DEATH INELIGIBILITY AND HABEAS CORPUS

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INTRODUCTION

In the last seven years, the Supreme Court has declared several categories of prisoners, such as juvenile and mentally retarded offenders,[1] to be categorically ineligible for capital punishment under the Eighth Amendment. If these "death ineligible" offenders nonetheless sit on death row with procedurally defective habeas corpus petitions, can the writ be used to scrutinize their capital eligibility? In other words, may a death-ineligible offender be executed on a technicality?[2]

The issue is not hypothetical, and the role federal habeas corpus is to play in redressing ineligibility violations remains a conspicuously open question.[3] That question, in turn, implicates some of the most fundamental disagreements over the Supreme Court's equitable authority over the habeas writ, as well as over the related "actual innocence" laws that often determine the outcome of federal habeas litigation. Existing ineligibility rules derive largely from actual innocence law applicable to the more familiar concept of "crime innocence"—the idea that, colloquially speaking, the petitioner "wasn't

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1 *See* Roper v. Simmons, 543 U.S. 551 (2005) (juvenile offenders); Atkins v. Virginia, 536 U.S. 304 (2002) (mentally retarded offenders).

2 One important study found that over 27% of all capital cases are dismissed on procedural grounds, without any merits consideration of claims presented therein. NANCY J. KING, FRED L. CHEESMAN II, & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM & EFFECTIVE DEATH PENALTY ACT OF 1996 45 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf [hereinafter HABEAS TECHNICAL REPORT]. To my knowledge, no study has collected comprehensive data on death-ineligibility cases.

3 For example, the Fifth Circuit has plainly indicated that the statute of limitations in 28 U.S.C. § 2244(d) applies to offenders found to be mentally retarded. *See* Rivera v. Quarterman, 505 F.3d 349, 354–55 (5th Cir. 2007). A number of federal circuit courts allow claims brought in subsequent habeas petitions to be denied, without merits inquiry, on the procedural ground that they should have been brought in a prior petition. *See, e.g.*, *In re* Hill, 437 F.3d 1080, 1083 (11th Cir. 2006) (denying on procedural grounds and without merits inquiry authorization to file a successive habeas petition containing an ineligibility claim); Resendiz v. Quarterman, 454 F.3d 456, 458–59 (5th Cir. 2006) (denying as successive and without merits inquiry a claim that the prisoner was not competent to be executed); Nance v. Norris, 429 F.3d 809, 811 (8th Cir. 2005) (Melloy, J., dissenting) (dissenting against the court's denial of authorization to offender who had made a prima facie showing of ineligibility); Hubbard v. Campbell, 379 F.3d 1245, 1247 (11th Cir. 2004) (refusing to authorize a potentially meritorious claim of incompetence).

there, and didn't do it."[4] Unlike a crime-innocence claim, a death-ineligibility challenge does not dispute that the offender committed the murder for which he was convicted; it disputes only the constitutionality of the capital sentence.

For many years, the question of whether procedural habeas bars should have ineligibility exceptions has been fairly inconsequential. By the time the Supreme Court recognized a narrow ineligibility exception to procedural default rules in 1992,[5] habeas law conformed primarily to a model favoring severe restrictions on relitigation of procedural questions, with exceptions for challenges supplementing viable crime-innocence claims. The model's historical arc is familiar to habeas scholars. Modern habeas restrictions are largely responses to three developments during the Warren era: new procedural rights announced under the Fourth, Fifth, and Sixth Amendments;[6] their application against states through the Fourteenth Amendment;[7] and the vesting in state prisoners of a federal habeas remedy for violations of those rights.[8] Habeas activity swelled as offenders went to federal court to relitigate procedural claims that they had lost in state proceedings. Moreover, many of the newly cognizable claims had no bearing on the guilt or innocence of the defendant. These developments provoked landmark critiques by Professor Paul Bator and Judge Henry Friendly,[9] who argued that such litigation should be curtailed dramatically. Our habeas regime is now geared largely toward restricting relitigation of procedural questions, with exceptions for challenges supplementing viable crime-innocence claims.

Death-ineligibility claims disrupt this established model of habeas adjudication.[10] They are not purely procedural challenges because, if

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4 What I call "crime innocence" is usually called "actual innocence"; what I call "death ineligibility" is usually called "actual innocence of the death penalty." In the interest of clarity, I instead use the "crime innocence/death ineligibility" nomenclature.

5 *See* Sawyer v. Whitley, 505 U.S. 333, 336 (1992).

6 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (holding, under the Fifth and Sixth Amendments, that statements made during police interrogation are admissible only if the defendant is informed of his right against self-incrimination and his right to an attorney).

7 *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (applying Fifth Amendment privilege against self-incrimination to the states); Mapp v. Ohio, 367 U.S. 643 (1961) (applying Fourth Amendment exclusionary rule to the states).

8 *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953) (holding that claims of constitutional error are cognizable under the federal habeas statute).

9 *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). The content and influence of Bator's and Friendly's arguments are discussed *infra* Part I.A and Part II.C.

10 I focus primarily on four types of ineligible prisoners in this Article. *See infra* text accompanying notes 114–17. There are smaller categories of ineligible offenders that I do not treat comprehensively. *See, e.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641, 2659 (2008) (holding that the death penalty may not be imposed for crimes against individuals that do

successful, they would categorically bar a capital sentence. They are also beyond the strictest readings of crime-innocence exceptions for procedurally defective petitions because they do not constitute pure challenges to a conviction's validity.

Recent scholarship has understandably emphasized the implications of DNA evidence for actual innocence law,[11] but that focus may crowd out scrutiny of other developments that also affect central tenets of habeas theory. The number of offenders in whom a death-ineligibility claim vests has increased dramatically and will only grow as the Court declares new categories of prisoners—probably those exhibiting some sort of diminished capacity—exempt from capital punishment. Existing scholarship has made little attempt to explore how these claims' unique attributes change the habeas equation. In this Article I argue that, in light of important distinctions between death-ineligibility challenges and the claims on which existing law is premised, the Supreme Court should reformulate habeas relief available to categories of offenders that may not be executed under the Eighth Amendment.

In Part I, I map the traditional actual innocence concept in habeas law, describing the two analytic variants in which it now appears—as a habeas "gateway" to bypass procedural obstacles and as a "freestanding" claim. The development of actual innocence doctrine is critical to understanding death ineligibility because it represents the legal rules to which ineligibility challenges must currently conform. In Part II, I argue that adjudicating ineligibility claims under the existing habeas framework—that of restrictions on procedural claims with exceptions for crime innocence—does not make sense in light of the policies that the restrictions and exceptions were designed to secure. In Part III, I suggest how the Court may conform habeas doctrine to the unique questions that ineligibility claims present, regardless of the procedural status of the habeas petition that contains them. In short, I trace the genesis of and appropriate response to the concept of death ineligibility, concluding that federal habeas relief

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not result in death); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that the death penalty may not be imposed for rape of an adult woman).

11 *See, e.g.*, Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008) (advocating increased access to evidence of innocence, including DNA evidence, during trial and postconviction appeals); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) [hereinafter Garrett, *Judging Innocence*]; Paul C. Giannelli, Ake v. Oklahoma*: The Right to Expert Assistance in a Post-*Daubert*, Post-DNA World*, 89 CORNELL L. REV. 1305 (2004); Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L.J. 489 (2008); J. Brent Alldredge, Note, *Federal Habeas Corpus and Postconviction Claims of Actual Innocence Based on DNA Evidence*, 56 SMU L. REV. 1005 (2003); Matthew J. Mueller, Comment, *Handling Claims of Actual Innocence: Rejecting Federal Habeas Corpus as the Best Avenue for Addressing Claims of Innocence Based on DNA Evidence*, 56 CATH. U. L. REV. 227 (2006).

may almost always issue to nullify an ineligible prisoner's capital sentence.[12]

I
The Role of Innocence in Habeas Law

The writ of habeas corpus is not a substantive right; it is a procedural remedy. Therefore, when the substantive scope of the Eighth Amendment expands, the habeas remedy available to vindicate constitutional violations remains limited by procedural obstacles imposed by common law and by statute. This Part analyzes the role of crime innocence in shaping modern habeas law. I ultimately argue that the significant role of crime innocence explains why modern habeas law is ill-equipped to properly adjudicate death-ineligibility claims, which are entirely detached from guilt determinations. Part I.A discusses how early "injustice" exceptions to procedural restrictions on habeas relief developed into crime innocence "gateways" by which federal courts could reach the merits of procedurally defective claims. The historical context in which courts and Congress forged special crime-innocence rules helps explain why those rules are not suited to the orderly adjudication of ineligibility challenges. Part I.B discusses the judicial rejection of freestanding crime-innocence claims, and explains that such a rejection does not affect the legal viability of death-ineligibility claims.

A. Innocence Gateway Claims

The writ of habeas corpus is a civil, postconviction remedy with roots dating back to fourteenth-century English common law.[13] The United States Constitution forbids Congress from suspending the writ except during periods of invasion or rebellion.[14] Congress statutorily authorized federal courts to issue habeas relief to federal prisoners in 1789,[15] and it made the writ generally available to state prisoners at the inception of Reconstruction.[16] In 1953, the Supreme Court held, in *Brown v. Allen*,[17] that federal courts had statutory jurisdiction to examine the merits of constitutional questions adjudicated by state

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12 I deal only with prisoners sentenced to death by state courts.

13 *See generally* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575 (2008) (tracing the history of the writ of habeas corpus).

14 "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

15 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

16 Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385–86.

17 344 U.S. 443 (1953).

courts of competent jurisdiction.[18] Many commentators consider *Brown v. Allen* the inception of the modern habeas regime.[19] Modern habeas doctrine is a creature of common, statutory, and constitutional law.[20] Congress made significant changes to the statute in 1948, 1966, and 1996.[21] The last of these enactments was the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[22] which altered or enacted several key features of modern habeas law.[23] Capital prisoners may use federal habeas proceedings to attack either a conviction or a sentence.[24]

After *Brown v. Allen* definitively established that federal habeas jurisdiction included the authority to hear challenges to procedurally sound state trials,[25] Professor Bator and Judge Friendly produced landmark scholarship[26] that, although inconsistent in many ways, shaped the conservative position on habeas for the next forty years. Bator emphasized the epistemic limits of human inquiry and argued that the criminal justice system ensures correctness by proxy of reliable procedure.[27] Judge Friendly's central thesis was that innocence should be the touchstone of any decision to disrupt state criminal process.[28] Although Judge Friendly relied heavily on some of Bator's arguments,[29] the two theories are in fact profoundly inconsistent: Judge

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18 *Id.* at 458–59.

19 *See* Honorable Patrick E. Higginbotham, *Reflections on Reform of § 2254 Habeas Petitions*, 18 HOFSTRA L. REV. 1005, 1008 (1990); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362, 371–72 (1991); Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1716–17 (2000).

20 The leading habeas treatise describes the writ as a "civil, appellate, collateral, equitable, common law, and statutory procedure." 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2 (5th ed. 2005) [hereinafter FHCPP].

21 *See id.* § 2.4(d)(viii), (ix), (xi) (respectively describing the 1948, 1966, and 1996 amendments).

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

23 This characterization obviously excludes habeas cases involving Guantánamo detainees.

24 *See* 28 U.S.C. § 2254 (2006) (providing for attack on conviction); *id.* § 2255 (providing for attack on sentence).

25 344 U.S. 443 (1953). Even before *Brown*, however, when the Court would observe that federal habeas jurisdiction was limited to questions of trial-court jurisdiction, the Court suggested an unusually broad definition of that term. Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 339 & n.172 (1993).

26 *See* sources cited *supra* note 9.

27 Bator, *supra* note 9, at 447–48. Three articles by Professor Larry W. Yackle together constitute an exhaustive survey of post-*Brown* habeas legislative history and discuss extensively the role that Bator's model played in that activity. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 422–43 (1996); Larry W. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 401–12 (1983); Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 543–53 (2006).

28 Friendly, *supra* note 9, at 142.

29 *Id.* at 146 n.15.

Friendly's presents innocence as the *raison d'être* of habeas review whereas Bator's considers innocence unknowable and, tersely speaking, irrelevant.[30]

Emboldened by theories that habeas relief should be reoriented towards innocence (Judge Friendly) and circumscribed by the epistemic limits of human inquiry (Bator), the Court and Congress began to impose procedural obstacles to issuance of the writ. Restrictions apply to claims not properly presented to state courts ("defaulted claims"), claims presented in prior federal petitions ("successive claims"), claims that were not (but could have been) presented in prior federal petitions ("abusive claims"), and claims that do not comply with the federal statute of limitations ("untimely claims"). Concurrently, the Court developed innocence "gateways"—showings that could overcome the procedural restrictions in instances where the habeas petitioner claimed actual innocence.[31] Although the contents of the innocence gateways applicable to defaulted, successive, abusive, and untimely claims have largely converged, the various gateways originally derived from different authorities and exhibited different formulations. Usually, the formulations contained some form of an (in)justice standard, which considered more than just the guilt of the offender. All of the gateway formulations, before they were narrowed by the Rehnquist Court or by AEDPA, would have encompassed death-ineligibility claims had such claims been cognizable at that time.[32]

1. *Procedurally Defaulted Claims*

A procedural default occurs where: (1) a petitioner violates a state procedural rule, (2) the procedural violation is an adequate and independent ground for denying the constitutional claim, and (3) the procedural violation was clearly and unambiguously the reason state relief was denied.[33] A procedurally defaulted claim may nonetheless be excused if the petitioner can either show cause for and prejudice resulting from the default or show that failure to review the defaulted claim would constitute a fundamental miscarriage of justice.[34] Around one-half of post-AEDPA capital habeas cases include a claim that is ruled to be procedurally defaulted.[35]

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30 Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 458 (1980).

31 *See infra* Parts I.A.1–3.

32 As I will explain in Part II, this winnowing process occurred not to eliminate the then-unrecognized ineligibility claims, but to stem the tide of purely procedural challenges.

33 *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 729–32, 750 (1991).

34 *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 314–15 (1995).

35 HABEAS TECHNICAL REPORT, *supra* note 2, at 48.

Procedural default is unique among the doctrines subject to crime-innocence gateways because it remains entirely a creature of common law. It is a "prudential[,] rather than [a] jurisdictional," barrier to relief.[36] *Fay v. Noia*,[37] decided by the Supreme Court in 1963 and representing a high water mark for habeas claimants, held that defaulted claims would be excused unless the petitioner "deliberately by-passed" that claim in state appellate or postconviction proceedings.[38] Unsettled by the habeas litigation that the deliberate bypass standard invited, in *Wainwright v. Sykes*[39] the Court heightened the showing necessary to excuse a default to the now-familiar "cause and prejudice" standard.[40]

The aggregate effect of the Court's post-*Noia* procedural default jurisprudence was to virtually eliminate courts' ability to entertain defaulted claims for which offenders could not show cause and prejudice. But because the post-*Noia* cases had ratcheted up the cause and prejudice standard under the auspices of the Court's equitable authority over the writ, the Court was also free to exercise that same equitable authority to introduce a judge-made mechanism for hearing defaulted *and* unexcused claims.

Indeed, that is exactly what the Court did in *Murray v. Carrier*.[41] In order to prevent a "fundamental miscarriage of justice," the Court held that, if a petitioner can show that "a constitutional violation has probably resulted in the conviction of one who is *actually innocent*, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[42] Not drawing directly from any procedural default precedent, the Court cited *Wainwright* for the proposition that its equitable authority freed it to craft whatever gateways it deemed appropriate.[43]

In *Carrier*, the Court for the first time connected the idea of "actual innocence" with the "miscarriage of justice" language from earlier default jurisprudence.[44] In *Sawyer v. Whitley*, the Court eventually held

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36 *See* Steiker, *supra* note 25, at 323–24 (explaining that defaults have a greater effect on direct review because they implicate the Article III case-or-controversy requirement).

37 372 U.S. 391 (1963).

38 *Id.* at 438.

39 433 U.S. 72 (1977).

40 *Id.* at 90–91.

41 477 U.S. 478 (1986).

42 *Id.* at 495–96 (emphasis added) (internal quotation marks omitted). The Court reaffirmed the viability of the crime-innocence gateway for defaulted claims in *House v. Bell*, 547 U.S. 518, 536–37 (2006).

43 *Carrier*, 477 U.S. at 496 (quoting *Wainwright*, 433 U.S. at 81).

44 *See also* Schlup v. Delo, 513 U.S. 298, 322 (1995) ("Explicitly tying the miscarriage of justice exception to innocence thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case.'" (quoting *Murray*, 477 U.S. at 496)).

that "actual innocence" included death ineligibility.[45] *Carrier*'s holding echoed Justice Felix Frankfurter's dissent in *Brown v. Allen*,[46] in which he wrote that habeas relief must be available to "'prevent a complete miscarriage of justice.'"[47] In fact, scrutiny of the phrase "miscarriage of justice"—as it is used in the originating procedural default cases, in closely related evidentiary default cases, and in Federal Rule of Criminal Procedure 52(b)—reveals that the concept of innocence that *Carrier* incorporated is much broader than a crime-innocence rule. The term's breadth is important because, in Part II, I argue that there was never any historic restriction on ineligibility challenges and that they were not litigated until recently because they were not, until that time, cognizable under the Eighth Amendment.[48]

Originating Procedural Default Cases. The originating "miscarriage of justice" opinions make clear that the originally formulated concept was broader than pure crime innocence. In fact, a *Brown v. Allen* companion case strongly suggests a broad reading of "miscarriage of justice."[49] Justice Frankfurter wrote that refusing to hear two capital prisoners' grand-jury discrimination claims, which were defaulted in state court because the statement of appeal was hand delivered a day late, would constitute a "complete . . . miscarriage of justice."[50] The executions fit within the "miscarriage of justice" language even though the prisoners' arguments could not be conceptualized as crime-innocence claims.

Justice Frankfurter's "miscarriage of justice" formulation in *Brown v. Allen* also relied heavily on Judge Learned Hand's opinion in *United States* ex rel. *Kulick v. Kennedy*,[51] a case involving a changed interpretation of the Selective Training and Service Act of 1940.[52] The petitioner, a Jehovah's Witness, was convicted for refusing induction into the armed forces and had failed to appeal his induction procedures because the controlling precedent clearly forbade it. When the law changed and the petitioner sought habeas relief, Judge Hand held that he should be permitted to challenge his conviction collaterally.[53] Punishing the forfeiture of a futile appeal, Judge Hand reasoned, would constitute a "miscarriage of justice."[54] Although Judge Hand

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45 505 U.S. 333, 336 (1992).

46 344 U.S. 443, 554–60 (1953) (Frankfurter, J., dissenting).

47 *Id.* at 558 (quoting United States *ex rel.* Kulick v. Kennedy, 157 F.2d 811, 813 (2d Cir. 1946), *rev'd sub nom.* Sunal v. Large, 332 U.S. 174 (1947)).

48 Whether a majority of the current Court equates miscarriage of justice with actual innocence is not clear. *See* 2 FHCPP, *supra* note 20, § 26.4.

