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**Error-Centricity, Habeas Corpus
and the Rule of Law as the
the Law of Rulings**

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I. Introduction

On August 10th, 1927, as hundreds of thousands of protesters marched in New York, Paris, Berlin and in cities from South America to the Soviet Union, as workers around the world called general strikes and took to the streets, and as, in the words of one commentator, “the world waited,”¹ a team of attorneys representing Nicola Sacco and Bartolomeo Vanzetti sought out United States Supreme Court Justice Oliver Wendell Holmes, Jr. Trailed by journalists to Holmes’ Beverly, Massachusetts summer residence, the attorneys pleaded with the Justice to grant Sacco and Vanzetti a writ of habeas corpus. If Holmes were to grant the writ, the murder verdict against the two Italian-American anarchists would be nullified, and they would be set free pending a new trial. As Sacco and Vanzetti were scheduled to be executed that evening, time was short and tensions were high.

Accused of murdering Frederick A. Parmenter, a paymaster, and Alessandro Beradelli, his guard, during the payroll robbery of the Slater and Morrill shoe factory on April 15, 1920, Sacco and Vanzetti had been convicted by a unanimous trial jury on July 14, 1921. They appealed the decision, arguing both that they were innocent and that they had been denied constitutional and statutory procedures necessary to guarantee a fair trial.² Massachusetts law at the time stipulated that the only judge to rule on the merits of

¹ Felix Frankfurter, *Reminisces, Recorded in Talks with Harlan B. Phillips* 212 (1965).

² Of primary importance were the allegations, supported by affidavits, that the prosecution had

the appeal could be the trial judge,³ Webster Thayer, who himself stood accused of prejudice and partisanship against the defendants. It was only after Judge Thayer had refused all of the appeals and had sentenced Sacco and Vanzetti to “suffer the punishment of death by the passage of a current of electricity through [their] bod[ies]...”, and after the mercy of executive clemency had been denied by Massachusetts Governor Fuller, that the lawyers—with the execution of Sacco and Vanzetti looming—took the at the time extraordinary step of seeking a writ of habeas corpus.

Habeas Corpus—literally translated: have the body present—was, and technically remains, a civil—as opposed to a criminal—law procedure available to prisoners held without legal authority.⁴ *Habeas corpus cum causum* and its successor writ, *habeas corpus ad subjiciendum* were originally writs designed to compel the appearance of a defendant in court. They were employed by English justices in the 17th century to free prisoners held by the King or his representatives without legal cause.⁵ The breadth of the writ extended to many kinds of improper confinements. It provided wives relief from illegal detention by their husbands,⁶ it gave persons committed to asylums the right to secure a medical review showing cause for confinement,⁷ and it enabled slaves brought

knowingly encouraged perjury by one of the ballistics experts testifying against Sacco and Vanzetti, that certain members of the jury and the judge himself had expressed highly prejudicial opinions about Sacco and Vanzetti’s personal and political beliefs, and that new evidence in the form of a confession to the murder by another man could exonerate Sacco and Vanzetti. In all, eight motions were filed. Robert P. Weeks, ed. *Commonwealth vs. Sacco and Vanzetti* (1958).

³ While the Massachusetts Court of Appeals could evaluate the trial judge’s findings of law, it was forbidden from reviewing his application of the law to the facts of the case. See, Felix Frankfurter, *The Case of Sacco and Vanzetti* (1927).

⁴ Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* §2.2 (2nd ed. 2001) [hereafter *Habeas Corpus Practice*].

⁵ William F. Duker, *A Constitutional History of Habeas Corpus* chp. 1 (1980) [hereafter *Duker*]. See J.H. Baker, *An Introduction to English Legal History* 169 (1990).

⁶ *Streater’s Case* (1653).

⁷ *R. V. Turlington, ex parte D’Vebre* (1761).

into English territory to escape being sent back to slavery in the U.S.⁸ The writ of habeas corpus, Alexander Hamilton wrote in Federalist 83, was, along with trial by jury, the necessary and sufficient bulwark against “arbitrary methods of prosecuting pretended offenses, and arbitrary punishment upon arbitrary convictions.”⁹

Hailed as the “Great and efficacious writ,” habeas corpus has long been considered one of the treasured inheritances of the English struggle for individual liberty and the rule of law. It has been “esteemed the best and only sufficient defense of personal liberty;”¹⁰ no lesser authority on English law than William Blackstone has hailed habeas corpus as “another Magna Carta,”¹¹ and Supreme Court Justice Felix Frankfurter claimed that “[i]t is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world.”¹² The Writ was considered so fundamental a protection of personal liberty that the founding fathers guaranteed its availability in the United States Constitution.¹³ In 1867, more than 50 years before Sacco and Vanzetti sought to save their lives with a writ of habeas corpus, the Supreme Court gushed that habeas corpus was a remedy “for every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible,” Chief Justice Chase continued, “to widen this jurisdiction.”¹⁴ The idea,

⁸ *Ex parte Somerset* (1772).

