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Executing the Factually Innocent: The U.S. Constitution, Habeus Corpus, and the Death Penalty: Facing the Embarrassing Question At Last

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ARTICLE

EXECUTING THE FACTUALLY INNOCENT: THE U.S. CONSTITUTION, HABEAS CORPUS, AND THE DEATH PENALTY: FACING THE EMBARRASSING QUESTION AT LAST

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I. INTRODUCTION[1]

On Saturday July 13, 1985, after putting her two young children to bed, Carolyn Muncey disappeared into the night. Her badly beaten body was found the next day about 100 yards away from her home, where it was partially concealed in a brush pile. She had been partly strangled. Death had resulted one or two hours after she suffered a severe blow to her left forehead, sometime between nine and ten pm. She was dressed in her nightgown, housecoat and underclothing. Her body revealed no evidence of trauma associated with sexual assault. The murder happened in Union County, a rural community of about 12,000 people, located in the hills of East Tennessee.

"Little Hube," Carolyn's husband, in a drunken stupor, tearfully confessed to two women that he had killed his wife. Apparently Little Hube came home from a dance that Saturday night, argued with his wife and then beat her, unintentionally causing her death. A few weeks prior to the killing, Little Hube told a third woman he was going to get rid of his wife. A fourth woman stated that she was asked by Little Hube to provide him with an alibi for the night of the murder, for he had left the dance early and did not have an alibi at the estimated time of death. Little Hube grew up in Union County. His reputation for domestic abuse was well-known in the community. It was also common knowledge that Carolyn was contemplating leaving Little Hube because of their marital difficulties.

Rather than charging Little Hube, the police investigation focused on a neighbor and stranger, twenty-three-year-old Paul House, who lived two miles down the road with his girlfriend. He was seen in the vicinity where the body was found, had been out for a walk the night of the murder, and had arrived home that night with unexplained bruises, in a disheveled condition. He was panting, hot and exhausted. He had lost his shoes and shirt. All this might have been dismissed but for the fact that House was on parole, and had a single prior conviction for sexual assault. House became the only suspect when police discovered semen on Carolyn's nightgown. In his two interrogations by police, House maintained his innocence.

At House's trial, the prosecution argued that House raped and then murdered his victim to escape responsibility for the sexual assault. One of Carolyn's children testified that after she had gone to bed in her room, she heard a man with a deep voice ask her mother to go outside. Even though

1. The narrative contained in the introduction is drawn from the majority and dissenting opinions in the case of *House v. Bell*, 386 F.3d. 668 (6th Cir. 2004).

House did not testify at trial, others testified that he had a deep voice. A local jury convicted House of both rape and murder. He was sentenced to death.

After he was found guilty, but before he was sentenced, House unsuccessfully attempted suicide. In the ensuing twenty years, it was discovered that the semen on the nightgown belonged to Little Hube. Experts determined that the blood stains on House's blue jeans had happened after vials of Carolyn's blood stored in police custody were spilled either accidentally or intentionally on Paul's pants. The jury never heard the witnesses that could prove the guilt of Little Hube, for the witnesses only became known long after the trial. House later testified in habeas proceedings that strangers had assaulted him the night of the murder and that was why he looked like he had been in a fight when he returned home.

Is Paul House factually innocent? On the basis of all the evidence now known in the case, can anyone decide with moral certainty Paul House killed Carolyn Muncey? If Paul House did not have anything to do with the death of Carolyn Muncey, as a factually innocent, yet wrongly convicted, individual, should he continue to be incarcerated and executed for a crime he did not commit? If Paul House is innocent, then who is guilty? Should Little Hube be prosecuted for murder?

On these foregoing facts, in my opinion, an impartial jury acting reasonably would have reasonable doubt and acquit Paul House, given the confessions of Little Hube, his propensity for violence, his arrangement of a false alibi, and his stated intention to get rid of his wife. Futhermore, additional reasonable doubt could be based on the absence of forensic evidence linking House to the crime scene, the expert testimony describing when and how blood was leaked onto House's pants, and the fact that Carolyn Muncey was never raped. Even if House's explanation of being in a fight is not believed, and if the deep pitch of his voice coincided with the deep voice heard by one of the children who had gone to bed, there is simply not enough evidence to prove House's guilt beyond a reasonable doubt. Even strong suspicion is an insufficient basis upon which to rest a conviction.

So why is Paul House about to be executed?

The simple legal answer is that Paul House has lost his appeals and been denied habeas relief.[2] Even if Paul House is factually innocent, he remains legally guilty, having been convicted in a court of law. The more complicated answer is that, unless there is a change in the law, it is almost impossible for a factually innocent person to obtain habeas relief.[3]

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2. *Id.*

3. *See* Hazel v. United States, 303 F. Supp. 2d 753 (E.D. Va. 2004) (denying claim of actual innocence and deeming as unreliable and untimely the affidavit exonerating petitioner which therefore did not meet the extraordinary high standard for freestanding claims of actual innocence); Hunt v. McDade, 2000 U.S. App. LEXIS 2849 (4th Cir. 2000) (holding that DNA results eliminating petitioner as donor of sperm found in body of raped murder victim did not to meet evidentiary burden required for freestanding claim of actual

Paul House's last hope to avoid execution rests with the United States Supreme Court. Fortunately for him, the U.S. Supreme Court decided to hear House's appeal in *House v. Bell*, 125 S. Ct. 2991 (2005). Certiorari was granted on June 28, 2005 on the following two questions:

What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera*[4] sufficient to warrant freestanding habeas relief?

Did the majority below err in applying this Court's decision in *Schlup*[5] to hold that the Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?

The challenge faced by House's appellate attorneys goes beyond the stated questions, for there currently exists a divide between law and justice that allows for the view that it is morally and legally acceptable to execute the factually innocent. Law will permit the execution of a factually innocent person; justice will not.

Consider the following exchange in another case between Judges Laura Denvir Stith and Michael A. Wolff of the Missouri Supreme Court and Assistant State Attorney General Frank A. Jung in oral argument in the 2003 appeal of convicted murderer Joseph Amrine:

> Judge Stith: "Are you suggesting, even if we find Mr. Amrine is actually innocent, he should be executed?"
>
> Mr. Fung: "That's correct, your honor."
>
> Judge Wolff: "To make sure we are clear on this, if we find in a particular case that DNA evidence absolutely excludes somebody as the murderer, then we must execute them anyway if we cannot find an underlying constitutional violation at their trial?"
>
> Mr. Fung: "Yes."[6]

Attorney General Jeremiah W. Nixon defended the government's position: "there must come a time when cases can be closed . . . . Is the state required to prove every day that someone committed a crime beyond a reasonable doubt?"[7]

Joseph Amrine won his case and obtained habeas corpus relief.[8] His release

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innocence).

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

5. Schlup v. Delo, 513 U.S. 298 (1995).

6. Adam Liptak, *Prosecutors See Limits to Doubt in Capital Cases*, N.Y. TIMES, Feb. 24, 2003, at A1.

7. *Id.*

8. State *ex rel.* Amrine v. Roper, 102 S.W. 3d 541 (Mo. 2003); *see* Ryan E. Shaw, Note, *Avoiding a Manifest Injustice: Missouri Decides Not to Execute the "Actually Innocent,"* 69 MO. L. REV. 569 (2004); Larry May & Nancy Viner, *Actual Innocence and Manifest Injustice*, 49 ST. LOUIS U. L.J. 481 (2005).

from custody was ordered, subject to any decision by the state to retry him. Amrine succeeded on a bare claim of actual innocence, independent of any alleged constitutional violation at trial. The Missouri Supreme Court held it would be a "manifest injustice" to continue Amrine's imprisonment and to eventually execute him. The Court found that Amrine had proven his actual innocence by "clear and convincing" evidence.

Amrine had been convicted by a jury solely on the basis of the testimony of three inmates, Terry Russell, Randy Ferguson and Jerry Poe, who claimed Amrine killed a fellow inmate in prison. There was no physical evidence linking Amrine to the crime scene. Six other inmates testified Amrine was away from where the stabbing occurred, and of those six, three identified prosecution witness Terry Russell as the perpetrator, who chased the deceased, Gary Barber. Correctional Officer John Noble identified Terry Russell as the killer. He saw Russell chase Barber, saw the victim pull a knife out of his back, collapse and die. Amrine's defense of innocence was rejected. He was sentenced to death. Over the next several years, one by one, Russell, Ferguson and Poe recanted, admitting that they lied under oath. When the Missouri Supreme Court addressed for the first time all the cumulative evidence in the case, it found that the recantations of all the state's key witnesses undermined confidence in the original verdict at trial. This constituted "clear and convincing"[9] evidence of innocence meriting habeas relief.

