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# IS IT EVER TOO LATE FOR INNOCENCE? FINALITY, EFFICIENCY, AND CLAIMS OF INNOCENCE

*George C. Thomas III,*[*] *Gordon G. Young,*[**] *Keith Sharfman,*[***] *and Kate B. Briscoe*[****]

> [Does it violate the Constitution] to execute a person who, having been convicted of murder after a full and fair trial, later alleges that newly discovered evidence shows him to be "actually innocent." . . . [I]t is perfectly clear what the answer is: There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.
>
> Justice Scalia, joined by Justice Thomas, concurring in *Herrera v. Collins*.[1]

Should innocent people be imprisoned as criminals? More precisely, given the impossibility of absolute knowledge, should those who now seem innocent, to the very best of our capacity to determine such matters, nevertheless continue to serve sentences because at one time guilt seemed highly probable? On the surface it borders on the ridiculous to ask the question. But Supreme Court opinions such as *Herrera* have made it necessary to explore this question.[2]

All systems of justice are imperfect. When a mistake is made, innocent defendants are convicted of crimes, sometimes capital crimes. When those

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* Professor of Law & Judge Alexander P. Waugh, Sr. Distinguished Scholar, Rutgers University, Newark. I thank Howard Latin, Richard Leo, and Welsh White for their help. Professor Young and I are both indebted to Richard Boldt for putting the collaboration together. My work on this project was partly supported by the Dean's Research Fund of Rutgers School of Law-Newark.

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1. 506 U.S. 390, 427 (1993) (Scalia, J., concurring).

2. The quotation that began this article is from a concurring opinion, but a majority of the *Herrera* Court entertained the idea that overwhelming evidence of innocence should not require a court to ignore procedural bars to presenting new evidence. *See infra* notes 112-19 and accompanying text.



HeinOnline -- 64 U. Pitt. L. Rev. 263 2002-2003

convictions become final, after all appeals and collateral challenges, what then do we say about the prisoner? Two responses are typically given, one by the United States Supreme Court and one by critics of the Court's response. We will argue that both answers are unsatisfying and, ultimately, unhelpful.

As the above quotation from Justice Scalia implies, one could say that as far as our system of justice is concerned, the innocent defendant's claim of innocence has been extinguished, that he has had all the process that is due him. Found guilty, and his conviction now final, he is guilty in the only relevant sense we need consider: a fair procedure determined that he is guilty. The critics of this view respond by asserting what could be understood as a substantive claim of innocence—an innocent defendant remains an innocent prisoner and it violates the Constitution to continue to imprison the innocent.

But there is an intermediate position that is sensitive both to the needs of the system to achieve finality in verdicts and the needs of innocent prisoners to have their claims vindicated. We will argue that the Due Process Clauses to the Constitution (in the Fifth and Fourteenth Amendments) require courts to be open to powerful claims of innocence without regard to whether procedural deadlines for challenging a conviction have expired.[3] As this right is limited to powerful claims of innocence—DNA evidence would be the easiest, but not the only, example—it would almost always involve newly discovered evidence that creates a strong likelihood of actual innocence.[4] So

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3. Vivian Berger has argued that the Eighth Amendment creates a right for prisoners on death row to present claims of innocence without regard to procedural bars. Vivian Berger, Herrera v. Collins: *The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943 (1994). To extend that right beyond the death row context, as we will argue is appropriate, requires an account that addresses the efficiency of the process. Perhaps the Eighth Amendment is or should be indifferent to efficiency if an innocent life is in danger of being extinguished. It is much more difficult to assert that the Eighth Amendment is indifferent to efficiency if thousands of cases are potentially at issue. Efficiency concerns are more naturally lodged in a due process analysis.

Susan Bandes relies on substantive and procedural due process, as well as the Eighth Amendment, to make her argument against procedural bars, again limited to the death penalty. Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501 (1996). Our proposal extends to non-death cases and is based solely on procedural due process. We also differ from Professor Bandes in that we concede the many virtues of the Court's "finality" jurisprudence and argue only that those virtues do not extend to procedural bars on powerful claims of innocence.

4. A defendant in possession of powerful evidence of innocence at trial, or who discovers it within the period permitted for challenging his conviction, has every incentive to present the evidence. Moreover, innocent defendants have every incentive to use due diligence to search for evidence of innocence. Thus, the universe of innocent prisoners who now have powerful evidence of innocence to present is likely populated only by those who exercised due diligence and then discovered the evidence after the deadlines for presenting this evidence have passed. This is so likely, in our judgment, that due process might suggest considering claims of newly discovered evidence in a separate category from all other claims of innocence. We do not pursue that argument here, instead relying on judges to separate powerful claims from other

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limited, it is a very narrow exception to the rule that once final, convictions should be immune from challenge. Indeed, because powerful evidence of innocence will not be easy to discover years after trial even with sophisticated DNA testing, our proposal contemplates that many innocent prisoners will remain in prison. Those prisoners have received the process that is due them, and the state can constitutionally hold them in prison unless powerful evidence of innocence can be offered. But the exception to finality for powerful claims of innocence that we urge is nonetheless an important exception, one demanded, we will argue, both by fairness and efficiency.[5]

The exception we urge is also grounded firmly in due process of law when the Court's due process principles are applied to the world of criminal justice that now includes DNA as well as persuasive evidence that the police often arrest innocent people. In *Mathews v. Eldridge*, the Court identified three "distinct factors" that determine whether due process requires a particular hearing for a *civil* litigant facing termination of Social Security benefits.[6] Due to the long-standing assumption that the process due *criminal* defendants can be determined from the Sixth and Eighth Amendments, the relevance of *Mathews* to the incarceration of innocent people has rarely been mentioned and it has never formed the basis of a doctrine that determines the best set of procedures to protect innocence. We will seek to change the assumption that *Mathews* somehow has nothing to do with innocent prisoners.

Our argument is that the *Mathews* balance requires flexibility in the pursuit of an accurate guilt determination at an acceptable cost. This flexibility includes the time when the evidence is presented as well as the intensity of procedures needed to assess the evidence. A procedurally intense and well conducted trial at an earlier time may not be as accurate an indication of culpability as would a brief hearing years later when conclusive new information has surfaced. For due process calculus purposes, the costs to be weighed are those of all hearings, but even a sum of such cumulative costs is often likely to be exceeded by the benefits of a powerfully confident determination of innocence. *Mathews* requires courts to consider what

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claims without categories that we might create.

5. In a consequentialist world, justice and efficiency are likely two sides of the same coin. The system produces justice to the extent that it delivers the optimally efficient number of convictions of guilty defendants and the optimally efficient number of discharges (as early as possible) of suspects who are innocent. Indeed, our paper makes essentially this argument. Of course, what is "optimal" will depend on many factors, including what other uses one might make of the government resources. *See* discussion *infra* Part IV. Kantians would deny the relationship between justice and efficiency, of course, and we treat them as formally distinct whether or not they are functionally distinct.

6. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

HeinOnline -- 64 U. Pitt. L. Rev. 265 2002-2003

innocence-uncovering tools they must use at what time. Despite what the Court suggests in *Herrera*, the use of different tools at a later time will sometimes, in context, not be repetitious at all but more efficient.

The answer to the question posed by our title—"Is it ever too late for innocence?"—is thus "no, but with qualifications." Due process does not recognize time alone as relevant to innocence.[7] But due process does require powerful evidence to overcome a valid conviction produced by a fair process, meaning that while it is never too late for innocence, the search for innocent prisoners will go only as far as efficiency can justify. In sum, it is never too late for innocence discoverable by an efficient post-conviction process.

Part I describes the problem of innocents who are arrested, convicted, and imprisoned. It also contains an overview of some solutions to this problem, including our proposal to require courts to entertain powerful claims of innocence. Part II describes how current state and federal law often restrict, rather than facilitate, the efforts of prisoners to challenge their convictions on the basis of newly discovered evidence. Part III describes the Court's current "judgment model" approach to collateral attack with its emphasis on finality. We conclude that the judgment model has many virtues but that it should not be applied in a mechanical fashion to foreclose powerful evidence of innocence. Part IV assesses the current legal treatment of newly discovered evidence in light of considerations of fairness and efficiency, concluding that the current regime is generally sensible but that it is suboptimal from the standpoints of fairness and efficiency when a powerful claim of innocence is made. In this part, we describe and critique Vermont Senator Patrick Leahy's proposal to entitle death row prisoners to an opportunity to present powerful claims of innocence based on DNA testing that is newly available. This part suggests that Senator Leahy's proposal would be an improvement to the current regime, but that our proposal is superior to his in terms of both fairness and efficiency.

Part V summarizes our argument, made throughout the paper, that due process requires a hearing for powerful claims of innocence. When these claims come before state and federal courts, judges must ignore time limits and the rules of procedural default that appear to prevent the claims from being reviewed.[8] Not all claims need be reviewed on the merits, and many

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7. To be sure, time can implicate other values, such as the clarity of the evidence available to prove innocence.

8. We do not discuss here whether the appropriate remedy for a powerful claim of innocence asserted by a state prisoner in federal court is to compel a balking state court to provide post conviction relief or for the federal court to issue the writ itself. *See* RICHARD H. FALLON, JR. ET AL., HART &

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claims of innocent prisoners will fail because of lack of sufficiently powerful evidence. But due process requires courts to ignore procedural bars to considering these claims.

The Supreme Court has found that due process requires elaborate procedures to deprive inmates of "good time" reductions to their sentences,[9] to deprive debtors of their collateral,[10] and to notify trust fund beneficiaries of a judicial settlement.[11] Yet due process of law does not seem to include the right to present powerful evidence of innocence to a court after the deadlines for challenging a conviction have expired.[12] It appears that the Supreme Court has neglected the most important "do-no-harm" value of the criminal justice system: to separate the innocent from the guilty.

## I. THE PROBLEM

### *A. One Case*

Two boys, age ten and eight, were fishing in Becky's Pond in a semi-rural area not far from Baltimore when a man walked past.[13] The boys asked him to look at their catch and he stopped to talk to them briefly. At that moment, Dawn Hamilton, age nine, walked up and asked the boys if they had seen her cousin Lisa. They had not seen her but the man offered to help Dawn find Lisa. They disappeared into the woods. A witness heard the man tell Dawn that "Lisa and me is [sic] playing hide-and-seek. Come on, let's go find her."[14]

> Five hours later, Dawn Hamilton, a girl who smiles from her photograph with a front tooth missing, was found facedown in the woods. Her skull had been crushed. Her underwear and pants were flung over a tree branch. She had been raped and then

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WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1391-92 (4th ed. 1996) (discussing whether states are ever required by federal law to hear post conviction claims).

9. Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974). *See also* Morrissey v. Brewer, 408 U.S. 471 (1972) (detailing provisions required before denying inmates parole).

10. Fuentes v. Shevin, 407 U.S. 67 (1972).

11. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

12. Those who tend to categorize rights might wonder why we rely, as we do, on civil due process cases and doctrine as part of our argument. Many responses are possible but we offer the simplest: if due process requires procedures to protect the interest debtors have in their collateral, it surely requires procedures to hear powerful claims of innocence whenever those claims are pressed on courts.

13. The account in this paragraph is taken from JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 211-12 (2000) [hereinafter ACTUAL INNOCENCE].

14. *Id.* at 212.