49 *Brown* 344 U.S. at 556–60 (Frankfurter, J., dissenting).

50 *Id.* at 558.

51 157 F.2d 811.

52 Pub. L. No. 76-783, 54 Stat. 885 (1940).

53 *Kulick*, 157 F.2d at 813.

54 *Id.*

was grappling with a question of statutory retroactivity, when he referred to a "miscarriage of justice," he had obviously conceptualized the term as broader than a crime-innocence rule.

Evidentiary Default Cases. Evidentiary defaults are analytically distinct from procedural defaults, but habeas jurisprudence provides similar rules for situations in which a petitioner seeks to develop *material facts* (as opposed to *claims*) not presented to a state court. In *Keeney v. Tamayo-Reyes*,[55] the Supreme Court held that a failure to develop a claim factually in state proceedings could be excused and that a federal evidentiary hearing could be mandated if a petitioner shows that "a fundamental miscarriage of justice would result" from a failure to conduct such a hearing.[56] The evidentiary default standard was expressly designed to mirror the converging (in)justice standards for defaulted and abusive claims.[57]

AEDPA codified this rule, with some changes, forbidding federal evidentiary hearings unless "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."[58] One of the seemingly obvious purposes of the change in wording, which purges any reference to the "miscarriage of justice" standard, is to exclude death-ineligibility claims from the exception to the evidentiary default bar. I do not take up the exclusionary intent in depth here, as I analyze an analogous change in wording applicable to abusive claims. Suffice it to say that the change in statutory wording reflects a belief that the prior "miscarriage of justice" standard was indeed broad enough to encompass ineligibility claims.

Federal Rule of Criminal Procedure 52(b). The Supreme Court has recently stated that, "[i]n our collateral-review jurisprudence, the term 'miscarriage of justice' means that the defendant is actually innocent," but that the term has broader meaning in other criminal contexts.[59] For example, the "miscarriage of justice" language also encompasses more than "innocence" when the term is used in interpretations of Federal Rule of Criminal Procedure 52(b). The Court has held that Rule 52(b), which grants an appeals court authority to review a determination for "[a] plain error that affects substantial rights . . . even though it was not brought to the court's attention,"[60] is

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55 504 U.S. 1 (1992).

56 *Id.* at 12; *cf.* McCleskey v. Zant, 499 U.S. 467, 494–95 (1991) (analogizing to injustice standard for abusive claims); Murray v. Carrier, 477 U.S. 478, 496 (1986) (analogizing to injustice standard for defaulted claims).

57 *See Keeney*, 504 U.S. at 7–8.

58 28 U.S.C. § 2254(e)(2)(B) (2006).

59 *See* United States v. Olano, 507 U.S. 725, 736–37 (1993).

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

to be used in "those circumstances in which a miscarriage of justice would otherwise result."[61] This interpretation is consistent with a review of the Rule's drafting, in which the Committee expressed its preference that courts of appeals review prejudicial errors "so that any miscarriage of justice may be thwarted."[62]

The Court has equated the "miscarriage of justice" language in Rule 52(b) to "particularly egregious errors"[63] and errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings."[64] "Miscarriage of justice" does not have a particular meaning as a habeas gateway simply because it has that meaning in a rule of criminal procedure, but the general understanding of Rule 52(b) adds to the evidence that the injustice exception to procedurally defective habeas claims was not, as originally conceived, limited to questions of crime innocence.

2. *Successive and Abusive Claims*

The historical development of successive petition jurisprudence also exemplifies the equitable authority the Supreme Court continues to exercise over the writ, even where the inquiry is partially controlled by statute. A successive petition may contain successive claims (those raised and rejected in a prior petition), abusive claims (those available but not raised in a prior petition), or both. For that reason, successive and abusive claims are often analyzed and adjudicated together, and they are controlled by the same provision in the federal habeas statute.[65] Around five percent of post-AEDPA capital petitions are terminated as successive.[66]

Prior to AEDPA, the Court had established an "ends of justice" gateway for abusive and successive claims.[67] In the 1920s, the Supreme Court held that lower federal courts could dismiss successive federal petitions where the petitioner had raised the same claim in an earlier petition and where relitigation would not serve "ends of jus-

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61 United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 n.14 (1982) (internal quotation marks omitted)). *See also* United States v. Krasn, 614 F.2d 1229, 1236 (9th Cir. 1980) (stating that plain error review is used "to prevent a miscarriage of justice"); Steiker, *supra* note 25, at 340–41 n.174 (collecting cases).

62 ADVISORY COMM. ON RULES OF CRIMINAL PROCEDURE, FEDERAL RULES OF CRIMINAL PROCEDURE: PRELIMINARY DRAFT 263 (1943).

63 *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163).

64 *Id.* (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936) (internal quotation marks omitted)).

65 *See* 28 U.S.C. § 2244(b)(1) (2006) (successive claims); *id.* § 2244(b)(2) (abusive claims).

66 *See* HABEAS TECHNICAL REPORT, *supra* note 2, at 47.

67 *See* McCleskey v. Zant, 499 U.S. 467, 495 (1991) (abusive claims); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) (successive claims).

tice."[68] The "ends of justice" standard applied to successive and abusive claims and functioned in much same way as the "miscarriage of justice" standard applied to defaulted claims. The "ends of justice" language first appeared in a statute in the 1948 amendments to § 2244 and, even after that language was removed in the 1966 amendments, the Court continued to imply that exception to claims by *both* federal and state prisoners.[69] But, because the Court had invoked its surviving equitable authority to maintain "injustice" exceptions, it also exercised that broad authority to craft common law limitations on their scope by holding that successive and abusive claims were cognizable "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[70]

In 1991, *McCleskey v. Zant* reconfigured the abusive-claim gateway so that it mirrored the gateway for procedural defaults and changed the "ends of justice" standard to the "fundamental miscarriage of justice" language indigenous to default doctrine.[71] The standards applicable to same-claim successive petitions remained unchanged until 1996,[72] when AEDPA revamped laws applicable to all successive petitions. Under the current version of § 2244(b), *successive* claims are to be dismissed, with no statutory exceptions; courts may entertain *abusive* claims only in very limited circumstances.[73] For a variety of reasons, including the discovery of new DNA evidence and the announcement of new and retroactively applicable rules of constitutional law,[74] many meritorious claims are controlled by AEDPA's successive petition and abusive-claim rules.[75]

AEDPA dramatically changed the gateway jurisprudence for abusive claims. Prior to AEDPA, abusive-claim jurisprudence contained gateways both for innocence claims and for claims where the petitioner could show cause and prejudice.[76] AEDPA merged the two formerly independent gateways and now requires a successive petition to show cause and prejudice for the prior failure to raise the claim,

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68 *See* Salinger v. Loisel, 265 U.S. 224, 230–31 (1924); Wong Doo v. United States, 265 U.S. 239, 241 (1924).

69 *See Kuhlmann*, 477 U.S. at 451–54.

70 *Id.* at 454 (discussing successive petitions).

71 *See McCleskey*, 499 U.S. at 494.

72 *See* Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (pre-AEDPA case describing application of "miscarriage of justice" exception to successive claims).

73 *See* 28 U.S.C. § 2244(b)(1)–(2) (2006). I discuss how the Supreme Court reads these bars forgivingly in Part III.C.2(c), *infra*.

74 *See* 28 U.S.C. § 2244(b).

75 For example, a claim may not mature until after an offender completes his first round of federal habeas litigation. *See* Kyle P. Reynolds, Comment, *"Second or Successive" Habeas Petitions and Late-Ripening Claims After* Panetti v. Quarterman, 74 U. CHI. L. REV. 1475, 1487–92 (2007) (discussing circuit courts' treatment of cases in which habeas petitioner's successive petition includes newly ripened claim).

76 *See McCleskey*, 499 U.S. at 494–96.

which must in turn demonstrate that, "but for constitutional error, no reasonable factfinder would have found the [claimant] guilty of the underlying offense."[77]

Several points merit emphasis. First, AEDPA eliminated any statutory references to "justice," codifying what the Supreme Court had already effectively accomplished—equating "ends of justice" and "miscarriage of justice" with innocence. Second, AEDPA transformed the innocence inquiry from a free-floating equitable exception into the crux of the cause-and-prejudice inquiry.[78] Because the innocence standard was always considered more demanding than the prejudice requirement, AEDPA effectively made abusive claims harder to excuse (because petitioners now had to show crime innocence). Third, no excuse or innocence gateway allows habeas petitioners to circumvent the bar on successive claims. Fourth, AEDPA increased the burden of proof necessary to show innocence from "more likely than not" to "clear and convincing."[79] Finally, and perhaps most central to my discussion, the phrasing of the innocence clause, at least superficially, appears to exclude death-ineligibility claims. This situation creates the conflicts between the Eighth Amendment and the statutory limits of the habeas remedy that I explore in Part III.

3. *Untimely Claims*

AEDPA established, for the first time, a statute of limitations for habeas petitions.[80] A prisoner generally has a year from the date on which his conviction becomes final or when a claim otherwise matures to file for habeas relief.[81] The statute of limitations tolls during the pendency of state collateral attacks so that offenders may exhaust state remedies without penalty. About four percent of post-AEDPA capital cases include a time-barred claim, although equitable tolling (described below) is frequently required to avoid the statutory limitations rule.[82]

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77 *See* 28 U.S.C. § 2244(b)(2)(B)(ii).

78 *Compare McCleskey*, 499 U.S. at 493–94 (describing abusive-claim prejudice prong and actual innocence gateway separately), *with* 28 U.S.C. § 2244(b)(2)(B)(ii) (requiring cause-and-prejudice showing for crime-innocence claim).

79 *Compare* Schlup v. Delo, 513 U.S. 298, 327 (1995) ("more likely than not" burden), *with* 28 U.S.C. § 2244(b)(2)(B)(ii) ("clear and convincing" standard).

80 *See* 28 U.S.C. § 2244(d) (applicable to state prisoners).

81 I use the phrase "otherwise matures" because there are in fact four "trigger dates" in 28 U.S.C. § 2244(d)(1). Alternate trigger dates include the date on which an unconstitutional state impediment to filing is removed (§ 2244(d)(1)(B)), the date on which the Supreme Court declares a new constitutional right expressly made applicable to cases on collateral review (§ 2244(d)(1)(C)), and the date on which the factual predicate for the claim could be discovered with due diligence (§ 2244(d)(1)(D)).

82 *See* HABEAS TECHNICAL REPORT, *supra* note 2, at 46.

Under the statute of limitations, a new claim matures and is subject to a separate one-year limitations period when new predicate evidence could be discovered with due diligence.[83] Because a separate statute of limitations applies to claims predicated on newly discovered evidence and because there is no prejudice requirement, the statute of limitations might superficially seem more forgiving than the rules governing defaulted, successive, and abusive claims. The absence of an innocence excuse, however, renders it perhaps the most severe of all the procedural bars to habeas relief.

Most observers familiar with the statute's legislative genesis acknowledge that AEDPA was shoddily crafted and poorly cohered,[84] but the omission of an actual innocence exception in § 2244(d)(1) is particularly strange. After all, AEDPA did craft such an exception for abusive claims in § 2244(b)(2)(B) and for federal new evidentiary hearings in § 2254(e)(2)(B). The legislative history's two references to the effect of the limitations statute on innocence claims are from Representatives Watt and Pelosi, and those comments confirm the provision's plain textual reading.[85]

Because the limitations statute has no common law precursor and because it contains no express crime-innocence or death-ineligibility exception, it may be the catalyst for a potentially explosive conflict between legislative restrictions on relief and the powerful interest in avoiding unconstitutional executions.[86] As I argue in Part III.C.2(c), however, the universally recognized equitable-tolling exception could be used to blunt any constitutional problems that the absence of a crime-innocence or death-ineligibility gateway creates.[87]

B. "Freestanding" Innocence

"Actual innocence" claims appear in two analytic variants. The first is as a "gateway claim," which I discussed in Part I.A and which is asserted to overcome a procedural defect. In other words, a successful

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83 *See* 28 U.S.C. § 2244(d)(1)(D).

84 *See* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 459–68 (2007) (presenting AEDPA's legislative history). Writing for the Court, Justice Souter has remarked that "in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting." Lindh v. Murphy, 521 U.S. 320, 336 (1997).

85 *See* 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statement of Rep. Watt) ("By imposing this limitation, important new evidence, even new compelling evidence of one's innocence, ... can no longer be offered, after that one bite within 1 year."); 142 CONG. REC. H3614 (daily ed. Apr. 18, 1996) (statement of Rep. Pelosi) ("The habeas corpus provisions in this bill . . . . increase the risk that innocent persons could be held in prison in violation of the constitution, or even executed.").

86 *See* Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 387–91 (2001) (arguing that AEDPA's statute of limitations violates the Constitution because it lacks an actual innocence exception).

87 *See* sources cited *infra* note 370.

gateway-innocence claim allows a court to entertain a defaulted, successive, abusive, or untimely claim.[88]

The second analytic variant is a "freestanding innocence claim," a claim that a prisoner is innocent of capital murder, and that does not supplement some other constitutional challenge.[89] For example, imagine a prisoner who discovers new DNA evidence that definitively disproves his role in a murder, but who either fails to allege or prove an accompanying constitutional violation. Whether a "freestanding innocence" claim is even cognizable on federal habeas review remains an open question.[90]

Freestanding innocence jurisprudence actually subdivides into two different concepts, and parsing the difference is important to understanding how death-ineligibility claims should fare under the rules. The difference between the two freestanding innocence concepts is roughly the difference between the question of whether a federal court *may* grant relief on a meritorious freestanding innocence claim and whether a federal court *must* do so.

The habeas statute allows prisoners to obtain habeas relief only for *constitutional* violations,[91] and the Court has wrestled mightily with the question of which constitutional provision a freestanding crime-innocence claim actually invokes.[92] If a freestanding innocence claim does in fact state a constitutional violation (more on that below), then it is cognizable under the habeas statute and a federal court *may* grant habeas relief. The habeas statute, however, unambiguously imposes all sorts of remedial limits on meritorious claims, and few argue that Congress cannot promulgate any restrictions on habeas relief. The question of whether a federal court *must* grant relief naturally arises whenever a routine restriction on the remedy (such as the statute of limitations) is applied to a potentially meritorious innocence claim. Under such circumstances, the only way to grant relief on a freestanding innocence claim would be to declare the routine restriction un-

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88 Recall that there is in fact no statutory innocence gateway for untimely claims. *See* 28 U.S.C. § 2244(d).

89 More precisely speaking, a claim is "freestanding" whenever a prisoner does not prove an accompanying constitutional violation. These situations include where the offender makes no accompanying constitutional claim, where the petitioner made the claim but its merits cannot be decided because it was subject to a successful procedural defense, or where the petitioner simply lost on the merits of the constitutional claim.

90 *See* Herrera v. Collins, 506 U.S. 390, 419–27 (1993) (O'Connor, J., concurring). The *Herrera* majority opinion contained dicta suggesting that a freestanding innocence claim might not be cognizable. *See id.* at 401 (majority opinion) ("Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence."). The Court passed on the freestanding innocence question again in *House v. Bell*, 547 U.S. 518, 554–55 (2006) and in *Dist. Att'y's Office for the Third Jud. Dist. v. Osborne*, 129 S. Ct. 2308, 2322 (2009).

91 *See* 28 U.S.C. § 2254(a).

92 *See infra* text accompanying notes 94–98.

constitutional or to read some implied innocence exception into the statute.[93]

Understanding the Court's skepticism of freestanding crime innocence is crucial to understanding why death-ineligibility claims do not create similar cognizability problems under the habeas statute. Ineligibility claims are uncontroversially anchored in the Eighth Amendment and do not ask courts to consider the thorny issue of whether habeas review may be used to redress arguably nonconstitutional claims. I explain this important distinction further in Part III.B, but for now I focus on *Herrera v. Collins*,[94] the 1993 case in which the Court first took up the freestanding crime-innocence issue.

Herrera was sentenced to death in Texas and claimed, in a successive federal petition, that he was actually innocent of the murder.[95] Herrera argued that the Eighth and Fourteenth Amendments forbid a state from executing an actually innocent offender and that he was entitled to habeas relief to prevent such an execution.[96]

In a fractured decision and narrow opinion, the Supreme Court denied his petition. Rather than reaching the broad question of whether the Eighth and Fourteenth Amendments forbid the execution of an actually innocent prisoner, the Court held only that Herrera's claim did not fit within its Eighth Amendment jurisprudence and, because state corrective process was available, that Texas procedure did not violate the Fourteenth Amendment's procedural due process guarantees.[97] In fact, the Justices seemed unable to agree on precisely what they were deciding.[98]

But the various opinions make clear what the Justices did *not* decide. The Court did state in dicta that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a

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93 Part III.C.2 considers the feasibility of each of these options in the ineligibility context.

94 506 U.S. 390 (1993).

95 *Id.* at 396.

96 *Id.* at 398.

97 *See id.* at 405–07, 411.

98 *Compare id.* at 407 n.6 ("The question before us . . . [is whether procedural due process] entitles petitioner to judicial review of his 'actual innocence' claim."), *with id.* at 420 (O'Connor, J., concurring) ("[T]he issue before us is . . . . whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial."), *and id.* at 427 (Scalia, J., concurring) ("We granted certiorari on the question whether it violates due process or constitutes cruel and unusual punishment for a State to execute a [fairly convicted prisoner who] later alleges that newly discovered evidence shows him to be "actually innocent."), *and id.* at 430–31 (Blackmun, J., dissenting) ("We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence.").

ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."[99] Justice Sandra Day O'Connor, joined by Justice Anthony Kennedy, however, wrote a separate concurrence emphasizing that the Court had not resolved the freestanding innocence question.[100] Justices Harry Blackmun, David Souter, John Paul Stevens, and Byron White each wrote or joined in separate opinions that would have recognized the cognizability of freestanding innocence claims.[101] Justice Blackmun's dissent concluded with the famously scathing remark that "[t]he execution of a person who can show that he is innocent comes perilously close to simple murder."[102]

Thirteen years later, when the cognizability of a freestanding innocence claim was again before the Court in *House v. Bell*, the Court still refused to decide the issue.[103] It again demurred in this most recent term, deciding *District Attorney's Office v. Osborne* on other grounds.[104] Over the summer, however, the Court took the extraordinary step of invoking its *original* authority to grant habeas writs (as opposed to its authority to review habeas decisions in lower courts) to transfer a freestanding claim for adjudication in federal district court.[105] The transfer order provoked an angry dissent by Justice Antonin Scalia, who considered the instructions to the district court a "fool's errand" and cited *Herrera* in support of the proposition that the constitutional status of such actual innocence claims remained in serious dispute.[106]

The *Herrera* dicta disputing the cognizability of freestanding innocence claims is central to my death-ineligibility discussion because of the interests it invokes in support of that position: namely, the notions that (1) habeas exists to redress constitutional errors and not to conduct factfinding;[107] (2) the relief available to a petitioner with a successful freestanding innocence claim is unclear;[108] (3) evidence goes

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99 *Id.* at 400.

