LEGAL INNOCENCE AND FEDERAL HABEAS

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Although it has long been thought that innocence should matter in federal habeas corpus proceedings, innocence scholarship has focused almost exclusively on claims of factual innocence—the kind of innocence that occurs when new evidence reveals that the defendant did not commit the offense for which he was convicted. The literature has largely overlooked cases where a defendant was convicted or sentenced under a statute that is unconstitutional, or a statute that does not apply to the defendant. The Supreme Court, however, has recently begun to recognize these cases as kinds of innocence and it has grounded its concern for them in innocence-related considerations. This Article highlights how the doctrine has started to treat these "legal innocence" cases as cases in which defendants are innocent, as well as the reasons why it has done so. As this Article explains, legal innocence is conceptually and inextricably linked with factual innocence; in both kinds of cases, the defendant was convicted or sentenced under a law she did not violate. These cases raise similar concerns and implicate many of the same features of our criminal law system. By recognizing the emerging category of legal innocence as a kind of innocence, this Article maps out how the existing federal habeas system can provide relief to legally innocent defendants.

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INTRODUCTION

It has long been thought that innocence should matter in federal habeas corpus. Ever since an influential article by Judge Henry Friendly proposed that federal habeas courts should review all colorable claims of innocence,[1] scholars and courts have continued to press for innocence to

[1] See Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160–64 (1970).

matter in federal habeas.[2] And the Supreme Court has repeatedly drawn on innocence-oriented accounts of habeas to exempt innocent defendants from a variety of the procedural barriers that habeas petitioners face.[3]

But courts and scholars have embraced different kinds of innocence in their proposals to make federal habeas more attentive to innocence. Scholarship has primarily focused on claims of *factual* innocence which occurs when new evidence reveals that the defendant did not commit the offense he was convicted of (the offense of conviction).[4] Doctrine, however, has become increasingly attentive to claims of *legal* innocence, which arise when no valid criminal statute prohibited the defendant's conduct or supplied the basis for the defendant's sentence.[5] What is striking about the disconnect between the scholarship and the

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[2] Brandon L. Garrett, Claiming Innocence, 92 Minn. L. Rev. 1629, 1630–37 (2008); Stephanie Roberts Hartung, Habeas Corpus for the Innocent, 19 U. Pa. J.L. & Soc. Change 1, 3, 35–39 (2016); Joseph L. Hoffmann, Innocence and Federal Habeas after the AEDPA: Time for the Supreme Court to Act, 24 Fed. Sent'g Rep. 300, 304 (2012); Jordan M. Steiker, Innocence and Federal Habeas, 41 UCLA L. Rev. 303, 384 (1993); Carol S. Steiker & Jordan M. Steiker, The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy, 95 J. Crim. L. & Criminology 587, 609–17 (2005).

[3] See David M. Dorsen, Henry Friendly: Greatest Judge of His Era 219 (2012) ("As if in answer to Judge Friendly's original query . . . the Court shift[ed] the pith of the habeas inquiry from procedural demands for fairness to substantive claims of innocence."(alteration in original)(citation omitted)); Jake Sussman, Note, Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations, 27 N.Y.U. Rev. L. & Soc. Change 343, 378 (2001) ("Innocence is now unquestionably relevant to federal habeas corpus review."); see also, e.g., McQuiggin v. Perkins, 569 U.S. 383, 386–87 (2013) (actual innocence exception to statute of limitations); Murray v. Carrier, 477 U.S. 478, 495–96 (1986) (actual innocence exception to procedural default). {Master: spacing}

[4] See, e.g., Nancy J. King & Joseph L. Hoffmann, Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ 91 (2011) [hereinafter King & Hoffman, Habeas for the Twenty-First Century]; Hoffmann, supra note 2, at 304 ("clear and convincing new evidence" (citation omitted)); Emily Hughes, Innocence Unmodified, 89 N.C. L. Rev. 1083, 1084–85 (2011) (noting scholarship has "focus[ed] attention on people who were not involved in the crime for which they were convicted"); John C. Jeffries, Jr. & William J. Stuntz, Ineffective Assistance and Procedural Default in Federal Habeas Corpus, 57 U. Chi. L. Rev. 679, 691 (1990) (arguing for "factual innocence" to matter in federal habeas); Steiker, supra note 2, at 386 (1993) ("colorable showing of factual innocence").

[5] See, e.g., Montgomery v. Louisiana, 136 S. Ct. 718, 731 (2016) (holding that a petitioner can argue in federal habeas that he could not constitutionally be subject to a non-capital sentence and invoking Friendly, supra note 1, at 151); Welch v. United States, 136 S. Ct. 1257, 1261, 1265 (2016) (explaining why considerations of innocence matter when a defendant is sentenced under a statute that does not apply to him); Bousley v. United States, 523 U.S. 614, 616, 620–21 (1998) (equating petitioner who may have been convicted of conduct the law did not make criminal with an "innocent" defendant).

doctrine in this area is that the two kinds of innocence are conceptually similar and overlap in important ways—in both cases, the defendant is "innocent" because she did not commit an act the law makes criminal. In factual innocence cases, that is because a factfinder erred in determining what the defendant did; in legal innocence cases, it is because there was an error as to what the criminal law did, or could, prohibit. Although the result in both cases is the same, the scholarly calls to make federal habeas more amenable to claims of innocence have primarily focused on cases of factual innocence.[6]

This Article highlights how the doctrine has started to treat certain categories of legal innocence as instances where a defendant is innocent of a crime, as well as the conceptual overlap between legal and factual innocence. The Court has recently approached some cases of legal innocence in the same way it would approach cases of factual innocence. That is, the Court treats the "innocence" designation as if it includes both factually and legally innocent defendants, including cases in which a defendant was convicted or sentenced under a statute that either did not apply to him, or a statute that was unconstitutional. The doctrine's reception to legal innocence is noteworthy because it runs against the general trend of judges narrowing the scope of federal habeas review. Beyond merely noting rhetorical signals in the doctrine, this Article also defends the doctrine's broader conception of innocence that encompasses both factual innocence and legal innocence. Treating some kinds of legal innocence as cases in which the defendant is innocent makes sense given that the two kinds of innocence lie along a continuum of the relevant substantive goals of criminal law and punishment, as well as the structure of our criminal law system.

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[6] This Article differs from other scholars' proposals to expand the kinds of innocence that might matter in federal habeas. Some have argued that because criminal procedure rights like the Fourth, Fifth, and Sixth Amendments also protect the guilty, a defendant may be legally innocent, and thus actually innocent, if his conviction was obtained in violation of a criminal procedure right. See, e.g., Hughes, supra note 4, at 1090 (describing as "actually innocent" people who "have strong constitutional claims that warrant the reversal of their . . . convictions"). Others argue that a defendant should be considered innocent if he makes a lesser showing of factual innocence than is required under current doctrine. See, e.g., Keith A. Findley, Defining Innocence, 74 Alb. L. Rev. 1157, 1157–62 (2011) (innocence should not demand certainty). This Article does not wade into what burden of proof might be required to establish innocence, or address whether innocence claims should be available to those who can be retried or resentenced under the same statute they were convicted or sentenced under in the initial proceeding.

Legal innocence cases also represent rare, and welcome, judicial regard for the importance of noncapital penalties in criminal procedure and law. Criminal procedure doctrine has, thus far, avoided meaningful judicial scrutiny of the severity of noncapital criminal sentences.[7] But recent legal innocence cases have recognized the importance of sentencing distinctions and graduated penalties by proclaiming that defendants may be innocent of their sentence, including term-of-year sentences that were mistakenly imposed on them.[8] Reinforcing the claim that a defendant may be innocent of a noncapital sentence might provide some basis for a more robust review of noncapital sentences in the future.

Revealing how and why the doctrine treats some kinds of legal innocence as actual innocence accomplishes several things. First, it provides a roadmap for legally innocent defendants to overcome several of the restrictions on federal habeas review. While existing doctrine allows innocent defendants to bypass many procedural barriers to federal habeas review, the doctrine also proclaims, at times, that these bypasses are only available to defendants who are actually (factually) innocent. The Court's recent cases, however, have treated some kinds of legal innocence as actual innocence, underscoring that actual innocence, properly understood, encompasses both factual and legal innocence. Moreover, the procedural contexts in which the Court has treated legal innocence as a species of actual innocence protect similar concerns and interests as the procedural areas of habeas in which the Court has not yet taken this approach. The doctrine has therefore already suggested that the interest in affording federal habeas relief to legally innocent defendants outweighs the relevant interests furthered by other procedural restrictions on federal habeas. Furthermore, understanding legal innocence as a species of actual innocence allows legally innocent defendants to avail themselves of the existing exceptions to procedural restrictions for cases of innocence. This approach also makes the current federal post-conviction system fairer even without a legislative fix.

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[7] See, e.g., Rachel E. Barkow, The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity, 107 Mich. L. Rev. 1145, 1146 (2009) ("The Court will scrutinize whether the death sentence is proportionate to the crime and the defendant . . . . In noncapital cases, in contrast, the Court has done virtually nothing to ensure that the sentence is appropriate.").

[8] See supra note 5.

Second, the category of legal innocence does not necessarily implicate many of the criticisms of the current federal habeas system and the concerns with litigating factual innocence claims in federal habeas. Many of the proposals to make federal habeas about innocence originated as ways to limit the ability of defendants to relitigate Fourth, Fifth, and Sixth Amendments claims after a trial and an appeal. If successful, these claims would allow defendants to obtain new trials to redetermine their guilt.[9] Legal innocence claims are different. Successful legal innocence claims would not result in a retrial either because the statute under which the defendant was convicted did not prohibit his conduct, or because the statute under which the defendant was convicted is unconstitutional. The defendant also could not be retried under a subsequently enacted, constitutional statute because the constitutional protection against ex post facto laws would bar the government from prosecuting the defendant under that statute. The same would be true if the defendant was legally innocent of his sentence and received a sentence that exceeded the lawful statutory maximum—any subsequent resentencing proceeding would not merely redo the original proceeding, either because the statute under which the defendant was sentenced does not apply to him, or because it is invalid. Moreover, litigating legal innocence claims can be less burdensome than litigating factual innocence claims. Legal innocence claims involve challenges to the validity of the statute under which the defendant was convicted or sentenced, not efforts to redetermine prior facts. While some legal innocence challenges may generate assessments as to whether the defendant's conduct, as established at trial or admitted to in a plea agreement, was prohibited or penalized by a criminal statute, those cases do not necessarily require redetermining the facts or collecting new

[9] See, e.g., Friendly, supra note 1, at 155–56 (explaining that "[t]he dimensions of the problem of collateral attack today are a consequence of . . . the Supreme Court's imposition of the rules of the fourth, fifth, [and] sixth . . . amendments . . . concerning unreasonable searches and seizures, double jeopardy, speedy trial, compulsory self-incrimination, jury trial in criminal cases, confrontation of adverse witnesses, [and] assistance of counsel . . . upon state criminal trials"); Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 517 (1963) (explaining difficult "retrial[s]" that might result from successful habeas petition). The Court has likewise raised concerns with relitigating a defendant's guilt on retrial. See, e.g., Herrera v. Collins, 506 U.S. 390, 403, 417 (1993) (worrying that "the passage of time only diminishes the reliability of criminal adjudications," and about "the enormous burden that having to retry cases based on often stale evidence would place on the States").

evidence, nor do they involve other burdens associated with litigating factual innocence claims.

Third, conceptualizing legal innocence claims as claims of innocence reveals some of the flaws in the existing critiques that push back on the idea that federal habeas should be more attentive to claims of innocence. Not all claims of innocence, including claims of factual innocence, will require relitigation, and not all claims of innocence will undermine criminal law's force. Finally, this Article also shows how current understandings of innocence may be flawed: factual and legal innocence lie on a continuum that does not lend itself to firm separation.

This Article argues that in light of the conceptual similarities between legal innocence and factual innocence, as well as the distinctions between legal innocence claims and the claims on which existing habeas law is premised, habeas relief can and should be made available to legally innocent defendants. Part I outlines the scholarly and judicial tradition of innocence in habeas law, which recognizes that innocence can function either as a gateway that allows a defendant to bypass procedural obstacles or as a freestanding claim that warrants habeas relief.[10] Part II defends the doctrine's suggestion that legal innocence cases are properly treated similarly to factual innocence cases in light of the purposes of substantive criminal law, the structure of our lawmaking system, and the policies that purportedly animate federal habeas doctrine. It also argues that the restrictions on federal habeas, and even the concerns with litigating factual innocence claims, do not apply with equal force to legal innocence claims. Part III outlines how current law can make federal habeas available to legally innocent defendants.

I. THE GRAVITATIONAL PULL OF INNOCENCE

Courts and scholars have long been drawn to conceptions of federal habeas that prioritize innocence. Even after Congress restructured federal habeas with the Antiterrorism and Effective Death Penalty Act ("AEDPA"),[11] much of the law of federal habeas remains related to

[10] "Gateway" and "freestanding" are the terms typically used to describe the two different functions. Innocence serves as a "gateway" when it allows defendants to bypass procedural restrictions. Innocence serves as a "freestanding" claim when it warrants issuance of a writ of habeas corpus. See, e.g., Lee Kovarsky, Death Ineligibility and Habeas Corpus, 95 Cornell L. Rev. 329, 332 (2010).

[11] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

innocence. But what is innocence? When scholars have called for innocence to matter in federal habeas, they have focused primarily on factual innocence, at least outside the context of capital cases. But these cases are not limited to factual innocence, and the courts have suggested in recent years that legal innocence also matters to federal habeas.

A. Innocence Reform

Some of the scholarly calls for innocence-oriented accounts of federal habeas originated in response to *Brown v. Allen*.[12] *Brown* announced that prisoners convicted in state court could relitigate their federal constitutional claims in federal habeas proceedings.[13] The decision drew sharp dissents,[14] including one from Justice Jackson that bemoaned how petitions for habeas corpus—all of the 3,702 petitions filed in the seven years before *Brown*—would inundate the federal courts and prejudice meritorious petitions.[15] Scholars raised additional criticisms of *Brown*'s model of relitigation. Professor Paul Bator offered one of the most prominent critiques, in which he argued that collateral attacks on criminal judgments undermine criminal law's deterrent and rehabilitative purposes;[16] lead to unreliable factual and legal determinations because federal habeas occurs so long after the relevant events (and any subsequent trial ordered as a result of federal habeas occurs even later);[17] and undermine society's interest in repose.[18] Bator also argued that relitigation should not be used to correct errors because it is impossible to know with certainty what facts occurred in the past; nor is it possible

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[12] 344 U.S. 443 (1953).

[13] Id. at 458 (explaining that prior state court adjudication is not res judicata); id. at 497–513 (Frankfurter, J., concurring) (explaining bases for relitigation).

[14] Id. at 532–38 (Jackson, J., concurring in the result) (arguing against relitigation).

[15] Id. at 537 (Jackson, J., concurring in the result); see id. at 498 (Frankfurter, J., concurring) (citing statistics about the number of petitions). Recent estimates indicate that the figure is much higher, with over 15,000 petitions filed by state court prisoners, and approximately 6,000 petitions filed by federal prisoners in 2007. King & Hoffman, Habeas for the Twenty-First Century, supra note 4, at 60, 116.

[16] Bator, supra note 9, at 452.

[17] See id. at 446–47, 515–16.

[18] See id. at 452.

to know the correct legal rule or the correct application of a rule to the facts.[19]

Echoing many of the same criticisms,[20] Judge Henry Friendly proposed a solution.[21] Friendly argued that while federal collateral review of criminal judgments should generally allow for relitigation in certain narrow circumstances,[22] it should also be available where a defendant makes a "colorable showing[] of innocence,"[23] meaning there is

> a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of the facts would have entertained a reasonable doubt of his guilt.[24]

Under Friendly's model, federal courts would ascertain if "an error, whether 'constitutional' or not," was "producing the continued punishment of an innocent man."[25]

Scholars have continued to press for innocence-oriented accounts of federal habeas. Most of these calls for innocence-focused federal habeas have, like Friendly's, focused on factual claims of innocence where evidence shows that the defendant was not guilty of the crime he was convicted of. For example, Professors Bill Stuntz and John Jeffries maintained that federal habeas review should only be available for claims not raised in state proceedings where "consideration of [the] . . . claim would present a realistic possibility of correcting an

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[19] See id. at 446–48. Bator also argued Brown's relitigation model was inconsistent with the history of federal habeas. See id. at 463–99.

[20] See Friendly, supra note 1, at 146–49.

[21] Bator proposed that federal relitigation should be available only where the state did not provide a full and fair process to litigate the constitutional claim or the prior court lacked jurisdiction. Bator, supra note 9, at 462.

[22] These included: (1) the initial court lacked "jurisdiction"; (2) claims premised on facts outside the record; (3) claims for which the state failed to provide an adequate procedure for their litigation; and (4) new constitutional rules that are fully retroactive. Friendly, supra note 1, at 151–53.

[23] Id. at 157.

[24] Id. at 160 (footnote omitted).

[25] Id. (footnote omitted); see id. at 167 (proposing same for state prisoners); id. at 143 (proposing legislation for state prisoners).

unjust conviction or sentence of death."[26] Stuntz and Jeffries defined an unjust conviction or sentence to include cases where the defendant did not commit the charged crime[27] as well as any claim "concerning the sentencing stage of capital proceedings."[28] Professors Joseph Hoffmann and Bill Stuntz offered another innocence-focused proposal[29] which imagined two "tracks" for federal habeas—one track made federal habeas available where it was necessary to deter constitutional violations, while the other was meant to prevent "the unjust punishment of innocent defendants."[30] Under Hoffman and Stuntz's model, "any defendant could obtain habeas review of the constitutionality of his conviction by (1) demonstrating a 'reasonable probability' that he is innocent of the crime for which he was convicted, and (2) alleging a constitutional violation that resulted in his erroneous conviction."[31] Hoffman and Stuntz's proposed innocence track also involved consideration of unjust capital sentences,[32] and "would not preclude habeas relief even for a 'naked' innocence claim" that did not allege any independent constitutional violation.[33]

One of the more full-throated calls for an innocence-oriented federal habeas occurred on the heels of the Supreme Court's decision in *Herrera v. Collins*.[34] In *Herrera*, the Court opted not to decide whether the Constitution prohibited the execution of a person who had not committed the crime for which he was sentenced to death.[35] After *Herrera*, Professor Jordan Steiker argued that federal habeas review should be available for claims of innocence, whether or not a

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[26] Jeffries & Stuntz, supra note 4, at 680.

[27] Id. at 691. They defined this as "factual innocence," and underscored that their "focus is on factual innocence." Id.

[28] Id. at 720. They explain: "[T]he statutory and constitutional criteria governing the death sentence involve irreducible elements of subjectivity and discretion" and so "the concept of factual reliability loses its clarity and hardness." Id. at 720–21.

[29] See Joseph L. Hoffmann & William J. Stuntz, Habeas After the Revolution, 1993 Sup. Ct. Rev. 65, 65–66.

[30] Id. at 85–86, 95.

[31] Id. at 95.

[32] See id. at 119–22.

[33] Id. at 97.

[34] 506 U.S. 390 (1993).

[35] Id. at 405.

freestanding claim of innocence amounted to a constitutional violation.[36] Steiker adopted Friendly's standard and proposed that a petitioner would need to make a "colorable showing of factual innocence," considering all of the evidence, including any excluded evidence, in order to obtain federal habeas review of an innocence claim.[37] Steiker concluded that to obtain federal habeas relief, a petitioner would need to show "by a preponderance of the evidence . . . that it is more likely than not that he did not commit the crime."[38]

Even after Congress enacted the AEDPA, which imposed considerable restrictions on federal habeas, the calls for innocence persisted. Hoffmann renewed Steiker's proposal for bare factual innocence claims to be reviewable in federal habeas, but argued that, in light of the AEDPA, the Supreme Court would have to hold that the conviction of an innocent person amounted to a constitutional violation.[39] Hoffmann argued that in order to establish a constitutional violation, the defendant must show "by clear and convincing new evidence, not previously discoverable through the exercise of due diligence, that in light of the evidence as a whole, no reasonable factfinder would have found him guilty of the underlying offense."[40] Hoffmann and Professor Nancy King proposed this same standard for innocence claims when they recommended a legislative overhaul of federal habeas review of state convictions.[41]

These proposals, for the most part, focus on claims of factual innocence. Either explicitly or implicitly, the proposals' suggested standard for the availability of habeas is designed to ferret out when new (or existing) facts establish that a defendant is not guilty of the offense, or did not commit the act that made him eligible for a capital sentence.[42]

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[36] Steiker, supra note 2, at 303 (1993). Steiker argued that because so much of federal habeas was federal common law, the Court could announce, as a matter of federal common law, that defendants could obtain review of their factual innocence claims.

[37] Id. at 386–87 (citation omitted).

[38] Id. at 387 (footnote omitted).

[39] Hoffmann, supra note 2, at 304–05.

