in abeyance . . . . It is not flight from duty but rather performance of it to recognize that we need guidance and to say that we will withhold action to see if more certain legal standards become available to us.”), with *id.* at 891 (Brown, C.J.) (“[W]aiting is not the privilege of a Federal Judge. He must act in the face of the day's challenge to constitutional denial. . . . [T]o delay means that identifiable children . . . will leave the last year of their public education without ever experiencing a single year of education free of racial/ethnic discrimination.”). More recent cases in which judges disagreed over whether to hold a case in abeyance include *United States v. Santana-Illan*, 357 F. App'x 992, 998 (10th Cir. 2009) (O'Brien, J., dissenting); *Turner v. Quarterman*, 284 F. App'x 182, 183 (5th Cir. 2008) (Prado, J., concurring in part and dissenting in part); *In re Williams*, 359 F.3d 811, 814–16 (6th Cir. 2004) (Moore, J., dissenting); *Gherebi v. Bush*, 352 F.3d 1278, 1305 (9th Cir. 2003) (Graber, J., dissenting), *vacated*, 542 U.S. 952 (2004).

<sup>53</sup> See, e.g., *United States v. Craigo*, 993 F.2d 1086, 1087 (4th Cir. 1993); see also *infra* Part II.A (describing how several courts held the mandates in scores of cases in anticipation of changes in sentencing law).

## II

A CASE STUDY IN APPELLATE PROCEDURE AND THE COSTS  
OF LEGAL CHANGE

In any system in which law changes, the transitions are accompanied by costs. Depending on the details of a system's law of legal change, the magnitude and distribution of the costs varies.

In some respects this principle is already well known, particularly when it comes to retroactivity doctrine. Retroactivity can lead to disruptive legal transitions as transactions and proceedings conducted under old law become flawed when judged under the new. With prospectivity, by contrast, no past transactions become suspect, and no completed trials need be retried.<sup>54</sup> Indeed, one reason the debates over the Supreme Court's experiments with prospectivity were so contentious is that a less painful transition is one the courts might be more willing to set in motion. As Justice Scalia claimed, prospectivity "mak[es] it easier to overrule prior precedent" and thus acts as "the handmaid of judicial activism."<sup>55</sup> Others have viewed this feature of prospectivity as a virtue, a means of bringing about needed reforms that otherwise would remain infeasible due to high transition costs.<sup>56</sup> Decisions regarding retroactivity doctrine have a distributional aspect as well in that they shift burdens and benefits between temporally defined classes of litigants.<sup>57</sup>

What I aim to show here is that the less celebrated part of the law of legal change, in particular the choice of when to decide a case, also profoundly affects the size and distribution of costs during transitional periods. My primary example is the roughly six-month period between two major United States Supreme Court sentencing decisions: *Blakely v. Washington*<sup>58</sup> and *United States v. Booker*.<sup>59</sup>

Before proceeding further, I should comment on the advantages and disadvantages of using this tumultuous episode as my leading ex-

---

<sup>54</sup> To be sure, prospectivity would still involve some costs—e.g., costs of learning the new law or of printing new legal texts. See Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 816–52 (2002).

<sup>55</sup> *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 105 (1993) (Scalia, J., concurring); see also Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 70–72 (1965) (making a similar point).

<sup>56</sup> See, e.g., *Jenkins v. Delaware*, 395 U.S. 213, 218 (1969) (Warren, C.J.) (referring to "the impetus [that prospectivity] provides for the implementation of long overdue reforms, which otherwise could not be practicably effected"); see also Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889–90 (1999) (discussing how the cost of remedies affects the scope of rights that courts are willing to recognize).

<sup>57</sup> This same point has also been made about the doctrine of qualified immunity. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90, 98–110 (1999).

<sup>58</sup> 542 U.S. 296 (2004).

<sup>59</sup> 543 U.S. 220 (2005).

ample. The *Blakely-to-Booker* interval is important and interesting in its own right, which makes it an attractive choice. But the same factors that make it compelling also mean, almost necessarily, that it does not represent the way courts operate most of the time. Because the case-management problem during this interval was so massive and so obvious, courts' responses were more easily discernible and probably more deliberate than is usually the case. Although the responses differed widely across circuits, most circuits were at least internally consistent and seemed to follow some plan. In more routine episodes of legal change, fewer cases are involved and systematic patterns, if they exist, are harder to detect. Nonetheless, while an extreme example, the *Blakely-to-Booker* interval is symptomatic of a general phenomenon: whenever the Supreme Court has granted certiorari on an issue that affects many cases, one will observe a variety of disparate approaches to appellate case management. This observation held true, to take one example, in the months leading up to the Supreme Court's recent decision in *New Process Steel, L.P. v. NLRB*, which held that over two years' worth of NLRB decisions were defective because the agency lacked a quorum.<sup>60</sup> Some courts of appeals continued to decide cases despite their knowledge that the Supreme Court had granted certiorari to resolve the issue,<sup>61</sup> while others appeared to delay adjudication.<sup>62</sup> One could provide many other examples. Even if the case study below is in some ways atypical, it sheds some much-needed light on the different procedural approaches to managing all transitions, large and small, civil and criminal.

---

<sup>60</sup> 130 S. Ct. 2635, 2638–39, 2644 (2010).

<sup>61</sup> See, e.g., *Sheehy Enters., Inc. v. NLRB*, 602 F.3d 839, 842 n.1 (7th Cir. 2010), *reh'g granted*, Nos. 09-1383 & 09-1656, 2010 U.S. App. LEXIS 18125 (7th Cir. July 21, 2010); *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849, 852 n.2 (10th Cir. 2009), *vacated*, No. 09-1404, 2010 WL 1990005 (U.S. Oct. 4, 2010). In another case, the Fourth Circuit issued a decision that did not mention the grant of certiorari, though the parties had advised the court of that development. See *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654 (4th Cir. Nov. 20, 2009); Letter Filed Pursuant to FRAP 28(j), *Narricot Indus.*, 587 F.3d 654 (Nos. 09-1164 & 09-1280) (Nov. 4 filing informing the court of a Nov. 2 grant of certiorari).

<sup>62</sup> See, e.g., *Cnty. Waste of Ulster, LLC v. NLRB*, Nos. 09-1038 & 09-1646, 2010 WL 2679831, at \*1 (2d Cir. July 1, 2010); *NLRB v. Whitesell Corp.*, No. 08-3291, 2010 WL 2542904, at \*1 (8th Cir. June 25, 2010) (per curiam); *Bentonite Performance Mineral LLC v. NLRB*, No. 09-60034, 2010 WL 2545988, at \*1 (5th Cir. June 22, 2010) (per curiam). I say *appeared* because this statement is an inference based on filings advising the court of the Supreme Court's grant of certiorari, the length of time the case was under submission, the speed with which the court acted after *New Process Steel* was released, comments at oral argument (where recordings are available), and the like. In another case, the Third Circuit expressly noted that it had delayed decision. See *St. George Warehouse, Inc. v. NLRB*, Nos. 08-4875 & 09-1269, 2010 U.S. App. LEXIS 13886, at \*2 (3d Cir. July 7, 2010).

### A. Appellate Case Management in the *Blakely*-to-*Booker* Interval

For our purposes, we can start the story with the decision a decade ago in *Apprendi v. New Jersey*.<sup>63</sup> A state criminal defendant had been convicted of a weapons offense punishable by up to ten years of imprisonment. At sentencing, the judge gave the defendant a twelve-year sentence based on a separate statute that allowed enhanced penalties based on a judicial finding, by a preponderance of the evidence, that the offense was motivated by racial or other bias. Defendant Apprendi argued that he had a right to have the prosecution prove the punishment-enhancing bias to a jury beyond a reasonable doubt. In his view, the biased motivation should be considered an element of a different, aggravated offense rather than a mere sentencing factor. Essentially, he argued that he had been convicted of one crime but then punished as if he had committed a more serious crime.<sup>64</sup>

The Supreme Court agreed with the defendant.<sup>65</sup> The Court's crucial holding was 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."<sup>66</sup> The statutory maximum for the offense of which Apprendi had been convicted was only ten years, not the twelve years he had been given.<sup>67</sup>

As the *Apprendi* dissenters pointed out, this holding raised questions about the validity of the federal Sentencing Guidelines.<sup>68</sup> After all, under the Guidelines, a convicted defendant's actual sentence typically turned on a multitude of judicial findings concerning factors such as the gravity of the offense (drug quantity, magnitude of financial losses, etc.) and the defendant's culpability (for example, whether the defendant had been a leader or organizer)—all matters that the prosecution typically need not prove to secure the conviction.<sup>69</sup> (Indeed, judges were even allowed to base sentences on bad conduct underlying charges of which the defendant had been *acquitted*.<sup>70</sup>)

Nonetheless, the lower courts quickly determined that the Guidelines were still largely sound. The rationale was that even when Guidelines-mandated factual findings determined the defendant's actual

---

<sup>63</sup> 530 U.S. 466 (2000). *Apprendi* itself identified its roots in older Due Process Clause cases like *In re Winship*, 397 U.S. 358 (1970). See *Apprendi*, 530 U.S. at 477. In addition, the constitutional rule in *Apprendi* was foreshadowed by a statutory interpretation decision in *Jones v. United States*, 526 U.S. 227 (1999). See *Apprendi*, 530 U.S. at 476, 490.

<sup>64</sup> See *id.* at 469–72.

<sup>65</sup> See *id.* at 471–72, 474.

<sup>66</sup> *Id.* at 490. The court's holding made an exception for the fact of a prior conviction, which was considered a judicial sentencing factor under *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). See *Apprendi*, 530 U.S. at 488–90.

<sup>67</sup> See *id.* at 468–71.

<sup>68</sup> See *id.* at 551 (O'Connor, J., dissenting).

<sup>69</sup> See *id.* at 556–57 (Breyer, J., dissenting).

<sup>70</sup> See *United States v. Watts*, 519 U.S. 148, 149 (1997) (per curiam).

sentence, *Apprendi* was not a problem as long as the sentence imposed did not exceed the “statutory maximum,” which, crucially, was understood as the U.S. Code–authorized maximum for the crime.<sup>71</sup> Thus, if the U.S. Code authorized a sentence of up to twenty years, then *any* sentence up to that maximum was valid, even though the Guidelines required the judge to impose a sentence of (say) fifteen years rather than two years due solely to factual determinations not contained in the verdict. Put differently, *Apprendi* did not apply to determinations that moved sentences within the (usually very broad) U.S. Code range.

This method of reconciling the Guidelines with *Apprendi* suffered a serious blow when the Court decided *Blakely v. Washington* on June 24, 2004, near the end of the Court’s term.<sup>72</sup> *Blakely* changed the legal landscape because of how it defined the term “statutory maximum” that was so crucial to *Apprendi*’s rule. Writing for the Court in *Blakely*, Justice Scalia stated as follows:

[T]he “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.<sup>73</sup>

*Blakely* concerned the sentencing scheme of the State of Washington. As to the federal Guidelines, the majority said only that they “are not before us, and we express no opinion on them.”<sup>74</sup> But the dissenters certainly thought they saw the writing on the wall; if the Washington sentencing scheme is unconstitutional, so too must be the federal Guidelines, as they are not fairly distinguishable under the above-quoted reasoning.<sup>75</sup> Virtually all commentators agreed that *Blakely*’s rationale applied to the federal Guidelines.<sup>76</sup> Yet while the Guidelines seemed doomed in light of *Blakely*, the Court had not yet actually so

---

<sup>71</sup> See, e.g., *United States v. Kinter*, 235 F.3d 192, 201 (4th Cir. 2000); *Talbott v. Indiana*, 226 F.3d 866, 869–70 (7th Cir. 2000); see also *United States v. Garcia*, 240 F.3d 180, 184 (2d Cir. 2001) (citing cases from nine circuits that ruled that a Guidelines factor need not be submitted to the jury where it relates to a sentence not exceeding the statutory maximum).

<sup>72</sup> See 542 U.S. 296, 296 (2004).

<sup>73</sup> *Id.* at 303–04 (citations omitted).

<sup>74</sup> *Id.* at 305 n.9.

<sup>75</sup> See *id.* at 324–26 (O’Connor, J., dissenting).

<sup>76</sup> E.g., Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 223 (2004) (stating that the differences between the Washington system and the federal system “would seem to be either immaterial or to render the federal guidelines more, not less, objectionable under the *Blakely* analysis”); cf. R. Craig Green, *Apprendi’s Limits*, 39 U. RICH. L. REV. 1155, 1155–56 (2005) (acknowledging, but challenging, the “consensus” view that the federal Guidelines were unconstitutional in light of *Blakely*).

held, thus leaving it unclear what lower courts were supposed to do regarding sentencing.

Whatever one thinks of the merits of the *Apprendi* line of cases, it is hard to disagree with Justice Breyer's assessment in his *Blakely* dissent that the Court had acted irresponsibly from the point of view of judicial administration.<sup>77</sup> If the Guidelines were infirm, it would have been desirable to have a clear holding on that point in a companion case, along with a statement of how exactly sentencing should thereafter proceed. Certainly the right answer from the managerial point of view was not to severely wound the Guidelines, thus casting doubt upon all sentencing proceedings, and then adjourn for the long summer recess. And so, as the dissenters predicted, something approaching chaos did ensue as judges across the country struggled with whether the Guidelines were still valid and, if not, how courts should sentence defendants.

The decisions came first from a few district courts<sup>78</sup> and, before long, from the courts of appeals. On Friday, July 9, 2004, Judge Posner of the Seventh Circuit released the first appellate ruling on the continued validity of the federal Guidelines.<sup>79</sup> He put the pieces together quite readily:

The Supreme Court had already held [in *Apprendi*] that "other 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." In *Blakely* it let the other shoe drop and held over pointed dissents that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" . . . [In light of *Blakely*'s definition of the "statutory maximum," it] would seem to follow . . . that *Blakely* dooms the guidelines insofar as they require that sentences be based on facts found by a judge. The majority in *Blakely*, faced with dissenting opinions that as much as said that the decision doomed the federal sentencing guidelines, might have said, no it doesn't; it did not say that.<sup>80</sup>

Judge Easterbrook dissented partly on grounds that it was not the Seventh Circuit's place to repudiate even shaky Supreme Court precedents,<sup>81</sup> though he also seemed to think that the Guidelines might

---

<sup>77</sup> See *Blakely*, 542 U.S. at 347 (Breyer, J., dissenting).

<sup>78</sup> E.g., *United States v. Croxford*, 324 F. Supp. 2d 1230, 1242–48 (D. Utah 2004); *United States v. Shamblin*, 323 F. Supp. 2d 757, 766 (S.D. W. Va. 2004), *vacated*, 153 F. App'x 247 (4th Cir. 2005).

<sup>79</sup> See *United States v. Booker*, 375 F.3d 508, 508, 510 (7th Cir. 2004), *aff'd*, 543 U.S. 220 (2005).

<sup>80</sup> *Id.* at 510–11 (citations omitted).

