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Recalibrating Constitutional Innocence Protection

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RECALIBRATING CONSTITUTIONAL INNOCENCE PROTECTION

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Abstract: This Article examines the constitutional nature of the right of a prisoner to receive post-conviction relief based solely on the claim that he[1] is innocent. Part I explores innocence protection as an animating value of constitutional criminal procedure (Part I.A) and describes how developments in the way that crimes are investigated, proved, and re-examined have dislodged the trial from its place at the center of the constitutional criminal procedure universe (Part I.B). Part II explores how realigning the importance of innocence protection with the practical realities of our criminal justice system would impact the regulation of post-conviction procedures. It also is divided into two sections. Part II.A provides an overview of how the U.S. Supreme Court has treated innocence claims to date. First, it considers gateway innocence claims—those in which the prisoner asserts that new evidence of his factual innocence should permit substantive review of an otherwise defaulted claim that he received a constitutionally deficient trial. It also considers freestanding innocence claims—those in which a prisoner asserts that new evidence of his factual innocence warrants relief despite the fact that the conviction stemmed from a constitutionally sound trial. Part II.B articulates a three-tiered framework—conviction relief, execution relief, gateway innocence—for adjudicating such claims.

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1. Throughout the Article, I use "he" and "his" because males are disproportionately represented in state and federal prison populations relative to their presence in the general population.

INTRODUCTION

Society suffers thrice when it convicts an innocent person. First, as a retributive matter, the harm done to society has not been rectified but amplified. Second, the real perpetrator is still "out there," which, from a public safety standpoint, might not seem significant in the context of small-time marijuana distribution or tax fraud, but means much more in the case of a murderer or serial rapist. Finally, when it convicts—and especially if it executes—an innocent person, society suffers in terms of both the perceived legitimacy of its power to allocate punishment and the criminal justice system's competence to protect innocent citizens from unjust punishment.

The Constitution's Framers recognized the paramount importance of innocence protection. Though there is no text in the Constitution that reads, "Congress shall pass no law to convict an innocent person" in the same way that the First Amendment reads, "Congress shall pass no law . . . abridging speech," innocence protection is an "axiomatic and elementary" value of constitutional criminal procedure.[2] Its spirit animates the Fifth[3] and Sixth Amendments.[4] The lack of culpability that

2. Coffin v. United States, 156 U.S. 432, 453 (1895).

3. *See* U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").

4. *See* U.S. CONST. amend. VI ("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

it represents serves as the baseline against which grossly disproportionate sentences are measured under the Eighth Amendment.[5] It is the reason for providing staples of due process such as the presumption of innocence and the requirement that the prosecution prove each element of an offense beyond a reasonable doubt.[6]

The purpose of most innocence protection mechanisms is to guard against wrongful conviction at trial. This Article suggests the need to reconsider the trial as the center of gravity for innocence protection. At common law, a sentence was rendered shortly after the conviction.[7] No real ability to house prisoners for long periods existed.[8] Punishment was physically severe, but temporally limited.[9] Even if a longer period of time between conviction and the completion of the punishment had existed at the founding, in a world without forensic science, the best evidence likely already had been introduced at trial. Traditional forms of evidence uniformly became less reliable following the trial.[10] Witnesses died. Memories faded. Evidence decayed. Other societal interests, such as finality, comity, and judicial economy, weighed heavily against upsetting verdicts.[11]

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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 defence.").

5. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

6. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). The Court referred to the presumption of innocence as "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *Id.* at 363 (internal quotation marks omitted).

7. Knight v. Florida, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) ("[O]ur Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades.") *denying cert. to* 721 So. 2d 287 (Fla. 1998) *and* Moore v. Nebraska, 591 N.W.2d 86 (Neb. 1999).

8. *See* Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1187 (1982) (noting that "terms [of incarceration]" in the mid-eighteenth century "rarely exceeded three months, and often proved as fleeting as twenty-four hours").

9. *See id.*

10. Peyton v. Rowe, 391 U.S. 54, 62 (1968) (noting the resolution of contested factual issues, such as those involving "claims of coerced confession," becomes more challenging as time passes because "dimmed memories or the death of witnesses is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact"). "Postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice." *Id.* "Even where resolution of constitutional claims turns on record evidence, loss or destruction of a relevant document or failure to transcribe the record over a period of years, could mean that a claim relegated to the limbo of prematurity might never be adequately determined." *Id.* at n.16.

11. *See* Schlup v. Delo, 513 U.S. 298, 324 (1995) (underscoring that the "individual interest in

The balance of interests has shifted substantially over the past quarter century.[12] A rapid escalation in the quality and quantity of scientific evidence, including new tools and modes of analysis, has meant that for the first time in history some forms of evidence can become more reliable with time. Meanwhile, the ability to house prisoners long-term has provided more of an opportunity for innocence to be discovered posttrial. The perceived reliability of traditional forms of evidence, such as eyewitness identification testimony and confessions, has diminished significantly. Worse, perhaps, social cognition research demonstrates that fact-finders sometimes assign probative force to, or misremember evidence based on, arbitrary factors such as race.[13] The Framers could not have envisioned this altered criminal justice landscape.

Nor could the Framers have foreseen the extent to which innocent citizens are convicted of crimes they did not commit. There have been 289 DNA-based exonerations since 1989.[14] Seventeen of those prisoners had been sentenced to death.[15] When one considers both DNA and non-DNA cases together, there have been more than 600 known wrongful convictions since 1973.[16] One hundred forty of those exonerations involved citizens who had been sentenced to death.[17] This is not a passing phenomenon. From eyewitness identification science[18] to the diagnosis of shaken baby syndrome,[19] there are fundamental flaws in the evidence that prosecutors regularly use to secure convictions. At the same time, overworked and underpaid defenders often are unable to

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justice" is counter-balanced by these societal interests).

12. *See* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 688 (2005) ("Valuing finality and efficiency as assets in the world of post-trial litigation . . . does not mean they should trump competing policy objectives, particularly the accuracy of criminal adjudication.").

13. *See, e.g.*, Justin Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010) (discussed *infra* Part I.B.2.c); Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decision Making, and Misremembering*, 57 DUKE L.J. 345 (2007) (discussed *infra* Part I.B.2.c).

14. *Innocence Project Case Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited Feb. 28, 2012).

15. *Id.*

16. Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 176 (2008) (reporting that there are "perhaps 600 to 700 exonerations of all types from across the country over a period of 35 years").

17. *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last updated Jan. 23, 2012).

18. *See infra* Part I.B.2.a (discussing the questionable reliability of eyewitness identification evidence).

19. *See generally* Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1 (2009).

thoroughly investigate solid pretrial claims of innocence.[20] These developments signal that a substantial number of innocent women and men are residing within United States prison walls.[21]

Just how substantial? Though he has emphasized that the full scope of the problem is "unknown and frustratingly unknowable," Professor Samuel Gross has labeled the known cases of wrongful conviction as "the tip of the iceberg."[22] Professor Michael Risinger estimates the wrongful conviction rate at as high as five percent.[23] At the other end of the spectrum, renowned district attorney Joshua Marquis estimates the wrongful conviction rate at .027%.[24] In his concurring opinion in *Kansas v. Marsh*,[25] Justice Antonin Scalia adopted the Marquis estimate—which he phrased as a 99.973% success rate.[26] Assuming Marquis and Justice Scalia are correct that the wrongful conviction rate is only .027%, what does that mean in absolute terms? It may help to consider the analogy of plane crashes.[27] Roughly 18,000 flights arrive or depart Atlanta's

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20. *See* Laurence A. Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice*, AM. CONST. SOC'Y FOR L. & POL'Y 1 (Mar. 2011), http://www.acslaw.org/sites/default/files/bennerib_excessivepd_workloads.pdf. In places like Florida, "the annual felony caseload of individual public defenders increased to 500 felonies per year while the average for misdemeanor cases rose to an astonishing 2,225." *Id.* "Caseloads are so excessive that . . . defense counsels are unable to perform core functions such as conducting an adequate factual investigation into guilt or innocence." *Id.*

21. *See* Baze v. Rees, 553 U.S.__, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring) ("Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses.").

22. Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the* Marsh, 105 MICH. L. REV. FIRST IMPRESSIONS 67 (2006), http://www.michiganlawreview.org/assets/fi/105/gross.pdf.

23. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007). Professor Risinger employed a database of 1980s capital rape-murder cases and put the wrongful conviction rate at 3.3% in those types of cases. *Id.* at 778. He then extrapolated from those cases to reach the 5% figure. *Id.* at 779–80.

24. Kansas v. Marsh, 548 U.S. 163, 198 (2006) (Scalia, J., concurring) (citing Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23 (treating .027% as a high-ball estimate of the wrongful conviction rate)); *see also id.* (citing Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 518 (2005) (suggesting that those who estimate the wrongful conviction rate based on exonerations exaggerate the number of released prisoners who were factually innocent)).

25. 548 U.S. 163.

26. *Id.* at 199 (Scalia, J., concurring) (referring to the number of wrongful convictions as an "insignificant minimum"). Justice Scalia further contends that no factually innocent person has been executed in recent times. *Id.* at 188 ("If such an event had occurred in recent years, we would not have to hunt for it; the innocent's name would be shouted from the rooftops by the abolition lobby.").

27. *See, e.g.*, Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 127 (1998) ("Airplane crashes . . . are also rare; as passengers, we can feel comfortable telling ourselves and each other not to worry, that it will never happen. But engineers, traffic controllers, and pilots must not ignore crashes: They are terrible, tragic events, and they

Hartsfield–Jackson airport each week.[28] If five of those planes crashed—roughly .027% of flights—operations at the airport would cease immediately. So, too, would 125 people wrongfully imprisoned annually (.027% of all state court felony convictions) represent a disturbing number of wrongful convictions.[29]

The rise of scientific evidence, the discovery of flaws in the traditional forms of evidence relied upon at trial, and the realization that our criminal justice system results in the conviction of innocent defendants in previously unimaginable numbers force a reexamination of how the aims of innocence protection fit with the practical realities of our criminal justice system. In other words, to preserve the position of innocence protection as a primary constitutional value, we need to reconsider the near singular focus on the trial as the setting where substantive innocence is best determined. This shift would reflect the reality that substantive innocence is often detected most accurately either before or after trial.

Regulating pretrial procedures is key to reorienting innocence protection.[30] Only six percent of state felony cases proceed to trial.[31] Moreover, as Justice Scalia noted in *Marsh*, the primary use for DNA evidence in criminal cases is as a "highly effective way to avoid conviction of the innocent."[32] Other scientific tests such as fingerprint analysis perform a similar screening function. The Due Process Clause of the Fourteenth Amendment requires prosecutors to turn over the results of such testing, if exculpatory.[33] But, the evidence does not

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remain rare precisely because as a society we do worry about them, and try to stop them from ever happening.").

28. *Operating Statistics*, HARTSFIELD-JACKSON ATLANTA INT'L AIRPORT, http://www.atlanta-airport.com/Airport/ATL/operation_statistics.aspx (last visited Aug. 27, 2011) (listing 79,647 flights in June 2011).

29. In 2004, there were roughly 500,000 felony convictions in state courts in the United States. Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004 – Statistical Tables*, U.S. DEPARTMENT JUST. tbl.1.8 (2004), http://bjs.ojp.usdoj.gov/content/pub/html/scscf04/tables/scs04108tab.cfm.

30. *See* Stephanos Bibas, *The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421, 422 (2003) (highlighting that "most criminal procedure scholars[] mistakenly view trials as the center of the universe and assume that rational suspects should care mainly about maximizing their chances of success at trial" and noting that "[t]his academic obsession with trials bears little relationship to the real world, where only about 6% of felony defendants go to trial and most plead guilty").

31. Sean Rosenmerkel et al., Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006 – Statistical Tables*, U.S. DEPARTMENT JUST. 25 tbl.4.1 (Dec. 2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (showing that six percent of state court felony convictions were achieved at trial).

32. Kansas v. Marsh, 548 U.S. 163, 191 (2006) (Scalia, J., concurring).

33. United States v. Agurs, 427 U.S. 97, 107 (1976) (holding that prosecutors must turn over to the defense evidence "clearly supportive of a claim of innocence" regardless of whether the defense

always make its way into the defense counsel's hands. Sometimes this is because prosecutors willfully refuse to turn over the evidence despite its exculpatory nature. Other times the prosecution does not test the evidence, or tests the evidence but believes in good faith that the results are not exculpatory. "Open-file" discovery can fix this non-disclosure problem. Under such a requirement, the prosecution must simply turn over all of its evidence regardless of whether or not the prosecutor believes it to be exculpatory.[34] The issue has gained little traction with the Court to date. However, when it is viewed through an innocence protection lens and in light of the new pretrial center of gravity in criminal cases, open-file discovery—at least for materials subject to biological testing—obtains a new constitutional dimension.[35]

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requests the evidence); Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

34. *See* Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1557 (2010) (defining "open file" discovery as a process "where prosecutors must turn over all evidence known to the government, exculpatory *and* inculpatory alike" (emphasis in original)).

35. *Id.* at 1557–58 ("Some commentators have pushed for a federal constitutional doctrine of open file discovery to realize *Brady*'s idealistic vision."); *id.* at 1558 n.138 (citing Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 262 (2008)).

Two other ramifications of an innocence-protection framework are fruitful areas for future scholarship. First, aligning innocence protection with the realities of the modern criminal justice system would also require reframing the Sixth Amendment doctrine regarding interrogations. Absent a specific request for counsel in the context of a custodial interrogation, law enforcement is free to approach and interrogate any suspect. *See* Montejo v. Louisiana, 556 U.S.__, 129 S. Ct. 2079, 2986–87, 2091 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625, 636 (1986), which forbade police-initiated "interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel"). This scenario is especially plausible in the context of a suspect who has committed some crime, but not the crime charged (e.g., manslaughter versus first degree murder). This rule reflects the Court's understanding of a lawyer's role in a pretrial interrogation as merely helping to enforce the client's right to remain silent. In actuality, the counsel's presence can protect the innocent accused from making statements that can be interpreted as incriminating. A person who relays a narrative of events does not necessarily know which particular facts are inculpatory. Sometimes, a detective suggests alterations to the narrative. This may be done in connection with intense hostility or misleading statements about the evidence in the case. In such a situation, an innocent defendant might accept the alternate version of events under the false impression that the altered facts have no bearing on the detective's perception of his innocence. Skilled lawyers are able to referee this interaction between law enforcement and their clients, increasing the likelihood that innocent defendants are not pressured or tricked into making false inculpatory statements. Brief of Amicus Curiae the Criminal Justice Institute of Harvard Law School at 4, *Montejo*, 129 S. Ct. 2079 (No. 07-1529) ("Aside from the ultimate decision whether to plead guilty, there is perhaps no more critical stage in a criminal prosecution than a post-attachment encounter between a defendant and the government.").

Another area of improvement concerns the presumption that a prisoner received effective assistance of counsel in cases where the lawyer did not perform duties known to lower the risk of an erroneous conviction—for instance, failure to interview a credible alibi witness. Corroboration of snitch witness testimony, regulation of eyewitness identification procedures, and more rigorous plea colloquies are other areas that call for reconsideration to restore innocence protection to its place as

A more fundamental piece of the innocence protection puzzle, however, is prisoners' right to obtain relief upon a sufficient post-conviction showing that they are factually innocent of the crime for which they were convicted. The bulk of this Article focuses on that element—the constitutional regulation of posttrial innocence claims. Though it might seem uncontroversial that prisoners who are able to establish their innocence to some predefined degree of certainty are entitled to relief, there is relentless debate over whether a court possesses the power to release prisoners who are able to demonstrate their factual innocence. Indeed, the U.S. Supreme Court has declined to decide whether the Constitution prohibits the continued incarceration (or even the execution) of prisoners who are factually innocent of the crime for which they were convicted.[36]

Absolute certainty is not a feature of many credible claims of innocence. Consequently, in the most difficult cases, society must engage in the distribution of risk. *How much are we willing to risk protecting against the possibility that an innocent person remains incarcerated? How much are we willing to risk so that a guilty prisoner is not released?* The uncertainty of innocence claims often makes these cases unattractive candidates for clemency. Moreover, elected state court judges may be reluctant to adjudicate such cases for fear of political backlash. However, it is in these cases—where the proof of innocence is strong but not ironclad—that we most need an answer to the question of whether the Constitution compels relief for a prisoner who is able to prove, to some predefined degree of certainty, that he is innocent of the crime for which he was convicted.

Part I of this Article explores innocence protection as an animating value of constitutional criminal procedure and describes how developments in the way that crimes are investigated, proved, and re-examined have dislodged the trial from its place at the center of the constitutional criminal procedure universe. Part II explores how realigning innocence protection with the practical realities of the United States criminal justice system would impact the regulation of post-conviction procedures. It provides an overview of how the Court has treated innocence claims to date. First, it considers gateway innocence claims. In such claims prisoners assert that new evidence of their factual innocence should permit substantive review of an otherwise defaulted

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the primary motivating value of constitutional criminal procedure.

36. *See, e.g.*, Dist. Attorney's Office v. Osborne, 557 U.S.__, 129 S. Ct. 2308, 2321 (2009) (referring to the existence of a "federal constitutional right to be released upon proof of 'actual innocence'" as an "open question").

claim that they received a constitutionally deficient trial. Second, it examines freestanding innocence claims. In those claims, prisoners assert that new evidence of their factual innocence warrants relief despite the fact that the conviction stemmed from a constitutionally sound trial. Part II also articulates a three-tiered framework (conviction relief, execution relief, gateway innocence) for adjudicating both gateway and freestanding innocence claims.[37]

I. INNOCENCE PROTECTION AND THE DECLINE OF THE TRIAL

This part of the Article begins by exploring both innocence protection as a transcendent constitutional value and the fit between innocence protection and the trial mechanisms that put the value into effect. It then questions whether the trial is still the location where innocence protection is best accomplished. Specifically, it discusses: (1) several shifts in how crimes are investigated, prosecuted, and punished that alter the innocence protection calculus; (2) the diminished reliability of traditional forms of evidence presented at the trial; and (3) the increased availability and reliability of posttrial scientific evidence. Finally, it navigates the doctrinal possibilities for realigning innocence protection with the location (here, posttrial) and mechanisms (here, posttrial review of factual innocence claims) where its aims can best be met.

A. Innocence Protection Is a Transcendent Constitutional Value

What follows is an overview of the constitutional basis for innocence protection before a person is convicted of a crime. This is the easiest and most obvious piece of the freestanding innocence puzzle. It provides a baseline understanding of the primacy of innocence protection as a value in constitutional criminal procedure and dispels the erroneous but often repeated assumption that the Constitution protects the innocent with

37. Under the proposal described *infra* Part II.B, in order to get a new trial, a petitioner must present "clear and convincing" evidence that he is innocent of the underlying crime. Because a death sentence is different in kind than any other punishment, however, and because the possibility of presenting future evidence that provides a conclusive showing of innocence is irrelevant once the person has been executed, a lesser showing of probable innocence should bar execution. Finally, the standard for so-called gateway innocence claims (e.g., where proof of innocence is sufficient to forgive ordinary procedural impediments to the review of constitutional claims) should be lowered to a "reasonable probability" standard. In exchange for the reduction in the quantum of evidence required, the underlying constitutional issues that can be raised under the gateway innocence exception should be restricted to those most likely to have an impact on the guilt–innocence determination. This alteration brings the exception in line with the overriding innocence-protection framework.

equal gusto regardless of when the fact of innocence is uncovered. The rest of this Article reaches back to this foundation as it attempts to define what innocence protection means after a conviction and how to allocate risk when determining the appropriate remedies for post-conviction innocence claims.