⁹ Alexander Hamilton, *The Federalist* No. 83.

¹⁰ See George Burton Adams, *The Origin of the English Constitution*, 33 (cited in *Duker* 7, supra n. 5).

¹¹ William Blackstone, *Commentaries on the Law of England* v. 3 136 (1770) v.3, (cited in *Duker* 7, supra n. 5).

¹² *Brown v. Allen*, 344 U.S. 443, 512 (1952) (Frankfurter, J. concurring).

¹³ United States Constitution, Art. 1, sect. 9, clause 2.

¹⁴ *Ex parte Mccardle*, 73 U.S. (6 Wall) 318, 326 (1867).

therefore, that a writ of habeas corpus could be used to prevent the happening of a grave injustice was in itself neither out of the ordinary nor new.

While habeas corpus had long been a bulwark protecting individual liberty, however, Sacco and Vanzetti's claim that their convictions were injustices remediable by habeas corpus was at the time radical. In spite of its reputation, the writ did not inquire into the guilt or innocence of the prisoner,¹⁵ but only into whether the detaining authority had the proper legal jurisdiction to adjudicate the proffered cause.¹⁶ Habeas corpus was not, until the latter half of the last century, a legitimate means of addressing factual or procedural trial error in state courts.¹⁷ Even if, as has been argued recently, the scope of review in habeas corpus cases expanded in the early 20th century to include errors of law as well as mixed legal and factual errors,¹⁸ the fact remained that the writ could neither open an inquiry into the petitioners' innocence,¹⁹ nor could it grant post-conviction relief as a result of *mere* errors of law. "It is certainly true," Holmes wrote in *Moore v.*

¹⁵ "At common law a petitioner was not permitted to introduce evidence to controvert the truth of a return filed in response to a writ of habeas corpus ." Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus* 453 (1966) (citing, *Commonwealth v. Chandler*, 11 Mass. 83 (1814)).

¹⁶ This mainstream opinion is most forcefully advocated by Paul Bator. Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L.Rev. 441 (1963). For an opposing viewpoint, see, *Habeas Corpus Practice* §2, supra n. 4.

¹⁷The modern and specifically American use of the writ to remedy trial errors emerged sporadically as a minority doctrine in U.S. federal courts in the late 19th and early 20th centuries. See *Ex Parte Siebold*, 100 U.S. 371 (1879) (Granting a writ of habeas corpus where a federal prisoner was convicted according to an unconstitutional statute); *Moore v. Dempsey*, 261 U.S. 86 (1923) (When the state appellate and corrective procedures are radically insufficient to prevent the potentiality of error, the writ of habeas corpus may be granted). See generally, *Duker* 241-257, supra n. 5; *Oaks* supra n. 15; Bator 478-493, supra n. 16; H.L.A. Hart, *Foreword* 73 Harv. L. R. 84 (1959); Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism* 1988 U.Chi. Legal F. 315, 319 (Federal habeas corpus was not available for state prisoners until the 1950s and 1960s). But see, *Habeas Corpus Practice* xx supra note 4 (arguing that "for centuries the writ [of habeas corpus] has served the same essential function...").

¹⁸ *Habeas Corpus Practice* §2.4(d) 64-65, supra n. 4 (arguing that Holmes' dissenting opinion in *Frank* and majority opinion in *Moore* turned on the question of "whether independent federal appellate review reached mixed factual and legal determinations or only purely legal ones."

Dempsey, “that mere mistakes of law in the course of a trial are not to be corrected [by habeas corpus].”²⁰ Legal error alone, absent some further circumstance voiding the trial court’s jurisdiction, was not enough to justify issuing a writ of habeas corpus.

While it has been suggested that the Court’s emphasis on jurisdiction as the main inquiry in habeas corpus cases has been perfunctory,²¹ the Court continued to insist that valid claims for a writ of habeas corpus challenge the jurisdiction of the trial court. In *Matter of Moran*, for example, Justice Holmes held for the Court that a claim of error regarding the forcing of a defendant to incriminate himself in violation of the Fifth Amendment could not be recognized under the writ of habeas corpus, because “it did not go to the jurisdiction of the court.”²² Even in *Moore v. Dempsey*, where the Court granted a writ to African- Americans whose trial jury had been intimidated by a mob, Holmes reaffirmed the traditional view that mistakes of law could only give rise to a claim of habeas corpus “if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong.”²³

In short, habeas corpus could only free a prisoner convicted in a U.S. court when that court was so infected with non-legal norms as to forfeit its presumptive jurisdiction.²⁴ Particular legal errors that denied a defendant important constitutional protections were, taken alone, insufficient to allow the granting of a writ of habeas corpus. Only when both the errors at trial were so extreme as to render the legality of the

¹⁹See, e.g., *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923).

²⁰*Id.* 91. See also, *Frank v. Magnum*, 237 U.S. 309, 334-335 (1914).