[40] King & Hoffman, Habeas for the Twenty-First Century, supra note 4, at 91–92.

[41] Id.; see also Joseph L. Hoffmann & Nancy J. King, Rethinking the Federal Role in State Criminal Justice, 84 N.Y.U. L. Rev. 791, 819 (2009) [hereinafter Hoffman & King, Rethinking the Federal Role]

[42] The exception is King and Hoffmann, but their proposal differs from this article's. See infra Section III.A.

A more recent proposal for an innocence-oriented account of federal habeas argued for federal habeas to extend to one particular kind of legal innocence: "death ineligibility" claims.[43] Death ineligibility claims are claims that "if successful . . . would categorically bar a capital sentence," like the constitutional rules that prohibit imposing capital sentences on certain subsets of offenders like juveniles, individuals with limited mental capacity, or persons convicted of rape or felony murder.[44] By urging federal courts to treat death ineligibility claims as innocence claims, Professor Lee Kovarsky sought to have federal courts review procedurally defaulted death ineligibility claims as well as death ineligibility claims presented in second, successive, or untimely petitions for federal habeas.[45] But Kovarsky's proposal was solely concerned with the kind of legal innocence cases where the Constitution bars the defendant's sentence, and only then in cases involving capital sentences.

B. The Law of Innocence

Scholars are not alone in being drawn to innocence-oriented accounts of federal habeas. Before Congress enacted the AEDPA, federal judges incorporated innocence into several features of the law surrounding federal habeas. Several of the AEDPA's restrictions even incorporate innocence considerations, and judges have continued to include innocence in additional features of the law surrounding federal habeas post-AEDPA.

1. Gateways & Bypasses

Procedural Default. Procedural default is a judge-made doctrine that generally bars federal courts from considering claims that were not previously adjudicated because they were not raised in accordance with a procedural rule.[46] *Murray v. Carrier* held that a federal habeas court may entertain procedurally defaulted claims to prevent a "fundamental

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[43] Kovarsky, supra note 10, at 332–33.

[44] See id. at 331–32, 349–55.

[45] See id. at 378–89.

[46] See, e.g., Martinez v. Ryan, 566 U.S. 1, 13 (2012) (describing procedural default doctrines as rules "elaborated in the exercise of the Court's discretion"). The default must rest on an adequate and independent state ground, and a defendant can obtain review by showing cause and prejudice. E.g., Harris v. Reed, 489 U.S. 255, 262-63 (1989) (summarizing the doctrine).

miscarriage of justice,"[47] which it defined as instances where a defendant has established there has "probably" been "[a] conviction of one who is actually innocent."[48]

Murray spoke in terms of the conviction of an innocent person, but subsequent cases expanded the miscarriage of justice exception to include persons who are innocent of their capital sentences. *Sawyer v. Whitley* set the standard for a defendant to establish her innocence of her capital sentence, which the Court defined to mean that a defendant was guilty of a crime, but not subject to the death penalty.[49] The Eighth Amendment requires states to "define death-eligible crimes" by "provid[ing] a finite list of specific aggravating factors," that is, prerequisites for the imposition of the death penalty that juries must find before imposing a capital sentence.[50] *Sawyer* held that a defendant may establish she is actually innocent of a capital sentence, and thus have her procedurally defaulted claim heard on the merits, if the defendant shows by "clear and convincing evidence"[51] that a trier of fact could have entertained a reasonable doubt about "facts which are prerequisites under state or federal law for the imposition of the death penalty."[52]

Statute of Limitations. The AEDPA established a one-year statute of limitations that runs from one of four dates,[53] and the Court has held that the statute of limitations may be tolled for equitable reasons.[54] The Court has also held that the statute of limitations may be excused for "a convincing showing of actual innocence," meaning that the petitioner has "persuade[d] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find [her] guilty beyond a reasonable doubt."[55]

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[47] 477 U.S. 478, 495–96 (1986).

[48] Id. at 496.

[49] 505 U.S. 333, 350 (1992). The Court acknowledged that "'innocent of death' is not a natural usage of" the words, but nevertheless stuck with that phrase to define the category of relevant cases. See id. at 341.

[50] Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality); Rachel E. Barkow, The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity, 107 Mich. L. Rev. 1145, 1152–53 (2009).

[51] *Sawyer*, 505 U.S. at 350.

[52] Id. at 346–47.

[53] 28 U.S.C. § 2244(d)(1) (2012); 28 U.S.C. § 2255(f) (2012).

[54] See Holland v. Florida, 560 U.S. 631, 645 (2010).

[55] McQuiggin v. Perkins, 569 U.S. 383, 386–87 (2013) (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)) (internal quotation marks omitted).

Evidentiary Hearings. The Court, and later Congress, also infused considerations of innocence into the rules about when evidentiary hearings are appropriate in federal habeas proceedings. The Court permitted evidentiary hearings where a petitioner "can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."[56] Congress partially codified this standard in the AEDPA, which prohibits evidentiary hearings for state prisoners unless the petitioner establishes that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[57]

Successive Petitions. Prior to the AEDPA, the Supreme Court held that federal habeas courts could dismiss claims in successive petitions where consistent with the "ends of justice."[58] The Court later clarified that "the 'ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[59] The AEDPA subsequently changed the standards applicable to successive petitions. For state prisoners, federal courts must now dismiss claims that were presented in prior federal habeas petitions.[60] Claims that were not previously raised in prior petitions can be considered only if (1) they rely "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"; or (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for

[56] Keeney v. Tamayo-Reyes, 504 U.S. 1, 11–12 (1992).

[57] 28 U.S.C. § 2254(e)(2)(B) (2012). The AEDPA modified the standard for evidentiary hearings by eliminating the freestanding miscarriage of justice exception. See *McQuiggin*, 569 U.S. at 396–97 ("In a case not governed by those provisions . . . the miscarriage of justice exception survived AEDPA's passage intact and unrestricted.").

[58] Kuhlmann v. Wilson, 477 U.S. 436, 448–49 (1986); Salinger v. Loisel, 265 U.S. 224, 230–31 (1924).

[59] *Kuhlmann*, 477 U.S. at 454 (invoking Friendly).

[60] 28 U.S.C. § 2244(b)(1) (2012). Several courts of appeals have applied this provision to federal prisoners as well, reasoning that the phrase "must be certified as provided in section 2244" incorporates 2244(b)(1)'s requirement that claims presented in a prior application be dismissed. See, e.g., In re Baptiste, 828 F.3d 1337, 1339 (11th Cir. 2016); Taylor v. Gilkey, 314 F.3d 832, 836 (7th Cir. 2002).

constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[61]

Mandate Recalls. The Court also incorporated innocence into the standard for when federal courts of appeals may recall the mandate in habeas proceedings. As a general rule, a court of appeals may recall a mandate in response to a motion filed by a litigant or on its own initiative.[62] While the AEDPA's restrictions on successive motions limited courts' ability to recall a mandate in response to a motion by a prisoner, or on the basis of "new claims or evidence presented in a successive application for habeas relief,"[63] the Court held that federal courts may recall a mandate on the court's own initiative "to avoid a miscarriage of justice," which it defined as a "strong showing of 'actua[l] innocen[ce].'"[64]

2. Merits

Cognizability. In cases involving state prisoners, federal habeas courts may not consider Fourth Amendment claims if the state prisoner had "an opportunity for full and fair litigation" of the claim in state courts.[65] Citing Judge Friendly,[66] the Court reasoned that Fourth Amendment claims are generally not cognizable in federal habeas because they divert attention "from the ultimate question of guilt or innocence that should be the central concern" in habeas.[67] The Court has not held any other constitutional claim not cognizable in federal habeas proceedings, although it did avoid a decision on whether a freestanding claim of innocence was a cognizable ground for relief in federal habeas.[68] In distinguishing *Stone v. Powell* and Fourth Amendment claims, the Court

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[61] 28 U.S.C. § 2244(b)(2) (2012). The same conditions apply to federal prisoners, except they do not have to show diligence. 28 U.S.C. § 2255(h) (2012).

[62] Fed. R. App. P. 41; Calderon v. Thompson, 523 U.S. 538, 550 (1998) ("[C]ourts of appeals . . . have an inherent power to recall their mandates, subject to review for an abuse of discretion.").

[63] *Calderon*, 523 U.S. at 553–54.

[64] Id. at 554, 557–58.

[65] Stone v. Powell, 428 U.S. 465, 469 (1976).

[66] Id. at 491–92 n.31.

[67] Id. at 489–90.

[68] In dicta, the Court stated in a footnote that *Stone* applied to "analogous federal cases under 28 U.S.C. 2255," for federal prisoners. United States v. Johnson, 457 U.S. 537, 562 n.20 (1982).

has reasoned that other constitutional claims are cognizable because the claims are relevant to whether the defendant is innocent.[69] For example, in holding that *Miranda* claims may be raised in federal habeas proceedings, the Court observed that *Miranda* does not "serve some value necessarily divorced from the correct ascertainment of guilt."[70] The Court has also incorporated innocence considerations in delineating which statutory claims are cognizable in habeas proceedings: only violations of federal laws that result in a "fundamental defect which inherently results in a complete miscarriage of justice" or deprivations of rudimentary procedure are cognizable.[71]

Retroactivity. Prior to the 1960s, Supreme Court decisions were fully retroactive and applied to all criminal cases, including ones that had become final. Beginning in the 1960s, the Court announced that it could limit the retroactive effect of its decisions, including the effect on cases that are on direct review (that is, before a petition for certiorari has been denied or the time to file one has expired).[72] Dissatisfied with that approach, Justice Harlan proposed that all new constitutional rules would apply to cases on direct review, but not to cases on collateral review (that is, in federal habeas) unless the new rule satisfied certain exceptions.[73] One exception was for rules that "significantly improve the pre-existing fact-finding procedures."[74] Justice Harlan explained that

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[69] The Court also held other claims were cognizable without any mention of whether such claims affected the likelihood that the defendant was innocent. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 374–75 (1986) (ineffective assistance claims predicated on counsel's failure to make a Fourth Amendment objection); Rose v. Mitchell, 443 U.S. 545, 560–61 (1979) (grand jury discrimination claims).

[70] Withrow v. Williams, 507 U.S. 680, 692 (1993). *Miranda v. Arizona*, 384 U.S. 436 (1966), held that confessions obtained in custodial interrogations are not admissible unless accompanied by several warnings.

[71] Reed v. Farley, 512 U.S. 339, 348–49 (1994) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

[72] See, e.g., Desist v. United States, 394 U.S. 244, 256–57 (1969) (Harlan, J., dissenting) (listing examples); Linkletter v. Walker, 381 U.S. 618, 636–40 (1965) (holding that the Mapp rule does not require retrospective application

[73] See, e.g., Mackey v. United States, 401 U.S. 667, 675–702 (1971) (Harlan, J., concurring in part and dissenting in part) (suggesting that new constitutional principles should be applied to federal habeas cases in certain circumstances); *Desist*, 394 U.S. at 256–69 (Harlan, J., dissenting) (same).

[74] *Desist*, 394 U.S. at 262. Justice Harlan later walked away from this exception, proposing in its place an exception for the retroactive application of rules "implicit in the concept of ordered liberty." *Mackey*, 401 U.S. at 693 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). See id. at 693–95 (explaining reasons for modification).

such rules should provide grounds for habeas relief because one of the principal functions of habeas is "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[75] Justice Harlan likewise offered a second exception to the general bar against retroactivity for new decisions that "place[] 'certain kinds of primary individual conduct beyond the power of the criminal law-making authority to proscribe.'"[76]

When *Teague v. Lane* ultimately purported to adopt Justice Harlan's rules regarding retroactivity, it also incorporated the rules' innocence-related exceptions.[77] *Teague* announced that a new constitutional rule would apply retroactively if the rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"[78] as Justice Harlan suggested in *Mackey*. *Teague* also directed that a new rule would apply retroactively if it was a "watershed rule[] of criminal procedure" that implicates "the fundamental fairness of the trial" and "without which the likelihood of an accurate conviction is seriously diminished."[79] *Teague* explained "our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review."[80]

The second *Teague* exception for watershed rules related to innocence focused on *factual* innocence and the accuracy of convictions.[81] The first *Teague* exception for rules that place "certain kinds of . . . individual conduct beyond the power of the criminal law-making authority"[82] initially focused on one kind of legal innocence—when the defendant was convicted under a statute that criminalized constitutionally protected conduct. Although the defendant's conviction was accurate in that the

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[75] *Desist*, 394 U.S. at 262.

[76] Teague v. Lane, 489 U.S. 288, 311 (1989) (quoting *Mackey*, 401 U.S. at 692).

[77] See id. at 305–10.

[78] Id. at 311 (quoting *Mackey*, 401 U.S. at 692)).

[79] Id. at 311–13.

[80] Id. at 313.

[81] *Teague* surmised that because "such procedures would be so central to an accurate determination of innocence or guilt," it is "unlikely that many such components of basic due process have yet to emerge." Id. at 313. Subsequent cases have also described the second exception as "extremely narrow." Whorton v. Bockting, 549 U.S. 406, 417–18 (2007).

[82] *Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 692) (internal quotation marks omitted).

jury correctly ascertained both the facts and the defendant's guilt of the charged offense, the Constitution prohibited the state from criminalizing the defendant's conduct. As an example of rules that would be retroactive under this exception, Justice Harlan listed *Loving v. Virginia*, the case prohibiting criminalization of interracial marriages, and *Griswold v. Connecticut*, the case prohibiting criminalization of married couples obtaining birth control.[83]

The first *Teague* exception quickly expanded to encompass other types of legal innocence.[84] The same year that *Teague* was decided, the Court announced that *Teague*'s first exception also included rules that hold "the Constitution itself deprives the State of the power to impose a certain penalty," meaning "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[85] The Court explained that a rule prohibiting States from imposing the death penalty on persons with limited mental capacity would, in effect, prohibit a category of punishment for a class of defendants, generating what Kovarsky identified as death-ineligible claims.[86]

Several years later, the Court announced that rules that narrow the scope of a federal criminal statute by interpreting its terms also apply retroactively.[87] That decision, *Bousley v. United States*, framed *Teague*'s first exception explicitly in terms of innocence. The Court reiterated that a principal function of habeas is to ensure that a defendant was not "incarcerated under a procedure which creates an impermissibly large

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[83] See *Mackey*, 401 U.S. at 692 n.7 (1971) (Harlan, J., concurring in judgment in part and dissenting in part).

[84] In a sentence purporting to describe the first exception, Justice Harlan maintained that "the writ has historically been available for attacking convictions on such grounds," (id. at 692–93) and listed such grounds as a federalism challenge to a federal statute (which, if successful, would presumably have allowed the state to penalize the relevant conduct) (id. at 693 n.8) (listing Ex parte Siebold, 100 U.S. 371 (1880)). Justice Harlan also listed as "such grounds" falling under the first exception "cases collected" in the footnote of an article by Professor Anthony Amsterdam, which included vagueness challenges (which, if successful, would not have prohibited the criminalization of conduct under a more precisely worded statute) (id.) (citing Anthony G. Amsterdam, Search, Seizures, And Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 384 n.30 (1964) (citing In re Gregory, 219 U.S. 210 (1911)).

[85] Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

[86] See id.

[87] Bousley v. United States, 523 U.S. 614, 616, 620–21 (1998).

risk that the innocent will be convicted."[88] And with that framing, the Court explained that "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct 'beyond the power of the criminal law-making authority to proscribe,' necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'"[89] Attempting to generalize *Teague*'s first exception, the Court has emphasized that rules falling under the exception apply retroactively "because they 'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him" or was convicted of something the law does not criminalize.[90]

Two recent cases have further solidified the Court's expanding definition of legal innocence. *Welch v. United States* held that a rule invalidating the Armed Career Criminal Act's ("ACCA") residual clause was retroactive. The ACCA imposed both a mandatory minimum sentence and raised the statutory maximum sentence for defendants convicted of being a felon in possession of a firearm.[91] The Court held that the ACCA's residual clause was constitutionally void for vagueness, meaning that Congress could have rewritten the provision in a different, lawful way to impose the same penalty on the same defendants.[92] Moreover, defendants who were sentenced under the ACCA were convicted of conduct that the law could, and still did, criminalize—being a felon in possession of a firearm. However, in this case the defendants received additional, mandatory punishment (terms of imprisonment) under an invalid statute (the ACCA's residual clause). Without the ACCA, the remaining statutes made these defendants eligible for a maximum of ten years in prison, whereas the ACCA required that they be sentenced to at least fifteen years.[93] The Court concluded that the ACCA "produce[d] a class of persons convicted of conduct the law does

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[88] *Bousley*, 523 U.S. at 620 (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

[89] Id. (citations omitted) (quoting Davis v. United States, 417 U.S. 333, 346 (1974) and Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in judgement in part and dissenting in part).

[90] Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004); id. at 352 (quoting *Bousley*, 523 U.S. at 620).

[91] Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

[92] Id. at 1262, 1267 (noting this).

[93] See id. at 1261.

not make criminal."[94] After the ACCA was invalidated, the same person engaging in the same conduct is no longer covered by the Act.

Then, in *Montgomery v. Louisiana*,[95] the Court made retroactive a rule (*Miller v. Alabama*[96]) that invalidated the mandatory imposition of life without parole on juveniles.[97] *Miller* did not "foreclose a sentencer's ability to impose life without parole on a juvenile."[98] But, *Montgomery* reasoned, *Miller* rested on the idea that "sentencing a child to life without parole" would amount to cruel and unusual punishment in violation of the Eight Amendment "for all but 'the rare juvenile offender.'"[99] Therefore, *Miller* was a substantive rule because, unless applied, there was a significant risk that "the vast majority of juvenile offenders" faced a punishment (life without parole) that was prohibited by the Constitution.[100] The Court again gestured toward innocence considerations as it applied *Miller* retroactively. Citing Judge Friendly's article on innocence, the Court explained that "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result void."[101] Those decisions produced a class of persons whose conduct was not (lawfully) criminalized or punished.

II. LEGAL INNOCENCE AS INNOCENCE

There is little to like in the Court's recent federal habeas cases.[102] But habeas doctrine has outpaced scholarship's focus on innocence in one respect—identifying the kinds of innocence that warrant special

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[94] Id. at 1265 (quoting *Schriro*, 542 U.S. at 352).

[95] 136 S. Ct. 718 (2016).

[96] 132 S. Ct. 2455 (2012)

[97] *Montgomery*, 136 S. Ct. at 718.

[98] Id. at 726.

[99] Id. at 734 (quoting *Miller*, 132 S. Ct. at 2469).

[100] Id. (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004))

[101] Id. at 731 (citing Friendly, supra note 1, at 151).

[102] See, e.g., Stephen R. Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219, 1219–22 (2015).

consideration.[103] These kinds of legal innocence include instances where:

- a defendant was convicted under a statute that, properly interpreted, did not reach her conduct;
- a defendant was convicted under a statute that could have prohibited her conduct but did not do so lawfully;
- a defendant was sentenced under a statute that, properly interpreted, did not apply to the defendant;
- a defendant was sentenced to additional time in prison under a statute that could have imposed the additional prison time but did not do so lawfully; and
- a defendant received a noncapital sentence that is prohibited by the Constitution.

In these cases, the defendant was either convicted under a statute that did not lawfully prohibit his conduct, or sentenced under a statute that did not lawfully impose the sentence he received.[104] Also included in the category of legal innocence are cases where a defendant was convicted of conduct that cannot be constitutionally criminalized, but that is not a recent addition to the category. These defendants were wrongfully subject to statutes that authorized criminal punishment based on the defendant's conduct or characteristics, either because of an error of statutory interpretation or a constitutional error about the statute's validity.

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[103] A recent example is Justice Gorsuch's concurrence in the decision to vacate and remand for further proceedings a case where the United States noted that a federal prisoner was wrongly sentenced to a 20-year mandatory minimum statute that was later interpreted not to apply to him. Hicks v. United States, 137 S. Ct. 2000, 2000–01 (2017) (Gorsuch, J., concurring) ("A plain legal error infects this judgment—a man was wrongly sentenced to 20 years in prison under a defunct statute . . . . [W]ho wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes?"). Another arguable example is the recent *Class v. United States*, 138 S. Ct. 798 (2018), which held that defendants do not, merely by entering a guilty plea, waive the right to challenge the constitutionality of the statute under which they were convicted. As *Class* observed, such claims "challenge the Government's power to criminalize [the defendant's] (admitted) conduct" and "thereby call into question the Government's power to 'constitutionally prosecute' him." Id., at 805 (quoting United States v. Broce, 488 U.S. 563, 575 (1989)).

[104] See *Hicks*, 137 S. Ct. at 2000.

Are these new kinds of innocence even properly characterized as innocence? Section II.A defines the types of cases in which a defendant should be considered legally innocent, focusing on definitions supported by the current doctrine. Section II.B argues that these kinds of legal innocence are conceptually of a piece with the kinds of factual innocence that courts and scholars would like to make part of federal habeas law.[105] Section II.C also argues that despite the conceptual similarities between factual and legal innocence, many of the difficulties that would result from making federal habeas more receptive to factual innocence claims would not apply to legal innocence claims. Tying the various procedural restrictions on habeas to legal innocence may even further some of the reform goals that have animated restrictions on federal habeas.