<sup>81</sup> See *id.* at 516–17 (Easterbrook, J., dissenting).

survive<sup>82</sup> and perhaps even should survive because they were arguably distinguishable from the schemes involved in *Apprendi* and *Blakely*.<sup>83</sup>

A circuit split quickly developed on the following Monday as the Fifth Circuit decided that the Guidelines still survived—or at least that the court of appeals could not declare them dead.<sup>84</sup> Although the Fifth Circuit hardly seemed convinced that the Supreme Court would ultimately uphold the Guidelines, it did not think its role was to engage in prediction or anticipation, even if its cautious stance would set itself up for a reversal:

This court assuredly will not be the final arbiter of whether *Blakely* applies to the federal Guidelines, but the unremitting press of sentencing appeals requires us to produce a decision. We have undertaken to discern, consistent with our role as an intermediate appellate court, what remains the governing law in the wake of *Blakely*.

....

... *Blakely* strikes hard at the prevailing understanding of the Guidelines. . . .

But *Blakely*, which did not actually involve the federal Guidelines, is not the only case that we must consider. While we are bound to follow *Blakely*, as an inferior court we are also bound to examine the Supreme Court's prior pronouncements and guidance . . . .

... [C]onsidering the entire matrix of Supreme Court and circuit precedent, we adhere to the position that the Guidelines do not establish maximum sentences for *Apprendi* purposes. In writing these words we are more aware than usual of the potential transience of our decision. We trust that the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty; and then, if necessary, Congress can craft a uniform, rational, nationwide response.<sup>85</sup>

Responding to the mess it had caused, on August 2, 2004, the Supreme Court granted certiorari in the Seventh Circuit's *Booker* case, consolidated it with *United States v. Fanfan*, and set the cases for oral argument to be held at the start of October.<sup>86</sup> (As many readers will

<sup>82</sup> *Id.* at 516 ("Just as opera stars often go on singing after being shot, stabbed, or poisoned, so judicial opinions often survive what could be fatal blows. Think of *Lemon v. Kurtzman*, 411 U.S. 192 (1973), which is incompatible with later decisions, has been disparaged by most sitting Justices, yet has not been overruled.") (internal citations altered).

<sup>83</sup> *See id.* at 517–21.

<sup>84</sup> *See United States v. Pineiro*, 377 F.3d 464, 464, 473 (5th Cir. 2004), *vacated*, 543 U.S. 1101 (2005).

<sup>85</sup> *Id.* at 465, 470, 473.

<sup>86</sup> *United States v. Booker*, 542 U.S. 956 (2004); *United States v. Fanfan*, 542 U.S. 956 (2004).

already know, the Court issued its decision in these cases in January 2005 and, as most observers had predicted, held the Guidelines infirm under the *Apprendi/Blakely* reasoning.<sup>87</sup> Less anticipated was the Court's remedy, which was to sever the statutory section that made the Guidelines mandatory, leaving them alive as mere advice for the sentencing judge to consult.<sup>88</sup>)

Naturally enough, the thing that attracted everyone's attention during the six-month *Blakely-to-Booker* interlude was how various courts were deciding the question of the hour: the Guidelines' validity. The early-August grants of certiorari hardly stopped the action, as various courts continued to weigh in.<sup>89</sup> But the question of which outcome to pick—here, thumbs up or thumbs down on the Guidelines—is only one dimension of the problem courts face during a transitional period. Another question is when to decide—that is, should the court rule *at all* before the *Booker* decision or instead just wait? From the point of view of appellate procedure, the major divide was not whether the Guidelines would survive but whether courts would process cases as usual.

This dimension of the problem did not go unnoticed. In the en banc Sixth Circuit case addressing the effect of *Blakely*, issued in late August 2004,<sup>90</sup> the dissenters contended that any quick decision was improvident:

The majority's opinion in this case amounts to nothing more than an exercise in futility and a waste of time and resources, in light of the Supreme Court's grant of *certiorari* in [*Booker* and *Fanfan*]. Both cases present the question of the impact of *Blakely v. Washington* on the United States Sentencing Guidelines, and both are scheduled for oral argument in just over a month, on October 4. Given that the Supreme Court's impending resolution of *Booker* and/or *Fanfan* will likely resolve the primary issue in this case, I believe that the most appropriate course of action would be to withhold our decision until the Supreme Court has spoken.<sup>91</sup>

---

<sup>87</sup> See *United States v. Booker*, 543 U.S. 220, 220, 226–27 (2005) (Stevens, J., for the Court).

<sup>88</sup> See *id.* at 245 (Breyer, J., for the Court).

<sup>89</sup> Professor Douglas A. Berman's blog chronicled all of the developments during the hectic post-*Blakely* period with speed, expertise, and some flair; its archives can still be consulted to refresh one's memory of this period. See SENTENCING LAW AND POLICY, <http://sentencing.typepad.com> (last visited Nov. 13, 2010); see also Bowman, *supra* note 76, at 226–49 (describing various approaches of post-*Blakely* courts); Kathleen A. Hirce, *A Swift and Temporary Instruction: The Effectiveness of the Circuit Courts Between Blakely and Booker*, 2 SETON HALL CIRCUIT REV. 271, 283–96 (2005) (same).

<sup>90</sup> See *United States v. Koch*, 383 F.3d 436, 436 (6th Cir. 2004) (en banc), *vacated*, 544 U.S. 995 (2005).

<sup>91</sup> *Id.* at 443 (Martin, J., dissenting) (citations omitted).

A number of panels of the Third Circuit apparently concurred with that sentiment; they held cases under advisement awaiting the *Booker* decision.<sup>92</sup> The Eighth Circuit agreed with the wait-and-see approach as well, albeit in a different way. Although panels of that court initially held that *Blakely* applied to the Guidelines, the en banc court vacated those decisions and announced that en banc reconsideration would wait until after the Supreme Court decided *Booker*.<sup>93</sup> In the meantime, the Eighth Circuit mostly continued to process appeals and took the unusual step of issuing partial decisions that disposed of the non-*Blakely/Booker* issues; those matters could be addressed in petitions for rehearing and would be decided later, after *Booker* came down.<sup>94</sup> A few circuits managed to avoid addressing the big question head on, relying on the plain error standard to turn away defendants who raised *Apprendi/Blakely* arguments for the first time on appeal.<sup>95</sup>

Although some courts thus refrained from ruling on the Guidelines' validity, a greater number of courts decided that they needed to resolve the question in one direction or the other and sooner rather than later.<sup>96</sup> Although recognizing that they would not have the final say, they frequently cited the need to provide guidance to the circuit's district courts, where sentencing hearings were rapidly becoming logjammed.<sup>97</sup> Their theory was evidently that certainty and uniformity within the circuit was necessary, even if it risked proceedings that were uniformly in error.

---

<sup>92</sup> See, e.g., *United States v. Gonzalez*, 156 F. App'x 471, 472 (3d Cir. 2005); *United States v. Gonzalez*, 134 F. App'x 595, 596 (3d Cir. 2005); *United States v. Yocum*, 127 F. App'x 590, 590 (3d Cir. 2005). The Third Circuit continued to decide cases that (it thought) were unaffected by the *Booker* problem. See, e.g., *United States v. Thomas*, 389 F.3d 424, 426–28 (3d Cir. 2004), *vacated*, 545 U.S. 1125 (2005); *United States v. Coplin*, 106 F. App'x 143, 147–49 (3d Cir. 2004).

<sup>93</sup> See *United States v. Pirani*, 406 F.3d 543, 548 (8th Cir. 2005) (en banc); *United States v. Mooney*, 401 F.3d 940, 942 n.2 (8th Cir. 2005); Administrative Order Regarding *Blakely* Cases (8th Cir. Sept. 27, 2004), available at <http://www.ca8.uscourts.gov/files/blakelyfinal.pdf> [hereinafter Eighth Circuit Order].

<sup>94</sup> See, e.g., *United States v. Meza-Gonzalez*, 394 F.3d 587, 594 n.2 (8th Cir. 2005); *United States v. Borer*, 394 F.3d 569, 577–78 (8th Cir. 2005), *vacated on reh'g and substitute opinion* at 412 F.3d 987 (2005); Eighth Circuit Order, *supra* note 93.

<sup>95</sup> See, e.g., *United States v. Savarese*, 385 F.3d 15, 20–23 (1st Cir. 2004); *United States v. Badilla*, 383 F.3d 1137, 1142 n.2 (10th Cir. 2004), *vacated*, 543 U.S. 1098 (2005). Under the plain error test of FED. R. CRIM. P. 52(b), an appellate court can correct an error not raised at trial only if the error was “plain,” affected the defendant’s substantial rights, and seriously affected the fairness, integrity, or public reputation of the proceedings. *United States v. Olano*, 507 U.S. 725, 731–32 (1993).

<sup>96</sup> See Douglas A. Berman, *Circuit Contrasts: Variations in Appellate Justice*, SENTENCING LAW & POLICY (Sept. 15, 2004, 11:56 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/09/circuit\\_contras.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/09/circuit_contras.html).

<sup>97</sup> See, e.g., *United States v. Koch*, 383 F.3d 436, 438 (6th Cir. 2004) (en banc), *vacated*, 544 U.S. 995 (2005); *United States v. Mincey*, 380 F.3d 102, 103 (2d Cir. 2004), *vacated sub nom. Ferrell v. United States*, 543 U.S. 1113 (2005); *United States v. Booker*, 375 F.3d 508, 510 (7th Cir. 2004), *aff'd*, 543 U.S. 220 (2005).

Of the circuits that decided the question, a substantial majority eventually agreed with the Fifth Circuit that the Guidelines remained valid until the Supreme Court said otherwise.<sup>98</sup> (Some of these courts, in an attempt to hedge their bets, advised district courts both to impose Guidelines sentences and to announce alternative non-Guidelines sentences in case the Supreme Court struck down the Guidelines.<sup>99</sup>) Beneath the surface, however, the various courts upholding the Guidelines managed cases very differently.<sup>100</sup> This diversity of managerial approaches is the untold story from that otherwise much-chronicled period.

Consider the Second Circuit. It had initially responded to *Blakely* in July 2004 by invoking the rarely used procedure of certifying the question of the Guidelines' validity to the Supreme Court.<sup>101</sup> But by August—just after the Supreme Court's grant of certiorari in *Booker* and *Fanfan*—it gave up on that approach and held unenthusiastically that the Guidelines remained in force.<sup>102</sup> In that regard, the Second Circuit did nothing unusual. Notably, however, the court also set forth a procedure for how it would deal with the change in law that was likely soon forthcoming. In an administrative order issued by the chief circuit judge, the court stated that although it would continue to

---

<sup>98</sup> See Berman, *supra* note 96 (describing decisions reached in each circuit). The Ninth Circuit was the only court to join the Seventh Circuit in holding the Guidelines unconstitutional. See *United States v. Ameline*, 376 F.3d 967, 970 (9th Cir. 2004), *withdrawn on reh'g*, No. 02-30326, 2005 U.S. App. LEXIS 2033 (9th Cir. Feb. 9, 2005).

<sup>99</sup> See, e.g., *United States v. Hammoud*, 381 F.3d 316, 353–54 (4th Cir. 2004) (en banc), *vacated*, 543 U.S. 1097 (2005). The court offered a cost-benefit analysis:

We believe that announcing—not imposing—a non-guidelines sentence at the time of sentencing will serve judicial economy in the event that the Supreme Court concludes that *Blakely* significantly impacts guidelines sentencing. The announcement of a non-guidelines sentence may require the district court to consider issues not generally pertinent in guidelines sentencing, thereby requiring the investment of additional time at the sentencing hearing. If the Supreme Court does not apply *Blakely* to the guidelines, this will be wasted effort. If the Court does apply *Blakely* to the guidelines, however, the district court and the parties will have made at least substantial progress toward the determination of a non-guidelines sentence, at a time when the facts and circumstances were clearly in mind. While a new hearing may have to be convened in order to impose the previously determined and announced non-guidelines sentence, we anticipate that the district court and the parties will need to spend far less time preparing because the issues will already have been resolved.

*Id.* (footnote omitted).

<sup>100</sup> Naturally, one wonders why courts behaved as they did. Ideology is a usual suspect, of course, but one should also consider the role of court culture, caseloads, and other factors. Various considerations that might impact appellate case management are explored in Part III *infra*.

<sup>101</sup> See *United States v. Penaranda*, 375 F.3d 238, 239–40 (2d Cir. 2004) (en banc); see also 28 U.S.C. § 1254(2) (2006) (providing for “certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired”).

<sup>102</sup> See *United States v. Mincey*, 380 F.3d 102, 106 (2d Cir. 2004) (per curiam).

decide sentencing appeals in the ordinary course, it would generally withhold issuance of the mandate in those cases, thus suspending their finality.<sup>103</sup> In other words, the court would decide—but not *finally* decide.

Looking ahead to what would happen after *Booker* came down, the Second Circuit administrative order further provided:

Although any petition for rehearing should be filed in the normal course pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the court will not reconsider those portions of its decisions that address defendants' sentences until after the Supreme Court's decision in *Booker/Fanfan*. In that regard, the parties will have until 14 days following the Supreme Court's decision to file supplemental petitions for rehearing in light of *Booker/Fanfan*.<sup>104</sup>

The Second Circuit went on to process over one hundred cases in this manner during the months leading up to the *Booker* decision.<sup>105</sup>

Measures like those described above are, needless to say, departures from the ordinary course of handing appeals, and not all courts fashioned special procedures. The Fifth Circuit, for example, proceeded as usual. It did not hold cases in abeyance. Scores of *Blakely*-based challenges were turned aside on the authority of the fresh circuit precedent declaring *Blakely* inapplicable to the federal Guidelines.<sup>106</sup> Mandates generally issued as usual. So too with the Fourth and Eleventh Circuits.<sup>107</sup>

The strategy of withholding mandates was not limited to courts, like the Second Circuit, that upheld the Guidelines. The Eighth Circuit also used provisional, nonfinal decision making. As noted above, it actually did not decide the fate of the Guidelines on the merits at

---

<sup>103</sup> See Procedural and Administrative Order (2d Cir. Aug. 6, 2004). Issuance of the mandate, which typically comes about three weeks after the court's decision, divests the court of appeals of jurisdiction and officially puts its judgment into effect. See FED. R. APP. P. 41; *supra* Part I.B.

<sup>104</sup> Procedural and Administrative Order (2d Cir. Aug. 6, 2004). Realizing that receiving supplemental filings on the effect of *Booker* in every case would be unnecessary and burdensome, the court later dispensed with that requirement until it could issue its first decision interpreting and implementing *Booker*. See *In re: Special Order of Stay* (2d Cir. Jan. 19, 2005); see, e.g., *United States v. Washington*, 171 F. App'x 908, 909 (2d Cir. 2006).

<sup>105</sup> See *In re: Special Order of Stay* (2d Cir. Jan. 19, 2005).

<sup>106</sup> One can see many of these cases by running a KeyCite or Shepard's report on the first Fifth Circuit case upholding the Guidelines, *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004), and restricting the results to Fifth Circuit cases decided between *Blakely* and *Booker*. This search does not capture all such cases because unpublished decisions sometimes tersely state that circuit precedent forecloses the defendant's arguments without actually citing the controlling precedent, particularly when the defendant recognizes that the argument is foreclosed but raises it solely to preserve the point for potential review.