²¹ *Habeas Corpus Practice* §2.4d 65-66, *supra* n. 4.

²² *Matter of Moran*, 203 U.S. 96, 105 (1906).

²³ *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).

proceeding a sham, *and* when the corrective procedures—as distinct from the results—were deemed so insufficient, could a court be obliged to grant a writ of habeas corpus in order to avoid a violation of the due process clause.

In the case of Sacco and Vanzetti, Justice Holmes, consistent with legal dogmatics of the age,²⁵ could not readily grant Sacco and Vanzetti writs of habeas corpus. The procedural errors the prisoners alleged were serious violations of their constitutional rights, and certainly threw the fairness of the convictions into doubt; the errors, however, did not throw the entire legality of the proceedings into question. Sacco and Vanzetti could not rightly claim that their trial was void, a mere empty form without legal substance.²⁶ Holmes refused to issue the writ, and Sacco and Vanzetti were executed.²⁷

Habeas corpus jurisprudence changed radically in the latter half of the 20th century.²⁸ The writ is now accepted as a method for prisoners, convicted in state court trials and whose convictions have been upheld on appellate review, to have federal courts review the state court proceedings looking for federal constitutional error. While this

²⁴ *Ex parte Watkins*, 3 Peters 183, 202-203 (1830).

²⁵ That mere errors would not be grounds for the writ, was, with some exceptions, still the law as late as 1949. *Bator* 464, *supra* n. 16. In *Schechtman v. Foster, e.g.*, Judge Learned Hand held that the writ of habeas corpus could not be used to review or correct valid state verdicts. “It must be remembered,” Hand wrote,

that upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge’s conclusion that the evidence did not make out a *prima facie* case of the deliberate use of perjured testimony.... [D]ue process of law does not mean infallible process of law. If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights. 172 F.2d 339 (2d Cir. 1949).

²⁶ “Memorandum of Mr. Justice Holmes,” August 10, 1927 (cited in R. P. Weeks, *Commonwealth v. Sacco and Vanzetti* 239 (1961)). See also, Holmes’ letter to Laski, August 18, 1927, in Mark DeWolf Howe (ed.) *Holmes-Laski Letters* (1953).

²⁷ The execution was delayed for technical reasons until August 23rd.

modern application of habeas corpus as an omnipotent writ of error²⁹ has remained controversial, and even though the Supreme Court and Congress have restricted its reach, the general principle is firmly established that the writ of habeas corpus is available to inquire into and to prevent legal errors.³⁰

That habeas corpus, the “Great Writ” and protector of individual liberty, should be transformed into an all-purpose writ empowered to prevent legal errors appears, at first sight, unremarkable. What could be more natural than the connection between the prevention of erroneous criminal law verdicts and our sense of justice? Is it not, in other words, a matter of principle that people have a profound right not to be erroneously convicted and punished for crimes?³¹

The work of this article is to explore the connection between justice and the prevention of errors in criminal law. It begins in part II with the historical observation that errors in criminal law verdicts only recently emerged as a topic of legal concern. The advent of habeas corpus as a writ to protect against legal error, therefore, reflects the emergence of legal error itself as a problem. This is not to say that criminal law has not long been preoccupied with the truth of verdicts. On the contrary, the connection between truth and justice has been a formative power on the development of western legal

²⁸ But see, *Habeas Corpus Practice* 67 (arguing that there has been “no revolution” in habeas corpus jurisprudence).

²⁹ Rober M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977).

³⁰ The Court has reaffirmed its adherence to the “principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution...” *Herrera v. Collins*, 506 U.S. 390, 400 (1993). See generally, *Bator* supra n. 16; *Steiker*, supra n. 17, at 325; Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 28 Review of Law & Social Change 415 (1990); R. H. Fallon, et. al. ed. *Hart and Wechsler’s The Federal Courts and the The Federal System* (1996); Cover and Aleinikoff, supra n. 29; Hart, supra n. 17.

³¹ For a provocative defense of this fundamental principle, see Ronald Dworkin, *Principle, Policy, Procedure*, in *A Matter of Principle* (1985).

systems. Rather, what the historical investigation makes visible is that legal truth was not always, as it is in the modern American doctrine of habeas corpus, understood as the absence of legal error from verdicts.

This article probes the meaning of the uniquely modern obsession with legal error. Part III asks the question: What is error, as it has emerged as a legal concept? Error is, as is revealed by the contemporary debates over habeas corpus, intimately related to injustice. But the understanding of error as injustice, as is shown in part IV, has little connection to justice as jurists have traditionally understood it. In seeking justice and truth through the obsessive avoidance of legal error, modern jurisprudence betrays a commitment to the fairness and legitimacy of verdicts rather than to their justice or truth. In conclusion, I argue that the concern to eradicate legal errors in the pursuit of legitimacy has accompanied an unexpected transformation and trivialization of the idea of law itself. The consequence of the transformation of law is that errors, as in pre-modern legal systems, again retreat into the background of legal consideration. Law, understood as positive law, shows itself to be so obsessed with error that error itself disappears into the realm of triviality.