100 *Id.* at 427 (O'Connor, J., concurring).

101 *See id.* at 429 (White, J., concurring) (proposing a standard that would require a petitioner to show that "no rational trier of fact could find proof of guilt beyond a reasonable doubt" (alterations, citations, and internal quotation marks omitted)); *id.* at 442 (Blackmun, J., dissenting) (proposing a standard that would require a petitioner to "show that he probably is innocent").

102 *Id.* at 446 (Blackmun, J., dissenting).

103 547 U.S. 518, 555 (2006).

104 129 S. Ct. 2308, 2322 (2009).

105 *See In re* Davis, No. 08-1443, 2009 WL 2486475, at *1 (U.S. Aug. 17, 2009). Understanding precisely what *Davis* will ultimately mean is at this point difficult because no federal court has actually had to rule on the merits and decide the constitutionality of the freestanding claim at issue in *Davis*.

106 *See id.* at *2 (Scalia, J. dissenting).

107 *See Herrera*, 506 U.S. at 400.

108 *See id.* at 402–03.

stale over time;[109] and (4) the gateways applicable to procedural defenses secure the innocence interests expressed in the habeas statute.[110] These interests resurface in support of several types of habeas restrictions—not just as arguments against the cognizability of freestanding innocence claims. This Part explained the various doctrines to which these interests attach, and Part II will explain why those interests are not promoted by adjudicating newer death-ineligibility categories under the existing habeas framework.

II
The Limits of Actual Innocence in Adjudicating Death-Ineligibility Claims

Three Warren-era developments conspired to increase dramatically the volume of habeas litigation created by state prisoners: the expansion of Fourth, Fifth, and Sixth Amendment procedural rights, the incorporation of those rights against the states through the Fourteenth Amendment, and the widespread use of the federal habeas remedy to redress these violations.[111] Modern procedural restrictions and the limits on freestanding innocence claims were direct responses to these developments. In this Part I argue that newly cognizable death-ineligibility challenges differ materially from the litigation that provoked these restrictions, and should not by default be subject to doctrine crafted for the earlier phenomena.

I begin this Part by charting early death-ineligibility litigation, culminating in *Sawyer*.[112] *Sawyer* announced what I call the "paradigm ineligibility claim," a claim that an offense satisfies no statutory aggravating conditions necessary to impose a capital sentence.[113] I then describe four major non-paradigm death-ineligibility categories: nontriggermen convicted of felony murder without sufficient culpability;[114] juvenile offenders;[115] mentally retarded offenders;[116] and offenders who are not competent to be executed.[117] I conclude with the argument that, because non-paradigm ineligibility claims do not compromise the interests that provoked habeas restrictions, the law should treat them differently.[118]

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109 *See id.* at 403–04.
110 *See id.* at 404.
111 *See* sources cited *supra* notes 6–8.
112 Sawyer v. Whitley, 505 U.S. 333 (1992).
113 *See id.* at 343–44.
114 *See* Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982).
115 *See* Roper v. Simmons, 543 U.S. 551 (2005).
116 *See* Atkins v. Virginia, 536 U.S. 304 (2002).
117 *See* Panetti v. Quarterman, 551 U.S. 930 (2007); Ford v. Wainwright, 477 U.S. 399 (1986).
118 At the beginning of the October 2009 Term, the Supreme Court heard two *noncapital* ineligibility cases, both of which involved the issue of whether the Eighth and Four-

A helpful conceptual framework divides a capital trial into three phases: the phase where the court considers the defendant's guilt; the phase where the court considers the defendant's capital eligibility; and the phase where the court considers mitigating evidence that may warrant a noncapital sentence. The trial court may not actually conduct these inquiries discretely (for example, eligibility and mitigation are often considered simultaneously), but the framework usefully isolates the eligibility concept I explore here.

A. Paradigm Death-Ineligibility Claims

Modern death-penalty jurisprudence begins in 1972 with *Furman v. Georgia*,[119] which, in holding that Georgia's capital sentencing statute allowed the death penalty to be arbitrarily imposed, effectively struck down almost all existing state capital sentencing schemes.[120] In the four years after *Furman*, at least thirty-five states passed capital sentencing statutes, many of them bifurcating capital trials into guilt and punishment phases.[121] *Gregg v. Georgia* upheld the use of bifurcated capital proceedings, holding that such systems are "more likely to ensure elimination of the constitutional deficiencies identified in *Furman*."[122] After *Gregg*, every state that retains capital punishment has instituted a bifurcated system.[123] The state schemes that the Court has upheld involve sentencing statutes that (1) cabin jury discretion and (2) allow individualized culpability determinations.[124]

Under these statutes, states will not impose death without proof of certain statutorily defined aggravating circumstances. The first death-ineligibility litigation grew out of these sentencing requirements. The presence of sufficient jury-found aggravators rendered the offender death eligible, and, in *Sawyer*,[125] the Supreme Court considered whether a death-ineligibility challenge qualified under the

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teenth Amendments permit juveniles to be sentenced to life without parole. *See* Sullivan v. Florida, 987 So.2d 83 (Fla. Dist. Ct. App. 2008), *cert. granted*, 129 S.Ct. 2157 (U.S. May 4, 2009) (No. 08-7621); Graham v. Florida, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008), *cert. granted*, 129 S.Ct. 2157 (U.S. May 4, 2009) (No. 08-7412). These cases, not decided at the time of publication, are significant because they represent the Court's most important foray into *noncapital* ineligibility questions, but they are beyond the scope of this article for that reason.

119 408 U.S. 238 (1972) (plurality opinion) (per curiam).

120 *See* Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317, 319 (1981).

121 *See* McCleskey v. Kemp, 481 U.S. 279, 301 (1987).

122 Gregg v. Georgia, 428 U.S. 153, 191–92 (1976).

123 *See* Caren Myers, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 COLUM. L. REV. 787, 796 (1997).

124 *See, e.g.*, *Gregg*, 428 U.S. at 153; Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

125 Sawyer v. Whitley, 505 U.S. 333 (1992).

pre-AEDPA gateways for defaulted, successive, and abusive claims.[126] A Louisiana court sentenced Sawyer to death under a capital sentencing statute requiring that a jury find at least one statutory aggravating factor beyond a reasonable doubt.[127] The jury found three such factors, one of which the Louisiana Supreme Court struck down as unsupported by the evidence, and no mitigating circumstances.[128] On a successive petition, Sawyer argued that the prosecution unconstitutionally kept from the jury evidence disproving two aggravators.[129] In the absence of any aggravating circumstances, Sawyer argued, the Eighth Amendment barred his execution.[130]

The Court considered three options for the death-ineligibility gateway standard. First, it rejected the strictest standard, which would have confined the gateway to evidence tending to disprove an element of the capital offense.[131] Second, it rejected the most lenient gateway standard, which would have permitted claims challenging any determination implicit in the death sentence, including evaluation of mitigating evidence.[132] The Court instead opted for an intermediate standard, which focused on whether the evidence bore on what it described as an offender's eligibility to be executed.[133] Using that standard, the Court held that Sawyer did not "show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty."[134]

Rather than casting "actual innocence of the death penalty" narrowly as an elemental question of capital murder, or broadly as a question of mitigating evidence, the Court chose to focus on the concept of death ineligibility—whether the evidence offered to satisfy the innocence gateway would tend to disprove the existence of statutory aggravating factors that made a petitioner eligible for the death penalty. Because the affidavits and psychiatric reports Sawyer submitted did not show, by clear and convincing evidence, that none of the two aggravating factors that the sentencing jury identified were satisfied, the Court reasoned that Sawyer had not made the requisite gateway showing.[135] I refer to instances in which an offender argues that he would not satisfy any statutory aggravators as "paradigm" ineligibility claims

126 *Id.* at 335.
127 *Id.* at 342 & n.9 (citing LA. CODE CRIM. PROC. ANN. art. 905.3 (1984)).
128 *Id.* at 337 & n.2.
129 *Id.* at 347–50.
130 *Id.* at 341.
131 *Id.* at 343.
132 *Id.* at 343–45.
133 *Id.* at 347.
134 *Id.* at 350.
135 *Id.* at 349–50.

for two reasons: because *Sawyer* claims were, until recently, by far the most common type of ineligibility claim and because, to the extent that they invite relitigation of fact questions resolved by a jury and subject to evidentiary decay, they fit neatly within the familiar critiques of the Warren Court's habeas jurisprudence.

One problem with the pro forma extension of existing innocence rules to death-ineligibility claims is that they were configured more or less at a time when many death-ineligibility claims were not cognizable under the Eighth Amendment. And the paradigm claims that were cognizable fit neatly within the prevailing models of habeas litigation.

B. Non-Paradigm Death-Ineligibility Claims

Because a paradigm ineligibility inquiry is in many respects similar to that conducted for more familiar procedural and crime-innocence claims, the controlling ineligibility law became a feature of actual innocence jurisprudence somewhat uneventfully. Paradigm ineligibility claims were almost certainly what Congress had in mind when it enacted AEDPA, crafting statutory gateways for offenders who argue that they are not "guilty of the underlying offense."[136]

Non-paradigm claims, more recently cognizable under the Eighth Amendment, are distinguishable from their paradigm counterparts in important ways: the vast majority of non-paradigm claims involve fact questions that are not subject to evidentiary decay; many involve challenges that were neither litigated at trial nor decided by a jury; and there are reasons to be skeptical of state criminal process even for challenges that are adjudicated in state court. I briefly describe the existing non-paradigm claims below, but a new ineligibility model is also central to the orderly adjudication of Eighth Amendment exemptions that the Supreme Court recognizes in the future.

1. *Culpability for Felony Murder* (Enmund *and* Tison)

In *Enmund v. Florida* and *Tison v. Arizona*,[137] the Court considered the level of culpability an offender must exhibit in order to be eligible for execution as a non-triggerman in a felony murder. In *Enmund*, the Supreme Court ruled that the Eighth Amendment forbids capital punishment for such offenders who lack a sufficiently culpable mental state.[138] In *Tison*, the Court held that Arizona's "reckless indifference to human life" requirement satisfied the *Enmund* culpability requirement.[139]

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136 *See* 28 U.S.C. §§ 2244(b)(2)(B)(ii), 2254(e)(2)(B) (2006).
137 Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987).
138 *Enmund*, 458 U.S. at 797.
139 *Tison*, 481 U.S. at 158.

Claims under *Tison* are unlikely to precipitate a collision between habeas restrictions and death ineligibility—a situation where an ineligible claimant will be denied habeas relief on a technicality. *Tison* claims are less frequent than *Sawyer* claims, but, of the four non-paradigm ineligibility challenges I discuss here, they are the most similar to the sorts of claims that prompted procedural restrictions in habeas law. Because the issue of mental culpability is a fact question that will be decided by a trial jury and is subject to evidentiary decay, existing habeas law is already reasonably well configured to accommodate *Tison* claims.

2. *Juvenile Offenders* (Roper)

Decided in 2005, *Roper v. Simmons* held that executing prisoners who were under the age of 18 at the time of the offense constitutes cruel and unusual punishment.[140] Like *Tison* claims, *Roper* claims probably will not require federal habeas litigation at all. Prosecutors will not seek the death penalty for juvenile offenders, and qualifying offenders already on death row will almost certainly have their sentences commuted or will prevail in state postconviction proceedings.[141] State process was similarly sufficient to accommodate the Supreme Court's 1977 ruling in *Coker v. Georgia*,[142] which barred capital punishment for the rape of adult women.[143]

3. *Mentally Retarded Offenders* (Atkins)

Perhaps the most active area of ineligibility litigation involves a claim that, under *Atkins v. Virginia*,[144] the Eighth Amendment prohib-

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140 543 U.S. 551, 568 (2005). The Supreme Court is currently considering whether the Eighth and Fourteenth Amendments also prohibit juveniles from being sentenced to life without parole. *See supra* note 118.

141 *See* Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia*: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 723 (2008) (noting that the ban on executing juvenile offenders has rendered "virtually no litigation [because] offenders who committed the crime before turning eighteen have had their sentences commuted via judicial or clemency proceedings").

142 433 U.S. 584 (1977).

143 *Id.* at 592. There were five affected offenders on death row when the Court decided *Coker*. *Id.* at 596–97. Coker's case was remanded to the trial court for resentencing. *See* Coker v. State, 238 S.E.2d 690, 690 (Ga. 1977). Two other prisoners received relief in another case the Court decided that same day, *Eberheart v. Georgia*, 433 U.S. 917 (1977). On remand from the U.S. Supreme Court, the Georgia Supreme Court vacated the death sentences and remanded the two cases for resentencing. *See* Eberheart v. State, 238 S.E.2d 1, 1 (Ga. 1977); Hooks v. State, 238 S.E.2d 1, 1 (Ga. 1977). The Georgia Supreme Court vacated the sentence of another offender whose case was before it on mandatory appeal during the pendency of *Coker*. *See* Hughes v. State, 236 S.E.2d 829, 834 (Ga. 1977). Finally, the Georgia Supreme Court remanded for resentencing the case of a death row inmate sentenced to death for rape before *Coker* was decided, although I cannot precisely determine the procedural posture of that case. *See* Boyer v. State, 240 S.E.2d 68, 68 (Ga. 1977).

144 536 U.S. 304 (2002).

its a petitioner's execution because he is mentally retarded.[145] *Atkins*, decided in 2002, left the precise definition of and procedures for adjudicating mental retardation to the states.[146] *Atkins* litigation poignantly illustrates how meritorious death-ineligibility claims are not redressed by state procedure and end up in federal court.[147]

In defining mental retardation, *Atkins* relied primarily on clinical formulations used by the American Association of Mental Retardation ("AAMR") and by the American Psychiatric Association ("APA").[148] Those definitions varied slightly, but both formulations—consistent with any clinical definition of mental retardation—defined the condition as having three components: (1) intellectual impairment; (2) adaptive deficits; and (3) evidence of onset before the age of 18.[149] Although estimates state that between one and three percent of the general population is mentally retarded, estimates for death row offenders vary between four and twenty percent.[150]

Atkins was not popular in the states that had allowed capital punishment of mentally retarded offenders, and, because of the procedural leeway the decision afforded those states, some do not use a clinical standard of retardation.[151] That circumstance, combined with byzantine state postconviction procedure that prisoners must often navigate without counsel, means that meritorious but procedurally defective *Atkins* claims frequently find their way into federal court.[152]

Federal courts are likely to hear meritorious *Atkins* claims because certain states use underinclusive definitions of retardation.[153] Although state *legislation* defining retardation is mostly consistent with

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145 *Id.* at 321.

146 *Id.* at 317.

147 *See generally* Steiker & Steiker, *supra* note 141, at 731–39 (arguing that the procedural leeway given to states so that they could implement *Atkins* resulted in a state postconviction regime that undercuts the substantive right of mentally retarded offenders not to be executed).

148 *Atkins*, 536 U.S. at 308 n.3.

149 *Id.* at 308 n.3 (citing AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)).

150 *See* Peggy M. Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS 77, 86 (2003). As of May 2008, eighty-four death sentences have been commuted under *Atkins*. *See* JOHN BLUME, DEATH PENALTY INFORMATION CENTER, SENTENCE REVERSALS IN MENTAL RETARDATION CASES (2008), *available at* http://www.deathpenaltyinfo.org/sentence-reversals-mental-retardation-cases.

151 *See, e.g.*, *Ex parte* Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004) (using an aclinical mental-retardation test to determine eligibility for the death penalty).

152 I address the problems with state postconviction treatment of ineligibility claims more generally in Section III.A.2, *infra*.

153 *See* John H. Blume et al., *An Empirical Look at* Atkins v. Virginia *and its Application in Capital Cases*, 76 TENN. L.R. 625, 629 (2009) (describing, for example, North Carolina's restrictive definition of metal retardation, which uses a "strict IQ cutoff and assesses adaptive functioning deficits by focusing on what the claimant can do rather than focusing . . . on the individual's limitations").

the clinical definitions in *Atkins*, state judicial formulations are not. This problem, which usually involves a selective focus by the courts on the adaptive strengths of *Atkins* claimants, disproportionately affects litigants in states with active capital dockets, such as Alabama,[154] Florida,[155] and Mississippi.[156] I draw the following examples largely from Texas, which executes more prisoners than any other state.[157] The Texas legislature has twice forgone the opportunity to statutorily define the term "retardation,"[158] thus leaving that responsibility to state courts. The state's highest criminal court has identified seven "evidentiary factors . . . indicative of mental retardation or of a personality disorder" to guide lower state courts in deciding *Atkins* claims.[159] These factors are as follows: whether those who knew the offender during childhood thought he was retarded; whether the offender formulated plans and carried them through or acted impulsively; whether the offender's conduct shows leadership or shows that he is led around by others; whether his conduct in response to external stimuli is rational and appropriate; whether the offender responds coherently, rationally, and on point to oral or written questions; whether the offender can hide facts or lie effectively in his own or others' interests; and whether the crime required forethought, planning, and complex execution of purpose.[160] That approach, which often substitutes for clinical inquiry, has been a disaster. First, the Texas factors have morphed from a means of distinguishing retardation from personality

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154 In *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002), Alabama denied relief under a nonstatutory definition of retardation, emphasizing that the petitioner did not have adaptive deficits because he was married and employed. *Id.* at 456. In *Smith v. State*, No. CR-92-1258, 2009 Ala. Crim. App. LEXIS 2, at *1 (Ala. Crim. App. Jan. 16, 2009), the court emphasized that the petitioner did not have adaptive deficits because he could function well in society, maintain a bank account, and perform other activities. *Id.* at *10. In *Clemons v. State*, No. CR-01-1355, 2005 Ala. Crim. App. LEXIS 128, at *1 (Ala. Crim. App. June 24, 2005), the court denied the existence of adaptive limitations on the basis of only the petitioner's "employment history, the ability to have interpersonal relationships, being extensively involved in criminal activity, post-crime craftiness on the part of the criminal, and being able to use community resources." *Id.* at *15.

155 In *Brown v. State*, 959 So. 2d 146 (Fla. 2007), the Supreme Court of Florida upheld a state trial-court ruling because the state court found that the defendant demonstrated the ability to engage in a romantic relationship, drive a car, and obtain employment. *Id.* at 149–50. The appellate court heavily deferred to the trial court's resolution of the conflicting evidence and its ultimate conclusion against the defendant. *Id.* at 150.

156 In *Wiley v. State*, 890 So. 2d 892 (Miss. 2004), the Supreme Court of Mississippi upheld the lower court's determination that the petitioner did not have adaptive deficits because the prisoner operated heavy machinery, was employed, was admitted to radio operator school, legally drove a car, and provided for his family. *See id.* at 896–97.

157 Death Penalty Information Center, Facts about the Death Penalty, at 3, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Oct. 8, 2009).

158 *See* Moore v. Dretke, No. Civ.A.603-CV-224, 2005 WL 1606437, at *3 n.2 (E.D. Tex. July 1, 2005), *vacated sub nom.* Moore v. Quarterman, No. 05-70038, 2006 WL 1776605 (5th Cir. June 29, 2006).