<sup>107</sup> I am not aware of any single document in which these courts set forth such a policy. I have consulted many reported cases, docket sheets, and other sources and make generalizations on that basis.

all, deferring decision on that question until after *Booker* but continuing to issue opinions deciding the other issues presented in impacted cases.<sup>108</sup> In these cases, it stayed the mandates and stored them up, like the Second Circuit had done.<sup>109</sup> Indeed, even the two courts that decided the big merits question the *other* way (i.e. invalidating the Guidelines) employed the strategy of withholding mandates: the Seventh Circuit held the mandate in many cases,<sup>110</sup> as did the Ninth Circuit.<sup>111</sup>

For the sake of completeness, it is worth noting that important differences in appellate procedure persisted even after the Supreme Court decided *Booker*. First, courts varied in their application of appellate forfeiture rules. Consider a defendant who had not raised any *Apprendi*-related issues in his or her appeal (or had tried to do so but was denied leave to file a supplemental brief after *Blakely*) but who had then filed a petition for certiorari and obtained a GVR. On remand from the Supreme Court, some courts permitted these defendants to raise *Booker* challenges that were advanced for the first time in the petition for certiorari,<sup>112</sup> yet other courts deemed *Booker* issues forfeited and would not consider them at all (not even under plain error) despite the Supreme Court's GVR.<sup>113</sup> This latter practice rendered many GVRs dead letters. Second, for *Booker* claims that were entertained, the claims were usually reviewed under the plain error standard, which different circuits applied in vastly different ways. Some courts affirmed virtually all sentences because they assigned the defendant the burden of producing record evidence showing that the district judge would have imposed a different sentence had the Guide-

---

<sup>108</sup> *Supra* text accompanying note 93.

<sup>109</sup> *See, e.g.*, United States v. Rosales, 111 F. App'x 857, 858–59 (8th Cir. 2004) (per curiam); Eighth Circuit Order, *supra* note 93. The court continued to finally dispose of cases that it did not consider impacted by *Blakely*. *E.g.*, United States v. Martinez-Salinas, 110 F. App'x 733, 734 (8th Cir. 2004) (upholding sentence enhancement based on facts admitted in guilty plea).

<sup>110</sup> *See, e.g.*, United States v. McKee, 389 F.3d 697, 701 (7th Cir. 2004); United States v. Henningsen, 387 F.3d 585, 591 (7th Cir. 2004); United States v. Pree, 384 F.3d 378, 396–97 (7th Cir. 2004); *see also* United States v. Swanson, 394 F.3d 520, 530 n.5 (7th Cir. 2005) (noting that the mandate would have been held except that remand for resentencing was required even apart from *Booker* issues).

<sup>111</sup> *See, e.g.*, United States v. Fox, 119 F. App'x 142, 146 (9th Cir. 2005); United States v. Mitchell, 120 F. App'x 24, 28–29 (9th Cir. 2004); United States v. Fernandez, 388 F.3d 1199, 1257 (9th Cir. 2004). The Ninth Circuit did not hold the mandate but instead remanded when it appeared to the court that the defendant might be entitled to be released but for a *Blakely* violation. *See, e.g.*, United States v. Castro, 382 F.3d 927, 928–29 (9th Cir. 2004) (per curiam). In still other cases, the court deferred submission of the appeal until after *Booker*. *E.g.*, United States v. Canedo, 148 F. App'x 582, 583 (9th Cir. 2005).

<sup>112</sup> *See, e.g.*, United States v. Nahia, 437 F.3d 715, 716 (8th Cir. 2006); United States v. Young, 160 F. App'x 518, 519–20 (7th Cir. 2005).

<sup>113</sup> *See, e.g.*, United States v. Ogle, 415 F.3d 382, 383–84 (5th Cir. 2005); United States v. Dockery, 401 F.3d 1261, 1262–63 (11th Cir. 2005).

lines been advisory; others remanded in just about every case on the theory that the only way to know what the district judge would have done is to ask.<sup>114</sup> As a result, otherwise identically situated defendants could have their *Booker* claims reviewed under a lenient plain error standard in one circuit, reviewed under a harsh plain error standard in another, or not considered at all in a third.

## B. The Consequences and Costs of the Different Approaches.

Decisions about how to process cases during the *Blakely-to-Booker* interval had strikingly divergent consequences. According to the established retroactivity doctrines, the *Booker* decision would apply to all cases still on direct review when *Booker* was issued but, if history were any guide, would not apply in subsequent collateral proceedings challenging cases that had become final.<sup>115</sup> Therefore, it was of overriding importance that attorneys ensure their clients' cases remained pending on direct review rather than becoming final before *Booker* came down.<sup>116</sup> Recall that a case becomes final on direct review when the period for filing a petition for certiorari expires (usually ninety days) or, if a petition is filed, when it is denied.<sup>117</sup> The ninety-day period for filing a petition for certiorari does not even start to run until the court of appeals disposes of a petition for rehearing.<sup>118</sup> Therefore, under the Second Circuit's system of requesting pro forma

---

<sup>114</sup> See *United States v. Ameline*, 409 F.3d 1073, 1078–81 (9th Cir. 2005) (en banc) (describing conflicting approaches to plain error); Deborah S. Nall, Comment, *United States v. Booker: The Presumption of Prejudice in Plain Error Review*, 81 CHI.-KENT L. REV. 621, 634–47 (2006) (same); see also *United States v. Paladino*, 401 F.3d 471, 484–85 (7th Cir. 2005) (criticizing another circuit for “condemn[ing] some unknown fraction of criminal defendants to serve an illegal sentence” by “placing on the defendant the impossible burden of proving that the sentencing judge would have imposed a different sentence had the judge not thought the guidelines mandatory”).

<sup>115</sup> See *supra* Part I.A.1 (describing current retroactivity doctrines, which distinguish between direct and collateral review). As expected, courts held that *Booker* did not apply retroactively on collateral review, just as they had held regarding *Apprendi*. See *United States v. Bellamy*, 411 F.3d 1182, 1187 n.1 (10th Cir. 2005) (citing circuit court cases); cf. *Schirio v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that *Ring v. Arizona*, 536 U.S. 584 (2002), which was based on *Apprendi*, “does not apply retroactively to cases already final on direct review”).

<sup>116</sup> Cf. Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 HOUS. L. REV. 747, 794 (2008) (making similar observations regarding the importance of filing certiorari petitions to keep cases alive on direct review in order to benefit from potential future overruling of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). To be clear, keeping the case on direct review would hardly mean the defendant would be sure to win. Among other hurdles, forfeiture doctrines meant that those who had not made an *Apprendi*-related objection at trial would be subjected to the daunting prospect of plain error review. See *United States v. Booker*, 543 U.S. 220, 268 (2005) (directing reviewing courts to implement its ruling using “ordinary prudential doctrines” such as plain error); *supra* Part I.A.2 (discussing forfeiture of new law).

<sup>117</sup> See SUP. CT. R. 13.1; *Clay v. United States*, 537 U.S. 522, 527 (2003).

<sup>118</sup> SUP. CT. R. 13.3.

petitions for rehearing,<sup>119</sup> which would then be held until after *Booker*, there would be no need even to file a petition for certiorari to keep a case live for retroactivity purposes. In contrast, in circuits deciding cases as usual, defendants needed to file a petition for certiorari in order to try to obtain a GVR. Not every defendant who might have benefited from *Booker* was able to navigate the procedural obstacle course.<sup>120</sup>

Many defendants, though, did take the proper steps to preserve their ability to benefit from *Booker*, and hundreds of them filed petitions for certiorari.<sup>121</sup> The Court's practice when it receives a petition for certiorari raising a question implicated in a pending case is to hold the petition until the plenary case is decided. Then, if the new decision might reasonably affect the disposition in the held case, the Court GVRs in light of the new precedent, thereby returning the case to the court of appeals.<sup>122</sup> *Booker* is the all-time champion of GVR generation, triggering approximately 800 GVRs. (Before *Booker*, an average year would yield around 50 GVRs from all cases combined.<sup>123</sup>)

The different procedural approaches adopted by the courts of appeals hugely influenced the distribution of GVRs. The top three courts for generating GVRs were the Fifth Circuit, the Eleventh Circuit, and the Fourth Circuit—all courts that did not routinely withhold mandates.<sup>124</sup> The Fifth Circuit alone generated over 200 separate GVR orders. By way of contrast, consider the Second Circuit, which agreed on the merits with the foregoing courts that the Guide-

---

<sup>119</sup> See *supra* notes 105–06 and accompanying text.

<sup>120</sup> A striking example of this point comes from multiple-defendant cases like *United States v. Rennert*, 182 F. App'x 65 (3d Cir. 2006). In *Rennert*, two defendants' convictions were affirmed in June 2004. After *Blakely*, both filed petitions for rehearing, which were denied. Defendant Miller then filed a petition for certiorari. After *Booker*, the Supreme Court GVR'd, and then the Third Circuit remanded Miller's case to the district court for resentencing. Defendant Rennert did not file a petition for certiorari, and his case became final in November 2004. He then filed a motion for resentencing under 28 U.S.C. § 2255. In the resulting appeal, the Third Circuit held Rennert was not entitled to relief under *Blakely* because that case did not concern the federal Guidelines; nor could he benefit from *Booker* because his conviction became final before *Booker* was decided. *Rennert*, 182 F. App'x at 66–68; see also *Nichols v. United States*, 563 F.3d 240, 243–46 (6th Cir. 2009) (en banc) (describing similar circumstances). Defendants whose attorneys failed to file a petition for certiorari in these circumstances probably would not be entitled to relief on grounds of ineffective assistance of counsel, as there is no constitutional right to counsel at the certiorari stage. See *Nichols*, 563 F.3d at 242, 249–50. But cf. *Nnebe v. United States*, 534 F.3d 87, 90–92 (2d Cir. 2008) (recalling a mandate where counsel violated his duty under the Criminal Justice Act to file petition for certiorari); *United States v. Smith*, 321 F. App'x 229, 233 (4th Cir. 2008) (similar), *vacated*, 129 S. Ct. 2763 (2009) (issuing a GVR in light of *Booker*).

<sup>121</sup> See Bruhl, *supra* note 41, at 719–21.

<sup>122</sup> See *supra* text accompanying notes 41–44 (describing the GVR procedure).

<sup>123</sup> See Bruhl, *supra* note 41, at 719–21.

<sup>124</sup> The statements in this and the following paragraph concerning the number of GVRs in various circuits are substantiated in a document that is available from the author.

lines survived *Blakely* but decided to withhold the mandates in its cases:<sup>125</sup> it generated only 26 GVRs.

Further, that large difference actually *understates* the disparity attributable to the courts' different case-handling approaches. Some GVRs stemmed from cases decided before *Blakely* cast doubt on the Guidelines, and these pre-*Blakely* cases account for the large majority of the Second Circuit's GVR total. If one removes the pre-*Blakely* cases from the tallies, one finds only a mere handful of GVRs from the Second Circuit but around 160 GVRs from the Fifth Circuit.<sup>126</sup> (Indeed, even that figure arguably understates the difference in that a sizable number of those Fifth Circuit GVRs were single orders that vacated and remanded at least a dozen separately decided cases that the Federal Public Defender had combined into consolidated petitions for certiorari;<sup>127</sup> counting the underlying cases separately would add well over 100 to the Fifth Circuit's total.) It is true that the Fifth Circuit has a larger criminal sentencing caseload than the Second, such that one would expect more GVRs in the former than the latter. But the criminal docket in the former is merely several times larger,<sup>128</sup> not twenty-five or fifty times larger.

In fact, if we want to find a court that looks like the Second Circuit in terms of its GVR-generation profile, the best place to look is a court that *disagreed* with the Second Circuit on the merits of whether the Guidelines survived: the Seventh Circuit.<sup>129</sup> The two courts are

---

<sup>125</sup> See *supra* note 102 and accompanying text.

<sup>126</sup> In both circuits, there were also several cases in which the case was decided before *Blakely* but a petition for rehearing was denied after.

<sup>127</sup> See, e.g., *de la Cruz-Gonzalez v. United States*, 544 U.S. 1014 (2005); *Martinez-Alfaro v. United States*, 543 U.S. 1183 (2005); *Gonzalez-Orozco v. United States*, 543 U.S. 1137 (2005); see also SUP. CT. R. 12.4 (allowing use of a single petition to cover multiple judgments from the same court involving closely related legal issues).

<sup>128</sup> Different measures and time periods give somewhat different results, though all are in the same ballpark of three to five times. See JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 2004 tbl.B-1, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/appendices/b1.pdf> (providing data for appeals commenced, terminated, and pending, by circuit); U.S. SENTENCING COMMISSION, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.55, available at <http://www.uscc.gov/annrpt/2004/Table55.pdf> (providing data for types of appeal in each circuit and district).

<sup>129</sup> Compare *United States v. Mincey*, 380 F.3d 102, 106 (2d Cir. 2004) (per curiam) (upholding the Guidelines), *vacated sub nom. Ferrell v. United States*, 543 U.S. 1113 (2005), with *United States v. Booker*, 375 F.3d 508, 510, 515 (7th Cir. 2004) (invalidating the Guidelines), *aff'd*, 543 U.S. 220 (2005). The Eighth Circuit, which followed a case-handling strategy similar to the Second Circuit's, had somewhat more GVRs than the Second Circuit. One possibility, based on my examination of Eighth Circuit decisions and docket sheets, is that the Eighth Circuit was stingier about construing the scope of pending appeals and permitting expansion of the appeal to encompass *Blakely* issues.

roughly comparable on relevant criminal caseload measures<sup>130</sup> and were nearly identical in the number of GVRs issued to each.<sup>131</sup>

The various procedural approaches differ in how they create and distribute costs. The process-cases-as-usual approach requires litigants to file petitions for certiorari if they wish to obtain the benefit of new law. As previously mentioned, not all litigants will do so, which means some will lose the benefit of new law. For those litigants who are well counseled and who try to obtain a GVR, the petition itself involves attorney time, requires nontrivial filing expenses,<sup>132</sup> and might necessitate a new attorney.<sup>133</sup> And then the Supreme Court must read the petition and familiarize itself with the case sufficiently to determine whether the case warrants a GVR. The time the Court spends doing this work is not well spent if we believe the Court's role is not to correct error or do justice in individual cases, which is all GVRs involve. To be sure, one does not want to overstate the burden on the Court. In federal criminal cases, the Court likely relies to some degree on the Solicitor General's office to advise it on which cases need to be GVR'd, which reduces the burden on the Court (though only by shifting it elsewhere). Further, the Court's GVR inquiry is not an especially searching one.<sup>134</sup> Nonetheless, looking across the litigation system as a whole, the costs must add up, especially when one is talking about some 800 GVRs stemming from *Booker*. (Some years following the *Booker* episode have also featured hundreds of GVRs, a high number by historical standards.<sup>135</sup>)

Some of the above costs were reduced or eliminated in courts that modified their normal procedures. Depending on how exactly the court of appeals acted (abeyance, deciding cases but withholding the mandate, etc.), litigants in a given court might not need to file

---

<sup>130</sup> See *supra* note 128.

<sup>131</sup> One might wonder why the Seventh Circuit had any GVRs at all. There are a few reasons. As mentioned in the main text, some *Booker* GVRs stemmed from cases decided before *Blakely*. In addition, a few GVRs occurred in cases that the Seventh Circuit believed were not at all impacted by *Blakely*. See, e.g., *United States v. Tellez-Boizo*, 114 F. App'x 754, 756 (7th Cir. 2004), *vacated*, 544 U.S. 902 (2005). And a few GVRs were issued in cases in which sentencing was apparently not even at issue in the Seventh Circuit proceedings. See, e.g., *United States v. Saladino*, 119 F. App'x 10, 12–15 (7th Cir. 2004), *vacated*, 544 U.S. 970 (2005).