II. Error and The Criminal Law

The criminal justice system is today organized around the principle of eliminating, or at least reducing, the possibility of legal errors. To that end, criminal verdicts are now subject to extensive appellate procedures. Cognizant, however, of the possibility that despite appellate review errors may go uncorrected, the Supreme Court has adopted, through a strategic expansion of the writ of habeas corpus, a policy of redundancy designed to safeguard against the erroneous denial of constitutional rights. Robert Cover and Alexander Aleinikoff, for example, have argued that the goal of the Court's habeas corpus decisions in the 1960s was to use the redundancy of multiple considerations of a difficult case to reduce the possibility of error. Since "[r]edundancy fosters greater certainty that constitutional rights will not be erroneously denied,"³² the goal of habeas corpus criminal procedure, as it has been expressed since Justice Frankfurter's opinion in *Brown v. Allen*,³³ was to increase the certainty of criminal verdicts and to protect against the possibility of constitutional and procedural errors.³⁴ The principle of this distinctly American use of habeas corpus is that all defendants have the right to the "fullest opportunity for plenary federal judicial review" to ensure that their rights of personal liberty are not erroneously denied.³⁵

The correction and prevention of error need not be the most important, or even a pertinent principle of a system of crime and punishment. Utilitarian theories of criminal deterrence, for example, exhibit little concern for the protection of the innocent. The utilitarian goal of deterrence is served as long as the citizenry believes that those who

³² Cover & Aleinikoff, *supra* n. 29, at 1045.

³³ 344 U.S. 443 (1953) (Frankfurter, J. concurring).

³⁴ Cover & Aleinikoff, *supra* n. 29, at 1042.

commit crimes will be punished;³⁶ whether that belief is erroneous is of little concern to utilitarian criminal procedure. Similarly, psychological models of criminal sacrifice are ambivalent as to the question of the guilt of the punished. What is important is that the community joins together to assert itself as a unity against the accused who becomes a sacrificial offering to the community's continued existence.³⁷

A lack of concern with error is also historically characteristic of western criminal legal systems. Throughout western legal history, for example, there has been a strong disinclination to recognize the possibility of error in criminal judgments. Even as writs of errors in England and appellate procedures on the Continent arose as a forum for the remedying of legal errors in civil law proceedings, criminal law developed no procedural remedies for erroneous decisions.³⁸ Anglo-American common law did not even recognize the possibility of an appeal of criminal jury verdicts. "For centuries," Plucknett reports, "it was an unwritten axiom that a criminal trial could not be reviewed. The solemnity of jury trial was so great that it was hardly thinkable that a verdict could be set aside for any reason...."³⁹ The judgment of a jury and its acceptance by a judge were final, a statement of the truth of the matter that could not be legally contested.⁴⁰

³⁵ *Fay v. Noia*, 372 U.S. 391, 424 (1963).

³⁶ See, e.g. Jeremy Bentham, *Theory of Legislation* (1876).

³⁷ See, e.g. René Girard, *Violence and the Sacred* (1979).

³⁸ Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* (1936) 190-191. The word "appeal" originally referred to specific types of civil appeals in cases of equity. Lawrence Meir Friedman, *Crime and Punishment in American History* (1993) 256. In connection to the *ius commune*, see S. Löwenstein, *Berüfung*, in *Handwörterbuch der Rechtswissenschaft* (1926) 640.

³⁹ The criminal appeal in England was first instituted by statute in 1907. *Plucknett*, supra n. 38, at 191. Prior to the statute the prosecutor could, in rare cases, reopen the case himself by a writ of error. Such incidences were extremely technical and rare.

⁴⁰ See Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (1994) esp. chp. 4. See also Marianne Constable, *The Modern American Jury: Fact and Law in Law and Society*, 15 *Journal of American Culture* 37 (1992); Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991).

Not only in England but also in Europe, a strong opposition to the appeal, and with it to the reviewing of criminal judgments, persisted until the present century.⁴¹ In Germany, for example, the appeal was not mentioned in the Criminal Court Ordinances of Karl V (1532), and post-verdict challenges were declared impermissible by the Saxon Code of Criminal Procedure of 1530.⁴² Criminal appeals were first instituted in 1877, and even then only for minor cases.⁴³

The finality and near incontestability of criminal verdicts were also established in the American colonies and then in the United States. While the right of appeal in private law was well established, criminal law appeals were, especially in serious cases, severely limited.⁴⁴ Similarly, neither the U.S. Constitution nor the first congressional Judiciary Act provided for appeals of either state or federal criminal verdicts. Persons adjudged in federal courts of the United States had no opportunity for appeal until the late 19th century.⁴⁵ That criminal verdicts were final, incontestable on grounds of factual or legal error, was a commonplace for Chief Justice Marshall in 1830. “A judgment,” wrote the Chief Justice in *ex parte Watkins*,

in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. . . . It puts an end to inquiry concerning the facts by deciding it. . . . An imprisonment under a judgment cannot be unlawful, unless that judgment

⁴¹Löwenstein, *supra* n. 38, at 640.