HeinOnline -- 64 U. Pitt. L. Rev. 267 2002-2003

> violated with a stick. A sneaker imprint appeared on her neck. In a few weeks, she would have started fourth grade.[15]

Though the police initially had no suspects and little evidence, within a month they had arrested Kirk Bloodsworth, who "had grown up on Maryland's Eastern Shore, the son of a waterman, had gone to Bible academy, had done a turn in the Marine Corps."[16] He had a "barrel chest, large head, receding hairline, heavy brow above small eyes set deep in his face. His teeth [were] crooked. He had a reddish brown beard."[17] A newspaper writer who saw him later in prison commented that Bloodsworth was "a bit intimidating, because of his looks . . . . [T]he perfect suspect."[18]

According to a Department of Justice report,[19] the state put on a fairly strong case against Bloodsworth:[20] five eyewitnesses said that Bloodsworth was the man who stopped by Becky's Pond and went into the woods with Dawn; Bloodsworth had told more than one person that he had done something "terrible" that day that would affect his marriage; in his first interview with police, Bloodsworth mentioned a "bloody rock" though police had not mentioned the cause of death or weapons that might have been used; and a shoe impression found near the scene of the crime matched the size of Bloodsworth's shoe.[21] While the shoe impression seems like slight evidence (how many men, for example, wear a size 9 shoe?), the other evidence is reasonably powerful. There was a small semen stain on the victim's underwear,[22] but if testing was done at the time it was inconclusive.[23]

The jury's initial vote was eleven to one in favor of guilt and within two hours it was unanimous; the judge sentenced Bloodsworth to die.[24] Bloodsworth maintained his innocence throughout the proceedings, even prior

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15. *Id.*

16. *Id.* at 214.

17. Dan Rodricks, *Bloodsworth, the Suspect from Central Casting*, BALT. EVENING SUN, June 29, 1993, at 1B.

18. *Id.*

19. *See* EDWARD CONNERS ET AL., NATIONAL INSTITUTE OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 36 (1996) [hereinafter DNA CASE STUDIES].

20. The account in ACTUAL INNOCENCE, *supra* note 13, at 213-18, shows a substantially weaker case. As the case was almost certainly sufficient to go to the jury, and as juries can sometimes make mistakes, the truth as to the strength of the state's case is beside the point for our paper.

21. DNA CASE STUDIES, *supra* note 19, at 36.

22. ACTUAL INNOCENCE, *supra* note 13, at 221.

23. DNA CASE STUDIES, *supra* note 19, at 36 (noting later request to have "more sophisticated testing than was available at the time of trial").

24. ACTUAL INNOCENCE, *supra* note 13, at 218.

HeinOnline -- 64 U. Pitt. L. Rev. 268 2002-2003

to sentencing: "All's I'm saying, Your Honor, I did not commit this crime on July the 25th 1984. If I had have, it would have been stated from the start."[25] He took up residence on death row for the next two years.

Unlike many cases of wrongful conviction, the system ultimately worked in Bloodsworth's case. It appears that his counsel provided effective, aggressive representation at trial and on appeal. The court of appeals sent the case back to investigate the possibility that the police had withheld evidence of the possibility of another suspect.[26] His initial appeal also contended that "Bloodsworth mentioned the bloody rock because the police had one on the table next to him while they interrogated him; the terrible thing mentioned to friends was that he had failed to buy his wife a taco salad as he had promised . . . ."[27] The state court of appeals reached only the issue of the withheld evidence. He was retried and convicted again. A newspaper reporter who covered the second trial thought the jury likely "influenced by his appearance—not to mention his decision not to testify at his second trial, or his flimsy 'taco salad' story, or his knowledge of the 'bloody rock.'"[28] This time he received two consecutive life sentences. The appeal from these convictions proved fruitless.[29]

Bloodsworth's father continued to believe in his son's innocence and to pay for lawyers and DNA testing.[30] After the appeals had been exhausted, a new lawyer took over the case and proposed to the prosecutor, Sandra O'Connor, that items of evidence be submitted for more sophisticated DNA testing than was available at trial.[31] Many times evidence is not preserved,[32] and due process requirements are remarkably parsimonious in this area,[33] but

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25. *Id.* at 221.

26. *Id.*

27. *Id.*

28. Rodricks, *supra* note 17.

29. DNA CASE STUDIES, *supra* note 19, at 36.

30. He spent about $100,000 from his retirement funds. Paul W. Valentine & Richard Tapscott, [*Maryland*] *to Give Cleared Man $300,000*, WASH. POST, June 23, 1994, at B1.

31. Glenn Small, *Nine-Year Prison "Nightmare" Ends as Former Convicted Killer Is Released; DNA Test Leads to Exoneration*, BALT. EVENING SUN, June 29, 1993, at 1A.

32. *See, e.g.*, JIM DWYER ET AL., ACTUAL INNOCENCE 334-35 (2001) [hereinafter ACTUAL INNOCENCE (2001 edition)]; ACTUAL INNOCENCE, *supra* note 13, at 172-73, 180.

33. In *Arizona v. Youngblood*, 488 U.S. 51, 53 (1988), the police had not refrigerated the victim's clothes, causing the DNA test on the semen stains to be inconclusive. The Court held that the Due Process Clause requires only that police act in good faith when handling potentially exculpatory evidence. *Id.* at 58. The Court then reversed the Arizona Court of Appeals ruling in favor of Youngblood on the ground that the record was bare of any evidence of police bad faith. *Id.* at 58-59. In a remarkable irony, Youngblood was exonerated seventeen years after he was convicted, and twelve years after the Supreme Court turned him away, when DNA tests were done on a cotton swab that *had* been refrigerated. ACTUAL

HeinOnline -- 64 U. Pitt. L. Rev. 269 2002-2003

evidence had been preserved in Bloodsworth's case. Even when the evidence is readily available, some prosecutors resist DNA testing after a conviction has become final.[34] As James Liebman puts it, state prosecutors manifest an "astonishing *lack* of confidence . . . by fighting tooth and nail to keep from releasing DNA and other evidence that would verify the accuracy of capital convictions."[35] That temptation must be particularly strong when a capital case has been tried twice to a jury. Ms. O'Connor thus deserves credit for agreeing to the defense's request.[36]

Two tests by different laboratories, including the FBI lab, confirmed that Bloodsworth could not have been the man who left the semen on the victim's underwear. Maryland law, like many states, has a time limit on the presentation of new evidence. In Maryland, the limit was one year following the final appeal.[37] But in another refreshing example of the system ultimately working to help protect innocent defendants, the prosecutor cooperated in getting the evidence before a circuit court judge. On June 28, 1993, Bloodsworth's lawyer filed a Defendant's Unopposed Motion for New Trial, setting out the argument that DNA technology not known at the time of either trial showed the incriminating semen was not his. He attached the lab results and noted that the State had no objection and would enter a *nolle prosequi* upon the court's order granting new trial.[38] The next day, the judge granted the motion, the State entered a *nol pros*, and the judge ordered Bloodsworth released from prison.[39] Six months later, the governor granted a pardon request jointly submitted by defense counsel and prosecutors.[40] Six months after the pardon, the State agreed to give Bloodsworth $300,000 in compensation for the time wrongly spent in prison.[41] That the system ultimately worked reasonably well and still cost an innocent man eight years in prison is one of the chilling features of this case.

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INNOCENCE (2001 edition), *supra* note 32, at 334-35.

34. *See* ACTUAL INNOCENCE, *supra* note 13, at 248 (South Dakota Supreme Court chief justice asked, during oral argument, what should be done when innocent defendants asked for DNA testing; the lawyer for state attorney general responded: "We would not allow them to be tested.").

35. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2050 n.84 (2000).

36. Defendant's Motion to Release Evidence, April 30, 1992, Bloodsworth v. State, 543 A.2d 382 (Md. Ct. Spec. App. 1988) (No. 84-3138), *cert. denied*, 548 A.2d 128 (1988) (both sides agreed to have DNA tests performed on a stick, a shirt, and victim's underwear). *Id.*; Small, *supra* note 31.

37. *See Bloodsworth*, 543 A.2d at 392 (discussing the authority of the version of Md. Rule 4-331 in force before 1997).

38. Defendant's Unopposed Motion for New Trial, *Bloodsworth* (No. 84-3138).

39. *Id.*, Order of Circuit Ct. for Baltimore County, Md., June 28, 1993 (No. 84-1338).

40. DNA CASE STUDIES, *supra* note 19, at 37.

41. Valentine & Tapscott, *supra* note 30.

HeinOnline -- 64 U. Pitt. L. Rev. 270 2002-2003

### *B. How Many More?*

Until recently, most people believed that cases like Bloodworth's were horrible, but rare, miscarriages of justice.[42] The last few years have opened our eyes to the reality that the system fails far more often than most people thought, and far more often than is acceptable. Some of the evidence is anecdotal, and some involves small samples. The former Republican governor of Illinois, George Ryan, declared a moratorium on the death penalty because he found thirteen cases of innocent death row inmates out of a total death row population of 158, an error rate of 8%.[43] In 1996, a group of Department of Justice researchers published a monograph identifying twenty-eight cases in which an innocent man was convicted and later exonerated by DNA testing.[44]

A team of researchers, led by James Liebman, studied 5,760 death sentences imposed between 1973 and 1995, examining them for "serious error"—"error that substantially undermines the reliability" of the outcome.[45] Of these cases, 79% were reviewed on "direct appeal" by a state high court and, of that group, 41% were reversed on the basis of "serious error."[46] Because the Liebman team used "reliability of the outcome" to include defendants who did not deserve the death penalty as well as those who were innocent, one must be careful not to over-read these results. Nonetheless, these researchers found that in 19% of the cases reviewed by a state high court, the prosecution or the police had suppressed evidence favorable to the defendant.[47] Within that sample of 19% there are likely to be substantial numbers of innocent defendants who were ultimately sentenced to die.

The largest sample, so far, is a study of over 10,000 cases from 1988 to 1995 in which the FBI compared DNA of the suspect with DNA from the crime scene.[48] These tests excluded the suspect in 20% of the cases.[49] In

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42. ACTUAL INNOCENCE, *supra* note 13, at xiii.

43. *See* Paul Krawzack, *Inmates Nearing Death Sway Ryan 's View; Governor Fearful of Executing Innocent People*, THE ST. J.-REG. (Springfield, Ill.), Feb. 1, 2000.

44. DNA CASE STUDIES, *supra* note 19.

45. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases 1973-1995*, 78 TEX. L. REV. 1839, 1846-47 (2000).

46. *Id.* at 1847.

47. *Id.* at 1850.

48. DNA CASE STUDIES, *supra* note 19, at 20. A second sample of 10,000 cases taken from various other laboratories was also studied. The results were similar to the FBI data, and we focus on the latter.

49. *Id.*

HeinOnline -- 64 U. Pitt. L. Rev. 271 2002-2003

another 20%, the results were inconclusive.[50] Removing the inconclusive results from the study, and assuming that police seek FBI testing only of prime suspects, this study tells us that in roughly one in four cases (20% of the 80% conclusive results), the police had an innocent person identified as a prime suspect.[51] To be sure, we must be cautious when interpreting this data. The researchers provided no information about the types of cases in the sample.[52] Cases in which police ask the FBI to test for DNA might not be representative of all cases. It might be, for example, that police only seek testing when they have no other evidence, a category of cases that seems likely to contain more innocents than the general population of suspects.[53] Perhaps crimes that lend themselves to DNA testing are more likely to result in charges against innocent suspects. To be sure, police have a powerful incentive to seek DNA testing in all cases. If the DNA test positively identifies the suspect as the perpetrator, the position of the police and prosecutor will be strengthened immensely.