<sup>132</sup> See, e.g., SUP. CT. R. 12.1, 33.1(a), (f) (requiring parties to file forty copies in booklet format); SUP. CT. R. 33.1(b) (requiring a petition appendix to be typeset rather than photocopied). Litigants proceeding *in forma pauperis* are largely relieved of these unusual printing requirements. See SUP. CT. R. 12.2, 33.2, 39. Many criminal defendants can proceed as paupers. Many defendants in the federal system are also represented by the federal public defender, which means that the requirement that all defendants needed to file petitions for certiorari imposed a concentrated cost on those offices.

<sup>133</sup> See SUP. CT. R. 9.1 (generally requiring those filing documents with the Court to be members of the Court's bar).

<sup>134</sup> See *supra* text accompanying notes 41–43.

<sup>135</sup> See Bruhl, *supra* note 41, at 720, 723.

anything to ensure that their case would remain eligible for new law. Or they might have to file a pro forma petition for rehearing, which is not as much trouble as a pro forma petition for certiorari. True, there are costs associated with the parties' post-*Booker* briefing and the court of appeals' post-*Booker* decision. But those costs would probably be borne in any event, the difference being whether a trip to the Supreme Court and a remand were necessary before that could happen. The Supreme Court was largely left out of the process in courts like the Second Circuit.

To be sure, the go-slow approach is not without costs of its own. It entails delay, which in some cases will turn out to be unnecessary. And there is the administrative inconvenience of keeping a case pending on the docket. Further, if the court of appeals does not decide the question at all, then the district courts are left without interim guidance, which might be important when the matter arises frequently (as the validity of the Guidelines most certainly did, though this characteristic makes the episode somewhat atypical). Yet note that courts of appeals could address the need for guidance through methods such as deciding one precedential case and then holding all others or suspending the finality of a decision (as the Second Circuit did by withholding mandates).

\* \* \*

The *Blakely*-to-*Booker* interval was an exceptional period. Yet the same problem—whether to decide a case before an anticipated legal change or wait until after—arises all the time. The everyday version of the problem escapes notice mainly because no single episode is very momentous on its own. An event like *Blakely* is valuable because it can draw attention to the more general problem. Now that our attention has been drawn, let us see if we can develop a systematic account of how courts should deal with this problem.

### III

#### A FRAMEWORK FOR PRESCRIPTIONS AND APPLICATIONS

Different circuits handled cases quite differently during the *Blakely*-to-*Booker* interval. Outside of that unusual episode, there might remain some recurring patterns, with certain circuits tending to favor waiting and others discountenancing deviations from routine processing.<sup>136</sup> The main impression one gets, however, is that everyday deci-

---

<sup>136</sup> In conversations with current and former staff attorneys and others, it appears that some courts' staff attorneys feel that a grant of certiorari presumptively merits abeyance. In other courts, the assumption is just the opposite, i.e. a grant of certiorari does not provide sufficient reason for delay. See *infra* notes 187–89 and accompanying text (discussing the role of court culture); see also Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH.

sions about timing are simply haphazard and unpredictable even within circuits. A court will wait in one instance but not in another, and it is difficult to identify why. True, the right answer in any given case will depend on context-specific considerations that might not be visible to an outsider. And in many cases more than one reasonable choice may exist. Therefore, some degree of variation is expected and appropriate. But because there is no one-size-fits-all answer, it is difficult to know whether courts are making the right decisions. My initial sense is that it is unlikely that the decisions we observe, with their multiple levels of apparent inconsistency, could all be correct in efficiency terms. Moreover, even aside from inefficiency, we risk unfairness when we give similarly situated litigants different treatment. So perhaps courts could do better. If, by contrast, the courts are in fact doing well, that too would be worth knowing so that we can avoid changing things for the worse.

Any attempt to evaluate performance or recommend reform needs to work from an accurate understanding of the problem. This issue, however, turns out to be surprisingly complicated. Accordingly, perhaps the most valuable contribution here is just to define the nature of the decision-making problem: what is the goal at which we are aiming, and what might cause courts to fall short? Having done that, we can then consider, with due caution, some possible improvements. Finally, we can extend the insights developed in this Article to some related topics.

## A. Defining the Nature of the Problem

### 1. *What Is the Goal?*

Before suggesting how to reform decisions about timing, one must first identify what counts as success and failure.

Initially, it is tempting to see the problem largely as a matter of accuracy in prognostication. On this view, the task for the lower court is to (1) predict how the superior court will decide; (2) determine how the lower court itself would currently decide (taking into account constraints of circuit law, superior court precedent, and other considerations that would not bind the superior court); and then (3) either delay or not, depending on whether the two anticipated decisions match. On this model, success takes the form of either

- a correct guess, where the lower court decides now in a way that accords with the superior court's later ruling,<sup>137</sup> or

---

L. REV. 659, 678–79 (2007) (empirically demonstrating that courts differ in how they balance speedy disposition against other deliberative values like granting oral argument and publishing opinions).

<sup>137</sup> For example, in *United States v. Santana-Illan*, the Tenth Circuit declined to hold case in abeyance in light of a pending Supreme Court case. 357 F. App'x 992, 994 n.4

• a prudent delay, where the lower court delays decision when it otherwise would have guessed (or would have been compelled to rule) in the wrong direction.<sup>138</sup>

Error, on this model, takes the form of either

- false positives, where the lower court delays needlessly (the superior court's decision turns out to be irrelevant, or the decision agrees with existing circuit law, etc.),<sup>139</sup> or
- false negatives, where the court moves ahead and makes a decision that turns out to be wrong.<sup>140</sup>

The following chart illustrates these possibilities:

CHART ONE  
PROGNOSTICATION-CORRESPONDENCE MODEL

<i>Does lower court delay?</i>	<i>Does lower court's current decision match superior court's eventual decision?</i>	<i>Outcome</i>
Yes	Yes	Unnecessary delay (false positive)
	No	Prudent delay (success)
No	Yes	Correct guess (success)
	No	Improvident decision (false negative)

(10th Cir. 2009). The Supreme Court's eventual decision agreed with the position that the Tenth Circuit adopted. See *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589–90 (2010) (holding that simple possession was not an aggravated felony when offender was not charged as a recidivist); *Santana-Illan*, 357 F. App'x at 994–98 (same); see also *United States v. Volungus*, 595 F.3d 1, 4 (1st Cir. 2010) (presenting a similar scenario regarding *United States v. Comstock*, 130 S. Ct. 1949 (2010), which later agreed with the First Circuit's analysis); *United States v. Cole*, 31 F. App'x 235, 236 (4th Cir. 2002) (presenting a similar scenario regarding *Harris v. United States*, 536 U.S. 545, 551–52, 568–69 (2002), which later affirmed Fourth Circuit precedent).

<sup>138</sup> For example, the Sixth Circuit held some cases in abeyance pending the Supreme Court's decision in *Jones v. Bock*, 549 U.S. 199, 202–03 (2007). The delay turned out to be wise because the Supreme Court reversed the prior Sixth Circuit law. See, e.g., *Fisher v. Primstaller*, 215 F. App'x 430, 431 (6th Cir. 2007); *Floyd v. Caruso*, 216 F. App'x 478, 478 (6th Cir. 2007). Other circuits have taken similar actions in different contexts. See, e.g., *United States v. Ellyson*, 326 F.3d 522, 527, 530 (4th Cir. 2003) (noting that the circuit court held the case in abeyance in light of a pending Supreme Court case, which rejected prior Fourth Circuit law); *Mandel v. Max-France, Inc.*, 704 F.2d 1205, 1206 (11th Cir. 1983) (similar).

<sup>139</sup> See, e.g., *Fail v. Hubbard*, 315 F.3d 1059, 1060 (9th Cir. 2002); *United States v. Provost*, 237 F.3d 934, 937 (8th Cir. 2001); *Watson v. United States*, 439 F.2d 442, 449 (D.C. Cir. 1970) (en banc); *McCullough Tool Co. v. Well Surveys, Inc.*, 343 F.2d 381, 409 (10th Cir. 1965).

<sup>140</sup> See, e.g., *Rutherford v. Crosby*, 438 F.3d 1087, 1089, 1095 (11th Cir. 2006) (refusing, over dissent, to grant stay of execution and hold the case in abeyance in light of a grant of certiorari in *Hill v. McDonough*, 547 U.S. 573 (2006)), *vacated sub nom.* *Rutherford v. McDonough*, 547 U.S. 1204 (2006) (GVR'ing in light of *Hill*); *Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89–90 (2d Cir. 1996) (noting that the court had decided the case rather than waiting for a pending state supreme court decision, which reached a contrary conclusion). The *Blakeby-to-Booker* transition generated hundreds of similar examples. See *supra* Part II.

One assumption of this model is that the Supreme Court's forthcoming decision is a fixed exogenous input unaffected by the lower court's rulings. This assumption is contestable, though ultimately I do not think it is a substantial defect in the model. True, it is possible that the lower court's analysis, if it decides the case now, might influence the Supreme Court's later decision or at least its decision-making process, hopefully for the better.<sup>141</sup> Indeed, the Supreme Court has occasionally said that the availability of a variety of lower court opinions improves its decision making.<sup>142</sup> Nonetheless, whatever positive role a lower court opinion might play in other circumstances,<sup>143</sup> here its added value *at the margin* seems *de minimis*. In our scenario, the Supreme Court has already granted certiorari, likely because the issue has already divided the lower courts. The likelihood that *another* lower court opinion would provide new insight not available from other sources—namely the prior lower court opinions, the parties' presentations, amicus briefs, scholarly commentary, and the Court's own research—is minuscule when appraised objectively, even if lower court judges' natural human pride, supplemented by their simple desire to have their say,<sup>144</sup> might suggest a greater value. This fact warrants treating the Supreme Court's decision as fixed, and so in that respect the prognostication model is sound.

Despite overcoming the objection just described, the prognostication-correspondence model nonetheless fails as a framework for understanding the problem of deciding when to decide. A better objection to the model is that it uses a flawed notion of success because it neglects some of the costs of legal change. To illustrate this point, suppose that things went as well as possible for a court like the Fifth Circuit. That is, suppose that the Supreme Court surprisingly agreed that the Guidelines survived *Blakely* perfectly intact. On the prognostication model, this result would count as a success. The Fifth Circuit would look good—accurate *and* fast—while courts that stayed or held cases would have needlessly delayed. But that assessment changes once one considers the institutional mechanics of legal

---

<sup>141</sup> See, e.g., *Gherebi v. Bush*, 352 F.3d 1278, 1304 (9th Cir. 2003) (rejecting abeyance because issuing an opinion might aid the Supreme Court), *vacated*, 542 U.S. 952 (2004). *But see id.* at 1313 (Graber, J., dissenting) (advocating abeyance because “the views that we express here will become obsolete as soon as the Supreme Court renders its decision”).

<sup>142</sup> See, e.g., *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (noting that the Supreme Court's decisions can benefit from the existence of numerous and diverse opinions from lower courts).

<sup>143</sup> *But cf.* Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 691 (1990) (questioning the value of “percolation” in the lower courts); Caminker, *supra* note 33, at 56–60 (same); William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986) (same).

<sup>144</sup> See *infra* note 152 (speculating that judges might derive some personal satisfaction from expressing their view, even if they expect the Supreme Court to disagree).

change. The Fifth Circuit's "success" would not have averted the costs to the litigants and the Supreme Court that we have discussed, at least not completely.

To see why, consider litigant Francisco Pineiro, whose appeal was the vehicle through which the Fifth Circuit issued its July 2004 decision upholding the Guidelines.<sup>145</sup> Pineiro does not know how the Supreme Court will rule on the Guidelines. All he knows is that if he wants to benefit from a potentially favorable ruling in the near future, he needs to file a petition for certiorari and hope that the Supreme Court will agree with his position. And file a petition he did, along with hundreds of defendants like him.<sup>146</sup> All defendants in his situation should file certiorari petitions. Note that these defendants and their attorneys expend all of this effort even though, in this hypothetical, the *Booker* decision turns out to vindicate the Fifth Circuit's opinion. It is true that the Fifth Circuit would not have to reconsider all of its post-*Pineiro* cases in this scenario because the Supreme Court would just deny, rather than GVR, the numerous petitions for certiorari. But the Second Circuit also would not need to reconsider its cases; it could simply issue all the mandates that it had withheld. The difference is that the Second Circuit, by warehousing its cases locally, would not have required litigants to go to the Supreme Court while waiting to see how *Booker* turned out.

Again, this insight is not limited to the admittedly unusual *Blakely/Booker* mess. The more general point is that deciding a case immediately, rather than holding it in abeyance or otherwise delaying it, can still impose transition costs on the litigants and the Supreme Court even if the lower court guesses "right." For even when that happens, the disappointed party may well take steps to preserve its right to benefit from the new rule while the Supreme Court's decision remains pending. The very important conclusion here, then, is that *guessing wrong is not the only source of bad outcomes*. Equally, guessing right is not always the solution.

These considerations suggest that waiting has some advantages that the prognostication model misses (and that judges might overlook too). Waiting not only avoids the palpable risk that the lower court ends up being wrong, but it also averts the less obvious costs that a decision creates even when the court guesses right. We will return to these matters shortly, when we try to develop mechanisms for improving case administration. For the moment, the point is just that more is involved here than correctly forecasting the *direction* of legal

---

<sup>145</sup> *United States v. Pineiro*, 377 F.3d 464, 467, 473 (5th Cir. 2004), *vacated*, 543 U.S. 1101 (2005).

<sup>146</sup> See Bruhl, *supra* note 41, at 719–21 (reporting that the Supreme Court issued about eight hundred GVRs in light of *Booker*).

change. Any notion of success should include the *costs* of legal change as well.

Here we run into another complexity. All would agree that reducing transition costs is not our only goal, to be pursued singlemindedly at the expense of other procedural values like equal treatment and transparency. A full accounting requires consideration of those and other values. A deeper and initially counterintuitive challenge would go further and ask whether reducing the costs of legal transitions is desirable at all. The thinking follows the following logic: Judicially initiated legal change is, *ceteris paribus*, bad. The entity most to blame for this unwanted change is the Supreme Court. So instead of trying to ameliorate the damage wrought by legal change, we should try to drive up the costs and indeed focus them when possible on the Supreme Court, chastening it so that it will stop making such messes.<sup>147</sup> *More* certiorari petitions, *more* holds, and *more* GVRs should be the goal, not fewer.

Although not a crazy line of thought, the above reasoning strikes me as unpersuasive in this context. First, although there is some harm associated with change per se, that harm is probably small compared to the benefit (or detriment) of the change in the substance of the law. If that assessment is correct, then this chastisement theory would only appeal to those people who find the status quo desirable on the merits; others will wish to facilitate change. Second, and more important as a practical matter, the fact that our current arrangements for handling legal change are quite costly and require lots of GVRs does not seem to have prevented the Supreme Court from initiating highly disruptive legal change in contexts ranging from the criminal sentencing to civil pleading standards.<sup>148</sup> Perhaps that is because many of the costs in these situations fall not on the Court itself but on litigants, attorneys, and other courts. It would seem problematic to inflict pain on bystanders in an attempt, likely futile, to discipline the Supreme Court.