A. Recognizing Legal Innocence

1. Statutory Interpretation

One kind of "legal innocence" arises when a defendant has been convicted or sentenced under a statute that, properly interpreted, does not apply to the defendant.

a. Offenses

One example of this kind of innocence arose in *Bousley v. United States*, where the defendant pled guilty to the charge that he knowingly and intentionally used firearms "during and in relation to any . . . drug trafficking crime" in violation of 18 U.S.C. § 924(c).[106] The defendant admitted to selling methamphetamine[107] and to storing two pistols in

[105] In other work, I expand on constitutional dimensions of legal innocence that should make freestanding legal innocence claims a basis for federal habeas relief even for state prisoners. See Leah M. Litman, The Constitutional Significance and Scope of Legal Innocence (unpublished manuscript) (on file with author) [hereinafter Litman, Constitutional Significance]. The project in this Article, however, is to show the conceptual similarities between factual and legal innocence in ways that matter to federal habeas so that legal innocence can piggyback into spaces where the doctrine is already amenable to factual innocence.

[106] 18 U.S.C. § 924(c)(1) (1994); *Bousley*, 523 U.S. at 616.

[107] Brief for the United States, *Bousley*, 523 U.S. 614 (No. 96-8516), 1997 WL 805418, at *5.

close proximity to the drugs.[108] But the Supreme Court later interpreted the phrase "knowingly and intentionally used . . . firearms" to mean "active employment of a firearm," not "merely . . . storing a weapon near drugs."[109] Thus, a defendant who merely placed a firearm near drugs was not actually guilty of the crime established by 18 U.S.C. § 924(c) and was legally innocent as a result.

b. Sentences

A defendant may also be legally innocent when he was sentenced under a statute that, properly interpreted, does not apply to him. The difference between a statute that establishes a new offense and a statute that provides for a sentencing enhancement may not always be clear.[110] Whether a defendant is innocent of an offense, as opposed to a sentence, may not always be clear. Sometimes a statute creates a new offense by providing for additional penalties depending on the offense conduct. For example, Section 924(c) imposes a sentence on defendants who use a firearm while committing a "drug trafficking crime," and provides for a term of imprisonment "in addition to" whatever sentence might be given for the drug trafficking crime.[111] But a defendant can be charged and convicted of violating only Section 924(c) and not the underlying drug trafficking crime.[112] As a result, Section 924(c) defines a standalone crime even though it appears to impose additional penalties on defendants who are guilty of a separate offense. Other statutes establish different penalties for reasons other than the offense conduct. For example, 18 U.S.C. § 922(g)(1) prohibits persons convicted of felonies from possessing a firearm,[113] and the statutory penalties section provides that defendants convicted of violating Section 922(g) will be

[108] Brief for the Petitioner, *Bousley*, 523 U.S. 614 (No. 96-8516), 1997 WL 728537, at *5, *9; Brief for the United States, *Bousley*, 523 U.S. 614 (No. 96-8516), 1997 WL 805418, at *5.

[109] Bailey v. United States, 516 U.S. 137, 148–49 (1995) (internal quotation marks omitted).

[110] See Brandon L. Garrett, Accuracy in Sentencing, 87 S. Cal. L. Rev. 499, 510 (2014) [hereinafter Garret, Accuracy in Sentencing].

[111] 18 U.S.C. § 924(c)(1)(A) (2012).

[112] Id. (stating that the use of the firearm must be in connection to a crime "for which the person may be prosecuted").

[113] Id. § 922(g)(1).

"imprisoned not more than 10 years."[114] The ACCA, however, subjects certain persons convicted under Section 922(g) to a statutory sentencing enhancement—persons convicted under Section 922(g) must receive "not less than fifteen years" imprisonment if they have three previous convictions for "a violent felony or a serious drug offense, or both."[115]

Wherever the precise line between a standalone offense and a sentence-enhancing statute falls, the Court's recent decision in *Welch v. United States* contemplates that a defendant can be innocent of a non-capital sentence in addition to being innocent of an offense.[116] *Welch* held retroactive a decision invalidating a provision of the ACCA, which the Court views as a sentence-enhancing statute.[117] The Court repeatedly equated a decision that alters the scope of a sentence-enhancing statute, such as the ACCA, with a decision that alters the scope of a standalone offense, such as Section 924(c).[118]

Although the doctrine contemplates that some defendants may be legally innocent of their sentences, it is not clear what class of petitioners this applies to, and specifically whether a petitioner can be legally innocent of his sentence when he received a sentence that does

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[114] Id. § 924(a)(2).

[115] Id. § 924(e)(1).

[116] 136 S. Ct. 1257 (2016). This notion is also contemplated in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

[117] The Court has held that recidivism—a defendant's criminal history—is a sentencing factor, not an element that establishes a new offense, even when it serves as the reason for enhanced punishment under a statute. *Welch*, 136 S. Ct. at 1262–63, 1268 (petitioner's crime of conviction is being a felon in possession of a firearm, and he is sentenced under the Armed Career Criminal Act); Johnson v. United States, 135 S. Ct. 2551, 2555 (2015) (same); Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998) (referring to recidivism as a sentencing factor). But *Almendarez-Torres* has been questioned, *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013), and the Court has also described statutes that subject defendants to harsher sentences based on the fact of a prior conviction as creating a separate offense. See Carachuri-Rosendo v. Holder, 560 U.S. 563, 567 & n.3 (2010).

[118] See, e.g., *Welch*, 136 S. Ct. at 1265 (citing *Schriro's* characterization of *Bousley* to explain why rule in *Johnson* is substantive); id. at 1267–68 (invoking *Bousley* to explain why rule in *Johnson* is substantive). While *Welch* involved a decision that invalidated a provision of the ACCA rather than interpreted it, *Welch* was clear that did not matter to whether the petitioner was legally innocent. See id. at 1267 ("Neither Bousley nor any other case from this Court treats statutory interpretation cases as a special class of decisions . . ."). Appellate courts also uniformly treat decisions interpreting the ACCA as retroactive. See Leah M. Litman, Residual Impact: Resentencing Implications of Johnson's Potential Ruling on ACCA's Constitutionality, 115 Colum. L. Rev. Sidebar 55, 63 n.43 (2015).

not exceed the valid, statutory maximum for his offense. *Welch* involved a set of defendants who received sentences that exceeded the statutory maximum sentence for their offense of conviction.[119] By statute, defendants who are convicted of violating Section 922(g) can receive at most 10 years imprisonment, but the ACCA changes that by imposing a mandatory minimum of at least 15 years imprisonment.[120] *Bousley* likewise involved defendants who received a discrete, additional term of imprisonment: *Bousley* involved a set of defendants convicted and sentenced under Section 924(c), which imposes sentences "in addition to" whatever sentence the defendant received for the other crime. [121] Section 924(c) therefore made it easy to disaggregate the 5-year (or more) sentence a defendant received under Section 924(c) from the sentence the defendant may have received for the drug trafficking crime.[122] If the defendant was only convicted of violating Section 924(c), the entirety of the prisoner's sentence was based on the Section 924(c) conviction.

It may not be as easy to identify what particular term of imprisonment a defendant is innocent of when the defendant has been mistakenly sentenced under a statute that supplies a new mandatory minimum sentence but does not change a defendant's statutory maximum sentence. It would be similarly difficult in cases where a statute supplies a new statutory maximum sentence but does not change a defendant's statutory minimum sentence.[123] For example, the relevant statutes might have provided that defendants convicted of violating Section 922(g) could be sentenced to up to 25 years, and the ACCA might have required Section 922(g) defendants with multiple prior convictions to be sentenced to at least 15 years. If a defendant was sentenced under the ACCA, but the ACCA, as properly interpreted, did not apply to him, the defendant would still be "innocent" of the ACCA sentence. But it would not be as easy to disaggregate the ACCA sentence of which the defendant is innocent because he could have received the same sentence had he not been sentenced under the ACCA. The same could also occur when a defendant is sentenced under a statute that supplies a different

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[119] See *Welch*, 136 S. Ct. at 1268.

[120] 18 U.S.C. § 924(a)(2), (e)(1) (2012).

[121] *Bousley*, 523 U.S. at 616 (citing 18 U.S.C. § 924(c)(1)(A) (2012)).

[122] 18 U.S.C. § 924(c)(1)(A) (2012).

[123] See Garrett, supra note 110, at 510 (noting overlap).

statutory maximum.[124] While there are good reasons why defendants who are mistakenly sentenced under provisions that establish either a mandatory minimum, or a new statutory maximum sentence, are legally innocent, this project focuses on defendants sentenced above the statutory maximum for their offense, a type of legal innocence the Court has explicitly recognized.[125]

2. Statutory Invalidation

Other kinds of legal innocence arise when a defendant has been convicted or sentenced under a statute that is unconstitutional. The statute may be unconstitutional either because the Constitution forbids certain conduct from being criminalized, or because it forbids a state from imposing a particular punishment on an offender or for a particular offense. A statute may also be unconstitutional because it forbids conduct or imposes penalties in an unconstitutional manner. All of these cases also result in defendants who are legally innocent.

a. Constitutional Immunities

Offenses. One kind of legal innocence arises from constitutional rules that protect certain individual conduct. For example, the Constitution protects a consenting adult's ability to engage in sexual conduct with another consenting adult. States may not, as a result, criminalize sex acts between two consenting adults, regardless of whether those acts involve individuals of the same or opposite sex.[126] The Constitution also protects an individual's right to express herself by burning a flag, and so the government may not criminalize flag burning.[127]

Defendants who are convicted of conduct that cannot be constitutionally criminalized are legally innocent because the law could not make their actions criminal. When a court holds that a federal or

[124] For example, the relevant statutes might have provided that defendants convicted of violating § 922(g) could be sentenced to up to 25 years and that § 922(g) defendants with multiple prior convictions could be sentenced to up to 35 years. It would be relatively easy to disaggregate the ACCA sentence of which a defendant might be innocent if the defendant were sentenced to more than 25 years. But it would not be so easy for defendants sentenced to fewer than 25 years.

[125] See Litman, Constitutional Significance, supra note 105.

[126] Lawrence v. Texas, 539 U.S. 558 (2003).

[127] Texas v. Johnson, 491 U.S. 397, 399, 420 (1989).

state statute is facially unconstitutional, the general rule is that the statue is "void ab initio," meaning "null from the beginning."[128] As the Court has explained, "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[129] Because no operative law criminalized the defendant's conduct, defendants convicted under unconstitutional statutes are legally innocent.

Sentences. Other constitutional rules forbid the government from imposing only certain kinds of penalties. The Constitution forbids punishments that are cruel and unusual, which include punishments that are grossly disproportionate to the defendant's offense.[130] The Constitution also includes several categorical immunities that prohibit states from imposing particular punishments in a defined set of cases. The most common examples are categorical immunities from capital punishment. The Constitution forbids states from imposing capital punishment on certain offenders, such as juveniles[131] or individuals with intellectual disabilities.[132] The Constitution also forbids states from imposing capital punishment for some offenses, such as rape[133] or certain kinds of felony murder.[134] There are also categorical immunities

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[128] 16A Am. Jur. 2d Constitutional Law § 195 (2009) ("The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is void ab initio."); Void ab initio, Black's Law Dictionary (10th ed. 2014); see also Montgomery v. Louisiana, 136 S. Ct. 718, 730–31 (2016) (invoking the idea that unconstitutional statutes are "contrary to law and, as a result, void"); Laurence H. Tribe, American Constitutional Law 216 (3d ed. 2000) ("If an unconstitutional statute or practice effectively never existed as a lawful justification for state action, individuals convicted under the statute or in trials which tolerated the practice were convicted unlawfully even if their trials took place before the declaration of unconstitutionality...").

[129] Norton v. Shelby County, 118 U.S. 425, 442 (1886).

[130] See, e.g., Solem v. Helm, 463 U.S. 277, 284 (1983).

[131] Roper v. Simmons, 543 U.S. 551, 568 (2005).

[132] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[133] Kennedy v. Louisiana, 554 U.S. 407, 413 (2008); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

[134] Tison v. Arizona, 481 U.S. 137, 158 (1987); Enmund v. Florida, 458 U.S. 782, 797 (1982).'

from non-capital sentences. The Constitution forbids states from imposing life without parole on juveniles for nonhomicide offenses[135] or on juveniles who are not incorrigible.[136] It also disallows states from imposing mandatory life without parole on juveniles for homicide offenses.[137]

Defendants who receive sentences that cannot be constitutionally imposed on them are also legally innocent—but solely of their sentence rather than their offense. While defendants who are legally innocent of their offense cannot be punished at all, defendants who are legally innocent of their sentence cannot be punished to the extent prescribed under the law. These laws are also treated as void and inoperative.[138]

The idea that sentence innocence is a kind of innocence has already appeared in the Court's doctrine, as has the intuition that sentence innocence overlaps substantially with offense innocence.[139] In *Montgomery v. Louisiana*, which held that states are constitutionally required to give retroactive effect to the rule that juveniles cannot be sentenced under statutes that mandate life without parole, the Court explained that "the same logic governs a challenge to" punishment and convictions.[140] In equating the two, *Montgomery* cited Friendly's work on innocence.[141]

b. Constitutional Means

Another kind of legal innocence arises when a defendant has been convicted under a statute that is unconstitutional in its current form. In these cases, the government could both criminalize the defendant's same conduct and impose the same punishment under a valid statute, but the

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[135] Graham v. Florida, 560 U.S. 48, 82 (2010).

[136] Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016); Tatum v. Arizona, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring); Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

[137] *Miller*, 132 S. Ct. at 2469.

[138] *Montgomery*, 136 S. Ct. at 730–31.

[139] Sawyer v. Whitley, 505 U.S. 333, 343 (1992) ("[T]he concept of 'actual innocence' could be applied to mean 'innocent' of the death penalty . . .").

[140] 136 S. Ct. 718, 731 (2016).

[141] *Montgomery*, 136 S. Ct. at 731; see also id. ("In support of its holding that a conviction obtained under an unconstitutional law warrants habeas relief, the *Siebold* Court explained that '[a]n unconstitutional law is void, and is as no law.' A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional.").

statute was not written in a constitutionally acceptable manner at the time of the crime. For example, the Due Process Clause forbids the government from enacting criminal statutes that are so unclear they fail to provide reasonable people with fair notice of what the statute prohibits—aptly referred to as "void for vagueness."[142] Criminal statutes that are invalidated on vagueness grounds are void and inoperative just like statutes that criminalize protected conduct.[143] Defendants who are convicted under those statutes are therefore also legally innocent.[144]

In *Welch*, the Court explained that defendants who were sentenced under a provision of the ACCA found to be unconstitutionally void for vagueness are indistinguishable from defendants sentenced under a provision that never applied to them in the first place.[145] In both cases, the defendant is legally innocent of his or her sentence.[146]

* * *

To take stock: legal innocence occurs when the criminal justice system wrongfully subjected a defendant to a statute that authorized criminal punishment based on the defendant's conduct or characteristics. It can occur either because of an error of statutory interpretation (wrongfully interpreting the statute to apply to the defendant), or because of a constitutional error about the statute's validity (concluding that the statute was constitutional). To understand the contours of legal

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[142] U.S. Const. amend V; Id. amend. XIV; see also Johnson v. United States, 135 S. Ct. 2551, 2556–57 (2015) ("[Vagueness] principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences."); Kolender v. Lawson, 461 U.S. 352, 357–58 (1983).

[143] See *Montgomery*, 136 S. Ct. at 731 ("A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void."); *Welch*, 136 S. Ct. at 1265 ("[T]he rule announced in *Johnson* is substantive.")

[144] *Welch* explained these cases would generate legally innocent defendants, just as decisions invalidating a statutory sentencing enhancement on vagueness grounds would:

> For instance, a decision that invalidates as void for vagueness a statute prohibiting "conduct annoying to persons passing by," cf. Coates v. Cincinnati, 402 U.S. 611, 612, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), would doubtless alter the range of conduct that the law prohibits. That would make it a substantive decision under our precedent.

136 S. Ct. at 1266.

[145] See *Welch*, 136 S. Ct. at 1265.

[146] See id. at 1265–66. The same restrictions Subsection II.A.1 discussed about the kinds of sentencing provisions that may generate legal innocent defendants when the provisions are interpreted apply here when those provisions are invalidated.

innocence, it is helpful to establish a backdrop of concepts that legal innocence parallels as well as those from which it diverges. In some respects, legal innocence resulting from an error of statutory interpretation is similar to sufficiency of the evidence claims, which concern whether the evidence at trial was sufficient to prove the defendant's guilt beyond a reasonable doubt.[147] But sufficiency claims do not challenge the nature and contours of the crime that the jury was supposed to determine if the defendant committed. That is, in sufficiency claims, the defendant's argument takes the nature of the offense and the legal definition of the crime as a given and challenges whether the facts at trial establish that the defendant committed that crime (as described to the jury and interpreted by a court).

Legal innocence that results from an error of statutory interpretation may present as a claim that the jury instructions omitted or misdescribed an element of the criminal offense, thereby denying a defendant his Sixth Amendment right to have a jury find every element of the criminal offense. If a court misinterprets a statute and fails to instruct the jury as to all of the elements of the offense, the jury will, naturally, be unable to make findings on every element of the offense.[148] A similar result would occur if a court misinterpreted a statute in the context of a plea colloquy, and the defendant pled guilty without fully understanding the elements of the offense. But the nature of the violation would be different in those circumstances; the claim would be that the defendant's plea agreement was not intelligently made and was therefore unconstitutional.[149]

This definition of legal innocence does not include defendants who were convicted or sentenced under a valid statute in a proceeding that may have been infected by other constitutional errors. For example, even if the defendant's conviction was based on hearsay evidence, violating his Sixth Amendment right to confront the witnesses, the defendant is

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[147] Jackson v. Virginia, 443 U.S. 307, 318–19 (1979).

[148] See, e.g., Neder v. United States, 527 U.S. 1, 7, 12 (1999) (addressing a claim that the jury was improperly instructed in violation of the Sixth Amendment because the court misinterpreted a statute not to contain a particular element).

[149] *Bousley*, 523 U.S. at 618–19 (1997) ("We have long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.' . . . Petitioner nonetheless maintains that his guilty plea was unintelligent because the District Court subsequently misinformed him as to the elements of a § 924(c)(1) offense. . . . Were this contention proved, petitioner's plea would be . . . constitutionally invalid." (citations omitted)).

not legally innocent;[150] neither is a defendant whose conviction or sentence was obtained without the effective assistance of counsel, also guaranteed by the Sixth Amendment.[151]

Part of the reason for this definition of legal innocence is that it takes the existing doctrine as a starting point, and there are no doctrinal indications that courts view procedural errors such as Confrontation Clause violations as errors that are species of innocence. There are, however, plenty of indications that courts treat as varieties of innocence cases where defendants were wrongfully subjected to statutes imposing criminal punishment because of an error of statutory interpretation or a constitutional error about the statute's validity.

Another reason for this definition of legal innocence is conceptual. Where a defendant's conviction or sentence resulted from an error like the Confrontation Clause or right to counsel, he or she may still be guilty of the offense of conviction. That is not true for defendants who were convicted or sentenced under unlawful statutes or statutes that did not apply to them; they are not guilty of a criminal offense. This means that the latter set of cases (cases of legal innocence) overlap more with factual innocence than do the former set of cases (cases involving errors of criminal procedure). And the similarities between factual and legal innocence suggest that federal habeas should be available for both kinds of innocence claims, whereas the differences between them reveal that there may be fewer concerns with litigating legal innocence claims than factual innocence claims.

B. The New Innocence?

The Supreme Court has described the kinds of cases from Section II.A as cases of innocence. *Bousley*, for example, maintained that decisions narrowing the scope of a criminal statute by interpreting its terms apply in federal habeas proceedings because a principal function of habeas is to minimize the "risk that the innocent will be convicted."[152] Subsequent cases have underscored that decisions invalidating statutes on grounds that would not prevent Congress from criminalizing the same conduct or imposing the same punishment under a differently

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[150] Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

[151] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[152] 523 U.S. at 620 (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)); see also *Bousley*, 523 U.S. at 621–22.

constructed statute concern innocence,[153] as are cases where no valid statute authorized the defendant's sentence.[154]

But apart from the fact that the doctrine has started to describe these as cases of innocence, should they be treated as such? This Part suggests that they should be for several reasons. Most importantly, there is conceptual overlap between factual and legal innocence, and both raise similar concerns in relation to theories of punishment.