⁴² *Id.*

⁴³ D.J.G. zu Dohna, *Berufung in Strafsachen* (1911) 3. In the criminal procedure codes of November 1, 1877, criminal procedures were divided into three classes, only the lowest of which were subject to appeals. See also Löwenstein, *supra* n. 38 at 640.

⁴⁴ The laws of the Massachusetts Bay Colony of 1648, for example, allow for the appeal by “every man cast, condemned, or sentenced in any Inferiour Court,” except that when his cause be of a capital nature “wee admit no appeal unles where two of five or three of six or seven, or such a proportion of the number of Magistrates or other Iudges then present shall actually dissent.” *General Laws and Liberties of 1648*, Massachusetts Bay Colony, Boston, 1648. At pg. 2.

⁴⁵ See *ex parte Kearney*, 7 Wheaton 38, 42 (1822); See generally R. H. Fallon, et. al. ed. *Hart and Wechsler’s The Federal Courts and the The Federal System* (1996).

be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.⁴⁶

Marshall does not say that imprisonment under a judgment cannot be erroneous. That to err is human was readily acknowledged by the same judges who maintained that a decision pronounced the “law” of the case and that a judgment, by its nature, is lawful. What Marshall’s wording helps to reveal is that for jurists trained in the common law tradition, substantive and procedural errors did not challenge the truth of a verdict.

One question raised by the English, European, and American legal systems’ disinterest in criminal procedures to protect against errors is, “how did these pre-modern legal systems understand the truth of legal verdicts”? The answer is not to be found in 19th and 20th century legal restatements of the prohibition against criminal appeals, a rule that had long since been separated from its cultural roots. Justice Marshall, for example, provides no convincing justification for his ruling that error is consistent with the criminal jury verdict. Instead, he simply cites the common law rule without attempting to justify it. Various 19th and 20th century efforts to justify the rule against appeals fall back onto arguments of efficiency, the fear that convicted persons with nothing to lose will tie up judicial resources in endless proceedings.⁴⁷ Criticisms against criminal appeals include the fear of weakening the faith in criminal verdicts,⁴⁸ and the

⁴⁶ *ex parte Watkins*, 3 *Peters* 193, 202-203 (1830).

⁴⁷ Paul Bator, for example, recognizes the modern difficulty of defending efficiency and finality in criminal law, even as he embarks on an effort to do so. *Bator*, *supra* n. 16, at 442-43. See also, Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 *Univ. Chicago L. Rev.* 142, 143 (1970).

⁴⁸ A principle argument against appeals, and similarly against the modern use of habeas corpus, is that there is no reason to distinguish the decisions of one judge or court as better than those of another. There is no more pointed statement of this position than Justice Jackson’s remark in *Brown*: “[R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible

need to finalize the verdict quickly so that the criminal can adequately repent.⁴⁹ These arguments appear as post facto justifications for a problematic and not fully comprehensible precedent, what Justice Felix Frankfurter called a “jejune abstraction.”⁵⁰ By the 19th century, the original grounds for the rule against criminal appeals and the non-problematic position of legal error had fallen out of memory.

In order to understand the significance of the modern need to eliminate errors, it is first helpful to understand the pre-modern world that saw no contradiction between error and a true saying of law. The touchstone of medieval criminal procedure was the judgment by means of ordeal. In trial by ordeal or by battle, judgment was rendered by God, and the truth of the verdict was manifest in God’s decision. While the verdict was considered to be true, it was a truth that could not be held accountable to objective determinations. God’s judgment was true despite, or rather because of, its inscrutability and its non-objectivity. Law, the saying of a higher truth, was not measured in human terms.⁵¹

Even after the religious presuppositions supporting the ordeal disappeared, English criminal procedure retained the belief in the truthfulness, inscrutability, and thus

only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). Jackson’s suspicions had a long history, beginning with the opposition to the introduction of criminal appeals in the early part of this century. In Germany, for example, Alexander Graf zu Dohna argued vociferously against the introduction of criminal appeals, primarily because the appellate procedure would in no way guarantee better decisions, and would simultaneously weaken the connection between the people and their courts. Zu Dohna, *supra* n. 43, at 4, 5 ff.

⁴⁹ See e.g., Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 Univ. Chicago L. Rev. 142, 146 (1970); S. Löwenstein, *Berufung*, in *Handwörterbuch der Rechtswissenschaft* (1926) 640.

⁵⁰ *Brown v. Allen*, 344 U.S. 443, 558 (1953) (Frankfurter, J., dissenting).