Not so lucky was a black man, Larry Griffin, a former St. Louis Missouri resident, who was convicted and executed for the drive-by shooting of nineteen-year-old Quintin Moss, a well-known drug dealer, who was fatally shot thirteen times on "The Stroll," a once notorious city block.[10] Larry Griffin's numerous appeals failed. He was executed by lethal injection in 1995. Years after his death, following an investigation led by Samuel Gross, a law professor at the University of Michigan, and a 2005 report by the NAACP legal defense and Educational Fund,[11] Jennifer Joyce, the St. Louis circuit attorney, has reopened his case. Why? It seems that Larry Griffin was innocent, and his case is solid proof that an innocent person can be wrongfully convicted and executed.

The prosecution's case against Larry Griffin rested solely upon the eyewitness testimony of a career criminal and drug addict, a white man named Robert Fitzgerald, who was in St. Louis in the federal witness protection

9. To satisfy the "clear and convincing" standard, the new evidence is enough if it "instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true." *Amrine*, 102 S.W. 3d at 548 *quoting In re* T.S., 925 S.W.2d 486, 488 (Mo. App. E.D.1996).

10. *See* Bob Herbert, *Convicted, Executed, Not Guilty*, N.Y. TIMES, July 14, 2005 at A1; Kate Zernike, *Executed Man May Be Cleared In New Inquiry*, N.Y. TIMES, July 19, 2005 at A15.

11. Samuel Gross, *Report of June 10, 2005*, http://www.law.umich.edu/NewsandInfo/griffin-report.pdf.

program. Fitzgerald testified he heard shots, saw the gunmen, and identified Griffin out of a photo line-up. After Griffin was executed, Fitzgerald's federal felony charges were dropped. Before Fitzgerald died in 2004, he disclosed in 1993 for the first time that he was shown a single photograph that was marked on the back with the name of Larry Griffin, by a police officer, who purportedly suggested, "We happen to know who did it."[12]

It is now believed Fitzgerald was not even at the crime scene, for no one who was there, including the victim's sister, Patricia Moss Mason; a police officer, Michael Ruggeri, who was the first officer on the scene; nor a passerby, Wallace Connors, who was hit by a stray bullet, ever recalled seeing a white man in the black neighborhood or identifying Larry Griffin as one of the shooters. Without Fitzgerald's evidence, there is no evidence that places Larry Griffin either at the crime scene or in the car from which the shots were fired. Larry Griffin's case is well on its way to becoming the ultimate reason why the death penalty ought to be abolished. Despite the NAACP report, Gordon Ankney, whose work as prosecutor convinced the jury of Larry Griffin's guilt, remains convinced of Griffin's guilt.

Why did the criminal justice system fail both Larry Griffin and, so far, Paul House? Should the habeas corpus avenue be bypassed because it offers little practical chance to free a factually innocent person? Ought prosecutors to follow the examples set in New York State and Florida and initiate a motion before a judge to vacate a wrongful conviction based on new evidence of innocence?[13] Or will the Supreme Court use its opportunity in *House* to devise a fundamentally fair, practical and clear test to free an innocent person? Just what is the appropriate constitutional standard to review claims of actual innocence in habeas applications?

At stake is the life and liberty of innocent people.

This Article advances the proposition that the mere conviction of a factually innocent person is a constitutional violation. Convicting the wrong person goes well beyond an error in fact as to the identity of the perpetrator. Substantive due process of law goes well beyond fair process and requires that no factually innocent person be convicted and punished for a crime he or she did not commit. If the Constitution means anything at all, it stands for truth and justice. If this means a case must be reopened to free the innocent, so be it.[14] If

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13. Kate Zernike, *In a 1980 Killing, a New Look at the Death Penalty*, N.Y. TIMES, July 19, 2005 at A15.

13. Ihosvani Rodriguez & Chrystian Tejedor, *After 26 Years, DNA Evidence Clears Man Known As 'Bird Road Rapist': Freed Inmate Never Lost Faith,* SUN-SENTINEL, Aug. 4, 2005, at A1; Sabrina Tavernise, *Prosecutors Asking Court to Free Convict*, N.Y. TIMES, July 23, 2005, at B5.

14. There can never be a limitation period for the introduction of evidence of actual innocence. It is a fundamental principal of justice that the innocent must always be freed and compensated for their suffering. *See* Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus, and Justice*, 12 GEO. MASON U. CIV. RTS. L.J. 233 (2002).

this means the state must continue to bear the burden of proof beyond a reasonable doubt to sustain a conviction in habeas corpus proceedings before a judge, so be it. Sacrificing the innocent is anathema to the Constitution and the natural-law roots of this nation. Fundamental fairness and substantive due process will never tolerate putting law ahead of justice. Executing the factually innocent is incompatible with justice. This is a fundamental principle of a society governed by the rule of law.[15] It is time the Court directly confront the question of whether the execution of an innocent person is a constitutional violation, and, if so, whether the conviction and detention of a factually innocent person is too.

II. THE CURRENT LAW

A. "A Truly Persuasive Showing of Actual Innocence": *Herrera v. Collins*[16]

Public Safety Officer David Rucker's body was found late in the evening on a stretch of highway beside his patrol car near Brownsville, Texas. About the same time, a few miles down the same road, speeding way from the crime scene, was a car that pulled over in response to Police officer Enrique Carrisalez's pursuit. Carrisalez was shot as he appeared to engage in conversation with the driver. Lionel Torres Herrera was arrested a few days later. In January 1982, he was found guilty of the capital murder of Carrisalez

15. I define the "rule of law" as government by laws that people are willing to obey because the laws are inherently just. The ideal of the "rule of law" is to live in a democratic society that places constitutional limits on the power of government, permanently protects inalienable human rights and fundamental freedoms from undue encroachment, and provides equality before laws administered by an independent judiciary. The "rule by law" is the antithesis of the "rule of law," which I define as government by unjust laws in any society, including democratic societies, where the government may exercise arbitrary powers and may abridge at will inalienable human rights and remove from constitutional protection the inalienable civil rights of any human being, such as by convicting, incarcerating and executing innocent persons. The main difference between these opposite concepts is that justice is the defining characteristic in a society governed by "rule of law," and deferential coerced obedience is the defining characteristic in a "rule by law" society. Without a moral component that squares with the eternal and natural law of God that objectively sets up a standard of righteousness, there can be no rule of law, but the tyrannical imposition of rule by law. A caution is in order: my definition of the rule of law is not universally held, for others, such as Supreme Court Justice Antonin Scalia, label what I define as "rule by law" as the rule of law. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). The idea of the rule of law is thus universally misunderstood and is normally assumed to be a way to describe binding legal rules of general application. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); *see also* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

16. The following factual narrative is drawn from the opinion of Chief Justice Rehnquist, in *Herrera v. Collins*, 506 U.S. 390, 393-98 (1993).

and sentenced to death. In July 1982, he pleaded guilty to the murder of Rucker. Herrera appealed his conviction and sentence for the murder of Carrisalez. In state court, he argued unsuccessfully that the identification evidence was unreliable and inadmissible. Subsequently, he filed state and federal habeas corpus applications, on the same grounds, which were also dismissed.

In 1984, Herrera's brother and convicted felon, Raul Herrera Sr., died. Juan Franco Palacious, who was a former cellmate of Raul, and Raul's former attorney, Hector Villarreal, signed affidavits claiming that Raul had confessed to the murders of both Rucker and Carrisalez. According to the attorney, Raul, his father, his brother, Lionel, Rucker, and the Hidalgo County Sheriff were all part of an illegal conspiracy to traffick in drugs. Things had gone wrong and Raul shot both Rucker and Carrisalez. Raul did not come forward at his brother's trial because he expected Lionel would be acquitted. After his brother's conviction, Raul tried to blackmail the sheriff. His enforcer, Jose Lopez, killed Raul. Lopez was allegedly present at the murders of Rucker and Carrisalez. This new evidence led to a second round of state and federal habeas relief applications by Herrera, who now alleged for the first time he was factually innocent of the murders of both Rucker and Carrisalez, and that his execution would violate the Fourteenth and Eight Amendments to the U.S. Constitution. The Supreme Court granted cert in 1992 to hear this new second petition.

B. The Majority Opinion

Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, denied the petition for a variety of legal reasons. They decided Herrera could not now complain, for he had had a fair trial. He benefited from all the constitutional provisions in place to guard against the conviction of an innocent person: due process, the presumption of innocence, and the requirement that the prosecution prove its case beyond a reasonable doubt.[17] After trial, Herrera's presumption of innocence no longer existed, for it had disappeared upon his conviction.[18] Due process meant procedural due process, having regard to constitutional safeguards, including those found in the Sixth Amendment.[19] No defendant is entitled to a perfect trial. The Court accepted

17. Herrera v. Collins, 506 U.S. 390, 398 (1993) (citing *In re* Winship, 397 U.S. 358 (1970)).

18. *See* Ross v. Moffit, 417 U.S. 600, 610 (1974) ("The purpose of the trial stage from the state's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt.").