Protecting from conviction those who are factually innocent[38] of the crime charged is an "axiomatic and elementary" value infused throughout constitutional criminal procedure.[39] In *Berger v. United States*,[40] the Court emphasized that the "twofold aims" of the criminal justice system are "that guilt shall not escape or innocence suffer."[41] Similarly, across his substantial and widely recognized scholarship on the first principles of constitutional criminal procedure, Professor Akhil Amar has identified "protection of innocence" and "pursuit of the truth" as the two "deep principles underlying . . . constitutional criminal procedure."[42] The spirit of innocence protection informs the Fourth Amendment,[43] drives the Fifth[44] and Sixth Amendments,[45] and anchors

38. Factual innocence, meaning that the prisoner took no part whatsoever in the crime, differs from innocence in the sense that the underlying factual basis for a sentence no longer exists. However, these two conceptions of innocence are at the very least close cousins. *See* Dretke v. Haley, 541 U.S. 386, 396 (2004) (noting conflicting circuit court treatment on the question of whether a non-capital offender can establish a gateway innocence claim, and highlighting the "difficult questions regarding the scope of the actual innocence exception itself"); Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329 (2010) (arguing that the Court should entertain freestanding death-ineligibility claims).

39. Coffin v. United States, 156 U.S. 432, 453 (1895).

40. 295 U.S. 78 (1935).

41. *Id.* at 88.

42. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 642 (1996); *id.* at 643 ("Many parts of the Amendment, rightly read, do not protect only *innocents*, but they do protect only *innocence*; they protect the guilty only as an incidental by-product of protecting the innocent because of their innocence. Put another way, although the guilty will often have the same rights as the innocent, they should never have more, and never because they are guilty." (emphasis in original)); *see also* Oregon v. Hass, 420 U.S. 714, 723 (1975) ("We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution.").

43. *See, e.g.*, Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1477 (1996) (describing the "Innocence model" as one of the three main constructs for interpreting the Fourth Amendment); *id.* at 1463–64 n.24 (citing Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 310 (1818)); Arnold Loewy, *The Fourth Amendment As a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983) (identifying innocence protection as the primary purpose to be served by the Fourth Amendment).

44. *See, e.g.*, Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 904 (1995) ("The Self-Incrimination Clause, as best read, is designed to protect a truly innocent defendant who might be made to look guilty on the stand by a clever prosecutor skilled in technical courtroom procedure and forensics. To infer guilt from mere in-court silence would seem to betray the innocent but unpersuasive defendant whom the clause seeks to protect.").

45. *See, e.g.*, Amar, *supra* note 42, at 661 ("[A]ccusation and indictment shove a person onto a legal road whose destination can never be certain even for the innocent man. At the end of this road

both the Eighth Amendment's proportionality principle[46] and the Due Process Clause of the Fourteenth Amendment.[47]

Mechanisms that protect innocence by enhancing the trial verdict's validity were built into the Bill of Rights. For example, in the Sixth Amendment's Confrontation Clause, the Framers believed cross-examination to be the best mechanism for assessing the truth or falsity of witness testimony.[48] In turn, maximizing the reliability of witness testimony serves the value of innocence protection by enhancing the fact-finder's ability to render a reliable trial verdict.[49] Innocence protection similarly guides the right to be tried by an impartial jury of one's peers. As the U.S. Supreme Court stated in *Duncan v. Louisiana*,[50] "[t]hose who wrote our constitutions knew from history and experience that [the jury trial right] was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority."[51] With regard to the right to counsel, the Court in *Powell v. Alabama*[52] explained that the accused "requires the guiding hand of counsel at every step in the proceedings against him," because "[w]ithout it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[53] The Constitution deploys these rules, among others, as part of a trial framework that is meant to facilitate accurate guilt determinations.

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may hang a noose . . . . [M]uch of the . . . Sixth Amendment was designed to reduce the risk that a noose would be wrapped around an innocent neck . . . ."). *But see* Carol Steiker, *First Principles of Constitutional Criminal Procedure, A Mistake?*, 112 HARV. L. REV. 680, 688 (1999) ("[T]he various factual situations that can arise under the constitutional provisions at issue and the multiple values that are plausibly promoted by these provisions are not easily reduced to one or two general principles, however simple or normatively attractive those principles might be.").

46. *See infra* notes 141–157 and accompanying text (discussing the Eighth Amendment).

47. The presumption of innocence and the beyond-a-reasonable-doubt standard, discussed *infra* at notes 54–59 and accompanying text, are examples of procedural due process protections. *See also* California v. Trombetta, 467 U.S. 479, 485 (1983) (noting that the Due Process Clause requires "fundamental fairness" including the right to present a defense and the right to access exculpatory and material evidence, and highlighting that "[t]aken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system").

48. *See* Crawford v. Washington, 501 U.S. 36, 61 (2004) (finding that the "ultimate goal" of the Sixth Amendment is to "ensure reliability" and explaining that the specific prescription of confrontation "reflects a judgment" that cross-examining is "how reliability can best be determined").

49. *See id.*

50. 391 U.S. 145 (1968).

51. *Id.* at 156.

52. 287 U.S. 45 (1932).

53. *Id.* at 69.

The pursuit of truth, the quest to convict the guilty, and the aim of not convicting the innocent generally converge. However, the fact that substantive and procedural regulations cannot guarantee accurate criminal-liability determinations requires assigning comparative weight to these core values. In other words, the impossibility of an error-proof trial forces the question of how much we are willing to risk that a guilty person goes free to increase the odds that an innocent person is not convicted. Both at common law and in contemporary practice, we privilege protecting innocence over the pursuit of truth or the goal of obtaining convictions against the guilty. As Blackstone noted, we presume that "it is better that ten guilty persons escape, than that one innocent suffer."[54] This presumption translates into both a baseline and a liability rule. First, the accused starts the trial presumed innocent. As the Court explained in *In re Winship*,[55] because a defendant's liberty is a "transcending value," due process requires reducing the margin of error "by placing on the [prosecution] the burden of . . . persuading the factfinder."[56] Second, the government must establish beyond a reasonable doubt that the accused committed the crime charged.[57] The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times"[58] and in its modern expression, the beyond a reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error."[59] The presumption of innocence works in tandem with the reasonable doubt standard to privilege protecting the innocent over convicting the guilty.

The goal of innocence protection, then, is infused with and inseparable from the constitutional criminal procedure amendments, where a bevy of procedural and substantive regulations aim to maximize

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54. 4 WILLIAM BLACKSTONE, COMMENTARIES *358; *see also* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997) (tracing the standard as far back as ancient Greece).

55. 397 U.S. 358 (1970).

56. *Id.* at 364 (second alteration in original) (quoting Speiser v. Randall, 357 U.S. 513, 525–26 (1958)) (internal quotation marks omitted).

57. *See In re Winship*, 397 U.S. at 363 (underscoring that the "reasonable-doubt standard plays a vital role in the American scheme of criminal procedure"); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 37 (1997) ("[M]ost people would agree that the system should seek to minimize convictions of innocent defendants. This preference for skewing the risk of error in the defendant's favor does not apply to most constitutional claims, where the system can tolerate a much higher level of pro-government error: Better that an occasional Fourth Amendment violation or *Batson* claim be overlooked than that an occasional innocent defendant be imprisoned.").

58. *In re Winship*, 397 U.S. at 361 (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE, § 321, at 681 (1954)) (internal quotation marks omitted).

59. *Id.* at 363.

the accuracy of trial verdicts.[60]

B. The Trial Is No Longer the Penultimate Place for Innocence Protection

It is not controversial to suggest that the Constitution prohibits imprisoning or executing a person who is factually innocent—so long as the prosecution failed at the trial to rebut the presumption of innocence with proof beyond a reasonable doubt. What is controversial is the idea that factual innocence alone is enough to warrant relief from conviction after an otherwise sound trial. Resistance stems from the notion that the trial is the main event in criminal law.[61] It is meant to be the definitive time and place to determine guilt or innocence. Thus, the "what" (e.g., right to counsel) and "why" (to facilitate accurate determinations of criminal liability) of innocence protection are attached to a "when" and a

60. This is not to suggest that recognizing innocence protection as a sort of constitutional trump card is without its critics. For instance, Professor Emily Hughes recently argued that the Court should not prioritize innocence over other types of constitutional error, and thus "innocence" should not be modified by terms such as "factual" or "actual." *See generally* Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083 (2011). Professor Hughes contends that the Court has diluted the concept of innocence by valuing "actual innocence over other constitutional rights, such as the effective assistance of counsel to explore exculpatory evidence, weaknesses in the government's case, or other legal defenses that comprise an innocence unmodified." *Id.* at 1119−20. The argument treats a person who committed the crime, but did not get a constitutionally sound trial, the same as a person who did receive a fair trial, but did not commit the crime. "Legal" and "actual" innocence are not equals, however. The procedural mechanisms required by the Bill of Rights (e.g., the right to receive exculpatory evidence from the prosecution or the right to the effective assistance of counsel) are meant to protect the factually innocent by maximizing the possibility that guilt is determined accurately at trial. Because the procedural rights are in service of the substantive value of innocence protection, it seems that a prisoner who is able to prove actual innocence without the necessity of fussing over legal innocence is in a stronger position than a person with a stronger claim of procedural error but a weaker (or, worse, non-existent) claim of underlying innocence.

Professor Hughes focuses much of her argument on the context of guilty pleas, and she acknowledges that the prioritization of actual innocence might not be as problematic where defendants are represented by counsel. Other scholars have made the broader argument that innocence should not be prioritized over other types of constitutional error. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 610−11 (2005). Professor Hughes's argument—which draws on these previous attempts—is a particularly concise and persuasive statement of the position. *See* Hughes, *supra* at 1083 ("Because the Innocence Movement has focused on defendants who did not commit the actions underlying their convictions, courts, lawyers, and the larger society have come to believe that a person is wrongly convicted of a crime only if he is actually innocent. This perception overlooks the fact that a person can be wrongly convicted if his constitutional rights were violated in the process. As such, the Innocence Movement devalues legal innocence and the constitutional values that underlie a broader conception of innocence.").

61. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 416 (1993) ("[T]he trial is the paramount event for determining the guilt or innocence of the defendant."); Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1741 (2011) ("What is the purpose of a 'trial' worthy of the name, if not to allow a defendant a fair opportunity to show that he is innocent of the charges leveled against him?").

"where" (at the time and place of the trial).

However, once the trial is over and the prosecution has met its heavy burden, the presumption of innocence disappears. The accused is now the convicted. Considerations other than the interests of the convicted person come into play. The need for society to obtain finality in criminal judgments, to preserve scarce judicial resources, and to respect the judgment of other courts that decided the case must be factored into how we treat challenges to a conviction. The question at this stage is not whether the Constitution permits the incarceration or execution of an innocent person. Instead, the issue is whether the Constitution requires a court to revise a jury determination of guilt if the prisoner subsequently demonstrates his factual innocence to some predefined degree of certainty.

This section demonstrates the need to reconsider the trial as the center of gravity in criminal prosecutions. The Framers did not—and could not—envision our modern criminal justice system, in particular the declining importance of the trial for substantive determinations of innocence. Yet, the Framers hardly could have made it more clear that innocence protection mechanisms (such as the right to confront witnesses) were integral to constitutional criminal procedure. We should apply that value system to our modern criminal justice system by relocating some of the conceptual importance of trial innocence protection mechanisms to the post-conviction context. Contemporary understanding of the scope of the wrongful conviction problem, as well as the increasing availability of tools that make assessments of certain types of evidence more reliable with time, require us to reconsider where we locate constitutional innocence protection. The Constitution cannot protect the innocent—a value of surpassing importance to the Framers—unless it also provides a remedy for those discovered to be innocent (or very likely innocent) after a conviction has become final. The birth of long-term incarceration as a criminal justice tool, the expansion in time between the verdict and an execution in capital cases, the historical shift in the types of evidence relied on at trial, the rise of scientific evidence, and the vastly reconceptualized understanding of the possibility of incarcerating and executing innocent citizens support relocating some of the focus to the post-conviction context.

It is important to note that these shifts functionally de-emphasize the trial as the place to determine innocence, but the change has not all been in the same direction. There are strong arguments for the notion that the pretrial process has displaced the trial as the main event when it comes

to innocence protection.[62] The ability to test biological evidence pretrial—or to see a recording of the crime scene on a video camera or a cell phone—makes more objective what used to be determined primarily from the subjective testimony of fact witnesses. In many cases, the availability of objective evidence of innocence prevents erroneous arrests from occurring in the first place. The trial has been displaced as the main event in a much more fundamental way, though. Most of the action (and constitutional regulation) occurs pretrial—from litigating the admissibility of a confession, identification, or seized evidence to determining the scope of discovery. Indeed, despite (and probably because of) all of this pretrial noise, fewer than six percent of state felony cases proceed to trial.[63]

This dislocation of the trial as the point of resolution of criminal claims has a profound impact on the ability to identify wrongful convictions. This is especially true in instances where defendants plead guilty, not because they *are* guilty, but because they are faced with what appears to be overwhelming evidence. Such people might decide to accept a comparatively lenient sentence if they (or their lawyer) are convinced that they will receive a harsher sentence at trial. This type of plea bargaining happens in the context of a modern system where outcomes are often constricted by sentencing guidelines: prosecutors can take advantage of the unprecedented breadth and overlap of modern criminal statutes to pile on multiple charges for a single incident,[64] and overburdened public defenders simply may not have the time to thoroughly investigate—legally or factually—each case.[65] With the understanding that the focus on the criminal case has shifted in the pretrial direction, the rest of this section explains why it is important to recognize that some of the shift has also moved in the posttrial direction.

1. Changes in Investigative, Trial, and Sentencing Procedures

Understanding the centrality of the trial for determining criminal

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62. *See* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 475 (1996) (labeling a "miscarriage of justice as an error at trial . . . [is] a mistake" and noting that the "error occurs much earlier, in the investigation of the crime, when the police identify the wrong person as the criminal").

63. Matthew R. DuRose & Patrick A. Langan, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2004*, U.S. DEPARTMENT JUST. 1 (July 2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf.

64. *See* HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2009) (describing the proliferation of vague and broad federal laws and arguing that the federal criminal law covers more human activity than ever before).

65. *See supra* note 20 and accompanying text.

liability requires imagining a wholly unfamiliar legal landscape. Long prison sentences did not exist at the founding. The most sophisticated mechanisms for holding lawbreakers were "primitive jails" described as "dirty, undisciplined, unisex warehouses in which every form and shape of humanity was shoved in, helter-skelter."[66] These jails could hold a very limited number of offenders, despite a growing urban population and an uptick in violent crime.[67] Limited by the lack of technology necessary to house inmates long-term, punishments were physically brutal but temporally short.[68] Modern prisons allow for the long-term incarceration of prisoners, which satisfies the public safety interest without the need to physically maim offenders. The time between conviction and execution in the capital context also has grown dramatically. At the founding, executions generally took place shortly after the sentence was handed down.[69] The average capital inmate today spends years—or decades—on death row prior to execution.[70]

Public investigations and interrogations also have changed shape, which has had a negative impact on the transparency of criminal prosecutions. As Professors D. Michael Risinger and Lesley Risinger have explained, police forces did not exist at the founding.[71] Prosecutors likely did not prosecute or investigate most crimes.[72] Complaining witnesses brought cases directly to a justice of the peace.[73] Transcribing the witnesses' statements and the statement of the accused occurred in the courthouse, not behind the closed doors of an interrogation room or

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66. *See* Chris Hutton, *A Glimpse of the Past: A Review of Lawrence Friedman's Crime and Punishment in American History*, 41 S.D. L. REV. 223, 224 (1996) (book review) (quoting LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 77 (1983)).

67. *See* Hirsch, *supra* note 8, at 1187 (noting that "terms [of incarceration]" in the mid-eighteenth century "rarely exceeded three months, and often proved as fleeting as twenty-four hours"); *id.* at 1229 (noting, for example, that "[a]fter 1765, more than ten percent of the residents of Boston had lived in town for five years or less"); Michael J. Millender, *The Road to Eastern State: Liberalism, the Public Sphere, and the Origins of the American Penitentiary*, 10 YALE J.L. & HUMAN. 163, 168 (1998) (book review) (noting, for example, the "alarming rise in crime rates" in 1786 Pennsylvania).

68. *See supra* note 9 and accompanying text.

69. Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 179 (1998) (noting that "[t]he time from the imposition of a death sentence to the execution was not long" in the post-revolution period, meaning that "if an execution occurred, it routinely happened within one year of the conviction").

70. Tracy L. Snell, Bureau of Justice Statistics, *Capital Punishment, 2009—Statistical Tables*, U.S. DEPARTMENT JUST. 14 tbl.12 (Dec. 2010), http://www.bjs.gov/content/pub/pdf/cp09st.pdf (noting, for example, that in 2009 the average length between sentence and execution was 169 months).

71. D. Michael Risinger & Lesley Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV (forthcoming 2012) (manuscript at 8), *available at* http://ssrn.com/abstract=1783941(follow "One-Click Download" hyperlink).

72. *Id.* at 8−9.

73. *Id.*

district attorney's office.[74] Moreover, the idea that the trial would provide adequate testing of innocence did not account for the private nature of the investigative process today, which gives prosecutors the ability to game the system both in the discovery process (e.g., whether to turn over exculpatory evidence) and in the investigatory process (e.g., how coercive is the interrogation).[75]

Take the case of *Connick v. Thompson*.[76] John Thompson spent eighteen years in the Louisiana State Penitentiary—most of them on death row—before his release in 2003.[77] At his capital murder trial, Thompson opted not to testify in his own defense because he was previously convicted of armed robbery.[78] The proof of his innocence of the armed robbery languished in the files of the New Orleans Crime Laboratory.[79] One month before his scheduled execution a defense investigator stumbled upon a lab report indicating that the blood evidence the prosecution presented at trial did not match Thompson's blood type.[80] One assistant district attorney "intentionally suppressed [the] blood evidence" and then, shortly after being diagnosed with terminal cancer, confessed his wrongdoing to another assistant district attorney, who did not reveal the secret for another five years.[81] The Louisiana Supreme Court vacated both convictions.[82] Upon his release, the Jefferson Parish District Attorney retried Thompson for capital murder.[83] A jury acquitted him.[84]

Setting aside the impossibility of blood testing at the time of the founding, the idea of the prosecution possessing hidden evidence would have been inconceivable when the Framers constructed the innocence protection mechanisms in the Constitution. Investigations were more public, and the adversarial process was accompanied by fewer incentives for gamesmanship by individual prosecutors whose reputations are not

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74. *Id.* at 9.