We certainly cannot rule out the possibility that innocent suspects are overrepresented in the FBI sample. We concede that any inference from this data must be very tentative. Governor Ryan's discovery that 8% of death row inmates were provably innocent,[54] is consistent with the much larger sample studied by the Liebman team of researchers.[55] Even if the error rate in homicide cases is that "low," it is troubling.

Of course, the DNA study involved only suspects, not convicted defendants. Perhaps the pre-trial screening processes that have long been in place screen out most innocent suspects. Perhaps the few innocents who make it to trial are acquitted. After all, the prosecution must prove the defendant guilty beyond a reasonable doubt, a task that one hopes is more difficult when the defendant is innocent.

However, there is reason to doubt that the system screens almost all of the innocent suspects. First, it is not at all clear that innocent defendants benefit from trial protections any more than guilty ones. Prosecutors are unlikely to take weak cases to trial. Thus, the cases against innocent defendants that make it to the trial stage are likely to look to juries about the same as cases

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50. *Id.*

51. *See id.*

52. *Id.*

53. The sample could contain mostly suspects who have not confessed, a group that seems likely to contain more innocent suspects. With a confession in hand, police might not see the need to do DNA testing.

54. *See* Krawzack, *supra* note 43.

55. *See* Liebman et al., *supra* note 45, at 1852.

against guilty defendants.[56] Second, the Liebman study concludes that incompetent lawyering is one of the two main factors explaining the shocking reversal rate in capital cases.[57] An exhaustive study of New York County in the 1980s revealed that private lawyers appointed in lieu of the public defender to represent indigent defendants *did not interview their clients* in 82% of the non-homicide cases.[58] Even in homicide cases, the lawyer interviewed the client only 26% of the time.[59] Lawyers who do not interview their clients are unlikely to advance reliable outcomes.

Third, over 90% of convictions result from guilty pleas, usually as a result of a plea bargain,[60] and these defendants do not face the final "screening" process of trial. If many innocent suspects do not meet their lawyer until he arrives with a plea bargain in hand, as the New York study suggests, some might be tempted to take the offer. After all, if you are innocent, it would not inspire much confidence in your lawyer if you meet him for the first time only when he has already assumed your guilt and bargained a jail sentence for you.

Moreover, even if the system screens out most of the innocent suspects, a small error rate means that large numbers of real people, real innocents, convicted of crime, remain in the system.

### *C. Some Solutions*

Against the backdrop described in the last section, Senator Patrick Leahy has proposed federal legislation to address the problem of innocents who are sentenced to death. States must permit DNA testing if that testing "has the scientific potential to produce new, noncumulative evidence material" to innocence.[61] Moreover, state courts are prohibited from relying on time limits or procedural default to refuse to hear DNA results that are material to innocence. The legislation does not require a particular format for states hearing these claims, only that the claims be heard in an appropriate state

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56. Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317 (1997).

57. *See* Liebman et al., *supra* note 45, at 1850.

58. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 758-62 (1986-87).

59. *Id.*

60. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996, at 448, 471, tbls. 5.27 (federal courts) & 5.51 (state courts).

61. S. 486, 107th Cong. § 104 (2001); *see also* Patrick Leahy, *The Innocence Protection Act of 2001*, 29 HOFSTRA L. REV. 1113 (2001) (reproducing the legislation and Senator Leahy's speech introducing it).

HeinOnline -- 64 U. Pitt. L. Rev. 273 2002-2003

court.[62] One issue raised by this statute is whether Congress has the power under Section 5 of the Fourteenth Amendment to force states to ignore their rules and hear the claims in the manner prescribed. We agree with Larry Yackle that Congress has Section 5 power to enact the Leahy bill,[63] and if we are right that due process requires courts to be open to powerful claims of innocence without regard to procedural bars, Congress would obviously have the power under Section 5 to enforce that command by "appropriate" legislation.

Leahy's proposal deals only with defendants facing the death penalty, a minuscule group compared to those convicted of other serious felonies.[64] Even when non-negligent homicide is included, only 13,000 homicide arrests were made in 2000, compared to 2.23 million arrests made for other FBI index crimes (serious crimes of violence and serious property crimes).[65] Moreover, the vast majority of homicide arrestees are never sentenced to death. While the release of a single innocent person facing death is a triumph, the raw numbers will be pretty small. To estimate the numbers outside the homicide context, we will work from the conservative premise that only 5% of non-homicide suspects are innocent. Applying those assumptions to the 2.23 million non-homicide arrestees produces an estimate of over 100,000 innocents. If 90% are screened out of the process prior to conviction, that leaves 10,000 innocent people convicted of a serious crime. If we relax both of these assumptions to 10% innocent suspects and 80% success in screening, we wind up with 40,000 innocents convicted of serious crimes in each year. While the stakes are higher when innocent people face the death penalty, and Leahy's proposal is a salutary first step, it is difficult to justify the annual incarceration of thousands, perhaps tens of thousands, of innocent people convicted of serious felonies, year in and year out.

Innocents incarcerated and sometimes facing death sentences are people put in harm's way by governments in their legitimate efforts to punish the guilty. Governments make sometimes quite substantial expenditures to rescue people who are stranded and facing danger as a result of their own risk taking—in climbing mountains or exploring caves, to take two examples. Why would governments not owe at least this much to those accidentally "stranded" by the criminal justice system? The only question is what level of

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62. S. 486, 107th Cong. § 104 (2001).

63. Larry Yackle, *Congressional Power to Require DNA Testing*, 29 HOFSTRA L. REV. 1173 (2001).

64. S. 486, 107th Cong. § 104 (2001).

65. FED. BUREAU OF INVEST., 2000 FBI UNIFORM CRIME STATISTICS, p. 216, tbl. 29, *available at* http://www.fbi.gov/ucr/cius_00/00crime4.pdf (last visited Feb. 1, 2003).

HeinOnline -- 64 U. Pitt. L. Rev. 274 2002-2003

expenditure is optimal—that is, how much innocence can the system afford to purchase given the understandable concerns with finality and repose? The Supreme Court's procedural due process cases provide guidance here, as does standard economics.

One way of vindicating due process is through legislation. But Senator Leahy's proposed bill is too narrow to satisfy due process. Moreover, though some state approaches are consistent with our view of due process, a checkerboard approach that could have fifty state approaches may not be the ideal solution. Ultimately, we believe that due process requires federal and state courts to modify their procedures as necessary to entertain claims of innocence if the legislative options are not sufficient. Perhaps, then, it makes more sense for the courts to begin recognizing the due process right to have powerful claims of innocence considered.

As Vivian Berger has thoughtfully argued, flexibility is important here.[66] She concludes that it makes more sense to read the Constitution to require state courts to use their own procedures to decide death-row claims of innocence than to require federal courts to develop a uniform procedure for hearing these claims.[67] Flexibility is also important in how judges approach due process claims of innocence. As we envision the process, judges will have broad discretion in how they approach these claims in the first instance. While their decisions will be subject to review, we imagine that few first level decisions will be overturned. If the evidence shows a high level of certainty, as DNA evidence often can, the first-tier judges and appellate courts will find it easy to sustain or void the conviction.[68] If the claims fall into the "gray" area between frivolous and near certainty, judges will grant an increasing number of them as they reach the near certainty range, but review will likely change few decisions. Some advocates of claims of innocence might want more "top down" control in terms of rules requiring that relief be granted in particular categories of claims. But we think due process requires only that judges hear the claims and grant relief to those that demonstrate probable innocence without regard to fitting the claim into a category.

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66. Berger, *supra* note 3.

67. *Id.* at 1014-15. Berger's argument in this article is limited to death cases and premised on the Eighth Amendment.

68. If the DNA evidence conclusively exonerates, the prosecutor's duty to seek justice ought to require her to join in the motion to void the conviction, as occurred in the *Bloodsworth* case. *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935) (noting that while the United States Attorney "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

HeinOnline -- 64 U. Pitt. L. Rev. 275 2002-2003

One example of how flexibility is beneficial in this area concerns guilty pleas. Guilty pleas are among the most strategic of all decisions. Defendants sometimes plead guilty to crimes they did not commit in exchange for dismissal of more serious crimes that they *did* commit. It would not be just to permit this defendant to have the lesser conviction overturned years later on the ground of irrefutable DNA evidence of his innocence of that charge. Consider a defendant who pleads to a rape charge in exchange for dismissal of a murder count. Years later he offers DNA evidence from a vaginal smear that exculpates him on the rape charge. But of course it is logically possible that he murdered, but did not rape, the victim. In this kind of case, the judge might presume that the defendant is guilty of murder and then refuse to overturn the bargained-for rape conviction. This would be particularly appealing if the guilty plea process disclosed strong evidence against him on the murder charge—the prosecutor might have said for the record during the guilty plea process: "The defendant confessed to the murder but the state is satisfied with a rape conviction in this case." If, however, the DNA evidence not only exculpates the defendant but inculpates another suspect who was never charged, then we suppose the judge would want to hold a hearing to determine how to weigh the evidence. If the evidence logically exculpates the defendant on both charges, that, too, is an easy case. Matters like this can be safely left in the hands of the judges who hear the first level claims.

Flexibility is also important because even when DNA excludes guilt on the relevant charge, it will not necessarily exonerate a suspect. Exonerative evidence can sometimes merely mean the prisoner did not do the act with her own hand. The wife who hires a killer to murder her husband is not going to leave her DNA on the murder weapon. Thus, courts will have to weigh the evidence in the context of plausible theories of the case. However, courts will not have to do even this much, we stress, unless the prisoner comes forward with evidence that has the potential to prove probable innocence. The wife's petition will be summarily dismissed, for example, if the DNA on the weapon matches that of the killer she is convicted of hiring. If, however, the DNA is that of the victim's business partner, who received the proceeds of a life insurance policy and who was not connected in any way with the victim's wife, the claim merits inquiry.

We envision that very soft rules would emerge from this "common law" approach to deciding innocence cases. DNA evidence that excludes the prisoner will likely guarantee at least an inquiry into the prosecution's theory of the case. Newly discovered evidence will probably receive a more discerning evaluation than evidence that was available but not presented at trial. Claims of innocence that follow convictions based on guilty pleas will

HeinOnline -- 64 U. Pitt. L. Rev. 276 2002-2003

almost certainly be disfavored. That differences exist in the kinds of claims, as well as in individual cases, suggests that a procedural due process approach is the right analytical structure. To say in advance, and in the abstract, how much process is due by category or kind of claim is probably impossible and, we think, ill advised. The only foundational requirement is that the evidence be powerful—that considered in context of the particular case, it demonstrates probable innocence. Judges can screen out many claims based just on the papers submitted. A claim, without more, that a confederate now admits firing the murder weapon or that the defense lawyer failed to investigate the case properly both fail to demonstrate innocence. No hearing need be held.

A procedure like the one we have described seems unexceptional, almost inevitable. Are our systems of justice moving in this direction? For the states, the answer is a modified yes, though the process is halting and the approaches vary wildly. So far, the federal system has remained unresponsive to the problem of innocent prisoners.

## II. CLOSING THE DOOR FOREVER ON INNOCENCE

Though no system of justice can take pride in sending an innocent person to prison for eight years, compared to many cases of wrongful conviction, Kirk Bloodsworth was treated pretty well. He had a father willing to put up $100,000 to pursue his claim of innocence;[69] he had a lawyer who fought for him; and he faced a prosecutor willing to permit DNA testing and to act on the exculpatory results. Equally as important, the prosecutor and the judge ignored the statutory bar to his late-filed claim of innocence. You might think that all jurisdictions routinely permit consideration of newly discovered evidence of innocence after the time for appeal and presentation of new evidence has passed. But you would be wrong.