19. Coy v. Iowa, 484 U.S. 1012 (1988) (right to confront adverse witnesses); Taylor v. Illinois, 484 U.S. 400 (1988) (right to compulsory process); Gideon v. Wainright, 372 U.S. 335 (1963) (right to the assistance of counsel); Strictland v. Washington, 466 U.S. 668 (1984) (right to effective assistance of counsel); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to a jury trial); Brady v. Maryland, 373 U.S. 83 (1963) (right to the disclosure of

the risk that an innocent person will inevitably be mistakenly convicted. Relying upon *Patterson v. New York*,[20] the Court made it clear it was not willing to "paralyze our system for enforcement of the criminal law."[21] Sacrificing the odd innocent person was compatible with a criminal justice system whose central purpose is to "convict the guilty and free the innocent."[22] The real problem with Herrera's petition was that the majority did not believe he was innocent. If he were innocent, why did he plead guilty to one murder? Why did Herrera write a handwritten letter apologizing for the killing of both police officers? Why did Herrera wait six years after the death of his brother to collect affidavit evidence that shifted responsibility for the murders to Raul, who could not be cross-examined as to inconsistencies littered throughout the affidavits? Rather than convincing the majority of his innocence, Herrera came across as someone who was trying to perpetuate a fraud upon the Court.

However, the underlying premise of Herrera's claim of innocence did trouble the Court. Chief Justice Rehnquist assumed for the sake of argument "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."[23] Wary of imposing heavy workloads upon the federal judiciary, Chief Justice Rehnquist set an almost impossible hurdle for an innocent person to overcome, for "the threshold showing such an assumed right would necessarily be extraordinarily high."[24] Hearing claims alleging factual innocence would be disruptive, disturb the need for finality, and impose huge practical problems upon prosecutors who may have to retry an old case when prosecution witnesses may have died and memories have faded.

The majority was of the view that an appeal to the Supreme Court ought to be the last resort after all other means of appeal had been completely exhausted. The sentiment of the Court was aptly put by Justices Scalia and Thomas who wrote, "With any luck, we shall avoid ever having to face this embarrassing

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exculpatory evidence); *In re* Murchison, 349 U.S. 133 (1955) (the right to a fair trial in a fair tribunal); Beck v. Alabama, 447 U.S. 625 (1980) (right to be convicted of a lesser offense in death penalty cases.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

20. Patterson v. New York, 432 U.S. 197, 208 (1977) ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.").

21. *Herrera*, 506 U.S. at 399.

22. *Id.* at 398 (citing United States v. Nobles, 422 U.S. 225, 230 (1975)).

23. *Id.* at 417.

24. *Id.*

question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon."[25] The proper avenue to pursue justice for an innocent person is not the courts, but the discretionary mercy of the head of state, be it the Governor or the President, as the case may be. Executive clemency historically has been used, not just to grant mercy to the truly guilty but to free the factually innocent.[26]

Alternatively, state courts are to be preferred to federal courts to decide claims of factual innocence. This is because the purpose of a federal habeas court is "to ensure that individuals are not imprisoned in violation of the Constitution."[27] The better place to correct an error of fact, including a finding of guilt or innocence, is in a state court. The federal courts are not to serve as collateral proceedings to re-litigate state trials.[28] For this reason, Chief Justice Rehnquist cited to older, established authorities to explain that a federal habeas court will not weigh the evidence,[29] nor reexamine facts establishing guilt.[30] It is at trial, "within the limits of human fallibility,"[31] where the decisive battle over guilt and innocence must be fought and won.[32]

Implicit in Chief Justice Rehnquist's opinion is the view that the conviction and incarceration of a factually innocent person is not a constitutional violation. He adopts Justice's Holmes's divorce of law from morality by separating the question of guilt or innocence from the preservation of constitutional rights: "What we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."[33] Chief Justice Rehnquist then distanced himself from the Court's decision in *Jackson v. Virginia*,[34] which held that a federal habeas court may review the trial record and decide whether the evidence was sufficient to convict a defendant beyond a reasonable doubt, by rationalizing, "the Jackson inquiry does not focus on whether the trier of fact made the *correct* guilt or innocent determination, but rather whether it made a *rational* decision to convict or acquit."[35]

In my opinion, Chief Justice Rehnquist lost sight of the rule of law, for justice is concerned with the correct decision as to guilt or innocence. Paramount instead is law, even if injustice occurs, so long as rational decisions are made. This reasoning is deeply flawed, for it is inconsistent with the

25. *Id.* at 428.
26. *Id.* at 411-16.
27. *Id.* at 400.
28. Barefoot v. Estelle, 463 U.S. 880, 887 (1983).
29. Hyde v. Shine, 199 U.S. 62, 84 (1905).
30. *Ex parte* Terry, 128 U.S. 289, 305 (1888).
31. Wainwright v. Sykes, 433 U.S. 72, 90 (1977).
32. Herrera v. Collins, 506 U.S. 390, 416 (1993).
33. Moore v. Dempsey, 261 U.S. 86, 87-88 (1923).
34. Jackson v. Virginia, 443 U.S. 307 (1979).
35. *Herrera*, 506 U.S. at 402.

bedrock constitutional values upon which the criminal justice system is based.

Quoting from the decision of former Chief Justice Warren in *Townsend v. Sain*, Chief Justice Rehnquist held that a bare claim of factual innocence was not a ground for federal habeas relief: "[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."[36] Although Chief Justice Rehnquist conceded that the federal habeas courts have "equitable discretion" to "see that federal constitutional errors do not result in the incarceration of innocent persons,"[37] only a claim of an independent constitutional violation in the underlying state proceeding would permit a federal habeas court petition to proceed. It is only through this "gateway" of an independent constitutional violation, that a federal habeas court can assume jurisdiction and decide on its merits a supplemental claim that there has been a fundamental miscarriage of justice on the basis that a factually innocent person has been wrongfully convicted and unjustly detained.[38] The fundamental miscarriage of justice exception is not available to a freestanding claim of actual innocence.[39] In concurring opinions, Justices Kennedy and O'Connor agreed in principle that "executing the innocent is inconsistent with the Constitution,"[40] and "that the execution of a *legally and factually* innocent person would be a constitutionally intolerable event."[41] Thus the execution of a legally guilty but factually innocent person would presumably be constitutionally tolerable. Herrera's execution could proceed because he was legally guilty and "not innocent in any sense of the word."[42] Justice O'Connor observed that not one judge, in any court, state or federal, ever expressed any doubt about Herrera's guilt.[43] For this reason, in Herrera's case, the issue was not "whether a State can execute the innocent,"[44] but "whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew . . . ."[45]

Justices O'Connor and Kennedy emphasized that the *Herrera* case did not answer the question "whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open."[46] For this reason, the Supreme Court reserved on the question it granted certiorari, "whether it violates due process or constitutes cruel and unusual punishment for a State to

36. Townsend v. Sain, 372 U.S. 293, 317 (1963).
37. *Herrera*, 506 U.S. at 404.
38. *Id.*
39. *Id.* at 404-05.
40. *Id.* at 419.
41. *Id.* (emphasis added)
42. *Id.*
43. *Id.* at 427.
44. *Id.* at 420.
45. *Id.*
46. *Id.* at 427.

execute a person who, having been convicted of murder after a full and fair trial, later alleges that newly discovered evidence shows him to be actually innocent."[47]

Justices Scalia and Thomas expressed regret at this lost opportunity, stating, "There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."[48]

If Herrera could have shown he was factually innocent, Justice White assumed it would be unconstitutional to execute an innocent person. Herrera's evidence fell far short of the standard suggested by Justice White: "[P]etitioner would at the very least be required to show that based on the proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'"[49]

In the end, the Supreme Court Justices who signed on to the majority opinion chose not to take this opportunity to hold as a matter of law that the execution of a factually innocent person was a constitutional violation. If anything, the Court did everything it could to discourage a future claim by a factually innocent person being made before it again. As for Lionel Herrera, he was still protesting his innocence just prior to his execution on May 13, 1993.[50]

C. The Dissenting Opinion

Justices Blackmun, Stevens and Souter agreed that the execution of a factually innocent person would violate both the Eighth and Fourteenth Amendments to the U.S. Constitution.[51] They went further and suggested it also might violate the Eighth Amendment to imprison someone who is actually innocent.[52]

The dissenting Justices thought it was "perverse" that the majority turned its back on recent habeas jurisprudence that showed a trend toward embarking upon a fact-based investigation into facts supporting a petitioner's actual innocence.[53] Even if a defendant had a constitutionally perfect trial, a second chance at justice was deserved if that individual were factually innocent,

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47. *Id.*

48. *Id.* at 427-28.

49. *Herrera*, 506 U.S. at 429 (White, J., concurring) (citing Jackson v. Virginia, 443 U.S. 307, 314 (1979)).

50. *Man in Case on Curbing New Evidence is Executed*, N.Y. TIMES, May 13, 1993, at A14.

51. *Herrera*, 506 U.S. at 432, 435.

52. *Id.* at 432, n.2.