75. Professor William Stuntz noted that "the degree to which the sorting of defendants is done by prosecutors rather than by judges and juries" is an "important and underrated feature of our current system" because in a system where three in five arrestees in state felony cases are never incarcerated, "the prosecutor represents the best shot any defendant, guilty or innocent, has at a favorable outcome." Stuntz, *supra* note 57, at 45−46.

76. 563 U.S.__,131 S. Ct. 1350 (2011).

77. *Id.* at 1355.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1356 n.1; *In re* Riehlmann, 891 So. 2d 1239, 1242 (La. 2005).

82. *Thompson*, 131 S. Ct. at 1355.

83. *Id.* at 1357.

84. *Id.*

won or lost by how fairly they treat accused citizens.[85] A pessimistic view of how prosecutors decide whether to disclose potentially exculpatory material today might turn on maximizing how many convictions they can obtain within the outer limits of their ethical duties to disclose favorable information to the defense.[86]

2. Erosion of Confidence in Determinations of Criminal Liability

The realization that criminal verdicts are not foolproof, and indeed, that hundreds of people have been wrongly convicted, has led legislators and judges to reflect on the errors that occur in the trial process that can lead to wrongful convictions. The questionable reliability of two forms of evidence in particular—eyewitness identifications and confessions—erodes the strong assumption of accuracy that the Framers placed in the trial itself.[87] This section discusses each in turn.

a. Eyewitness Identification.

Almost four-fifths of the first 200 prisoners exonerated by DNA evidence were convicted based on erroneous eyewitness identification.[88] Numerous studies over the past two decades have found that eyewitnesses do not reliably identify strangers.[89] Accuracy does not appear to improve significantly when eyewitnesses are asked to identify

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85. *See supra* notes 71−74 and accompanying text. This Article does not argue that trial outcomes were more reliable or that criminal justice actors (including magistrates) were filled with more integrity at any previous point in history. The idea that the process was more public than it is today, and the absence of knowledge that individual prosecutors who make decisions in private would dominate criminal cases, changes the calculus by providing more of a possibility that there is undisclosed evidence that might surface at some future point.

86. The more opaque nature of the process today, and its unforeseen dominance by individual prosecutors who make decisions in private, changes the calculus by providing more of a possibility that there is undisclosed exonerating evidence that might surface after trial.

87. Other forms of error—such as incorrect serology or fiber analysis—led to a greater number of exonerations among the first 200 DNA-based cases. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 77 tbl.3 (2008). My point, however, is that confession and eyewitness identification evidence were staple forms of evidence at the creation of our constitutional criminal procedure. It is the erosion of confidence in these traditional forms of evidence that would have surprised the Framers (as it continues to surprise Americans more than 200 years later).

88. *Id.* ("The vast majority of the exonerees (79%) were convicted based on eyewitness testimony."). Professor Garrett explains that in crimes such as rape, eyewitness identifications are often central to the prosecution's case. *See id.* at 79. The point is not the eyewitness identifications should be excluded from trial, but rather that the frequent errors that accompany such testimony counsel less deference towards trial verdicts in the face of a strong showing of innocence post-conviction.

89. Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1497 (2008) (collecting studies and concluding that "[e]yewitness identifications are notoriously subject to error").

acquaintances, rather than strangers.[90] The reliability of eyewitness identification evidence is diminished further still when the identification is interracial.[91] Indeed, neuroscience research suggests that particular segments of the brain that mediate recognition simply do not work as hard when confronted with a person of a different race.[92] The background conditions in which the identification is made—variations in weather, lighting, and distance, for example—also decrease the reliability of identifications.[93] So do stressful situations, which, given the context, is particularly troubling in criminal cases.[94] Taken together, the developments cast considerable doubt on the foundational assumption that a person—especially an uninterested party—would not testify that he saw someone "do it" unless he really did "do it."

b. False Confessions

In *Arizona v. Fulminante*,[95] the Court emphasized: "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."[96] Concurring in *Fulminante*, Justice Anthony Kennedy agreed: "Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence."[97] Knowledge of false confessions existed at common law. The prototypical example was a confession in a murder case where

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90. Kathy Pezdek & Stacia Stolzenberg, Non-Stranger Identification: How Accurately Do Eyewitnesses Determine If a Person is Familiar 2 (July 12, 2009) (unpublished manuscript), http://ssrn.com/abstract=1433127 (follow "One-Click Download" hyperlink) ("An eyewitness's report that he can recognize a perpetrator because he has seen him casually in the past is of dubious reliability.").

91. *See* Thompson, *supra* note 89, at 1501 n.69 (citing ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 21 (1979)).

92. Sheri Lynn Johnson, *Litigating for Racial Fairness After* McCleskey v. Kemp, 39 COLUM. HUM. RTS. L. REV. 178, 193–94 (2007) ("[F]or most people, when they are observing faces, there is greater activity in the fusiform region of the brain (which is the region in which face recognition takes place) when a person tries to recognize a person of the same race as when he or she tries to recognize a person of another race.").

93. *See generally* Steven G. Fox & H.A. Walters, *The Impact of General Versus Specific Expert Testimony and Eyewitness Confidence Upon Mock Juror Judgment*, 10 LAW & HUM. BEHAV. 215 (1986) (discussing physical factors that affect the reliability of eyewitness identification, including lighting and distance).

94. *See generally* Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687 (2004) (reporting a consensus among experts that high levels of stress negatively impact the ability of an individual to make a reliable eyewitness identification).

95. 499 U.S. 279 (1991).

96. *Id.* at 296 (internal quotation marks omitted).

97. *Id.* at 313 (Kennedy, J., concurring).

the victim later appeared alive and well.[98] To protect against such scenarios, courts required the prosecution to present independent evidence that a crime had occurred.[99] The experience of the last two decades, however, has demonstrated that the problem is of a different degree than previously imagined.

A sizable number of those individuals who have been exonerated by DNA evidence—including cases where the real perpetrator has been located—confessed to the crime. Professors Richard Leo and Steve Drizin have identified thirty-eight proven post-conviction exonerations where the wrongfully convicted person falsely confessed to committing the crime.[100] In twenty-five of the cases, either the real perpetrator has been located or it was physically impossible for the person who confessed to have committed the crime.[101] There are a number of factors that contribute to false confessions: youth and mental impairment; police deception during interrogations;[102] confabulation;[103] and an accused's intentional or inadvertent mention of facts of the crime.[104] The devastating nature of the modern understanding of false confessions is not only that they exist in larger numbers than assumed, but also that average defendants—not just the severely mentally ill or those who have been coerced—give false confessions.

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98. Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 41 (2008) (discussing Perry's Case, 14 How. St. Tr. 1311 (1660), "which resulted in the execution of a defendant who had confessed to murdering a victim who was later discovered to be alive").

99. *See, e.g.*, Salazar v. State, 86 S.W.3d 640, 644 (Tex. Crim. App. 2002) ("The . . . rule [requiring external proof that a crime has occurred] guarded against the shocking spectacle and deleterious effect upon the criminal justice system when a murder victim suddenly reappeared, hale and hearty, after his self-confessed murderer had been tried and executed.").

100. Richard Leo & Steven Drizin, *Proven False Confession Cases, Post-Conviction*, INNOCENCE PROJECT, http://www.innocenceproject.org/docs/Master_List_False_Confessions.html (last visited Jan. 26, 2012).

101. *Id.*

102. For example, "we have DNA evidence that links you to the crime." *See, e.g.*, Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 813, 824 (2006). "[T]he growing body of empirical evidence [demonstrates] that law enforcement trickery plays a significant role in false confessions . . . ." *Id.* at 796.

103. Confabulation is the process whereby the brain remembers events that did not happen, often in response to excessive pressure and exhaustion. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 475 (2002).

104. *See* Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 930−31 (2008) ("It is entirely possible that most wrongful convictions—like 90 percent or more of all criminal convictions—are based on negotiated guilty pleas to comparatively light charges, and that the innocent defendants in those case received little or no time in custody.").

c. Misremembering and Misinterpreting Evidence

Implicit social cognition is the process by which the brain makes rapid and near automatic judgments about target objects, including people, on the basis of structures of knowledge that might not be consciously accessible.[105] Implicit race bias is one form of implicit social cognition. Two implicit racial bias studies by Professor Justin Levinson further erode the perception that criminal liability is determined most reliably at trial.[106] Levinson and Young tested whether implicit race bias impacts jurors' interpretation of ambiguous evidence.[107] Levinson provided a group of participants with a brief background story of a fictional mini mart robbery and then had the participants view three pictures from the crime scene for four seconds each. The first and second pictures were innocuous. The third picture—the centerpiece of the study—displayed one masked assailant reaching over the counter with a gun in his left hand. The only identifiable race cue of the assailant is a small section of visible flesh on his forearm. Levinson altered the skin tone of the assailant, showing half the participants a light-skinned suspect and the other half a dark-skinned suspect. After watching the short video, participants were told that a suspect was caught, and then provided with a series of ambiguous evidence about the suspect. Levinson asked the participants to rate the probative value of each piece of ambiguous evidence. Participants shown the photo with the dark-skinned suspect were significantly more likely to find ambiguous evidence to be more probative of guilt.

Levinson also conducted an elegant experiment to test whether implicit race bias impacted jurors' memories of case facts.[108] Levinson provided jury-eligible participants with a fictional story about a confrontation between two men. Some jurors read about "William" the white defendant, while others read about "Tyronne" the black defendant. The rest of the story remained constant. But when Levinson asked jurors to remember pertinent facts from the confrontation, he found that the race of the defendant affected how participants recalled the story's details. Participants more frequently remembered aggressive details

105. *FAQs: What Is the Difference Between 'Implicit' and 'Automatic'?*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq5 (last visited Jan. 26, 2012).

106. Levinson & Young, *supra* note 13; Levinson, *supra* note 13. The two paragraphs summarizing the Justin Levinson studies originally appeared in substantially similar form in G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425 (2010).

107. *See* Levinson & Young, *supra* note 13, at 332–39 (describing the study and its results).

108. Levinson, *supra* note 13, at 390–406 (describing the study and its results).

when Tyronne rather than William was the defendant. Levinson concluded "that the race of a civil plaintiff or a criminal defendant can act implicitly to cause people to misremember a case's facts in racially biased ways."[109] The participants appeared to remember "facts" that did not appear in the story more often when those facts were stereotype-consistent, such as facts that portray black males as aggressive.[110]

Other social cognition research demonstrates that people make the same type of biased decisions on the basis of age,[111] gender,[112] and weight,[113] among other characteristics. The point is not that criminal liability is determined inaccurately in most cases—there is no basis for that belief. In close cases, this type of implicitly biased decision-making can swing determinations of witness credibility or the probative force of a piece of evidence, and thus make the difference between a guilty verdict and a not guilty verdict. More broadly, implicit bias is another signal that the singular focus on the trial as the "portentous event" in a criminal case is misplaced.

3. Changes in the Availability and Reliability of Post-Conviction Evidence

Scientific evidence is admitted into the courtroom in a large number of trials, especially in cases that involve serious crimes such as rape and murder. Unlike witness memory, the invention of new tools and modes of analysis sometimes means that scientific evidence can improve with time. For example, DNA technology today can analyze the same droplets of blood that state-of-the-art technology ten years ago could not analyze due to limited sample size or degradation.[114] Thus, DNA evidence "provide[s] powerful new evidence unlike anything known before," and "no technology [is] comparable to DNA testing for

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109. *Id.* at 350.

110. *Id.* at 398–406.

111. *See, e.g.*, Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 801 (2001) ("[I]mplicit group preferences captured by the IAT reliably predict people's membership in various groups on the basis of the following characteristics: (a) race/ethnicity; (b) nationality; (c) age; (d) sex . . . ." (internal citations omitted)).

112. *Id.*

113. *See, e.g.*, BA Teachman & KD Bronwell, *Implicit Anti-Fat Bias Among Health Professionals: Is Anyone Immune?*, 25 INT'L J. OBESITY 1525 (2001) (finding that health professionals possess negative implicit attitudes towards overweight citizens).

114. *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1658–59 (2008). "DNA technology has eroded the twin pillars supporting the Court's ruling in *Herrera*: reliability and finality." *Id.* at 1636.

matching tissues when such evidence is at issue."[115] However, DNA is not the only forensic science specialty with the power to shine light on wrongful convictions. Indeed, multiple specialties are undergoing rapid evolution.[116]

On the other hand, forensic science is not perfect—despite the weight that juries tend to give to such evidence.[117] Consider the Cameron Todd Willingham case. On February 17, 2004, moments before Texas executed Willingham, he uttered these last words: "I am an innocent man – convicted of a crime I did not commit. I have been persecuted for 12 years for something I did not do."[118] A jury convicted Willingham and sentenced him to death in 1992 for the arson death of his three young children.[119] Fire investigators determined that the fire was set intentionally because, among other things, the walls in the burned out Willingham home displayed unusual "pour patterns" and "puddle configurations," which suggested the use of an accelerant to start the fire—or so the Texas deputy fire investigator testified at trial.[120]

Four days before the execution, Willingham's attorneys released a report by Gerald Hurst, a nationally acclaimed fire investigator, containing his conclusion that the arson investigation in the case was seriously flawed. Hurst noted that a reputable expert today might look at the initial report and wonder how someone could make so many "critical

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115. Dist. Attorney's Office v. Osborne, 557 U.S.__, 129 S. Ct. 2308, 2317 (2009).

116. Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CALIF. L. REV. 721, 728–30 (2007) (distinguishing between "first generation" forensic science specialties such as, "handwriting, fingerprinting, ballistics, bite or tool mark, and fiber analysis," and "second generation" technologies such as, "DNA typing, data mining, location tracking, and biometric scanning" and suggesting that the latter group of specialties have the power to alter criminal adjudications in far-reaching ways).

117. Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L. J. 1050, 1058 (2006) (describing the potential impact of television dramas such as *CSI: Crime Scene Investigation* on juror perception of evidence quality and noting "the show's plot twists often involve apparent victims who turn out to be the actual killers, alongside red herrings – those who confess despite their innocence, usually to save another"). Tyler asserts that "[t]he upshot of all this is that the investigators of *CSI* appear to place next to no faith in the credibility of the ordinary people with whom they talk. Rather than carefully weigh credibility, the investigators often seem to ignore the problem of determining whether or not someone is lying by instead going after 'real' evidence, like microfibers." *Id.*

118. *Offender Information*, TEXAS DEPARTMENT CRIM. JUST., http://www.tdcj.state.tx.us/stat/dr_info/willinghamcameronlast.html (last visited Jan. 28, 2012) (providing the last statement of Cameron Todd Willingham).

119. Willingham v. State, 897 S.W.2d 351, 354 (Tex. Crim. App. 1995).

120. CRAIG L. BEYLER, ANALYSIS OF THE FIRE INVESTIGATION METHODS AND PROCEDURES USED IN THE CRIMINAL ARSON CASES AGAINST ERNEST RAY WILLIS AND CAMERON TODD WILLINGHAM 5–8 (2009), *available at* http://www.docstoc.com/docs/document-preview.aspx?doc_id=10401390.

errors."[121] Hurst stated that the report and its findings "simply reflect[] the shortcomings in the state of the art" and thus are best viewed "in the context of its time and in light of a few key advances that have been made in the fire investigation field over the past dozen years."[122] He concluded that there was "nothing to suggest to any reasonable arson investigator that this was an arson fire."[123] Despite the report, the state and federal courts, as well as the Texas clemency process, failed to provide relief for Willingham. The Texas Forensic Science Commission later hired an expert, Craig Beyler, to investigate the case.[124] In 2009, Beyler concluded that the original conclusions testified to at trial lacked any basis "in modern fire science," and that the arson finding "could not be sustained."[125] Thus, Texas executed Cameron Todd Willingham despite highly convincing, but not certain, evidence of his innocence.

Fire science is just one example of dozens of forensic science specialties where flaws in methodological assumptions have been exposed. Indeed, after a review of the trial transcripts from 137 DNA-based exoneration cases in which a forensic science expert testified on behalf of the prosecution, Professor Brandon Garrett and Innocence Project Co-founder Peter Neufeld found that the expert offered "conclusions misstating empirical data or wholly unsupported by empirical data" in sixty percent of the cases.[126] Furthermore, the National Academy of Sciences (NAS) released a scathing report in 2009 on the state of forensic science in America, concluding that "serious problems" exist and suggesting an "overhaul [to] the current structure that supports the forensic science community in this country."[127] Justice Scalia, writing for the Court in *Melendez-Diaz v. Massachusetts*,[128] highlighted "[s]erious deficiencies . . . in the forensic evidence used in criminal trials" and cited a recent study finding that "invalid forensic

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121. GERALD HURST, REPORT OF DR. GERALD HURST 2–3 (2004), *available at* http://www.innocenceproject.org/docs/Willingham_Hurst_Report.pdf.

122. *Id.*

123. Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, CHI. TRIB. (Dec. 9, 2004), http://www.chicagotribune.com/news/nationworld/chi-0412090169dec09,0,1173806.story.

124. Chuck Lindell, *Man Was Executed over Arson That Wasn't, Scientist Says*, AUSTIN AM.-STATESMAN, Aug. 26, 2009, at A1, *available at* http://www.statesman.com/news/content/news/stories/local/2009/08/26/0826arson.html.

125. BEYLER, *supra* note 120, at 48–52.

126. Brandon L. Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 2 (2009).

127. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, at xx (2009) [hereinafter STRENGTHENING FORENSIC SCIENCE].

128. 557 U.S.__, 129 S. Ct. 2527 (2009).

testimony contributed to the convictions in 60% of [exoneration] cases."[129] One of the major problems that the NAS Report found, and Justice Scalia spotlighted, is that "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency."[130] In other words, forensic science evidence is both inherently fallible and susceptible to the manipulation and frailties of human beings. Thus, forensic science evidence is a double-edged sword that both risks conviction of the innocent and contributes to the exoneration of wrongfully convicted inmates.[131]

C. Mechanisms for Realigning Constitutional Innocence Protection

Shifts in the availability and reliability of scientific evidence force us to grapple with what substantive, doctrinal, or procedural mechanisms would best protect innocence outside of heightening the procedural protections available within the trial itself. There should be a constitutionally defined right to have a judge hear previously unheard evidence (or evidence that has been fundamentally altered due to new scientific analysis) at any point after the conviction has become final. This right holds regardless of whether a court has previously reviewed such a post-conviction claim so long as the new evidence meets predefined credibility and persuasion thresholds. Of course, the idea that changes in technology influence the mechanisms by which underlying constitutional values are enforced is not limited to the innocence context. Take the Fourth Amendment prohibition against unreasonable searches and seizures.[132] Privacy was one important value that the Framers meant to protect.[133] Until the mid-twentieth century, enforcing the value was

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129. *Id.* at 2536.