### *A. State Procedures and Claims of Innocence*

The states have developed several responses to the problem of innocent prisoners. We briefly note here the basic state approaches to late-filed claims of newly discovered evidence.[70] Illinois, Missouri, and Tennessee have a time

69. While not an exact measure of what it is "worth" to have a claim of innocence heard, it is relevant that Bloodsworth's father spent $100,000 to "purchase" the attention of the prosecutor and judge. See *supra* text accompanying note 30. Moreover, if this amount was all, or most, of the father's retirement funds, it takes on added "worth."

70. State approaches include a motion for a new trial, petition for habeas corpus, *writ of error coram*

HeinOnline -- 64 U. Pitt. L. Rev. 277 2002-2003

limit for motions for a new trial based on non-scientific evidence[71] but no time limit when the motion is based on scientific testing that could not have been done at trial.[72] Virginia's evolving approach is similar: it has rigid time limits both for motions for new trial (twenty-one days[73]) and for habeas (various deadlines, ranging from sixty days to two years[74]). But Virginia law requires that courts grant motions to test for scientific or biological evidence of innocence and permits a writ "of actual innocence" in cases involving this

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*nobis*, and post-conviction relief. Not all states provide each avenue for relief, and not every avenue is open for newly discovered evidence. For example, post-conviction relief statutes are usually only for claims that a conviction violated the state or federal constitutions or laws. Newly discovered evidence that shows a constitutional violation at trial—for example, a violation of the constitutional duty to disclose exculpatory evidence—may be admissible in these post-conviction proceedings. However, where the newly discovered evidence does not reveal a constitutional deficiency with the trial, a late-filed claim of actual innocence may be permissible only if the state court holds that these "bare innocence" claims are themselves cognizable due process violations. *See, e.g.*, People v. Washington, 665 N.E.2d 1330, 1335 (Ill. 1996) (explaining that a "bare innocence" claim is cognizable as a violation of the due process clause of the Illinois constitution); *State ex rel. Holmes*, 885 S.W.2d 389, 398 (Tex. Crim. App. 1994) (explaining that a "bare innocence" claim is cognizable as violation of the Due Process Clause of the Fourteenth Amendment).

71. In Illinois, newly discovered non-scientific evidence of innocence may be the basis for relief under the Post Conviction Hearing Act. 725 ILL. COMP. STAT. 5/122-1 (2002). Though there are deadlines for filing a petition under this act, there is an exception when "the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILL. COMP. STAT. 5/122-1(c) (2002). In Missouri, newly discovered non-scientific evidence must be presented, if at all, as a motion for a new trial. Section 547.020(1) provides for a new trial "[w]hen the jury has received any evidence, papers or documents, not authorized by the court, or the court has admitted illegal testimony, or excluded competent and legal testimony, or for newly discovered evidence"; *cf.* State v. Stephan, 941 S.W.2d 669, 679 (Mo. Ct. App. 1997) (where the court held that "claims of newly discovered evidence are not cognizable in a Rule 29.15 proceeding"). Section 547.030 requires that a motion for a new trial be made within four days of the return of the verdict and, upon application by defendant, the court can make one thirty-day extension. Although the statute of limitations is strict, there may be a very narrow interests of justice exception. In *State v. Hill*, 673 S.W.2d 847, 847-48 (Mo. Ct. App. 1984), the court remanded for consideration of an untimely motion for a new trial where the evidence would completely exonerate the defendant and where the state prosecutor filed an affidavit stating that the evidence in defendant's motion was true to the best of his knowledge. The Missouri Supreme Court has not ruled either way on the issue. In Tennessee, a *writ of error coram nobis* is the only means for introducing newly discovered non-scientific evidence of innocence, and that petition must be filed within one year. TENN. CODE ANN. § 40-26-105 (2002). However, in *Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001), a death penalty case, the Tennessee Supreme Court held that due process prohibited strict application of the time limit to bar claims based on newly discovered evidence of actual innocence.

72. 725 ILL. COMP. STAT. 5/122-1 (2002); MO. REV. STAT. § 547.035 & § 547.037 (2002); TENN. CODE ANN. § 40-30-202 (2002).

73. VA. SUP. CT. R. 3A:15(b)-(c).

74. VA. CODE ANN. § 8.01-654 & § 8.01-654.1.

evidence without deadline.[75] Similarly, the Texas habeas corpus statute permits claims of newly discovered evidence apparently without time limit.[76]

Alabama effectively waives the time limit on newly discovered evidence cases, while still insisting on diligence, by requiring that post-conviction petitions based on newly discovered evidence must be filed within two years after judgment or six months after the evidence is discovered, whichever is later.[77] Utah has a one year time limit, but allows the court to excuse late filings in the interests of justice.[78] Though the Florida habeas statute does not seem to have a loophole for good cause shown, the Florida Supreme Court has indicated that a prisoner could request a DNA test even if the request is outside the two year statute of limitations as long as the prisoner satisfied due diligence.[79] In Minnesota, "[t]imeliness is *not required* by the post-conviction statute, although it is a factor to be considered when determining whether relief should be granted."[80] Timeliness is obviously relevant to due diligence, an element that is required for relief in Minnesota.[81]

A few states still appear to have rigid deadlines for filing claims based on newly discovered evidence, with either no exception for fairness or the interests of justice or one that is difficult to satisfy. Arkansas requires claims of newly discovered evidence be filed within thirty days of sentencing.[82] If that period expires, the common law *writ of coram nobis* rule is available for four narrow categories of claims that do not include newly discovered evidence.[83] The Arkansas Supreme Court has held that collateral attack is not

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75. VA. CODE ANN. § 19.2-327.1-2 (effective Nov. 15, 2002).

76. TEX. CRIM. PROC. CODE ANN. art. 11.07 & art. 40.001 (2000).

77. ALA. R. CRIM. P. 32.2(c) (2002).

78. UTAH CODE ANN. § 78-35a-107 (2002). Utah explicitly provides post-conviction relief based on newly discovered evidence. § 78-35a-104. The statute of limitations for a petition for post-conviction relief on the basis of newly discovered evidence is one year after the date petitioner knew or should have known of the facts underlying the petition. § 78-35a-107(2)(e). The court may excuse a late filing in the interests of justice. § 78-35a-107(3).

79. Ziegler v. State, 654 So. 2d 1162, 1164 (Fla. 1995) (diligence includes making the request within two years of when the testing became available).

80. Sykes v. State, 578 N.W.2d 807, 814 (Minn. 1998). In *Sykes*, the Minnesota Supreme Court held the trial court erred when it concluded that defendant's petition was not timely filed because it was filed over thirteen months after entry of judgment. *Id.* at 814 (finding error harmless and upholding trial court denial of relief on other grounds).

81. *See* Black v. State, 560 N.W.2d 83, 85 (Minn. 1997) (dismissing petition in part because eighteen-year delay in filing was lack of diligence); Gaulke v. State, 206 N.W.2d 652, 652 (Minn. 1973) (dismissing post-conviction petition as untimely when filed twenty-five years after conviction).

82. ARK. R. CRIM. P. 33.3.

83. Pitts v. State, 986 S.W.2d 407 (Ark. 1999) (discussing *writ of coram nobis*).

HeinOnline -- 64 U. Pitt. L. Rev. 279 2002-2003

the vehicle for raising newly discovered evidence claims in the absence of some other error at trial. The remedy instead is clemency.[84]

Courts are beginning to craft exceptions to rules that appear to have no exception for innocence. For example, South Dakota has no exception for the interests of justice and a one year time period for filing claims of newly discovered evidence.[85] The South Dakota Supreme Court, however, recently found an exception, based on due process, for DNA tests if the prisoner can show that the results would "most likely produce an acquittal in a new trial" and that the testing would not impose an unreasonable burden on the State.[86] Moreover, rules can be ignored in the interest of justice. Maryland has strict guidelines for non-capital cases, but as we saw, the prosecutor and judge can ignore the rules to permit consideration of powerful evidence of innocence.[87]

The trend is undoubtedly in the direction of finding a basis to allow powerful claims of innocence to be heard even if filed too late under the rules of procedure.[88] In a few years, all states might provide procedures for hearing these claims.[89] In the meantime, though, innocents who are in prison in some states may be simply out of luck when powerful evidence becomes available after the deadline for challenging the conviction has passed. Moreover, some states that permit late-filed claims limit them to scientific evidence or, in some

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84. *Id.* at 409-10. An Arkansas Court of Appeals judge has found in the Arkansas *writ of coram nobis* "a narrow window of relief for petitioners who claim that newly discovered evidence in the form of a third-party confession has established their actual innocence." Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence,"* 22 U. ARK. LITTLE ROCK L. REV. 629, 640 (2000). Judge Hart and her co-author agree with our reading of the relevant Arkansas law that there is otherwise "no remedy in the Arkansas criminal court system which permits prisoners to make claims of actual innocence based on newly discovered evidence if such a claim falls outside the narrow limitations of existing remedies." *Id.* at 645.

85. S.D. CODIFIED LAWS § 15-6-60(b)(2) (Michie 2001) (petitioner must show that due diligence would not have discovered evidence in time to present a motion for a new trial within ten days of judgment).

86. Jenner v. Dooley, 590 N.W.2d 463, 472 (S.D. 1999).

87. *See supra* notes 38-39 and accompanying text. The current Maryland rule has no deadline in capital cases for newly discovered evidence of innocence. Md. Rule 4-331 (2002).

88. For more detailed treatment of the law on this issue in selected states, see Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After* Herrera v. Collins, 71 TEMP. L. REV. 489 (1998); Karen Christian, Note, *"And the DNA Shall Set You Free": Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195 (2001).

89. *See* United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002) (holding the Federal Death Penalty Act unconstitutional because of a lack of procedural standards to protect innocent defendants). *But see* United States v. Quinones, 313 F.3d 49 (2d Cir. 2000) (reversing district court ruling that the Federal Death Penalty Act is unconstitutional). If our proposal were part of federal law, it would not only make the incarceration or execution of defendants constitutional but would also save the underlying statutory schemes themselves from being struck down.

HeinOnline -- 64 U. Pitt. L. Rev. 280 2002-2003

cases, specifically to DNA evidence. Several innocent prisoners have been released in the last few years based on non-scientific evidence. It seems to us that if the evidence of innocence is sufficiently powerful, it should override the deadlines for making claims of innocence even when the evidence is not scientific. If a prisoner's lawyer uncovered a videotape (verified by neutral experts) of someone else committing the crime, it seems bizarre to say that the prisoner cannot present that evidence because it is non-scientific.

The federal statute permitting post-conviction challenges might function as a fail-safe to provide a remedy for innocent prisoners denied a hearing because of an inflexible state procedure. Unfortunately, the federal forum appears as inflexible as that in Arkansas.[90]

### *B. Federal Procedures and Claims of Innocence*

#### *1. Non-Constitutional Law*

We deal first with rules of procedure and statutes that might provide relief to innocent federal prisoners. Claims made by federal prisoners are initially governed by Rule 33 of the Federal Rules of Criminal Procedure: "A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty."[91] No exception exists for the "interests of justice."

Well, you might say, fair enough but surely collateral relief is available after the three year period for moving for a new trial. Though the answer is not completely clear, because of the murky language of the federal statutes, it seems that the innocent federal prisoner is out of luck here as well. The first paragraph of 28 U.S.C. § 2255 sets out the grounds under which a federal court can entertain a motion from a federal prisoner: "that the sentence was imposed in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."[92] There is no mention of newly discovered evidence or the interests of justice. Of course, one can argue, as we will, that to imprison an innocent person who can present powerful evidence of

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90. Even if all states and the federal forum were open to all powerful claims of innocence, the value of our paper is to recognize that the right to make the claim is embedded in the Due Process Clause and that a procedure for hearing the claim can be structured to be both fair and efficient.