All of the above just goes to show that the superficially simple problem of deciding when to decide conceals great complexity. The discussion below will proceed on the supposition (which, as just acknowledged, not everyone would embrace) that reducing the costs of implementing changes in law is one goal (among others) we should

---

<sup>147</sup> There are some parallels here to the arguments about how retroactivity and qualified immunity might encourage or discourage changes in doctrine by affecting the disruptiveness of legal change. See *supra* notes 56–57 and accompanying text; see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1730–31 (2000) (arguing that the discretionary certiorari policy frees the Supreme Court from dealing with the consequences of decisions expanding the reach of federal law).

<sup>148</sup> See *supra* note 10 (citing cases).

pursue in designing appellate structures. And while it is impossible to trace out every possible ripple effect of different approaches to the problem, some of the costs are substantial, knowable, and amenable to reform.

## 2. *Why Might Courts Fall Short?*

There are a number of possible explanations for why judges might fail to make the best choices about timing. To begin, they might not always know what issues are pending in the Supreme Court or state high courts, and litigants might sometimes fail to advise them.<sup>149</sup> (One would assume that at least one party would usually have an incentive to reveal such information, though that would not help if the parties are ignorant too.) Further, even armed with the knowledge that change is looming, lower courts might do a poor job of predicting how the law will change. Judges on lower courts might suffer from familiar cognitive biases, such as a tendency to overestimate the chances that the Supreme Court will agree with their own view of the law.<sup>150</sup>

If the problems are of the sort just mentioned—basically problems of information and information processing—that would lead to certain kinds of possible solutions. For example, courts could try to improve their internal mechanisms for keeping abreast of developments in other courts.

It might be, however, that the problems are of a different and perhaps less tractable sort. So far we have been trying to identify optimal results from the point of view of the system as a whole. But a single, impartial engineer does not make these case-handling decisions—judges do. And judges are people too, which means they might advance their own interests and not just those of the system.<sup>151</sup> Like the rest of us, they will be more aware of, and experience more vividly, the burdens that particular decisions impose on themselves as

---

<sup>149</sup> Cf. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1963–64 (2007) (arguing that trial judges often exercise discretion poorly because of bounded rationality, lack of information, and strategic complexities).

<sup>150</sup> See generally Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (describing empirical evidence showing that judges suffer from a number of common cognitive biases including egocentric bias, i.e. that they overestimate their own abilities).

<sup>151</sup> See generally Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 13–15 (1993) (discussing how judges might seek leisure, prestige, or other personal benefits). This insight should hardly be considered radical; others before me have relied on it in procedure-related contexts. See, e.g., Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 478–85 (1998) (discussing differing adjudicative incentives of trial judges and appellate judges); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 627–33 (1994) (explaining that courts might craft procedural rules that advance their own bureaucratic interests rather than the efficiency of the legal system).

opposed to costs visited upon others. They will, or at least some of them will, incline naturally toward bureaucratic paths of least resistance rather than toward creative solutions. They might manage cases with an eye toward whether the anticipated change in the law is ideologically palatable to them. In other words, the impediments might not be informational as much as motivational.

If these motivational kinds of factors are at work, then improving lower courts' performance would require more than increasing their awareness of the Supreme Court's activities and improving their predictive abilities.<sup>152</sup> Likewise, it would be insufficient to remind judges of the costs of legal change discussed above so that they could better incorporate those costs into their decision-making calculus. Increased awareness of those costs will not solve the problem if judges are not trying to minimize burdens impartially.

If we begin to think about the judges who are making these timing decisions as normal individuals, then we will quickly notice the divergence between the costs that fall on the lower court and those that fall on other courts and the litigants. Considering only the costs borne by the court of appeals, and simplifying for purposes of illustration,<sup>153</sup> the calculations look like this:

TABLE ONE

$$\begin{array}{ccccccc} \text{Cost to court of} & & \text{Court's} & & \text{Probability that} & & \text{Court's} \\ \text{appeals of deciding} & = & \text{decision costs} & + & (\text{case returns} & \times & \text{decision costs}) \\ \text{now} & & \text{now} & & & & \text{later} \end{array}$$

The probability that the case will return, such as through a GVR or a subsequent appeal from the district court, is less than one for several reasons: the court of appeals might guess correctly, some liti-

---

<sup>152</sup> Looking back at the *Blakeley-to-Booker* period, poor predictive accuracy does not seem to be the only reason, or probably even the primary reason, that some courts issued so many improvident decisions (and thus triggered so many GVRs). True, it may be that a few judges and courts believed that the Guidelines would be unaffected. But that does not seem to be true of other courts, which seemed to think the Guidelines were doomed. Consider the markedly unenthusiastic comments in the Fifth Circuit's opinion upholding the Guidelines. See *supra* text accompanying note 85. Indeed, it might be that the expectation that the Supreme Court will disagree actually prompts some lower court judges to issue an opinion as a sort of preemptive *cri de coeur* lamenting the Supreme Court's error.

<sup>153</sup> A complete accounting would need to consider more remote consequences of the courts' choices, such as whether one approach would affect the caseload in the future. Such an effect seems conceivable, but it is hard to know what the effect would be; in any case, it seems highly unlikely that the effect would be large enough—relative to the first-order consequences—to worry about even if it were knowable. Thus, it is safe to assume that such potential remote effects are excluded from the courts' thinking. If my assumption is wrong, that still would not affect the larger point that private costs and social costs do not align.

gants will not take the proper steps to obtain the benefit of new law, some cases will settle, and so on.

TABLE TWO

$$\begin{array}{ccccccc} \text{Cost to court of} & & & & & & \text{Court's} \\ \text{appeals of deciding} & = & \text{Court's cost of} & + & (\text{Probability of} & \times & \text{decision costs}) \\ \text{later} & & \text{delay} & & \text{later decision} & & \text{later} \end{array}$$

Again, the probability of a later decision is less than one, here because some cases might settle before or after the Supreme Court acts.

These calculations neglect a number of social costs. In particular, the first calculation omits the external costs, borne by litigants and other courts, of the lower court's decision to act on the case now. Recall that a case remains "live" for purposes of new law for quite a while after the court of appeals finally acts on the case.<sup>154</sup> During that months-long period, the appellate court's decision could become erroneous, as judged against the newly announced law. Obtaining a correct judgment will require effort by the litigants because one of them will (if properly counseled, at least) take steps to take advantage of the change in law; the other will expend some effort in response.

Under current procedures, the litigant seeking relief will probably first have to go to some court other than the court of appeals. Frequently that will be the Supreme Court, where the litigant will file a petition for certiorari seeking a hold or a GVR. (Again, this step might be necessary even in cases where the court of appeals has guessed *right* about how the Supreme Court will decide; if the Supreme Court's decision is still pending as the period for petitioning for certiorari expires, the litigant should file a petition seeking a hold until the decision comes down.) Alternatively, a litigant might be able to turn initially to the district court for relief, imposing a cost on that court and, again, on both parties.<sup>155</sup> If the litigant takes appropriate

<sup>154</sup> *Supra* Section I.A.1; *supra* notes 117–18 and accompanying text.

<sup>155</sup> In civil cases, although FED. R. CIV. P. 60(b) is generally not available merely because of a change in law, *see supra* note 22, the result probably differs when the change occurred before finality attached. *See, e.g.,* Schmitt v. Am. Family Mut. Ins. Co., 187 F.R.D. 568, 571–76 (S.D. Ind. 1999) (granting a motion under Rule 60(b) because of a change in controlling state law that occurred before the judgment became final on appeal). In criminal cases, a federal criminal defendant could file a § 2255 motion based on new law announced during the period for filing for certiorari. *See* United States v. Becker, 502 F.3d 122, 127–29 (2d Cir. 2007) (affirming district court's grant of § 2255 relief under *Crawford v. Washington*, 541 U.S. 36 (2004), which the Supreme Court decided before the period for seeking certiorari had expired, even though no petition for certiorari actually was filed); *Derman v. United States*, 298 F.3d 34, 39–42 (1st Cir. 2002) (reaching a similar conclusion concerning § 2255 review of *Apprendi* error). The availability of such collateral relief does not depend on whether the Supreme Court has made the case "retroactive" on collateral

action and if the court of appeals' guess turns out wrong, then the case might return to the court of appeals, whether through a GVR or a later appeal. The point is that some of the costs of correcting the error fall on the court of appeals but other costs fall on other courts and the litigants. Likewise, external costs of the wait-and-see approach (such as the burden of delay to the litigants) are not included in the court of appeals' private calculations either. And therein lies the problem: a divergence between private and social costs is a classic recipe for suboptimal outcomes.

The discussion above does not all by itself produce any generalizable conclusion about what courts will or should do, for those decisions depend on the values of the variables. Because the law's delay is a time-honored source of complaint,<sup>156</sup> one might suppose that courts would be too prone to wait, overlooking the inconvenience of postponement to the parties. Yet, as we have seen, courts often do not wait.<sup>157</sup> One can easily imagine scenarios in which consideration of only the internal costs would encourage them not to wait. For instance:

You are a judge on the court of appeals, and you have before you one or more cases that you could easily resolve under binding circuit law. Indeed, they could be resolved without argument through standardized unpublished summary orders drafted by the court's central corps of staff attorneys.<sup>158</sup> However, the cases happen to involve a question on which the Supreme Court has granted certiorari. The Court's decision might be expected in, say, six months. Will you wait?

---

review; in the circumstances described here, the application of the rule would not be "retroactive" because the direct appeal was not yet final. Some courts appear to misunderstand this point. See, e.g., *United States v. Murray*, 2 F. App'x 398, 400 (6th Cir. 2001).

Note that, after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, a state prisoner might not have the option of using habeas corpus as an alternative to a petition for certiorari to gain the benefit of prefinality new law. In place of the *Teague* understanding, which fixes the time for determining applicable law at the date of finality, the statute would appear to make the relevant time the date of the state court decision. See 28 U.S.C. § 2254(d); *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010); 2 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 32.3 & n.8 (5th ed. 2005).

<sup>156</sup> See, e.g., CHARLES DICKENS, *BLEAK HOUSE* (1853); WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

<sup>157</sup> See, e.g., *supra* Part II.A (providing examples from the *Blakely*-to-*Booker* period); *supra* notes 51, 61, 137, 140 (providing additional examples from other contexts).

<sup>158</sup> For example, in the run-up to *Booker*, the Fifth Circuit relied on its "conference calendar" procedure to swiftly dispose of nearly one hundred cases on the authority of its precedent in *United States v. Pineiro*, 377 F.3d 464, 467-73 (5th Cir. 2004), which upheld the Guidelines after *Blakely*. Indeed, dozens of these decisions were issued on a single day, December 17, 2004. (One can find these cases by searching the Lexis or Westlaw databases for cases containing "conference calendar" and "Pineiro.") See generally Jerry E. Smith, *Fifth Circuit Survey: Foreword*, 25 TEX. TECH L. REV. 255 (1994) (describing the conference calendar procedure).

If you wait, your now-routine cases might later be harder to resolve, inasmuch as they would be among the first cases to apply the new precedent. You might have a new crop of law clerks who will have to get up to speed on the issue, and you will have to refresh your own recollection of it too. In addition, delaying decision will involve the bureaucratic (and perhaps psychological) burden of keeping the cases hanging around on your pending-cases report rather than processing them out the door while they are in front of you.<sup>159</sup>

If you go ahead and decide the cases now and the Supreme Court later validates circuit law (and why wouldn't it, for surely your view is correct!<sup>160</sup>), there will be no new law to implement, and *you* will bear no change-related costs (though others will incur costs as they take steps to keep their case alive in anticipation of the change). True, if you decide now and the Supreme Court foolishly disagrees with your view of the law, you might need to fix your decisions later. You will bear some of the costs of making the correction.<sup>161</sup> But not every case will come back: some litigants that could or should benefit from new law will not be well counseled, some cases will settle after the Supreme Court announces the new governing law, etc.<sup>162</sup> In other words, (you believe that) the probability the case or cases will return is small.

Consequently, you go ahead and sign the summary dispositions.

The scenario above emphasizes certain administrative incentives and decision costs, but one could come up with alternative stories that emphasize other factors that might distort decision making. Perhaps a judge is eager to express his or her view of the law in the hope that it will sway the Supreme Court—a hope that is probably more rooted in human vanity than in reason.<sup>163</sup> Or perhaps the judge dislikes the

---

<sup>159</sup> For more on these costs, see *infra* notes 187–89 and accompanying text.

<sup>160</sup> Cf. Guthrie et al., *supra* note 150, at 811–16 (finding in an empirical study that judges suffer from egocentric bias).

<sup>161</sup> Obviously the moral hazard problem would be even worse if the case, assuming it returned, returned to different judges to fix (i.e. a different panel of judges selected through random assignment). If that were true, then the issuing panel would face a situation where it could decide improvidently with little risk at all, for another panel would be responsible for fixing any mistakes. The implicit assumption that the case would come back to the same panel is consistent with actual practice. See, e.g., Internal Operating Procedure of the United States Court of Appeals for the Third Circuit 10.87 (2002) (providing that cases on remand from the Supreme Court return to the original panel), available at <http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf>; Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit 27.5 (2009) (same), available at <http://www.ca5.uscourts.gov/clerk/docs/5thCir-IOP.pdf>; Sixth Circuit Internal Operating Procedures 104 (2009) (same), available at [http://www.ca6.uscourts.gov/internet/rules\\_and\\_procedures/pdf/rules2004.pdf](http://www.ca6.uscourts.gov/internet/rules_and_procedures/pdf/rules2004.pdf).

<sup>162</sup> Because the costs of the lower court's second decision would occur in the future, there may be an argument for discounting them, but I ignore that possibility here.

<sup>163</sup> See *supra* text accompanying notes 141–44.

anticipated change in law for ideological reasons and hopes to govern as many cases as possible with the old law, even recognizing that some of them might come back.

To be clear, I do not suggest that private incentives always favor immediate decision. For example, sometimes waiting for a Supreme Court decision will decrease the decision costs, as when current circuit law is unsettled but the Supreme Court looks poised to announce an easily administered, bright-line rule. If so, the lower court might wait, even if doing so severely burdens the parties. What is certain, however, is that the costs borne by the court of appeals are *not* the same as the costs borne by the system. The private costs include neither the burdens on other courts nor the burdens on the litigants.

To be sure, it would be wrong to believe that judges, in making their case-handling decisions, are completely ignorant of, or insensitive to, costs that fall on others.<sup>164</sup> But it is equally wrong to think that they are perfectly informed saints indifferent to their own workload and other burdens. Again, judges are people too. Because their private payoffs differ from social payoffs, we have reason to worry about sound decision making. That worry is always present, of course, but it is especially troubling here, in a domain that is highly discretionary and virtually immune from close policing.

#### B. Reforming Appellate Courts' Decisions About Timing

So what, if anything, is to be done about this problem? Any reform effort has to choose how radical it will be, i.e. which matters are up for grabs and which are treated as fixed. It might be that the best method of managing legal change would involve a major reform such as switching to some form of nonretroactive judicial decision making.<sup>165</sup> That switch would eliminate much of the problem of implementing changes in law, for the new law would not affect pending cases (apart, probably, from the very case that actually generates the new law<sup>166</sup>). But it seems unlikely that such an alteration will be soon in coming. Likewise, even if one favors a theory of precedent that would grant lower courts more latitude to anticipate changes in law, strict, vertical *stare decisis* is probably here to stay; among other things, the Supreme Court seems to think that such a rule is a crucial

---

<sup>164</sup> See Lynn A. Stout, *Judges As Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1626 (2002).