159 *Ex parte* Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

160 *Id.* at 8–9.

disorder into an independent definition of mental retardation. Second, the factors have no scientific or clinical content. Third, the approach provides no rules for how courts are to weigh the factors in making a retardation determination. Fourth, the factors emphasize the cognitive attributes that committing the crime required, but a clinical retardation inquiry involves no such emphasis.[161] In Texas, the likelihood that a mentally retarded offender will seek relief in federal court because he has been wrongly adjudicated death eligible under the aberrant state definition is extremely high. Texas state courts have rejected almost every contested *Atkins* claim on collateral review.[162]

Federal courts will also encounter meritorious but defective *Atkins* claims because so much of the procedural status of a federal petition turns on the ability of impaired offenders to negotiate extraordinarily complex state postconviction process without counsel.[163] Prisoners lack a federal right to counsel during state postconviction proceedings.[164] A thorough *Atkins* argument usually requires a pro-bono attorney, who may be unfamiliar with the state record, to review trial court records for evidence of retardation; assess the offender's social history and functional ability through first-person interviews; convince the offender to formally release school and medical records; compose record requests to the relevant schools, hospitals, and prisons; send follow-up requests; review the interviews as well as school and medical records for evidence of mental retardation; locate, interview, and obtain affidavits from people who knew the offender as a minor; procure a mental health expert to perform free testing for impaired intellectual and adaptive functioning; and have the expert prepare a comprehensive report.[165] Only then may counsel even begin drafting a state *Atkins* petition. The attorney must conduct this time-consuming process while the federal statute of limitations is run-

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161 In one Texas case, a petitioner was denied state collateral relief in part because, the court reasoned, the petitioner "functioned sufficiently in his younger years to hold jobs, get a driver's license, marry and have a child." Wilson v. Quarterman, No. 6:06-cv-140, 2009 WL 900807, at *9 (E.D. Tex. Mar. 31, 2009).

162 *See* Steiker & Steiker, *supra* note 141, at 728 & n.44 (citation omitted).

163 It is useful to understand the difference between mental retardation claims adjudicated in state trial proceedings and those adjudicated on state postconviction review. A state prisoner must exhaust state remedies before filing a § 2254 petition. *See* 28 U.S.C. § 2254(c) (2006). I explore the vagaries of state trial adjudication in Part III.A.1, *infra*, but the problems I discuss in this paragraph happen to pertain primarily to *Atkins* claims decided on state postconviction review.

164 *See* Celestine Richards McConville, *The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Postconviction Counsel*, 42 TULSA L. REV. 253, 256 & n.31 (2006) (citing Supreme Court cases denying such right).

165 *See, e.g.*, Michael L. Perlin, "*The Executioner's Face is Always Well-Hidden": The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 203 (1996) (enumerating the responsibilities of lawyers in death penalty cases).

ning because, until a state habeas petition is filed, no state postconviction proceedings are "pending" within the meaning of § 2244(d)(2).[166] Prisoners were therefore stuck in a dilemma—either spend precious portions of the limitations period developing every aspect of an *Atkins* claim before filing a pleading in state court or file less robust pleadings and risk having a more substantial federal petition dismissed as unexhausted and procedurally barred.[167] Even timely federal *Atkins* claims are often procedurally defaulted because an offender, sometimes acting pro se, is unable to comply with complex state postconviction procedure. Indeed, the aggressive imposition of state procedural rules is beginning to seriously undermine the substantive prohibition in *Atkins*.[168]

To illustrate how obscure state procedural rules can trigger federal procedural bars, I take yet another example from Texas. Texas courts had created a "two-forum" bar that prevented *Atkins* petitioners from seeking state collateral relief during the pendency of any other federal postconviction litigation.[169] When *Atkins* was decided, however, many qualifying offenders had other federal postconviction litigation pending. Those prisoners could not amend their federal petitions to include the *Atkins* claim because doing so would get all of their claims thrown out of federal court as unexhausted.[170] Even if their *Atkins* claims were ready for filing in state court, those prisoners could not actually file them during the pendency of the earlier habeas proceeding because the *Atkins* claim would be dismissed under state abusive-writ rules. These prisoners simply had to sit on viable *Atkins* claims, watching the limitations period run, because they were subject to the unintended effects of the two-forum rule.[171] As a result, the state has time-barred a number of these claims in federal court.[172] Because *Atkins* claimants first sought state collateral relief, only now

166 *See* 28 U.S.C. § 2244(d)(2).

167 Federal courts will sometimes impose a procedural default bar on unexhausted claims where it is apparent that there will be a procedural defect with the subsequent state filing that cannot be cured. *See* Hatten v. Quarterman, 570 F.3d 595, 605 (5th Cir. 2009).

168 *See* Steiker & Steiker, *supra* note 141, at 724–31.

169 *See In re* Wilson, 442 F.3d 872, 875 (5th Cir. 2006).

170 *See id.* at 875–76.

171 The Texas Court of Criminal Appeals abolished the dual-forum rule for precisely this reason in 2004, *see Ex parte* Soffar, 143 S.W.3d 804 (Tex. Crim. App. 2004), but that did not help offenders who sat on their *Atkins* claims before that time. The Fifth Circuit has invoked equitable tolling to alleviate the two-forum problem, but it has only done so for those petitioners who lost their entire limitations period. *Compare Wilson*, 442 F.3d at 874–78 (equitably tolling the limitations period because petitioner's initial federal habeas petition was still pending when the AEDPA limitations period expired), *with In re* Lewis, 484 F.3d 793, 797–98 (5th Cir. 2007) (refusing to equitably toll the limitations period because petitioner's initial federal habeas petition had been resolved three months before the AEDPA limitations period expired).

172 *See, e.g.*, *Lewis*, 484 F.3d at 797–98;

are claims in this posture percolating in federal court. Decisions procedurally defaulting and time-barring meritorious *Atkins* claims implicate the major issues I discuss in this Article.[173]

4. *Incompetent Offenders* (Ford *and* Panetti)

In *Ford v. Wainwright*,[174] the Supreme Court announced that the Eighth Amendment forbids states from putting to death offenders who would not be competent to be executed at the time the sentence would actually be imposed.[175] Although the Court's holding was substantively narrow, Justice Lewis F. Powell penned a widely followed concurrence arguing that the Constitution barred capital punishment of prisoners who were either not aware of their punishment or the reason for it.[176]

Ford also contained an important Fourteenth Amendment procedural due process ruling. Florida actually had a statutory restriction on the execution of incompetent offenders.[177] That restriction, however, vested authority for the competency determination in the governor, creating a severe conflict of interest because the governor is also Florida's chief law enforcement officer.[178] Moreover, the Florida process was nonadversarial, and the prisoner lacked an opportunity either to introduce evidence of his insanity or to rebut evidence that the state introduced. The Supreme Court held that such process was unconstitutional, and required a system of adversarial adjudication to enforce the restriction against executing incompetent offenders.[179]

Panetti v. Quarterman,[180] decided in 2007, also contained important substantive and procedural rulings. The Supreme Court affirmed the substantive standard for incompetency claims offered in Justice Powell's *Ford* concurrence.[181] In order for an offender to qualify as competent to be executed, *Panetti* held, the offender must understand that he is going to be put to death and why.[182] Panetti knew that he was being sentenced to death and was aware that Texas's stated reason for doing so was his murder conviction, but he believed the reason was pretextual and that he was actually being capitally punished for

173 *See infra* Part III.

174 477 U.S. 399 (1986).

175 *See id.* at 409–10.

176 *Id.* at 422 (Powell, J., concurring in part and concurring in the judgment). *See* Panetti v. Quarterman, 551 U.S. 930, 949 (2007) (noting that Justice Powell's concurrence is controlling).

177 *See Ford*, 477 U.S. at 403.

178 *See id.* at 416.

179 *Id.* at 417–18.

180 551 U.S. 930 (2007).

181 *Id.* at 954–60.

182 *Id.*

preaching the gospel in spiritual warfare between good and evil.[183] The Supreme Court held that Panetti's awareness of Texas's stated sentencing rationale did not alone render him competent for execution and that he had to actually possess a rational understanding of why that punishment was being imposed.[184]

Panetti also announced an important procedural ruling, affirming that, if an offender makes a threshold showing of incompetence, the offender must be afforded *Ford* protections.[185] Specifically, several circumstances rendered Panetti's competency adjudication constitutionally infirm, including the state court's refusal to transcribe the proceedings, to inform Panetti's lawyer of significant events occurring over the course of the adjudication, to afford Panetti an opportunity to refute the medical opinions of court-appointed experts, and to otherwise adhere to state procedural law for adjudicating *Ford* claims.[186]

Ford claims are unique among ineligibility arguments in that they are habeas relief issues based only on a prisoner's status at the time of a potential execution.[187] For that reason, even if a *Ford* challenge is successful, some federal appellate courts appear willing to allow the offender to be medicated into competency sufficient for execution.[188] The more frequent result, however, is a tacit agreement between the defense and the prosecution not to do anything, and the incompetent offender effectively serves a life sentence on death row.

C. Rationales Underlying Limits on Habeas Relief and Their Inapplicability to Death-Ineligibility Claims

I began this Article by describing briefly the two academic progenitors of modern habeas restrictions, articles by Judge Friendly and Professor Bator.[189] Procedural restrictions on relief and *Herrera*'s refusal to recognize the cognizability of freestanding crime-innocence claims represent legislative and judicial attempts to secure a set of interests that concerned these two legal thinkers. I submit that those interests are not compromised by entertaining the merits either of gateway or freestanding death-ineligibility claims that are formally defaulted, successive, abusive, or untimely.

The two salient features of the habeas claim types that provoked scholarly, judicial, and legislative responses during the second half of the twentieth century are that (1) they required relitigation of claims

183 Panetti v. Dretke, 401 F. Supp. 2d 702, 708 (W.D. Tex. 2004).
184 *Panetti*, 551 U.S. at 959–60.
185 *Id.* at 949.
186 *See id.* at 950–52; *see also infra* notes 259–65 and accompanying text.
187 Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45 (1998).
188 *See, e.g.*, Singleton v. Norris, 319 F.3d 1018, 1025–27 (8th Cir. 2003) (en banc).
189 *See supra* Part I.A.

decided by a trial jury or available on direct review and (2) they involved factual questions subject to evidentiary decay. Whereas paradigm ineligibility claims also exhibit those two characteristics, three out of the four non-paradigm challenges to capital eligibility do not implicate the interests that the procedural obstacles to relief are designed to secure. As a result, the strain in logic necessary to apply existing habeas doctrine to certain ineligibility claims has only become apparent recently. Accordingly, courts should formulate a new response to the unique issues that non-paradigm death-ineligibility claims pose.[190]

I start by unpacking the interests in habeas restrictions articulated by Judge Friendly and Bator. Judge Friendly argues against the "broad proposition that collateral attack should always be open for the asserted denial of a 'constitutional' right, even though this was or could have been litigated in the criminal trial and on appeal."[191] To support his argument, he invokes the interest in deterrence,[192] the diminished ability at a later date to determine the factual issue giving rise to the claim (sometimes associated with deliberate "sandbagging" by prisoners),[193] the inability to retry the defendant if the court grants

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190 This statement is subject to the caveat that ineligibility claims that receive a full and fair trial and direct appellate adjudication implicate different interests than do ineligibility claims that do not receive such treatment.

191 *See* Friendly, *supra* note 9, at 154.

192 *See id.* at 146.

193 *See id.* at 146–48. Concerns about sandbagging are expressed throughout the Supreme Court's habeas procedure cases. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 491–92 (1991) ("[H]abeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." (citations omitted)); Reed v. Ross, 468 U.S. 1, 14 (1984) ("[D]efense counsel may not make a tactical decision to forgo a [claim] . . . and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court."). The concern arises in several contexts. First, sandbagging may be advantageous when the constitutional claim does not affect the likelihood of acquittal because it does not influence the jury's fact-finding. Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1196 (1986). A challenge to the composition of the grand jury is such a case. *Id.* Second, sandbagging may be an attractive option when, should the initial conviction be overturned based on the withheld claim, the state's case in the subsequent trial will be weaker (for example, due to the unavailability of certain testimony). *Id.* at 1196–97. And lastly, when a federal court may be more favorable to the claim, the defense may prefer to bypass the state court's fact-finding and present an issue directly to the habeas court. *Id.* at 1197. Professor Meltzer, however, concludes that the likelihood of sandbagging is actually quite small. *See id.* at 1199. The pervasiveness of sandbagging is hotly disputed, even on the Court. *Compare* Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (noting that defense counsel may deliberately withhold, or sandbag, constitutional claims in a state trial court in order to later raise the claim in federal habeas court if defense counsel's client is not acquitted in state trial court), *with id.* at 103 (Brennan, J., dissenting) ("Under the [current] regime of collateral review . . . no rational lawyer would risk the 'sandbagging' feared by the Court."). Some judges have argued that there is no empirical evidence that it occurs. *See* Williams v. Lockhart, 862 F.2d 155, 161 (8th Cir. 1988) (Lay, C.J., concurring) ("To suggest that prisoners might hold back to play procedural games with the court is unrealistic."). Most habeas petitioners proceed pro se, and sandbagging is not a good

relief,[194] the strain on judicial resources,[195] and the public interest in finality.[196] The purposes invoked by courts and legislatures to support rules against defaulted, successive, abusive, and untimely claims are almost identical[197] and reflect the concerns expressed in Judge Friendly's article.[198]

Bator, much like Judge Friendly, was concerned with the implications of allowing relitigation of claims that were fully and fairly adjudicated in trial and appellate proceedings. He directed his attention "to the problem of finality as it bears on . . . creating rational institutional schemes for the administration of the criminal law."[199] Unlike Judge Friendly, Bator's thrust was that the epistemic limits of human inquiry rendered "truth" ultimately unknowable and that collateral review of state adjudication should accordingly be restricted to instances of defective state process.[200] The interest in finality, argued Bator, consists of a number of subsidiary interests: conservation of resources where relitigation would achieve no improvement in human inquiry, deterrence and rehabilitation, and the repose resulting from having tried hard enough to adjudicate claims accurately.[201] Bator's work was enormously influential and has spawned a half-century of legislative and judicial activity involving his "full and fair" model of habeas reform.[202] His argument regarding finality and the epistemic limits of

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strategy for such litigants. Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 351 (2006).

194 Friendly, *supra* note 9, at 147.

195 *Id.* at 148–49. The interest in judicial efficiency is oft-cited in habeas procedural jurisprudence. *See, e.g.*, *McCleskey*, 499 U.S. at 490–91 (noting that the doctrines controlling defaulted and abusive claims "flow[ ] from the significant costs of federal habeas corpus review"); Schneckloth v. Bustamonte, 412 U.S. 218, 260 (1973) (Powell, J., concurring) (noting, with respect to a Fourth Amendment claim raised collaterally, that the reexamination of claims on collateral attack jeopardizes the fair distribution of judicial resources).

196 *See* Friendly, *supra* note 9, at 149. The Supreme Court has invoked the finality interest in this context many times. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 403 (1993) (freestanding innocence claims); *McCleskey*, 499 U.S. at 490–91 (abusive and defaulted claims); Murray v. Carrier, 477 U.S. 478, 491 (1986) (procedurally defaulted claims); Engle v. Isaac, 456 U.S. 107, 126–27 (1982) (defaulted claims).

197 *See McCleskey*, 499 U.S. at 490–91 ("The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review.").

198 There are actually two ways to frame the argument that Judge Friendly would not have found death-ineligibility claims objectionable, had they been cognizable in 1970. First, because a death-ineligibility claim seeks relief that would often preclude imposition of the same sentence, it does not threaten the interests that concerned him. I discuss this frame in the text. Second, the exceptions that Judge Friendly specifies strongly suggest that, had ineligibility claims been cognizable at that time, he would have specified them as well. *See* Friendly, *supra* note 9, at 151–57.

199 Bator, *supra* note 9, at 446.

200 *Id.* at 449.

201 *Id.* at 452–53.

202 *Id.* at 456–57.

factfinding forms the intellectual basis of the requirement that habeas relief issue only to correct "unreasonable" state adjudications, as well as *Herrera* decision's refusing to recognize the cognizability of free-standing innocence claims.[203]

The critiques of Bator and Judge Friendly were a response to a particular era of criminal procedure—decisions by the Warren Court that expanded the scope of the Fourth, Fifth, and Sixth Amendments, applied those rights to state criminal defendants through the Fourteenth Amendment's Due Process Clause, and increased the availability of habeas relief to vindicate those rights.[204] Those critiques, and the doctrines that reflect them, simply failed to account for the advent of Eighth Amendment ineligibility challenges that present different legal questions and implicate different policy interests. The interests specified in each of those two landmark articles, and repeated frequently by Congress and courts thereafter, cluster generally into two broad sets of concerns: (1) those associated with relitigating claims that are either adjudicated or are capable of being adjudicated at trial and on direct review, and (2) those associated with the evidentiary decay that takes place before adjudication in a subsequent proceeding.[205]

1. *Relitigation of Claims Adjudicated at Trial*

Judge Friendly focused on the relitigation of cases subject to constitutional errors that do not affect the ability of courts to return the same verdict or to impose the same sentence.[206] Similarly, Bator wanted habeas law to account for the epistemic limits of human inquiry by imposing restrictions on when one court could collaterally review the legal and factual determinations of another.[207]

Specifically, both thinkers questioned the prudence of allocating scarce institutional resources to redundant federal habeas inquiries (or to habeas review of claims that *could have been* litigated at trial or on direct appeal).[208] Judge Friendly described the drain on community resources as the "most serious single evil" of collateral attack.[209]

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203 *See* Herrera v. Collins, 506 U.S. 390, 404–05 (1993).

204 *See supra* notes 6–9 and accompanying text.

205 Professor Anthony Amsterdam also published a very influential article that parsed the interest in finality expressed by Bator. *See* Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 383–86 (1964).

206 *See* Friendly, *supra* note 9, at 155. Judge Friendly's article is actually most concerned with collateral attacks in a "unitary" system—i.e., collateral attacks on conviction by federal prisoners. Judge Friendly nonetheless cross-applies these concerns to collateral attacks by state prisoners in Part V of his article. *See id.* at 164–69.

207 *See* Bator, *supra* note 9, at 448.

208 Friendly, *supra* note 9, at 148; *see also* Amsterdam, *supra* note 205, at 383 (specifying as a concern a "duplication of judicial effort").

209 Friendly, *supra* note 9, at 148.

Bator lamented the effect of collateral review on "all of the intellectual, moral, and political resources involved in the legal system."[210] Both scholars were describing the federal resources necessary to adjudicate the habeas petition rather than the state resources necessary to conduct state criminal process if a federal petition were granted.