91. FED. R. CRIM. P. 33.

92. 28 U.S.C. § 2255 (2000).

innocence violates the Constitution, but if this is right, then prisoners do not need a statute or rule of procedure to permit them to make powerful claims of innocence.

The federal collateral relief statute does contain a catch-all phrase about sentences "otherwise subject to collateral attack."[93] If that phrase manifests congressional intent to accommodate claims of newly discovered evidence that fall outside the Rule 33 deadline, it is a strange way of accomplishing that goal. Congress knew perfectly well how to refer to newly discovered evidence in § 2255; the last paragraph permits a successive motion when a panel of the court of appeals certifies that the motion contains "newly discovered evidence that, if proven and viewed in light of the evidence as a whole" would establish innocence by a clear and convincing standard.[94] That Congress did not include newly-discovered evidence in the § 2255 statement of jurisdiction indicates that it is not included in the "otherwise subject to collateral attack" language. Thus, nothing in the Rules of Procedure or the statutes governing collateral attack by federal prisoners seems to permit courts to hear late-filed claims of innocence.

### 2. *Constitutional Law*

The barriers to relief are clearer when state prisoners petition federal courts for relief. Once the conviction is final, state prisoners have only one avenue to reach federal courts—federal habeas under 28 U.S.C. § 2254. The only ground for relief relevant to our project is that the incarceration violates the Constitution.[95] We are thus faced with the issue that we hope to illuminate. Does a claim of innocence made by someone in prison, without any other claim of a constitutional error, constitute a claim of a violation of the United States Constitution?

The Supreme Court already recognizes innocence as part of the law of habeas corpus, though in a surprisingly tangential way that seems to invert the priorities of justice. As we will see, factual innocence while rejected as a constitutional claim itself, serves to ease the way for habeas petitioners to make *other*, non-innocence claims. To understand this somewhat odd doctrine

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93. *Id.*

94. *Id.* To be sure, the whole statutory scheme is odd. Why create an exception to the rule of preclusion for *second* petitions based on newly discovered evidence of innocence and not provide clearly that a *first* petition can be based on newly discovered evidence of innocence?

95. The other grounds are that the custody violates "laws or treaties of the United States." 28 U.S.C. § 2254.

HeinOnline -- 64 U. Pitt. L. Rev. 282 2002-2003

requires a bit of history. Federal habeas corpus has been a slumbering giant since the Constitution declared that the writ of habeas corpus "shall not be suspended"[96] and Congress followed by creating statutory habeas in the Judiciary Act of 1789. The Fourteenth Amendment fastened on the states, for the first time, the requirement that states provide due process when depriving citizens of life, liberty, or property. But what courts would hear those claims? The United States Supreme Court was, of course, available by writ of certiorari but its docket can hold only so many cases. Thus, in a bold move that made meaningful the protection of the Due Process Clause, Congress in 1867 made important changes to the habeas statute to enable federal courts to have more control over state criminal proceedings.[97] At least in theory, these changes permitted federal courts to review every state conviction for possible violations of federal law. But comity gradually reemerged as an important value, and the Court over time created four doctrines that dramatically lessened the chance of a federal habeas court reaching the merits of federal claims made by state prisoners.[98] The obstacle relevant to our project is the rule that federal courts will not intervene when there is an adequate and independent state ground for letting the conviction stand.

In 1977, the Court held that a habeas corpus petitioner could not obtain review of a constitutional claim that had been forfeited under state rules of procedure unless he could show "cause" for the failure to raise the claim and "prejudice" resulting from the alleged constitutional violation.[99] To soften this rule of procedural default, the Court in subsequent cases said that a showing of probable actual innocence would substitute for the cause and prejudice that petitioners would normally have to show. But the Court's innocence exception does *not* permit a petitioner to seek release based on a claim of innocence. The effect, instead, is to permit him to make the constitutional claim he forfeited in state court by failing to raise or preserve it. For example, if a petitioner had forfeited a *Miranda* claim, he could still press that claim in federal habeas if he could make a showing of probable innocence.

The innocence claim here is simply serving as a proxy for the cause and effect that must otherwise be shown—an innocence claim permits the federal

96. U.S. CONST. art. I, § 9, cl. 2.

97. The revised habeas statute passed Congress in 1867, the year after Congress sent the Fourteenth Amendment to the states for ratification, which occurred on July 9, 1868.

98. The Court describes all four of these doctrines in *Wainwright v. Sykes*, 433 U.S. 72 (1977).

99. *Wainwright*, 433 U.S. at 87-91.

HeinOnline -- 64 U. Pitt. L. Rev. 283 2002-2003

court to hear a claim unconnected to innocence.[100] The Court's current approach to federal habeas seems to have inverted the natural priorities of justice. Freeing the innocent, a primary if not sole goal of the criminal justice system, plays the role of a mere auxiliary doctrine whose only significance is to ease the way for constitutional claims less weighty than itself.

It might seem that this role for innocence was simply derivative of the Court's desire not to restrict too tightly the raising of innocence claims more generally. Perhaps when faced with the right case, the Court would quickly announce a free-standing claim of innocence as a ground on which a federal habeas court could grant relief to federal and state prisoners who make a sufficient showing. One might have thought that until *Herrera v. Collins*,[101] where the Court pointedly remarked: "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."[102] Moreover, the Court was persuaded that the lack of precedent was salutary, noting that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence."[103]

To respond to those who believe that innocent prisoners need a remedy—presumably almost everyone—the Court remarked: "History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency."[104] If the system worked as well as it ultimately did in Kirk Bloodsworth's case, where both the prosecutor and the governor were willing to admit that the state had convicted an innocent man, the Court's remedy might be acceptable, if parsimonious. But evidence abounds that prosecutors and governors are not always so willing to concede error.[105] Perhaps the best

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100. Viewing the role of probable innocence as a stand-in for a showing of cause and prejudice makes sense of § 2255. If Congress was tracking the Court's habeas doctrine, it might easily have seen probable innocence as a way to excuse the filing of a second petition, which would otherwise be forbidden. The role of actual innocence, again, is only to permit the petitioner to raise new constitutional claims that he had failed to raise in the first petition. So viewed, innocence does not give rise to a "free-standing" constitutional claim.

101. 506 U.S. 390 (1993).

102. *Id.* at 400.

103. *Id.* at 401.

104. *Id.* at 417.

105. *See, e.g.*, ACTUAL INNOCENCE, *supra* note 13, at 248 (recounting oral statement by lawyer for South Dakota attorney general that she would not permit testing of innocent defendants whose convictions had become final).

HeinOnline -- 64 U. Pitt. L. Rev. 284 2002-2003

known example of this is the case of Earl Washington.[106] Sentenced to die for a rape and murder, Washington was within nine days of execution when a pro bono team of lawyers managed to get a stay of execution. When DNA testing later demonstrated, even to the state Attorney General, that Washington was not the rapist, there was no recourse in Virginia law because it then required claims of newly discovered evidence to be filed within twenty one days after the last appeal was final.[107] Defense counsel thus urged Governor Douglas Wilder to grant Washington a pardon. Instead, Wilder commuted Washington's death sentence to life in prison with the right of parole, on the theory that innocence of rape did not conclusively exonerate the murder.[108] Six years later, after more DNA tests, Governor James Gilmore granted a full pardon on the capital charges.[109] The Court said in *Herrera* that "[e]xecutive clemency has provided the 'fail safe' in our criminal justice system."[110] If the Washington case is any measure, clemency is more "fail" than "safe."

Though some have treated the constitutional status of a free-standing claim of innocence as settled by *Herrera*,[111] we think *Herrera* did not go that far. The Court reached, and rejected, Herrera's claim on the merits by assuming "for the sake of argument in deciding this case" that "a truly persuasive demonstration of 'actual innocence' . . . 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."[112] Concerned about the burden that this hypothetical due process right would impose on the criminal justice system, the majority said that, even if it existed, "the threshold showing for such an assumed right would necessarily be extraordinarily high."[113] The Court concluded that Herrera had not made that extraordinarily high showing.

Though the majority did not decide the critical issue, for Justices Scalia and Thomas, the answer was crystal clear: there is "no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence

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106. For an excellent account of this case, and critique of the death penalty generally, see Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089 (2001).

107. For Virginia's new approach to newly discovered scientific evidence, see *supra* text accompanying notes 73-75.

108. Freedman, *supra* note 106, at 1100.

109. *Id.* at 1103.

110. 506 U.S. at 415.

111. Bandes, *supra* note 3.

112. *Herrera*, 506 U.S. at 417.

113. *Id.*

HeinOnline -- 64 U. Pitt. L. Rev. 285 2002-2003

brought forward after conviction."[114] Part of the *Herrera* majority, Scalia and Thomas's concurring opinion suggests that the dissenters suffer from a misplaced concern with punishment of innocence. "If 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."[115]

The three *Herrera* dissenters, and Justice White concurring in the judgment, made clear that a sufficient showing of probable innocence triggers a due process right to a judicial hearing on newly discovered evidence, whenever it becomes available.[116] They differed from the Court's hypothetical due process right principally on how powerful the triggering evidence must be. Justice Blackmun, joined by Justices Stevens and Souter in dissent, concluded that to obtain relief Herrera had to show that "he probably is innocent."[117] White, concurring in the judgment, would have required a greater showing—that "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt."[118]

The difference in these standards might not be all that significant in practice because powerful evidence of innocence, particularly DNA proof, would typically exclude guilt and thus meet Justice White's higher standard. In theory, of course, some cases would fall between the standards, those where the evidence does not exclude guilt but where the petitioner persuaded the reviewing court that he is probably innocent. Indeed, that Justice White concurred in the judgment rather than dissented shows that Herrera's case did not meet his standard. Herrera's proof of innocence was not DNA; it was not even the confession of a killer who would take Herrera's place on death row. Instead, it was hearsay evidence of a confession made by a prisoner who was dead by the time of the petition; the witnesses to the confession were Herrera's brother and the former cellmate of the confessed killer. One does not have to be too cynical to understand why Justice White concluded that this evidence "falls far short of satisfying" the standard he articulated.[119]

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114. *Id.* at 427-28 (Scalia, J., concurring).

115. *Id.* at 428 (Scalia, J., concurring).

116. *Id.* at 429.

117. *Id.* at 442 (Blackmun, J., dissenting).

118. *Id.* at 429 (White, J., concurring in the judgment) (*quoting* Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

119. *Id.* The dissenters did not find that Herrera met their "probably innocent" standard, only that the district court found that his showing was "not insubstantial" and thus should be enough to merit a hearing on his innocence. *Id.* at 444-45.