<sup>165</sup> See Fallon & Meltzer, *supra* note 17, at 1811–12 (proposing modifications to the current retroactivity doctrine); Heytens, *supra* note 28, at 979–90 (same).

<sup>166</sup> See *Stovall v. Denno*, 388 U.S. 293, 301 (1967) (suggesting that pure prospectivity would implicate the bar on advisory opinions and erode incentives to seek changes in the law). *But see* Fallon & Meltzer, *supra* note 17, at 1797–1807 (questioning those arguments).

aspect of its hierarchical power.<sup>167</sup> Accordingly, it is probably more practically fruitful to consider more measured reforms that address the narrower problem of improving courts' decisions about timing during transitional periods.

As the discussion above indicates, this problem is complicated enough all by itself. Clearly there can be no one-size-fits-all solution. To begin with, different approaches are appropriate depending on the identity of the entity that generates the legal change. The Supreme Court is like clockwork: after a grant of certiorari, a case is scheduled for argument later in the same term or early in the next term, and the Court almost always decides cases by the end of the term during which they are argued.<sup>168</sup> Some state courts, by contrast, might be slower or less predictable, which weakens the argument for waiting.<sup>169</sup> Similarly, waiting in anticipation of legislative action would usually be hard to justify. The legislative process does not operate on a predictable schedule that allows one to anticipate if and when a change will occur.<sup>170</sup> Further, nonjudicial legal changes are typically nonretroactive,<sup>171</sup> so they would usually not affect pending cases anyway. Thus, context matters.

---

<sup>167</sup> See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (reiterating that "it is this Court's prerogative alone to overrule one of its precedents"); Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 977-92 (2000). To be sure, the Supreme Court might be wrong that a strict form of vertical stare decisis enhances its power. See Caminker, *supra* note 33, at 51-61 (discussing the impact of precedent versus predictive models on the power of the Supreme Court).

<sup>168</sup> See Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 213, 229 (2004) (documenting the regularity of the Court's timetable).

<sup>169</sup> A good illustration of the problem comes from *McGeshick v. Choucair*, 72 F.3d 62, 63 (7th Cir. 1995). The Seventh Circuit decided a case without waiting for the benefit of a pending state supreme court ruling because it appeared that the state court would act slowly. The state court eventually issued its decision two years after it had granted review. In the meantime, the Seventh Circuit had expeditiously decided the case but, as it turned out, guessed incorrectly about state law. See *id.*

Another factor that might diminish the argument for waiting for state court decisions is that federal courts might enjoy somewhat greater latitude to predict how state high courts will rule, as compared to the rigid rules for applying current Supreme Court law. See *supra* note 33 and accompanying text.

<sup>170</sup> See *United States v. Bonner*, No. 09-2352, 2010 WL 226351, at \*3 (3d Cir. Jan. 21 2010) ("It would be inappropriate for the Court to hold off on deciding a fully briefed appeal simply because of the chance that Congress *may* pass and the President *may* sign legislation at some unknown point in the future."); *Gabarczyk v. Bd. of Educ. of Poughkeepsie*, 738 F. Supp. 118, 121 (S.D.N.Y. 1990) (reaching a similar conclusion). But see *U.S. Nuclear Regulatory Comm'n v. Sholly*, 463 U.S. 1224, 1225 (1983) (Blackmun, J., dissenting) (noting that the Court had twice postponed oral argument while Congress considered relevant legislation); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 426-27 (6th Cir. 2008) (noting that the court held the case in abeyance "in anticipation of pending legislation"); *Ctr. for Sci. in the Pub. Interest v. Regan*, 802 F.2d 518, 520 (D.C. Cir. 1986) (similar).

<sup>171</sup> See *supra* Part I.A.1.

Even when we confine our attention to changes that the Supreme Court generates, fixed prescriptions seem unattractive. Consider a rule to the effect that cases must always (or never) be held in abeyance upon a grant of certiorari on a relevant issue. A fixed rule would promote equal treatment across courts and cases, and it would increase transparency. Yet even if we assume that the rule could be adequately specified (e.g., concerning how closely related the legal issues must be), this blanket rule would be far too crude. To begin with, the balance of the various considerations—burden of delay, availability of alternate mechanisms for correcting mistakes, etc.—might weigh differently in different categories of cases, such as civil versus criminal. If so, we would need different rules for different categories of cases. (And how many categories would be optimal?) Even beyond that consideration, noteworthy differences will pervade cases within the same category. Delay might be especially problematic in light of the equities of a given case. Further, the court of appeals has the best information about the various alternative grounds on which it might be able to decide the particular case before it. This advantage will sometimes allow the court to avoid resting its judgment on the legal ground that is about to shift, thereby rendering any forthcoming change in law irrelevant.<sup>172</sup> We want courts to have some discretion because we want to harness this sort of case-specific information. The byproduct of this valuable discretion, of course, is that it also allows room for judges to further their own objectives.<sup>173</sup>

In short, not only is there no real law of abeyances, but there probably should not be—at least if one means fixed rules. Nonetheless, this does not leave us with nothing better than an unhelpful admonition to courts to exercise good judgment. Even if we cannot prescribe firm rules or even looser standards, the analysis developed in this Article suggests another way: arrange institutional circumstances and incentives so as to bring about better decisions.

In particular, we might make some progress by noting that much of the problem here stems from the existence of a long gap between when the court of appeals disclaims responsibility for the case (usually treated as when the mandate issues—about three weeks after the court of appeals rules<sup>174</sup>) and when the case becomes final for purposes of taking advantage of new law (at least three months after the

---

<sup>172</sup> See, e.g., *United States v. Husein*, 478 F.3d 318, 340 (6th Cir. 2007); *United States v. Mellen*, 393 F.3d 175, 182 n.2 (D.C. Cir. 2004).

<sup>173</sup> See Steven Shavell, *Optimal Discretion in the Application of Rules*, 9 AM. L. & ECON. REV. 175, 175–76 (2007) (discussing this tradeoff).

<sup>174</sup> *Supra* note 36 and accompanying text (discussing timeline for issuance of the mandate).

court of appeals rules, often much later<sup>175</sup>). During this interval, cases can become wrong (and predictably so), yet fixing them is unduly complicated, and responsibility for doing so falls in large part on entities other than the one that caused the error. We could try to close this gap from either end. Working from one end, we could make finality attach earlier (such as at the moment the court of appeals issues its decision) so that cases would not thereafter become wrong due to intervening authority. Alternatively, we could lengthen the courts of appeals' responsibility so that it expands into this gap. Let us consider each approach in turn.

Making finality attach earlier holds some appeal, especially from the point of view of judicial economy. Declaring a case final once the court of appeals rules would eliminate the bulk of the Supreme Court's GVRs as well as proceedings under 28 U.S.C. § 2255 or motions under Rule 60 that are based on changes in law that occur during the period for filing for certiorari.<sup>176</sup> There would be no point to such proceedings because the new law would simply not apply to those cases. Further, this alteration of the finality date would not be wholly arbitrary. We believe that people have the right to an appeal<sup>177</sup> and that the court of appeals' job is (among other things) to get cases right. Not so with the Supreme Court: we do not think that litigants have a right to invoke its jurisdiction,<sup>178</sup> and we do not think its job is correcting errors and ensuring justice between the parties. From that point of view, it makes some sense to treat a case as final at the conclusion of the proceedings in the court of appeals rather than at the conclusion of the certiorari stage.

---

<sup>175</sup> See SUP. CT. R. 13.1 (setting ninety-day deadline for filing petition for certiorari). The Court can extend the time for filing by up to sixty days. *Id.* 13.5. The date of finality is delayed even further while the petition is pending.

<sup>176</sup> See *supra* note 155 (discussing use of these devices to obtain the benefit of new law).

<sup>177</sup> Whether there is a federal constitutional right to an appeal is beside the point here. *Cf.* *Abney v. United States*, 431 U.S. 651, 656–58 (1977) (reiterating that there is no federal constitutional right to an appeal). Such a right is recognized in statutes (e.g., 28 U.S.C. § 1291 (2006)) and, probably most importantly, in the presuppositions that make up our contemporary legal culture. See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 43–44 (1995) (reaffirming the federal judiciary's commitment to “the principle of allowing litigants at least one appeal as of right to an Article III forum”).

<sup>178</sup> To be sure, there remain vestiges of mandatory Supreme Court jurisdiction. See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 89–117, 146–47 (9th ed. 2007). Nonetheless, I believe that the statement in the text is an accurate description of how we think about the matter. See *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 176–77 (1996) (Rehnquist, C.J., concurring and dissenting) (“[W]e would do well to bear in mind the admonition of Chief Justice William Howard Taft . . . [Litigants] have had all they have a right to claim, Taft said, when they have had two courts in which to have adjudicated their controversy.” (quoting 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 997–98 (1939)) (internal quotation marks omitted)).

But this change would come at a cost in terms of equity between litigants. First, multiple petitioners for certiorari will often present similar issues to the Supreme Court at roughly the same time. We can assume that the Supreme Court would apply any new rule to the party in whose case the new rule is announced.<sup>179</sup> But what of the other petitioners? Today we regard their cases as still pending, so they are entitled to the benefit of new law through one procedure or another. Yet under the proposal to advance the finality date, these cases would have become final once the court of appeals decided them. Therefore, the new rule would not apply to them (though it would still apply retroactively to litigants whose cases have not yet reached judgment in the court of appeals<sup>180</sup>). Yet, it seems inequitable to pick one lucky petitioner from the group to obtain relief while denying it to the others who just as easily might have been chosen as the vehicle for establishing the new rule.<sup>181</sup> Second, the court of appeals has the power to control the date on which it decides cases. Therefore, if the finality cutoff date were set at the end of the proceedings in the court of appeals, the court of appeals could directly change which law applied to the case. (Under current practices, in contrast, timing decisions primarily affect which court implements the change and at what cost, though ultimate outcomes are also sometimes affected.) Put simply, when a change in law is in the offing, the choice to delay the case will mean that the new law will govern the case; similarly, acting now will deprive one of the litigants of the benefit of the potential change. Thus, the court of appeals could choose which law applies and, thereby, which party wins.<sup>182</sup> Of course, one might say that the court

---

<sup>179</sup> See *supra* note 166 and accompanying text.

<sup>180</sup> In other words, this hypothesized system is not one of selective prospectivity, according to which the new rule applies only prospectively except for the very case that announces it. Rather, retroactivity for nonfinal cases would remain the general rule, but the date of finality would be changed. As the main text will explain, however, both systems generate some of the same inequities.

<sup>181</sup> See *United States v. Johnson*, 457 U.S. 537, 555 n.16 (1982); *Desist v. United States*, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting); *id.* at 258–59 (Harlan, J., dissenting).

<sup>182</sup> This same potential problem exists under current arrangements, where the Supreme Court has the power to control the finality date for cases in which certiorari petitions are filed. By holding cases pending a plenary decision, the Supreme Court makes them eligible for application of new law. One can imagine an alternate universe in which the Court never held cases; this system would reduce the need for GVRs and other means of implementing new law. What would be quite worrisome is if the Court held cases in a haphazard way, extending the life of some but not others. See generally Revesz & Karlan, *supra* note 48, at 1118–28 (discussing the Court's practices concerning holds and particularly the value of securing equal treatment for similarly situated petitioners). This generally does not seem to happen today, but one aspect of the Court's practice that does hold the potential for that type of arbitrariness is the Supreme Court's power to grant rehearing after a denial of certiorari in order to issue a GVR, essentially resurrecting a case that had become final. See SUP. CT. R. 44.2. The potential for mischief is limited by the twenty-five-day deadline for seeking rehearing, *id.*, which the current Court administers firmly. See GRESSMAN ET AL., *supra* note 178, at 812–13. In the past, the Court would sometimes per-

of appeals always chooses who wins, but the difference is that here the power to choose is exercised not through application of the substantive law but through a discretionary and essentially nonpublic administrative choice. This prospect seems troubling.

The considerations just described present an important counterargument to proposals to ameliorate the problem of changed law by advancing the finality cutoff date. More generally, they show that a system that attaches great importance to a finality cutoff date is also one in which the often-invisible matter of deciding when to decide is also critically important—too important, perhaps, to be left in the realm of unguided discretion.

Fortunately, we can also approach the problem by working from the other direction, making the courts of appeals responsible for fixing decisions that quickly become wrong. Suppose the court of appeals issues a decision despite the pendency of a Supreme Court case, and the decision of the court of appeals soon becomes wrong and in need of fixing. The court of appeals should be in charge of doing so, without necessitating a trip somewhere else first. That reform by itself would reduce cost and complexity. It might also tend to discourage the issuance of decisions that soon turn out to be wrong. That is, *ex post* responsibility might heighten *ex ante* prudence. At the same time, and unlike any general rule requiring the court of appeals to hold all cases, this approach would *not* delay cases that the court of appeals could decide on alternate grounds that would withstand any change in law. The court of appeals is free to decide the case if it thinks its decision will hold up—but others will not suffer as much if it guesses wrong.

At the level of technical detail, this reform might be implemented in a few different ways, such as with amendments to the appellate rules governing the deadline for petitions for rehearing or, instead, through a greater willingness (or even a duty) on the part of the courts of appeals to use their existing power to recall the mandate when there has been a change of law within the period during which a case is still pending for purposes of new law.<sup>183</sup> Some enlightened courts have exercised their discretionary power to recall the mandate

---

mit petitions for rehearing long after the deadline. *See id.* at 808-12. *See generally* Aaron-Andrew P. Bruhl, *When Is Finality . . . Final? Rehearing and Resurrection in the Supreme Court*, 11 J. APP. PRAC. & PROCESS (forthcoming 2011) (describing this problem).

<sup>183</sup> I have discussed such a proposal in more technical detail elsewhere. *See* Bruhl, *supra* note 41, at 741-54. That work approached the problem primarily from the narrower perspective of reducing the Supreme Court's need to issue GVRs. Here our concern is the broader goal of improving courts' handling of decisions about when to decide, which happens to have the same consequence.

in the way I would recommend.<sup>184</sup> Other courts, unfortunately, have not fixed errors themselves, instead leaving the chore to the Supreme Court or the district courts.<sup>185</sup>

\* \* \*

Now, a critic might contend that my proposals would encourage too much delay. Just as I have emphasized that a court of appeals might not fully weigh the cost to others of rushing ahead, so too might the court undervalue the external inconvenience of delay. Delay burdens the litigants, financially and otherwise. Delay might leave the law unsettled, harming the district courts<sup>186</sup> and private parties who need guidance.

The concern about overincentivizing delay is sensible, but there are several good responses to it.