1. Conceptual Overlap

Legal innocence cases are, in important ways, similar to cases of factual innocence. In both cases, the defendant did not do whatever act was prohibited by the law under which he was convicted or sentenced. In factual innocence cases, new facts or evidence reveal what the defendant did, and establish that the defendant's conduct was not a crime or did not warrant additional punishment. The same is true in legal innocence cases. Even without new facts or evidence, whatever the defendant did was not a crime, or did not warrant additional punishment. In cases of legal innocence, the statute under which the defendant was convicted or sentenced does not authorize the defendant's detention either because the statute does not apply to the defendant or because the statute is invalid. Cases of factual and legal innocence both result in defendants who did something that was not a crime. Every factually innocent person is legally innocent in the sense that they did not commit an act that was lawfully prohibited by the statute of their conviction.

Because both factual and legal innocence cases involve defendants who are not guilty of a crime, similar concerns are present in both kinds of cases. In a recent article, Professor Dan Epps surveyed the concerns that have motivated the legal system's attempts to prevent the conviction

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[153] McQuiggin v. Perkins, 569 U.S. 383, 393(2013) (characterizing *Bousley* as holding "that actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review"); see also *Welch*, 136 S. Ct. 1257, 1267 (2016).

[154] See *Montgomery*, 136 S. Ct. at 731 (citing Friendly, supra note 1, at 151); *Welch*, 136 S. Ct. at 1265 (invoking innocence considerations of whether conduct was criminal); Dretke v. Haley, 541 U.S. 386, 397 (2004) (Stevens, J., dissenting) ("because that . . . resulted in the imposition of an unauthorized sentence, it also follows that respondent is a 'victim of a miscarriage of justice...'") (quoting Wainwright v. Sykes, 433 U.S. 72, 91 (1977)); *Dretke*, 541 U.S. at 399 (Kennedy, J., dissenting) (describing case where "an individual has been sentenced for a crime he did not commit").

of the innocent.[155] One of the primary concerns Epps discusses is the severity of criminal sanctions, which include harsh terms of imprisonment, collateral consequences that prevent the defendant's ability to participate fully in civil society, and social stigma, among others.[156] Because of the severe impact of conviction on the individual, Epps explains, there is a particular concern with ensuring that criminal law's consequences are not imposed on defendants who are not actually guilty of a crime.[157] That concern is equally present in legal innocence cases.

There are similar concerns when the defendant is innocent of his particular sentence. Sentencing provisions can trigger a wide range of consequences, including additional years of imprisonment (sometimes doubling a prisoner's sentence); a different kind of punishment (such as capital punishment); different collateral consequences (such as eligibility for public benefits or subsequent criminal penalties); and others.[158] The severity of any one of these different sanctions and the attendant consequences for the defendant makes it important to ensure that a particular sanction is only applied to persons who are actually subject to it. Distinctions among sentences, and the applicability of any particular sentencing statute, are especially essential given the increasingly expansive criminal prohibitions which apply to a wide swath of conduct. As Professor Erik Luna has written, some states punish marketing techniques for perfumes and lotion; others prohibit disturbing a congregation by "engaging in boisterous or noisy amusement"; others bar spitting in public spaces or disturbing pigeons; and others prohibit juveniles from smoking or not attending school.[159]

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[155] See Daniel Epps, The Consequences of Error in Criminal Justice, 128 Harv. L. Rev. 1065 (2015). Epps's project was to critically examine whether a criminal justice system should adopt, as a theory of punishment, a preference for errors of the kind where a guilty defendant goes free or errors of the kind where an innocent defendant is convicted.

[156] Id. at 1088–89.

[157] Id.

[158] See, e.g., Shon Hopwood, Clarity in Criminal Law, 54 Am. Crim. L. Rev. 695, 706–08 (2017) (identifying increasingly draconian punishments); Eisha Jain, Prosecuting Collateral Consequences, 104 Geo. L.J. 1197, 1206–10 (2016) (cataloguing different collateral consequences).

[159] See Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703, 704 (2005). Professor Alexandra Natapoff's work has documented how almost ten million criminal misdemeanor cases are filed each year. See Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. 1313, 1313–15 (2012).

There are fewer cases where the question is whether the defendant's conduct is criminalized; the question is often instead to what extent the defendant's conduct is penalized.[160]

2. Theories of Punishment

Legal innocence also raises similar concerns as factual innocence with respect to the purported purposes of criminal law and punishment: retribution, deterrence, rehabilitation, and incapacitation.[161] Indeed, no firm line separates the two kinds of innocence when it comes to the theories of punishment, which, to whatever extent they operate in our criminal justice system, are tied to whether a defendant has committed a legal wrong. The criminal justice system exacts retribution and deters conduct with coercive sanctions through a process that first depends on identifying an act as criminal; only then is any kind of retribution or deterrence warranted. The theories of punishment do not authorize or justify punishment for any kind of wrong, moral or otherwise; they justify punishment only for those wrongs that are identified as such by criminal law.

The claim that different theories of punishment do not justify punishment for acts that haven't been criminalized may have a kind of "just so" feel to it. But the claim has some basis in the different theories of punishment.[162] Tying the theories of punishment to whether an act is

[160] See, e.g., Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 Colum. L. Rev. 1276, 1278–79 (2005) (noting rise of "harsher sentences"); Malcolm C. Young, Special Interests, Principles, and Sentencing Reform in America, 96 J. Crim. L. & Criminology 1509, 1510 (2006) ("In pursuit of a claim of near-innocence for the alleged victims of 'overcriminalization,' the authors of these chapters sidestep the central issue in sentencing, which is simply what amount of punishment a society should impose on wrongdoers.").

[161] See Aaron Xavier Fellmeth, Civil and Criminal Sanctions in the Constitution and Courts, 94 Geo. L.J. 1, 17–18 (2005). The Supreme Court has declared that the "two primary objectives of criminal punishment" are "retribution and deterrence." See, e.g., Kansas v. Hendricks, 521 U.S. 346, 361–62 (1997). I do not defend any one of these principles as a basis for punishment, but raise them only to show that, if they do not authorize the punishment of a factually innocent person, they also do not authorize the punishment of a legally innocent person.

[162] The claim has some basis in the different theories of punishment. However retribution is framed, it does not justify the punishment of a legally innocent individual because there is no legal wrong or crime to be remedied. See, e.g., J. Angelo Corlett, Responsibility and Punishment 40–60 (2d ed. 2004) (explaining retribution). For retributivists, an individual must "previously [be] found punishable before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens." Immanuel Kant, The Metaphysics of Morals, *in* Practical Philosophy, 473 (Mary J. Gregor ed. & trans., 1996)

made criminal by statute reflects the idea that laws function as a way for society to express, through its elected representatives, the majority's preferences against certain behaviors.[163] Criminal laws are therefore one means—and the only recognized operative means—of expressing a judgment about what acts warrant retribution or deterrence. Legislatures define crimes and ascribe penalties for them that prosecutors may choose to pursue or juries may elect to impose.[164]

With respect to whether the purposes of criminal laws and criminal punishment are being served, defendants who are legally innocent because of an error of statutory interpretation are similarly situated to defendants who are factually innocent. A defendant who is legally innocent because of an error of statutory interpretation committed an act that the law, properly interpreted, does not make criminal, or received a punishment that the law, properly interpreted, does not actually impose. Legally innocent defendants did not commit an act that has been identified as punishable, so their punishment is not justified on grounds of retribution. Legally innocent defendants also have not committed an act that the law has elected to deter.

Legal innocence cases may have a different moral valence than factual innocence cases, as legally innocent defendants may have done something wrong or immoral, unlike factually innocent defendants. Imagine, for example, a legally innocent defendant who robbed a bank, but carried with him a fake gun rather than a real one, such that the crime didn't amount to armed robbery under the relevant statute. By contrast, the most common example of a factually innocent defendant would be a defendant who was at home watching a movie instead of robbing a bank.

(1797) (emphasis omitted). The same is true when viewed from the perspective of deterrence. Punishing a legally innocent defendant is unwarranted because a legally innocent defendant has not committed an act that the law can deter or has elected to deter in coercive ways. See Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 169–72, 175–76 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1789) (where punishment is groundless, the suffering inflicted on the convicted criminal outweighs benefit to society); see also John Rawls, Two Concepts of Rules, *in* Collected Papers 20, 28 (Samuel Freeman ed., 1999) (social utility requires a conviction to be guilty).

[163] See Frank B. Cross, Institutions and Enforcement of The Bill of Rights, 85 Cornell L. Rev. 1529, 1550–76 (2000) (explaining while complicating the claim that the federal legislature is majoritarian).

[164] See Lauren M. Ouziel, Legitimacy and Federal Criminal Enforcement Power, 123 Yale L.J. 2236, 2274, 2275 n.147 (2014).

The reality, however, is that the two kinds of cases lie along a continuum, rather than being separated by a clear line, when it comes to issues like morality. In factual innocence cases, whether the defendant's conviction and sentence serves the purposes of criminal punishment is tied to whether the defendant actually committed his offense of conviction—not to general notions of wrongdoing.[165] Imagine that a defendant is accused of robbing a bank, but he has a videotape of himself having sex with a person who is not his spouse and who did not consent to the videotaping that is timestamped at the time when he was supposedly robbing the bank. Even though secretly taping a sexual encounter is wrong and should be deterred, it does not follow that the defendant's robbery conviction should be upheld.[166] Indeed, even if the defendant's nonconsensual videotaping is unlawful, it does not follow that his robbery conviction should be upheld. The two courses of conduct may be subject to different punishments and in order to warrant punishment, the defendant's nonconsensual videotaping would have to be subject to the entire criminal process. Nor is it the case that factual innocence is reserved for people who are entirely not blameworthy. That is particularly true for offenders whom the Court has recognized can be innocent of a death sentence, without being innocent of the underlying crime.[167]

While legal innocence cases that involve statutory interpretation share important similarities with factual innocence cases, legal innocence cases that involve statutory invalidation are not on all fours with cases of factual innocence with respect to the purposes of punishment.[168] Where

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[165] A recent paper by Gabriel Mendlow argues that the "wrong" that a statute punishes is related to the elements of the crime, though imperfectly as not all elements may be part of the wrong a statute punishes, and some statutes may punish wrongs that aren't a combination of some elements of the offense. See Gabriel Mendlow, The Elusive Object of Punishment (Dec. 11, 2017) (unpublished manuscript), https://ssrn.com/abstract=3083083 [https:// perma .cc/LPA4-ET44]. But, Mendlow writes, "[t]he wrong a law criminalizes" is "the product of . . . factors, including . . . what the law says" as well as "the way various officials exercise their discretion to charge, convict, and sentence." Id. at *4. For example, Mendlow notes "conditional" elements that establish "when to punish rather than what to punish for," such as statutes of limitations. Id. at *13.

[166] Id. at 13 ("We may punish a person under a criminal statute only if he satisfies the statute's elements.").

[167] E.g., Sawyer v. Whitley, 505 U.S. 333, 343–46 (1992).

[168] Legal innocence cases may also differ from some factual innocence cases in which the wrong person has been convicted of a crime. In legal innocence cases, however, it may be that there was no crime at all.

legal innocence results from statutory invalidation, the democratic process has identified the defendant's act as unlawful, punishable, and worthy of deterrence. But the Constitution sometimes prevents the democratic process from reaching that conclusion. Where the Constitution prohibits the defendant's conduct from being criminalized, or prohibits the defendant from receiving the sentence that he did, the calculus for purposes of the theories of punishment has already been made—the democratic process cannot choose to punish that conduct or punish the offender to the degree that it did. In some cases where the Constitution prohibits lawmakers from imposing punishment in the manner that a law prescribes, there may be questions about whether the democratic process has actually imposed punishment, namely when the law is unclear about what conduct is prohibited.

C. Resistance to Innocence

Several of the concerns, such as the staleness of evidence or the drain on resources in retrials, that Judge Friendly raised about the federal habeas process are echoed in Supreme Court decisions that have narrowed the scope of federal habeas review.[169] Although Friendly hoped to address these concerns by reorienting habeas around innocence, many of the issues he raised about the current federal habeas system would also apply to any federal habeas system that is devoted to remedying claims of factual innocence. Litigating factual innocence claims, like Fourth, Fifth, and Sixth Amendment claims, takes time and resources and requires federal courts to redetermine events that may have occurred a long time ago.

This section argues that these critiques may apply with less force to claims of legal innocence. The general critiques of federal habeas relitigation almost uniformly envision fact-dependent claims that would result in subsequent proceedings attempting to reanswer questions that the original proceeding already attempted to resolve. Many of these concerns are not as applicable to legal innocence claims because there may not be retrials, and sentence innocence claims in particular are not susceptible to many of the problems with federal relitigation or factual innocence claims. Here, too, cases of legal innocence and factual

[169] See, e.g., Bryan A. Stevenson, The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases, 77 N.Y.U. L. Rev. 699, 706–28 (2002) (documenting this).

innocence lie along a continuum in how much they implicate critiques of federal habeas relitigation.

1. Relitigation & Factual Innocence

Despite the draw of innocence in both doctrine and scholarship, federal habeas has not yet adopted any kind of rule that allows innocence claims to bypass the procedural restrictions on federal habeas review. The Court has yet to even decide whether a freestanding claim of factual innocence is a cognizable ground for federal habeas relief.[170] Understanding why innocence proposals have not made additional headway requires an analysis of the concerns with such proposals.

Judge Friendly recommended making federal collateral review about innocence in order to address the perceived defects he saw in relitigating "the asserted denial of a 'constitutional' right, even though this was or could have been litigated in the criminal trial and on appeal."[171] Friendly drew on Bator's earlier article that had criticized the system for allowing defendants to relitigate constitutional claims in federal habeas, and pointed to the strain it put on judicial resources. Friendly claimed that "the most serious single evil with . . . collateral attack is its drain upon the resources of the community."[172] Friendly and Bator also argued that relitigation undermined criminal law's deterrent function and other purposes of substantive criminal law, such as the societal interest in finality.[173]

Although Friendly's solution was to make federal habeas focus on innocence claims, many of the critiques he levied against relitigation also apply to innocence claims, or at least some innocence claims. Indeed, courts and scholars regularly use these same critiques to reject proposals that would make federal habeas more receptive to factual innocence claims.[174] Plausible claims of factual innocence are not hard

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[170] See Dist. Att'y's Office for Third Jud. Dist. v. Osborne, 557 U.S. 52, 71 (2009) (noting "[w]hether such a federal right [to be released upon proof of actual innocence] exists is an open question") (citing House v. Bell, 547 U.S. 518, 554–55 (2006); Herrera v. Collins, 506 U.S. 390, 398–417 (1993)).

[171] Friendly, supra note 1, at 154.

[172] Id. at 148; see also id. at 146–48; Bator, supra note 9, at 446–47.

[173] See supra Section I.A.

[174] See, e.g., *Herrera*, 506 U.S. at 401–04 (noting strain on resources and problems with evidentiary decay for factual innocence claims); infra note 175–176, 178. {Master: Triple digit cross reference}

to make, and by their nature, factual innocence claims are fact intensive. Litigating factual innocence claims would therefore strain judicial resources and involve a considerable amount of fact-finding and reconsidering stale evidence.[175] At a minimum, these claims require an examination of record evidence. But many claims will also require courts to collect and consider additional evidence as they may involve subsequently discovered facts. Factual innocence claims may involve subsequent research or findings about the kind of evidence that was used to convict the defendant, such as subsequent scientific research on the validity of forensic evidence, or eyewitness testimony. Either way, factual innocence claims involve collecting additional evidence and assessing how and whether it discounts prior evidence of the defendant's guilt. Additionally, any and all of the relevant evidence may have become stale. Because federal collateral review occurs many years after the relevant events occurred, redetermining the facts and events may be impractical due to the passage of time.[176]

The Supreme Court has raised other concerns with factual innocence claims as well. The Court has expressed uncertainty about the kind of relief that might be warranted for factual innocence claims. If a court has determined that the defendant was probably innocent in light of new evidence he obtained, the Court wondered, a subsequent retrial seemed inappropriate.[177] And any retrial that might occur would suffer from possible evidentiary decay.[178]

Some of the general critiques of the current federal habeas process are equally applicable to legal innocence claims. These claims are formally

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[175] John H. Blume et. al, In Defense of Noncapital Habeas: A Response to Hoffmann and King, 96 Cornell L. Rev. 435, 460 (2011) (outlining reasons why litigating factual innocence claims is burdensome); Eve Brensike Primus, A Crisis in Federal Habeas Law, 110 Mich. L. Rev. 887, 903–04 (2012) (same).

[176] Brian Hoffstadt, How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus, 49 Duke L.J. 947, 1006–07 (2000).

[177] See, e.g., *Herrera*, 506 U.S. at 402 (arguing that the petitioner was "understandably imprecise in describing the sort of federal relief to which a suitable showing of actual innocence would entitle him"); id. at 403 ("The dissent fails to articulate the relief that would be available if petitioner were to meets [sic] its "probable innocence" standard. Would it be commutation of petitioner's death sentence, new trial, or unconditional release from imprisonment?"). A recent article has argued it would violate the double jeopardy clause to retry the defendants. See Jordan M. Barry, Prosecuting the Exonerated: Actual Innocence and the Double Jeopardy Clause, 64 Stan. L. Rev. 535, 535 (2012).

[178] See *Herrera*, 506 U.S. at 417 (noting "the enormous burden that having to retry cases based on often stale evidence would place on the States.").

available to prisoners during both the criminal trial and appeal.[179] A defendant can always argue that the statute under which he was convicted or sentenced was unconstitutional, or that it does not apply to him. And although a court might not recognize the relevant constitutional immunity or interpret the statute correctly until after the defendant has been convicted or sentenced, there is little reason to suspect that state or federal trial courts are particularly hostile to legal innocence claims relative to other kinds of claims.[180]

But legal innocence claims are not as susceptible to the resource-based critiques of federal habeas relitigation or factual innocence claims for several reasons. First, several kinds of legal innocence claims are less fact dependent than factual innocence claims. Legal innocence claims that depend on a constitutional immunity do not require courts to consider or weigh the evidence that was used to convict the defendant. These claims require courts to assess the constitutionality of a statute, and whether it criminalizes protected conduct or imposes an unlawful punishment. The same is true for legal innocence claims that argue a statute was unconstitutional because of the way the statute was written, or how it was enacted. Courts would assess what the statute says, or how it was enacted, rather than any of the factual evidence from the defendant's trial.

Even legal innocence claims premised on the idea that a statute, properly interpreted, did not prohibit the defendant's conduct do not require the same kind of factual redeterminations as pure factual innocence claims. Some number of these claims will involve only an assessment of whether the facts, as they were revealed at trial (or, more likely, a plea colloquy), fall within the scope of a criminal prohibition, properly interpreted.[181] Where the criminal prohibition has a lesser-included offense (a prohibition with similar but fewer elements),[182] reviewing courts can enter judgments of acquittal on the statute whose

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[179] This claim is more complicated for guilty pleas. See, e.g., William Ortman, Probable Cause Revisited, 68 Stan. L. Rev. 511, 552–58 (2016).

[180] See *Herrera*, 506 U.S. at 415–16 (noting that states have provided remedies to innocent defendants).

[181] See infra Subsection III.A.1.c (discussing how the remedy would work in cases of plea bargains and offering modification to *Bousley*).

[182] See, e.g., Burrage v. United States, 134 S. Ct. 881, 887 & n.3 (2014) (explaining why Section 841(a)(1) is a lesser included offense of Section 841(b)(1)(C)).

elements the prosecution failed to prove, but a judgment of conviction on a lesser-included offense.[183]

In this way, adjudicating a legal innocence claim may not meaningfully expand the scope of federal habeas review because federal courts already review whether the evidence at trial was legally sufficient to convict the defendant beyond a reasonable doubt. Factual innocence claims, by contrast, would expand the federal courts' review of the facts by including evidence that was subsequently learned of or obtained. There may also be less of a concern with legal innocence claims expanding the scope of federal habeas review because some kinds of legal innocence claims (specifically those that argue the defendant was convicted under an erroneous interpretation of a statute) can already be raised and litigated as deprivations of the Sixth Amendment right to a jury trial, or allegations of an unknowing, involuntary guilty plea.[184]

Of course, some factual innocence claims also wouldn't present a significant drain on federal resources relative to existing habeas litigation. DNA testing that identified someone else as the perpetrator, for example, would not require an intense review and assessment of evidence at trial. And factual innocence claims resemble sufficiency-of-the-evidence claims to the extent they require courts to assess the evidence on the record.[185] Factual innocence claims, like legal innocence claims, will raise the resource-based critique of federal habeas litigation to varying degrees, although legal innocence claims may do so less frequently.

Second, some legal innocence claims, if successful, would not result in subsequent proceedings.[186] Legal innocence claims that depend on constitutional immunity do not result in a new trial. If the defendant's conduct is constitutionally protected, the state cannot retry the defendant at all. The same is true for legal innocence claims that result where the

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[183] Cf. Morris v. Mathews, 475 U.S. 237, 246–47 (1986) (holding that conviction vacated on double jeopardy grounds can be "reduced to a conviction for a lesser included offense which is not jeopardy barred").