HeinOnline -- 64 U. Pitt. L. Rev. 286 2002-2003

Lower courts have expanded on the intimations in *Herrera* that no free-standing claims of innocence are cognizable in federal habeas. A New York district court pointedly remarked that "[f]ederal habeas courts sit to insure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."[120] It concluded: "Claims of newly discovered evidence that relate only to a petitioner's guilt or innocence do not warrant federal habeas relief absent an independent constitutional violation occurring in the state proceeding."[121]

The Fourth Circuit recently rejected a similar argument made in the context of 42 U.S.C. § 1983.[122] This Civil War era statute creates a civil action for the deprivation, under color of state law, of federal constitutional rights. In *Harvey v. Horan*, Harvey petitioned the federal courts seeking an order directing the state's attorney to turn over a rape kit for DNA testing that was more sophisticated than what was available at the time of his trial.[123] The failure to do so, he claimed, amounted to a violation of his due process right of access to evidence that could prove his innocence.[124] The Fourth Circuit refused to "fashion a substantive right to post-conviction DNA testing out of whole cloth or the vague contours of the Due Process Clause."[125] The court sought to justify its holding as based on the "core democratic idea that if this entitlement is to be conferred, it should be accomplished by legislative action."[126] To hold in Harvey's favor "would improperly short-circuit legislative activity by allowing judges . . . to determine the contours of the right."[127] Judge King, concurring in part and concurring in the judgment in *Harvey*, conceded that due process might require access to evidence for purposes of DNA testing.[128] He concluded, however, that to articulate this right was not for a court of appeals. "[I]f any such right exists, it must be recognized by judges of a higher pay grade than those of this Court."[129]

In responding to a petition for rehearing, Chief Judge Wilkinson repeated his view, expressed in the panel opinion, that the legislatures are the appropriate source of the solution to this problem. "Only the most aggressive

120. *Id.*
121. Smith v. Edwards, No. Civ. 7962, 2000 Westlaw 709005, at *7 (S.D.N.Y. May 31, 2000).
122. *See* Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002).
123. *Id.* at 372.
124. *Id.* at 373.
125. *Id.* at 375.
126. *Id.* at 376.
127. *Id.*
128. *Id.* at 388 n.7.
129. *Id.*

HeinOnline -- 64 U. Pitt. L. Rev. 287 2002-2003

view of federal judicial power could lead us to preempt both a coordinate branch of the federal government and the state courts and legislatures with what would in essence be prescriptive law making of our own."[130] In a separate opinion, Judge Luttig argued for a substantive due process right to challenge a conviction that has become final, though he recognized that a plurality opinion of the Supreme Court might be inconsistent with this view.

> Were I writing on a clean slate, I would conclude that one retains, even after conviction and sentence, not only a protected liberty interest in his core right to freedom from bodily restraint, but also a protected liberty interest to pursue his freedom from confinement, though obviously after conviction these interests are residual and considerably reduced (to say the least) from those existing pre-conviction. There may even be an interest in freedom from confinement itself, although such a conclusion arguably is foreclosed by precedent.[131]

The division on the Supreme Court in *Herrera*, and on the Fourth Circuit in *Harvey*, show the powerful effect of finality and comity when federal habeas petitioners seek to overturn convictions, most of which come from state courts. The finality-comity effect can be seen in several cases of the Burger and Rehnquist Courts, rejecting much of the Warren Court's expansion of habeas corpus.[132] While many academics disagree with this return to a more traditional view of habeas corpus, the larger dispute is beside the point for our paper. We accept in this paper that the Rehnquist Court's view—which we call the "judgment model"—is plausible and has many virtues. We discuss the judgment model in Part III but first summarize the current procedure as it relates to innocent defendants

### *C. A Summary of How Innocent Defendants "Fall Between the Cracks"*

We explained in Part I that innocent defendants are convicted and sometimes sentenced to die. We presented data suggesting that the number of innocent defendants convicted of serious felonies could number in the tens of

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130. Harvey v. Horan, 285 F.3d 298, 301 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing and rehearing en banc).

131. *Id.* at 313 (Luttig, J., respecting the denial of rehearing en banc). The precedent to which he referred was *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (Rehnquist, C.J.) (plurality opinion) (stating, in the words of Judge Luttig, "that an individual who has been lawfully convicted no longer possesses a cognizable due process interest in his actual release from confinement through clemency, whether he is sentenced to a term of imprisonment or to death").

132. An excellent treatment of the expansion and retrenchment in federal habeas is Graham Hughes's paper, The Decline of Habeas Corpus, New York University Center for Research in Crime and Justice (1990).

HeinOnline -- 64 U. Pitt. L. Rev. 288 2002-2003

thousands. After conviction, the first right of redress is a motion for a new trial and then an appeal. If the innocent defendant could not present evidence sufficient to convince a jury, however, it is extremely unlikely that he will prevail on his innocence claim in the motion for a new trial or on appeal. The due process standard by which a reviewing judge must evaluate the sufficiency of the evidence presented at trial is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[133] As one might expect, very few convictions are reversed on this permissive measure of sufficient evidence.

Almost all convictions of innocent defendants thus become final and if the defendant managed to stay out of jail on bail pending the appeal, he now goes to prison (in the less severe felony cases, of course, probation is a possibility). The next avenue for the convicted innocent defendant is typically a state collateral proceeding to challenge convictions that have become final. In the absence of newly discovered evidence, or if there is no right to present the new evidence, the reversal rate here is likely to be extremely low. The state appellate courts have already reviewed the sufficiency of the evidence, and a review of that issue again by the same courts is very unlikely to produce a reversal. Nor is a petitioner likely to be successful raising any other issue that has already been reviewed on direct appeal. As noted earlier, state rules of procedural default bar raising new claims on collateral review.[134]

The final step is to file a habeas corpus petition in federal court in the district where the person is incarcerated. The success rate is low here as well. A study of petitions filed in the Southern District of New York from 1973-75 and 1979-81 shows that the district court dismissed 97% of the petitions.[135] The researchers do not mention any claims of innocence in their sample. A prisoner who has discovered evidence of innocence, but who is not allowed to present that evidence, thus faces odds no better than 3 in 100 of getting a hearing or a new trial. Without the right to present evidence of innocence at the hearing or retrial, habeas corpus is not a particularly hopeful remedy.

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133. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

134. *See, e.g.*, Smith v. Murray, 477 U.S. 527, 529 (1986) (because under Virginia law, the failure to raise a claim on direct appeal precludes its consideration in a collateral proceeding, the claim was also barred in federal habeas).

135. Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 680 tbl. 2 (1991).

HeinOnline -- 64 U. Pitt. L. Rev. 289 2002-2003

Federal habeas corpus is a good example of what we have termed the "judgment model," an approach to law that values finality, efficiency, and repose. We discuss the judgment model in the next Part.

## III. THE JUDGMENT MODEL

The judgment model has several dimensions but three are critical to the due process right to present powerful claims of innocence. First, the model emphasizes the responsibility of the defendant to raise claims as required by the state or federal procedure. As we have seen, the failure to raise claims as required almost always results in the procedural default of the claims in later judicial forums, including appeal and collateral attack on the conviction. Every criminal case is filled with strategic decisions—whether to accept the state's plea bargain, what motions to suppress to file and how to argue them, whether to waive a jury, which jurors to strike with peremptory challenges, what witnesses to call, what questions to ask on direct and cross-examination, what objections to make, and what to say to the jury in the opening statement and closing argument. Without something approaching a *per se* rule making those decisions binding on the defendant, convictions could yield endless litigation. That the failure to raise claims might appear, later, to have been a mistake is relevant to whether the lawyer provided effective assistance of counsel, but, assuming effective assistance,[136] the rule of procedural default functions in the judgment model to bar a second chance to persuade a jury of innocence.

Second, the judgment model focuses on the law at the time of the trial. A convicted prisoner is being held (and, in capital cases, can be executed) consistently with due process if he or she had a trial that was, *at the time that it occurred*, fair and consistent with the Constitution. The issue is whether, during the trial, some constitutional right, as it then existed, was violated. If not, the judgment stands and continuing execution of the sentence complies with due process, whether the prisoner is in fact innocent or guilty. If the law at the time of trial did not recognize a due process right to have DNA tested,

136. The Court has created an almost *per se* rule that failed strategic decisions cannot rise to the level of ineffective assistance. In *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984), the Court noted that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."

HeinOnline -- 64 U. Pitt. L. Rev. 290 2002-2003

then under the judgment model that right presumptively also does not exist in collateral litigation.[137]

Third, one might stretch the finality point to exclude facts not known at the time of trial. While various procedures in state and federal systems permit newly discovered evidence to be presented for a period of time, finality *might* suggest honoring those time limits to forbid reliance on new facts sought to be presented after these periods have expired. This could be particularly attractive when the facts were known at the time but their significance was not known or fully knowable. Assume a conviction from 1975 when a request to test a blood stain for DNA would have been speaking in foreign tongues. Or assume a conviction from 1990 when DNA tests were less sophisticated. In either case, a robust role for finality might militate against reopening the case for consideration of "new" evidence that is new only in the sense that its significance is better appreciated now. Indeed, this was one of the grounds the Fourth Circuit gave for ruling against Harvey in the case discussed above. The semen smear was tested for DNA in 1990 but the results did not exclude Harvey.[138] In 1998 and again in 1999, he asked for the evidence to be turned over for a more sophisticated DNA test.[139] The Fourth Circuit viewed opening up the evidence for re-testing as too destructive of finality, indeed as analogous to seeking to benefit from a change in the law.[140] After discussing the rule that habeas petitioners could not benefit from changes in the law, the court wrote: "Similarly, we believe that finality cannot be sacrificed to every change in technology. The possibility of post-conviction developments, whether in law or science, is simply too great to justify judicially sanctioned constitutional attacks upon final criminal judgments."[141]

Many arguments might be used to justify or rationalize applying the judgment model in its entirety to claims of innocence.[142] But support for

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137. *See* Teague v. Lane, 489 U.S. 288, 310 (1989).

138. Harvey v. Horan, 278 F.3d 370, 373 (4th Cir. 2002).

139. *Id.*

140. *Id.* at 376.

141. *Id.*

142. We suspect that actors in the criminal justice system—prosecutors, judges, even defense lawyers—are influenced by considerations beyond efficiency and fairness. Some of these considerations may be conscious influences as the actors explain or criticize decisions that accord with the judgment model. Others may operate in more subtle ways to make actors feel that a right, or wrong, decision has been made. Factors that might be viewed as supporting a bar on inquiries into highly probable innocence—beyond fairness and efficiency—include finality, federalism, gamesmanship, and "virtual guilt." Finality, however, is not an argument but, rather, the very question we seek to resolve. Which determinations are final to what degree, and which are not, must be determined by factors external to the concept itself.

Gamesmanship harkens back to a sporting theory of justice taken seriously, but rejected, by Roscoe

HeinOnline -- 64 U. Pitt. L. Rev. 291 2002-2003

extending the judgment model to powerful claims of innocence quickly narrows to two values—fairness and efficiency.[143] We conclude that while current limitations that advance finality are generally fair and efficient, they are neither in situations where, as in the case of exculpatory DNA, the new evidence that the prisoner wishes to present has a high probability of demonstrating innocence. DNA evidence best exemplifies this kind of claim, but other types of evidence can be used to create a powerful claim of innocence.

Limits on powerful claims of innocence are not only prudentially unjustifiable but also violate the fundamental premises of the Supreme Court's own procedural due process jurisprudence. Most clearly they violate the calculus adopted in *Mathews v. Eldridge*[144] for determining when due process requires a procedure to protect an interest in life, liberty, or property. *Mathews* told us that due process analysis entails examination of

> three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [third], the Government's interest, including the function involved and the fiscal and

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Pound. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 ABA REPORTS 395, 404-06 (1906). Commentators have criticized *Miranda v. Arizona*, 384 U.S. 436 (1966), precisely on the ground that the majority was moved by the "instinct of giving the game fair play." Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1441 (1985) (quoting 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 57, at 1185 (1983)). But even if some participants intuitively view the pursuit of the guilty as a game, the point is to convict the guilty. There is no point in playing against a probably innocent.