First, as to the concern about slighting the needs of district courts and other actors who require guidance, the need for guidance varies according to the circumstances. In the period following *Blakely*, guidance was immediately necessary because district courts sentence defendants every day. Perhaps giving them guidance quickly was more important than providing guidance that would ultimately hold up

---

<sup>184</sup> See, e.g., *United States v. Washington*, 171 F. App'x 908, 909 (2d Cir. 2006) (recalling the mandate in light of new developments that arose shortly after the court's initial decision); *United States v. Murray*, 2 F. App'x 398, 399–400 (6th Cir. 2001) (recalling the mandate based on a new Supreme Court decision issued approximately one month after the circuit court's prior ruling); *United States v. Skandier*, 125 F.3d 178, 182–83 (3d Cir. 1997) (similar); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1527–30 (9th Cir. 1989) (recalling the mandate and reconsidering the case based on new legislation that took effect before the Supreme Court denied certiorari); *United States v. Kismetoglu*, 476 F.2d 269, 270 (9th Cir. 1973) (recalling the mandate because of a Supreme Court decision issued forty-two days after the court of appeals ruling); *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427, 429–30 (2d Cir. 1970) (granting an untimely petition for rehearing in light of new precedent announced during the pendency of a petition for certiorari). The above cases should be distinguished from those in which a litigant attempts to recall the mandate after the case has become final, sometimes years after the final judgment. Recalling the mandate in such circumstances is problematic because it substantially interferes with finality and essentially circumvents restrictions on retroactivity. See *Carrington v. United States*, 470 F.3d 920 (9th Cir. 2006), *withdrawn and superseded*, 503 F.3d 888, 891–94 (9th Cir. 2007); *United States v. Saikaly*, 424 F.3d 514, 516–18 (6th Cir. 2005); cf. *supra* note 22 (describing limits on use of FED. R. CIV. P. 60(b)).

<sup>185</sup> See, e.g., *United States v. Fraser*, 407 F.3d 9, 10–11 (1st Cir. 2005) (refusing to recall the mandate in light of a Supreme Court decision issued approximately two months after the circuit court's prior ruling); *United States v. Padro Burgos*, 239 F.3d 72, 77 n.3 (1st Cir. 2001) (denying a request to file supplemental briefs concerning the impact of a newly decided case but suggesting that the defendant could seek collateral relief); *Richardson v. Reno*, 175 F.3d 898, 899 (11th Cir. 1999) (refusing to recall the mandate in light of a Supreme Court decision issued approximately two months after the circuit court's prior ruling).

<sup>186</sup> Delaying decision also deprives the Supreme Court of the benefit of any insights that the lower court's opinion may contain. As explained earlier, in these particular circumstances the marginal benefit of an additional lower court decision is likely to be trivial. See *supra* notes 143–44 and accompanying text.

(though one could question whether inconsistency is really worse than a substantial risk of uniform error). For most questions, however, the need for immediate guidance is less pressing. And even in those situations where guidance is urgently needed, the court of appeals may already weigh this need adequately. After all, one consequence of not providing the necessary guidance could be more work later sorting out appeals. In any event, as some circuits showed in the wake of *Blakely*, there are ways to provide guidance while avoiding managerial train wrecks. For example, the court of appeals could decide one case to serve as a precedent while holding others in abeyance, or it could decide cases but suspend their finality.

Second, we should not overstate the cost of delay to litigants. Although delay involves some pure losses (such as the burden of uncertainty), to some extent delay is a matter of distribution: one litigant's detriment is the other's benefit. That symmetry mitigates the net social loss from delay. True, it will be said that one party is legally *entitled* to its judgment, so that delay *unjustly* deprives one party and enriches the other. Justice delayed is justice denied, as the saying goes. However, we are here dealing with circumstances in which it is not clear exactly what justice and the law demand—the Supreme Court is planning to tell us in the next few months.

Third, the concern about overincentivizing delay may be based on an assumption that the courts of appeals themselves are not bothered (much) by delaying adjudication. True, the concrete administrative cost of putting a case on hold and periodically checking up on it is probably small. But we should remember that judges face bureaucratic incentives to clear their dockets rather than maintain long-pending cases.<sup>187</sup> The perceived weight of these costs no doubt varies according to the sensitivities and psychologies of individual judges.<sup>188</sup> Court culture also plays a role. Like other organizations, different courts may come to have different organizational cultures, with greater or lesser emphasis on processing cases and keeping the assem-

---

<sup>187</sup> The Administrative Office regularly issues statistics showing, *inter alia*, the number of pending cases and the average time to disposition in each circuit. See, e.g., JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 46 tbl.S-5, 84–87 tbl.B-1, 105 tbl.B-4 (2009), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/front/JudicialBusinesspdfversion.pdf>. Further, there are typically mechanisms within a court for tracking the age of pending cases and pressuring tardy judges. See RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 223 (2d prtg. 1996).

<sup>188</sup> Indeed, in informal conversations with judges, I have found that some care very little about how they fare on timeliness reports while others care a great deal about such things; the judges likewise report that they have observed such a variation in attitudes among their colleagues.

bly line moving.<sup>189</sup> But for no judge or court is delay costless. Thus, we should not expect to see courts routinely put cases on hold for long stretches based on weak evidence of a forthcoming change in law (such as the existence of a circuit split, dicta criticizing a precedent, etc.).

Fourth, we can deal with the problem of excessive delay in other ways. If the parties agree that delay is undesirable despite the possibility of a forthcoming change in law, then the court of appeals should not be responsible for fixing any mistake that the announcement of the new law later reveals. Courts should, in effect, treat the parties as having waived the application of new law by requesting a speedy decision.<sup>190</sup> Another approach would involve a sort of burden shifting: if neither party alerted the court of appeals to the possibility of a change in law, then that omission would act as a forfeiture of either party's right to later benefit from the change.<sup>191</sup> And legislatures might impose statutory timeliness requirements in particular types of cases.<sup>192</sup>

All in all, weighing both the pros and the cons, it seems to me that placing somewhat greater responsibility on the courts of appeals for implementing changes in law would better strike an appropriate balance of the relevant considerations than do our current arrangements.

### C. Other Applications

The insights developed above can shed light on some other problems in the law of legal change and appellate design more generally. Without purporting to give a comprehensive treatment, I will

---

<sup>189</sup> Cf. Rebecca Love Kourlis & Jordan M. Singer, *Managing Toward the Goals of Rule 1*, 4 FED. CTS L. REV. 1, 16–18 (2009) (finding that local legal and judicial culture explains much of the variation across trial courts in timeliness of ruling on motions and disposing of cases). See generally JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION AND JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* 14–19, 21–26, 170–74 (2002) (applying organizational culture frameworks to the study of appellate courts); BRIAN J. OSTROM ET AL., *TRIAL COURTS AS ORGANIZATIONS* 1–44 (2007) (similar, for trial courts).

<sup>190</sup> The Supreme Court should honor such a “waiver” by not GVR’ing in these circumstances. Cf. *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167–68 (1996) (suggesting that the Court could withhold a GVR in cases of manipulative litigation conduct). But see *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1226 n.7 (3d Cir. 1994) (noting that the parties asked the court *not* to hold the case in abeyance to await a pending Supreme Court decision), *vacated*, 514 U.S. 1034 (1995) (issuing GVR order anyway).

<sup>191</sup> Cf. *Bos. & Me. Corp. v. Town of Hampton*, 7 F.3d 281, 283 (1st Cir. 1993) (denying a motion to recall the mandate in light of a new state court ruling and noting, *inter alia*, that the movant could have sought a stay of the First Circuit proceedings pending the state decision). Again, this approach would work only if the Supreme Court stopped GVR’ing in such circumstances.

<sup>192</sup> See, e.g., *Charleston v. United States*, 444 F.2d 504, 506 (9th Cir. 1971) (stating that the case could not be held in abeyance because 28 U.S.C. § 1826 required the court to decide the appeal within thirty days).

briefly mention a few contexts that present interesting variations on the theme.

### 1. *Stays of Execution During Transitional Periods*

One particularly vexing context is the problem of stays of execution in death penalty cases. When the Supreme Court has granted certiorari on a particular issue, how should that grant affect pending capital cases involving the same issue? More particularly, does the grant of certiorari mean that the lower court should hold a pending case in abeyance and grant a stay of execution even though current circuit precedent forecloses the defendant's claims?

Despite the broad similarities between this specific problem and the more general issue of decisional timing during transitional periods, the death penalty context does of course differ in some important ways. One important threshold difference is that many requests for stays will arise in connection with habeas corpus proceedings rather than direct appeals.<sup>193</sup> The habeas context presents a number of formidable procedural obstacles to relief such that the Supreme Court's forthcoming ruling, even if superficially favorable, might not actually affect the outcome of the case at all.<sup>194</sup> These barriers significantly narrow the universe of cases for which stays would be appropriate. Another factor that distinguishes stays of execution from ordinary abeyance is that a stay is an affirmative order directed to state officials, which arguably demands additional justification beyond that required for discretionary, internal case-management decisions like abeyance. Against all this, the obvious consideration weighing in favor of granting stays is that errors cannot be "fixed" later should circuit law turn out to be wrong.

How do courts tend to handle requests for stays when the law might be on the verge of shifting in a relevant way? Given the risk of irreparable harm involved, one might suspect that courts would routinely grant stays of execution in light of the Supreme Court's grant of certiorari on a pertinent issue. Indeed, lower courts sometimes do just that.<sup>195</sup> But, perhaps surprisingly, many other times they do

---

<sup>193</sup> See Patrick E. Higginbotham, *Stays of Execution: A Search for Predictability and Rationality*, 20 TEX. TECH L. REV. vii, vii (1989).

<sup>194</sup> See *supra* notes 23–24, 155 (discussing the *Teague* nonretroactivity doctrine and even stricter nonretroactivity rule of 28 U.S.C. § 2254(d)); see also 28 U.S.C. § 2244(b) (2006) (restricting second or successive habeas petitions); *id.* § 2244(d) (statute of limitations); cf. *Timberlake v. State*, 859 N.E.2d 1209, 1213 (Ind. 2007) (granting a stay in light of a pending U.S. Supreme Court case and noting that the state court was not bound by § 2254(d) restrictions on relief that might have prevented a federal court from staying the execution).

<sup>195</sup> See, e.g., *Chambers v. Bowersox*, 197 F.3d 308, 309 (8th Cir. 1999). Many executions were stayed pending the Supreme Court's decision in *Baze v. Rees*, 553 U.S. 35, 41 (2008), which challenged a lethal injection protocol as unconstitutionally cruel and un-

not.<sup>196</sup> Some courts in major death-penalty regions are particularly firm about not granting stays—and not allowing district courts to grant stays—based on a grant of certiorari.<sup>197</sup> Thus, it certainly can happen, and indeed does happen, that condemned prisoners are denied stays and executed only to have the Supreme Court shortly thereafter reject the circuit law that denied relief.<sup>198</sup>

Although it is true enough that a grant of certiorari does not itself change the law,<sup>199</sup> the unwillingness of many courts to manage the timing of their decisions with an eye toward the potential for a forthcoming change of law is incongruous in light of how courts handle other cases. In other contexts, abeyance is certainly not automatic, but one does not find *per se* rules against it. True, actually blocking a scheduled execution (if only temporarily) does go beyond merely delaying resolution of a case. But it is curious that some courts apparently regard delaying an execution as an exceptional evil unlike all others.<sup>200</sup> This sentiment is especially puzzling in transitional periods, when the propriety of the judgment is in question.

To be clear, a lower court's denial of a stay does not necessarily mean the execution will occur and moot the case. The inmate could seek a stay from the Supreme Court, which could grant a stay, hold the inmate's case, and then dispose of the case appropriately once the

---

sual. See *Lethal Injection: Stays Granted*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/lethal-injection-stays-granted> (last visited Oct. 14, 2010).

<sup>196</sup> See, e.g., *Kelly v. Quarterman*, 296 F. App'x 381, 382 (5th Cir. 2008); *Rutherford v. Crosby*, 438 F.3d 1087, 1089, 1095 (11th Cir. 2006), *vacated sub nom.* *Rutherford v. McDonough*, 547 U.S. 1204 (2006); *In re Williams*, 359 F.3d 811, 813–14 (6th Cir. 2004); *Hines v. Johnson*, 83 F. App'x 592, 592–93 (5th Cir. 2003); see also *Higginbotham*, *supra* note 193, at xii–xviii (citing older cases). To be sure, in some such cases the courts could justify denial of a stay on grounds independent of the issue on which the Supreme Court had granted certiorari, such that the Supreme Court's grant of certiorari would be irrelevant to the ultimate disposition of the case. But that is not the basis on which all of these cases proceeded; the courts regard the existence of circuit law foreclosing the claim as a sufficient basis for denying the stay.

<sup>197</sup> See *Schwab v. Sec'y, Dep't of Corr.*, 507 F.3d 1297, 1298 (11th Cir. 2007) (*per curiam*) (“The district court’s action in granting the stay [of execution] is contrary to the unequivocal law of this circuit that, because grants of certiorari do not themselves change the law, they must not be used by courts of this circuit as a basis for granting a stay of execution that would otherwise be denied.”); *Berry v. Epps*, 506 F.3d 402, 405 (5th Cir. 2007).

<sup>198</sup> For instance, in *Harbison v. Bell*, 129 S. Ct. 1481, 1491 (2009), the Supreme Court rejected the view of the law that had supported the Fifth Circuit’s denial of a stay in several cases, including *Kelly*, 296 F. App'x at 382. Likewise, the Supreme Court in *Nelson v. Campbell*, 541 U.S. 637, 642–43 (2004), rejected the Sixth Circuit precedent that supported the denial of a stay in *Williams*, 359 F.3d at 813–14. To be sure, the condemned prisoners in such cases might not have ultimately avoided execution even under the new law, but we will never know for certain.

<sup>199</sup> See *Schwab*, 507 F.3d at 1298.

<sup>200</sup> Cf. Anthony G. Amsterdam, *In Favorem Mortis: The Supreme Court and Capital Punishment*, 14 HUM. RTS. 14, 51–52 (1987) (opining that the Supreme Court perversely believes delay is especially bad in capital cases).

Court issues the pending plenary decision. One gets the sense that the lower courts that routinely deny stays feel able to do so in part because the Supreme Court is there as a backstop. Indeed, one detects in some lower courts the feeling that, even if a case evidently warrants a stay, it is not their job to grant it.<sup>201</sup> Now, it is true that the Supreme Court has the best information about the likely scope of its forthcoming decision, and the Court is also well positioned to secure uniform handling of pending cases across the country. Those considerations, one might think, weigh in favor of centralizing the job of granting stays in the Supreme Court. But all of the stated advantages apply whether cases come to the Court as motions by the state to vacate a lower court's stay or instead as a capital petitioner's emergency plea to delay the execution. Both procedural postures involve high-stakes, time-pressured litigation that one would like to avoid for the sake of all concerned, but the latter posture is the more precarious. And nothing guarantees that the Court will grant a stay, even in cases in which a stay would appear proper.<sup>202</sup>

When one considers the equities involved and the unattractiveness of turning every emergency stay into a Supreme Court matter, it seems the better approach is a rule to the effect that lower courts should stay executions when a relevant change in law is in the offing, as particularly exemplified by the Supreme Court's grant of certiorari. I say *relevant* because, as with abeyances more generally, there is no reason to delay when the forthcoming decision will not affect the present case, such as when there is an independently dispositive defect in the condemned prisoner's claim or a procedural barrier to obtaining the benefit of the forthcoming ruling. Lower courts will not always be correct in these decisions—sometimes they will grant stays that are quickly vacated, other times they will fail to grant stays that a superior court quickly grants. But at least the lower courts will then be asking the right question rather than simply passing the buck.

---

<sup>201</sup> See, e.g., *Schwab*, 507 F.3d at 1301; *Bowden v. Kemp*, 774 F.2d 1494, 1494 (11th Cir. 1985).