130. *Id.* at 2539 (alterations in original) (quoting STRENGTHENING FORENSIC SCIENCE, *supra* note 127, at 183).

131. It is also worth noting that errors that occur in relation to the use of modern forensic science tools can impact multiple cases at once. *See* Murphy, *supra* note 116, at 775 ("[T]he scale of error that can occur among second-generation [forensic science] techniques is an order of magnitude larger than that which occurred among the first-generation," because, for example, "a wrongly calibrated machine can churn out large volumes of erroneous information and tarnish multiple cases."). Murphy also noted the potential for error affecting multiple cases in DNA typing: "a manufacturer may contaminate a kit, an analyst may fail to run positive or negative controls, or a technician may erroneously input data into a database." *Id.*

132. U.S. CONST. amend. IV.

133. Colb, *supra* note 43, at 1485. There is a strong argument that the Framers intended to "protect[] the innocent from invasions of privacy," and because it is often impossible to sort the innocent from the guilty ex ante, "[t]he requirement of probable cause is simply a rough way of achieving this goal while permitting evidence-gathering to take place." *Id.* at 1477. The "[i]nnocence model" of the Fourth Amendment "holds that the purpose of the Fourth Amendment

relatively straightforward.[134] That has changed. As Justice Scalia wrote for the majority in *Kyllo v. United States*,[135] "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."[136] To resolve the specific issue in *Kyllo*—whether a "thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment"—the Court centered its analysis on the value of privacy, noting that the home is the "prototypical . . . area of protected privacy."[137] Thus, technological change has required the Court to revise and devise doctrinal mechanisms in order to ensure that the Fourth Amendment continues to protect the core value of privacy. Similarly, the advent and pervasive nature of forensic evidence requires a doctrinal change to permit post-conviction process in order to best enforce innocence protection as a constitutional value.

There is a strong basis for shaking loose the almost total focus on the trial as the place where innocence is best protected. The theoretical underpinnings for heavily distributing those protections at the trial level have been altered in the more than 200 years since the Framers crafted a constitutional criminal procedure.[138] Investigations and interrogations are less public, long-time confinement is common, and there is a wider gap between trial and execution. At the same time, core assumptions about the reliability of the trial process have been called into serious question: eyewitness identifications are not always reliable, confessions are not always true (even in serious crimes, and even when the confessor is sane and has not been subjected to physical coercion), and fact-finders interpret the probative weight of evidence or misremember critical facts of the case based on arbitrary factors.[139] Meanwhile, the capacity for post-conviction determinations of innocence has increased with changes in technology and law. Some forms of scientific evidence become

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prohibition against unreasonable searches is to protect only those who are innocent and are not concealing evidence of crime from official searches." *Id.* at 1463.

134. Kyllo v. United States, 533 U.S. 27, 31 (2001) ("The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass.").

135. 533 U.S. 27.

136. *Id.* at 33–34.

137. *Id.* at 34.

138. Indeed, our contemporary knowledge of wrongful convictions and their causes, as well as our ability to right these wrongs after the conviction has become final, has been radically altered even since the Warren Court's criminal procedure revolution of the 1960s.

139. *See supra* Part I.B.2.a–c.

reliable as time passes, especially as more sophisticated tools and methods are developed. At the same time, the availability of post-conviction lawyers and forums allows tracking down previously unavailable evidence and witnesses.

The remaining step is to identify the doctrinal structure in which the right to a post-conviction innocence determination is located. The Eighth Amendment is an obvious starting point because its proscription against "cruel and unusual punishment"[140] is not static, but evolves to reflect modern sensibilities.[141] The Eighth Amendment prohibition against cruel and unusual punishment applies to modes of punishment (e.g., drawing and quartering) and also to the fit between the punishment and the offender.[142] The latter principle constrains extremely disproportionate sentences in both the capital and non-capital contexts. The Eighth Amendment might also prohibit the continued incarceration of factually innocent prisoners. The most poetic formulation of the inequity of wrongful imprisonment for any duration is found in *Robinson v. California*,[143] where the Court invalidated a state statute that outlawed the *status* of being addicted to drugs: Though ninety days imprisonment is not cruel and unusual in the abstract, "[e]ven one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."[144]

In *Graham v. Florida*,[145] the Court held that life without the possibility of parole is cruel and unusual punishment for a juvenile who commits a non-homicide offense.[146] Justice Kennedy's opinion for the *Graham* Court emphasized that the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime."[147] Thus, the Eighth Amendment is based on blameworthiness, and a person who is factually innocent is not blameworthy in relation to the crime

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140. U.S. CONST. amend. VIII.

141. Ford v. Wainwright, 477 U.S. 399, 410 (1986) ("[W]hile the underlying social values encompassed by the Eighth Amendment are rooted in historical traditions, the manner in which our judicial system protects those values is purely a matter of contemporary law. Once a substantive right or restriction is recognized in the Constitution, therefore, its enforcement is in no way confined to the rudimentary process deemed adequate in ages past.").

142. *Id.* at 406; *see also* Weems v. United States, 217 U.S. 349, 378–79 (1910).

143. 370 U.S. 660 (1962).

144. *Id.* at 667.

145. 560 U.S.__, 130 S. Ct. 2011 (2010).

146. *Id.* at 2034.

147. *Id.* at 2021 (quoting Harmelin v. Michigan, 501 U.S. 975, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment)). Lamenting the concept of non-capital proportionality review, Justice Thomas's dissent (joined by Justice Scalia) emphasized "how long [the Court] ha[d] resisted crossing that [death is different] divide." *Id.* at 2046 (Thomas, J., dissenting).

charged. Indeed, imprisoning or executing a factually innocent person embodies the concept of grossly disproportionate punishment.

In one sense, the Eighth Amendment jurisprudence does not reach far enough. It is designed to establish a class of crimes that are not severe enough to receive a particular sentence (e.g., death penalty for the rape of a child[148]) or a class of offenders who are not culpable enough to receive a particular sentence (e.g., juveniles and the death penalty[149]). In both scenarios, the Eighth Amendment question is an ex ante one about who could be subjected to what punishment and for which crimes. The idea that the Eighth Amendment prohibits punishing the innocent despite their conviction is not based on the notion that innocent people cannot be executed, as that is clear. Rather, it would be based on the notion that the Constitution provides innocent prisoners with the right to prove that fact at some point after the conviction has become final.

Under the Eighth Amendment, the U.S. Supreme Court requires a post-conviction determination of whether a right that the Amendment protects has been violated. In *Ford v. Wainwright*,[150] the Court held that the Eighth and Fourteenth Amendments prohibit a state from executing a capital defendant who is insane *at the time of the scheduled execution*.[151] The Court explained that though a prisoner is not entitled to the same presumptions as before he was convicted, "he has not lost the protection of the Constitution altogether."[152] Indeed, "if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being."[153] The "contingent fact" to be determined prior to an execution is that the prisoner is sane, and that determination needs to be made at multiple points (e.g., pretrial, during trial, and before any execution) because sanity fluctuates. Innocence does not fluctuate, but, like sanity, the best facts to determine criminal liability might not be available at the trial, through no fault of the prisoner.[154] For instance, in Todd Willingham's case,[155] it could not have been discovered at trial that the

148. Kennedy v. Louisiana, 554 U.S. 407 (2008).

149. Roper v. Simmons, 543 U.S. 551 (2005).

150. 477 U.S. 399 (1986).

151. *Id.* at 417 (Marshall, J., plurality opinion).

152. *Id.* at 411.

153. *Id.*

154. The easiest example is that testing for small amounts (or degraded samples) of biological material might be impossible today, but tomorrow, due to scientific advances, that same biological material might prove exculpatory.

155. *See supra* notes 118–125 and accompanying text.

fire scientists relied on faulty science in testifying that the fire that killed Willingham's three children was arson.[156]

Another possibility is to conceptualize each day of imprisonment—or the act of execution in capital cases—as a future event. This would reframe the incarceration of an innocent person as a perpetual violation of the Eighth Amendment. The shift in circumstances brought about by our contemporary understanding of the possibility of wrongful convictions and our enhanced ability to determine innocence posttrial might drive a corresponding change in what type of process is due to a prisoner who is able to demonstrate that he is factually innocent. Developments in state practice substantiate this notion. The vast majority of jurisdictions—most by statute, a handful through judicial interpretation of their respective state constitutions—afford a person with substantial evidence that he did not commit the crime with the opportunity to prove his innocence long after the conviction has become final.[157]

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156. Willingham v. State, 897 S.W.2d 351 (Tex. Crim. App. 1995). Perhaps the evidence of innocence does not even need to be "new" in the sense that it could not have been discovered at trial. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court held that Texas was obligated to provide a full and fair opportunity for Panetti to prove that he is insane (and thus that he cannot be executed). *Id.* at 950. Dissenting, Justice Scalia complained about "the Court bend[ing] over backwards to allow Panetti to bring his *Ford* claim despite no evidence that his condition has worsened—or even changed—since 1995." *Id.* at 963 (Scalia, J., dissenting). One could read *Panetti* to prohibit a person with the status of insanity from being executed, regardless of whether the claim could have been litigated on substantially similar facts at an earlier proceeding. If this is the case, then the impact on innocence claims (and also mental retardation type claims of death ineligibility) is apparent.

157. Medwed, *supra* note 12, at 675 ("Each state currently permits a motion for a new trial on the basis of newly discovered evidence, nominally providing any state prisoner who may be factually innocent—and who has new evidence to substantiate that claim—with recourse to a post-trial procedure in state court"); *see also In re* Davis, No. CV409-130, 2010 WL 3385081, at *40 n.28 (S.D. Ga. Aug. 24, 2010) (noting that only "three states . . . [that] have not enacted modern reforms to ensure that convicts are actually innocent are Massachusetts, Alaska, and Oklahoma"). The *Davis* opinion lists the following states as possessing provisions that also allow for post-conviction fact-finding to facilitate actual innocence determinations: ALA. CODE § 15-18-200 (2009); ARIZ. REV. STAT. ANN. § 13-4240 (2000); ARK. CODE ANN. § 16-112-202 (2001); CAL. PENAL CODE § 1405 (West 2001); COLO. REV. STAT. § 18-1-413 (2004); CONN. GEN. STAT. § 54-102kk (2003); DEL. CODE ANN. tit. 11, § 4504 (West 2000); D.C. CODE § 22-4133 (2001); FLA. STAT. § 925.11 (2006); GA. CODE ANN. § 5-5-41 (2003); HAW. REV. STAT. § 844D-123 (2005); IDAHO CODE ANN. § 19-4902 (2010); 725 ILL. COMP. STAT. 5/116-3 (2003); IND. CODE § 35-38-7-5 (2003); IOWA CODE § 81.10 (2005); KAN. STAT. ANN. § 21-2511 (2001); KY. REV. STAT. ANN. § 422.285 (West 2002); LA. CODE CRIM. PROC. ANN. art. 926.1 (2001); ME. REV. STAT. tit. 15, § 2137 (2001); MD. CODE ANN., CRIM. PROC. § 8-201 (West 2001); MICH. COMP. LAWS § 770.16 (2000); MINN. STAT. § 590.01 (1999); MISS. CODE ANN. § 99-39-5 (1995); MO. REV. STAT. § 547.035 (West 2002); MONT. CODE ANN. § 46-21-110 (2003); NEB. REV. STAT. § 29-4120 (2001); NEV. REV. STAT. § 176.0918 (2003); N.H. REV. STAT. ANN. § 651-D:2 (2004); N.J. STAT. ANN. § 2A:84A-32a (West 2001); N.M. STAT. ANN. § 31-1A-2 (2003); N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 1994); N.C. GEN. STAT. § 15A-269 (2001); N.D. CENT. CODE § 29-32.1-15 (2005); OHIO REV. CODE ANN. § 2953.72 (West 2010); OR. REV. STAT. § 138.690 (2001); 42 PA. CONS. STAT. § 9543.1 (2002); R.I. GEN. LAWS § 10-9.1-12 (2002); S.C. CODE ANN. § 17-28-30 (2008); S.D.

These post-conviction relief mechanisms concede that the state's interest in reliability exceeds its interest in finality. Thus, the argument from the evolution of contemporary practice, read in light of the primacy of innocence protection as a constitutional value, makes the case that the Eighth Amendment requires an opportunity for a prisoner to obtain post-conviction relief upon a sufficient showing that he is factually innocent.[158]

II. POST-CONVICTION INNOCENCE CLAIMS SHOULD BE VIEWED THROUGH THE INNOCENCE-PROTECTION FRAMEWORK

At this point, this Article has explored an innocent person's right to be free from punishment. It also has considered that the trial is not the only or even the best time to determine factual innocence and has suggested that a prisoner who can marshal a strong post-conviction claim of factual innocence has a constitutional right to press that claim

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CODIFIED LAWS § 23-5B-1 (2009); TENN. CODE ANN. § 40-30-304 (2001); TEX. CODE CRIM. PROC. ANN. art. 64.01 (West 2001); UTAH CODE ANN. § 78B-9-301 (West 2008); VT. STAT. ANN. tit. 13, § 5561 (2007); VA. CODE ANN. § 19.2-327.1 (2001); WASH. REV. CODE § 10.73.170 (2000); W. VA. CODE § 15-2B-14 (2004); WIS. STAT. § 974.07 (2001); WYO. STAT. ANN. § 7-12-303 (2008). *In re Davis*, 2010 WL 3385081, at *40 n.29. Most of these statutes place limits on the types of evidence that suffice (some limit to DNA only, some permit other forms of biological evidence, others permit all credible forms of new evidence) and most also place time or other restrictions on when claims can be raised. Medwed, *supra* note 12, at 676 (noting that "many time limits governing motions for a new trial on the grounds of newly discovered evidence are remarkably brief" and that only "[a] sparse number of jurisdictions—nine—have no limitations period whatsoever"). One important purpose of announcing a clear constitutional rule is to provide a uniform standard and to remove impediments that arbitrarily restrict the ability of prisoners to demonstrate actual innocence (e.g., DNA-only statutes, statutes that bar successive claims even though new evidence is found).

158. The Fourteenth Amendment also provides protection from substantive due process violations. As the U.S. Supreme Court explained in *United States v. Salerno*, 481 U.S. 739 (1987) "substantive due process prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" *Id.* at 746 (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)). In light of the primacy of innocence protection as a constitutional value, it also can be argued that imprisoning or executing a person known to be innocent would "shock the conscience" and "interfere with rights implicit in the concept of ordered liberty." *Id.* (citations omitted) (internal quotation marks omitted); *see also* Janet C. Hoeffel, *The Roberts Court's Failed Innocence Project*, 85 CHI.-KENT L. REV. 43, 58–59 (2010) (asserting that the right to be free from punishment if innocent is protected by substantive due process and emphasizing that "[f]ar more politically controversial than a right to prove actual innocence, the findings of due process rights to abortion, contraceptives, or interracial marriage all led to questions for the states of what limits they could place on the right"). Similar to the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Due Process Clause absorbs meaning from contemporary practice. *See* Leland v. Oregon, 343 U.S. 790, 798 (1952) ("The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

and obtain relief if warranted. This part of the Article considers the mechanics of post-conviction relief based on innocence. The first section provides an overview of how the U.S. Supreme Court has treated post-conviction innocence claims. The final section addresses the contours of the right to relief if innocent by proposing a three-tiered approach to adjudicating factual innocence claims. The first two tiers pertain to freestanding innocence claims. The third tier is a proposed reform to gateway innocence claims.

A. Overview of Post-Conviction Innocence Cases and the U.S. Supreme Court

This section briefly describes the Court's existing innocence jurisprudence, which encompasses both gateway and freestanding innocence claims. Gateway innocence claims are those in which the prisoner asserts that his factual innocence of the crime should excuse an otherwise defaulted claim of constitutional error in the trial process. In contrast, a petitioner who presents a freestanding innocence claim is asserting that new evidence suggests that he is factually innocent despite a constitutionally sound trial.[159]

1. Gateway Innocence

A state prisoner can challenge the lawfulness of his detention in federal court through a petition for a writ of habeas corpus. Article III, Section 2 of the United States Constitution provides the Court with "appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."[160] The Judiciary Act of 1789, which was the first Act by the First Congress, provided the Court with the ability to entertain petitions for a writ of habeas corpus from federal prisoners.[161] Congress first authorized the Court to adjudicate habeas petitions from state court prisoners in 1867,

159. The majority of this section focuses on freestanding innocence claims, but my three-tiered proposal for adjudicating innocence claims suggests alterations to the framework for considering gateway innocence claims.

160. U.S. CONST. art. III, § 2.

161. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81, 81–82; *see also* Felker v. Turpin, 518 U.S. 651, 659 (1996) (noting that section 14 "authorized all federal courts, including this Court, to grant the writ of habeas corpus when prisoners were 'in custody, under or by colour of the authority of the United States, or [were] committed for trial before some court of the same'" (alteration in original)). Habeas practice in the late 1700s consisted largely of freeing wrongfully detained *pretrial* prisoners. *Id.* Given the inability at the time to subject prisoners to long-term imprisonment, the nature of the practice makes sense.

contemporaneous with the ratification of the Fourteenth Amendment.[162] Federal courts did not regularly review the merits of federal claims raised by state court prisoners until the mid-twentieth century.[163] Incorporation of the criminal-procedure-related provisions of the Bill of Rights in the 1960s drove up the number of habeas petitions filed in federal courts for relief from state court convictions.[164]

To deal with the additional burden placed upon the federal courts, the Court crafted a host of procedural default rules aimed at reducing the quantity of claims for courts to adjudicate.[165] Accordingly, a state prisoner ordinarily cannot obtain federal court review of a procedurally defaulted claim of constitutional error unless he can demonstrate both *cause* and *prejudice*.[166] In *Murray v. Carrier*,[167] the Court crafted an exception to the cause and prejudice rule in extraordinary cases where a constitutional error "probably resulted in the conviction of one who is actually innocent."[168] In *Kuhlmann v. Wilson*,[169] decided on the same day as *Murray*, the Court elaborated that where "the prisoner supplements his constitutional claim with a colorable showing of factual innocence," the "ends of justice" require an exception to the default rule.[170]

The idea that innocence suspends the procedural rules that ordinarily prevent a federal court from reviewing an alleged constitutional defect at trial is referred to as "procedural innocence." In *Schlup v. Delo*,[171] the Court explained that unlike a person who is arguing that his factual

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162. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385; *see also* Stone v. Powell, 428 U.S. 465, 475 (1976) ("Under the 1867 Act federal courts were authorized to give relief in 'all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . .'").

163. Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1709–10 (2000).

164. *Id.* ("As the Court extended the protections of the Fourth, Fifth, Sixth, and Eighth Amendments to state criminal defendants via the Fourteenth Amendment, the grounds for federal habeas petitions radically broadened; the sheer volume of petitions increased from less than 600 in 1951 to over 12,000 in 1990.").

165. *Id.* at 1710.

166. *See* Francis v. Henderson, 425 U.S. 536, 542 (1976) (holding that "[i]n a collateral attack upon a conviction that rule requires, contrary to the petitioner's assertion, not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice"); *see also* Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977).