By "virtual guilt," we mean the notion that many prisoners who are not guilty of the crime of which they have been convicted, are nevertheless guilty of other serious crimes. This notion may explain some of the lack of concern about the effect of strict finality on those probably innocent of particular crimes. It is, however, not a legitimate argument in our criminal justice system, which insists on rigorous proof of a particular crime to justify punishment.

The federalism justification is of course limited to state prisoners. The notion is that the federal government should not unduly interfere with state systems of criminal justice. On closer examination this argument fails when due process considerations of fairness and efficiency require a hearing on a powerful claim of innocence. The Due Process Clause of the Fourteenth Amendment, after all, binds the states.

In sum, however much these factors might influence actors in the system, they fail to provide any justification for ignoring powerful claims of innocence. The question of whether to hear a particular claim must be answered by reference to the values of fairness and efficiency.

143. 278 F.3d at 376. We recognize that these terms, especially fairness, are difficult to define. By "fairness" we mean an intuitive sense of "justice" or "rightness" or "goodness." By "efficiency," we mean wealth maximization in the Kaldor-Hicks sense. On the distinction between these criteria of social choice, *see* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 12-13 (6th ed. 2003); JOHN RAWLS, JUSTICE AS FAIRNESS (1999).

144. Mathews v. Eldridge, 424 U.S. 319, 347 (1976) (stating entitlement to a procedure depends on whether the procedure is cost-justified).

HeinOnline -- 64 U. Pitt. L. Rev. 292 2002-2003

> administrative burdens that the additional or substitute procedural requirement would entail.[145]

*Mathews* seeks to balance the cost of an additional procedure against the expected value of the procedure. In applying *Mathews*, a court multiplies the importance of the interest at stake by the degree to which a particular procedure would increase the accuracy of determining whether the interest should be deprived. This gives the value of the procedure. Against this benefit, the court should balance the cost of providing the procedure. In some cases one can question the value to be assigned to the interest at stake—for example, what value should we assign to a student's interest in not being suspended from school for one day? In our universe of cases, however, no one doubts the value in not being executed or in not having to serve a lengthy prison sentence.

As explained below, the net benefits of considering powerful new evidence of innocence are likely to be higher than most procedures required by current law. Indeed, many of the claims now allowed aim only indirectly, if at all, at protecting innocence while a claim of innocence aims directly at that goal. That a procedure occurs after the conviction becomes final does not necessarily create inefficiencies. In some cases, the most efficient determination of guilt or innocence can occur only after post-trial developments—for example, after the discovery of new evidence and the further evolution of forensic science. Below we develop these ideas in terms of basic fairness, which should guide legislative reform, as well as judicial responses to due process challenges to current law.

## IV. FAIRNESS AND EFFICIENCY IN INNOCENCE CASES

In this Part, we consider the questions of fairness and efficiency separately. As to the latter, we use Judge Richard Posner's formula for determining when the review of evidence is efficient.

### *A. Considerations of Fairness*

Surely it is fair in most cases to deny a prisoner the opportunity to challenge his conviction on the basis of newly discovered evidence. If the prisoner has already had a fair trial and exhausted his right to appeal and to collateral review, then there is little reason to suppose that new evidence

145. *Id.* at 335.

HeinOnline -- 64 U. Pitt. L. Rev. 293 2002-2003

would or ought to change things. Even if the prisoner is innocent, another piece of evidence that is merely cumulative, adduced years later, is unlikely to persuade a new fact finder that the prisoner is innocent. If there were no way at some point to impose a sentence with finality, prisoners would endlessly search for scraps of new evidence and bombard the courts with petitions to reopen their cases. Moreover, affording to highly litigious prisoners preferential access to the courts would itself be unfair to other prisoners who are less litigious, as well as to other litigants in general.

Nevertheless, when it is known or easily knowable to a high degree of certainty that a prisoner is innocent of the crime for which he has been convicted (for example, when there is newly discovered, exculpatory DNA evidence), it plainly is unjust to keep him incarcerated on the ground that the time for consideration of new evidence has elapsed or that his right to collateral review has been exhausted. Because such convincing evidence of innocence is usually difficult or impossible to obtain, however, it is inevitable—and hence not unfair—that some prisoners must remain incarcerated even though in fact they are innocent.

Inevitability is not the only reason that the American system of criminal justice tolerates the tragedy of erroneous incarcerations. The imprisonment of innocent defendants is also permitted because (1) the criminal justice system is designed to ensure a fair procedure and not necessarily a fair outcome; and (2) scholars and jurists have long believed that situations of erroneous incarceration are relatively rare, especially once the rights to appeal and collateral review are taken into account. On the basis of these rationales, a long and distinguished literature regards our system of criminal justice, notwithstanding the inevitability of some erroneous outcomes, as basically fair.[146]

To be sure, the recent spate of convictions overturned by DNA evidence, along with the Liebman study and revelations that several innocent prisoners had been sentenced to death in Illinois, raise questions about how rare such mistakes are. But however rare they are, as long as the first trial outcome is not clearly erroneous, the chance of a second trial reaching a more accurate

146. *See, e.g.*, Townsend v. Sain, 372 U.S. 293, 334 (1963) (Stewart, J., dissenting) ("To require a federal court now to hold a new trial of factual claims which were long ago fully and fairly determined . . . is, I think, to frustrate the fair and prompt administration of criminal justice, to disrespect the fundamental structure of our federal system, and to debase the Great Writ of Habeas Corpus."); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (arguing that decisions should only be reviewed if the proceedings did not provide the defendant with a full and fair opportunity to litigate the case).

HeinOnline -- 64 U. Pitt. L. Rev. 294 2002-2003

result is miniscule.[147] There are many reforms needed in the criminal justice system, particularly with respect to convictions based on eyewitness testimony.[148] But we limit our attention here to cases where there is strong evidence of innocence. And however fair or unfair the justice system is in general, it is clear that when powerful evidence of innocence exists, the system must do all that it reasonably can to ensure fair results.[149]

So is the justice system doing that for newly discovered powerful evidence of innocence? Does the system in fact do all that it reasonably can to achieve fair outcomes? The answer is no. Prisoners with exculpatory DNA evidence or other powerful evidence of innocence who have exhausted their right to collateral review are an easily identifiable class of individuals who are very likely innocent. And it is unjust to keep them incarcerated when we know (or could easily ascertain) that they are innocent.

### *B. Considerations of Efficiency*

A procedure is efficient if it produces net benefits—i.e., benefits associated with the procedure that exceed its costs. Here we assess whether it would be efficient, in situations where a post-conviction DNA test has been performed[150] or other powerful evidence of innocence exists, to require a court to consider the new evidence on the merits. If so, then such a procedure would be both socially desirable and also likely required by the cost-benefit due process test of *Mathews v. Eldridge.*

Judge Posner has written the seminal article applying considerations of efficiency to the law of evidence.[151] In that article, Judge Posner likens a court's consideration of evidence to a "search" for the truth, and he specifies a model to capture the primary costs and benefits of that search: the net

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147. Indeed, a new trial may be just as likely to acquit the guilty as the innocent.

148. In one sample of seventy-four wrongful convictions, Project Innocence reports that mistaken eyewitness identification was present in 81% of the cases. ACTUAL INNOCENCE (2001 version), *supra* note 32, at 361.

149. This "reasonable fairness" approach is the view of the Justice Department. *See* NAT'L INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS iii (1999) ("Using DNA technology fairly and judiciously in postconviction proceedings will help those of us responsible for the administration of justice do all we can to ensure a fair process and just result.").

150. We assume that exculpatory DNA evidence has already been found and the only issue is whether the prisoner should have a right to have the evidence considered on the merits. We do not consider here whether an entitlement to government financing of the test would itself be efficient.

151. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999).

HeinOnline -- 64 U. Pitt. L. Rev. 295 2002-2003

benefits of considering a marginal piece of evidence equals the expected benefits of a more accurate outcome minus the administrative costs associated with consideration of the evidence.[152] More formally, consider the following formula:

$$B(x) = p(x)S - c(x) \quad (1)$$

In this equation B(x) equals the net benefits of the "search" as a function of the evidence (x)[153] considered; p(x) equals the probability that the case will be decided correctly as a function of the evidence; S equals the "stakes" in the litigation (i.e., the amount or value of the interest in dispute); and c(x) equals the cost of the procedure as a function of the evidence. In the situation of a procedure considering exculpatory new evidence, these cost-benefit variables might be specified as follows: p(x) equals the probability that the evidence would exonerate the prisoner; S equals the value of the prisoner's freedom; and c(x) equals the prisoner's litigation costs plus the prosecution's litigation costs plus the administrative court costs that are associated with the procedure. Incorporating these situation-specific variables into the formula, it might be modified and restated as follows:

$$\begin{aligned} B(x) = &\text{(probability of petition's success)} \\ &\text{(value of prisoner's freedom) -} \\ &\text{((prisoner's litigation costs) + (prosecution's litigation costs) +} \\ &\text{(court administrative costs))} \end{aligned} \quad (2)$$

So modified, Judge Posner's formula shows that if the probability of proving innocence and the value of freedom are high for a given prisoner (or class of prisoners) relative to the costs of considering the new evidence, then an entitlement to review of the evidence would be efficient. Empiricism suggests, on the basis of some conservative assumptions, that B(x) is a positive number in the case of exculpatory DNA evidence, implying that a procedural entitlement to have that evidence reviewed by a court would be efficient.

We arrive at an estimate of B(x) for new DNA evidence as follows. We conservatively assume that an exculpatory DNA evidence claim would have at least an 80% chance of success;[154] that the value of setting an innocent

152. *Id.* at 1481-82; *see also* POSNER, *supra* note 143, at 611-13.

153. While the formula contemplates the quantity of evidence presented at trial, we can think of (x) here as the new evidence brought to the court's attention in a post-conviction procedure.

154. Very few prisoners would petition for release on the basis of new, exculpatory DNA evidence if there is in fact no such evidence.

HeinOnline -- 64 U. Pitt. L. Rev. 296 2002-2003

prisoner free equals at least $100,000;[155] the prisoner's litigation costs equals $5,000;[156] the prosecution's litigation costs equals $10,000;[157] and court administrative costs equal $5,000.[158] Plugging these numbers into the restated formula, we obtain:

$$B(x) = (.8)(100,000) - (5,000 + 10,000 + 5,000) = 60,000 \quad (3)$$

Since $B(x)>0$, the proposed procedure is efficient.

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155. We derive this very conservative estimate of the stakes in this type of litigation from the story of Kirk Bloodsworth, whose father spent $100,000 in an effort to free him. See text accompanying *supra* note 30. This $100,000 is probably well below the actual value of Bloodsworth's liberty interest. The present value of Bloodsworth's future wages alone probably exceeded $100,000—the state paid him $300,000 in damages—and Bloodsworth's father might well have been willing to spend far in excess of $100,000 to obtain his son's release had it been necessary to do so. For other evidence concerning the value of a prisoner's liberty, see Kotler v. State, 680 N.Y.S.2d 586 (App. Div. 1998) (awarding $1.5 million, including $125,000 in lost earnings, to prisoner exonerated by post-conviction DNA evidence who had wrongly been convicted of rape and incarcerated for over ten years). In other contexts, the statistical value of a human life has been estimated to be far higher. Paul Lanoie et al., *The Value of a Statistical Life: A Comparison of Two Approaches*, 10 J. RISK & UNCERTAINTY 235 (1995); W. Kip Viscusi, *The Value of Risks to Life and Health*, 31 J. ECON. LIT. 1912 (1993). Moreover, whatever the private benefits of release, the social value is still higher, since releasing an innocent person improves the accuracy of the justice system as a whole. On the social value of legal accuracy, see Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994). Note, however, that Bloodsworth was serving a life sentence, and the stakes would be lower for prisoners serving lighter sentences.