53. *Id.* at 437-38.

justifying a "powerful and legitimate interest" in release from custody.[54] "Newly discovered evidence of petitioner's innocence does bear on the constitutionality of his execution."[55] As for the comment in *Townsend* that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus," it was dismissed by the dissenting Justices as "distant dictum" and not binding precedent since that Court was never asked to decide whether the execution of an innocent person violated the Constitution.[56] *Townsend* thus posed no bar to the hearing of an actual innocence claim.

The dissenting Justices also harshly criticized the "gateway" hurdle that blocked any freestanding claim for habeas relief, for it had the effect of placing an insurmountable obstacle in the path of any petitioner whose only claim was based on factual innocence. This result only makes sense if the goal of the Court is to deny habeas relief whenever possible,[57] for the "gateway" condition filters out genuine as well as fraudulent claims of innocence from petitioners who cannot show other kinds of constitutional violations at trial.

The dissenting Justices rejected the majority's favored remedy of executive clemency for innocent prisoners.[58] An executive pardon is an act of grace that is exercised in the arbitrary discretion of a politician and is not subject to review.[59] It is not an acceptable substitute for rectifying a constitutional wrong, where the remedy is governed by legal principles. The rule of law requires a judicial remedy for the violation of a legal right.[60]

What ought to be the standard of proof on a claim of actual innocence, and upon whom does this burden of proof fall? In answering these questions, the dissenting justices offered their definition of the undefined standard articulated by the majority, which put the burden on the petitioner to establish "a truly persuasive demonstration of actual innocence." The dissenting justices adopted a test that required the petitioner to show that he "probably is innocent."[61]

All the Justices agreed that once a conviction results, the burden of proving innocence falls upon the legally guilty petitioner.[62] The rationale for this shift in the burden of proof is based on the assumption that the petitioner was

54. *Id.* at 438-39.

55. *Id.* at 437.

56. *Id.*

57. *Id.* at 439.

58. *Id.*

59. *Id.* at 440.

60. *Id.*; *see also* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

61. *Id.* at 442.

62. *Id.* at 443.

"validly convicted."[63] The presumption of innocence is stripped after conviction, for the government has met its burden of proving its case beyond a reasonable doubt.[64] It would be unfair to the State, which might have the difficult task of retrying an old case, if the petitioner simply had the burden of just raising a reasonable doubt about guilt.[65] A case-by-case determination is required to weigh carefully the new evidence of innocence against the evidence of guilt contained in the trial record.[66] If a petitioner can show that he is probably actually innocent, then the "truly persuasive" demonstration has been met.[67]

Applying their interpretation of the "truly persuasive" test to Herrera's new evidence, the dissenting justices found that Herrera had satisfied the test on the strength of Hector Villareal's affidavit alone, for his status as an attorney and as a former state judge gave his evidence about Raul's confession credibility.[68] Herrera's case should have been remanded to District Court for a hearing on the merits.[69]

III. THE OBLIGATION TO NEGATE ADVERSE CIRCUMSTANTIAL EVIDENCE ON A COLORABLE CLAIM OF ACTUAL INNOCENCE: *SCHLUP V. DELO*

Lloyd E. Schlup Jr., an inmate at a Missouri jail claimed he was factually innocent of the murder of a black inmate, Arthur Dade, who was stabbed to death by white prisoners.[70] Schlup was convicted solely on the eyewitness testimony of one guard and the read-in pre-trial deposition of another.[71] He was sentenced to death. The District Court declined to reach the merits of Schlup's claim of innocence because his proffered evidence did not meet the threshold of "actual evidence."[72] Certiorari was granted to consider whether a "clear and convincing" standard "provides adequate protection against the kind of miscarriage of justice that would result from the execution of a person who is actually innocent,"[73] but denied on Schlup's *Herrera* claim.[74]

Schlup was ultimately successful, for his case was remanded to the District

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63. *Id.*

64. *Id.*

65. *Id.* at 442-43.

66. *Id.* at 443-44.

67. *Id.* at 444.

68. *Id.* at 445.

69. *Id.*

70. Schlup v. Delo, 513 U.S. 298, 301-02 (1995).

71. *Id.* at 302, n.1.

72. *Id.* at 301 (applying Sawyer v. Witley, 505 U.S. 333, 336 (1992) ("[A habeas petitioner] must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.").

73. *Schlup*, 513 U.S. at 301.

74. *Id.* at 315, n.31 (applying *Herrera* and ruling that Schlup's claim of factual innocence did not by itself provide a basis for relief.).

Court for further proceedings consistent with the Supreme Court's opinion. To overcome procedural bars to reviving these constitutional claims in a second round of habeas applications, Schlup supplemented these claims with "a colorable claim of factual innocence."[75] Linking miscarriages of justice to innocence qualified Schlup for a standard of proof that did not have to be clear and convincing: he could show that the constitutional error at trial "probably resulted" in the conviction of a factually innocent person.[76] He argued that his trial was constitutionally flawed because his counsel was ineffective for failing to interview alibi witnesses and the State had failed to disclose critical exculpatory evidence.

Unlike Herrera, who raised a substantive claim of factual innocence, Schlup used his claim of innocence as a gateway to persuade the Court to hear his procedural constitutional claims. Schlup's evidence of innocence was strong enough to convince the Court to lack confidence in the verdict at trial. Schlup's burden of proof was less than Herrera's, who had a constitutionally perfect trial and had to meet the unrealistic test of " a truly persuasive showing of actual innocence." Schlup only had to prove sufficient doubt about his guilt to show his conviction was a miscarriage of justice, for his trial was less than constitutionally perfect and therefore unfair.

This distinction is illustrated by Justice Stevens, who authored the majority opinion:

> "If there were no question about the fairness of the criminal trial, a *Herrera* type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish Schlup's innocence. On the other hand, if the habeas court were merely convinced that those new facts merely raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims."[77]

Justice Stevens and his colleagues Justices O'Connor, Souter, Ginsburg, and Breyer took this opportunity to set out general principles affecting claims of factual innocence. Despite statutory[78] and case law efforts[79] to limit the successive use of habeas applications, a habeas court must not shirk from its duty to accomplish the ends of justice.[80] As an equitable remedy, habeas corpus must prevail over the interests of judicial resources, finality and comity, which

75. As suggested by Justice Powell in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

76. This is the standard in *Murray v. Carrier*, 477 U.S. 478 (1986).

77. *Schlup*, 513 U.S. at 317.

78. For example, in 1966, Congress amended 28 U.S.C. § 2244(b) to shift the balance in favor of finality to discourage successive habeas applications. In 1976 Congress created Rule 9(b) to modify the Rules Governing Habeas Corpus proceedings in response to pressure to cut back on repetitive filings.

79. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467 (1991).

80. *Schlup*, 513 U.S. at 319-20.

must yield to protecting victims from fundamental miscarriages of justice,[81] the ultimate injustice being the conviction, imprisonment, and execution of a factually innocent person. These cases are rare, for reliable new evidence in the form of exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence rarely surface after a trial, with the unfortunate consequence that innocent persons who have been wrongly convicted end up being executed.[82] "The quintessential miscarriage of justice is the execution of a person who is entirely innocent."[83] It is a fundamental value at the core of our justice system that no innocent person suffer harm for a crime he or she did not commit.[84] It is this concern for individual life and liberty that is at the heart of the doctrine that "it is better that ninety-nine offenders should escape, than that one innocent man should be condemned."[85]

For these reasons, the majority concluded that a more lenient evidentiary standard was required of someone who sought habeas relief with a colorable claim of actual innocence.[86] The "probably resulted"[87] test, "more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt,"[88] was to be used in place of a standard designed for imposing the death penalty: "must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."[89] An even more rigorous standard designed to meet habeas challenges that test for the sufficiency of evidence, "no rational trier of fact *could* have found proof of guilt beyond a reasonable doubt,"[90] was also rejected.

In dissent, Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy, characterized the majority's threshold test of "probably resulted" as "confusing"[91] and preferred the more difficult to meet "clear and convincing" test that strikes a better balance in favor of finality.[92] Even if the Court were to adopt another standard, it should be a modified version of the most difficult test used to determine the sufficiency of evidence to meet the constitutional

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81. *Id.* at 320-21.

82. *Id.* at 324.

83. *Id.* at 324-25.

84. *Id.* at 325.

85. *Id.* (citing T. STARKIE, EVIDENCE 756 (1824)); Jon O. Newman, *Beyond Reasonable Doubt*, 68 N.Y.U. L. REV. 979, 980-81 (1993).

86. *Id.* at 325-26.

87. *Id.* at 326.

88. *Id.* at 327 (This test is known as the *Carrier* standard. *See* Murray v. Carrier, 477 U.S. 478 (1986)).

89. *Id.* (This test is known as the *Sawyer* standard. *See* Sawyer v. Witley, 505 U.S. 303 (1992)).

90. *Id.* at 323, n.38 (This test is known as the *Jackson* standard. *See* Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

91. *Id.* at 339.