⁵¹ John Langbein has argued that the early medieval ordeals were a functional system of proof that relied on extra-human guarantees. See John Langbein, *Torture and the Law of Proof* (1976) 6. See also Sir Frederick Pollock and William Maitland, *The History of English Law* (1980) 598-99.

the finality of criminal jury verdicts.⁵² A jury verdict (*vrie-dire* in law French) was a saying of the truth of the matter.⁵³ A jury verdict did not distinguish between fact and law, and did not seek objectively certain truths; instead, it issued judgments embedded in practices and informed by “a knowledge of action or of what to do.”⁵⁴ Since juries spoke the truth in a “language used in and of the acted world” i.e. “an inhabited language, not an objective one,”⁵⁵ the idea of checking verdicts or of correcting the jury’s errors was as nonsensical as it was foreign. Medieval and early modern jurists understood law, an expression of justice and truth, to emerge organically from out of sense of knowing, a fitting regard for what is to be done.⁵⁶

In European *ius commune* as well, a premium was placed on the true verdict, though no cognizance of errors in past verdicts was permitted.⁵⁷ This requirement of truth in medieval legal procedure, however, was not necessarily governed by the need for certainty. Truth was guaranteed through a criminal procedure almost as impervious to objective reckoning as the verdict of God and the English jury. According to medieval

⁵² See generally, John H. Baker, *An Introduction to English Legal History* (1990), 157-58: “Judgments in the superior courts were intended to be final; there was no justification for appealing from the king to anyone else. . . . The kind of attention now given to cases on appeal was therefore given, under the old system, before judgment was entered.”

⁵³ Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (1994) 40.

⁵⁴ Marianne Constable, *The Modern American Jury: Fact and Law in Law and Society*, 15 *Journal of American Culture* 37, 39 (1992). Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (1991).

⁵⁵ Marianne Constable, *The Modern American Jury: Fact and Law in Law and Society*, 15 *Journal of American Culture* 37, 40 (1992).

⁵⁶ Distant echoes of this idea of law can still be heard in the idea of custom, as long as custom is understood to signify what is fitting; i.e. as in a custom tailored suit.

⁵⁷ It is because judgments were considered final, as statements of the truth, that the idea of errors could not be tolerated. Judgments would not be rendered without certainty as to the truth of the outcome, and European monarchs continually had to battle with judges who refused to decide cases on the grounds that the truth was unknowable. Laurent Mayali, *Recht Sprechen*, in 14 *Rechtshistorisches Journal* 284 (1995).

and early modern criminal procedure, guilt could only be determined by the presence of two good witnesses to the gravamen of the offense. This burdensome and rarely met standard was carried over from the Roman law, but had little practical significance.⁵⁸ Since two living witnesses to a crime are rarely present, the principle method of proof in medieval criminal procedure remained the confession.⁵⁹ Even when witnesses were present, the accused whenever possible had to confess their crimes.⁶⁰ The confession, which was legally obtained through torture, was at least partly designed to ascertain the factual guilt of the suspect, and to that end medieval law set out strict procedures to be followed before a suspect could be tortured.

But other ends, and different understandings of truth, contributed as well to the creation of medieval and early modern criminal procedure. The torture and confession requirements, as Michel Foucault has argued, found their overarching rationale in that they were the only way that criminal punishment “might use all its unequivocal authority, and become a real victory over the accused, the only way in which the truth might exert all its power, was for the criminal to accept responsibility for his own crime and himself sign what had been skillfully and obscurely constructed by the preliminary investigation.”⁶¹ The requirement of a confession before punishment points toward an idea of justice that is not simply an objective reckoning of accounts, but encompasses an ideology of retribution. Justice understood as retribution requires that the accused sign

⁵⁸John Langbein, *Torture and the Law of Proof* (1976) 7. See also, M. Liepmann, *Geständnis*, in *Handwörterbuch der Rechtswissenschaft* (1927) 889-892.

⁵⁹Langbein writes that since the Roman-canon law requirement of two witnesses was unworkable standing alone, confession, and with it torture, emerged as the primary method of proof. Langbein, *id.*, at 7. Liepmann calls confessions the “chief means of proof of the old process.” Liepmann, *id.*, at 889.

⁶⁰Michel Foucault, *Discipline and Punish* (1977).

his support for his punishment, acknowledge the power and right of the sovereign, and seek to be forgiven and re-integrated into the legal and political community from which his wrong excluded him. Justice, understood as an ideology of retribution, is not simply a manifestation of right—though it is that—but also is a political act of constituting and reconstituting a community.⁶²

Given an understanding of truth and law that was, as the old English jury verdict, embedded in the knowledge and practices of a community, the idea that verdicts could be measured and found erroneous by objective standards is fully an anachronism. Similarly, the medieval requirement of confession sought to assure truth, though a truth that is not a measurable object of this world, but rather, in an important way, *is* the world itself. In such legal systems, the saying of the truth of a verdict serves as the re-establishment of right, and acts as the political event of the giving of the law. A legal judgment, *jurisdictio*, is not simply an applying of legal propositions, but is a speaking of the law of a people,⁶³ and thus the founding of a people.