Non-paradigm ineligibility claims are not well suited to resource-based critiques of habeas litigation. First, many such challenges cannot be litigated at trial or on direct review at all. For example, a *Ford* competency claim is premature until an execution is imminent.[211] Second, when the Court recognizes an ineligibility category, many qualifying offenders will already be on death row. For instance, when the Court decided *Roper* and *Atkins*, many juvenile and mentally retarded offenders were already subject to a final conviction and capital sentence. Third, there are structural reasons to believe that a crucial assumption of Judge Friendly and Bator—that the inquiries of the courts conducting trial and collateral proceedings are not subject to meaningfully different institutional pressures—simply does not hold in the death-ineligibility context.[212] Fourth, most empirical data suggests that procedural bars do not diminish the amount of litigation necessary to resolve a claim; all that happens is that courts divert resources from merits to procedural questions.[213] Finally, choking off habeas review of ineligibility claims could require the Supreme Court to expend valuable resources on avoiding unconstitutional executions by scrutinizing claims on its direct review of state collateral proceedings.

Both Bator and Judge Friendly emphasize an interest in psychological repose for the offender, a point at which the offender understands that he is "'justly subject to sanction, [and] that he stands in need of rehabilitation.'"[214] Rehabilitation cannot begin, the argument goes, until the offender is subjected to unqualified condemnation that is not open to relitigation. Setting aside the powerful argument that incarceration does not promote rehabilitation gener-

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210 Bator, *supra* note 9, at 451.

211 *See* Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45 (1998).

212 *See* Bator, *supra* note 9, at 451; Friendly, *supra* note 9, at 146. Indeed, Judge Friendly expressed disbelief at the notion, only possible in a unitary system, that a judge might hold his own ruling unconstitutional. *See* Friendly, *supra* note 9, at 155.

213 *See* HABEAS TECHNICAL REPORT, *supra* note 2, at 59 (study concluding that overall disposition time per case has increased since AEDPA's enactment); Steiker, *supra* note 25, at 316–17 ("[T]oday's procedural default inquiry[ ] occupies more pages of the U.S. Reports than the Court's consideration of petitioners' underlying substantive claims.").

214 *See* Friendly, *supra* note 9, at 146 (quoting Bator, *supra* note 9, at 452); *see also* Amsterdam, *supra* note 205, at 383 (specifying as a concern the "delay in setting the criminal proceeding at rest").

ally,[215] rehabilitation is irrelevant to death-ineligibility challenges for another reason. Rehabilitation cannot logically be a penal objective of a death sentence because that sentence necessarily means that the capital offender will not ever return to society.[216]

The implications for finality are different in the death-ineligibility context. An ineligibility claimant seeks to defeat a capital sentence, not his conviction. Any damage to finality is only the delay in execution associated with entertaining nonmeritorious claims. Finality is no doubt compromised by capital-eligibility challenges, but to a much lesser degree than with claims that seek new trials.[217] In many instances, ineligibility challenges will not have been litigated at trial, so federal habeas review would not constitute "mere relitigation" of a claim that creates no increment of human inquiry. Even in instances in which states have decided a claim, there are structural reasons to believe that federal adjudication may be less susceptible to improper political pressure.[218] I have already discussed the effect of ineligibility challenges on deterrence, and the rehabilitation interest invoked by Bator simply does not apply to offenders who otherwise face capital punishment. Finally, although society's sense of repose may be diminished by the state's failure to execute an offender sentenced to death at trial, the offender remains subject to the severe criminal punishment of a life sentence.

2. *Evidentiary Decay*

Judge Friendly and Bator both express concerns about evidence becoming stale over time. This broad concern subdivides into two analytically distinct considerations: (1) that evidence necessary to adjudicate the constitutional claim deteriorates and (2) that an accurate retrial, should the habeas claim succeed, becomes more difficult.[219] I consider each in turn.

Judge Friendly in particular argues that federal habeas proceedings cannot accurately adjudicate constitutional inquiries involving evidence that deteriorates over time—he calls the prospect of police officers remembering for many years which warnings they gave a sus-

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215 *See* Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 187–88 (2008) (collecting sources).

216 The compromise with rehabilitation that death-ineligibility litigation necessitates is also lower because the adjudication does not suspend an acknowledgement of responsibility—it implies nothing about the accuracy of the finding that the offender is a capital murderer.

217 Moreover, available data suggests that *Atkins* has not opened any floodgates of frivolous litigation. *See* Blume et al., *supra* note 153, at 628.

218 *See infra* Part III.A.

219 *See* Friendly, *supra* note 9, at 147; *see also* Amsterdam, *supra* note 205, at 384 (subdividing evidentiary reliability question into question involving constitutional claim and question involving underlying guilt adjudication).

pect "chimerical."[220] Once again, this argument turns on the type of constitutional claim involved, and it makes sense when directed at the types of claims (illegal searches, *Miranda* violations) that Judge Friendly critiqued. The argument also makes sense for paradigm ineligibility claims, which involve statutorily specified crime aggravators. Those aggravators often require inquiries into affairs contemporaneous with the crime's commission, such as culpability, that a prosecution proves using the testimony of police officers, the suspect, and other witnesses whose memories surely fade over time.

Non-paradigm ineligibility challenges, however, do not generally involve such decaying evidence.[221] *Roper* challenges allege that the offender was a juvenile, and the dispositive evidence neither improves nor degrades over time. *Atkins* challenges assert mental retardation and require assessments of intellectual functioning, adaptive behavior, and childhood (developmental) onset.[222] The effect of evidentiary decay on these claims is indeterminate. Although witness recollection of an offender's childhood deteriorates over time, the developmental-onset criterion is more often shown by reference to school and medical records and, in any event, is the least frequently disputed of the *Atkins* elements.[223] By contrast, psychometric testing for intellectual and adaptive deficits improves over time and often provides information that was not even available at trial.[224] In *Ford* competency challenges, evidence also improves over time, as such challenges involve psychiatric diagnoses at the point of imminent execution.

In a related criticism, Judge Friendly expressed concern that robust habeas review would precipitate sandbagging—the strategic decision not to assert a claim at trial and in direct review proceedings in hopes of prevailing with weaker evidence and arguments on habeas review.[225] Over the course of forty years, the Court has expressly and frequently invoked sandbagging as a rationale for imposing procedural restrictions.[226] Considerable authority disputes this casual observa-

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220 *See* Friendly, *supra* note 9, at 147; *see also* Illinois v. Allen, 397 U.S. 337, 351 (1970) (Douglas, J., concurring) ("[While] lapse of time is not necessarily a barrier to a challenge of the constitutionality of a criminal conviction[,] . . . . in this case it should be.").

221 Note, however, that habeas review of *Tison/Enmund* challenges are subject to the evidentiary decay characterizing paradigm ineligibility claims. *See supra* Part II.B.1.

222 *See supra* note 149 and accompanying text.

223 *See* Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 854–55 (2007) ("[T]he developmental onset requirement, though diagnostically essential, does very little work in the ordinary *Atkins* adjudication.").

224 Psychiatric professionals who administer IQ and behavioral testing can test for malingering so that they can spot instances where offenders are "faking it." *See id.*

225 *See* Friendly, *supra* note 9, at 157–59.

226 The sandbagging rationale recurs, for example, throughout the procedural-default jurisprudence. *See supra* note 193; *see also* Murray v. Carrier, 477 U.S. 478, 492 (1986)

tion,[227] particularly for capital-sentencing-phase claims.[228] The concern is particularly misplaced with respect to non-paradigm death-ineligibility claims. There is, for example, no serious concern that a prisoner would withhold claims about juvenile status. As for *Atkins* claims, a prisoner has no incentive to withhold the claim because (1) rules for postconviction relief make trial claims far more promising and (2) evidence of retardation does not deteriorate over time, so a prisoner does not benefit from delay. For a competency challenge, there is not even a claim to withhold. Talking in terms of dispersed witnesses and eroded memories makes little sense in this context, and the Court has observed that, "unlike the question of guilt or innocence, which becomes more uncertain with time for evidentiary reasons, the issue of sanity is properly considered in proximity to the execution."[229] For non-paradigm ineligibility claims that are now becoming litigable, concerns about being able to adjudicate the underlying constitutional violation are, for a variety of reasons, misplaced.[230]

The dominant critiques of Warren-era habeas doctrine expressed concern not only about the decay of evidence necessary to adjudicate the constitutional claim on habeas review, but also about the decay of evidence necessary to conduct a new trial should habeas relief issue. Judge Friendly cynically remarked that, "although successful attack usually entitles the prisoner only to a retrial, a long delay makes this a matter of theory only."[231] Ineligibility clams, however, never seek relief related to a trial court's guilt finding. Even paradigm ineligibility claims seek only to have a sentence commuted or to retry capital eligibility. For non-paradigm claims, the relief varies. *Simmons* claims of juvenile status are not litigated because the sentences are always commuted or vacated in state collateral proceedings. If an *Atkins* claim were simply asserted as an innocence gateway for consideration of an-

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(noting that the danger of sandbagging does not "vanish[ ] once a trial has ended in conviction, since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful"); Engle v. Isaac, 456 U.S. 107, 128–29 & n.34 (1982) (recognizing that sometimes "defendant's counsel may deliberately choose to withhold a claim in order to 'sandbag'").

227 *See* Meltzer, *supra* note 193, at 1199; Stevenson, *supra* note 193, at 351 & n.49.

228 *See* Helen Gredd, Comment, Washington v. Strickland*: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1577–78 (1983).

229 Herrera v. Collins, 506 U.S. 390, 406 (1993).

230 *See* Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 336–37 (1987–1988) (arguing that lawyers will always try to maximize their chances of prevailing at the first stage of litigation); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 897 (1984) ("Given that the success rate at trial and on appeal, while low, is greater than the success rate on habeas corpus, the odds are against being able to 'sandbag' in a first procedure and emerge victorious in a second." (footnotes omitted)).

231 Friendly, *supra* note 9, at 147.

other constitutional challenge, such as an alleged *Brady* violation[232] or an ineffective-assistance-of-counsel claim, then the result could be a new sentencing proceeding. As a matter of practice, however, the merits of an exhausted retardation claim almost never go back to state courts; ultimate *Atkins* relief is either granted or denied in federal court. A successful *Ford* competency challenge does not entitle an offender to a commutation or even to a new sentencing proceeding; the offender simply may not be put to death without a subsequent finding that he has become competent to be executed.

Concerns about evidentiary decay are also phrased partially in terms of their effect on deterrence.[233] Judge Friendly was concerned with the sorts of Fourth, Fifth, and Sixth Amendment violations that had little bearing on the guilt of the offender and with procedural errors that did not affect the outcome of the original proceeding.[234] According to the dominant critiques, the success of these claims requires new trials, diminishes a crime's expected punishment, and compromises the deterrent effect of criminal law.[235] Relief for procedural challenges might undermine the substantive commands of criminal law, but ineligibility challenges are not procedural. For meritorious claims, the Court already decided that the Eighth Amendment right asserted dominates any deterrence interest. With certain questions of capital ineligibility, such as juvenile status, a claim's merit is clear. In the ineligibility context, the salient deterrence question is whether potentially nonmeritorious challenges, such as mental retardation and mental incompetence claims, undermine the legal injunction against murder. I do not engage in a long discussion of this point here. Suffice it to say that academics hotly dispute whether the death penalty, as an institution, has any significant deterrent effect[236] and that the issue of questionably meritorious ineligibility petitions by bor-

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232 A *Brady* violation is a type of due process violation that occurs where the prosecution suppresses evidence, material to guilt or sentencing, that is favorable to the accused. Brady v. Maryland, 373 U.S. 83, 87 (1963).

233 Friendly, *supra* note 9, at 146 (citing Bator, *supra* note 9, at 452).

234 *Id.* at 155–56.

235 *See* Amsterdam, *supra* note 205, at 389 ("As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance."); Bator, *supra* note 9, at 452 ("[The deterrent power of criminal sanctions is] undermined [when] we so define the processes leading to just punishment that it can really never be finally imposed at all.").

236 *See, e.g.*, John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 841 (2005) (concluding that whereas the deterrent effect of the death penalty remains uncertain, capital punishment does not significantly influence homicide rates). In the recent Supreme Court case involving the constitutionality of lethal injection, Justice Stevens compiled significant authority on both sides of this question. *See* Baze v. Rees, 128 S. Ct. 1520, 1547 n.13 (2008) (Stevens, J., concurring).

derline retarded or incompetent offenders exists on such a periphery that mounting deterrence arguments are, without further data, unconvincing.

Concerns about deteriorating evidence are no doubt valid, but they obviously play out differently depending on the specific type of claim at issue. And for non-paradigm ineligibility claims, which are the challenges that I argue justify deviation from the normal habeas rules, major concerns about evidentiary deterioration are for the most part misplaced.

D. The Limits of Crime Innocence

The scholarship that ultimately prompted various types of remedial restrictions was written before habeas could even be used as a remedy for Eighth Amendment eligibility violations.[237] Controlling ineligibility law is an almost accidental byproduct of rules created to restrict excessive procedural litigation and freestanding innocence claims.

Even though ineligibility began to mature as a concept while the Court and Congress winnowed various innocence gateways, the only ineligibility claims cognizable on habeas review were paradigm claims, which fit neatly into the relitigation critiques that animated the relevant restrictions. *Sawyer* claims—claims that there are no statutory aggravators—called upon federal courts to pass upon questions that had been decided at trial. Moreover, paradigm claims were subject to the same evidentiary decay as were most Fourth, Fifth, and Sixth Amendment claims that prompted the habeas restrictions, as well as the crime-innocence claims that were considered in *Herrera*.

In 1996, certain procedural gateways were legislatively narrowed, and others were not. The Supreme Court had previously held that the gateways for defaulted and abusive claims were to be the same, but AEDPA appears to asymmetrically restrict abusive death-ineligibility challenges. For successive, abusive, and untimely death-ineligibility claims, AEDPA appears to foreclose habeas relief, even though Congress almost certainly had only paradigm ineligibility claims in mind.

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237 I want to flag another interest that the Bator/Friendly critiques invoke but that I do not discuss here: comity, a federalism interest in deference to state criminal process. Some emphasize that a guilt determination is the central purpose of state criminal adjudication, and that allowing federal courts to revisit that question therefore slights state judiciaries. *See* 1 FHCPP, *supra* note 20, § 2.5; 2 *id.* § 28.4. Others frame the issue in terms of the superior expertise of state courts in defining state offenses, as well as in applying rules of evidence and procedure. *See* Vivian Berger, Herrera v. Collins*: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 1010 (1994). Ineligibility challenges implicate state criminal adjudication, but not to the extent that pure procedural or crime-innocence claims do. They do not necessarily implicate state procedure, and they do not go to the guilt question that is considered the paramount responsibility of state adjudication.

This situation will, I argue, ultimately force the Court to consider a habeas question that it would prefer to avoid: whether the Constitution (rather than a statute or the common law) requires that the writ issue to thwart an execution that the Eighth Amendment forbids. This question is less likely to be presented starkly under crime-innocence litigation because states do not try to execute offenders who they know did not commit murder. In his *Herrera* concurrence, Justice Scalia openly remarked that, "[w]ith any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon."[238] States do appear willing, however, to proceed with executions of offenders who are death ineligible.[239] In these cases, habeas relief may issue to prevent the execution, but claims often appear in procedurally defective petitions that courts may not consider under many readings of the statute. The Court will have to confront the embarrassing question that concerned Justice Scalia, albeit in a slightly different context than he envisioned.

III
Toward a Coherent Death-Ineligibility Doctrine

If Part II is broadly about policy, then this Part is broadly about doctrine—specifically, how courts can reconfigure habeas law to accommodate the different issues that ineligibility challenges present. I contend that the Supreme Court may invoke the interpretive canon of constitutional avoidance, as well as its unique equitable authority over the writ, in order to entertain meritorious ineligibility claims without respect to any procedural defects in the petition containing it.

This Part proceeds in three subparts. The first explains why state institutions inadequately protect the Eighth Amendment rights of ineligible offenders. The second explains that, unlike with crime-innocence claims, an offender asserting death ineligibility uncontroversially states a claim cognizable under the habeas statute. The third argues that, in light of constitutional issues that ineligibility claims present, federal courts may functionally interpret AEDPA to prevent a state from executing death ineligible offenders.

A. The Ineffectiveness of State Remedies

One of the central conceits of modern habeas law is the sufficiency of state process. The exhaustion requirement, the tolling of the federal limitations statute during the pendency of state postconviction proceedings, and the procedural default doctrine are all de-

238 Herrera v. Collins, 506 U.S. 390, 428 (1993) (Scalia, J., concurring).

239 *See, e.g.*, Rivera v. Quarterman, 505 F.3d 349, 354–55 (5th Cir. 2007) (*Atkins* claim).

signed to promote the primacy of state criminal adjudication. There is no reason to believe, the argument goes, that state courts are not perfectly well suited to determine guilt and capital eligibility, or to adjudicate procedural challenges in direct criminal and postconviction proceedings.[240] If state trials, postconviction review, and clemency procedure can ensure that states do not execute ineligible offenders, then one might argue that there is no need to worry about how federal habeas law affects these claimants. Unfortunately, state process is unlikely to protect adequately the rights of such offenders.

1. *Trial*

The first stage of state criminal process at which a state may avert the execution of a death-ineligible offender is at trial. By "trial" I mean all proceedings that a trial entails, including the decision whether to charge a defendant capitally.[241] It includes both the guilt and the sentencing phases of a capital case as well as any pretrial hearings.

The efficacy of state trial process depends on the type of ineligibility at issue. Only certain types of death-ineligibility claims can even be determined at trial. For example, a *Ford* claim that a prisoner is not competent for execution is premature before execution is imminent. Prosecutors are unlikely even to seek the death penalty for juvenile offenders. On the other hand, prisoners with viable paradigm ineligibility claims,[242] as well as those with non-paradigm *Atkins* and *Tison* claims, will often face the capital charges.

Mindful of these differences, there are several reasons to be skeptical about how well state trials protect ineligibility claims. First, trials are inherently incapable of protecting the rights of offenders with premature ineligibility claims, such as those involving an offender's competence to be executed. Second, even for categories of offenders for whom the eligibility question is theoretically fixed at trial, the Supreme Court may not have yet recognized the relevant constitutional claim. For instance, a number of offenders already on death row were ineligible under *Simmons* and *Atkins* when those cases were decided in 2005 and 2002, respectively. Third, the tests that certain states apply

240 *See Herrera*, 506 U.S. at 411–13 (discussing clemency as an avenue of review); *id.* at 428 (Scalia, J., concurring).

241 A paradigm ineligibility claim will by definition be disputed at the sentencing phase (it takes the form of a defense to statutory aggravators). Ordinarily, a mental-retardation claim will be determined before trial, although in some jurisdictions an offender may raise the issue during sentencing. *See* Tobolowsky, *supra* note 150, at 112. The determination is sequenced this way to prevent evidence introduced at trial from prejudicing the jury's assessment of mental retardation. *See id.* at 113. The burden of persuasion and standard of proof vary from jurisdiction to jurisdiction. *See id.* at 118–19.