92. *Id.* at 342.

standard of proof beyond a reasonable doubt: "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[93]

IV. PROPOSAL

Both the *Herrera* and *Schlup* cases demonstrate the need for the Supreme Court to revisit the thorny issue of deciding what is the appropriate constitutional standard of proof that needs to be satisfied by a factually innocent person who is presumed guilty in subsequent habeas proceedings.[94] It would be a lot simpler if a conviction merely removed the presumption of innocence without attaching a presumption of guilt. Then, if new evidence were discovered that could in any way raise a reasonable doubt as to confidence in the correctness of the verdict, the verdict would be set aside and the option of a retrial would be available to the appropriate prosecuting state authority. This methodology accords with bedrock constitutional values that prize, more than anything, the avoidance of miscarriages of justice epitomized by the conviction, incarceration and execution of innocent persons. This proposal hinges on the thesis that the correctness of the verdict as to the identity of the perpetrator is a constitutional legal principle that is well within the jurisdiction of a federal habeas court to remedy.

A. Bedrock First Principles: Is it Constitutional for the State to Harm Innocent People?

The moral foundation of Anglo-American criminal law is derived from the Judeo-Christian principle that only the guilty are to be punished and that no innocent person is to suffer for the criminal acts of another. This moral principle is paramount in every civilized society that cherishes justice and lives by the rule of law. The responsibility lies with those in authority to ensure that no factually innocent person is punished, for that would be more than a grave miscarriage of justice – for the religiously observant, it would invite the wrath of God upon the judge and the jury that would condemn the innocent to incarceration or death by execution. "The Lord despises those who acquit the

93. *Id.* 340, 342.

94. *See* Schlup v. Delo, 513 U.S. 298,326, n.42 (1995) ("Schlup comes before the habeas court with a strong – and in the vast majority of the cases conclusive – presumption of guilt.") (Stevens, J.). Herrera was also presumed guilty: "Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears . . . . Here, it is not disputed that the State met its burden of proving at trial that petitioner was guilty . . . beyond a reasonable doubt. Thus, in the eyes of the law, petitioner does not come before us as "innocent," but on the contrary, as one who has been convicted by due process of law . . . ." Herrera v. Collins, 506 U.S. 390, 399 (1993).

guilty and condemn the innocent."[95]

Christians, especially, ought to be sensitive to the plight of executing the innocent. After all, Jesus Christ was innocent of any crime, and yet after two unfair illegal trial proceedings, one Jewish and another Roman, Jesus Christ was tortured and summarily executed without any chance of an appeal to worldly authorities.[96] Even in those times, the ruling authorities recognized utilitarian ideas, such as the concept that sacrifice of the innocent for the greater good of society was an acceptable price to pay in a less than perfect world.[97]

The ideal of perfect justice is impossible to achieve so long as human beings who judge others are fallible. One should not lightly accept the awesome responsibility of judging others except with humility, wisdom and grace. It is believed that in the ninth century King Alfred hanged a judge who ordered the execution of a defendant despite the verdict of jurors who had a reasonable doubt as to the guilt of the accused.[98] "Stop judging others, and you will not be judged. For others will treat you as you treat them. Whatever measure you use in judging others, it will be used to measure how you are judged."[99] In fear of making a mistake, the common law has, over time, established four fundamental principles of criminal law that have acquired the force of constitutional law and that tilt the scales of justice in favor of acquitting the innocent at the cost of letting the guilty go free.

The first of these principles is the presumption of innocence. Every accused person is assumed to be factually and legally innocent. Inevitably in some cases this amounts to a fiction, for a videotape may depict the actual commission of a crime and identify the perpetrator. Despite this perception of obvious guilt, to ensure fairness at trial, the only evidence that matters is the evidence lawfully admitted before the court, which begins proceedings with a clean slate and an open mind. Assuming the police properly did their job, the presumption of innocence, in most cases, will melt as the prosecution's case unfolds. An accused person in such a trial is often compelled to call evidence in recognition of the fact the presumption of innocence has been eroded by the strength of the prosecution's case. In other trials, the prosecution's case may be weak and unsuccessful in overcoming the presumption of innocence. In these cases, the defendant may choose not to call evidence, rely on the presumption of innocence, and be acquitted.

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95. *Proverbs* 17:15 (New Living Translation).

96. Richard C. Peck, *The Trial of Christ*, 49 THE ADVOCATE 895, 895-99 (1991).

97. *John* 11:47-53 (New Living Translation). Upon hearing of Jesus raising Lazarus from the dead, the Chief Priests and the Pharisees met to discuss the prospect of a Jewish rebellion by followers of Jesus and the inevitable Roman military response that would kill the Jewish leaders and take over the government. The High Priest Ciaphas advised, "You stupid idiots – let this one man [Jesus] die for the people – why should the whole nation perish?" From this time on, a plot was hatched to cause the death of Jesus. *Id.*

98. A. HORN, MIRROR OF JUSTICES 166-67 (1290)

99. *Matthew* 7:1-3 (New Living Translation).

The second principle, proof beyond a reasonable doubt, is linked to the first. The prosecution has the onus of proof, and must prove its case on all the essential ingredients of the charged offense beyond a reasonable doubt. This second principle thus contains three elements: the onus of proof, what must be proven and the degree of proof. The onus of proof always rests on the prosecution. As a matter of practice, the evidentiary burden may shift, but ultimately at the end of the trial, it is the job of the prosecution to have met the onus of proof in order to obtain a conviction. As to what must be proven, all essential elements of the charge must be proven. These elements normally include the identity of the perpetrator, the commission of the criminal act, the place, time and jurisdiction of the crime, the victim of the offense, and any intent required by law to commit the criminal act. This is not intended to be an exhaustive list, but is representative of what elements are normally parts of charge that must be proven beyond a reasonable doubt.

What is this "reasonable doubt?" It is a doubt based on reason, grounded in the evidence. It is the sort of doubt one can articulate by constructing a logical explanation why one has doubt. Any doubt based upon intuition or fanciful speculation falls outside this definition. No one is to be convicted if there is any doubt based on reason, having regard to the evidence, or lack of evidence, at trial.

A third fundamental principle is fairness. Without fairness, there will be bias and an improper application of the principles of a) the presumption of innocence and b) the prosecution's burden to prove its case beyond a reasonable doubt. This is why it is important to have a representative jury that is not prejudiced. That is why there is enshrined in the Constitution, the right to trial by jury,[100] so that the people can have the power to reject laws that offend the rule of law.[101] That is why there are courts of appeal to ensure the justice has been done, so that the innocent are not wrongfully convicted.

A fourth fundamental principle inextricably linked to the principles of fairness, proof beyond a reasonable doubt and the presumption of innocence is the raison d'etre of these fundamental safeguards – so that the innocent must never be convicted. If an error is to be made, one must err on the side of acquitting the guilty, lest one innocent person be convicted and punished. This principle is especially strong in societies where there is a death penalty, resulting in a historical reluctance by jurors to convict those on trial for capital offenses. The obvious reason for this is that, once an innocent person is executed and the mistake discovered, nothing can be done to rectify the situation to the unfortunate soul who paid with his or her life for the crime of another.

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100. U.S. CONST. Art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."); *see also* U.S. CONST. amend. VI.

101. *See* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997) (arguing that without jury nullification, the people lack the ability to stand up to unjust laws that are promulgated by tyrants).

The legal literature is replete with maxims that are embedded in the consciousness of anyone who has ever practiced criminal law to err on the side of protecting the innocent. Probably the most well known maxim is that attributed to Sir William Blackstone, "Better that ten guilty persons escape than one innocent person suffer."[102] There is no magic in the number ten, for a survey of the maxims known to the legal community reveals that while the number may vary from one to a million,[103] the principle is immutable: justice must always err on the side of protecting the innocent from wrongful conviction.

These four fundamental legal principles are intricately intertwined, working together like the four chambers of the heart, acting in rhythm to ensure the lifeblood of justice pulsates through the body of the community, to preserve and protect the lives of innocent persons who may be wrongfully accused of being the perpetrator of a crime. Even though these principles are not specifically enumerated in the U.S. Constitution or in the Bill of Rights, it is my position that they have constitutional status, being part of the unwritten constitution provided for by the Ninth Amendment and also implied within the substantive meaning of the due process clauses, set out in the Fifth and Fourteenth Amendments.

On July 4, 1776, when Congress proclaimed the Declaration of Independence and asserted that "self-evident" truths were "unalienable" rights bestowed by God the Creator upon all human beings, Congress included among those fundamental rights the "pursuit of happiness,"[104] an idea that tracks back to roots of Judeo-Christian morality articulated by English law professor Sir William Blackstone in his treatise, *Commentaries on the Laws of England*, which served as the foundation for the development of American law.[105] Simply put, the pursuit of happiness is the product of human laws that are in harmony with the eternal natural laws of God.[106] Some commentators, including Roscoe Pound and Clarence Manion, have described the linkage of the American Constitution to natural law.[107] Their observations are consistent

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102. SIR WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 16 (University of Chicago Press 2002) (1765-1769).