[184] See supra text accompanying notes 147–149.

[185] Jackson v. Virginia, 443 U.S. 307, 319 (1979) (framing the issue as whether "after viewing the evidence [at trial] in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

[186] See Herrera v. Collins, 506 U.S. 390, 403 (1993) (expressing concern that, if successful, a factual innocence claim "would in effect require the State to retry petitioner 10 years after his first trial" with attending problems of evidentiary decay).

statute of conviction, as written, is unconstitutional. If the statute was unlawfully written or enacted and a court invalidates it, the defendant cannot be retried under that statute. Nor can the defendant be retried under a subsequently enacted statute as the Ex Post Facto Clause prohibits states from enacting statutes that criminalize or penalize conduct that occurred before the statute's enactment.[187]

For similar reasons, legal innocence claims that result where the statute, properly interpreted, does not apply to the defendant, may not result in a retrial. The defendant cannot be retried under a statute that was later rewritten in a way that might be applied to the defendant. A court could determine whether the facts as they were revealed at trial (or, more likely, a plea colloquy) fall within the scope of a criminal prohibition, properly interpreted.[188] Alternatively, a court could enter a judgment of acquittal on the conviction on the criminal prohibition that was narrowed, a judgment of conviction on a lesser-included prohibition that reaches the defendant's conduct.[189] Or a court could permit the government to introduce additional evidence and retry the defendant under the criminal prohibition, properly interpreted, or another prohibition.[190] Moreover, the nature of relief in these cases of legal innocence is fairly clear, at least relative to cases of factual innocence, where the Court expressed concern about whether subsequent retrials should be prohibited.[191]

But again, some factual innocence claims will also not result in retrials. Where subsequently discovered facts identify someone else as

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[187] See U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); Peugh v. United States, 569 U.S. 530, 538 (2013) (explaining relevant doctrines); id. (noting that ex post facto clause prohibits ex post facto sentencing statutes and punishments, not just offense definitions).

[188] Cf. Neder v. United States, 527 U.S. 1 (1999) (finding that courts could conduct harmless error analysis where an erroneous jury instruction omitted an element of the offense).

[189] See Rutledge v. United States, 517 U.S. 292, 306 (1996) (approvingly noting federal appellate courts that "have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense").

[190] See infra Subsection III.A.1.c (discussing how the remedy would work in cases of plea bargains and offering modification to *Bousley*).

[191] See *Herrera*, 506 U.S. at 403 (expressing concern about requiring a new trial ten years after the first trial based on a claim of factual innocence).

the perpetrator, or conclusively exonerate the defendant, then no duplicative retrial will occur.

Third, any relief in cases of legal innocence would not be duplicative with a prior proceeding. Both Friendly and Bator were concerned with criminal procedure rules, such as the Fourth, Fifth, or Sixth Amendments' procedural protections, that govern how a defendant's trial proceeds.[192] A violation of any of these provisions ordinarily results in a retrial that would focus on the same question as the original trial—whether the defendant committed the offense he was convicted of at his first trial. Legal innocence claims that might result in subsequent proceedings are likely those that contend the statute was incorrectly interpreted in the original proceeding. But any subsequent proceeding that might occur in those cases would focus on a different question than whatever animated the original trial. For example, a state might attempt to charge the defendant with violating another criminal statute if a court concluded the statute under which the defendant was convicted did not apply to him. That subsequent proceeding, while it might rely on facts that could have become stale, would not merely be a reenactment of the original proceeding and the kind of duplicative proceeding that Friendly, Bator, and the Court singled out for particular criticism.[193]

Finally, the various finality-related concerns with relitigation, which range from deterrence, to rehabilitation, to repose, apply differently in cases of legal innocence.[194] As the previous section argued, these societal interests do not justify punishing defendants who have not committed an act the law has criminalized. If a defendant's conduct was not covered by a statute, there is no underlying substantive criminal law, with attendant substantive goals, to be furthered. If the substantive criminal statute was unconstitutional, then the Court has already determined that the underlying constitutional right outweighs any deterrent or other interest that may be part of the criminal law. Legal

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[192] See Amsterdam, supra note 84, at 383 (identifying the concern as a "duplication of judicial effort"); Bator, supra note 9, at 451 (referring to "repetition of inquiry" and "redetermination of the merits"); Friendly, supra note 1, at 157 (criticizing rules that the defendant "is entitled to repeat engagements directed to issues . . . even though his guilt is patent.").

[193] See *Herrera*, 506 U.S. at 417 (noting "the enormous burden that having to retry cases based on often stale evidence would place on the States").

[194] Anthony Amsterdam further parsed the finality interests that Bator invoked. See Amsterdam, supra note 84, at 383–86.

innocence challenges therefore do not undermine the substantive goals of criminal law in the same way procedural challenges might.

The existing critiques of litigating factual innocence claims are both under-inclusive and over-inclusive—not all factual innocence claims will implicate them, and those that do will implicate them to varying degrees. The same is true for legal innocence claims, although they may be less likely than factual innocence claims to require the kind of fact-intensive relitigation that is a concern with factual innocence claims.

2. Sentence Versus Offense

The relitigation critiques are also implicated to a lesser degree where a defendant argues that he is legally innocent of a sentence, rather than an offense. Sentence innocence claims do not require the same degree of resource-intensive relitigation as offense innocence claims because the defendant's guilt of the underlying offense does not have to be redetermined or relitigated.[195] For example, in the ACCA context, if a defendant is legally innocent of an ACCA sentence, the defendant's conviction of the underlying offense, Section 922(g) (unlawful possession of a firearm) still stands. Any subsequent sentencing proceeding that determines what sentence to impose for that offense without the ACCA sentencing enhancement is therefore more limited in nature, and thus less burdensome, than a subsequent relitigation of the defendant's guilt.[196]

Additionally, any resentencing proceeding would not be exclusively focused on events that occurred in the past, and thus the concerns with evidentiary decay and staleness are less potent in sentence innocence cases than they are in offense innocence cases. Criminal trials rely on factual determinations about what the defendant did or did not do at some prior time in order to assess whether the defendant's conduct falls within the scope of a criminal statute. Some sentencing eligibility determinations may also turn on the defendant's prior conduct and

[195] See United States v. Williams, 399 F.3d 450, 456 (2d Cir. 2005) (reasoning that "the cost of correcting a sentencing error is far less than the cost of a retrial" because "[a] resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel"); Sarah French Russell, Reluctance to Resentence: Courts, Congress, and Collateral Review, 91 N.C. L. Rev. 79, 146 (2012); and id. at 149.

[196] See Garret, Accuracy in Sentencing, supra note 110, at 543 (discussing the flexibility of miscarriage of justice exceptions and the view that the burden of this exception is not great).

events that are contemporaneous to the commission of the offense. But not all of them do. As the ACCA case illustrates, the sentencing enhancement turns on legal characterizations about the defendant's prior convictions. Even where sentencing eligibility turns on the defendant's prior conduct, the ultimate sentencing decision also incorporates an assessment about the defendant's character and likelihood of reoffending, both of which are determinations that would not be undermined by the passage of time.[197]

Finally, several of the finality-related concerns such as deterrence, rehabilitation, and repose, are implicated to a lesser degree where a defendant is innocent of his sentence, rather than his offense.[198] The remedy in sentence innocence cases is not overturning a conviction, and thus sentence innocence cases do not forego the possibility of using criminal law as a deterrent or means of retribution.[199] It was partially for these reasons that the Court, in *Molina-Martinez v. United States*, allowed defendants to more easily establish "plain error" for sentencing errors rather than offense errors.[200] The Court observed that "[c]ourts have . . . mechanisms short of a full remand to determine whether a district court . . . would have imposed a different sentence absent the error," and "a remand for resentencing . . . does not invoke the same difficulties as a remand for retrial."[201]

The resentencing litigation that occurred after the Supreme Court's decision in *Johnson v. United States* is illustrative. After the Court

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[197] See generally Douglas A. Berman, Re-Balancing Fitness, Fairness, and Finality for Sentences, 4 Wake Forest J.L. & Pol'y 151, 166–73 (2014) (explaining that "there are fundamental and essential conceptual differences between criminal trial[s] . . . which are designed . . . to determine the binary question of a defendant's legal guilt, and criminal sentencing proceedings, which . . . assess and prescribe a convicted offender's future and fate").

[198] See, e.g., United States v. Brockenborrugh, 575 F.3d 726, 743 (D.C. Cir. 2009) (relying on "the lesser costs to the systemic interests in finality where resentencing, as opposed to retrial, is the appropriate remedy").

[199] See Russell, supra note 195, at 82–83 (explaining that "[w]hen a mistake is made, the court can then decide whether it actually impacted the ultimate sentence and correct the sentence only in those instances").

[200] 136 S. Ct. 1338, 1348 (2016).

[201] Id. at 1348–49 (quoting United States v. Wernick, 691 F.3d 108, 117–18 (2d Cir. 2012)). *Montgomery* likewise suggested different ways states could reduce the burden of potential resentencings in the wake of *Montgomery*. See Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (noting that states could remedy *Miller* "violation[s] by permitting juvenile homicide offenders to be considered for parole").

invalidated the ACCA's residual clause, many federal prisoners filed resentencing requests; the Court of Appeals for the Eleventh Circuit alone received "more than 1,800" requests for authorization to file second or successive resentencing motions.[202] The Eleventh Circuit is unique in that the court requires panels to dispose of requests for authorization within 30 days,[203] based only on the prisoner's filing (and presentence reports or transcripts of sentencing proceedings).[204] Thus, the Eleventh Circuit ruled on thousands of authorization requests in the wake of *Johnson*, which entailed deciding whether prisoners' predicate convictions qualified as ACCA predicates under the still-valid, element-of-force clause or enumerated offense clause.[205] While the Eleventh Circuit's approach to *Johnson* resentencings was imperfect, and fairly subject to some criticism,[206] it underscores the judicial capacity to process sentence innocence claims more efficiently than offense innocence claims.

3. Reform Advantages

Making habeas law more uniformly receptive to legal innocence claims may even serve some of the reform goals animating procedural restrictions on federal habeas. The interest in judicial economy is often cited in both the case law about habeas procedure and the scholarship about habeas law.[207] That interest would be furthered by a general rule for legal innocence claims, and a commonly defined legal innocence exception that allows petitioners to bypass the many different procedural

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[202] In re Jones, 830 F.3d 1295, 1301 (11th Cir. 2016) (Rosenbaum & Pryor, JJ., concurring in result).

[203] In re Bradford, 830 F.3d 1273, 1275 (11th Cir. 2016) (citing In re Henry, 757 F.3d 1151, 1157 n.9 (11th Cir. 2014)); In re Clayton, 829 F.3d 1254, 1265–66 (11th Cir. 2016) (Martin, J., concurring in result) (identifying this as a difference between the Eleventh Circuit and other courts of appeals).

[204] *In re Clayton*, 829 F.3d at 1264 (Martin, J., concurring in result) (quoting In re McCall, 826 F.3d 1308, 1312 n.7 (11th Cir. 2016) (Martin, J., concurring)).

[205] Leah M. Litman & Shakeer Rahman, What Lurks Below *Beckles*, 111 Nw. U. L. Rev. 555, 574–75, 575 n.100 (2017) (citing cases) (originally published online) (available at https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1268&context=nulr [https://perma.cc/UBZ5-6RLA]).

[206] See *In re Clayton*, 829 F.3d at 1263–67 (Martin, J., concurring in result) (criticizing Eleventh Circuit approach); Litman & Rahman, supra note 205, at 572–81 (same).

[207] See, e.g., McCleskey v. Zant, 499 U.S. 467, 490–92 (1991); Schneckloth v. Bustamonte, 412 U.S. 218, 259–61 (1973) (Powell, J., concurring).

restrictions to habeas review.[208] If legal innocence functioned as a means of bypassing the various procedural restrictions, a determination about whether a petitioner is legally innocent would save courts from performing the many different inquiries that are now required by retroactivity, procedural default, the statute of limitations, exhaustion, and other restrictions on habeas review.[209] The Court has previously suggested that adopting uniform exceptions to procedural restrictions on habeas furthers the goals of habeas review. Before the AEDPA enacted restrictions on successive petitions, the Court elected to import the cause and prejudice, and miscarriage of justice exceptions to procedural default to cases of successive petitions. The Court explained that "[c]onsiderations of certainty and stability" supported doing so, because the standard was "defined in the case law" and thus would be "familiar to federal courts."[210]

Adopting a uniform legal innocence standard for the various procedural restrictions on federal habeas serves other purposes as well. Streamlining procedural rules may beneficially affect habeas litigants, who are primarily pro se.[211] Adopting a common, uniform account across different procedural domains would make the process of habeas litigation less unwieldy and difficult for habeas petitioners.[212]

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[208] It may mean that innocence should not be the "last resort" exception that courts could evaluate only once they have exhausted other potential exceptions to procedural restrictions. Cf. Dretke v. Haley, 541 U.S. 386, 393–94 (2004) (holding instead that federal courts may only inquire into whether a petitioner is actually innocent after concluding the petitioner had no other grounds for cause to excuse the procedural default, and no non-defaulted claims warranting comparable relief).

[209] See Blume et al., supra note 175, at 465–75 (identifying various procedural inquiries as a resource drain on federal courts); Barry Friedman, Failed Enterprise: The Supreme Court's Habeas Reform, 83 Calif. L. Rev. 485, 541–43 (1995) (same).

[210] *McCleskey*, 499 U.S. at 495–96. For additional benefits of importing one area of the law into another, see, for example, Nelson Tebbe & Robert L. Tsai, Constitutional Borrowing, 108 Mich. L. Rev. 459, 484–94 (2010).

[211] See Blume et al., supra note 175, at 445 (discussing the difficulties of collateral challenges for pro se litigants).

[212] Converging (i.e., making uniform) different remedial standards can be a mechanism to limit remedies. See, e.g., Leah M. Litman, Remedial Convergence and Collapse, 106 Calif. L. Rev. (forthcoming 2018) (manuscript at 20–32) (on file with author). But that would not be the case here, where the restrictions would be leveled up, instead of leveled down.

III. REALIZING LEGAL INNOCENCE

This Part builds on the project of the prior section by outlining what the law of federal habeas would look like if federal habeas was, in fact, committed to remedying claims of legal innocence. But an innocence-oriented law of federal habeas does not have to be left to the imagination. As this Part shows, doctrinal tools are already available for judges and litigants to make federal habeas more accommodating of legal innocence claims. These doctrines can fairly be read to make the federal habeas law we already have more amenable to claims of legal innocence. To the extent there are statutory barriers—and judicial decisions interpreting those statutory barriers to bar claims of innocence—this Part re-examines the interpretation of those barriers to ascertain which ones are actual impediments to litigating innocence claims.

Much of the scholarship on reforming habeas has focused on legislative fixes to the current system. Repealing the AEDPA and replacing it with something that is rational and fair would certainly be a welcome development, and the ability to rely on existing habeas law to address legal innocence claims is not a reason to forego that possibility. But Congress's failure to revisit the AEDPA should not preclude courts and litigants from using existing tools to make federal habeas more amenable to claims of innocence, including claims of legal innocence. The Supreme Court has shown that it is receptive to many different kinds of legal innocence—innocence resulting from decisions of statutory interpretation, or innocence of noncapital sentences—and the doctrine should follow suit.

Bringing legal innocence claims into the innocence fold may bring attention to certain kinds of innocence that scholars may wish to incorporate into innocence-oriented reform proposals. Of the legislative reform proposals, only one (King and Hoffman's) mentioned some of the kinds of claims that give rise to legal innocence, such as where a new substantive rule "place[s] certain conduct totally beyond the bounds of punishable behavior."[213] King and Hoffman proposed a statutory amendment allowing federal prisoners to obtain review of whether he

[213] See King & Hoffman, Habeas for the Twenty-First Century, supra note 4, at 93; Hoffman & King, Rethinking the Federal Role, supra note 41, at 820. King & Hoffmann might expand their definition of retroactive rules that may be raised in federal habeas expand in light of recent cases like *Welch* or *Montgomery*.

"was convicted for conduct that was never covered by the federal statute defining his offense."[214]

But by not framing these kinds of claims in terms of innocence, their proposal relies on the hope that some future Congress will enact a modified federal habeas statute that makes federal habeas relief available to legally innocent prisoners. If claims based on decisions of statutory interpretation, or claims based on new, retroactive constitutional rules are not conceived of as claims of innocence, then Congress must adjust many different statutory provisions and judicial doctrines—procedural default, statute of limitations, exhaustion, successive petitions, retroactivity, evidentiary hearings, mandate recalls, how claims are reviewed on the merits—that could bar relief on those claims. If these claims are instead treated as innocence claims, that is less of an issue because there are already exceptions to many of these procedural hurdles for claims of innocence. What is needed is a recognition that the Supreme Court has started treating legal innocence claims as claims of innocence. Additionally, because many of the procedural rules that might bar relief are judge-made doctrines, such as procedural default or retroactivity, any legislative proposal may require some doctrinal fixes anyway. Recognizing legal innocence claims as claims of innocence may also justifiably expand the scope of federal habeas review beyond King and Hoffman's proposal. King and Hoffman would allow federal, but not state, prisoners to argue in federal habeas that they were convicted of conduct that was not criminal under the statute.[215] But if innocence includes being convicted of an act that the law did not make criminal, or being given a sentence in excess of what the statutes authorized, then state *and* federal prisoners may have access to federal habeas relief on that ground. Even if those kinds of legal innocence do not create a cognizable, freestanding ground for habeas relief, conceptualizing them in terms of innocence would at least allow state prisoners to have their other, independent federal-law claims adjudicated because they would be "innocent," thus excusing them from whatever procedural impediment would otherwise preclude review of those claims.

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[214] King & Hoffman, Habeas for the Twenty-First Century, supra note 4, at 114.

[215] Id. at 113–14.

Section III.A discusses the gateway restrictions on federal habeas relief, and Section III.B discusses the scope of federal habeas review of the merits.

A. "Procedure": Gateways & Bypasses

1. Procedural Default

The actual innocence exception to procedural default should include legal innocence in addition to factual innocence. In other contexts, the Court has already concluded that the interests safeguarded by procedural default are outweighed by the interest in affording habeas relief to legally innocent defendants. And the Court's procedural default cases strongly suggest that legal innocence is a kind of actual innocence. This Part also outlines how the legal innocence inquiry should work in cases where a defendant argues he was convicted or sentenced under a statute that does not apply to him.

a. Balancing the Interests

The Court has already recognized and described legal innocence as a species of actual innocence. More importantly, the contexts in which it did so, retroactivity and the statute of limitations, are procedural limitations on federal habeas that are designed to protect many of the same interests that animate procedural default. Therefore, the Court has already balanced the relevant, competing interests, and concluded they are outweighed by the interest in ensuring the availability of federal habeas relief in cases of legal innocence. Procedural default doctrine, the Court has explained, furthers the interest in finality ("insuring that there will at some point be the certainty that comes with an end to litigation"),[216] as well as various interests associated with federalism. The federalism-related interests include "the important interests served by state procedural rules"; "the States' sovereign power to punish offenders";[217] and desire to channel the "adjudication of [defendants']

[216] E.g., Coleman v. Thompson, 501 U.S. 722, 748 (1991) (quoting Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting)).

[217] Id. at 748–49.

constitutional claims in state court" and validate states "good-faith attempts to honor constitutional rights."[218]

But finality and federalism are the same interests that are safeguarded by the doctrine barring retroactive application of new constitutional rules. In that context, the Court has concluded that the interests in ensuring the availability of federal habeas relief in cases of legal innocence outweighs the interests in finality and federalism. The bar against retroactive application accommodates "considerations of finality."[219] The finality concern "has no application in the realm of substantive rules,"[220] which include rules precipitating various kinds of legal innocence, such as where Congress did not, but could, constitutionally criminalize certain conduct or impose a noncapital sentence;[221] and where the defendant's conduct does not fall within the scope of the criminal statute.[222] In these cases, "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[223]

"[T]he general rule of nonretroactivity" is also based in part on "[f]ederalism and comity considerations,"[224] which the Court has concluded are outweighed by the interest in making federal habeas relief available for defendants who are legally innocent. The particularized federalism interests that are purportedly protected by procedural default doctrine either have no application in cases involving legal innocence or are insufficiently implicated in cases of legal innocence to outweigh the interest in affording federal habeas relief to legally innocent defendants. One federalism interest purportedly protected by procedural default

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[218] Id. at 748; see also Teague v. Lane, 489 U.S. 288, 308 (1989) (opinion of O'Connor, J.) (explaining procedural default as accommodating "interests of comity and finality").

[219] *Teague*, 489 U.S. at 309 (opinion of O'Connor, J.).

[220] Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016)

[221] See Welch v. United States, 136 S. Ct. 1257, 1266–68 (2016) (decision invalidating statutory sentencing enhancement on vagueness grounds is retroactive).