156. We arrive at this number by means of a cost comparison with habeas corpus litigation. The prisoner's litigation costs here should not exceed the cost of bringing a habeas corpus petition. West Virginia reports that its public defender's average cost in 1999 of bringing a habeas corpus petition was $1,330.46. West Virginia Public Defender Services Average Cost Per Charge For FY 1999, http://www.state.wv.us/wvpds/FY1999Reports/FY99avgalph.html (last visited Feb. 6, 2003). Even assuming that West Virginia is a low cost state, $5,000 is a very conservative estimate. *See also* BILLY L. WAYSON & GAIL S. FUNKE, WHAT PRICE JUSTICE?: A HANDBOOK FOR THE ANALYSIS OF CRIMINAL JUSTICE COSTS 74, 79, exhibits 7-1 & 7-5 (1989) (estimating for a typical criminal case the cost of counsel's first appearance in trial court at $483.99, the cost of litigating a hearing at $1,110.38; the prosecution, defense, and court costs of all pre-conviction proceedings (including a pre-trial hearing) at $3,311.40; and the total costs of a postconviction hearing at under $1,000).

157. Prosecution expenses on average will not be more than double those of the public defender for a particular type of case. See WAYSON & FUNKE, *supra* note 156, at 72-74, 76, 78 (estimating both pre- and postconviction prosecution costs in a typical criminal case to be *less* than twice the cost of defense counsel).

158. *See* J.S. KAKALIK & R.L. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR VARIOUS TYPES OF CIVIL CASES, tbl S.8 (Rand, 1983) (estimating the average cost of disposing of a habeas corpus petition in a U.S. District Court in 1982 at $2,697). Assuming a 3% annual inflation rate in criminal justice costs over the last twenty years, the Rand number today would be $4,871. This is perhaps on the high side, since the Rehnquist Court and the Republican Congress have adopted changes in the law making it less costly to dispose of a habeas corpus petition today than it was in 1982. *See also* WAYSON & FUNKE, *supra* note 156, at 79 (estimating the average cost in judicial time of an initial appearance plus a preliminary and final hearing in a typical criminal case in state court at less than $2,000).

HeinOnline -- 64 U. Pitt. L. Rev. 297 2002-2003

This result tracks commonsensical intuitions. A prisoner's liberty has value in excess of the costs associated with litigating about and reviewing the DNA evidence. So long as the petition's probability of success is high, whether with DNA or non-DNA evidence, consideration of the evidence is worth the cost.

Ironically, the Posner efficiency model appears to generate a different result for ordinary habeas corpus petitions, consideration of which is less obviously efficient, given that the probability of success of such petitions is no more than 21%.[159] Plugging this probability into the above formula yields net benefits of $1,000. Twenty-one percent is the highest estimated success rate and applies to only one category of petitions. So for most cases, the formula actually produces a negative net benefits number, confirming the doubts that many have about the general efficacy of the habeas corpus procedure.[160]

A procedural entitlement to consideration on the merits of a claim of innocence based on exculpatory DNA or other equally powerful new evidence would thus appear to be at least as efficient as other procedures recognized by current law. Indeed, if the general right to habeas corpus is efficient, then the right to consideration of new exculpatory DNA evidence is efficient *a fortiori*.

The trend over the last quarter century in the law of habeas corpus has been toward greater efficiency. Congress and the Supreme Court have made it more difficult today than it once was for prisoners to bring repetitive and frivolous claims that have little or nothing to do with innocence. Notably, the Court held in 1976 that Fourth Amendment claims could not be heard in federal habeas if they have been "fully and fairly adjudicated" in state courts.[161] And Congress later enacted the Antiterrorism and Effective Death Penalty Act of 1996 with its various time limits and rules forbidding successive habeas petitions.[162] These modifications have made the law of habeas corpus more efficient today than it was twenty-five years ago. The further procedural modification we offer is consistent with this trend. And so a legislative decision to adopt it should be an easy one.

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159. *See* Faust et al., *supra* note 135, at 697 (finding that the various types of habeas corpus petitions succeed between 1% and 21% of the time, depending on type). Given changes in habeas corpus doctrine adopted by the Rehnquist Court and the Republican Congress, the chance of success is probably even lower today than it was when the study was done.

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

161. Stone v. Powell, 428 U.S. 465, 481-82 (1976).

162. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, codified at 18 U.S.C §§ 2331-2339.

HeinOnline -- 64 U. Pitt. L. Rev. 298 2002-2003

Given the analysis in this Part, Senator Leahy's proposal[163] would seem an improvement over current law. The Leahy proposal would entitle death row prisoners to present claims of innocence based on new, exculpatory DNA evidence in either state or federal court. Such a petition would not count as a presumptively-barred "successive" habeas corpus petition.[164] Nor would it be barred on the ground of exhaustion or a time limit for presenting newly discovered evidence.[165] However, although Leahy's proposed legislation would in some respects be welcome, in our view it is too broad in some respects while in others too narrow.

The Leahy proposal is too narrow because it is restricted to DNA evidence and to prisoners on death row. We believe that reform legislation should be phrased in a more neutral way and apply to any type of newly discovered evidence that is especially likely to change the outcome of a given case. The legislative history could of course say that Congress mainly has DNA evidence in mind. But other evidence of similar probative value (*e.g.*, a videotape of the crime) ought not to be excluded. We also believe that restricting the legislation to death row inmates is too narrow. We would expand the category of covered prisoners at least to those with lengthy sentences yet to be served. We understand the motive to restrict the right to a merits review to cases—like those involving death row inmates—for which the stakes are particularly high. But our analysis suggests that so long as the stakes are high, such a procedure ought to be available. We think a sentence with substantial years left to serve—say five years—plainly meets this threshold.

The Leahy proposal is also over-broad. We do not agree that a petition based on new, exculpatory evidence should not "count" against the petitioner, to the extent that the petition does not succeed, for purposes of barring future collateral attacks. We see no reason why petitioners who rely on DNA evidence should not have to join all of their potential claims to the petition or else procedurally default them. If procedural default and other doctrines limiting collateral review make sense generally, then a petition based on newly discovered DNA evidence should not be an occasion for ignoring them.

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163. See *supra* note 61 and accompanying text.
164. S. 486, 107 Cong. § 104(d) (2001).
165. *Id.* § 104(b).

HeinOnline -- 64 U. Pitt. L. Rev. 299 2002-2003

## V. THE DUE PROCESS ANALYSIS: A SUMMARY

The South Dakota Supreme Court observed recently, "Punishment of the innocent may be the worst of all injustices."[166] We agree. The deprivations with which we deal—that of life or freedom from physical confinement—are core interests protected by all accounts of due process.

The idea that efficient use of resources is an important part of constitutional law is, of course, not new. The Rehnquist Court's strong finality rule for federal habeas corpus plainly manifests a cost benefit analysis. Multiple reviews of the same case become, at some point, an inefficient use of resources. More generally, the Court has long recognized that due process includes procedures that protect rights in life, liberty, or property at a reasonable cost.

In some cases, one could question whether the proposed procedure enhances accuracy. For example, if the new evidence is only cumulative of what was presented at trial, it seems likely that the increase in accuracy would be small or non-existent. In these cases, consideration of newly discovered evidence would not be cost-justified. But in our universe of cases, we specify that the new evidence is both powerful and likely to be conclusive. When DNA is involved, that standard is easily met. Other scientific evidence might qualify and we do not rule out non-scientific evidence. If a person who is not in prison and not mentally ill comes forward to confess to the crime, and if his confession meshes with the evidence and excludes the prisoner as an accomplice, that too would likely qualify as powerful evidence of innocence.

In some cases, prohibitive costs might be associated with a procedure thought to achieve more accuracy. But the costs associated with our due process proposal—attorneys' fees and judicial time—are low in relation to the benefits. While not trivial, these costs pale in comparison to the costs of other constitutionally mandated entitlements, such as the provision of counsel to indigent defendants.

In sum, it might be difficult in the abstract to assign a value to the interest being protected or to quantify the probability of an accurate outcome or the cost of the procedure. But the universe of cases we identify are easy to resolve under the *Mathews* calculus. A due process entitlement to present powerful evidence of innocence seems so obvious that we are unable to explain *Herrera*'s gratuitous observation that claims of actual innocence are

166. Jenner v. Dooley, 590 N.W.2d 463, 471 (S.D. 1999).

HeinOnline -- 64 U. Pitt. L. Rev. 300 2002-2003

not cognizable in federal habeas. Perhaps the Court was influenced by the *kind* of evidence offered by Herrera. The confession by someone now dead is not the kind of high quality evidence necessary in our view to make a due process claim of innocence. With this kind of inferior evidence, it was likely not the case that another fact-finding by a judge would be any more accurate than the original jury verdict.

With *Herrera* cabined both as gratuitous and as involving the kind of claim that our argument would not recognize as powerful evidence of innocence, we conclude that the *Mathews* calculus comes out strongly in favor of requiring a procedure roughly like the one we recommend. Thus, the Due Process Clause requires state and federal judges to modify existing procedures to permit these claims. The particular forum that is appropriate, or the precise modifications required in existing procedure, is not a question that we pursue in this paper. We suspect that due process is agnostic about the forum and the procedure. As the Court has said, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[167]

Due process, in our judgment, has only two bedrock requirements when the issue is new evidence of innocence that is barred by procedural rules. The first requirement falls on the petitioner: the right to have the evidence heard exists only when the petitioner makes a threshold showing that the newly discovered evidence constitutes powerful evidence of innocence. Second, when this showing is made, a court must admit the evidence and consider it in conjunction with the trial transcript and any other relevant evidence to determine if the new evidence is inconsistent with guilt on the state's theory of the case.[168] If so, due process requires that the court void the conviction. No new trial is necessary. If the court decides that the evidence is merely cumulative or is not inconsistent with the state's theory of the case, the conviction stands. Finality is the tie-breaker here. The petitioner has the burden to show that the jury and initial process produced an erroneous result.

Our argument is, ultimately, a simple one. Both a cost-benefit *Mathews* calculus and principles of fairness conclude that it is unjust to reject powerful claims of innocence because of rules about when those claims can be made. Due process requires a forum and a hearing. We urge Congress and the states to adopt procedures along the lines we have proposed to accommodate this due process interest. But whether or not legislative action is forthcoming,

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167. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

168. *See* Penny J. White, *Newly Available, Not Newly Discovered*, 2 J. APP. PRAC. & PROCESS 7, 14 (2000) (suggesting that courts must approach time deadlines "creatively" when faced with "harsh limitation periods" that extinguish the right to demonstrate actual innocence).

HeinOnline -- 64 U. Pitt. L. Rev. 301 2002-2003

courts must begin to modify existing procedures to hear these claims. The Fourth Circuit was wrong in *Harvey* to conclude that recognizing this due process right "should be accomplished by legislative action rather than by a federal court."[169] We hope the Supreme Court takes the invitation of Judge King, concurring in *Harvey*, for "judges of a higher pay grade" to recognize that due process at its heart protects innocence.[170]

169. Harvey v. Horan, 278 F.3d 370, 376 (4th Cir. 2002).
170. *Id.* at 388 n.7.

HeinOnline -- 64 U. Pitt. L. Rev. 302 2002-2003