103. Alexander Volokh, *N Guilty Men*, 146 U. PA. L. Rev. 173 (1997).

104. THE DECLARATION OF INDEPENDENCE (U.S. 1776), http://www.archives.gov/national-archives-experience/charters/declaration_transcript.html (last visited Nov. 24, 2005).

105. DOUGLAS W. KMIEC, ET AL, THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES AND PHILOSOPHY, (2d ed., LexisNexis 2004).

106. SIR WILLIAM BLACKSTONE 1 COMMENTARIES 38-41. ("[M]an shall pursue his own true and substantial happiness. This is the foundation of what we call ethics or natural law.").

107. *See* Roscoe Pound, *The Development of Constitutional Guarantees of Liberty*, 20 NOTRE DAME L. REV. 347, 367 (1945) ("American lawyers were taught to believe in a fundamental law, which after the [American] Revolution, they found declared in written constitutions."); Clarence Manion, *The Natural Law Philosophies of the Founding Fathers*, *in* 1 *Natural Law Institute Proceedings* 3, 16 (A. L. Scanlon, ed., 1949) ("The fact is that the Declaration [of Independence] is the best possible condensation of the natural law –common

with the text of the Declaration of Independence and the cultural context of 1789, so ably understood by President George Washington in his first inaugural address, in which he invoked reliance upon the natural laws of God to secure Heaven's blessing.[108] The Declaration of Independence has faithfully served as evidence of a bridge between the values of Judeo-Christian morality subsumed within the natural law and an integral part of the foundational principles of American Constitutional law. Basic to all this is the idea that law must serve justice, to fulfill the moral command in Micah "to be fair and just and merciful, and to walk humbly with your God,"[109] a scriptural passage that John Winthrop used so effectively in his famous sermon, *A Model of Christian Charity*, to exhort the Puritans who set out from England to establish a new home in the American colonies.[110] The notion of executing an innocent person could thus never be justified or rationalized by a religious people devoted to the laws of God and to the pursuit of happiness, for this would be a gross violation of scripture, the natural law and their understanding of constitutional law.

Further support for my views is found in the secular jurisprudence of the U.S. Supreme Court in cases answering the question whether one of these four principles, "proof beyond a reasonable doubt," was a part of the U.S. Constitution. In the leading case of *In re Winship*,[111] Associate Justice Brennan reviewed the historical authorities and concluded:

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof of beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[112]

Justice Brennan advanced two principal reasons why the reasonable doubt standard is entrenched as a matter of constitutional law. The first reason is linked to the paramount goal to convict only the guilty: the reasonable doubt standard is the main instrument to reduce "the risk of convictions resting on factual error."[113] The second reason recognizes the interdependency with another constitutional standard, the presumption of innocence: the reasonable doubt standard "provides concrete substance"[114] to the presumption of innocence.

Why is such importance attached to the goal of protecting the innocent

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law doctrines as they were developed and expounded in England and America for hundreds of years prior to the American Revolution.").

108. George Washington, *First Inaugural Address*, April 30, 1789, *reprinted in* GEORGE WASHINGTON: A COLLECTION 460, 462 (W.B. Allen ed., 1988).

109. *Micah* 6:8 (New Living Translation).

110. John Winthrop, *A Model of Christian Charity* (1630) *in* 7 Collections of the Massachusetts Historical Society 33-34, 44-48 (3d ser. 1838), *reprinted in* 1 A Documentary History of American Life 66-69 (Jack P. Greene ed., 1966).

111. *In re* Winship, 397 U.S. 358, 364 (1970).

112. *Id.*

113. *Id.*

114. *Id.*

from wrongful conviction? At stake in a criminal prosecution are transcendent values: the stigma of a conviction affecting the defendant's name and reputation, the loss of liberty, and in a capital case, the loss of life itself. A lower level of proof, such as clear and convincing evidence or the preponderance of evidence, used in a civil proceeding, will not suffice when the stakes are so high.

Not only at stake is the future of the defendant, but public confidence in the administration of justice. Nothing would undermine the moral force of the criminal law more than the discovery that, not only are innocent people found guilty of crimes they did not commit, but that they have been executed. The criminal justice system cannot function with integrity and command respect if it departs from constitutional principles indispensable to safeguarding the factually innocent from wrongful conviction. Justice Brennan explains:

> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.[115]

In his concurring opinion, Justice Harlan observed that convicting an innocent individual was not equal to the acquittal of the guilty. He stated: "In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[116]

It appears to be now settled that the first two principles, the application of the presumption of innocence and the duty of the prosecution to prove its case beyond a reasonable doubt, are constitutional provisions and are incorporated within the meaning of the Due Process Clauses. These dual pillars of reasonable doubt and presumption of innocence constitute the foundation of procedural due process in a criminal trial. Justice Black's dissent in *In re Winship*, which rejects such an interpretation for lack of textual content, has not been followed.

It is my contention that the remaining two principles, fairness and freeing of the factually innocent, go beyond procedure and constitute substantive due process, whether anchored in the Ninth Amendment,[117] as part of the unwritten constitution that contains unenumerated rights,[118] or read into the Due Process

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115. *Id.*

116. *Id.* at 372.

117. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

118. *See* CHARLES L. BLACK JR. A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED

Clauses of the Fifth[119] and Fourteenth[120] Amendments.

Let me illustrate the latter point, that convicting the factually innocent is a violation of substantive due process. Where there has been a grave miscarriage of justice, such as the discovery that a factually innocent individual has been executed, one would hope there would be a community consensus that this kind of injustice is an obvious constitutional violation that "shocks the conscience"[121] and offends against the core values and goals of criminal law that are implicit in a scheme of "ordered liberty."[122]

In *Palko v. Connecticut*, Justice Cardozo set out a very conservative test to identify whether or not a constitutional criminal law provision is so embedded in the Constitution as to constitute substantive due process so that it may not be tinkered with or altered by judges or legislators.[123] Adapted to the question of the execution of the innocent, his two-part inquiry may be something like this:

> 1. Would the abolition of habeas corpus to free the factually innocent and to prevent their eventual execution violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental?
>
> 2. Would a fair and enlightened system of liberty and justice exist if innocent people are convicted, imprisoned and executed?

Justice Cardozo believed torture, physical or mental, to extract a confession, would violate the scheme of ordered liberty.[124] To make his point, he cited the case of *Brown v. Mississippi*,[125] where torture resulted in false confessions and the wrongful murder convictions of innocent defendants who were sentenced to death. In contrast, in situations where the correctness of the verdict would not be jeopardized, Justice Cardozo was amenable to removing constitutional standards pertaining to the right of trial by jury, double jeopardy from multiple proceedings and compulsory self-incrimination, for in his

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AND UNNAMED, 1997.

119. U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

120. U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

121. Rochin v. California, 342 U.S. 165, 172-73 (1952).

122. Palko v. Connecticut, 302 U.S. 319 (1937).

123. *Id.* at 325.

124. *Id.* at 326.

125. Brown v. Mississippi, 297 U.S. 278 (1936).

opinion, these important values could be abolished and justice could still be done.[126]

Applying this reasoning to the matter of executing the factually innocent, Justice Cardozo would unquestionably agree that neither liberty nor justice would exist if the innocent were sacrificed. It is crystal clear that turning upside down the fundamental rationale for the criminal justice system to acquit the guilty (often by reason of police misconduct that triggers the exclusionary rule of evidence) and to punish the factually innocent (often by reason of inability to prove innocence thanks to legal hurdles imposed in *Herrera* and *Schlup*) violates those "fundamental principles of liberty and justice that lie at the base of all our civil and political institutions."[127] Justice Cardozo would concur that the impending execution of a factually innocent person is a constitutional violation that is sufficient to merit a free-standing claim of habeas corpus, for justice can never tolerate such a blatant injustice.

Unlike Justice Cardozo, I would not dilute the constitutional protections set out in the plain text of the Constitution, for the Constitution's integrity is composed of the sum of its parts, and it is the solemn duty of judges to give meaningful life to the entire text of the Constitution. However, I do agree with him that there comes a point in time when there can no longer be any confidence in the justice system, where it has fallen into disrepute by sanctioning the torture or killing of innocent people by the state. This kind of social disintegration and moral corruption goes beyond a mere constitutional violation, for it represents the coercive force of the "rule by law" that is emblematic of despotic regimes, rather than justice that characterizes a civilized society anchored to the rule of law.

In my opinion, the moment a factually innocent person is convicted, a constitutional violation begins. The injustice is immediately apparent to the convicted individual. It is only later that some factually innocent individuals are lucky enough to benefit from new exculpatory evidence that results in their release from prison. The unlucky ones are executed.