[222] See Bousley v. United States, 523 U.S. 614, 620 (1998) (decision narrowing scope of criminal statute by interpreting its term is retroactive).

[223] *Montgomery*, 136 S. Ct. at 732 (2016) (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)); *Welch*, 136 S. Ct. at 1266 (same).

[224] Danforth v. Minnesota, 552 U.S. 264, 279 (2008); see also Teague v. Lane, 489 U.S. 288, 310 (1989) (opinion of O'Connor, J.) (discussing federalism concerns raised by retroactivity).

doctrine is "the States' sovereign power to punish offenders."[225] But that interest is not implicated in cases of legal innocence. If the defendant is legally innocent because the Constitution prohibits states from criminalizing his conduct, imposing a particular sentence on him, or imposing a particular sentence in the way it did, the state has no "sovereign" power to override this prohibition. And if the defendant's conduct falls outside the scope of a criminal statute, or the defendant received a punishment that exceeded what was authorized by statute, the state lawmaking process has not exercised its sovereign power to punish that defendant.

Procedural default doctrine also respects the federalism-related "important interests served by state procedural rules,"[226] as well as the desire to channel the "adjudication of [defendants'] constitutional claims in state court," and thereby validate states' "good-faith attempts to honor constitutional rights."[227] The latter interest is one of the animating reasons behind retroactivity doctrine—to validate "reasonable, good-faith interpretations" of constitutional precedents.[228] And the Court has already concluded that interest is outweighed by the interest in affording federal habeas relief to legally innocent defendants, at least where their non-capital sentence violates the Constitution.

b. Doctrinal Signals

The Court's procedural default cases strongly signal that legal innocence should be treated as actual innocence. *Bousley v. United States* held that a decision narrowing the scope of a criminal statute by interpreting its terms was retroactive.[229] After rejecting the government's argument that the decision was not retroactive, *Bousley* proceeded to address the issue of whether the defendant had procedurally defaulted on the claim that the statute did not apply to him. *Bousley* did so by invoking *Smith v. Murray*'s "actual innocence" exception to procedural default, and remanded the case for a determination of whether the

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[225] Coleman v. Thompson, 501 U.S. 722, 748 (1991).

[226] Id. at 749.

[227] Id. at 748; see also Teague v. Lane, 489 U.S. 288, 308 (1989) (opinion of O'Connor, J.) (explaining procedural default as accommodating "interests of comity and finality").

[228] Stringer v. Black, 503 U.S. 222, 236 (1992) (quoting Butler v. McKellar, 494 U.S. 407, 414 (1990)).

[229] 523 U.S. 614, 620 (1998).

habeas petitioner was actually innocent.[230] *Bousley* thus recognized that legal innocence, if the defendant's conduct did not fall within the scope of the relevant criminal statute, would constitute cause for procedural default. The Court has also understood *Bousley* in this way, recently characterizing it as holding "that actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review."[231] Moreover, three Justices in *Dretke v. Haley*, including Justice Kennedy, signaled their willingness to hold that a habeas petitioner can be actually innocent of a noncapital sentencing enhancement that was mistakenly applied to the petitioner.[232] In *Dretke*, the sentencing enhancement for petty theft applied only where a defendant committed an offense after his prior conviction became final, but the defendant in that case committed the offense three days before his conviction became final.[233]

To be sure, the Court in *Sawyer v. Whitley* stated that "the miscarriage of justice exception is concerned with actual as compared to legal innocence."[234] But in the case the Court was referring to, *Murray*, the potential error was that a prosecutor elicited testimony from a mental health professional concerning a prior interview with the defendant—a classic kind of procedural error regarding the type of evidence that the government may use.[235] *Murray* did not even categorically foreclose consideration of the defendant's claim; rather, *Murray* explained that there was no allegation that the testimony "was false or in any way misleading," and that the evidence could not have affected "the ultimate

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[230] Id. at 623.

[231] McQuiggin v. Perkins, 569 U.S. 383, 393 (2013); see also Welch v. United States, 136 S. Ct. 1257, 1267 (2016) ("*Bousley* thus contradicts the contention that the *Teague* inquiry turns only on whether the decision at issue holds that Congress lacks some substantive power.").

[232] See 541 U.S. 386, 389–90 (2004) (defendant was sentenced under recidivist provision applicable where the defendant committed an offense after the previous conviction became final, but defendant committed second offense three days before conviction became final); id. at 396–97 (Stevens, J., dissenting, joined by Souter & Kennedy, JJ.) (stating that under those circumstances "there is no factual basis for respondent's conviction as a habitual offender"); id. at 399 (Kennedy, J., dissenting) (explaining that defendant was "sentenced for a crime he did not commit").

[233] Id. at 389–90.

[234] 505 U.S. 333, 339 (1992).

[235] Id. at 339–40 (characterizing Smith v. Murray, 477 U.S. 527 (1986)); *Murray*, 477 U.S. at 528–29.

question whether *in fact* petitioner constituted a continuing threat to society."[236]

The other early cases on procedural default also do not foreclose the actual innocence exception to procedural default extending to legal innocence claims. *United States v. Addonizio* held that the defendant's claim that the United States Parole Commission's policies prolonged the defendant's imprisonment will not "support a collateral attack on the original sentence under 28 U.S.C. § 2255."[237] *Addonizio* addressed only whether that claim was cognizable in a Section 2255 proceeding,[238] and specifically whether the claim fell within Section 2255's authorization for federal courts to entertain claims that the court "was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."[239] Section 2255 also authorizes courts to entertain claims where "the sentence was imposed in violation of the Constitution or laws of the United States,"[240] and *Addonizio* recognized that "the writ . . . encompass[es] claims of constitutional error."[241] *Addonizio* does, however, speak to what a miscarriage of justice means because Section 2255 listed "error[s] of law"[242] as another ground for relief, and *Addonizio* tied whether an error of law was cognizable in federal habeas to whether there was "a fundamental defect which inherently results in a complete miscarriage of justice."[243] *Addonizio* therefore might suggest that certain kinds of errors of law do not result in an actually innocent person, but only if the case was using "miscarriage of justice" in the same way the procedural default cases do. Even then, however,

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[236] *Murray*, 477 U.S. at 538. Additionally, the error in *Smith* concerned whether a piece of evidence should have been considered by a trier of fact in making a determination that did not turn exclusively on that evidence. Cases of legal innocence, however, involve the mistaken application of a substantive criminal statute or penalty provision to a defendant; these errors are sufficient to remove the very basis for convicting, sentencing, or detaining the defendant.

[237] 442 U.S. 178, 179 (1979).

[238] Id. at 184 ("We decide only the jurisdictional issue.").

[239] Id. at 185 (quoting 28 U.S.C. § 2255 (1976)).

[240] 28 U.S.C. § 2255(a) (2012).

[241] *Addonizio*, 442 U.S. at 185.

[242] Id.

[243] Id. (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). The Court later applied this same standard to cases involving state prisoners with an error of federal statutory law. See Reed v. Farley, 512 U.S. 339, 353–55 (1994).

Addonizio distinguished a prior case, *Davis v. United States*,[244] where "a change in the substantive law that established that the conduct for which the petitioner had been convicted and sentenced was lawful."[245] *Addonizio* explained that the kind of error in *Davis* constituted a miscarriage of justice because "the conviction and sentence were no longer lawful,"[246] whereas a change in the parole commission policies "affected the way in which the court's judgment and sentence would be performed but it did not affect the lawfulness of the judgment itself—then or now."[247]

Finally, the courts of appeals that have held that petitioners could not be actually innocent of noncapital sentences relied on reasoning that is either no longer tenable in light of subsequent cases, or is not persuasive.[248] For example, the Eighth and Tenth Circuits reasoned that because the Supreme Court had said that actual innocence "[i]n the context of a noncapital case, the concept of 'actual innocence' is easy to grasp,"[249] the "most natural inference" was that the Court "simply mean[t] the person didn't commit the crime."[250] But the Supreme Court has recognized that one way a habeas petitioner may not commit the crime is if the petitioner's conduct falls outside the scope of the criminal prohibition,[251] or outside the scope of the penalty-imposing provision.[252]

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[244] 417 U.S. 333 (1974).

[245] *Addonizio*, 442 U.S. at 186–87.

[246] Id. at 187.

[247] Id.; see also *Davis*, 417 U.S. at 346 ("If this contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice.'") (quoting *Hill*, 368 U.S. at 429). The kind of error that occurred in *Hill*, and that did not constitute a miscarriage of justice, was similar to that seen in *Addonizio*. In *Hill*, the defendant "was not asked whether he wished to make a statement in his own behalf" at sentencing which violated the federal rules of criminal procedure. See *Hill*, 368 U.S. at 425. These early formulations of miscarriage of justice, which focus on whether the defendant was convicted of "an act that the law does not make criminal," are similar to *Teague*'s initial formulation of substantive rules. See supra Section I.B. In any case, the statements are not an exhaustive list or necessary criteria of legal innocence; merely a list of sufficient conditions to establish legal innocence.

[248] The Court granted certiorari in *Dretke v. Haley* to decide whether the actual innocence exception applies where a habeas petitioner is actually innocent of a noncapital sentence but declined to answer that question. 541 U.S. 386, 393–94 (2004).

[249] Sawyer v. Whitley, 505 U.S. 333, 341 (1992).

[250] Embrey v. Hershberger, 131 F.3d 739, 740–41 (8th Cir. 1997); United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993).

[251] *Bousley*, 523 U.S. at 623–24.

The Eighth Circuit also noted that Judge Friendly proposed an innocence model of federal habeas to restrict, rather than expand, federal habeas.[253] But that fails to answer what *kinds* of innocence should matter in an innocence-oriented account of federal habeas. In any case, as Judge Friendly explained why innocence, rather than all constitutional errors, should matter in federal habeas, he specifically noted that "[a] judge's overly broad construction of a penal statute," which results in a "legally innocent" defendant, "can be much more harmful to a defendant" than many constitutional errors.[254] Appeals courts that declined to recognize a legal innocence exception to procedural default also worried that petitioners could turn actual innocence claims "into a complaint that the relevant facts did not support a conviction."[255] But courts are already making that determination because factual innocence currently functions as an exception to procedural default. Lastly, some courts of appeal rejected the idea that a petitioner could be actually innocent of a noncapital sentence on the ground that conditions establishing the defendant's eligibility for a higher, noncapital sentence were not "elements of the offense."[256] But the Supreme Court has since rejected that idea and held that both a statutory condition that exposes the defendant to a higher statutory maximum sentence,[257] and a statutory condition that exposes the defendant to a higher statutory minimum sentence,[258] are elements of the offense for Sixth Amendment purposes.[259]

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[252] Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

[253] *Embrey*, 131 F.3d at 741 (citing Friendly, supra note 1).

[254] Friendly, supra note 1, at 157.

[255] *Embrey*, 131 F.3d at 741.

[256] Gibbs v. United States, 655 F.3d 473, 478–79 (6th Cir. 2011) (concluding a petitioner could not actually be innocent of a Guidelines sentence within the statutory maximum); United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993).

[257] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[258] Alleyne v. United States, 570 U.S. 99 (2013).

[259] There is an exception, for Sixth Amendment purposes, for conditions predicated on the defendant's prior convictions. Almendarez-Torres v. United States, 523 U.S. 224 (1998). But in the retroactivity context, the Court recognized a prisoner could be actually legally innocent based on the misapplication of a statutory condition tied to the defendant's criminal history. Welch v. United States, 136 S. Ct. 1257, 1264–68 (2016).

c. Implementation

In *Bousley*, the Court attempted to craft procedural default doctrine to make the kind of legal innocence claim at issue in the case (that the defendant was convicted under a statute that did not make the defendant's conduct criminal) more akin to factual innocence. After the defendant pled guilty to using a firearm in connection with a drug trafficking offense, the Supreme Court held in *Bailey v. United States* that using a firearm required the government to prove active employment of the firearm.[260] But at the defendant's plea colloquy, he admitted only to storing the gun in proximity to drugs.[261] *Bousley* explained that because "'actual innocence' means factual innocence, not mere legal insufficiency," "the Government is not limited to the existing record to rebut" the petitioner's showing that he did not commit the act prohibited by the statute.[262] "Rather," the Court wrote, "the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy and would not normally have been offered before" the decision interpreting the statute to mean active employment of a firearm.[263]

While *Bousley*'s directive attempted to make legal innocence claims arising from decisions of statutory interpretation more similar to factual innocence claims, it also made the claims more administratively burdensome because it contemplated the collection of additional facts and evidence about events that occurred long ago. That may be a reason to reconsider the *Bousley* inquiry in the future, and to limit it to evidence that is already part of the record, particularly if resource constraints are a primary misgiving with litigating legal innocence claims. Limiting review has the potential to decrease prosecutors' incentives to overcharge, by encouraging them 1) to select charges and agree to plea bargains that are safer bets, rather than reaches, and 2) to enter plea deals under conservative interpretations of criminal statutes. That has the potential to decrease incentives to overcharge, and encourage prosecutors to enter plea deals to criminal statutes that are interpreted conservatively as well as select charges and agree to plea bargains that

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[260] *Bousley* , 523 U.S. at 616.

[261] Id. at 617.

[262] Id. at 623–24.

[263] Id. at 624.

are safer bets, rather than reaches.[264] Whether that aspect of *Bousley* should be changed is a conclusion beyond the scope of this Article, but warrants further consideration.[265]

2. Statute of Limitations

The rule that actual innocence excuses the statute of limitations should be understood to encompass cases of legal innocence. The case that recognized the innocence exception to the statute of limitations, *McQuiggin v. Perkins*, referred to the exception in terms of "actual innocence," as opposed to factual innocence.[266] Additionally, the same considerations that motivate the statute of limitations, "federalism and comity," are the same considerations that the court has already concluded do not outweigh the injustice that results from the continued detention of a legally innocent defendant.[267] The Court has recognized that the habeas rules treat the statute of limitations as "akin" to defenses such as "procedural default, and nonretroactivity."[268] Like those defenses, the statute of limitations, too, sounds in "considerations of comity, finality, and the expeditious handling of habeas proceedings."[269] The Court has already explicitly held those considerations yield to the interest in affording habeas relief to legally innocent defendants in the context of retroactivity. The previous section showed why the same is true for another defense, procedural default, because it too is grounded in considerations of comity, federalism and finality. The same should be true for the statute of limitations.

McQuiggin, however, did occasionally refer to innocence in terms of new facts or evidence establishing the defendant's innocence. But when it did so, the Court was addressing the State's argument that an actual innocence exception improperly rendered superfluous various AEDPA provisions, such as Section 2244(d)(1)(D), which starts the statute of

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[264] Cf., e.g., Kyle Graham, Overcharging, 11 Ohio St. J. Crim. L. 701 (2014) (documenting phenomenon of overcharging).

[265] There are countervailing interests, such as fairness to the state in allowing the state to introduce evidence it previously thought unnecessary.

[266] McQuiggin v. Perkins, 569 U.S. 383, 398 (2013).

[267] Id. at 393–94.

[268] Day v. McDonough, 547 U.S. 198, 208–09 (2006) (holding that district courts may raise the statute of limitations defense sua sponte, as with the other defenses listed).

[269] Id. at 208.

limitations on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."[270] Rejecting that argument, *McQuiggin* explained that Section 2244(d)(1)(D) is both "more stringent (because it requires diligence)" and "less stringent (because it requires no showing of innocence)."[271] In explaining the latter difference, *McQuiggin* maintained that the miscarriage of justice exception "applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted'" the petitioner.[272] *McQuiggin* elsewhere characterized legal innocence as a kind of actual innocence, characterizing *Bousley*, which concerned a decision of statutory interpretation that resulted in the petitioner's conduct no longer being criminalized, as an "actual innocence" case.[273] *McQuiggin* depicted *Bousley* as holding that "actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review."[274] Moreover, were actual innocence to include claims of *legal* innocence, that would be another reason why a miscarriage of justice exception to the statute of limitations does not render superfluous Section 2244(d)(1)(D), which concerns new evidence, rather than new constitutional rights or decisions of statutory interpretation.

But if actual innocence did include claims of legal innocence, that could render another provision of the AEDPA superfluous—specifically, the provision that triggers the statute of limitations on "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been . . . made retroactively applicable to cases on collateral review."[275] That provision is a specific trigger for legal innocence claims that result from the recognition of a new, substantive rule of constitutional law that invalidates the statute under which the defendant was convicted or sentenced. But that provision would not be rendered superfluous even if the statute of limitations were excused in cases of legal innocence. Like the provision the Court examined in *McQuiggin*, the provision here is both narrower and

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[270] 28 U.S.C. § 2244(d)(1)(D) (2012).

[271] *McQuiggin*, 569 U.S. at 395.

[272] Id. at 394–95 (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)).

[273] Id. at 393.

[274] Id.

[275] 28 U.S.C. §§ 2244(d)(1)(C), 2255(f)(3) (2012).

broader than an equitable exception for legal innocence. The provision is narrower because it applies only to "constitutional rights," but as *Bousley* illustrates, legal innocence can also arise from decisions of statutory interpretation. Moreover, the provision applies only to rights "made retroactively applicable"; depending on how that phrase is interpreted,[276] the provision may also be narrower than a legal innocence exception. The provision is also broader than cases of legal innocence because it is triggered by all constitutional rights made retroactively applicable to cases on collateral review, not all of which involve legal innocence. In addition to substantive rules, new watershed rules of criminal procedure are retroactive in cases on collateral review; and new watershed rules of criminal procedure do not necessarily result in the conviction of an actually innocent defendant. Although these new rules of criminal procedure "improve the pre-existing fact-finding procedures,"[277] the violation of a watershed rule of criminal procedure may not have resulted in the conviction of one who is actually innocent in any particular case.

3. Exhaustion

Although prisoners convicted in state court generally may not have their federal habeas petitions adjudicated if a prisoner has not exhausted the remedies available in state court,[278] there may be circumstances where federal courts should adjudicate unexhausted claims that are raised by legally innocent prisoners.

The AEDPA only requires petitioners to exhaust "available" remedies,[279] and federal courts may consider unexhausted claims where "there is an absence of available State corrective process."[280] While

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[276] See infra text accompanying notes 299–315 (explaining Tyler v. Cain, 533 U.S. 656 (2001)).

[277] Teague v. Lane, 489 U.S. 288, 312 (1989) (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., concurring)).

[278] 28 U.S.C. § 2254(b)(1) (2012). The "exhaustion" requirement for federal prisoners necessitates that a prisoner first use the remedy provided for by § 2255 before resorting to the general habeas corpus statute in § 2241. See 28 U.S.C. § 2255(e). Section 2255(e) is discussed infra Subsection III.A.5.

[279] 28 U.S.C. § 2254(b)(1)(A) (2012).

[280] 28 U.S.C. § 2254(b)(1)(B)(i) (2012). These provisions are part of why it matters less that the statute allows federal courts to deny unexhausted claims on the merits. See id. at 2254(b)(2).

many states allow petitioners to raise legal innocence claims that arise where the petitioner has been convicted of conduct the law does not make criminal, or received a sentence that exceeds the amount provided for by statute,[281] not all states do. At least four states, Iowa, Nevada, New York, and Florida, maintain that certain judicial interpretations of state statutes do not apply retroactively, and petitioners therefore cannot raise a claim in post-conviction proceedings that the statute under which they were convicted has been interpreted not to apply to them.[282] If a state does not allow a petitioner to raise a claim that he was convicted of conduct the law does not make criminal, then there are no available remedies for the petitioner's legal innocence claim, and a federal court may adjudicate that claim.[283] Even if a state generally allows petitioners to raise legal innocence claims in state post-conviction proceedings, the petitioner may be barred from doing so because of procedural doctrines, such as the statute of limitations,[284] or state procedural default

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[281] See, e.g., Ala. R. Crim. P. 32.1; Acra v. State, 105 So. 3d 460, 464 (Ala. Crim. App. 2012); State v. Slemmer, 823 P.2d 41, 49 (Ariz. 1991) (adopting federal retroactivity standards); People v. Mutch, 482 P.2d 633, 637–38 (Cal. 1971) (state judicial constructions of state statutes are retroactive); In re Joe, No. B275593, 2016 WL 4921420, at *7 (Cal. Ct. App. Sept. 15, 2016) (summarizing that judicial constructions of statutes are retroactive); Chao v. State, 931 A.2d 1000, 1000 (Del. 2007) (state decisions of statutory interpretation retroactive, but invoking a statute of limitations bar); Luke v. Battle, 565 S.E.2d 816, 820 (Ga. 2002); People v. Reed, 25 N.E.3d 10, 33 (Ill. App. Ct. 2014); Jacobs v. State, 835 N.E.2d 485, 487–88 (Ind. 2005); Thornton v. Denney, 467 S.W.3d 292, 299 (Mo. Ct. App. 2015); Kendrick v. Dist. Att'y of Phila. Cty., 916 A.2d 529, 538–39 (Pa. 2007); In re Hinton, 100 P.3d 801, 804 (Wash. 2004).