242 *See* Sawyer v. Whitley, 505 U.S. 333 (1992).

to ineligibility claims deviate significantly from the standards, often clinical, that federal courts use.[243] These state tests, often for psychiatric phenomena, almost always disqualify fewer offenders than do federal standards, and they risk sentences that are simply erroneous under federal law.[244] Finally, even if a certain type of ineligibility claim is brought at trial, local political pressures that are absent in a federal forum may exist in state capital proceedings.[245] These pressures are familiar: state judges are generally either appointed by elected governors or are elected themselves, and in many death-penalty jurisdictions, rules against executing certain categories of offenders may be very unpopular.[246] The result is twofold. First, juries may pretextually decide that a prisoner on the margin is death eligible because they do not like the idea of categorical exemptions.[247] Second, at least one study has concluded that elected state judges in states with public support for the death penalty are less likely to set aside capital sentences than are their appointed federal counterparts sitting in the same territorial jurisdictions.[248]

2. *State Postconviction Review*

After a defendant's conviction becomes final on direct review, the federal exhaustion rule requires state prisoners to pursue state postconviction remedies before seeking federal habeas relief, and the federal statute of limitations is tolled during the pendency of that exhaustion.[249] During state proceedings, death-ineligible offenders are often subject to systemic or idiosyncratic state procedural bars.[250]

One of the most glaring problems with the proposition that state collateral proceedings can sufficiently protect death-ineligible offenders is the fact that there is no federal right (either constitutional or statutory) to a lawyer during state postconviction review.[251] That process is notoriously complex, and capital prisoners are woefully ill

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243 *See* Part II.B.3, *supra*.

244 *See* Steiker & Steiker, *supra* note 141, at 728–29; Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396, 1409 (2005). Those rulings are nonetheless left undisturbed because, under the federal habeas statute, decisions need only be "reasonable" determinations of fact and interpretations of law to withstand federal habeas scrutiny. *See* 28 U.S.C. § 2254(d) (2006).

245 *See* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 293–336 (2008) (discussing the institutional pressures on state officials responsible for implementing the death penalty).

246 *See id.* at 328–31.

247 *See* Tobolowsky, *supra* note 150, at 109–10.

248 Paul Brace & Brent D. Boyea, *Judicial Selection Methods and Capital Punishment in the American States*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 186, 199 (Matthew J. Streb ed., 2007).

249 *See* 28 U.S.C. § 2244(d); *id.* § 2254(b).

250 *See* Steiker & Steiker, *supra* note 141, at 728–29.

251 *See supra* note 164 and accompanying text.

equipped to navigate it pro se. Even if a prisoner does secure counsel during state postconviction proceedings, there is no mechanism to ensure that such representation is constitutionally adequate. The federal statute of limitations is not tolled during the preparation of state postconviction applications.[252]

There are also problems associated with claims, such as those created by *Atkins* and *Roper*, that would not have been cognizable during the first round of a prisoner's state postconviction proceedings. Prisoners lose meritorious claims in state postconviction litigation because they run afoul of limitations statutes, peculiar pleading requirements, and a variety of other procedural obstacles—even if the claim was not adjudicated at trial or on direct appeal.[253]

Moreover, familiar political pressures undermine postconviction adjudication. In fact, such pressures can be more influential because overturning a sentence on state postconviction review often requires the ruling of a judge rather than the verdict of a jury.[254] The vast majority of state judges are elected and are less likely than an appointed counterpart to overturn a capital conviction.[255] *Atkins* and *Ford* adjudication therefore embodies the problems with state postconviction process.

State *Atkins* litigation has been problematic since the federal statute of limitations began to run when the Supreme Court decided *Atkins* on June 20, 2002.[256] Mentally retarded death-row offenders then had a year to file their federal petitions, with the limitations period tolled during the pendency of state postconviction proceedings, but not during the preparation of applications for state postconviction relief. Prisoners must navigate that convoluted process without the Sixth Amendment right to counsel. As I explained in Part II.B.3, the

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252 *See* 1 FHCPP, *supra* note 20, § 5.2b(ii).

253 *See infra* notes 256–58 and accompanying text.

254 *See* 1 FHCPP, *supra* note 20, § 3.5; Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1808–09 (2000) (finding that elected judges must decide between losing reelection and conducting fair postconviction review). *See generally* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997) (describing two political campaigns to remove state supreme court judges from office because of their unpopular decisions in death-penalty cases).

255 *See* Brace & Boyea, *supra* note 248; *see also* Harris v. Alabama, 513 U.S. 504, 519–20 (1995) (Stevens, J., dissenting); John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 488 (1999) (finding that "partisan election of judges correlates with death penalty affirmance" in some states); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 776–79, 784 (1995) (noting that "campaigning for the death penalty and against judges who overturn capital cases [is] an effective tactic" for judges running for office).

256 Atkins v. Virginia, 536 U.S. 304 (2002).

offender's *Atkins* claim usually requires a pro-bono attorney who must pour through the trial record for evidence of retardation, conduct interviews, secure releases for medical and prison records (a process that alone takes many months), and find a mental health professional to perform gratis the intellectual and adaptive testing necessary to file a litigable *Atkins* claim. The limitations period runs during this entire process, and capital prisoners frequently end up filing untimely federal petitions. Pleading requirements in many death-penalty states are onerous, and meritorious but formally defective *Atkins* claims often run afoul of some other state procedural rule. Even if *Atkins* claimants obtain review on the merits in state court, that process runs an unusually high risk of constitutional error for a variety of reasons, including that granting a postconviction *Atkins* claim may be particularly unpopular in many death-penalty jurisdictions.[257] Moreover, in order to adjudicate cognitive functioning during postconviction proceedings, at least some states allow the introduction of extraordinarily prejudicial trial evidence regarding the crime's heinousness.[258]

Adjudication of *Ford* claims similarly exemplifies the pitfalls of state postconviction process, the sufficiency of which was at issue in *Panetti*.[259] Notwithstanding Panetti's multiple motions, the state court refused to transcribe its proceedings,[260] and it repeatedly provided him information that was not true.[261] On at least one occasion, it provided an important notice to the state and not to Panetti, and, as a more general matter, it failed to notify him of his right to present his case.[262] Moreover, the state court failed to provide a competency hearing.[263] Finally, the state court unconstitutionally denied Panetti the opportunity to rebut evidence submitted by court-appointed experts.[264] The Supreme Court ultimately granted relief,[265] but *Panetti* exposed serious problems with the way state postconviction process addresses competency determinations.

3. *Clemency*

The most frequently invoked argument, and one relied on heavily by *Herrera*, for the sufficiency of state corrective process involves the

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257 *See supra* notes 242–48 and accompanying text.

258 *See* Steiker & Steiker, *supra* note 141, at 727–28 (identifying Alabama and Texas as two jurisdictions that have sought to highlight gruesome facts of an offender's crime during the inquiry into the offender's mental retardation).

259 Panetti v. Quarterman, 551 U.S. 930 (2007).

260 *Id.* at 950.

261 *Id.*

262 *Id.*

263 *Id.*

264 *Id.* at 951.

265 *Id.* at 962.

availability of clemency.[266] Clemency authority includes the power to commute sentences, a result similar to the relief sought by ineligibility claimants.[267] The power usually vests in a governor, although in some states the governor shares it with an executive-appointed administrative board.[268] Unlike judicial process, clemency lacks both formalized procedure and substantive standards. As Professor Vivian Berger has observed, the system's structural virtues are its vices.[269] The absence of red tape means that there are no procedural safeguards, [270] and the lack of substantive standards means that clemency may be denied for any reason.[271] Judicial review is not available for a clemency decision.[272]

The argument that clemency is a safety valve for failures in ineligibility adjudication contains serious problems. To begin with, as judges and juries have meted out more capital sentences, the use of clemency has declined.[273] Because clemency power vests either in a governor or in a board appointed by the governor, the decision whether to commute a sentence occurs in the most political climate imaginable.[274] The calculus necessarily involves a number of factors other than the constitutional claim's merit: the lawyers' political affiliations and ambitions, the status of the victim's family,[275] the proximity to a gubernatorial election,[276] and the perception that a governor is too soft on crime.[277] Further, some commentators argue that mentally ill and mentally retarded offenders fare particularly poorly in clemency proceedings.[278]

Although fraught with less procedural peril than trial and the postconviction remedial process, the political distortions affecting adjudication are even more exaggerated when introduced into clemency determinations. Taken together, the three major state channels for

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266 *See* Herrera v. Collins, 506 U.S. 390, 411–16 (1993).

267 *See* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 577 (1991).

268 *See* Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 255 (2003). In a subset of the states where authority is shared, the board is the dominant decision maker. *Id.* at 256.

269 Berger, *supra* note 237, at 967.

270 *Id.* at 967 (citing Louis D. Bilionis, *Legitimating Death*, 91 MICH L. REV. 1643, 1699–1700 (1993)).

271 *Id.*; *see* Austin Sarat and Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1326 (2004).

272 *See* Heise, *supra* note 268, at 252; Sarat & Hussain, *supra* note 271.

273 *See* Heise, *supra* note 268, at 250; Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from* Gregg *to* Atkins, 33 N.M. L. REV. 349, 353–55 (2003).

274 *See* Richard A. Rosen, *Innocence and Death*, 82 N.C. L. Rev. 61, 87–88 (2003).

275 *Id.* at 88.

276 *Id.*; *see* Heise, *supra* note 268, at 291.

277 Rosen, *supra* note 274, at 88; *see* Rapaport, *supra* note 273, at 369.

278 *See* Rapaport, *supra* note 273, at 365 (citations omitted).

offenders to seek relief for death ineligibility fail to ensure that such relief actually issues to qualified claimants.

B. Death Ineligibility as a Constitutional Claim

One of the recurrent questions explored in modern habeas law and commentary is whether a freestanding crime-innocence challenge—one that does not supplement another constitutional claim—is even cognizable on habeas review. 28 U.S.C. § 2241(c)(3) provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." Similarly, § 2254(a) restricts relief for state prisoners to claims that they are "in custody in violation of the Constitution or laws or treaties of the United States."

Courts and commentators have struggled to persuasively frame freestanding crime-innocence challenges as constitutional claims. And if the claim is not capable of constitutional phrasing, then it is arguably not cognizable under the habeas statute. The more vocal critics of crime-innocence theories describe such challenges as attempts to constitutionalize new trial motions.[279] These critics would argue that no constitutional provision requires an offender whose guilt has been determined beyond some threshold of certainty to obtain a federal forum to retest his conviction when guilt seems less probable.[280] In *Herrera*, the Supreme Court conspicuously refused to affirm the cognizability of a freestanding crime-innocence claim at least partially for this reason.[281]

My introductory discussion of the concept in Part I.B actually distinguishes between two freestanding innocence questions, and that distinction in part explains why freestanding analysis is different for ineligibility claims. The difference is roughly that between the questions of (1) whether a claim states a constitutional violation cognizable under the habeas statute and (2) whether the constitution compels a habeas remedy for the stated constitutional violation. *Herrera* muddles these two questions because, for crime-innocence claims, the answer to both is unclear. For death-ineligibility claims, however,

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279 *See* Herrera v. Collins, 506 U.S. 390, 407–08 (1993).

280 *See id.* at 404–05.

281 *Id.*; *see supra* Part I.B; *see also* David R. Dow et al., *Is It Constitutional to Execute Someone Who Is Innocent (and If It Isn't, How Can It Be Stopped Following* House v. Bell*)?*, 42 TULSA L. REV. 277, 277 (2006) ("We begin with a question that might seem ridiculous: does the Constitution prohibit the execution of someone who is actually innocent? Remarkably, this question remains open."); Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2358 (2007) ("When a district court is convinced that a state prisoner is innocent but that the prisoner's trial and sentencing proceedings were constitutionally unobjectionable, . . . it is not at all clear that the Supreme Court would permit the district court to award the habeas remedy on the strength of the prisoner's innocence alone.").

only the latter, remedial question is salient. Nobody seriously disputes that the offender is stating a constitutional claim under the Eighth Amendment.[282] Because freestanding ineligibility theories do not force courts to decide whether freestanding crime-innocence challenges are statutorily cognizable, the controlling law is (perhaps counterintuitively) more amenable to those claims.

1. *Theories of Freestanding Crime Innocence*

Freestanding innocence theories have been a dead end for capital claimants. Data released in 2008 and spanning twenty years shows that, of 133 selected offenders exonerated by DNA evidence, not one was granted relief on a freestanding actual innocence claim.[283] Another study reported in 2005 found that, in 178 cases in which actual innocence was asserted, no court issued a habeas writ on that ground.[284] Although *Herrera* did not formally bar such claims, its failure to recognize their cognizability has had roughly the same practical effect.[285]

Perhaps an exchange during oral argument in *Herrera* best reveals how deeply federal and state parties oppose the idea that freestanding crime-innocence challenges state a constitutional claim. The State was asked, "Suppose [there was] a video tape which conclusively shows the person is innocent and you have a state which as a matter of policy or law or both simply does not hear new evidence claims in its clemency proceeding. Is there a Federal constitutional violation in your

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282 This point actually has different implications for claims that seek relitigation of a *trial* finding that an offender is death eligible. One might describe a freestanding ineligibility petition stating such a claim as an attempt to "constitutionalize" a new trial motion for the sentencing phase of capital proceedings. *See infra* Part III.B.2.

283 *See* Garrett, *Judging Innocence*, *supra* note 11, at 99 tbl.6, 112.

284 *See* Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 AM. CRIM. L. REV. 121, 133–36 (2005) (pointing out that in ninety-one cases, federal courts refused to recognize a bare claim of innocence; in thirty-three cases, federal courts assumed that a bare innocence claim existed *arguendo* and held that petitioner did not meet the requisite showing; and in fifty-four cases, federal courts recognized the bare innocence claim but held that petitioner failed to meet the required standard).

285 *Id.* The Ninth Circuit recognizes freestanding innocence. *See* Osborne v. Dist. Att'y's Office for the Third Jud. Dist., 521 F.3d 1118, 1130–31 (9th Cir. 2008); Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997). Of the remaining courts of appeal, all but the Second and the D.C. Circuits concluded, with varying caveats (usually involving capital prisoners), that such claims are not generally cognizable. *See* Foster v. Quarterman, 466 F.3d 359, 367 (5th Cir. 2006); Fielder v. Varner, 379 F.3d 113, 122 (3d Cir. 2004); Johnson v. Bett, 349 F.3d 1030, 1038 (7th Cir. 2003); Rouse v. Lee, 339 F.3d 238, 255 (4th Cir. 2003) (en banc); Zuern v. Tate, 336 F.3d 478, 482 n.1 (6th Cir. 2003); David v. Hall, 318 F.3d 343, 347–48 (1st Cir. 2003); Brownlee v. Haley, 306 F.3d 1043, 1065 (11th Cir. 2002); Burton v. Dormire, 295 F.3d 839, 848 (8th Cir. 2002); LaFevers v. Gibson, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001).

view?"[286] The State's Attorney simply answered, "No, Your Honor, there is not."[287]

Justice O'Connor, joined by Chief Justice William Rehnquist, emphasized in her *Herrera* concurrence that the Court had actually failed to decide "whether federal courts may entertain convincing claims of actual innocence."[288] Justices O'Connor and Kennedy, in conjunction with Justices Scalia and Clarence Thomas (who would have found that freestanding crime innocence is not a constitutional claim), and with Chief Justice Rehnquist (who only assumed such a claim existed *arguendo*), formed a five-Justice majority that was unprepared to declare freestanding crime-innocence claims cognizable on habeas review.

Justices Scalia and Thomas took a view more consistent with that of Bator[289] and believed the question is not whether a prisoner is innocent, but whether there exists "in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."[290] Understanding why death-ineligibility challenges sidestep this debate first requires understanding the constitutional provisions that freestanding crime-innocence challenges usually invoke: the Eighth Amendment's bar on cruel and unusual punishment,[291] as well as the Fourteenth Amendment's protections for substantive and procedural due process.[292]

The Eighth Amendment theory, emphasized in Justice Blackmun's *Herrera* dissent, is a "greater includes the lesser" argument that, somewhat ironically, emphasizes the constitutional cognizability of

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286 Transcript of Oral Argument at 37, Herrera v. Collins, 506 U.S. 390 (1993) (No. 91-7328), *available at* http://www.oyez.org/cases/1990-1999/1992/1992_91_7328/argument/ (last visited Nov. 11, 2009).

287 *Id.*

288 *See* Herrera v. Collins, 506 U.S. 390, 427 (1993) (O'Connor, J., concurring).

289 *See* Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817, 819 (1993) ("*Herrera* tests the bounds of the Court's determination to stick with a process-oriented approach to the Eighth Amendment."). In a separate opinion in *Wright v. West*, 505 U.S. 277 (1992), Justice O'Connor rejected Bator's "full and fair" interpretation of pre-*Brown* habeas jurisprudence. *See id.* at 298–301 (O'Connor, J., concurring).

290 *Herrera*, 506 U.S. at 427–28 (Scalia, J., concurring).

291 *See, e.g.*, Rosen, *supra* note 274, at 108 (stating Eighth Amendment argument).

292 *See, e.g.*, *Herrera*, 506 U.S. at 407 n.6 ("This issue is properly analyzed only in terms of procedural due process."); *id.* at 435 (Blackmun, J., dissenting) ("The majority's discussion misinterprets petitioner's Fourteenth Amendment claim as raising a procedural, rather than a substantive, due process challenge." (footnote omitted)); Berger, *supra* note 237, at 949–50 (arguing that the Constitution mandates state procedures for actual innocence claims); Rosen, *supra* note 274, at 108–09 (stating substantive due process argument). The *In re Davis* concurrence does not specify which constitutional provisions would be violated if an innocent offender were executed. *See* In re Davis, No. 08-1443, 2009 WL 2486475, at *1 (U.S. Aug. 17, 2009). I do not discuss the Suspension Clause issue at this time because it is relevant primarily to the remedial question, not to whether crime-innocence challenges state a constitutional claim.

death-ineligibility claims.[293] If it is cruel and unusual under *Tison* and *Edmund* to execute certain felony murderers, he reasoned, then the Eighth Amendment obviously bars a state from executing someone who is actually innocent.[294]

The second major theory supporting the cognizability of freestanding innocence claims involves substantive due process. In fact, in his *Herrera* dissent, Justice Blackmun chided the majority for failing to conduct a substantive due process inquiry.[295] Under such a challenge, a claimant must show that the state action imposes "arbitrary impositions and purposeless restraints."[296] The essential argument is that the execution of an innocent person "shocks the conscience."[297]

The final major theory that freestanding crime-innocence claims are cognizable under the Constitution is premised on procedural due process.[298] *Herrera* expressly framed the prisoner's Fourteenth Amendment argument in procedural due process terms.[299] The Court held that the availability of new trial motions and clemency proceedings alleviated any concern that states provide insufficient process under the Fourteenth Amendment.[300] *Herrera* seems to have signaled the Court's potential receptivity to this theory where it considers state process deficient, although no actual innocence claim has ever succeeded on this ground.[301]

2. *Cognizability of Freestanding Ineligibility Claims*

In contrast to freestanding crime-innocence challenges, a death-ineligibility claim plainly seeks relief under the Eighth Amend-

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293 *See Herrera*, 506 U.S. at 431, 432 & n.2 (Blackmun, J., dissenting).