167. 477 U.S. 478 (1986).

168. *Id.* at 496 ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.").

169. 477 U.S. 436 (1986).

170. *Id.* at 454 ("In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude 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.").

171. 513 U.S. 298 (1994).

innocence should trigger relief, those who bring procedural innocence claims seek to have a federal court grant relief on an underlying claim, such as ineffective assistance of counsel (*Strickland v. Washington*[172]) or the failure of the prosecution to turn over exculpatory evidence to the defense (*Brady v. Maryland*[173]).[174] The Court emphasized the weighty reasons that counsel respect for state court procedural default rules and reiterated that, except for in extraordinary circumstances, a petitioner would need to show both cause and prejudice to proceed to the merits on defaulted claims.[175] Nonetheless, after "balanc[ing] the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case,"[176] the Court found that in such cases, "the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration."[177] The Court held that a petitioner is entitled to relief from default if it is "more likely than not that no reasonable juror would have convicted him in the light of the new evidence" that he is innocent.[178]

2. Freestanding Innocence Claims

Freestanding innocence claims are those in which the petitioner asserts that he is innocent despite a constitutionally sound trial. Though the Court has articulated a standard to review gateway innocence claims,[179] it has not explicitly ruled that freestanding innocence claims are grounded in the Constitution. This is not to say that a freestanding innocence claim would be written on a blank slate, however.[180] In

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172. 466 U.S. 668 (1984).

173. 373 U.S. 83 (1963).

174. *Schlup*, 513 U.S. at 315 ("Schlup's claim of innocence is thus 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)).

175. *Id.* at 314.

176. *Id.* at 334.

177. *Id.* at 320.

178. *Id.* at 327.

179. See *supra* text accompanying note 178.

180. The Court also has addressed how to treat claims that a petitioner is innocent of the death penalty, meaning that he is not disputing that he committed the underlying crime, but is disputing that he was eligible for a possible death sentence. Sawyer v. Whitley, 505 U.S. 333, 336 (1992) (holding that to demonstrate actual innocence of the death penalty "one 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 under the applicable state law"). This Article focuses solely on how to treat crime-innocence claims.

Herrera v. Collins,[181] the petitioner argued that regardless of whether he received a constitutionally sound trial, the Eighth and Fourteenth Amendments prohibit the execution of a person who is factually innocent of the underlying crime.[182] Chief Justice William Rehnquist, writing for the majority, noted that the claim had an "elemental appeal"[183] but emphasized that "actual innocence based on newly discovered evidence ha[s] never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."[184]

The *Herrera* majority wrote that habeas corpus does not encompass a fact-finding mission, which is what an evaluation of factual innocence requires, but provides relief for inmates whose imprisonment offends the Constitution because of a legal error at trial.[185] Chief Justice Rehnquist also expressed confusion over how a freestanding innocence claim would operate in practice: "Would [the relief] be commutation of petitioner's death sentence, [a] new trial, or unconditional release from imprisonment?"[186] Rehnquist also worried that "entertaining claims of actual innocence" would be "very disruptive" to the notion of finality, and that "having to retry cases based on often stale evidence" would impose an "enormous burden" on the states.[187] Nonetheless, the Court 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."[188]

Concurring in the judgment, Justice Sandra Day O'Connor, joined by Justice Kennedy, wrote that she "cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution," and that "the execution of a legally and factually innocent person would be a constitutionally intolerable event."[189] She, like the

181. 506 U.S. 390 (1993).

182. *Id.* at 396–97.

183. *Id.* at 398.

184. *Id.* at 400 (citing Townsend v. Sain, 372 U.S. 293, 317 (1963) (holding 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")).

185. *Id.* ("[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.").

186. *Id.* at 403.

187. *Id.* at 417.

188. *Id.*

189. *Id.* at 419 (O'Connor, J., concurring).

Court, however, determined that Herrera was not innocent. Justice Byron White wrote a separate concurring opinion, in which he voiced agreement that actual innocence claims could be raised "even though made after the expiration of the time provided by law for the presentation of newly discovered evidence."[190] White believed that at a minimum such claims would require the petitioner to demonstrate that after assessing "the 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.'"[191]

Justice Harry Blackmun, joined by Justices David Souter and John Paul Stevens, dissented. The dissent argued that the Court should have squarely resolved whether the Constitution permits the execution of a factually innocent person: "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent."[192] The dissenters relied on the evolving standards of human decency reflected in the Eighth Amendment's Cruel and Unusual Punishment Clause. They reasoned that if punishing rape and mere involvement in a homicide with the death penalty is "grossly out of proportion to the severity of the crime" then it "plainly is violative of the Eighth Amendment to execute a person who is actually innocent."[193] In a footnote, the dissent also noted that it might be unconstitutional to incarcerate a person who is factually innocent.[194]

Justice Scalia, joined by Justice Clarence Thomas, penned a vicious concurrence, arguing that "[t]here 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."[195] Responding to Justice Blackmun's claim that executing the factually innocent "shocks the conscience," Justice Scalia scolded "[i]f the system that has been in place for 200 years (and remains widely approved) 'shock[s]' the dissenters' consciences, perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of 'conscience shocking' as a legal test."[196]

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190. *Id.* at 429 (White, J., concurring).

191. *Id.* (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

192. *Id.* at 430 (Blackmun, J., dissenting).

193. *Id.* at 431.

194. *Id.* at 432 n.2.

195. *Id.* at 427–28 (Scalia, J., concurring).

196. *Id.* at 428.

Twelve years later, in *House v. Bell*,[197] the Court again granted certiorari to resolve whether a freestanding innocence claim is cognizable and again did not resolve the question.[198] The prosecution in *House* had secured a guilty verdict and death sentence against Paul House for the murder of one of his neighbors.[199] At trial, the prosecution presented evidence that the victim's blood was present on the pants that House wore on the night of the crime[200] and that semen found on the victim belonged to House.[201] House brought his underlying constitutional claims based on newly discovered evidence to federal court after the Tennessee state courts found them to be procedurally defaulted.[202] House presented evidence proving that semen on the victim's pants belonged to the victim's husband.[203] He also brought forward evidence that small drops of blood belonging to the victim had transferred to House's pants as a result of a spill from an autopsy sample and not from direct transfer from the victim.[204] Taken together, those two facts undercut the probative force of the State's case at trial. The Court held that the new evidence that House presented met the procedural innocence threshold (i.e., the gateway innocence standard), but did not meet whatever threshold showing would be required to prove a substantive innocence claim.[205] Once again, the Court reserved the freestanding innocence question, noting that *Herrera* described the (would-be) standard as "extraordinarily high," and thus "implie[d] at the least that *Herrera* requires more convincing proof of innocence than *Schlup*."[206]

In *In re Troy Anthony Davis*,[207] the U.S. Supreme Court exercised its original habeas jurisdiction for the first time in nearly fifty years to transfer Davis's petition to the U.S. District Court for the Southern District of Georgia.[208] In 1991, a Chatham County, Georgia, jury sentenced Davis to death for the murder of a Savannah police officer.[209]

197. 547 U.S. 518 (2006).
198. *Id.* at 554–55.
199. *Id.* at 525–34.
200. *Id.* at 541.
201. *Id.* at 529.
202. *Id.* at 534.
203. *Id.* at 540.
204. *Id.* at 542.
205. *Id.* at 555.
206. *Id.*
207. 557 U.S.__, 130 S. Ct. 1 (2009) (mem.).
208. *Id.* at 1.
209. *See In re* Davis, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010).

The case against Davis rested on the testimony of nine eyewitnesses. Seven of the nine subsequently recanted their identification of Davis as the shooter.[210] One of the two remaining witnesses was the alternative suspect.[211] Multiple individuals alleged that another man, Sylvester "Red" Coles, confessed to the crime.[212] No physical evidence connected Davis to the crime, nor does any known physical evidence exist to exonerate him.[213]

The Court ordered the district court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[214] Justice Scalia dissented from the transfer order, accusing the Court of sending the district court on a "fool's errand."[215] He wrote:

> If this Court thinks it possible that capital convictions obtained in full compliance with law can never be final, but are always subject to being set aside by federal courts for the reason of 'actual innocence,' it should set this case on our own docket so that we can (if necessary) resolve that question.[216]

Justice Stevens shot back at Justice Scalia, writing that a "substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing."[217] Justice Stevens faulted Justice Scalia's logic that innocence provides a gateway to consideration of defaulted substantive claims, but is itself not an independent claim warranting relief.[218] He argued that it would allow for executing a person who "possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man."[219] "The Court," Justice Stevens concluded, "correctly refuses to endorse such reasoning."[220] The federal district court held an evidentiary hearing, but ruled that the evidence did not adequately support Davis's innocence claim.[221] The U.S. Supreme Court subsequently refused to

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210. *Id.* at *54.
211. *In re Davis*, 130 S. Ct. at 1 (Stevens, J., concurring).
212. *In re Davis*, 2010 WL 3385081, at *55.
213. *Id.* at *59–61.
214. *In re Davis*, 130 S. Ct. at 1 (mem.).
215. *Id.* at 4 (Scalia, J., dissenting).
216. *Id.*
217. *Id.* at 1 (Stevens, J., concurring).
218. *See id.* at 1–2.
219. *Id.* at 2.
220. *Id.*
221. *See In re* Davis, No. CV409-130, 2010 WL 3385081, at *61 (S.D. Ga. Aug. 24, 2010).

review the district court's judgment.[222] If credible, the post-conviction evidence that Davis presented casts serious doubt on the accuracy of the trial verdict, though it does not eliminate all doubt that Davis committed the crime.

The federal district court judge who presided over the transfer order ruled that the Constitution does prohibit the execution of a person who is factually innocent, but found that Davis did not adequately prove his innocence.[223] The U.S. Supreme Court subsequently denied Davis's renewed requests for review,[224] leaving the existence of a freestanding innocence claim unresolved. The remainder of this Article articulates a three-tiered proposal for adjudicating these types of claims.

B. The Three-Tiered Proposal

The following three-tiered proposal involves differing standards of proof. A standard of proof in a post-conviction criminal case distributes risk between the plausibly innocent prisoner and the society that retains an interest in maintaining accurate convictions. It also signals the degree of confidence that society should have in the outcome of a proceeding.[225] Prisoners who bring post-conviction innocence claims should be sorted into three groups depending on the relief requested:

> 1. *Conviction Relief.* A prisoner who seeks outright reversal of his conviction based solely on the grounds that he did not commit the crime in question must present a judge with clear and convincing evidence that he is factually innocent. Clear and convincing evidence is evidence that convinces the judge that the prisoner is "highly probably" innocent.[226]

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222. Davis v. Humphrey, 563 U.S.__, 131 S. Ct. 1788 (U.S. Mar. 28, 2011) (No. 10-950).

223. *In re Davis*, 2010 WL 3385081, at *1.

224. *Davis*, 131 S. Ct. 1788 (dismissing appeal from Georgia District Court, denying petition for writ of habeas corpus, and denying a common law writ of certiorari); Davis v. Humphrey, 563 U.S.__, 131 S. Ct. 1787 (U.S. Mar. 28, 2011) (No. 10-949) (denying petition for writ of certiorari to Eleventh Circuit); *In re* Davis, 563 U.S.__, 131 S. Ct. 1808 (U.S. Mar. 28, 2011) (No. 08-1443) (denying petition for writ of habeas corpus). Georgia executed Troy Davis on September 21, 2011. Kim Severson, *Davis Is Executed in Georgia*, N.Y. TIMES (Sept. 21, 2011), http://www.nytimes.com/2011/09/22/us/final-pleas-and-vigils-in-troy-davis-execution.html.

225. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 423 (1979) (citing *In re* Winship, 397 U. S. 358, 370 (1970) (Harlan, J., concurring)).

226. *See* Bryant M. Bennett, *Evidence: Clear and Convincing Proof: Appellate Review*, 32 CALIF. L. REV. 74, 75 (1944); J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 254 (1944) (asserting that under a clear and convincing evidence standard the "litigant who bears the burden must induce belief in the minds of the judge or the jury that the facts which he asserts are not merely probably true, but that they are highly probably true, yet not require him to discharge the greater burden of persuading them that they are almost certainly true, true beyond a

2. *Execution Relief.* A death-sentenced prisoner who cannot convince a judge that he is "highly probably innocent," nonetheless should be spared from execution if he can convince the judge that it is more likely than not that he did not commit the crime.

3. *Gateway Innocence.* A prisoner who is unable to prove that he is highly probably innocent, or even that it is more likely than not that he is innocent, should still be able to obtain review on the merits of a defaulted substantive constitutional claim (e.g., *Brady*) if the prisoner is able to convince a judge that there is a reasonable probability that he is factually innocent of the crime for which he was convicted.

This three-tiered approach balances the necessity of avoiding wrongful imprisonment or execution with the legitimate concern that a person who is wrongfully released could not be convicted in a new trial due to fluctuations in the availability of witnesses, memory, and evidence quality that accompany the passage of time.[227] It provides a uniform rule for treatment of possibly innocent prisoners as they litigate such claims in both state and federal courts. Indeed, one benefit of establishing the contours of the constitutional right is to encourage adequate resolution of state prisoner claims before they get to federal court.

The proposal also prevents doctrinal stretching by providing an outlet for freestanding claims without requiring courts to stretch the merits of underlying claims of constitutional error. Judges generally do not want to be responsible for the conviction or execution of an innocent person. Nonetheless, as of yet, there is no freestanding innocence remedy.[228] In close cases where the person appears to be innocent, judges might be tempted to "find" *Brady*, *Strickland*, or *Batson*[229] errors that might not otherwise be winning claims. The problem in those cases is that the individual person gains relief, but the clarity of the procedural doctrine suffers, along with its general deterrent and enforcement mechanisms. Consequently, lawyers, judges, and law enforcement officials struggle to

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reasonable doubt, or are certainly true").

227. Indeed, the uncertainty over the relief that would follow from a freestanding innocence claim, specifically the fear of releasing a guilty murderer who could not be reconvicted, might be responsible for Congress's reluctance to remove the procedural obstacles that surround the substance of any would-be freestanding innocence claim.

228. *See supra* Part II.A.2.

229. *See infra* note 307 (discussing Batson v. Kentucky, 476 U.S. 79 (1986)).

apply the facts to future cases.[230] Thus, due to the flaws inherent in stretching underlying claims to grant relief, a freestanding innocence claim provides a more legitimate alternative for vacating a conviction.[231]

The analysis that follows challenges a fundamental assumption of the existing innocence jurisprudence. Remember that in a gateway innocence claim, a convincing case of innocence provides an entryway through which a federal court can consider an otherwise defaulted claim that the prisoner received a constitutionally deficient trial.[232] The Court in *Schlup* posited that a conviction that underlies a successful gateway innocence claim is entitled to less respect than a conviction challenged via a freestanding innocence claim because the latter type of conviction arose from an error-free trial.[233] This theory relies on the assumption that an under-functioning innocence protection mechanism (e.g., the right to effective assistance of counsel) is more likely to result in the conviction of an innocent person than the under-consideration of post-conviction evidence (e.g., DNA evidence) undermining the accuracy of the trial verdict. That assumption is erroneous. As articulated at length earlier in this Article, there is reason to believe that in some cases exonerating evidence discovered post-conviction is more likely to indicate a wrongful conviction than the discovery of a trial error.[234] Moreover, the focus on trial error is tied to the now-suspect assumption that an error-free trial process protects the innocent (and thus a trial error interferes with reliable guilt determinations) and not to any notion that there is independent value in getting the established process correct even if the result is flawed. Trial error might be correlated with wrongful convictions, but an error-free trial is not sufficient to prevent them.

A person who brings a freestanding innocence claim, and who

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230. One could argue that "harmless error" findings already obscure doctrinal clarity. The difference between doctrinal stretching and a finding of harmless error is that in the harmless error context the constitutional violation is analyzed separately from merits of the underlying constitutional violation, which preserves the integrity of the doctrine.

231. A federal constitutional rule provides cover for state court judges and legislators whose incentives are not clearly aligned with the release of a potentially—but not certainly—innocent prisoner. *See generally* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

232. *See supra* Part II.A.1.

233. *See* Schlup v. Delo, 513 U.S. 298, 316 (1995) ("Schlup, in contrast [to Herrera], accompanies his claim of innocence with an assertion of constitutional error at trial. For that reason, Schlup's conviction may not be entitled to the same degree of respect as one, such as Herrera's, that is the product of an error-free trial."); *see also* Stuntz, *supra* note 57, at 61–62 ("[T]he courts consistently have adopted more favorable standards of review for *non*-guilt-related claims than for those claims most likely to be tied to guilt and innocence." (emphasis in original)).

234. *See supra* Part I.B.

presents the necessary quantum of proof to obtain relief, brings a stronger claim—entitling the conviction to less respect.[235] The right to the effective assistance of counsel, or the right to confrontation, are means to the end of protecting the innocent. Post-conviction evidence—especially biological evidence—can be more probative of guilt than any evidence introduced at trial. As a result, excluding it from a fact-finder's consideration will often be far more damaging to the truth-seeking process than the under-functioning of a constitutionally protected procedural right at trial. A reliable innocence determination, whenever it is best determined based on the facts as we know them and as soon as we can know them, is the standard to which we want to attach post-conviction review.

Before defining the contours of the three-tiered framework, it is important to acknowledge that the Antiterrorism and Effective Death Penalty Act (AEDPA)[236] presents complications for adjudicating post-conviction innocence claims filed by state court prisoners in federal court. In his dissent from the transfer order in *In re Davis*, Justice Scalia asserted that the federal district court could not grant relief to Davis because AEDPA precludes federal courts from granting habeas relief unless the state court judgment is contrary to or an objectively unreasonable interpretation of federal law as clearly established by U.S. Supreme Court precedent.[237] Similarly, a federal court cannot grant habeas relief on a factual disagreement with the state court unless the state court's interpretation of the facts is objectively unreasonable.[238]

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235. Professor Stuntz makes a similar point:

> In the criminal process, the presence of plausible constitutional claims is a poor proxy for plausible claims on the merits. Discriminatory jury selection may lead to biased juries, which then do a bad job of deciding whether the defendant is guilty. Yet there is no good reason to treat any particular instance of discriminatory jury selection as a signal that *this* jury erred in finding *this* defendant guilty; a much better way to identify likely errors would be to look at the evidence in particular cases. A great many criminal procedure claims are like that: They correlate (if at all) only very slightly with strong claims on the merits.

Stuntz, *supra* note 57, at 46–47 (emphasis in original).

236. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

237. *In re* Davis, 557 U.S.__, 130 S. Ct. 1, 2 (2009) (Scalia, J., dissenting); *see also* 28 U.S.C. § 2254(d) (2006) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim — (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.").