These historical examples show that truth, always a concern of criminal procedure, has not always been understood as the absence of error from a verdict. Trial error, as a problem or even a concept of criminal justice, was not judicially recognized until recent times. The advent of legal error as a problem for criminal law suggests an accompanying transformation in the social and idealistic order of society. Just as medieval procedures of proof developed in response to the loss of faith in the religiously

⁶¹ *Id.*, at pg. 38.

⁶² Foucault certainly recognized this when he wrote: “The public execution is to be understood not only as a judicial, but also as a political ritual. It belongs, even in minor cases, to the ceremonies by which power is manifested.” *Id.*, at 47.

⁶³ Philippe Nonet, *Judgment*, 48 *Vanderbilt L. Rev.* 987 (1985).

supported ordeals, so the modern criminal procedure, with its multi-level protections against legal error, emerged in response to a crisis of faith in the truth-speaking capacities of jury verdicts and tortured confessions. Only once juries became fact-finding bodies, and thus subject to verifiable error, could the truth of jury verdicts be cast into doubt by suspicions of errors.⁶⁴ And only after circumstantial evidence and rationally guided free judicial reasoning replaced the literal proof of the confession, could the truth of judgments be challenged.⁶⁵ The concern, even obsession, with error today is unique to our modern legal culture. Legal error, as a problem of criminal law, first emerged out of the ashes of the medieval and early modern conception of legal truth.

III. Error and Justice

To explore the significance of the modern legal system's error-centricity, it is necessary first to ask after the construction of error. Nowhere in American jurisprudence is the question of error more searchingly discussed than in the doctrinal debates over habeas corpus. The modern revolution in habeas corpus doctrine is governed by the idea that erroneous convictions are unjust and must be prevented whenever possible. Asking how error is conceived by modern habeas corpus jurisprudence can, therefore, help to illuminate the modern concept of justice.

There are two fundamental approaches to the cognizance of error in habeas corpus proceedings. The constitutional error approach requires courts to grant writs of habeas corpus upon any showing that a defendant was erroneously denied a fair trial, i.e. a trial in accord with constitutional procedural guarantees. Since the mid-1970s, an opposing view of habeas corpus has emerged that shifts the habeas inquiry from an

⁶⁴ *The Law of the Other*, supra n. 40.

exclusive concentration on the presence of error understood as unfairness, to error understood as an inaccurate determination of guilt. In this section I analyze the arguments supporting these often opposing positions and argue that these approaches represent apparently fundamentally opposed conceptions of error as injustice.

The Constitutional Error Approach

The legal controversy over what types of errors will authorize a post-conviction writ of habeas corpus began in earnest 25 years after Sacco and Vanzetti were executed. In the landmark case of *Brown v. Allen*,⁶⁶ Supreme Court Justice Felix Frankfurter achieved what he had unsuccessfully sought as a member of Sacco and Vanzetti's legal defense team—i.e. the expansion of the writ of habeas corpus into a strategic remedy designed to correct erroneous and thus unjust trial verdicts. The *Brown* decision granted persons convicted in a process tainted by constitutional legal errors recourse to the writ of habeas corpus, and thus the opportunity to petition for a new and constitutionally fair trial.

The decision actually encompassed four similar cases, the most important of which were *Brown v. Allen* and *Daniels v. Allen*.⁶⁷ Brown was an African-American man convicted of rape in North Carolina and sentenced to death. He appealed to the North Carolina Supreme Court and argued that the admission into testimony of a coerced confession, in addition to the fact of racial discrimination in the selection of the grand and petit juries, constituted legal errors that violated his federal constitutional rights and

⁶⁵ John Langbein, *supra* n. 51.

⁶⁶344 U.S. 443 (1952).

⁶⁷H.L.A. Hart, *Foreward*, 73 Harv. L. Rev. 84, 106 (1959).

denied him the due process of law guaranteed by the Fourteenth Amendment. The North Carolina Supreme Court denied his appeal,⁶⁸ and the U.S. Supreme Court then denied Brown a writ of *certiori*,⁶⁹ thus finalizing the North Carolina verdict.

Having exhausted all of the accepted procedural channels to obtain a new trial and to avoid execution, Brown filed in federal district court for a writ of habeas corpus. Both the district and the federal appellate courts refused either to issue the writ or to hold a hearing to further investigate Brown's factual claims.⁷⁰ Brown then brought his application for the writ to the Supreme Court. While the narrow issue in *Brown* concerned the district and appellate courts' use of the Supreme Court's denial of *certiori* in their denying of the habeas petition, the case broached as well the question of whether habeas corpus ought to be available to challenge and remedy constitutional errors in state court proceedings.