294 *Id.* at 431.

295 *See id.* at 435–36.

296 *Id.* at 436 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961))).

297 *Id.* (quoting United States v. Salerno, 481 U.S. 739, 746 (1987) (quoting Rochin v. California, 342 U.S. 165, 172 (1952))); *see* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). The prisoner in *Osborne* made this argument with respect to his postconviction access-to-DNA-evidence claim. *See* Brief for the Respondent at 42–44, Dist. Att'y's Office for the Third Jud. Dist. v. Osborne, 129 S. Ct. 2308 (2009) (No. 08-6).

298 *See* Berger, *supra* note 237, at 1021–22; Larry May & Nancy Viner, *Actual Innocence and Manifest Injustice*, 49 ST. LOUIS U. L.J. 481, 490–91 (2005). In *Osborne*, the prisoner argued that procedural due process requires postconviction disclosure of potentially exculpatory DNA evidence. *See* Brief for the Respondent, *supra* note 297, at 39–41.

299 *See Herrera*, 506 U.S. at 407 n.6.

300 *See id.* at 407–17.

301 In *Osborne*, the District Attorney's Office contended that freestanding innocence was not a Fourteenth Amendment claim. *See* Brief for Petitioners at 19 n.8, 40–49, Dist. Att'y's Office for the Third Jud. Dist. v. Osborne, 129 S. Ct. 2308 (2009) (No. 08-6). The District Attorney's Office treated the Fourteenth Amendment challenge primarily as a procedural due process question. *See id.* at 44–50.

ment.[302] The Court has stated that the writ may issue to correct constitutional violations that arise at the time of execution.[303] Under *Roper* and *Atkins*, juvenile status claims and mental retardation claims are cognizable under the Eighth Amendment.[304] Under *Ford* and *Panetti*,[305] the cognizable event that violates the Eighth Amendment is the imminent execution of an incompetent offender. Because courts may grant relief on procedurally sound ineligibility challenges, a prisoner need not supplement such claims with the allegation of another constitutional violation.

A small subset of ineligibility challenges, appearing in a certain procedural posture, present constitutional issues resembling those that freestanding crime-innocence claims create. In situations where ineligibility claims are decided at trial, one might argue, the claimant arrives at the federal courthouse legally death eligible, asserting a constitutional right to a federal forum in which he may introduce evidence tending to disprove his eligibility. There are a few responses to this point. First, the offender still arguably states a challenge under the Eighth Amendment, making the claim cognizable under the habeas statute.[306] Second, the offender may still allege a procedural due process violation, and ineligibility determinations lack the procedural protections that generally support deference to state guilty verdicts. There is no right to a jury finding of eligibility, or a requirement that the state prove eligibility beyond a reasonable doubt.[307] Most importantly, there is no presumption of ineligibility, analogous to a presumption of innocence, that a state must overcome. States lack any historic expertise, subject to substantive and procedural restrictions imposed by the U.S. Constitution, in adjudicating death eligibility. As a result, even trial ineligibility determinations may be challenged as constitutional violations.

The upshot is that freestanding death-ineligibility claims are easier to resolve than are freestanding crime-innocence claims. Freestanding crime-innocence claims implicate two difficult-to-resolve questions—whether the claim is "constitutional" and therefore cogni-

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302 *See Herrera*, 506 U.S. at 406 ("Because Ford's claim went to a matter of punishment—not guilt—it was properly examined within the purview of the Eighth Amendment.").

303 *See id.* at 433 (Blackmun, J., dissenting) ("Both [*Johnson v. Mississippi*, 486 U.S. 578 (1988)] and [*Ford v. Wainwright*, 477 U.S. 399 (1986)] recognize that capital defendants may be entitled to further proceedings because of an intervening development even though they have been validly convicted and sentenced to death.").

304 *See supra* Part II.B.2 and Part II.B.3.

305 *See supra* Part II.B.4.

306 *See supra* text accompanying note 279.

307 *See* Steiker & Steiker, *supra* note 141, at 724–28 (describing the lack of procedural safeguards governing the determination of mental retardation in state courts, and arguing that they undermine the substantive Eighth Amendment right of *Atkins* claimants).

zable under the habeas statute and, if so, whether the Constitution also compels a habeas remedy. Death-ineligibility claims, by contrast, usually struggle only with the second question. Because death-ineligibility claims can be framed straightforwardly either as violations of the Eighth Amendment bar on cruel and unusual punishment or the Fourteenth Amendment guarantee of procedural due process, courts will not need to confront some of the most vexing questions presented in freestanding crime-innocence cases.[308]

C. Configuring Relief

The salient ineligibility question involves how courts and Congress may limit habeas as a remedy for state violations. Habeas law is, after all, replete with rules that frustrate relief for meritorious claims. Petitions can be technically defective because they are defaulted, successive, abusive, or untimely.[309] I commit the balance of this Article to the question of whether habeas relief may issue to prevent executions of death-ineligible offenders with procedurally defective claims.

The answer to that question depends on two others: (1) whether the Court would be willing to hold that state offenders have a constitutional entitlement to a federal habeas forum to test ineligibility claims; and (2) if not, whether the Court would be willing and able to read a death-ineligibility exception into existing statutory and common law procedural restrictions. I submit that the Court is unlikely to actually constitutionalize entitlement to the habeas remedy,[310] but that it may nonetheless avoid unconstitutional executions by interpreting habeas rules in favor of ineligible claimants whose challenges appear in procedurally defective petitions. By invoking its historically broad equitable authority over the habeas writ, the Court may even construe AEDPA so as to avoid problems under the Suspension Clause and the Fourteenth Amendment.

Most federal procedural obstacles contain exceptions for "innocence" but vary in both the source of authority for the exception (common law versus statute) and the exception's wording.[311] Creating functional death-ineligibility gateways will therefore involve very different interpretive steps depending on the defect involved. For cases in which the procedural defect is statutory, the courts' equitable

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308 Also worth mentioning is the fact that recognizing the cognizability of a crime-innocence claim in a capital case would probably suggest the cognizability of crime-innocence claims in noncapital cases. There is no such "slippery slope" in the ineligibility context because an ineligibility claim requires a prior determination that a category of offenders is exempt from execution under the Eighth Amendment.

309 *See supra* Part I.A.

310 That is, the Court is not likely to declare that restrictions on the writ's availability for meritorious death-ineligibility claims are unconstitutional.

311 *See supra* Part I.A.

authority over the exceptions is obviously diminished. Nonetheless, federal courts appear willing, at least in certain instances, to conduct a form of constitutional avoidance to preserve merits consideration of colorable crime-innocence claims.[312] They should be willing to practice such avoidance for colorable death-ineligibility challenges as well, and the Supreme Court has already done so in at least one major case.[313]

1. *Common Law Bars*

The Court has historically emphasized its unusually broad equitable power over the writ's function in a variety of contexts,[314] and it continues to do so today.[315] The Court's willingness to exercise that power is greatest when the procedural defect is a pure creature of common law, as is the case with procedural default. Recall that an offender procedurally defaults a claim if a state court had an adequate and independent state ground for rejecting it.[316] Petitioners may "bypass" the procedural obstacle either by showing cause and prejudice or by demonstrating that the sentence will result in a "fundamental miscarriage of justice."[317] The fundamental-miscarriage-of-justice gateway, like the procedural default for which it furnishes an exception, remains subject to equitable definition.[318]

The Court may easily adapt this pure common law framework to new types of ineligibility claims, and it has already recognized that exception for otherwise-defective paradigm challenges.[319] As I ex-

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312 Others have not called this "avoidance" but have noted that the Court has consistently sidelined statutory restrictions on its jurisdiction by invoking its equitable authority over the writ. *See* Steiker, *supra* note 25, at 309 (noting that the Court has used "court-identified equitable principles . . . . [to] ignore[ ] statutory language in determining the availability of a habeas forum."). The Court has held more generally that it must "construe a federal statute to avoid constitutional questions where such a construction is reasonably possible." Arnett v. Kennedy, 416 U.S. 134, 162 (1974) (citations omitted).

313 *See* Panetti v. Quarterman, 551 U.S. 930, 943–45 (2007) (rejecting a reading of AEDPA that would categorically bar successive petitions in favor of an interpretation favored by pre-statutory case law). In its October 2009 term, the Court has granted certiorari on another case that calls for it to adopt a restrictive understanding of what constitutes a "successive" petition in order to avoid executing a potentially death ineligible offender. *See* Magwood v. Culliver, 555 F.3d 968 (11th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3083 (Nov. 16, 2009) (No. 09-158).

314 *See* Murray v. Carrier, 477 U.S. 478, 496 (1986) (recognizing the Court's "'historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged'" (quoting Wainwright v. Sykes, 433 U.S. 72, 81 (1977))); Steiker, *supra* note 25, at 342.

315 *See, e.g.*, House v. Bell, 547 U.S. 518, 536 (2006) (emphasizing that the Court-created injustice exceptions for procedurally defaulted claims control the habeas-relief inquiry).

316 *See supra* Part I.A.1.

317 *See Carrier*, 477 U.S. at 495–96 (internal quotation marks omitted).

318 *See id.*

319 *See* Sawyer v. Whitley, 505 U.S. 333, 347–50 (1992); *supra* Part II.A.

plained in Part I.A.1, the originating procedural default cases, related evidentiary default law, and the interpretation of Federal Rule of Criminal Procedure 52(b) (where the same language also appears) all indicate that the miscarriage-of-justice gateway encompasses more than just crime innocence, particularly in death cases. In *Carrier*,[320] the Court expressly held that the "miscarriage of justice" standard may be used to grant habeas relief to petitioners who are "actually innocent," and in *Sawyer* it held that the term "actual innocence" includes paradigm death ineligibility.[321] Because procedural default is not defined by statute, federal courts face few barriers in adapting these gateway dispositions to new, non-paradigm categories of ineligibility.[322]

2. *Statutory Bars*

Although most procedural obstacles (the statute of limitations excepted) originated as common law doctrines, many of them have, over time, been codified in Title 28 of the U.S. Code.[323] When faced with a statutory obstacle to a meritorious ineligibility claim, a court would have three choices: (a) declare the provision unconstitutional per se; (b) hold it unconstitutional as applied; or (c) read the statute, pursuant to some interpretive convention, so as to avert state executions that violate the Constitution. What emerges from scrutiny of the jurisprudence is that, while the Supreme Court is unlikely to declare any statutory bar per se unconstitutional, or even unconstitutional as applied, it has, despite enjoying less authority to modify procedural bars imposed by statute than those imposed by common law,[324] shown a unique inclination to ignore the plain import of statutory restrictions that frustrate equitable discretion to decide habeas cases.[325]

I argue that the Supreme Court could conduct a form of constitutional avoidance (perhaps using the Suspension Clause) that might permit consideration of ineligibility claims irrespective of any statutory defects in the petitions containing them. My discussion will focus heavily on two statutory restrictions: limits on successive and abusive claims contained in § 2244(b) and the statute of limitations contained in § 2244(d). These are the two most significant procedural provi-

320 477 U.S. at 495–96.

321 *See* 505 U.S. at 347–50.

322 *See supra* note 314 and accompanying text.

323 *See, e.g.*, 28 U.S.C. § 2244(b) (2006) (restricting successive and abusive petitions); *id.* § 2254(e)(2) (restricting evidentiary hearings).

324 *See infra* Part III.C.2(a).

325 *See infra* Part III.C.2(c).

sions obstructing merits consideration,[326] and together they present an important contrast between a provision that has a common law antecedent and one that does not.

a. *Per Se Challenges*

The biggest problem with arguments seeking per se invalidation of procedural obstacles is the Suspension Clause doctrine in which the facial challenges are rooted.[327] The Suspension Clause states that "the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[328] Suspension Clause jurisprudence is notoriously confusing,[329] and even the fiercest death-penalty opponents concede that the Clause's unusual phrasing, which bars suspension of the writ without vesting it,[330] creates questions about who may seek and how Congress may constitutionally restrict relief.[331]

The modern inquiry's touchstone is whether a collateral remedy is inadequate or ineffective to test the legality of a prisoner's detention.[332] As to restrictions on successive petitions, *Felker v. Turpin*[333] held that § 2244(b) did not per se violate the Suspension Clause.[334] With respect to the statutory limitations period, all circuit courts that have considered whether the Suspension Clause invalidates § 2244(d) on its face have affirmed the provision's constitutionality, usually be-

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326 Procedural default is an equally important restriction but is not statutory; Although 28 U.S.C. § 2254(d) is argued in virtually every habeas case it is generally considered a substantive limit on relief.

327 The Eighth and Fourteenth Amendment arguments usually appear in "as-applied" challenges, not facial challenges.

328 U.S. CONST. art. I, § 9, cl. 2.

329 *See* 1 FHCPP, *supra* note 20, § 7.2d & n.67 (collecting cases demonstrating the difficulty of determining the scope of the writ); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555, 555–62 (2002).

330 *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94–95 (1807) ("[T]he power to award the writ by any of the courts of the United States, must be given by written law . . . . [without which vesting] the privilege itself would be lost, although no law for its suspension should be enacted.").

331 *See* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 864–65 (1994) (acknowledging that the Clause's phrasing "raises doubts about whether the Clause affords prisoners even a qualified entitlement to habeas"); *see also* Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 451–52 (1996) (arguing that original intent could be invoked in favor of four different interpretations of the Suspension Clause). *But see* Steiker, *supra*, at 888–913 (arguing that the Fourteenth Amendment incorporated the Suspension Clause in favor of state prisoners seeking a federal forum to redress violations of federal law).

332 INS v. St. Cyr, 533 U.S. 289, 314 n.38 (2001) ("'[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention' does not violate the Suspension Clause." (alteration in original) (quoting Swain v. Pressley, 430 U.S. 372, 381 (1977))).

333 518 U.S. 651 (1996).

334 *Id.* at 663–65.

cause offenders can seek habeas relief on the claim for a year, no matter how defective state postconviction process may have been.[335] The rule of thumb appears to be that, as long as a prisoner has some means of raising a particular constitutional claim, a provision has not unconstitutionally suspended the writ, at least on its face.[336]

b. *As-Applied Challenges*

An as-applied challenge contends that a statutory provision is unconstitutional under specific circumstances in which it applies. Offenders with crime-innocence claims frequently argue that procedural obstacles are unconstitutional as applied. The difficulty in mounting as-applied challenges reflects the murky relationship between the quasi-statutory habeas remedy and the constitutional violations that it remediates: a federal remedy does not follow *ipso facto* from the existence of a constitutional violation. I remain skeptical as to the ultimate viability of as-applied arguments that the Eighth Amendment, Fourteenth Amendment, or Suspension Clause render procedural restrictions on the habeas writ unconstitutional. The Eighth Amendment surely says something about the constitutionality of executing such offenders making as-applied challenges, but its role in limiting remedial restrictions is less clear.[337] The remedial argument nonetheless has some appeal, no doubt because of the visceral discomfort many express at the prospect of executing someone conclusively exonerated by DNA evidence.[338] Perhaps because the possibility of executing an ineligible offender does not necessarily provoke that same level of discomfort, courts may be less likely to adopt a remedial interpretation of the Eighth Amendment in that context.

For many of those same reasons, courts are also unlikely to sustain substantive due process challenges to statutory procedural restrictions. Moreover, a Fourteenth Amendment "shocks the conscience" test is always problematic for litigators, and the Roberts Court seems especially unlikely to introduce such a test to control the constitutional entitlement to a federal habeas forum. *Herrera* indicated that the Court may be more solicitous of a procedural due process challenge, suggesting that a constitutional entitlement to habeas relief

335 *See, e.g.*, Crater v. Galaza, 491 F.3d 1119, 1125 (9th Cir. 2007); Wyzykowski v. Dep't of Corrs., 226 F.3d 1213, 1217 (11th Cir. 2000); Lucidore v. N.Y. State Div. of Parole, 209 F.3d 107, 113 (2d Cir. 2000); Miller v. Marr, 141 F.3d 976, 977–78 (10th Cir. 1998).

336 *Felker*, 518 U.S. at 664–65; 1 FHCPP, *supra* note 20, § 7.2d.

337 *Cf.* Herrera v. Collins, 506 U.S. 390, 398–406 (1993) (concluding that the Eighth Amendment does not clearly require habeas-relief issue to allow consideration of new crime-innocence claims).

338 *See* David Grann, *Trial By Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?printable=true.

might arise upon a failure of state procedure.[339] That argument, however, also analytically conflates the question of whether a constitutional violation exists with the question of whether the Constitution requires that a federal habeas remedy exist to redress it. A court would have to hold that a failure of *state* process would constitutionally require a procedurally unobstructed *federal* habeas remedy—an argument more easily undertaken under the Suspension Clause.

The Suspension Clause is the only constitutional provision I discuss that expressly limits restrictions on the habeas remedy,[340] and it furnishes the Court with the greatest license to invalidate an otherwise-legitimate procedural obstacle as applied to death-ineligibility claims. The case law makes clear that the writ may be suspended indirectly, such as when prisoners cannot obtain relief without overcoming unreasonable procedural hurdles.[341] Suspension Clause jurisprudence is uniquely underdeveloped, and leaves the Court with the sort of doctrinal flexibility that it would not have with the other constitutional theories. It could, for example, determine that § 2244(b) or § 2244(d) is inadequate or ineffective for the purposes of testing *Atkins* claims.[342] At least two sets of decisions indicate that Suspension Clause theories could be viable in the ineligibility context: (1) where § 2244(b) makes certain *Ford* competency claims impossible to litigate[343] and (2) where § 2244(d) is applied to an offender who can show crime innocence.[344]

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339 *Herrera*, 506 U.S. at 407 n.6.

340 *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 n.329 (1987).

341 *See, e.g.*, Johnson v. Avery, 393 U.S. 483, 487 (1969) (prison rules forbidding prisoners to seek assistance from other prisoners in writing habeas writs); Smith v. Bennett, 365 U.S. 708, 713 (1961) (financial hurdles for indigent offenders); *Ex parte* Hull, 312 U.S. 546, 548–49 (1941) (excessive prison preapproval conditions for federal habeas filing); *see also* Davis v. Adult Parole Auth., 610 F.2d 410, 414 (6th Cir. 1979) (holding that a "rule which would permit a court to dismiss an action for habeas relief without any consideration of the equities presented . . . constitutes a prohibited suspension of the writ").

342 Professors Hertz and Liebman suggest that the writ may be suspended where complicated federal claims become defective due to a failure of a prisoner to timely navigate the state postconviction process without sufficient assistance from counsel. 1 FHCPP, *supra* note 20, § 7.2d. That is precisely the scenario that many *Atkins* claimants encounter. *See supra* Parts II.B.3 and III.A.2.

343 *See In re* Page, 179 F.3d 1024, 1026 (7th Cir. 1999) (noting that § 2244(b) may be unconstitutional in certain circumstances); *cf.* Martinez-Villareal v. Stewart, 118 F.3d 628, 635 (9th Cir. 1997) (Nelson, J., specially concurring) (arguing that § 2244(b) is an unconstitutional suspension of the writ as applied to *Ford* claims).