238. 28 U.S.C. § 2254(d) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."); Woodford v. Visciotti, 537 U.S. 19, 27 (2002)

Troy Davis sought to circumvent the AEDPA restrictions by filing a petition directly to the Court, urging it to hear the case under its original habeas jurisdiction.[239] Distinct from the Court's Article III jurisdiction, the Court's original habeas jurisdiction derives from Article I of the Constitution, which provides: "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."[240] Congress provided statutory authorization for the Court's original habeas jurisdiction in section 14 of the Judiciary Act of 1789 (and later in 28 U.S.C. § 2241).[241] The writ is rarely granted, and under U.S. Supreme Court Rule 20.4, a petitioner "must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."[242] The Court has not granted habeas relief under its original jurisdiction since 1925.[243] Indeed, *In re Davis* marked the first time in nearly fifty years that the Court used its power under 28 U.S.C. § 2241(b) to transfer an original habeas action to a federal district court.[244]

The relationship between AEDPA and original habeas jurisdiction is contentious and beyond the scope of this Article. However, both the Court and Congress have feasible options to allow the two to coexist. First, the Court could hold that Congress did not intend the operative portions of AEDPA to limit its original habeas jurisdiction, as opposed to its appellate jurisdiction. In *Felker v. Turpin*,[245] the Court held that Congress did not intend to repeal its original habeas jurisdiction in enacting 28 U.S.C. § 2244(b)(3)(E), which bars the Court from reviewing the decision of a federal appellate court denying a petitioner

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("The federal habeas scheme . . . authorizes federal-court intervention only when a state-court decision is objectively unreasonable.").

239. *In re Davis*, 130 S. Ct. at 2 (Stevens, J., concurring) (noting that the petition was brought under the Court's original jurisdiction).

240. U.S. CONST. art. I, § 9, cl. 2.

241. Felker v. Turpin, 518 U.S. 651, 659 & n.1 (1996) (citing Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82).

242. SUP. CT. R. 20.4 (2010).

243. *See Ex parte* Grossman, 267 U.S. 87, 107–08, 122 (1925) (ordering the discharge of a prisoner who received a full pardon from the President); Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 62 (2011) (noting that original habeas relief has not been granted since 1925).

244. *See In re Davis*, 130 S. Ct. at 1 (Scalia, J., dissenting); *see also* 28 U.S.C. § 2241(b) (2006) ("The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.").

245. 518 U.S. 651.

leave to file a second or successive petition.[246] The Court emphasized that if Congress intends for a new rule to impact its original habeas jurisdiction, as opposed to its appellate jurisdiction, Congress must say so explicitly.[247] That rule is relevant in this context.

Congress also could revise AEDPA. Enacting legislation viewed as pro-defendant is not an easy political sell. However, there is reason to believe that innocence-based reforms are different. Legislation reforms based on innocence have been passed in almost every state,[248] and even traditionally conservative courts have expressed frustration over AEDPA's inflexibility in the innocence context.[249] Moreover, public polling on attitudes towards wrongful convictions reveals that citizens are aware of the problem and believe that it needs correction.[250] Thus, amending AEDPA to allow for the proposal in this Article likely can be accomplished without substantial public backlash. Moreover, the proposal for an intermediate solution that results in reversing the death sentence—but not the conviction—of a prisoner who demonstrates probable innocence might further increase political capital for the proposal. This is so because the execution-relief proposal decreases the

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246. *Id.* at 661.

247. *See id.* ("[W]e declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication then, we decline to find a similar repeal of § 2241 of Title 28—its descendant, by implication now." (internal citations omitted)).

248. *See* sources cited *supra* note 157.

249. The frustration expressed recently by the conservative Fifth Circuit could be telling:

> It is beyond regrettable that a possibly innocent man will not receive a new trial in the face of the preposterously unreliable testimony of the victim and sole eyewitness to the crime for which he was convicted. But, our hands are tied by the AEDPA, preventing our review of Kinsel's attack on his Louisiana post-conviction proceedings, so we dutifully dismiss his claim.

Kinsel v. Cain, 647 F.3d 265, 273–74 (5th Cir. 2011).

250. *See* Regina A. Corso, *Over Three in Five Americans Believe in Death Penalty: Half of Americans Say Death Penalty Not a Deterrent to Others*, HARRIS INTERACTIVE (Mar. 18, 2008), http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Over-Three-in-Five-Americans-Believe-in-Death-Penalty-2008-03.pdf (reporting the results of a survey of 1010 Americans, which found that "[t]here is one issue almost all Americans agree on – 95 percent of U.S. adults say that sometimes innocent people are convicted of murder while only 5 percent believe that this never occurs. This is a number that has held steady since 1999. Among those who believe innocent people are sometimes convicted of murder, when asked how many they believe are innocent, the average is 12 out of 100 or 12 percent"); June 2000 Newsweek Poll Data, POLLINGREPORT.COM, http://www.pollingreport.com/crime.htm (last visited Jan. 28, 2012) (reporting that 82% of 750 survey participants nationally agreed that "[i]n general . . . states should make it easier for Death Row inmates to introduce new evidence that might prove their innocence, even if that might result in delays in the death penalty process"). These polling results likely stem from the fact that awareness of wrongful convictions has seeped into many facets of public consciousness. *See* Daniel S. Medwed, *Innocentrism*, U. ILL. L. REV. 1549, 1551 (2008) ("[T]he innocence movement has captivated the public with accounts of the exonerated not only surfacing regularly in newspapers, film documentaries, and television news programs, but also making inroads into components of pop culture.").

risk that a guilty person is released while maximizing the odds that an innocent person is not executed.

The following discussion assumes that there has not been a previous decision on the merits on the same claim and on the same facts as presented to the federal court. This might be true for a variety of reasons: perhaps the state court refused to allow the petitioner to present evidence because the court rules that the evidence could have been discovered earlier,[251] or the time to raise an extraordinary motion for a new trial under state law has elapsed, or this is a state post-conviction proceeding where the court is determining the petitioner's rights under the Eighth Amendment. This section articulates the standard of proof that the Constitution requires to upset a conviction based on a claim of freestanding evidence.

1. Conviction-Relief

Imagine a scenario where a person is convicted and sentenced to death in state court after a trial free of constitutional error. The hypothetical person receives sterling representation on direct appeal, as well as on state and federal habeas. He obtains no relief from his conviction or death sentence. The state sets an execution date. After seeing the reported execution date on the news, a witness comes forward who happened to be in the convenience store at the time that the hypothetical prisoner is said to have shot the store attendant. Imagine that the new witness recorded the shooting on her cell phone. The video is a little fuzzy, but the shooter definitely appears to be taller and lighter-skinned than the prisoner convicted of murdering the clerk.[252]

The attorney for the hypothetical prisoner files immediately under the applicable state post-conviction procedure. The state court refuses to hear the new evidence. The governor will not commute the sentence. The federal courts are the only hope left. How should they treat the

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251. This restriction itself might pose constitutional problems because an innocent person has every possible incentive to obtain exculpatory evidence as early as possible. Thus, refusing to admit undiscoverable evidence that could have been discovered before conviction, yet went undiscovered, might infringe upon due process.

252. This case is perhaps too close to certitude to be an apt example for the clear and convincing evidence standard. I use it, however, to remove the factual scenario from the possibility that the proposed standard is not met. To make the scenario messier, which is often the case in wrongful conviction cases, suppose that the state retorts that a jury found the prosecution's case to be credible and that the new evidence does not explain other incriminating evidence in the case, such as the fact that the prisoner in the hypothetical was in the store minutes before the shooting or that he was apprehended running down the street adjacent to the store. A reviewing court would need to weigh the new videotape evidence with the evidence presented at trial when deciding whether the petitioner presented clear and convincing evidence of his innocence.

claim? Although the federal court cannot be certain that the defendant is not the shooter, this type of showing would satisfy the "truly persuasive" evidence benchmark discussed in *Herrera*. The videotape, while grainy, establishes by clear and convincing evidence that the prisoner is factually innocent, and upon such a showing the Constitution should require reversing the conviction.[253] Before turning to why the clear and convincing evidence standard is the most appropriate to use in this context, it is important to discuss why other standards of proof are less desirable.

The distinction between standards seems less important than establishing the existence of the right to challenge the conviction on innocence grounds. That perception changes quickly amidst the difficulties that come with any standard used to measure the combined quantum of evidence produced in at least two separate events—the trial and a post-conviction evidentiary hearing—that usually are spaced out over a period of many years. The implications of new, post-conviction evidence differ from those associated with more traditional claims of trial error. In the context of an insufficiency of the evidence claim, the court asks only whether the jurors were authorized to reach a guilty verdict, while a traditional constitutional trial error claim requires a showing of prejudice.[254] In contrast, in the freestanding innocence context, the newly adduced evidence is considered without having been filtered through the range of trial mechanisms that render the process of deciding guilt or innocence more accurate, such as a jury trial or the live testimony of now-unavailable witnesses.

Credibility evaluations are also more difficult than in the context of traditional trial error. For instance, after an evidentiary hearing, a habeas judge is in a better position to render credibility determinations on the newly discovered evidence, while the trial jurors are in a better position to test the credibility of the original evidence.[255] Thus, any standard that requires a probabilistic determination of what a reasonable juror would have done given all of the evidence requires the habeas judge to filter the new evidence through the credibility assessment, factor in the evidence

253. This is likely the type of scenario (but not the relief) envisioned by the Court in *Herrera* when it assumed arguendo 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." Herrera v. Collins, 506 U.S. 390, 417 (1993).

254. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring petitioner to demonstrate prejudice before relief could be granted on ineffective assistance of counsel claim).

255. This is not an uncontroversial point. Some commentators suggest that the review of transcripts results in more—not less—accurate verdicts in some instances. *See, e.g.*, Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 829–30 (2011).

presented at trial without the benefit of the credibility determinations rendered there, and balance the combined evidence to predict what a reasonable juror would have done. The task is daunting. As such, the standard that governs the claim must be flexible enough to be administrable under a range of factual scenarios that cover a host of different types of new evidence while being clear enough that it does not add to the difficulty of the determination.

In his *Herrera* concurrence, Justice White suggested that the Court borrow the "insufficiency of the evidence" standard articulated in *Jackson v. Virginia*,[256] which would require the petitioner to demonstrate that "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt."[257] The *Jackson* standard is a corollary to the requirement that the prosecution prove every element of a crime beyond a reasonable doubt.[258] It requires the appellate court to determine whether any reasonable juror could convict based on the evidence presented at trial.[259] Shortly after the Court decided *Herrera*, the Texas Court of Criminal Appeals (the highest court in Texas with jurisdiction over criminal cases) held that a habeas petitioner who presented a court with evidence that met the "no rational trier of fact" standard would state a cognizable freestanding innocence claim.[260] The dissent accused the majority of crafting an unreachable standard:

> [T]he majority has given with one hand and taken away with the other. . . . This is an impossibly high standard of proof. By that I do not mean that as a practical matter precious few applicants will be able to produce new evidence sufficiently compelling to meet the majority's test. By that I mean that it will be impossible *by definition* for any applicant to meet the test, regardless of how compelling his newly discovered evidence.
>
> This is so because any evidence sufficient to support a jury's verdict beyond a reasonable doubt at trial will also be sufficient to support a rational jury's guilty verdict even after adding the most compelling newly discovered evidence to the mix.[261]

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256. 443 U.S. 307 (1979).

257. *Herrera*, 506 U.S. at 429 (White, J., concurring) (citing *Jackson*, 443 U.S. at 324).

258. *See Jackson*, 443 U.S. at 324.

259. *Id.*

260. State *ex rel.* Holmes v. Court of Appeals, 885 S.W.2d 389, 399 (Tex. Crim. App. 1994), *rejected by Ex parte* Elizondo, 947 S.W.2d 202, 206 (Tex. Crim. App. 1996) (holding that a prisoner is entitled to relief on a freestanding innocence claim if the habeas judge determines at a hearing that "the newly discovered evidence, when considered in light of the entire record before the jury that convicted him, shows that no rational trier of fact could find proof of guilt beyond a reasonable doubt").

261. *Id.* at 417 (Clinton, J., dissenting) (emphasis in original).

An insufficiency of the evidence claim is directed at the quantum of evidence presented at trial. In the context of a freestanding innocence claim, the prisoner is not contesting that the prosecution put forth adequate evidence at the trial to establish guilt beyond a reasonable doubt. Rather, the claim is that new evidence arose after the fact, casting doubt on the accuracy of the original determination. Thus, the *Jackson* standard, with its focus on the minimum level of evidence necessary to sustain a conviction rather than a probabilistic determination of the likelihood that the prisoner is factually innocent, is too miserly if the goal is to remedy the wrongful punishment of a person who did not commit the underlying crime.

Given that the "no rational trier of fact" standard is insufficient to remedy wrongful convictions, stricter standards certainly are not desirable. For instance, following *Herrera*, a California appellate court held that in order to obtain habeas relief new evidence of innocence must "cast[] fundamental doubt on the accuracy and reliability of the proceedings. . . . [It] must undermine the entire prosecution case and point unerringly to innocence or reduced culpability."[262] Any standard that requires near-certitude (such as DNA evidence excluding the prisoner and pointing to another culprit) does not reflect our contemporary knowledge of wrongful convictions or our understanding that trial procedures alone cannot protect the innocent sufficiently.

In *Herrera*'s aftermath, the Illinois Supreme Court held that its state constitution affords a new trial to a petitioner who can demonstrate innocence by evidence "of such conclusive character that it will probably change the result on retrial."[263] The position that the federal

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262. *In re* Clark, 855 P.2d 729, 739 (Cal. 1993) (quoting People v. Gonzalez, 800 P.2d 1159, 1196 (Cal. 1990)); *see also* State v. Conway, 816 So. 2d 290, 291 (La. 2002) (suggesting that a freestanding innocence claim would require the prisoner to demonstrate that the new evidence "undermine[s] the prosecution's entire case" (alteration in original) (citing *In re Clark*, 855 P.2d at 739)).

263. People v. Washington, 665 N.E.2d 1330, 1340 (Ill. 1996) (McMorrow, J., specially concurring) (internal quotation marks omitted).

> In order to be entitled to a new trial based on newly discovered evidence of actual innocence, the defendant must demonstrate that the new evidence is of such conclusive character that it will probably change the result on retrial, that the evidence was discovered since the trial and . . . [that it is of such] character that it could not have been discovered prior to trial by the exercise of due diligence.

Id. (alteration in original) (internal quotation marks omitted); *see also* Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 387 (1993) (concluding that a "bare-innocence" claim should be cognizable on federal habeas review and arguing that "[t]o receive relief, a bare-innocence claimant should bear the burden of demonstrating innocence by a preponderance of the evidence—that is, a petitioner must show that it is more likely than not that he did not commit the crime").

Constitution requires relief for a prisoner who is *probably* innocent, which was originally articulated in Justice Blackmun's *Herrera* dissent,[264] cuts too far the other way. Releasing a convicted prisoner under a probable innocence standard (which theoretically is met even at forty-nine percent likelihood that the prisoner is guilty) does not adequately account for the societal interest in securing and maintaining convictions against those who do commit crimes. The prosecution might not be able to successfully retry a prisoner. Witnesses move or die. Memories fade. A reversal on traditional trial error grounds similarly results in the diminished ability to retry the prisoner; however, in the context of a traditional trial error, society through its representatives—the police and the prosecution—did something improper to subvert the constitutionality of the initial determination. By contrast, in the freestanding innocence context, the decreased odds of securing another conviction do not stem from government wrongdoing or from insufficient evidence to secure the initial conviction.

The spectrum of uncertainty that marks the space between the rejected probable innocence (51%) and certain innocence (100%) standards is vast. The clear and convincing evidence standard is the appropriate compromise. To meet the clear and convincing evidence standard, an appellate court judge needs to find that the petitioner demonstrated with "convincing clarity" that he is factually innocent of the crime committed.[265] Put another way, the appellate judge must believe that the prisoner is "highly probably innocent."[266] The Court has categorized the clear and convincing evidence standard as an intermediate standard of proof between the "preponderance of the evidence" and "beyond a reasonable doubt" standards.[267] Its roots are in civil proceedings, but it is used in a number of criminal law contexts, too. For example, in *Sawyer v. Whitley*,[268] the Court held that a death-sentenced prisoner who

264. Herrera v. Collins, 506 U.S. 390, 444 (1993) (Blackmun, J. dissenting) ("I believe that if a prisoner can show that he is probably actually innocent, in light of all the evidence, then he has made a truly persuasive demonstration, and his execution would violate the Constitution." (citation omitted) (internal quotation marks omitted)).

265. *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984) (using "convincing clarity" to explain the clear and convincing evidence threshold required to prove "actual malice" in the First Amendment context).

266. *See supra* note 226 and accompanying text.

267. Addington v. Texas, 441 U.S. 418, 425 (1979). The Court suggested in *Addington* that attempts to further differentiate between clear and convincing evidence and other intermediate standards of proof might be fruitless. *See id.* ("We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence.").

268. 505 U.S. 333 (1992).

demonstrates his "innocence of the death penalty" (i.e., that he is death ineligible) by clear and convincing evidence is permitted to bypass any procedural defaults that obstruct review of his underlying constitutional claim.[269] In the quasi-criminal civil commitment context, the Court held that due process requires that a state prove by clear and convincing evidence that a mentally ill person is an imminent danger to himself or to others before the government can involuntarily commit him.[270] These two examples demonstrate that the Court imposes the clear and convincing evidence standard in situations that demand weighty consideration and only tolerate very low levels of risk.[271] At the same time, unlike standards that require near-certitude, the clear and convincing evidence threshold is both relaxed enough to permit relief in extraordinary cases and flexible enough to encompass a wide range of fact patterns.[272]

This is not to imply that the prisoner is entitled to reversal with prejudice—which is the case in the insufficiency of the evidence context.[273] The state would retain the power to retry a prisoner granted factual innocence relief. In the insufficiency of the evidence context, the Double Jeopardy Clause bars retrial because the state did not possess the necessary evidence to secure a conviction by proof beyond a reasonable doubt.[274] When a prisoner secures relief under a "clear and convincing evidence" standard, however, the new evidence renders it highly improbable that a jury would return a guilty verdict. However, it does not preclude the possibility that a juror could find proof of guilt beyond

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269. *See id.* at 336, 339.

270. *See Addington*, 441 U.S. at 429–32 (holding that states must, at a minimum, refrain from involuntarily committing citizens except by proof by clear and convincing evidence that the mentally ill person is a danger to himself or others).

271. *See id.* at 424 (indicating that the Court "has used the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in various civil cases" (citations omitted)). "The standard of proof [at a minimum] reflects the value society places on individual liberty." *Id.* (citing Tippet v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)); *see also In re* Winship, 397 U.S. 358, 370 (1970) ("[A] standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.").

272. The clear and convincing evidence standard is the most popular in post-*Herrera* consideration of freestanding innocence claims. *See In re* Davis, No. CV409-130, 2010 WL 3385081, at *45 (S.D. Ga. Aug. 24, 2010); Montoya v. Ulibarri, 163 P.3d 476, 478 (N.M. 2007); People v. Cole, 765 N.Y.S.2d 477, 486 (Sup. Ct. 2003); *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

273. *See* Herrera v. Collins, 506 U.S. 390, 404 (1993) (asking whether a prisoner granted freestanding innocence relief would receive a "new trial, or unconditional release from imprisonment").