If new evidence of innocence is discovered, which could raise a reasonable doubt on the whole of the evidence or as to any essential element of the offense required to be proved beyond a reasonable doubt by the prosecution, then I believe a successful claim of actual innocence may be made on a free-standing basis, since the wrongful conviction of a factually innocent person is at its roots a constitutional violation. A federal court would then have jurisdiction to hold a habeas corpus hearing to determine whether or not to order a new trial or to set aside a conviction and to order the outright release of the factually innocent

126. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

127. *Palko*, 302 U.S. at 328 (citing Hebert v. Louisiana, 272 U.S. 312, 316 (1926)). "The due process clause in the Fourteenth Amendment . . . [requires] that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'" *Id.*

individual.

This approach is derived from the elementary moral proposition at the base of all criminal law prosecutions that it is simply wrong to convict and punish the factually innocent, and to do otherwise is unconstitutional. The purpose of criminal law is to convict only the factually guilty. It is for this reason that the writ of *habeas corpus ad subjiciendum* was devised to be the instrument by which a judge may free the factually innocent.

B. Habeas Corpus

Habeas corpus is much more than a legal avenue to redress a wrong. Habeas corpus is a fundamental constitutional right explicitly enshrined in the Constitution, to ensure individual freedom is not wrongfully deprived and to achieve the ends of justice. Only Congress has the legal power to curtail the writ of habeas corpus,[128] and then only temporarily for the duration of a narrowly defined emergency: "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."[129] Federal judges are empowered by the Constitution to decide all cases in law and equity that arise under the Constitution.[130] Habeas corpus has been described as the last chance for a judge to re-examine the validity of a conviction and is "a bulwark against convictions that violate 'fundamental fairness'."[131] "All agree, that absent suspension, the writ of habeas corpus remains available to every individual detained within the United States."[132]

In *Price v. Warden*,[133] a 1943 decision of the U.S. Supreme Court, Associate Justice Murphy discussed the importance of the writ of habeas corpus and his fear that its effectiveness may become lost in a twisted nest of procedural obstacles. Justice Murphy sent a strong message reminding judges the overriding purpose of the criminal justice system is to achieve justice:

> The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.[134]

To attain this goal of ensuring an individual was not unjustly punished,

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128. *Ex Parte* Merryman, 17 F. Cas. 144, 151-152 (1861) (Taney C.J.) (rejecting purported power by President Lincoln to suspend habeas corpus under Article II of the U.S. Constitution).

129. U.S. CONST. art. I, § 9, cl. 2.

130. U.S. CONST. art. III, § 2

131. Engle v. Isaac, 456 U.S. 107, 126 (1982).

132. Hamdi v. Rumsfeld, 542 U.S. 507, 596 (2004).

133. Price v. Johnston, 334 U.S. 266 (1943).

134. *Id.* at 291.

Justice Murphy stated that "the writ of habeas corpus should be left sufficiently elastic" to deal effectively with "any and all forms of illegal restraint," and that "dry formalism" must not "sterilize" the procedure to effectively bring on the application for relief.[135]

Prosecutors, too, must remember that their highest duty is to ensure that justice is done, for their obligation is to be impartial and ensure the innocent do not suffer and the guilty are punished:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[136]

The production of a wrongful conviction is the antithesis of the prosecutor's role as a minister of justice, for such a result violates the constitutional values of life and liberty that habeas corpus was designed to defend. In a habeas claim of factual innocence, the normal presumption of the validity of the conviction cannot stand, for such a miscarriage of justice reveals the brokenness of the justice system and the ineffectiveness of the adversarial process.[137]

Since the core values of the criminal justice system are to free the innocent and convict the guilty, it would be completely arbitrary to deprive the factually innocent of life and liberty. If the writ of habeas corpus is of such constitutional importance so that it was the only common law writ accorded constitutional status to defend against arbitrary imprisonment,[138] then the detention of an innocent prisoner even after a form of due process that includes a trial amounts to a continuing constitutional violation.

In 1923, in *Moore v. Dempsey*, Justice Holmes, who wrote the majority opinion, granted a petition for habeas corpus filed by five African Americans who were convicted of murder and sentenced to death. The petitioners alleged they were factually innocent, claiming that white men instead of them were responsible for the crime. Although they went through a form of trial, it was unfair, for the local community was enraged and behaved as a mob, eager to

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135. *Id.* at 283-284.

136. Berger v. United States, 295 U.S. 78 (1935) (unanimous opinion of the Court).

137. Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. 2003).

> At the same time, because an actual innocence claim necessarily implies a breakdown in the adversarial process, the conviction is not entitled to the nearly irrebuttable presumption of validity afforded to a conviction on a direct appeal challenging the sufficiency of the evidence. If habeas relief were conditioned on a finding that no rational juror could convict the petitioner after introduction of the new evidence, it would be impossible to obtain relief because exculpatory evidence cannot outweigh inculpatory evidence under that standard.

Id.

138. The incorporation of the writ of habeas corpus into the Constitution was to ensure a check against arbitrary imprisonment. *See* THE FEDERALIST NO. 84 (Alexander Hamilton).

lynch the defendants and any juror that would dare vote for an acquittal. Due process was allegedly denied at trial, including the exclusion of all potential black jurors. Justice Holmes did not need to answer the question of guilt or innocence, and decided the case solely on the narrow question of whether the constitutional rights of the petitioners at trial were violated. He held it was the duty of the Court to intervene when the influence of public passion rendered the legal proceedings "a mask."[139] Justice Holmes left open the question of deciding guilt or innocence by a habeas court, for before him were admitted facts enough to dispose of the case. It would be wrong to cite this case for support that it is not the business of the habeas court to inquire into the correctness of the verdict, for Justice Holmes noted that a federal judge has the duty in a habeas proceeding to examine the facts, perhaps even of innocence, that if left uncorrected, would result in a grave miscarriage of justice:

> We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.[140]

The correctness of the verdict at trial is the fundamental constitutional issue in a case of factual innocence. If facts need to be re-examined, to ensure that justice is done, then so be it. There is no limit to what a habeas judge can do to correct a miscarriage of justice:

> The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action . . . . The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.[141]

Thus, federal courts must grant evidentiary hearings to petitioners "upon an appropriate showing."[142]

Habeas corpus petitions merit the greatest priority in American constitutional law, for "there is no higher duty"[143] than to release the innocent, and "the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves."[144] As habeas corpus is an equitable remedy, substance must take priority over form, for rules intended to streamline procedure have a way of defeating meritorious claims and,

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139. Moore v. Dempsey, 261 U.S. 86, 91 (1923).

140. *Moore*, 261 U.S. at 92.

141. Harris v. Nelson, 394 U.S. 286, 290-291 (1969) (unanimous opinion of the Court).

142. *Id.* at 291.

143. *Id.* at 292.

144. *Id.*

ultimately, justice itself.[145] The object of habeas corpus is to rectify not just illegal imprisonments occasioned by constitutional violations at trial, but also to remedy unconstitutional imprisonments caused by incorrect verdicts. "It is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution . . . . Perhaps there is no more exalted judicial function."[146] "The prisoner must always have some opportunity to reopen his case if he can make a sufficient showing that he is the victim of a fundamental miscarriage of justice."[147] The root principle at the heart of 28 U.S.C. § 2254, the Congressional legislation forbidding imprisonment contrary to the Constitution, is that the government cannot escape accountability for the detention of any human being, for "if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to his immediate release."[148] "The prisoner must always have some opportunity to reopen his case if he can make a sufficient showing that he is the victim of a fundamental miscarriage of justice."[149]

It is therefore extremely important not to lose sight of the purpose of habeas corpus when it comes to freeing the factually innocent. It is too easy to fall into the trap of creating an unrealistic evidentiary hurdle that is impossible to overcome and then to devise a test akin to "sufficiency of the evidence" to sustain a conviction,[150] when the proper focus ought to be on whether the petitioner could have raised reasonable doubt as to guilt at his or her trial. Inadequate evidence that falls short of a reasonable doubt is only one way innocent people get convicted; other ways include perjured testimony, false or misleading forensic evidence, mistaken eyewitnesses, adverse findings of credibility, and drawing the wrong inference in a circumstantial case. For this reason, a habeas court must recognize there may be multiple factors or a combination of circumstances that lead to the conviction of innocent people in constitutionally perfect trials and that an analogous test to one based on "sufficiency of the evidence" is simply unfair.

On the other hand, there is a legitimate complaint that habeas corpus is utilized by petitioners who are factually guilty and seek to escape their fair and just punishment by asserting violations of their constitutional rights. Justice Hugo Black, in *Kaufman v. United States*,[151] forcefully argued that a habeas judge ought to exercise discretion and refuse to hear a collateral attack on a conviction where innocence was not an issue and the object of the hearing was

145. Murray v. Carrier, 477 U.S. 478, 500 (1986) (citing Brown v. Allen, 344 U.S. 443 (1953)).

146. *Id.* at 509 (Stevens, J., dissenting).

147. *Id.* at 515.

148. *Id.* at 516 (Brennan and Marshall, J.J., dissenting).

149. *Id.* at 515 (Stevens and Blackmun, J.J., concurring).