344 *See* Whitley v. Senkowski, 317 F.3d 223, 225 (2d Cir. 2003) (remanding a case that dismissed a habeas petition as time-barred although petitioner alleged crime innocence and instructing the district court to determine whether petitioner made a credible showing of actual innocence and whether such showing excepted him from being time-barred); Wyzykowski v. Dep't of Corrs., 226 F.3d 1213, 1218–19 (11th Cir. 2000); Molo v. Johnson, 207 F.3d 773, 775 (5th Cir. 2000); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (acknowledging that a limitations period may render the habeas remedy inadequate as ap-

c. *Constitutional Avoidance*

Based on the emerging pattern in Suspension Clause cases, courts are unlikely to declare the successive petition or statute-of-limitations bars unconstitutional as applied to ineligible offenders.[345] By practicing a fairly aggressive form of constitutional avoidance, courts do, however, appear quite willing to avoid state executions that violate the Eighth Amendment. The license to conduct such interpretation is actually well established, as the Supreme Court has historically ignored restrictive statutory wording and has emphasized its common law authority to shape the writ's function.[346] Despite the confusion over precisely what the Suspension Clause actually means (and over whether a decision to revoke the writ for state prisoners could even constitute suspension),[347] it may be a promising theory upon which to premise avoidance because it is the Constitution's primary reference to remedies.[348] Moreover, at least three members of the Court have expressed their willingness to consider an avoidance interpretation based on a more general constitutional prohibition on erroneously executing offenders.[349]

In what follows, I explore what this avoidance looks like under the § 2244(b) bar on successive and abusive claims, as well as under the § 2244(d) statute of limitations. The crime-innocence and mental-competency decisions discussed in the previous subsection provide a blueprint for how federal courts may standardize the treatment of ineligibility claims. Because avoidance is already an established feature of cases interpreting the habeas statute, federal courts may avert the execution of ineligible offenders without wading formally into modern Suspension Clause jurisprudence.

Successive and Abusive Petitions. Section 2244(b)(1) states that all successive claims shall be dismissed, and § 2244(b)(2) provides for the same treatment of abusive claims, except for previously unavailable claims expressly made retroactive by the Supreme Court and claims that, but for cause to have omitted them from the original petition, would establish innocence of the underlying crime by clear and con-

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plied to an actually innocent offender); Holloway v. Jones, 166 F. Supp. 2d 1185, 1190 (E.D. Mich. 2001); Alexander v. Keane, 991 F. Supp. 329, 334–39 (S.D.N.Y. 1998).

345 The Supreme Court, however, has recently suggested that AEDPA provisions might be unconstitutional as applied to meritorious crime-innocence claims. *See In re* Davis, No. 08-1443, 2009 WL 2486475, at *1 (U.S. Aug. 17, 2009) (citing, with approval, Triestman v. United States, 124 F.3d 361, 377–80 (2d Cir. 1997)).

346 *See supra* note 314 and accompanying text.

347 *See supra* note 331 and accompanying text.

348 *See supra* note 340and accompanying text.

349 *See In re* Davis, 2009 WL 2486475, at *2 (Stevens, J., concurring).

Moreover, available data suggests that *Atkins* has not opened any floodgates of frivolous litigation. *See* Blume et al., *supra* note 153, at 628.

vincing evidence.[350] On first blush, AEDPA therefore appears to have eliminated relief for any successive claim and winnowed the abusive-claim gateway down to a pure crime-innocence inquiry. In order to avoid the Suspension Clause and procedural due process issues mentioned above, however, courts may nonetheless construe AEDPA to allow merits consideration of ineligibility claims in successive petitions.

The Supreme Court has a rich history of ignoring potentially restrictive wording when interpreting the habeas statute's limits on abusive and successive claims.[351] When the Court decided *Sanders v. United States* in 1963, it borrowed without explanation the "ends of justice" exception for abusive claims by state prisoners, and it created a presumption in favor of entertaining successive claims for federal prisoners even though the statute appeared to support an opposing inference.[352] In 1966 Congress eliminated any statutory reference in § 2244(b) to "the ends of justice," but *Kuhlmann v. Wilson* continued to apply that exception to successive claims.[353]

Nor have federal courts been bashful about interpreting AEDPA's more recent and facially severe limits in favor of petitioners.[354] For example, the Supreme Court has highlighted the absurdity of applying § 2244(b) to a *Ford* claim in a prior petition that was dismissed as premature.[355] Lower courts have followed suit by adopting a number of nonliteral § 2244(b) avoidance interpretations, including holdings that a subsequent petition is not "second or successive" (1) because it does not attack the same judgment as a prior petition and (2) because a prior petition was not denied on the merits.[356]

Perhaps the most significant area where the Supreme Court has abandoned a literalist interpretation of § 2244(b) is in its *Ford* competency cases. *Ford* claims present a unique problem because they are usually not ripe for inclusion in an offender's initial habeas petition.

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350 28 U.S.C. § 2244(b)(2)(B) (2006).

351 *See* Steiker, *supra* note 25, at 342 ("Despite this statutory guidance, the Court's approach to 'successive' and 'abusive' petitions likewise has been fashioned without close attention to statutory language. . . . [B]oth the Warren and the Rehnquist Courts designed their own substantive standards governing such petitions wholly apart from statutory language.").

352 373 U.S. 1, 18–19 (1963).

353 *See* 477 U.S. 436, 451–52 (1986).

354 *See* Crouch v. Norris, 251 F.3d 720, 723 (8th Cir. 2001) (rejecting a literalist interpretation of § 2244(b) and agreeing with other courts that the interpretation of the provision "involves the application of the pre-AEDPA abuse-of-the-writ principles" (citation omitted)); Vancleave v. Norris, 150 F.3d 926, 928 (8th Cir. 1998) (observing that the Supreme Court rejects a literalist interpretation of the term "second or successive").

355 Stewart v. Martinez-Villareal, 523 U.S. 637, 644 (1998); *see* Slack v. McDaniel, 529 U.S. 473, 487 (2000) (affirming analysis in *Martinez-Villareal*).

356 *See* 2 FHCPP, *supra* note 20, § 28.3b(i) (different judgment) (collecting cases); *id.* § 28.3(ii) (no prior merits judgment) (collecting cases).

Prior to AEDPA, no federal appellate court had barred a *Ford* claim on the ground that it was abusive.[357] In both *Panetti* and *Stewart v. Martinez-Villareal*,[358] the Court confronted post-AEDPA *Ford* challenges that were not decided in the offenders' first round of habeas litigation, and in each instance the Court found a way to permit merits consideration of the claim.[359] In both cases, the Court refused to apply § 2244(b) because, it reasoned, the provision simply codified common law doctrine.[360] In *Panetti*, the Court expressly eschewed a literalist interpretation of § 2244(d) in favor of a functional competency rule that avoided "troublesome results" and that did not "close [federal courts] to a class of habeas petitioners seeking review without any clear indication that such was Congress'[s] intent."[361]

Death-ineligibility categories pose different successive petition challenges depending on the type of claim involved. For newly declared constitutional rules that the Supreme Court expressly makes retroactive on collateral review (such as ineligibility holdings involving mental retardation or juvenile status), the successive-petition provision poses less of a hurdle because § 2244(b)(2)(A) carves out an exception for those claims.[362] For ineligibility categories creating challenges that remain premature at trial, federal courts may simply apply *Panetti*'s logic and hold that petitions containing such claims are not "second or successive." If an ineligibility claim is presented in a successive petition, but barred because it does not qualify under § 2244(b)(2)(A) or because the *Panetti* logic does not apply, courts may nonetheless interpret the statute in a way that does not "close [the courthouse] doors" to non-paradigm ineligibility categories that Congress did not consider.[363] I do not theorize every other conceivable statutory construction here, but the most obvious interpretive ma-

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357 *See* Panetti v. Quarterman, 551 U.S. 930, 947 (2007) (quoting Barnard v. Collins, 13 F.3d 871, 878 (5th Cir. 1994) ("[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ." (alteration in original)).

358 *Panetti*, 551 U.S. 930; *Martinez-Villareal*, 523 U.S. at 645–46.

359 *Panetti*, 551 U.S. at 943–47; *Martinez-Villareal*, 523 U.S. at 644.

360 *See Panetti*, 551 U.S. at 943–44 (stating that the § 2244(b) is not "self-defining" but rather "takes its full meaning from [the Court's pre-AEDPA] case law"); *Martinez-Villareal*, 523 U.S. at 645–46 (rejecting a literal reading of § 2244(b) to avoid "perverse" results).

361 *Panetti*, 551 U.S. at 946 (quoting Castro v. United States, 540 U.S. 375, 381 (2003)).

362 These claimants may still face considerable difficulty. For example, they must still seek authorization from a circuit court under § 2244(b)(3) before filing their successive petitions, and that authorization ruling is not reviewable. *See* 28 U.S.C. § 2244(b)(3)(E) (2006). Because there is no certiorari review of authorization determinations, ineligibility claimants may be irreversibly but erroneously denied relief in that procedural posture. *See, e.g.*, *In re* Lewis, 484 F.3d 793 (5th Cir. 2007) (per curiam) (time-barring *Atkins* claimant on authorization motion even though statute does not seem to permit consideration of affirmative defense on such motion). Moreover, a court might deny relief on a meritorious claim because that claim was not "previously unavailable" under § 2244(b)(2)(A).

363 *See Panetti*, 551 U.S. at 946.

neuver would, pursuant to the Supreme Court's statement that the AEDPA codifies existing abusive- and successive-writ jurisprudence,[364] imply to § 2244(b) the "ends of justice" exception that the Court has always recognized.[365]

Statute of Limitations. 28 U.S.C. § 2244(d)(1) specifies the "trigger dates" for the one-year limitations period on filing federal habeas petitions. The limitations period runs from the latest of four events: (1) the date a conviction becomes final on direct review; (2) the date on which a state-created impediment to filing is eliminated; (3) the date on which the Supreme Court recognized a retroactively applicable constitutional right; or (4) the date on which a claim's factual predicate could be discovered through due diligence.[366] Section 2244(d)(2) tolls the limitations period during state postconviction proceedings. Whereas § 2244(b)'s successive petition limits have common law antecedents, the statute of limitations does not. Any avoidance-based interpretation of § 2244(d) must therefore be predicated on something other than the theory that AEDPA codified some existing doctrine. As I explain below, the Suspension Clause cases referenced in Part III.C.2.a provide a framework for recognizing an equitable-tolling exception to the statute of limitations.[367]

For paradigm ineligibility claims (in which the petitioner argues that no aggravating circumstances exist), the limitations period will usually begin to run on the date that the conviction becomes final under § 2244(d)(1)(A). For categories of ineligibility that the Supreme Court has recently recognized (such as mentally retarded and juvenile offenders), the limitations period usually begins the day after the case is decided under § 2244(d)(1)(C). For new substantive categories of ineligibility, the applicable limitations trigger will depend on the attributes of the claim created. No matter which subsection of § 2244(d) applies, there is no statutory exception either for crime innocence or for death ineligibility. Because *Atkins* has forced the issue, the limitations question is only now percolating in the courts of appeal. At least the Fifth Circuit appears poised to time-bar and allow the execution of offenders it has legally determined to be mentally retarded.[368]

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364 *See supra* notes 351–56 and accompanying text.

365 *See supra* Part I.A.2.

366 28 U.S.C. § 2244(d)(1)(A)–(D).

367 An avoidance rationale might also support reading certain ineligibility claims to fall under the § 2244(d)(1)(B) trigger for the removal of state-created filing obstacles or under the § 2244(d)(1)(D) trigger for the discovery of a claim's factual predicate with due diligence.

368 *See* Rivera v. Quarterman, 505 F.3d 349, 354–55 (5th Cir. 2007).

Although the Supreme Court has never formally affirmed the existence of equitable tolling under § 2244(d),[369] every court of appeals to consider the issue has recognized that events not specified in the statute may equitably toll the statute of limitations[370]—usually upon a showing of due diligence and extraordinary circumstances.[371] The circuits divide on the question of whether a showing of crime innocence equitably tolls the statute of limitations,[372] with several suggesting that the rule applies in order to avert Suspension Clause problems.[373] Other courts have avoided Suspension Clause questions by holding that an offender could not show actual innocence.[374] Justices Steven Breyer, Ruth Bader Ginsburg, John Paul Stevens, and David Souter have all indicated that they would consider a form of equitable tolling to avoid unjust applications of the statute.[375] An advisory note to the 2004 Habeas Rule Amendments, without taking a position, observes that equitable tolling is universally recognized.[376]

In the death-ineligibility context, questions of equitable tolling most frequently arise in connection with *Atkins* mental retardation and *Ford* competency claims. Several circuits equitably toll the statute of limitations once a prisoner shows that he is not competent to be executed,[377] and others toll the statute only once the petitioner shows a causal connection between his mental condition and his failure to

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369 *See* Pace v. DiGuglielmo, 544 U.S. 408, 418 n.8 (2005).

370 *See, e.g.*, Neverson v. Farquharson, 366 F.3d 32, 41 (1st Cir. 2004); McClendon v. Sherman, 329 F.3d 490, 492 (6th Cir. 2003); Helton v. Sec'y for Dep't of Corrs., 259 F.3d 1310, 1312 (11th Cir. 2001); Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000); Harris v. Hutchinson, 209 F.3d 325, 329–30 (4th Cir. 2000); Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000); Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999); Miller v. N.J. State Dep't of Corrs., 145 F.3d 616, 617–18 (3d Cir. 1998); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998); Davis v. Johnson, 158 F.3d 806, 810–12 (5th Cir. 1998); Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal., 128 F.3d 1283, 1288–89 (9th Cir. 1997).

371 *See* Lawrence v. Florida, 549 U.S. 327, 336–37 (2007).

372 *Compare, e.g.*, Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000) ("Equitable tolling would be appropriate, for example, when a prisoner is actually innocent." (citation omitted)), *with* Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002) ("[P]etitioner's claims of actual innocence . . . [do not] justify equitable tolling of the limitations period.").

373 *See* Souter v. Jones, 395 F.3d 577, 601–02 (6th Cir. 2005) (collecting and citing cases); sources cited *supra* note 344; *cf.* Wyzykowski v. Dep't of Corrs., 226 F.3d 1213, 1218 (11th Cir. 2000) (stating that issue of actual innocence should be resolved before potential conflict with the Suspension Clause is considered).

374 *See, e.g.*, Doe v. Menefee, 391 F.3d 147, 174 (2d Cir. 2004) (declining to decide whether actual innocence justified equitable tolling of limitations period on grounds that offender did not make sufficient showing of innocence).

375 *See* Duncan v. Walker, 533 U.S. 167, 183–84 (2001) (Stevens, J., joined by Souter, J. concurring in part and concurring in the judgment); *id.* at 192–93 (Breyer, J., joined by Ginsburg, J. dissenting)

376 *See* Advisory Committee Notes to Rule 3 (2004 Amendment) of the Rules Governing Section 2254 Cases in the United States District Courts.

377 *See, e.g.*, Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal., 163 F.3d 530, 541 (9th Cir. 1998) (holding that mental incompetence was an extraordinary circumstance beyond prisoner's control that justified equitable tolling).

file a timely petition.[378] I can locate no federal appellate decision permitting equitable tolling for an *Atkins* claim without the presence of some other complicating factor or a showing that mental retardation in some way frustrated the timeliness of federal filing.[379]

The result of such confused treatment in the courts of appeals, and of particularly harsh treatment in the Fifth Circuit (which includes the Texas capital docket), is that many offenders with legitimate ineligibility challenges will not have the merits of their claims entertained in federal court. Given the universal recognition of equitable tolling in the courts of appeal, as well as the procedural abyss of state *Atkins* and *Ford* adjudication,[380] future litigants may persuade courts to apply equitable tolling to avoid Suspension Clause or other constitutional issues—perhaps automatically upon a colorable showing of ineligibility.

The most heavily litigated categories of non-paradigm ineligibility will probably involve questions of diminished capacity, such as mental retardation, incompetence, and, potentially, mental illness. State postconviction litigation of these claims is highly problematic,[381] and courts may be receptive to the theory that, where procedural obstacles are too aggressively imposed on certain ineligibility categories, they implicate the Suspension Clause.[382] In Suspension Clause and equitable tolling jurisprudence, courts have the two concepts they would need to undertake constitutional avoidance: a constitutional provision that undermines a literalist statutory interpretation, and a plausible alternative construction. Several courts have been willing to equitably toll the limitations period upon colorable showings of crime innocence on that basis,[383] and there is actually a stronger argument for the statutory cognizability of ineligibility claims.[384] There might be still other avoidance arguments, including those involving § 2244(d)(1)(B) (changing the limitations trigger to the date state-imposed obstacles are removed) and § 2244(d)(1)(D) (changing the

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378 *See, e.g.*, Lawrence v. Florida, 421 F.3d 1221, 1226 (11th Cir. 2005) (refusing to apply equitable tolling absent showing of "causal connection between [petitioner's] alleged mental incapacity and [petitioner's] ability to file a timely petition"); Nara v. Frank, 264 F.3d 310, 320 (3d Cir. 2001) (holding that in order to justify equitable tolling, "mental incompetence must somehow have affected the petitioner's ability to file a timely habeas petition" (citation omitted)).

379 *See, e.g.*, *In re* Lewis, 484 F.3d 793, 798 n.20 (5th Cir. 2007) ("We have previously applied the limitations period to *Atkins* claims, including a claim in which the petitioner had made a prima facie showing of mental retardation.").

380 *See supra* Part III.A.

381 *See supra* Part III.A.2.

382 *See supra* notes 340–44 and accompanying text.

383 *See supra* notes 372–73.

384 *See supra* Part III.B. I do not mean to imply that statutory cognizability is the only, or even the major, factor that goes into an equitable-tolling determination.

limitations trigger to the date a claim's factual predicate is discoverable).

The important point is that the statute of limitations, which lacks a common law antecedent, is uniquely amenable to Suspension Clause challenges because ineligibility turns on membership in a death-exempt category, and because Suspension Clause challenges may proceed on that level of categorical granularity.[385] Although I doubt that courts would actually declare the limitations statute to be an unconstitutional suspension of the writ, they should be willing to invoke that doctrine to conduct constitutional avoidance—thereby rejecting the application of § 2244(d) to meritorious ineligibility claims.

CONCLUSION

I have tried to map the various common law, statutory, and constitutional dimensions of the burgeoning death-ineligibility phenomenon. Our existing habeas corpus regime is largely informed by critiques of Warren-era litigation, which are not well suited to ineligibility adjudication. Under the prevailing habeas model, offenders with meritorious ineligibility claims may be executed because the petition containing their claim is procedurally defective. By invoking the Suspension Clause, equitable principles, and the canon of constitutional avoidance, federal courts may nonetheless be able to avert state executions that the Eighth Amendment categorically forbids.

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385 *See supra* notes 341–44 and accompanying text.