274. Smalis v. Pennsylvania, 476 U.S. 140, 142 (1986) (holding that "a judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause").

a reasonable doubt.[275] Moreover, in the factual innocence context, unlike the insufficiency context, the strongest evidence of innocence is not tested along with the strongest evidence of guilt in a process steeped with the full panoply of constitutionally defined innocence protection mechanisms. Finally, in the innocence context, two sets of actors—the jurors and a post-conviction judge—make the credibility determinations. Neither set is likely to hear live testimony from all the witnesses upon which the innocence determination is made. These factors all counsel towards permitting the state to retry any prisoner granted relief under a freestanding actual innocence claim.

2. Execution Relief

Remaining with the hypothetical murder of the convenience store clerk, suppose that instead of presenting a video recording of the shooting from her cell phone camera, the new witness informs the police that she saw the murder occur, but then ran out of the store after the shots were fired. The police review the videotape from the store—which was not used at trial because it does not show the face of the perpetrator—and see that the new witness was at the scene moments before crime. The new witness is positive that the person who killed the clerk was much taller than our hypothetical prisoner. The perpetrator also had lighter skin, she remembers. She apologizes for not coming forward sooner. She has no relationship with the hypothetical prisoner, and is an avid supporter of the death penalty. Nonetheless, she insists that the wrong man is about to be executed. This scenario (likely even more so than the stronger claim of innocence presented by a video that displays the general outline of the assailant) demonstrates the tensions that accompany strong but inconclusive claims of actual innocence. Either the hypothetical prisoner murdered a convenience store clerk in cold blood or else the state is going to execute an innocent man.

On the one hand, the prisoner received a fair trial. Who is to say that the new evidence is correct? Maybe the new witness remembers incorrectly. If the court vacates the death sentence, and the prisoner indeed is guilty, it might be impossible to reconvict him. The legal

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275. *See* Tibbs v. Florida, 457 U.S. 31, 42–43 (1982) ("A reversal based on the weight of the evidence, moreover, can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict. The reversal simply affords the defendant a second opportunity to seek a favorable judgment."). The *Tibbs* court stated, "Just as the Double Jeopardy Clause does not require society to pay the high price of freeing every defendant whose first trial was tainted by prosecutorial error, it should not exact the price of immunity for every defendant who persuades an appellate panel to overturn an error-free conviction and give him a second chance at acquittal." *Id.* at 44.

system would have released a murderer onto the street with no recourse. On the other hand, is society willing to execute this man despite the very real possibility that he did not commit the crime? This is a case of *probable* innocence. It is not as strong of a case as one where new DNA results eliminate the prisoner as a suspect. It is not as weak as a claim where a single witness recants his earlier identification of the prisoner.

Relief from execution (but not conviction relief) is appropriate in this type of case.[276] This proposal singles out death-sentenced prisoners for special treatment. Justice Potter Stewart first articulated the basis for this "death is different" approach in his concurring opinion in *Furman v. Georgia*[277]:

> The penalty of death differs from all other forms of criminal punishment not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.[278]

Justice Souter, dissenting in *Kansas v. Marsh*, wrote that "a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests."[279] Souter suggested that the United States has entered "a period of new empirical argument about how 'death is different.'"[280] Since the Court decided *Marsh* in 2006, at least seventeen death-sentenced prisoners have been exonerated.[281] This is more impressive in context: there are

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276. The proposal to prohibit the execution of a person who establishes his probable innocence is based on the degree of risk that the prisoner is factually innocent. A new penalty phase would be geared towards whether the prisoner deserves a death sentence assuming the fact of his guilt. Residual doubt is not a critical—and perhaps not a permissible—element of the penalty phase. *See* Oregon v. Guzek, 546 U.S. 517, 525 (2006). Thus, a penalty phase retrial is not an appropriate form of relief.

277. 408 U.S. 238 (1972).

278. *Id.* at 306 (Stewart, J., concurring); *see also* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (noting that the death penalty "is unique in its severity and irrevocability").

279. Kansas v. Marsh, 548 U.S. 163, 207 (2006) (Souter, J., dissenting).

280. *Id.* at 210 (citing *Gregg*, 428 U.S. at 188).

281. *See Innocence: List of Those Freed from Death Row*, *supra* note 17. The Death Penalty Information Center maintains a list of exonerated death row prisoners. In order to qualify for the list, the person must: (1) have been retried *and* acquitted, (2) had all charges pertaining to the case

only 3260 people on death row across the country,[282] and approximately 118 new people sentenced to death each year.[283]

Execution relief is consistent with the Court's capital jurisprudence, which emphasizes that the death penalty "is unique in its severity and irrevocability."[284] The Court has stated on numerous occasions that the Eighth Amendment requires "heightened reliability" in the administration of capital punishment.[285] The primary way in which "death is different" is that the need for a closer fit between punishment and culpability in the capital context requires states to permit a defendant to introduce mitigation evidence that tends to show that a death sentence is too severe.[286] Similarly, the need for a tighter culpability–punishment fit has resulted in categorically excluding some offenders from the possibility of a death sentence. In *Atkins v. Virginia*,[287] the Court excluded mentally retarded individuals from capital punishment, finding that as a class mentally retarded citizens have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[288] In *Roper v. Simmons*,[289] the Court held that those under the age of eighteen at the time of the crime are uniformly less culpable than adult offenders who commit murder, and thus cannot be subjected to capital punishment.[290] If a guilty mentally retarded or juvenile offender possesses insufficient culpability to be executed, innocent people of all stripes do not possess the requisite culpability level.

There also are at least four pragmatic reasons to extend the "death is different" jurisprudence to require that death-sentenced prisoners cannot

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dropped, or (3) received a gubernatorial pardon on the basis of innocence. *Id.* Seventeen formerly death-sentenced inmates met those criteria between 2007 and October 28, 2010. *Id.* One hundred and forty former death row inmates have been exonerated since 1973. *Id.*

282. Deborah Fins, Criminal Justice Project, *Death Row U.S.A.*, NAACP LEGAL DEF. & EDUC. FUND 1 (Apr. 1, 2010), http://naacpldf.org/files/publications/DRUSA_Spring_2010.pdf.

283. This number reflects the average sentence total over the five years between 2006 and 2010. The Death Penalty Information Center recorded 118 death sentences in 2009 and 104 death sentences in 2010, suggesting that the trend is towards fewer death sentences. *Facts About the Death Penalty*, DEATH PENALTY INFO. CENTER (Jan. 27, 2012), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

284. *Gregg*, 428 U.S. at 187.

285. *Id.*; *see also* Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring).

286. Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976).

287. 536 U.S. 304 (2002).

288. *Id.* at 318.

289. 543 U.S. 551 (2005).

290. *Id.* at 578.

be executed if they are probably innocent. First, the procedural protections afforded to capital defendants in the penalty phase of a capital trial do not protect against wrongfully executing a factually innocent person. Rather, they aim to prevent wrongfully condemning a person who is factually responsible for the homicide but does not deserve the death penalty.[291] The overriding goal of the "death is different" jurisprudence, however, is to protect against the possibility that someone is undeservingly executed. No one could deserve execution less than someone who is factually innocent of the crime charged. The realizations that the problem of wrongful convictions in death penalty cases is more widespread than previously imaginable, and that the best opportunity to identify innocence is often after the trial has ended, militate towards adopting a "death is different" intermediate innocence standard.

A second, more obvious reason to tie execution relief to a lower burden of proof than that required for vacating a conviction outright is that once the state executes the prisoner there is no further opportunity to develop the evidence that could have conclusively demonstrated his innocence. Once the prisoner presents a threshold display of probable innocence, the justice system should not short-circuit his ability to demonstrate outright innocence in the future—perhaps someone else in the store on the night of the shooting recorded the crime on her cellular phone, or perhaps technological improvements allow for enhancing the video that displayed the outlines of the suspect's figure, or maybe the real perpetrator confesses on his deathbed. It is true that any prisoner might be able to present evidence of his innocence in the future. Unlike the vast majority of prisoners, however, the prisoner in our hypothetical already has demonstrated that he is probably innocent. Another difference is that for death-sentenced prisoners, unlike all other prisoners, the opportunity for future remedy (including executive commutation) has a time limit.[292] In this sense, death is categorically different from even the harshest non-capital sentence.

A third reason to adopt a lower standard for execution relief is that

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291. *See, e.g.*, Oregon v. Guzek, 546 U.S. 517, 524 (2006) (rejecting a due process right to introduce evidence of residual doubt in the penalty phase of a capital trial because the Eighth Amendment right to introduce mitigation evidence is limited to types of "evidence [tending] to show *how*, not *whether*, the defendant committed the crime" (emphasis in original)).

292. Blackstone identified the same problem in the insanity context: "[I]f after judgment, [a prisoner] becomes of insane memory, execution shall be stayed," because "had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." 4 BLACKSTONE, *supra* note 54, at *24, *quoted in* Ford v. Wainwright, 477 U.S. 399, 407 (1986). In other words, prisoners who are insane might not be able to allege new evidence (e.g., new evidence of innocence) that would cause a judge to stay an execution.

capital cases appear to result in more wrongful convictions per capita than non-capital cases.[293] Error is more likely to occur—and more likely to remain uncorrected—in homicide cases because there (often) is no surviving victim to cooperate in the investigation or prosecution.[294] Moreover, the heinous nature of the crime heightens fear and other emotional responses. The emotionally charged climate drives the feeling that the police need to "get" someone. It also might cause jurors to feel less comfortable labeling any doubt that they feel as "reasonable." Additionally, death-qualified juries—which are the only ones that decide capital cases—are more conviction-prone than ordinary juries.[295] The same dynamics could play out as post-conviction courts or parole boards analyze these cases. In Troy Davis' case, for example, absent physical evidence, it is impossible to know for certain that Davis was innocent. Nonetheless, a parade of witnesses came forward to disavow their trial testimony.[296] There is evidence that the alternative suspect confessed on multiple occasions. By contrast, if Davis had been convicted of tax evasion rather than killing a police officer, the pragmatic obstacles to releasing him on the same evidence may have been considerably diminished. Uniform standards should provide uniform results across cases. But emotionally charged cases change the perceived risk calculus. A lower threshold for execution relief protects against that possibility in close cases.

The final pragmatic reason to extend the "death is different" notion to probably innocent defendants is that society has a decreased interest in obtaining an execution as opposed to keeping a convicted prisoner incarcerated. The marginal benefit of executions is minimal compared to the high cost of executing an innocent person. First, incarcerating a person who commits a homicide satisfies the public safety prerogative. As Professor Mark Cunningham explains, "[m]odern prison capabilities provide for super-maximum confinement . . . render[ing] the probability

293. *See* Kansas v. Marsh, 548 U.S. 163, 210 (2006) (Souter, J., dissenting) (citing Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005)). *But see id.* at 198 (Scalia, J., concurring) ("The dissent's suggestion that capital defendants are *especially* liable to suffer from the lack of 100% perfection in our criminal justice system is implausible. Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed." (emphasis in original)).

294. *See Marsh*, 548 U.S. at 210 (Souter, J., dissenting) (speculating that a disproportionate number of exonerations stem from murder convictions "probably owing to the combined difficulty of investigating without help from the victim, intense pressure to get convictions in homicide cases, and the corresponding incentive for the guilty to frame the innocent").

295. *See* Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 121–32 (1984).

296. *See supra* text accompanying note 210.

of serious assaultive misconduct negligible."[297] Indeed, nearly all death-eligible prisoners refrain from committing assaultive behavior while incarcerated.[298] Former death-row inmates do not commit assaultive behavior at a higher rate than their originally life-sentenced counterparts.[299] Second, there is no reliable evidence that executions produce a greater deterrent effect than a sentence of life without parole. Four-fifths of leading criminologists surveyed in 2009 agreed that the death penalty is not a deterrent.[300] Nearly six out of ten police chiefs agreed.[301] Third, if Blackstone is correct, the risk of executing someone who is not culpable outweighs the additional retributive effect gained from executing a culpable prisoner.[302] Finally, the cost to the justice system's credibility that would result from the execution of a factually innocent person is not worth the benefit of executing a prisoner who has already demonstrated his probable innocence.

One objection to the execution-relief portion of the proposal is that creating a lower evidentiary bar for avoiding the execution of a person who is probably innocent reduces the incentive for courts to provide relief from the conviction itself, regardless of the strength of the innocence showing.[303] Under this "freedom or bust" approach, an

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297. Mark Cunningham et al., *Capital Jury Decision-Making: The Limitations of Predictions of Future Violence*, 15 PSYCHOL. PUB. POL'Y & L. 223, 228 (2009).

298. *Id.* at 236–38.

299. *Id.* at 242–43.

300. Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicides Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 501, 504 (2009) (concluding from survey data of criminologists that "the vast majority of the world's top criminologists believe that the empirical research has revealed the deterrence hypothesis for a myth"). Harvard Law Professor Cass Sunstein recently took the position that "the best reading of the accumulated data is that they do not establish a deterrent effect of the death penalty." *Id.* at 496 n.45.

301. Richard Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis: National Poll of Police Chiefs Puts Capital Punishment at Bottom of Law Enforcement Priorities*, DEATH PENALTY INFO. CENTER 1, 10 (Oct. 2009), http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf (finding that fifty-seven percent of police chiefs agreed with the statement: "The death penalty does little to prevent violent crimes because *perpetrators rarely consider the consequences* when engaged in violence" (emphasis in original)).

302. *See* 4 BLACKSTONE, *supra* note 54, at *358 ("[I]t is better that ten guilty persons escape, than that one innocent suffer.").

303. *In re* Davis, No. CV409-130, 2010 WL 3385081, at *40 n.24 (S.D. Ga. Aug. 24, 2010) (citing Brandon L. Garrett, *Exoneree Post-Conviction Data*, VA. L. SCH., http://www.law.virginia.edu/pdf/faculty/garrett/judging_innocence/exonerees_postconviction_dna_testing.pdf (last visited Jan. 29, 2012) (finding that prosecutors opposed efforts to vacate the sentence in 9.8% of 225 DNA-based exonerations)). Another objection is that parole boards and governors are meant to—and do—prevent wrongful executions via clemency procedures. In his *Herrera* dissent, Justice Blackmun discredited the notion that clemency, which is not a legal remedy to protect a substantive right but rather an act of grace from the executive branch, could substitute for freestanding innocence claims. He observed: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the

innocent person is more likely to spend the rest of his life incarcerated than if the only avenue to federal habeas relief was through reversing the conviction and not the sentence. The first thing to note is the absence of a current articulated freestanding innocence claim, despite the passage of nearly two decades since the Court decided *Herrera*. It is highly plausible that both the Court and Congress are reluctant to craft a freestanding innocence claim that results in vacating the underlying conviction except where the prisoner presents near-conclusive evidence of his innocence. Of course, successful rehabilitation or good prison behavior are not preconditions to being ruled factually innocent. The legitimate fear of releasing someone who committed a murder, and the antecedent fear that such a person might commit another violent crime, drives this inaction. In the same vein, in cases where evidence of probable but not conclusive innocence exists, and there is no underlying claim to litigate under *Schlup*, the prisoner is not as likely to obtain executive clemency (e.g., non-judicial relief from the death sentence). Thus, intermediate relief has an impact on cases such as Troy Davis's or Cameron Todd Willingham's, where the possibility of a wrongful execution is the greatest. For these reasons, adding an intermediate standard could result in saving more factually innocent death-sentenced prisoners from the execution chamber than would a single standard.

There is also a likely element of belief that life on death row is not worth living, which drives the "freedom or bust" approach. There is, however, an unquantifiable difference between execution and being alive in prison. The relationship between the two approximates the relationship between a murder victim and a rape victim that the Court discussed in *Coker v. Georgia*[304]: "Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was,

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reach of majorities and officials and to establish them as legal principles to be applied by the courts." Herrera v. Collins, 506 U.S. 390, 440 (1993) (Blackmun, J., dissenting) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). Justice Blackmun's concerns are most readily apparent in cases that present factual claims that are impossible to prove with certainty. Indeed, in the Willingham case, *even after his execution*, Texas Governor Rick Perry has actively obstructed attempts to clear Willingham's name. *See, e.g.*, Lila Shapiro, *Gov. Rick Perry: Cameron Todd Willingham "Was A Monster,"* HUFFINGTON POST (May 25, 2011, 3:20 PM), http://www.huffingtonpost.com/2009/10/14/gov-rick-perry-cameron-to_n_321710.html (reporting that "[Governor] Perry stifled a panel reviewing Willingham's execution by abruptly removing three people from the group 48 hours before the review, forcing its cancellation"); Paul Thornton, Editorial, *Rick Perry: The Presidential Candidate Dogged by a Ghost?*, L.A.TIMES (June 14, 2011, 3:40 PM), http://opinion.latimes.com/opinionla/2011/06/rick-perry-the-presidential-candidate-who-executed-an-innocent-man.html (reporting Perry's potential decision to seek nomination as the Republican candidate for President in 2012 and noting that the Cameron Todd Willingham case might not sit well with voters).

304. 433 U.S. 584 (1977).

but it is not over and normally is not beyond repair."[305] An innocent prisoner serving life without parole is still able to visit with his family, to develop meaningful relations with other inmates or with pen pals, and to maintain hope that he will one day obtain outright release. Moreover, state penitentiaries often offer inmates serving life sentences opportunities to take educational courses, maintain employment within the prison, or have contact visits with friends or relatives that often are not available (or available on a greatly reduced basis) to death row inmates.[306] And, again, the prisoner who obtains intermediate relief is still able to marshal stronger evidence of his innocence and return to court in an attempt to meet the stricter threshold for conviction-relief. This is not a possibility for someone who already has been executed.

3. Gateway Innocence Claims

In order to align gateway innocence claims with the underlying concern for innocence protection, courts should review a gateway innocence claim despite being procedurally defaulted if, and only if, it appears that the deprivation of the constitutional right itself interfered with an accurate determination of criminal liability. For instance, a petitioner may present enough evidence to meet the innocence-centered exception to a procedural default on the underlying claim that his counsel was ineffective during jury selection for failing to object under *Batson v. Kentucky*.[307] In that case, the federal court should not review the otherwise defaulted claim because there is not a direct nexus between the elimination of a particular juror and the conviction of a factually innocent person.[308] On the other hand, if under the same showing of innocence, a person alleges ineffective assistance of counsel for failure to investigate a credible alibi witness, the petitioner should receive a determination on the merits of the otherwise defaulted claim. Failure to investigate credible leads that a client is innocent directly and

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305. *Id.* at 598.

306. *See, e.g.*, Christopher Reinhart, *OLR Research Report: Prison Conditions for Death Row and Life Without Parole Inmates*, CONN. GEN. ASSEMBLY (Apr. 4, 2011), http://cga.ct.gov/2011/rpt/2011-R-0178.htm (comparing restrictions and privileges for death row and life without parole prisoners in Connecticut).