<sup>202</sup> See, e.g., *Watson v. Butler*, 483 U.S. 1037, 1038 (1987) (Brennan, J., dissenting) (noting that four Justices voted to hold the case pending a forthcoming plenary decision but that five votes were necessary to grant a stay); see also *Streetman v. Lynaugh*, 484 U.S. 992, 995 (1988) (similar circumstances). The Court has at times followed a custom according to which a fifth Justice will vote to issue a stay of execution when four have voted to grant certiorari, but that custom of preserving jurisdiction does not apply when four Justices (or three, which Brennan said in *Watson* is the required number) merely vote to *hold* a case. See *Straight v. Wainwright*, 476 U.S. 1132, 1133 n.2 (1986) (Powell, J., concurring).

2. *Judicial Federalism: Abeyance, Abstention, and Certification to State Courts*

The problem of deciding when to decide takes on another dimension when we consider the fact that the United States has a dual judicial system featuring both federal and state courts. This structure requires a variety of doctrines and mechanisms to harmonize the actions of the two systems. As should be obvious by this point, one potential mechanism is abeyance, and indeed federal courts sometimes hold their rulings in abeyance pending a forthcoming state decision on a relevant question.<sup>203</sup> Here we briefly compare abeyance to other coordinating devices.

A more broadly applicable coordinating mechanism is abstention, under which a federal court declines to exercise its jurisdiction out of deference to a state court's right to adjudicate the matter.<sup>204</sup> Abstention takes a number of varied forms, and most abstention cases do not involve an imminent change in state law. But some abstention cases do, and to that extent a federal court's decision to hold a case in abeyance pending a forthcoming state court decision might be considered a special form of abstention.<sup>205</sup> Indeed, it is an especially defensible form of abstention. Holding a case in abeyance pending a forthcoming change in state law is more attractive than ordinary abstention in terms of delay because here a state court decision (involving other parties) is already in the works. This distinguishes abeyance from some other abstention scenarios, which can require the litigants to undertake years of additional litigation.<sup>206</sup> Further, a decision to temporarily defer adjudication is not as susceptible as the usual abstention scenario to the argument that federal courts have a duty to

---

<sup>203</sup> See, e.g., *Intex Plastics Sales Co. v. United Nat'l Ins. Co.*, 23 F.3d 254, 256 (9th Cir. 1994); *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 850–51 (2d Cir. 1992). Given its current docket composition and certiorari practices, there are few instances in which the Supreme Court has reason to delay adjudication pending a state decision—but even it has done so before. See, e.g., *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 163 n.3 (1932). Inferior state courts might also decide to delay adjudication in light of forthcoming decisions from superior state courts. See, e.g., *People v. Crotty*, 914 N.E.2d 1269, 1272 n.1 (Ill. App. Ct. 2009); *G & J Pepsi-Cola Bottlers, Inc. v. Fletcher*, 229 S.W.3d 915, 916 (Ky. Ct. App. 2007). As explained earlier, there may be factors that make abeyance in light of forthcoming state court decisions less common and less desirable than waiting for U.S. Supreme Court decisions, notably the risk of excessive delay. *Supra* note 169 and accompanying text.

<sup>204</sup> See generally 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4241 (3d ed. 2007) (describing various abstention doctrines).

<sup>205</sup> For cases that present themselves as abstention cases but also display aspects of abeyance because related questions were already pending before state high courts, see *Rivera-Feliciano v. Acevedo-Vilá*, 438 F.3d 50, 61–62 (1st Cir. 2006); and *Smelt v. Cnty. of Orange*, 447 F.3d 673, 681 (9th Cir. 2006).

<sup>206</sup> See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75–79 (1997) (discussing disadvantages of abstention, including delay).

exercise their jurisdiction and cannot remit parties to state court merely because state law is difficult or unsettled.<sup>207</sup>

Yet another method of intersystem coordination is certification, the procedure by which a federal court can directly ask a state court to answer a difficult and crucial question of state law currently pending before the federal court.<sup>208</sup> Abeyance and certification have a basic structural similarity. In both cases, the federal court must choose between delaying the proceedings in order to obtain more information about the content of state law or deciding now according to its current best understanding. If the court chooses the latter course, its understanding might later be proven wrong. Depending on the lapse of time and other procedural details, the court might correct that wrong decision through more or less costly procedural maneuvers. Both devices require the court to weigh considerations such as accuracy, timeliness, and error cost.

The great difference between abeyance and certification is that the potential for abeyance arises when a new development is *already* imminent through separate litigation; with certification, in contrast, the federal court itself *generates* the potential for a new development. For this reason, abeyance does not suffer from some of certification's drawbacks. Abeyance does not impose more work on the state court, as certification arguably does. Further, although some commentators have cogently criticized certification as representing a misguided quest for an eternally valid "'right' answer,"<sup>209</sup> that criticism is less powerful regarding abeyance, if simply because a wrong decision stings worse when it becomes wrong so quickly and predictably, as may happen when the pertinent question is already pending before the state court. Because such errors seem worse, courts are probably more likely to try to reform newborn errors than aged ones.<sup>210</sup> If

---

<sup>207</sup> See *Meredith v. Winter Haven*, 320 U.S. 228, 234–37 (1943); see also Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1729–48 (2003) (discussing whether and how certification and abstention can be reconciled with *Meredith*); cf. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730–31 (1996) (holding dismissal of damages action on abstention grounds improper but suggesting that a stay might have been proper in light of pending state litigation).

<sup>208</sup> See generally 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4248 (3d ed. 2007) (describing certification procedure).

<sup>209</sup> See Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 690 (1995).

<sup>210</sup> Compare *Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 88–91 (2d Cir. 1996) (recalling the mandate where the court of appeals had failed to hold the case in abeyance pending a state decision, proceeded to decide the case according to its best understanding of state law, and was proven wrong shortly thereafter), with *DeWeerth v. Baldinger*, 38 F.3d 1266, 1269, 1273–74 (2d Cir. 1994) (leaving a prior decision in place where the federal court failed to certify a question to the state court and was proven wrong years later). Cf. *Lords Landing Vill. Condo. Council v. Cont'l Ins. Co.*, 520 U.S. 893, 897 (1997) (GVR'ing in light of change in state law).

courts are going to want to fix such errors after the fact and at some cost to the system, then they should avert the errors by holding cases in abeyance in the first place. Thus, whatever the merits of certification, abeyance is better—though of course the latter is relevant only in situations where there is already the potential for a near-term alteration or clarification of state law. To the extent that abeyance can be considered a special case of abstention, this is one of the rare instances when abstention is better than certification.

### 3. *The Transition from the District Court to the Court of Appeals*

This Article has focused on the transition from the court of appeals to the Supreme Court. Now we turn briefly to the handoff from the district court to the court of appeals. The general problem here is essentially the same, although differences in institutional contexts might dictate different prescriptions.<sup>211</sup> Here I merely describe the mechanisms that are currently in place and flag some issues.

As to the timing of the handoff, the filing of a notice of appeal ordinarily divests the district court of jurisdiction, at least as to matters within the scope of the order from which the appeal is taken.<sup>212</sup> Thus, generally speaking, the district court typically can and should handle changes in law that occur before that event.<sup>213</sup> Changes in law that occur after the initiation of the appeal are the responsibility of the court of appeals.

Of course, some complexities lie behind that simple allocation of authority. Recall that, when it comes to the handoff from the court of appeals to the Supreme Court, part of the difficulty stems from the gap between the date when courts of appeals often act as if a case leaves their hands (usually the date when the mandate issues) and the expiration of the period for filing a petition for certiorari. During that period of procedural limbo, a case is eligible for the application of new law, yet the route for obtaining that result is unduly circuitous. Until very recently, a somewhat similar procedural “no man’s land”

---

<sup>211</sup> One obvious difference is that the courts of appeals, unlike the Supreme Court, are generally required to accept appeals. *Supra* notes 177–78 and accompanying text. But here, this usually important difference is less pronounced because the Court tends to act as if it has a duty to manage transitions by holding petitions and issuing GVRs rather than simply denying all petitions besides the one granted plenary review.

<sup>212</sup> See *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (“The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”). See generally 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3949.1 (4th ed. 2008) (discussing the rule and various elaborations and exceptions, especially those regarding postjudgment motions).

<sup>213</sup> See, e.g., *Marable v. Nitchman*, 511 F.3d 924, 930 n.11 (9th Cir. 2007); *D.C. Fed’n of Civic Ass’ns v. Volpe*, 520 F.2d 451, 453 (D.C. Cir. 1975); *Max M. v. Thompson*, 585 F. Supp. 317, 324 (N.D. Ill. 1984).

existed during the transition from the district court to the court of appeals. The primary tool for fixing legal error in the district court's judgment is a motion under Rule 59 of the Federal Rules of Civil Procedure; before December 2009, that motion had to be filed within ten days of the judgment.<sup>214</sup> However, the period for filing a notice of appeal in civil cases is ordinarily thirty days.<sup>215</sup> What if a change in law occurred during that gap? One promising alternative was the Rule 60(b) motion for relief from judgment, which did not have such a restrictive deadline.<sup>216</sup> Fortunately, many courts properly recognized that it makes much sense to use Rule 60(b) to allow the district court to update its judgment in light of new law that is announced during this gap.<sup>217</sup> To the extent that some courts might not have permitted Rule 60(b) to be used to revise a judgment in light of changed law before the time for appeal had lapsed,<sup>218</sup> that view was undesirable.

The December 2009 amendments to the Federal Rules of Civil Procedure largely solved these problems. The period for filing various postjudgment motions, including those under Rule 59, has been lengthened to twenty-eight days. The stated rationale for this change was that experience had shown that ten days is frequently too little time to prepare an adequate motion.<sup>219</sup> An added benefit of the extension is that the procedural limbo period has been largely eliminated. Further, the new amendments provide that the filing of a postjudgment motion within the twenty-eight day period—whether under Rule 59 or Rule 60—delays the deadline for filing a notice of appeal.<sup>220</sup> This change is desirable inasmuch as it aids coordination between the district court and the court of appeals. Under prior practice, a Rule 60(b) motion filed in the twenty-day no man's land did

---

<sup>214</sup> See FED. R. CIV. P. 59 (2008) (amended 2009); see also FED. R. CIV. P. 50 (2008) (amended 2009) (setting a ten-day deadline for motion for judgment as a matter of law).

<sup>215</sup> FED. R. APP. P. 4(a)(1).

<sup>216</sup> Depending on the grounds of the motion, the period for filing is either one year or "within a reasonable time." FED. R. CIV. P. 60(c).

<sup>217</sup> See, e.g., *D.C. Fed'n of Civic Ass'ns*, 520 F.2d at 453 (D.C. Cir. 1975); *Schildhaus v. Moe*, 335 F.2d 529, 531 (2d Cir. 1964). Some courts appear to go further: any legal error—not just those that stem from intervening developments—may be corrected via Rule 60(b) if the motion is filed within the period for filing the notice of appeal. See generally 12 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE—CIVIL* § 60.41[4] (3d ed. 2010) (describing the circuits' varying approaches). That more generous view might be correct as well, although it is a closer call because allowing Rule 60(b) to be used to correct preexisting errors would (at least under pre-December 2009 rules) undermine the deadline in Rule 59.

<sup>218</sup> Some courts, such as the First Circuit, take a firm stand against allowing Rule 60(b) to be used to correct errors of law. See *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 189 (1st Cir. 2004). It is possible that such courts would take a more accommodating view in the special circumstance of an error caused by an intervening change in law.

<sup>219</sup> See FED. R. CIV. P. 59 advisory committee note.

<sup>220</sup> See FED. R. APP. P. 4(a)(4).

not stop the clock for filing the notice of appeal,<sup>221</sup> substantially reducing Rule 60(b)'s efficacy in dealing with postjudgment changes in law even in the majority of courts that authorized its use for that purpose.

Once either party files a notice of appeal and authority shifts to the court of appeals, the appellate body might deal with a change in law in a variety of ways. The court of appeals can itself apply the new law in the first instance, particularly if no further facts need to be developed. Alternatively, if the court of appeals wants the district court to apply the new law in the first instance, it could vacate and remand for reconsideration—a version of the Supreme Court's GVR.<sup>222</sup> The December 2009 amendments formalize another route to essentially the same outcome: the "indicative ruling." Under this procedure, a litigant can present a Rule 60(b) motion to the district court during the pendency of the appeal, and if the district court indicates an inclination to grant it, then the litigant can seek a limited remand from the court of appeals to restore the district court's authority to rule.<sup>223</sup> There are, in short, several methods for coordinating between the court of appeals and the district court.

Although the courts and litigants have adequate procedural mechanisms at their disposal, that does not ensure optimal outcomes. Like the courts of appeals, district courts have a great deal of discretionary control over the management of their dockets.<sup>224</sup> Indeed, district courts probably enjoy more room to maneuver because the path of district court decision making is even less structured. There is no guarantee that district courts will wait when they should wait and proceed when they should proceed. (As with the courts of appeals, it seems unlikely that an across-the-board requirement one direction or the other would be appropriate.) Likewise, despite the numerous tools at the appellate court's disposal, it might use the tools poorly, for instance by remanding to the district court when it should have applied new law itself or vice versa.<sup>225</sup> My tentative sense is that this tran-

---

<sup>221</sup> See FED. R. APP. P. 4(a)(4)(A)(vi) (2008) (amended 2009). The clock was stopped only for motions filed within ten days of the judgment.

<sup>222</sup> See, e.g., *Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21, 34, 36 (1st Cir. 1997); *Vicknair v. Formosa Plastics Corp., La.*, 98 F.3d 837, 839 (5th Cir. 1996).

<sup>223</sup> See FED. R. APP. P. 12.1; FED. R. CIV. P. 62.1. Many courts allowed such maneuvers even before the new rules. See 16A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3949.1 (4th ed. 2008) (discussing prior "indicative-ruling" practices); see also Catherine T. Struve, *Power, Protocol, and Practicality: Communications from the District Court During an Appeal*, 84 NOTRE DAME L. REV. 2053, 2096–2101 (2009) (discussing indicative-ruling procedure and other modes of communication between the district court and court of appeals).

<sup>224</sup> See FED. R. CIV. P. 16(b); *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936).

<sup>225</sup> Cf. *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 909 (4th Cir. 1999) (en banc) (Motz, J., dissenting) (arguing that the majority's decision to remand rather than hold the claim in abeyance "wastes time and scarce judicial resources" and

sition is typically handled better than the transition from the court of appeals to the Supreme Court, but I leave for the future an assessment of what the courts are doing and should be doing in this context.

#### CONCLUSION

There is nothing new about legal change, but there might be new ways to deal with it. The first step is to understand the way various doctrines and arrangements associated with legal change work together as a system. When we do so, we see that certain features of our system make the timing of lower court decisions during transitional periods especially important. But unlike other aspects of our law of legal change, these matters of timing have not attracted much scrutiny. When we do scrutinize them, we find that some practices in this area appear sound. In other areas, however, the prevailing practices appear deficient, at least as implemented by some courts. Although case-management decisions are highly context specific—which makes it difficult and perhaps undesirable to formulate general rules—we might be able to improve courts' handling of such matters by designing the system with greater sensitivity to institutional contexts and judicial incentives.

---

“creat[es] unnecessary extra work for the district court”), *aff'd sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000).