[282] See Goosman v. State, 764 N.W.2d 539, 540 (Iowa 2009) (refusing to apply state interpretation of sentencing statute retroactively); Clem v. State, 81 P.3d 521, 523 (Nev. 2003) (same); People v. Diguglielmo, 952 N.E.2d 1068, 1068 (N.Y. 2011) (same); State v. Barnum, 921 So. 2d 513, 528 (Fla. 2005) (only decisions of state statutory interpretation that are constitutional in nature applied retroactively). Kansas courts have suggested some decisions of statutory interpretation would not be applied retroactively. See Easterwood v. State, 44 P.3d 1209, 1220–23 (Kan. 2002).

[283] Gamble v. Calbone, 375 F.3d 1021, 1026–27 (10th Cir. 2004) (where state did not afford means to review prison disciplinary proceedings resulting in revocation of earned good behavior credits, state remedies were not available). If resorting to state court would be futile, then the unexhausted claims are treated as procedurally defaulted ones where innocence would be an exception. See, e.g., Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000) (treating as procedurally defaulted claims that would be futile to raise in a state proceeding).

[284] Commonwealth v. Jones, No. 3585 EDA 2015, 2016 WL 6311755, at *4 (Pa. Super. Ct. Oct. 28, 2016).

doctrines.[285] Under those circumstances, resort to state court would be futile and the petitioner's claim is procedurally defaulted.[286]

However, even if there are available remedies for a petitioner's legal innocence claim such that a habeas petitioner could air that claim in state court, a federal court may be able to adjudicate an unexhausted claim in some circumstances. The AEDPA does not require courts to dismiss unexhausted claims or petitions where state remedies would be "ineffective to protect the rights" of the petitioner, thus allowing a federal court to adjudicate the merits of a petitioner's claim.[287] That may be the truth in some cases where a habeas petitioner is legally innocent. In cases of legal innocence, there is no statute that authorizes the petitioner's detention at all, or there is no statute that authorizes the petitioner's continued detention and sentence. Because there is no basis to detain a legally innocent petitioner, dismissing a legally innocent defendant's federal habeas petition only aggravates the relevant harm—the continued detention of someone whom a state has no basis to detain.

That makes a legal innocence claim different than many criminal procedure claims that concern the process the state used to detain a prisoner because a legal innocence claim extinguishes the state's detention authority itself. Dismissing an unexhausted petition or a mixed petition would only prolong the relevant harm, which is the unauthorized detention, and a subsequent trial or sentencing could not remedy the harm to the habeas petitioner. If the petitioner is legally innocent because the state cannot criminalize his conduct, or impose a sentence on him, it may not do so on retrial. And if the state amended a statute to apply to the petitioner, the Ex Post Facto Clause prohibits a

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[285] Easterwood v. State, 44 P.3d 1209, 1211 (Kan. 2002); State v. Harwood, 746 S.E.2d 445, 446 (N.C. Ct. App. 2013).

[286] See supra Subsection III.A.1.

[287] This argument was contemplated and apparently endorsed by three Justices in *Dretke*. See infra note 289. It weaves together two strands of existing case law. The first are the cases that recognize an extended delay in state procedures may make those procedures ineffective or unavailable. See, e.g., Burks v. Thaler, 421 F. App'x 364, 365 (5th Cir. 2011) (per curiam) (seven years); *Lines*, 208 F.3d at 163–64; Dickey v. Hargett, 979 F.2d 1533, 1533 (5th Cir. 1992) (per curiam) (1 year); Hankins v. Fulcomer, 941 F.2d 246, 247 (3d Cir. 1991) (eleven years). The second are cases that tie whether state remedies are ineffective to the nature of the petitioner's claim. See, e.g., Bies v. Bagley, 519 F.3d 324, 330–31 (6th Cir. 2008), rev'd on other grounds by Bobby v. Bies, 556 U.S. 825 (2009); Jones v. Chappell, 31 F. Supp. 3d 1050, 1068 (C.D. Cal. 2014), rev'd on other grounds by Jones v. Davis, 806 F.3d 538, 541 (9th Cir. 2015) (reversing on ground that claim was barred by *Teague*).

state from applying it to the defendant—the Ex Post Facto Clause prohibits legislatures from criminalizing conduct or imposing punishments for conduct that was not criminalized pursuant to a lawful statute at the time.[288]

Therefore, state corrective processes may be ineffective where they would prolong the detention of a petitioner whose conduct was not criminalized pursuant to a lawful statute. State corrective processes may also be ineffective where they would result in the detention of a petitioner beyond the period authorized by statute. In some cases of legal innocence, a habeas petitioner's term of imprisonment will already exceed the amount of time that was authorized by a lawfully written provision. In other cases, the term of imprisonment may be near the amount of time that was authorized by a lawfully written provision. In these kinds of legal innocence cases, state corrective processes would also aggravate the relevant harm, the continued detention of individuals who there is no lawful basis to detain, or to continue to detain, and the processes may therefore be ineffective to protect the rights of the habeas petitioner. In part for these reasons, the Justices in *Dretke*, who signaled their willingness to hold that a petitioner can be legally innocent of a noncapital sentence, also stated they would not require some legally innocent petitioners to pursue other avenues before federal habeas: as they explained, "requir[ing] [the petitioner] to pursue other avenues for comparable relief . . . needlessly postpones final adjudication . . . and perversely prolongs the very injustice" petitioner suffered—unauthorized incarceration.[289]

There may, however, be circumstances where it nonetheless makes sense to require petitioners to proceed in state court first, such as where another provision of state law may continue to authorize the defendant's sentence.[290] For example, the statute at issue in *Welch*, the ACCA, sentenced defendants convicted of unlawfully possessing a firearm to a

[288] See U.S. Const. art. I, § 9, cl. 3; id. art. I, § 10; Peugh v. United States, 133 S. Ct. 2072, 2077–78 (2013); Calder v. Bull, 3 U.S. 386, 390 (1798).

[289] *Dretke*, 541 U.S. at 398 (Stevens, Kennedy, & Souter, JJ., dissenting); id. at 399 (Kennedy, J., dissenting) ("For the reasons Justice STEVENS sets forth, the respondent should be entitled to immediate relief."). Cf. Rose v. Lundy, 455 U.S. 509, 542-43 (1982) (Stevens, J., dissenting) (proposing that exhaustion rules should depend on the nature of the defendant's claim).

[290] Exhaustion may also make sense if the government is allowed to supplement the trial record to show that a defendant's conduct falls within the ambit of a statute as it has been subsequently interpreted. See *Bousley*, 523 U.S. at 623–24; supra Subsection III.A.1.

mandatory minimum term of fifteen years imprisonment if those defendants had three or more prior convictions for violent felonies or serious drug offenses.[291] The Court invalidated the provision of the ACCA that defined a violent felony as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[292] But invalidating that provision did not do away with the rest of the ACCA, and under the ACCA, defendants could still be subject to a mandatory fifteen-year term if their prior convictions qualified as serious drug offenses or violent felonies, as that term was defined elsewhere in the ACCA. If a state argues that a defendant's sentence remains valid because the defendant's detention is authorized under other parts of the same statute, deciding whether that is true requires a court to look to other provisions of state law. In those cases, an exhaustion requirement would further a state's role in interpreting its own laws.[293] The same may be the case where the statute under which the petitioner has been convicted or sentenced has not yet been declared invalid, and a petitioner is arguing that a state statute is invalid because it is sufficiently similar to other statutes that have been declared invalid. Whether exhaustion makes sense depends on how similar the statute is to ones that have been declared invalid.

4. Evidentiary Hearings

While the restrictions on evidentiary hearings may pose significant barriers for petitioners who maintain they are factually innocent of a crime,[294] they pose less of a barrier for petitioners who are legally innocent of a crime. Petitioners who are legally innocent may not need

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[291] 18 U.S.C. § 924(e)(1) (2012); Johnson v. United States, 135 S. Ct. 2551, 2555 (2015).

[292] 18 U.S.C. § 924(e)(2)(B)(ii) (2012); *Johnson*, 135 S. Ct. at 2563.

[293] Where the statute under which the petitioner was convicted or sentenced has not yet been interpreted to not reach the petitioner's conduct, an exhaustion requirement would make sense to further a state's unique role in interpreting its own laws. Cf. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (abstaining from deciding federal issue to allow state court to determine state law issue); Gordon G. Young, Federal Court Abstention and State Administrative Law From Burford to Ankenbrandt: Fifty Years of Judicial Federalism Under *Burford v. Sun Oil Co.* and Kindred Doctrines, 42 DePaul L. Rev. 859, 886–99 (1993) (describing doctrines vindicating state interest in interpreting state law).

[294] 28 U.S.C. § 2254(e)(2) (2012). Section 2254(e)'s restrictions on evidentiary hearings do not apply to federal prisoners, who can receive a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b) (2012).

to rely on evidence aside from what is already in the state record—the facts adduced at trial or a plea colloquy—to establish that a statute, as subsequently interpreted, does not apply to them; or that the statute under which the petitioner was convicted or sentenced is invalid. The state may want an evidentiary hearing in order to introduce additional evidence of a petitioner's guilt, or evidence that a petitioner is guilty under the statute, as it was recently interpreted. But the state may seek an evidentiary hearing because the restrictions on them assume that the habeas petitioner is the one seeking the hearing[295]; additionally, the state can waive the argument that the statutory preconditions on evidentiary hearings have not been satisfied.[296]

5. Successive Petitions

The AEDPA severely restricts prisoners' ability to file successive post-conviction motions and may foreclose relief for some legally innocent prisoners, including where a ruling has invalidated the statute under which the prisoner was convicted. In order to file a successive motion for post-conviction review,[297] a prisoner must show that the "new rule of constitutional law" on which he relies was "made retroactive to cases on collateral review by the Supreme Court."[298] And in *Tyler v. Cain*, the Supreme Court held that the Court can "make" a rule retroactive only through "holdings" rather than dicta.[299] Thus, a prisoner can establish that a rule has been "made retroactive . . . by the Supreme Court" by showing that "the Supreme Court h[eld] it to be retroactive," either by applying that rule to a case on collateral review, or issuing a

[295] The next section discusses the additional argument that some legally innocent petitioners may fall within one of the preconditions for granting an evidentiary hearing. See 28 U.S.C. § 2254(e)(2) (2012).

[296] Cf. Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (explaining that arguments are subject to waiver unless they implicate courts' jurisdictions).

[297] There are a variety of procedures a prisoner must follow to obtain authorization to file a successive motion. See 28 U.S.C. § 2244(b) (2012).

[298] 28 U.S.C. §§ 2244(b)(2)(A); 2255(h)(2) (2012).

[299] 533 U.S. 656, 666 (2001). Interestingly, in *Tyler v. Cain*, the United States represented that the Court need not adopt an expansive interpretation of "made" for purposes of Section 2244 in part "[b]ecause of the availability of the 'savings clause,' there is no concern that federal prisoners who have a claim based on a new decision of this Court cutting back on the sweep of a criminal statute will lack a remedy." Brief for the United States as Amicus Curiae at 20 n.9, Tyler v. Cain, 533 U.S. 656 (2001) (Mar. 2, 2001).

series of decisions whose holdings make that rule retroactive.[300] As a result, courts occasionally conclude that, even though a new rule *is* retroactive, a prisoner cannot rely on that rule to bring a successive motion because the Supreme Court has not yet *made* that rule retroactive.[301] Thus, even prisoners who are legally innocent because the statute under which they were convicted or sentenced has been held unconstitutional may not be able to bring a successive motion for post-conviction review.

The statutory restrictions on successive motions may also preclude relief for prisoners who are legally innocent because the statute under which they were convicted or sentenced has since been interpreted not to apply to them. The provisions authorizing successive motions allow them only in cases involving new evidence, or cases featuring "new rules of constitutional law," but a decision interpreting a federal or state statute is a decision of statutory interpretation. The AEDPA provisions thus do not appear to authorize successive motions for these prisoners either.

This subsection discusses four possible avenues that might allow legally innocent prisoners to file successive motions—the interpretation of "made" under Sections 2244 and 2255; the interpretation of Section 2255(e), which provides a safety valve for federal prisoners; mandate recalls; and extraordinary writs in the Supreme Court.[302] The statutory restrictions on successive motions pose the greatest challenge for making federal habeas law available to legally innocent prisoners, and more than one of these avenues may be necessary to afford federal habeas relief to legally innocent prisoners.

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[300] *Tyler*, 533 U.S. at 663; see Leah M. Litman, Resentencing in the Shadow of *Johnson v. United States*, 28 Fed. Sent'g Rep. 45, 48–49 (2015).

[301] See, e.g., In re Williams, 806 F.3d 322, 325–26 (5th Cir. 2015) (holding *Johnson* had not been made retroactive by the Supreme Court); In re Gieswein, 802 F.3d 1143, 1147 (10th Cir. 2015) (same); In re Rivero, 797 F.3d 986, 989 (11th Cir. 2015) (same).

[302] This section does not discuss Rule 60(b) motions, which ordinarily allow a petitioner to seek relief from a final civil judgment. Fed. R. Civ. P. 60(b). *Gonzalez v. Crosby* held that 60(b) motions are governed by the restrictions for successive motions where a motion "contend[s] that a subsequent change in substantive law is a 'reason justifying relief.'" 545 U.S. 524, 531 (2005).

a. (Re)interpreting Sections 2244 and 2255

Some of the barriers to relief for legally innocent prisoners could be removed if the provisions restricting successive post-conviction motions made less of the distinction between new constitutional rules that are retroactive and have been made retroactive, and new constitutional rules that have been made retroactive by the Supreme Court.[303] Although *Tyler* indicated that "a new rule is not []made retroactive . . . unless the Supreme Court holds it to be retroactive,"[304] it also said that "with the right combination of holdings," the "Court can make a rule retroactive over the course of two cases."[305] Moreover, in describing the kinds of rules that have not been made retroactive, *Tyler* envisioned cases where "[t]he Supreme Court . . . merely establishes principles of retroactivity and leaves the application of those principles to lower courts" or where courts of appeals would have "to engage in the difficult legal analysis that can be required to determine questions of retroactivity in the first instance," rather than "simply rely[ing] on Supreme Court holdings."[306]

In *Price v. United States*, the U.S. Court of Appeals for the Seventh Circuit interpreted *Tyler* in a way that would significantly reduce the barriers to habeas relief for legally innocent petitioners.[307] *Price* recited Justice O'Connor's concurrence in *Tyler*,[308] which had stated that "[i]t is relatively easy to demonstrate" that a rule is retroactive for substantive rules—the kind that fall within *Teague*'s first exception.[309] Justice O'Connor, who had joined the majority opinion in *Tyler*, explained that the Supreme Court had already held that new substantive rules should be applied retroactively. Thus, "[w]hen the Court holds as a new rule in a

[303] Given the simultaneous enactment of the exact same language in the two provisions, it would be hard to interpret the two provisions differently. At least two commentators identified constitutional concerns with the barriers to resentencing federal prisoners that they argued were not present with regard to state prisoners. See Carlos M. Vazquez & Stephen I. Vladeck, The Constitutional Right to Collateral Post-Conviction Review, 103 Va. L. Rev. 905, 941–51 (2017).

[304] *Tyler*, 533 U.S. at 663.

[305] Id. at 666.

[306] Id. at 663–64.

[307] 795 F.3d 731, 733–34 (7th Cir. 2015).

[308] Id. at 734.

[309] *Tyler*, 533 U.S. at 669 (O'Connor, J., concurring).

subsequent case" a substantive rule, "it necessarily follows that this Court has 'made' that new rule retroactive.'"[310]

One problem with this approach, however, is that it will not always be clear what counts as a substantive rule. *Teague* originally stated that a substantive rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'"[311] and Justice O'Connor pointed to that definition in *Tyler*.[312] But the Court's most recent retroactivity cases solidified another definition of substantive rules that has emerged: a rule is substantive if it "necessarily carries a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him."[313] Included in that definition are rules that narrow the scope of a federal criminal statute by interpreting the statute,[314] and rules that hold "the Constitution itself deprives the State of the power to impose a certain penalty."[315]

The better question, then, may be whether the Supreme Court has "made" a particular kind of rule substantive.[316] Thus, for example, in *Welch*, the Supreme Court made retroactive a rule that invalidated a criminal statute that both imposed a mandatory minimum sentence *and* altered the maximum sentence a defendant could otherwise receive. Any subsequent rules that invalidate statutes that both fix mandatory minimum sentences and raise a defendant's statutory maximum sentence have thus been made retroactive. Less clear, however, is whether a rule invalidating a statute that subjected a defendant to a minimum sentence without altering the defendant's maximum sentence has been made a substantive rule. In those kinds of cases, courts of appeals would

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[310] *Tyler*, 533 U.S. at 669 (O'Connor, J., concurring).

[311] Teague v. Lane, 489 U.S. 288, 307 (1989) (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgment and dissenting in part)).

[312] *Tyler*, 533 U.S. at 669 (O'Connor, J., concurring).

[313] Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)); Welch v. United States, 136 S. Ct. 1257, 1266 (2016) (quoting *Bousley*, 523 U.S. at 620).

[314] *Bousley*, 523 U.S. at 616, 620–21.

[315] Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

[316] Although the more expansive reading might be justified in terms of constitutional avoidance concerns in light of the Supreme Court's decision in *Montgomery*, see infra 321–324, it would also do nothing for petitioners who are legally innocent as a result of a decision of statutory interpretation, and it may also be more difficult to reconcile with *Tyler*.

seemingly need to apply the principles of retroactivity the Supreme Court has established rather than mechanically implement them.

Reinterpreting Sections 2244 and 2255 also may not help those prisoners who are legally innocent as a result of a decision of statutory interpretation, rather than constitutional interpretation. Although the Supreme Court has said that decisions interpreting criminal statutes are retroactive,[317] the AEDPA permits successive motions only for new, retroactive "rule[s] of constitutional law."[318]

b. Interpreting section 2255(e)

One compelling way to close the gap for federal prisoners would be via the savings clause of Section 2255. Section 2255(e) allows federal prisoners to file petitions for habeas corpus under the general habeas corpus statute that is codified at 28 U.S.C. § 2241. Habeas petitions filed under Section 2241 are not subject to the limitations contained in Section 2255. Section 2255(e) allows federal prisoners "who [are] authorized to apply for relief by motion pursuant to this section" to file habeas petitions under Section 2241 if "the remedy by [Section 2255] motion is inadequate or ineffective to test the legality of [the] detention."[319] Several courts have interpreted the savings clause to allow petitioners to raise the claim that, as a result of a subsequent decision of *statutory* interpretation, they were wrongly convicted or sentenced.[320]

Section 2255(e) is, at a minimum, ambiguous. Section 2255(e) was also enacted prior to the AEDPA's more specific limitations on successive motions, including those applicable to federal prisoners.[321]

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[317] *Bousley*, 523 U.S. at 616, 620–21.

[318] 28 U.S.C. §§ 2244(b)(2)(A), 2255(h)(2) (2012).

[319] 28 U.S.C. § 2255(e) (2012).

[320] E.g., Triestman v. United States, 124 F.3d 361, 377–80 (2d Cir. 1997) (permitting *Bailey* claim); In re Dorsainvil, 119 F.3d 245, 252 (3d Cir. 1997). Other courts of appeals have interpreted the savings clause to allow petitioners to raise new constitutional claims that are based on retroactive rules and were foreclosed by precedent at the time of the prisoner's first petition. E.g., Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001); In re Jones, 226 F.3d 328, 333–34 (4th Cir. 2000); In re Davenport, 147 F.3d 605, 610–11 (7th Cir. 1998).

[321] At the time, second or successive petitions were prohibited when a successive petition constituted an abuse of the writ, such as when a petitioner "deliberately withholds" a ground of relief "in the hope of being granted two hearings rather than one . . . ." Sanders v. United States, 373 U.S. 1, 18 (1963). The Court later held, prior to the AEDPA's enactment, that the

However, the Supreme Court's recent decision in *Montgomery v. Louisiana* provides some basis for courts to interpret Section 2255(e) in a way that avoids the constitutional concerns with an interpretation of the provision that forecloses relief for claims that are based on substantive rules.[322] *Montgomery* held that the Constitution requires state courts to give retroactive effect to substantive rules. The reason, *Montgomery* explained, is because the nature of substantive rules compels judges to award claims for relief based on those rules provided the court has jurisdiction to do so:

> A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.[323]

Professors Carlos Vasquez and Stephen Vladeck have argued that, in light of *Montgomery*, the Constitution requires the availability of post-conviction review for claims that raise substantive rules.[324] But even if it does not, *Montgomery*, at a minimum, indicates there would be constitutional concerns with any interpretation of a statute that requires courts to leave in place a conviction or sentence that was not authorized pursuant to a valid statute, particularly for federal prisoners.