307. 476 U.S. 79, 89 (1986) (holding that the Fourteenth Amendment prohibits the use of race discrimination against even a single prospective juror).

308. It is worth noting that the Court views *Batson* claims as affecting the integrity of the trial itself, and thus *Batson* errors are not subject to harmless error analysis. *Dawson v. Delaware*, 503 U.S. 159, 169 (1992) (Blackmun, J., concurring). Nonetheless, the step from the composition of a jury to the conviction of an innocent defendant requires more mental flexibility than the fact that trial counsel failed to interview a critical alibi witness who has now come forward or the prosecution failed to turn over a piece of evidence that appears to point towards a different suspect.

obviously undermines the public confidence that the underlying conviction is correct. It also damages the conviction's legitimacy because the petitioner would have had to make a gateway showing of innocence to reach the point at which the court will review the ineffective assistance claim. The difference between the two examples is that the person who shows plausible innocence and a malfunctioning of a traditional innocence-protection mechanism is on average more likely to be factually innocent.[309]

One objection is that distinguishing between "legal" and "actual" innocence is detrimental to both types of petitioners because most "actually innocent" prisoners will not have received a constitutionally sound trial.[310] The point that procedural error and factual innocence often go hand in hand is a strong one. Indeed, the link between those two concerns is what drives the proposal to create a more forgiving gateway innocence standard. However, eradicating the distinction between "actual" and "legal" innocence will not provide an adequate remedy. Justice Robert Jackson's analogy is relevant here: "He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[311] Equating innocence claims with traditional claims of trial error has the disadvantage of equating the claims of those most likely to be innocent with the rest of the 17,000 federal habeas petitions filed by state court prisoners each year.[312] Moreover, by actively removing what makes innocence attractive to ordinary citizens, their representatives, and to judges—that is, the difference between factual innocence and "innocence" by procedural error—it is very possible that there would be a net decrease in relief granted to wrongfully convicted prisoners. It is true that in some cases where an underlying *Brady* or *Strickland* claim occurred, that error deprives the prisoner of presenting evidence of innocence. The difficulty is that there is no ex ante way to separate those claims from routine

309. I do not endeavor here to create an exhaustive list of those fundamental types of trial error that would fall under the exception and those that would not. The point is simply that if there is to be an innocence exception to procedural default, then the underlying claim should be of the variety that is likely to alter the fact-finder's ability to reliably assess guilt.

310. *See* Hughes, *supra* note 60, at 1106–10 (discussing how "actual" and "legal" innocence interweaves in practice, and using the Troy Davis case to explain the point).

311. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

312. Joseph L. Hoffmann & Nancy J. King, *Justice, Too Much and Too Expensive*, N.Y. TIMES, Apr. 15, 2011, at Opinion 8 ("State prisoners convicted of non-capital offenses file more than 17,000 habeas corpus petitions in federal court each year," but "[o]nly a tiny fraction of these habeas petitioners — estimated at less than four-tenths of one percent — obtain any kind of relief, which is usually a new trial, sentencing or appeal, after which they may be sent back to prison."); *see also* NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT (2011).

Brady or *Strickland* claims. Demonstrating a reasonable probability of actual innocence provides the only administrable nexus (short of deprioritizing actual innocence) between the traditional trial error and the conclusion that a person is innocent of the crime. On the margins, the courts will likely find and remedy more inaccurate guilt determinations if they use the gateway innocence sorting device than if they treat all petitions alleging a constitutional error the same.[313]

Lowering the burden of proof for gateway innocence claims and restricting the types of claims to those most likely to "interweave" with innocence is a more targeted route. In exchange for limiting the types of underlying claims to those likely to have an effect on the accuracy of the trial verdict, it is necessary to lower the quantum of evidence that a petitioner must put forward to travel through the innocence gateway. It is helpful to begin by examining the theoretical underpinnings for procedural restrictions on federal habeas review before discussing both parts of the proposed alteration to gateway innocence claims.

Judge Henry Friendly and Professor Paul Bator penned the two most influential contemporary theories of federal habeas review.[314] Both accounts figure prominently in the Court's creation of procedural default rules and Congress's codification of the same.[315] In the seminal article, *Is Innocence Irrelevant?*, Judge Friendly wrote, "the one thing almost

313. A strong objection to this trade-off is that it gives state actors an incentive to cut constitutional corners. My criticism of this position is limited to the posttrial context. Plans to divert pretrial funding or to assign the best lawyers or the most hours to someone who appears to be innocent is the wrong path to travel down. To begin with, defense lawyers likely are not better able to predict innocence in cases where their client claims innocence than are jurors or judges. In fact, attorney knowledge of past bad acts (or even the client's unfavorable personality characteristics or habits) might color the view of a client in a way that a juror without that knowledge is not susceptible. Moreover, stamping out all constitutional error at the trial and direct review stages is critical for deterrence and for doctrinal development. To a lesser extent federal review is also necessary to achieve the same goals—for instance, where a state court refuses to faithfully apply a federal constitutional rule or applies it in an objectively unreasonable manner. *See* 28 U.S.C. § 2254(d)(1) (2006). As I have argued in other places, however, the U.S. Supreme Court should fill some of the void by extending the use of its power to grant, vacate, and remand certiorari petitions that do not present novel questions of law, but do call out for the Court to set boundaries (or to show that the boundaries it has already set have teeth). Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 249 (2012). These deterrence and enforcement rationales lose their force as state prisoners travel farther through the federal court system, and are often overcome by competing finality, comity and judicial resource interests. Prisoners who present claims of factual innocence avoid most of these pitfalls, and thus keeping "legal" and "factual" innocence separate provides better odds that the primary value of innocence-protection is adequately enforced.

314. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1971); Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

315. Kovarsky, *supra* note 38, at 334 ("Professor Bator and Judge Friendly produced landmark scholarship that . . . shaped the conservative position on habeas for the next forty years.").

never suggested on collateral attack is that the prisoner was innocent of the crime."[316] Judge Friendly emphasized the tremendous amount of resources that federal courts spend reviewing frivolous habeas petitions.[317] To decrease the influx of frivolous petitions and increase the ability of courts to remedy meritorious petitions, Friendly argued that federal habeas review of state court judgments should be restricted to cases where the petitioner is able to demonstrate a colorable claim that he is factually innocent of the underlying crime.[318] Judge Friendly defined "colorable" as one where the appellate court believed there to be a "fair probability that, in light of all the evidence, . . . the trier of the facts would have entertained a reasonable doubt of his guilt."[319]

Rather than using innocence as the touchstone for habeas review, Professor Bator believed that the focus should be on whether the state courts provided the prisoner with adequate process for raising federal constitutional claims.[320] Bator's focus on the richness of the process rather than on the substantive question of innocence derived partly from his belief that innocence is a question whose answer often is unknowable in an absolute sense.[321] Due to these epistemological limits, Professor Bator believed that the correctness of the proceeding's outcome is unlikely to improve with relitigation.[322] He argued that relitigating an issue when it was adequately resolved the first time not only wastes resources, but also interferes with the law's ability to achieve its deterrent and educational aims and restricts the ability of the prisoner to

316. Friendly, *supra* note 314, at 145.

317. *Id.* at 148–49.

318. *Id.* at 142 ("My thesis is 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.").

319. *Id.* at 160.

320. Bator, *supra* note 314, at 455 (asserting that "a process fairly and rationally adapted to the task of finding the facts and applying the law should not be repeated" and concluding that the main purpose of federal review of state conviction should be to determine "whether previous process was meaningful process, that is, whether the conditions and tools of inquiry were such as to assure a reasoned probability that the facts were correctly found and the law correctly applied" (emphasis omitted)).

321. *Id.* at 447 ("[T]he concept of 'freedom from error' must eventually include a notion that some complex of institutional processes is empowered definitively to establish whether or not there was error, *even though in the very nature of things no such processes can give us ultimate assurances* . . . ." (original emphasis omitted) (emphasis added)).

322. *Id.* at 451 (asking why "if a proceeding is held to determine the facts and law in a case, and the processes used in that proceeding are fitted to the task in a manner not inferior to those which would be used in a second proceeding, so that one cannot demonstrate that relitigation would not merely consist of repetition and second-guessing, why should not the first proceeding 'count'? Why should we duplicate effort? . . . What seems so objectionable is second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the 'truth.'").

start the process of rehabilitation.[323] In light of these concerns, Bator credited to "unreasoned anxiety" support for most types of federal habeas review of state convictions.[324]

Both Judge Friendly and Professor Bator placed enormous trust in the ability of the trial process to accurately weed out the innocent. Both agreed that the state court appellate process (as a general rule) provides adequate protections for the review of trial verdicts. They separated paths at the question of innocence, however. Friendly believed identifying the factually innocent during post-conviction proceedings to be possible, but exceedingly rare. Bator believed that innocence in the absolute sense is largely unknowable and that we are likely to get it as right as we ever shall on a first pass at the question. Our contemporary understanding of wrongful convictions, our realization that even traditional forms of evidence are not as reliable as we imagined them to be, and our ability to test some types of evidence more reliably as time passes, each demand reconsideration of the fundamental assumptions that Friendly and Bator made.

Bator argued that the idea of adequate process might now include as a matter of course (rather than as an exceptional departure) post-conviction reliability testing where a petitioner is able to present an adequate quantum of proof that he is factually innocent of the crime charged. There is ample reason to believe that Bator would support this added point of procedural protection *if* he accepted the underlying premise that there is a sufficiently strong ability to determine innocence posttrial so that the extra step would increase overall functioning. Indeed, he wrote:

> I want to be careful to stress that I do not counsel a smug acceptance of injustice merely because it is disturbing to worry whether injustice has been done. What I do seek is a general procedural system which does not cater to a perpetual and unreasoned anxiety that there is a possibility that error has been made in every criminal case in the legal system.[325]

Bator argued that adequate process meant process "fitted" to provide a "reasoned probability that the facts were correctly found."[326] Given the plain and relatively frequent possibility that scientific evidence discovered post-conviction casts fundamental doubt on a conviction, it

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323. *Id.* at 452.

324. *Id.* at 453.

325. *Id.*

326. *Id.* at 451, 455 (emphasizing that a process was full and rational where it provided a "reasoned probability that the facts were correctly found, and the law correctly applied").

seems reasonable to conclude that the trial process is not reasonably fitted to the task of determining the most important fact: innocence. Moreover, Bator opposed routine federal court review of state convictions because it would "merely consist of repetition and second-guessing."[327]

In the context of a gateway innocence exception, however, the odds are best that federal court relitigation does more than second-guess state court judgment. The claims most likely to proceed on these grounds—ineffective assistance of counsel *and* failure to comply with discovery obligations—present politically difficult questions for judges (and especially state court judges). These claims strike at core ethical responsibilities and a judgment against a prosecutor who did not turn over evidence or a defense lawyer who did not perform adequately is a personal rebuke from one member of an often tight-knit legal community against another member of the same community. Moreover, in instances where the underlying legal defect was litigated *before* the discovery of new evidence, the disincentive to grant relief on a borderline constitutional error is strongest in the most heinous cases, which are exactly the type of cases where wrongful convictions are most likely to occur. Federal courts are not perfect. However, unlike elected state judges, they are largely immune from political consequences.[328] They are also comparatively more immune from the interpersonal consequences that lurk in the shadows of these types of cases. The same cannot always be said for state courts, however, as some former state prosecutors become state judges who review cases from the same prosecutorial district, and other former prosecutors become defense lawyers who try cases in the same district.[329]

On the other hand, the infrequency with which habeas relief is granted today, combined with the increased frequency with which innocent prisoners are being exonerated, seems to amplify Judge Friendly's argument that habeas should be tied to underlying claims of innocence. Thus, Judge Friendly's "reasonable probability standard" better suits the gateway innocence exception to procedurally defaulted claims. Under

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327. *Id.* at 451.

328. U.S. CONST. art. III, § 1 (providing that federal "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office").

329. This logic also applies to freestanding actual innocence claims presented on federal habeas review. If the state court did not consider all of the new evidence of innocence—even if discovered outside of the traditional motion for a new trial timeframe or otherwise procedurally defaulted—then there is every reason to believe—given the number of post-conviction exonerations and the nature of most of the evidence that drives post-conviction innocence claims—that the process *is* insufficient to determine innocence with a reasonable probability.

Schlup, a prisoner who presents a forty-nine percent likelihood of innocence (say, through new biological evidence) is not able to obtain review of an underlying ineffective assistance of counsel claim *even if* the *Strickland* claim is based on something such as the trial lawyer failing to locate a credible alibi witness that is no longer locatable. As the example demonstrates, the prevailing *probably* innocent standard (and, by extension, any higher standard required under AEDPA) does not adequately reflect the paramount value of innocence-protection in light of our contemporary situation.

It is also important to highlight the erosion in the finality interests that the Court relied upon in *Schlup* to conclude that the balance of the interests supported a probable innocence standard. [330] First, a change in frequency with which a competing concern arises alters the relative weight of competing principles. We now have an idea of the frequency with which the innocent are convicted.[331] Professor Bator and Judge Friendly highlighted rehabilitation, retribution, deterrence, and educational aims as the driving force behind the finality argument.[332] The rehabilitation process cannot begin for a person who truly is innocent of the crime, however. It is not possible to realize the retributive benefit. Society does not obtain the intended educational benefit from convicting an innocent person; indeed, as strong claims of innocence leak from the courthouse to the newsroom, the educational effect that occurs is that our system is both not as accurate as we might imagine and that the federal courts are not capable of remedying the most extraordinary injustice. It is difficult to argue for the guaranteed incapacitation of the prisoner as presenting a deterrent effect if the prisoner is innocent and the true perpetrator is free to commit other crimes. Again, these factors have always been present. The difference now is that the frequency with which wrongful convictions occur increases their relative strength.

A truly innocent person also lacks the incentive to use gamesmanship to lengthen his sentence. Therefore, after limiting gateway innocence claims to those most likely to affect the guilt determination, those

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330. It is also worth noting that a perceived need for finality did not bar relitigation of claims at the founding or at common law. *See* Eric M. Freedman, *Dimension I: Habeas Corpus As a Common Law Writ*, 46 HARV. C.R.-C.L. L. REV. 591, 609 n.90 (2011) (citing Schlup v. Delo, 513 U.S. 298, 317 (1995)). To the contrary, prisoners generally could urge any court in the jurisdiction where he had been convicted to reconsider whether he was being held in violation of the Constitution. Courts providing successive review generally reviewed the case de novo. *Id.*

331. *See supra* notes 14–29 and accompanying text (discussing the number of known exonerations—including those originally sentenced to death row—in the modern period).

332. Bator, *supra* note 314, at 452; Friendly, *supra* note 314, at 146.

pursuing non-frivolous claims of trial error will have a strong *positive* incentive to discover and present evidence of innocence as soon as possible. Comity concerns are also at a low point once we tie underlying claims to those likely to impact the guilt–innocence determination. First, as innocence protection is the overriding value in constitutional criminal procedure, federal courts possess more of an interest in enforcing constitutional protections in this context than in any other. Second, state court judges often are elected. Questions of possible or probable (rather than near-certain) innocence entail the possible release of a person whom the local community might believe to be guilty (often of a gruesome crime) on what might be perceived as a constitutional technicality. Thus, gateway innocence claims are the least likely of the innocent claims to cut through the political nature of state court judging.

The final and strongest interest against lowering the standard for gateway innocence claims is that, by their nature, gateway claims are the most likely of the innocence claims to needlessly deplete judicial resources. Professors Nancy King and Joseph Hoffmann estimate that sixty to seventy prisoners receive federal habeas relief each year, despite more than 17,000 petitions filed.[333] Although most of these petitions do not use innocence as a gateway, the miniscule number of petitions granted relief of any kind is informative. By limiting the types of claims eligible for the gateway exception, however, there is reason to believe that the total number of petitioners *seeking* the gateway exception will drop. Indeed, it is more likely that prisoners respond to the decreased availability of claims than to a fluctuation in the requisite quantum of proof, because the latter is far more difficult for a petitioner to determine ex ante, especially in light of their subjective bias.

In any event, the number of innocence claims raised on federal habeas is comparatively small. This dicta from *Schlup* remains valid:

> Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty. Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare.[334]

Federal courts might further reduce the burden of innocence claims by enacting a procedural rule that requires reviewing first the factual basis

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333. *See* Hoffmann & King, *supra* note 312.

334. *Schlup*, 513 U.S. at 324.

of the innocence claim. This would allow courts to quickly discard claims that do not come close to the prevailing standard *before* moving to the substance of the petition. It is also worth considering that even under the procedural obstacles that AEDPA imposes on habeas petitioners generally, courts do not spend less time adjudicating petitions. They simply spend less time adjudicating the merits and more time navigating the procedural maze.[335] These factors, considered together, warrant a reduction in the quantum of proof necessary to pass through the innocence gateway.[336]

CONCLUSION

Recognizing that trial is no longer the center of gravity for protecting innocent people entangled in the criminal justice system, this Article has grounded freestanding innocence claims in the federal Constitution. First, it documented that protecting the innocent is a foundational constitutional value. Although at the time of the founding and until recent times the trial possessed a monopoly on the determination of guilt or innocence, today innocence is often determined with a high degree of accuracy during the pretrial process and also posttrial after the discovery of new evidence (or the advent of new technology that allows for fresh examination of old evidence). This dislocation of the trial as the definitive time and place to determine innocence drives a corresponding change in the scope of our evolving Eighth and Fourteenth Amendments.

The functional differences in how and where innocence is best determined, as well as the heightened awareness that wrongful convictions regularly occur, warrant reweighing the competing interests in obtaining substantively accurate guilt determinations and prioritizing individual justice versus the societal interests in finality, comity, and judicial economy. Doing so reveals a prisoner's right to obtain a posttrial determination of his criminal liability in cases where he is able to make a sufficiently strong allegation that the fact-finder convicted him at trial despite his factual innocence.

Specifically, this Article has proposed that the Constitution now requires a posttrial determination of innocence in cases where a petitioner presents a threshold showing of innocence. In cases where a

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335. *See* KING & HOFFMANN , *supra* note 312, at 79–80.

336. These same factors—when transferred into the context of freestanding innocence claims—warrant congressional (or judicial, within the space of AEDPA, or after a determination that AEDPA does not apply) reduction in the ordinarily applicable deference to state court judgments on such claims.

petitioner presents clear and convincing evidence of innocence the Constitution requires vacating the prisoner's sentence. In a circumstance where a death-sentenced petitioner presents *probable* innocence, the Constitution—under the death is different framework—requires that the prisoner not be executed. Finally, the shift in our understanding of wrongful convictions, and the corresponding knowledge that innocence is sometimes *more reliably* determined posttrial, counsels towards lowering the quantum of proof—from probable innocence to a reasonable probability of innocence—necessary to obtain relief from procedurally defaulted claims. It is necessary to limit the nature of claims that are able to proceed through the innocence gateway to those most likely to impact the determination of guilt or innocence. Taken together, these three steps reduce the likelihood that an innocent person will be executed or remain incarcerated.