150. *See* Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

151. Kaufman v. United States, 394 U.S. 217, 232-241 (1969) (Black, J., dissenting.)

to exclude trustworthy and relevant evidence obtained in the course of an unconstitutional search and seizure. Without innocence being an issue, it was illogical to argue that habeas corpus was mandated, for the reliability and soundness of the verdict was not in question. Justice Black concluded:

In collateral attacks whether by habeas corpus or by § 2255 proceedings, I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of doubt on his guilt.[152]

Disturbed by the trend of expanding the use of habeas corpus to free the guilty, Judge Henry Friendly of the United States Court of Appeals for the Second Circuit followed up on Justice Black's observations to advance his thesis that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence."[153] A "colorable claim of innocence" existed when the petitioner could show a fair probability in light of all the evidence (whether admissible or not, including evidence that was not available until after the trial), that the trier of fact would have entertained a reasonable doubt of guilt.[154]

Judge Friendly's goal was to restore the Great Writ to its historic esteem and to rescue it from perceived abuse. Court dockets were flooded with stale, frivolous, and repetitive applications by petitioners who almost never raised an assertion of factual innocence. The truly meritorious rare application by the factually innocent risked being lost in a sea of applications by the factually guilty. To remedy this, Judge Friendly hoped that by filtering out claims that did not have "a colorable showing of innocence," courts could focus their limited time and resources upon those few cases where an injustice may have been done.[155] This fit in with Judge Friendly's view that the "prime object of collateral proceedings should be to protect the innocent."[156] In his opinion, a constitutional error that may have led to the conviction of an innocent person was a deserving claim; an undeserving claim was one advanced by a factually guilty individual who complained about an unconstitutional search and seizure.[157] Significantly, Judge Friendly would not prohibit a collateral attack where there were no constitutional errors made at trial, thus allowing for a free standing habeas claim grounded in factual innocence:

> In a case where the prosecution had no other substantial evidence, as, for example, when identification testimony was weak or conflicting and there was

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152. *Id.* at 242.

153. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970-1971).

154. *Id.* at 160. Nothing less that the reasonable doubt standard will suffice in a death penalty case. *See* Jill H. Reinmuth, *When Actual Innocence is Irrelevant: Federal habeas Relief for State Prisoners After Herrera v. Collins*, 69 WASH. L. REV. 279, 301 (1994).

155. *Id.* at 150.

156. *Id.* at 151, n. 37.

157. *Id.* at 161-62.

> nothing else, I would allow collateral attack *regardless of what happened in the original proceedings*. Such a case fits the formula that considerations of finality should not keep a possibly innocent man in jail.[158]

Thus Judge Friendly would "fully protect the innocent,"[159] unless other evidence eliminated "any reasonable doubt of guilt."[160]

A close reading of Judge Friendly's article shows he would have disapproved of any distortion of his thesis in creating today's *Herrera* or *Schlup* "gateway approach" that screens out a claim of factual innocence where there is no underlying constitutional violation at trial. He would also be appalled that the onus of proof has shifted from the prosecution to the defendant, and that the burden of proof upon the defendant petitioner bears no resemblance to his standard (raise a reasonable doubt) and the standard envisioned by Justice Black (raise a shadow of a doubt).

Yet the Supreme Court attributed to Judge Friendly the idea that "the 'ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[161] Left out of the formula is the circumstance envisioned by Judge Friendly that a factually innocent person could be mistakenly identified as the perpetrator in a trial free from constitutional error. It would have been far better for the Court to leave open the definition of the "ends of justice" to meet all the exigencies of cases that may occur so that justice may be done in all cases of factual innocence.[162]

V. CONCLUSION

The conviction of a factually innocent individual is a constitutional violation, offending against substantive due process and the unwritten constitutional values embedded in the bedrock of our criminal law. Every judicial avenue must be available without limitation to the factually innocent to rectify such a fundamental miscarriage of justice. To tolerate the conviction, incarceration and execution of the factually innocent is a sign that marks the departure of the rule of law and the substitution of rule by law. Law becomes a tool to serve the state and oppress justice, rather than a means to attain justice. Habeas corpus is stripped of its power and meaning, for it is unable to reach out to rescue the oppressed and the needy. To err is human, and the rare conviction of a factually innocent proves the point. Can a court err by ordering the release of an individual who fraudulently claims to be a victim of manifest injustice? Certainly. However, is it not better to err in favor of safeguarding the innocent?

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158. *Id.* at 163-64 (emphasis added).
159. *Id.* at 164.
160. *Id.*
161. Kuhlman v. Wilson, 477 U.S. 436, 454 (1986).
162. *Id.* at 461-62 (Brennan and Marshall, J.J., dissenting).

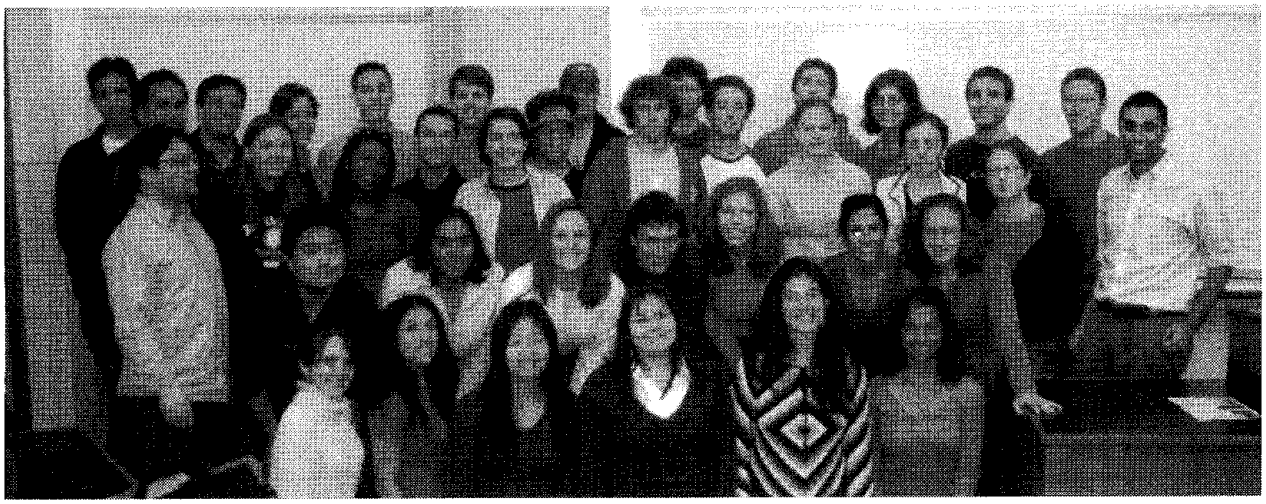
For it is surely morally preferable to executing the factually innocent, for this is as repugnant as tearing out the heart of justice itself.

The current law enunciated in *Herrera v. Collins* desperately needs reform. A "truly persuasive showing of actual innocence" puts an unfair high burden and an unlawful onus on the wrongfully convicted to establish innocence. Such a reverse onus of proof violates the constitutional standard that places the burden of proof upon the state to prove its case beyond a reasonable doubt. A reverse onus of proof makes a wrongful conviction almost impossible to correct and guarantees that innocent people will continue to be executed for crimes they did not commit. Instead, I suggest that habeas relief is merited if there is new evidence that could raise a reasonable doubt or a shadow of doubt on either the whole of the evidence or on any essential element of the proof needed by the prosecution to prove its case beyond a reasonable doubt. The onus of proof and the standard of proof need to be consistent at trial and on appeal as a matter of fundamental fairness.

The test in *Schlup v. Delo* ought to be replaced. No defendant at trial is ever required to negate each and every item of circumstantial evidence that is consistent with guilt. Rather, in a circumstantial case it is the cumulative effect of the whole of the evidence that established guilt beyond a reasonable doubt. Similarly, a jury could have a reasonable doubt on the whole of the state's evidence to acquit a defendant. Habeas relief must be available on a freestanding basis, for an innocent person may still be convicted and eventually executed without any constitutional violations occurring at trial.

A creeping complacency in accepting utilitarian values that allow for the cost of executing the innocent threatens the rule of law. The tension between the power of the state to impose laws that are necessary to preserve the life of the state and the original understanding that this nation was founded to secure inalienable rights of life and liberty free from the tyranny of the government presently tilts in favor of sacrificing the innocent for the benefit of others. It is much easier to seal the lid on a closed file than to open a Pandora's box and the floodgates of litigation. On the other hand, it may be better to find out now if the justice system works as well as the Justices believe. If miscarriages of justice are indeed rare, then there is nothing to fear from a few cases that deserve reopening. If there are legions of such cases, we may as well find that out too, because that means we do not have a working justice system.

Acknowledging that perfect justice is impossible to achieve does not mean that our quest for perfect justice should be abandoned. Substituting law for justice is not an acceptable answer when it comes to executing the factually innocent.



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