In addition to the constitutional concerns with interpreting Section 2255(e) to bar claims by persons who are mistakenly sentenced above the statutory maximum for their offense, there are strong arguments for why the text, history, and structure of the statute suggest federal prisoners should be able to file habeas petitions in certain legal innocence cases, including where a petitioner has a claim that she was mistakenly convicted because of an error of statutory interpretation or a claim that she was mistakenly sentenced above the statutory maximum for her offense, again because of an error of statutory interpretation.[325]

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procedural default exceptions apply to successive petitions. See McCleskey v. Zant, 499 U.S. 467, 479 (1991).

[322] 136 S. Ct. 718, 731 (2016).

[323] Id.

[324] Vazquez & Vladeck, supra note 303, at 910.

[325] I outline some of those arguments in Leah M. Litman, Judge Gorsuch And Johnson Resentencing (This Is Not A Joke), 115 Mich. L. Rev. Online 67, 73–76 (2017).

When Congress enacted Section 2255, its "purpose and effect . . . was not to restrict access to the writ [of habeas corpus] but to make post-conviction proceedings more efficient."[326] Rather, Congress ensured that prisoners can file Section 2255 motions in districts where they were sentenced, rather than where they were detained.[327] When Congress originally enacted Section 2255 and also when it later enacted the AEDPA, there was a long history of special solicitude for habeas petitions that challenge the legality of the statute under which the defendant was convicted or sentenced, and whether the defendant had been sentenced to a term of imprisonment that was not lawfully authorized by the statute of his conviction.[328] The AEDPA partially reflects that solicitude by authorizing successive motions that raise claims based on new and retroactive rules of constitutional law.[329] But petitioners who are erroneously convicted or sentenced above the statutory maximum because of an error of interpretation are similarly situated to petitioners who were convicted or sentenced under an invalid statute. The Court has explained that the relevant metric for whether the Constitution requires courts to afford relief based on a particular rule depends on "the function of the rule," meaning the rule's effects.[330] And the effects of decisions invalidating a statute or narrowing the statute by interpreting its terms are the same: in both cases, no statute authorizes all of these petitioners' detentions.[331]

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[326] Boumediene v. Bush, 553 U.S. 723, 775 (2008); H.R. Rep. No. 2646, at A172 (1946); H.R. Rep. No. 808, at A180 (1947).

[327] United States v. Hayman, 342 U.S. 205, 213–14 (1952); In re Davenport, 147 F.3d 605, 609 (7th Cir. 2008).

[328] In re Gregory, 219 U.S. 210, 213–14 (1911); In re Bonner, 151 U.S. 242, 256, 258 (1894); In re Mills, 135 U.S. 263, 269–71 (1890); Ex parte Yarbrough (The Ku-Klux Cases), 110 U.S. 651, 654 (1884); Ex Parte Siebold, 100 U.S. 371, 376 (1879); Litman, Constitutional Significance, supra note 105.

[329] 28 U.S.C. §§ 2255(h)(2), 2244(b)(2)(A) (2012).

[330] See, e.g., *Montgomery*, 136 S. Ct. at 729–32; Welch v. United States, 136 S. Ct. 1257, 1265–66 (2016).

[331] The United States, until recently, has argued that the savings clause allows prisoners who were mistakenly convicted or sentenced above the statutory maximum because of an error of statutory interpretation can file habeas petitions under the savings clause where circuit precedent foreclosed their claim at the time. Based in part on the United States' representation, the Court interpreted the limitations on successive petitions expansively. See Reply Brief for the Petitioner-Appellant at 5, McCarthan v. Collins, No. 17-85 (U.S. Oct. 30, 2017).

Section 2255(e)'s text also specifically contemplates authorizing a habeas petition where "the court which sentenced [a prisoner] . . . has denied him relief" by "motion pursuant to this section."[332] That is, Section 2255(e) contemplates authorizing a petitioner to file a habeas petition where the prisoner previously litigated and lost a claim in a previous proceeding under Section 2255, or where the restrictions on the availability of post-conviction relief would prevent the petitioner from obtaining relief.[333] Otherwise, that portion of the savings clause would be meaningless.[334] And Section 2255(e)'s use of the word "remedy" does not signify that it is irrelevant whether a prisoner is able to obtain *relief* under Section 2255.[335] Congress frequently uses relief to signify the result of a remedy; the two terms are not so distinct.[336] Neither does the word "test" imply a limitation on the kinds of claims that can be brought under Section 2255[337]—the statute authorizing writs of habeas corpus for persons detained by Indian tribes allows the detainee "to test the legality of his detention," and the Court has described this language as a general grant of authority to issue writs.[338]

While courts could—and should—interpret Section 2255(e) to allow federal prisoners to bring habeas petitions that raise substantive claims if

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[332] 28 U.S.C. § 2255(e) (2012).

[333] Id.

[334] As noted supra, at the time Section 2255 was enacted, federal prisoners could raise a claim, in successive petitions, that they were mistakenly convicted or sentenced because of an error of statutory interpretation. Supra notes 314, 320–321. To the extent the argument is that Section 2255(h)'s limitations repealed or limited the scope of the savings clause, implied repeals of jurisdictional statutes are heavily disfavored, particularly when they raise constitutional concerns. See, e.g., Mims v. Arrow Fin. Servs., 565 U.S. 368, 749 (2012) (citing Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 643 (2002)).

[335] Cf. Prost v. Anderson, 636 F.3d 578, 584–85 (10th Cir. 2011).

[336] See, e.g., 12 U.S.C. § 3755(b)(2) (2012) ("other remed[ies] . . . include . . . relief under an assignment of rents"); 22 U.S.C. § 1642(b) (2012) ("No judicial relief or remedy shall be available..."); 22 U.S.C. § 1631(g)(i) (2012) ("The sole relief and remedy . . . shall be the relief and remedy provided in this section."); 22 U.S.C. § 1631(f)(c) (2012) (similar); 22 U.S.C. § 4139 (2012) (describing "other remedies" as "relief under chapter 12"); 38 U.S.C. § 4323(d) (2012) (authorizing as "remedies" the court to "award relief as follows"); 42 U.S.C. § 299(b)–22(f)(4)(A) (2012) (describing "equitable relief" together with other "remedies available"); 42 U.S.C. § 262(l)(1)(H) (2012) (describing "legal remedy" as opposed to "injunctive relief" and then "injunctive relief" as a "necessary remedy").

[337] 25 U.S.C. § 1303 (2012).

[338] Id.; See, e.g., United States v. Lara, 541 U.S. 193, 209 (2004) (describing § 1303 as "vesting district courts with jurisdiction over habeas writs from tribal courts").

they are not permitted to do so under Section 2255(h), that would still not address claims by legally innocent state prisoners.[339]

c. Extraordinary Writs

Another option would be to have the Supreme Court use a variety of extraordinary writs to substitute for successive motions for post-conviction review. The AEDPA prevents prisoners from appealing a decision denying them authorization to file a successive petition for post-conviction review, either by way of a petition for rehearing in the court of appeals, or a petition for certiorari in the Supreme Court.[340] *Felker v. Turpin* rejected a constitutional challenge to that provision, but held that it did "not deprive this Court of jurisdiction to entertain original habeas petitions."[341] The statute conferring original habeas jurisdiction in the Supreme Court does not contain any of the limitations applicable to successive motions.[342]

The Supreme Court's own rules make clear that original writs are rarely granted. "To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted."[343] In 2009, however, the Supreme Court transferred a petition for an original writ of habeas corpus to a district court to hear additional evidence of the petitioner's innocence.[344] A concurrence explained why a claim of innocence warranted an exercise of the Court's power to issue an extraordinary writ—"[t]he substantial

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[339] One court of appeals rejected this interpretation before *Montgomery*, reserving the constitutional question. E.g., *Prost*, 636 F.3d at 591 (10th Cir. 2011). The other did so after *Montgomery*, rejecting the argument that it would be unconstitutional to prevent a defendant from filing a habeas petition to challenge a sentence above the lawful statutory maximum. McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1086 (11th Cir. 2017). For reasons explained supra and elsewhere, their reasoning is unpersuasive. See Litman, Gorsuch, supra note 325.

[340] 28 U.S.C. § 2244(b)(3)(E) (2012).

[341] Felker v. Turpin, 518 U.S. 651, 658 (1996).

[342] Compare 28 U.S.C. § 2241 (2012) with 28 U.S.C. § 2255(h) (2012) and 28 U.S.C. § 2244(b) (2012).

[343] *Felker*, 518 U.S. at 665 (quoting Sup. Ct. R. 20.4(a)).

[344] In re Davis, 557 U.S. 952, 952 (2009). After the district court heard additional evidence, it found that the petitioner failed to prove his innocence. In re Davis, No. CV409-130, 2010 WL 3385081, at *1 (S.D. Ga. Aug. 24, 2010).

risk of putting an innocent man to death clearly provides an adequate justification . . . . Simply put, the case is sufficiently 'exceptional' to warrant utilization of this Court's Rule [on original writs], and our original habeas jurisdiction."[345]

There is some possibility that the Court could use original writs of habeas corpus to grant relief to legally innocent prisoners. The statute allowing prisoners to file original writs of habeas corpus extends to both state and federal prisoners,[346] and the Court could use original writs either in cases where petitioners were convicted or sentenced under statutes that have since been held unconstitutional, or where prisoners were convicted or sentenced under statutes that have since been interpreted not to apply to them. In cases where the petitioner's conviction or sentence might remain valid under another provision, the state or federal government could argue those points in the court to whom jurisdiction was passed.

There are, however, serious limitations to the Court's ability to use original writs as a mechanism to make post-conviction relief available to legally innocent prisoners. The first is that many prisoners do not have counsel when they ask the Supreme Court to hear their cases; their petitions might not identify the relevant decision that invalidated or interpreted the statute under which they were convicted or sentenced, or even the statute under which the petitioner was convicted or sentenced. The second is the sheer number of pro se petitions that are filed in the Supreme Court. Each year the Court receives some 7–8,000 petitions for a writ of certiorari.[347] Were the Court to start granting petitions for original writs of habeas corpus, there would likely be many such petitions filed. The third may be a general reticence to resort to extraordinary writs, which the Court's actions over the last several decades evince.[348]

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[345] *In re Davis*, 557 U.S. at 952 (Stevens, J., concurring).

[346] 28 U.S.C. § 2241(c)(3) (2012).

[347] Frequently Asked Questions, Supreme Court of the U.S., https://www.supremecourt.gov/about/faq_general.aspx [https://perma.cc/5ZBY-E9MR] (last visited Dec. 9, 2016).

[348] Lee Kovarsky surveyed the Court's original habeas jurisdiction and outlined how it could and should be used. See Lee Kovarsky, Original Habeas Redux, 97 Va. L. Rev. 61 (2011). But the Court has repeatedly ducked any reliance on, or resort to, its original habeas jurisdiction, even when original habeas petitions present otherwise ideal vehicles to resolve issues they want to and do resolve. See Stephen I. Vladeck, The Supreme Court, Original Habeas, And The Paradoxical Virtue of Obscurity, 97 Va. L. Rev. Online 31, 32–33 (2011)

There may be ways to make the original writ process more open to claims of legal innocence. Right now, the Supreme Court's guide for prospective indigent petitioners does not require them to include any information that will necessarily indicate whether the petitioner is legally innocent. Because petitioners seeking to use original writs as a substitute for successive motions will have, in many cases, already filed at least one motion for post-conviction review in federal court, the guide directs them to include only federal court opinions, and any state court decision that is referenced in the federal court decision.[349] It would be a fairly easy addendum to ask petitioners to also identify the statute under which they were convicted and sentenced, and any subsequent decision (in either federal or state court) that has held that statute invalid, or narrowed it such that it does not apply to them. There may still be many cases where petitioners, unlearned in the law, do not do so, but amending the form would at least point them in that direction.

B. Merits & Freestanding Claims

1. Cognizability

It is not yet clear whether factual innocence provides a freestanding ground for habeas relief. The federal post-conviction statutes only provide a remedy for persons who are in custody in violation of "the Constitution or laws of the United States."[350] Because the Court has not yet recognized that it would violate the Constitution to convict, detain, or perhaps even execute an individual who is factually innocent of the crime they were convicted of, it remains unclear whether factual innocence claims provide a cognizable ground for federal habeas relief.[351] Given the relationship between legal innocence and factual innocence, that may suggest that legal innocence claims are not a

(using post-World War II war crimes petitions); Stephen I. Vladeck, Using The Supreme Court's Original Habeas Jurisdiction To 'Ma[k]e' New Rules Retroactive, 28 Fed. Sent'g Rep. 225 (2016) (using *Johnson*-related petitions).

[349] Supreme Court Guide For *In Forma Pauperis* Cases, at 4, available at https://www.supremecourt.gov/casehand/guideforifpcases2017.pdf_[https://perma.cc/3PHW-PWSS].

[350] 28 U.S.C. §§ 2254(a); 2255(a) (2012).

[351] See Dist. Att'y's Office for Third Jud. Dist. v. Osborne, 557 U.S. 52, 71 (2009) (noting "whether such a federal right [to be released upon proof of actual innocence] exists is an open question") (citing Herrera v. Collins, 506 U.S. 390, 398–417 (1993) and House v. Bell, 547 U.S. 518, 554–55 (2006)); *Herrera*, 506 U.S. at 400–01.

freestanding ground for habeas relief. If it is unresolved whether there is such a thing as a freestanding factual innocence claim, then there may not be a freestanding legal innocence claim either.

That being said, the grounds for habeas relief that are specified by the federal habeas statutes pose less of a barrier to legally innocent petitioners. If a petitioner is legally innocent because the statute under which the petitioner was convicted or sentenced is unconstitutional, the petitioner is necessarily raising a constitutional claim. For federal prisoners who are legally innocent because the state law under which they were convicted or sentenced has been interpreted not to apply to them, their custody and detention is also in violation of the "laws of the United States," which do not authorize the petitioner's custody or detention.[352]

The more difficult case is for state prisoners who are legally innocent because the state statute under which they were convicted or sentenced has been interpreted not to apply to them. Those prisoners, superficially at least, do not appear to have a constitutional claim that arises because they are being imprisoned for an act that the state statute did not actually make criminal.[353] They may, however, obtain habeas relief on another constitutional claim: because legal innocence functions as an exemption to the many procedural doctrines that might otherwise preclude federal habeas review, such as procedural default, a petitioner's legal innocence would allow a claim to be heard on its merits even if the petitioner did not previously raise that claim in state court. And a petitioner could reframe a statutory legal innocence claim as a constitutional one, such as a claim that the evidence was legally insufficient to support a conviction under the statute, properly interpreted;[354] or the claim that the jury did not find all of the elements of the offense beyond a reasonable doubt;[355]

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[352] 28 U.S.C. § 2255(a) (2012).

[353] For state prisoners, whether a decision of state statutory interpretation is retroactive now turns on whether the decision reflected the meaning of the statute at the time of the prisoner's conviction. If the decision clarified or merely interpreted the language of the statute, the decision applies retroactively. Bunkley v. Florida, 538 U.S. 838, 840 (2003) (per curiam); Fiore v. White, 531 U.S. 225, 228–29 (2001) (per curiam). If the decision "changed" the language of the statute, there are now only uncertain due process limits that may require the retroactive application of some decisions. Metrish v. Lancaster, 569 U.S. 351, 365–68 (2013); Rogers v. Tennessee, 532 U.S. 451, 458–62 (2001).

[354] Jackson v. Virginia, 443 U.S. 307, 316–18 (1979).

[355] Apprendi v. New Jersey, 530 U.S. 466, 475–77 (2000) (Sixth Amendment requires juries to find all elements of the offense); Sullivan v. Louisiana, 508 U.S. 275 (1993) (Fifth

among others. And under the innocence exception to procedural default, a prisoner could obtain review of that claim even if he did not previously raise that claim in state court.

2. AEDPA Deference

Under 28 U.S.C. § 2254(d), federal courts may grant a writ of habeas corpus to a state prisoner on a claim that was adjudicated on the merits only if the state court's adjudication was "contrary to, or an unreasonable application of" clearly established Supreme Court precedent.[356] *Carey v. Musladin* held that whether a decision is contrary to or an unreasonable application of Supreme Court precedent is determined with reference to holdings, not dicta of the Supreme Court,[357] and *Greene v. Fisher* held that the relevant Supreme Court precedent is only whatever Supreme Court precedent existed at the time of the state court's adjudication of the defendant's claim.[358]

The combination of *Carey* and *Fisher* could create a dilemma where a state court has previously rejected the prisoner's legal innocence claim. For example, prior to the Supreme Court's decision in *Graham v. Florida*, there was no holding of the Supreme Court that said states could never impose life without parole sentences on juveniles who were convicted of nonhomicide offenses.[359] But once *Graham* held that the Eighth Amendment prohibited states from sentencing those juveniles to life without parole, it created a class of legally innocent petitioners who had received a sentence that the law could not impose on them. But those legally innocent petitioners may not have been entitled to relief if federal courts were only able to assess whether the state court's adjudication of the petitioner's Eighth Amendment claim was reasonable at the time of the state court's adjudication. At the time of the adjudication—and indeed, at any time prior to *Graham*—there was no Supreme Court holding (or even a suggestion in dicta) that juveniles convicted of nonhomicide offenses were categorically precluded from receiving a sentence of life without parole.

Amendment requires juries to find elements beyond a reasonable doubt and to be instructed on reasonable doubt standard).

[356] 28 U.S.C. § 2254(d)(1) (2012).

[357] 549 U.S. 70, 74 (2006).

[358] 565 U.S. 34, 39 (2011).

[359] 560 U.S. 48 (2010).

Greene, however, contained a potential caveat. In a footnote, the Court stated that "[w]hether 2254(d)(1) would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague*, is a question we need not address to resolve this case."[360] Because the first exception to *Teague* is where a petitioner was convicted or sentenced under an unconstitutional statute (or received a punishment the law cannot impose), *Greene* appears to contemplate that the AEDPA would not limit federal courts' ability to review the merits of those claims. The *Greene* footnote is interesting because there is nothing in Section 2254(d)(1) itself that might suggest a carve-out for legal innocence claims, or any particular kind of claim.[361] *Greene* reasoned that "the provision's 'backward-looking language requires an examination of the state-court decision at the time it was made,'" to measure them against the Court's contemporaneous precedent.[362] But *Greene*'s seeming willingness to treat legal innocence claims differently under a provision that makes little reference to the nature of the claim that is being raised may suggest that legal innocence claims could and would be treated differently under some of the other provisions, such as successive motion or exhaustion provisions.

Even though *Greene* suggests the reasonableness of a state court's adjudication of a legal innocence claim might be measured with reference to current Supreme Court precedent, rather than that which existed at the time of the state court's adjudication, it did not explicitly suggest anything about whether federal courts should ask only whether it was reasonable for a state court to reject the petitioner's claim. That is, should a federal court ask whether the best reading of current Supreme Court precedent is that the petitioner is legally innocent, or whether it would have been reasonable to conclude that the petitioner was not legally innocent (taking into account all potentially relevant Supreme Court precedent)? For example, before the Court announced in *Miller v. Alabama* that most juveniles convicted of homicide could also not be sentenced to life without parole, it may have been a reasonable reading

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[360] *Greene*, 565 U.S. at 39 n*.

[361] Section 2254(d)(1) refers to "the adjudication of the claim" that "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law."

[362] *Greene*, 565 U.S. at 38.

of *Graham* that the decision did not prohibit imposing sentences of life without parole on juveniles convicted of homicide. But what if a federal court was convinced the best reading of *Graham* was that the decision did foreclose states' ability to sentence almost all juveniles to life without parole? The *Greene* footnote does not suggest that federal courts are freed from the statutory directive to assess whether a denial of a claim is reasonable, but its logic, which is predicated on the nature of the petitioner's claim, does. But it suggested that Section 2254(d)(1) allows courts to treat legal innocence claims differently for purposes of deciding what Supreme Court precedent counts under Section 2254(d)(1) because of the nature of legal innocence claims.[363] *Greene* therefore might indicate some willingness to allow federal courts to treat legal innocence claims differently when deciding whether Section 2254(d)(1) requires only a very limited reasonableness review of a petitioner's legal innocence claim.

CONCLUSION

Calls for innocence to matter in federal habeas have overlooked an emerging category of innocence—cases where a defendant is legally innocent of his offense or sentence because he was convicted or sentenced under a statute that is unconstitutional, or that does not apply to him. The Court has increasingly begun to recognize and treat these cases as cases of innocence, and grounded its concern for these cases in innocence-related considerations. These kinds of legal innocence are conceptually and inextricably linked with factual innocence cases, where new evidence shows the defendant did not commit the act for which he was convicted. In both sets of cases, the defendant was convicted or sentenced of something the law does not criminalize. Recognizing the emerging category of legal innocence as a kind of innocence makes it possible for the existing federal habeas system to provide relief to legally innocent defendants rather than hoping for a future Congress to make clear that federal habeas review should be available in those cases.

[363] *Montgomery* also bolsters this reading. 136 S. Ct. at 718. See supra Subsection III.A.5.

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