Daniels, also an African-American, was tried in the same manner as Brown and, as did Brown, sought to appeal his conviction. Daniels' lawyer, however, delivered the papers requesting an appeal one day after the deadline imposed by the state.⁷¹ The North Carolina Supreme Court refused to hear Daniels' appeal and the U.S. Supreme Court denied *certiori*. Daniels then filed for a writ of habeas corpus which was denied by both the federal district and appeals courts. If Brown's case raised the question of the availability of habeas corpus in cases where purportedly erroneous verdicts had been

⁶⁸ *State v. Brown*, 63 S.E.2d 99 (1951).

⁶⁹ 341 U.S. 943 (1951).

⁷⁰ 192 F.2d 477 (4th Cir.), affirming 98 F. Supp. 866 (E.D.N.C. 1951).

⁷¹ Actually, Daniels' lawyer had the papers ready on the day of filing, but decided to hand deliver them the following day rather than putting them in a mailbox. They were received by the court on the same day as they would have been if they had been mailed in compliance with the procedural deadline. H.L.A. Hart, *Foreward*, 73 Harv. L. Rev. 84, 107 (1959).

approved by appellate procedures, Daniels' case presented the Court with the additional issue of whether the refusal, on procedural grounds, to hear an appeal in a capital case was itself a constitutional error.

In *Brown v. Allen*, the Supreme Court denied Brown's and Daniels' requests for habeas corpus; how the Court did so, however, has been of profound and revolutionary importance. The Court did not cite, as it had before, the old common law rule proclaiming the finality of criminal verdicts. Rather, the Court denied the writ of habeas corpus on the merits of Brown and Daniels' constitutional claims. For the first time, the Court in *Brown* explicitly held that federal courts are empowered to reexamine constitutional issues even after trial and full appellate review.⁷² Habeas corpus, according to the *Brown* decision, is an appropriate remedy to correct constitutional errors of procedure in otherwise final state trials.

While the *Brown* decision made habeas corpus available for the remedy of errors, it has been a matter of continuing debate what constitutes an error remediable through habeas corpus. The controversy is fueled by the opinion that the judicial reasoning behind the *Brown* decision is absent or at best inadequate; the Court, commentators argue, neither spelled out what constitutes a constitutional error, nor provided a justification for its break with prior decisions.⁷³ The majority opinion, written by Justice Reed, abstains from any discussion of the justification of the expansive interpretation of

⁷²*Brown* is considered to hold that, "habeas lies to correct any constitutional error addressed in state-court proceedings." Bruce Friedman, "A Tale of Two Habeas" 73 *Minnesota Law Review* 247, 264 (1988). See also H.L.A. Hart, Foreward, 73 *Harv. L. Rev.* 84, 106 (1959). [Arguing that *Brown* "manifestly broke new ground" in finding that the due process of law "relates essentially to the avoidance in the end of any underlying constitutional error—that is, to the correct application of basic federal rules governing the decision to be made."].

⁷³ See, e.g., *Bator*, supra n. 16, at 501-503; H.L.A. Hart, Foreward, 73 *Harv. L. Rev.* 84 (1959).

habeas corpus. And Justice Frankfurter's concurring, yet authoritative,⁷⁴ opinion reputedly limits its arguments to statements of conclusion.⁷⁵

Frankfurter's concurring and dissenting opinions reveal two arguments justifying the use of habeas corpus to correct legal errors. First, Frankfurter argues that the Judiciary Act of 1867 gives federal courts the jurisdiction to issue writs of habeas corpus to any person already under sentence of State courts in violation of the constitution of the United States.⁷⁶ Few commentators or judges take Frankfurter's bow to the 1867 Act seriously. While the Act is invoked on occasion, the Court consistently treats its power to grant habeas corpus as deriving from its equitable jurisdiction.⁷⁷ Further, though already in force for 85 years, the Act had never been interpreted by the Supreme Court to give the federal courts the sweeping habeas powers that Frankfurter claims, and he offers no arguments in support of his interpretation.⁷⁸

Second, and more importantly, Frankfurter argues that the expanded habeas review is necessary to ensure that the few "meritorious claims [for habeas corpus]. . . not be stifled by indiscriminating generalities."⁷⁹ It is clear that by "undiscriminating generalities" Frankfurter means the common law rule, that "jejune abstraction"⁸⁰ that has prevented the granting of habeas corpus to prisoners already convicted in state courts.

⁷⁴ The confused grounds for the holding were furthered by the fact that there were two majority opinions in the case, one by Justice Reed, and the other by Justice Frankfurter. Since Frankfurter's concurring but also partially controlling opinion, and his separate dissent regarding the merits of the allegations of constitutional errors, have become the accepted Court opinions in the case, any attempt to understand how *Brown* and its subsequent extension have helped to determine what kind of errors would be subject to post-conviction collateral habeas corpus review must begin with his opinion. See generally, *Hart and Wechsler*, supra n. 30.

⁷⁵ *Bator*, supra n. 16, at 500-501.

⁷⁶ *Brown*, at pg. 499.

⁷⁷ Jordan Steiker, *Innocence and Federal Habeas Corpus*, 41 U.C.L.A. L. Rev. 303 (1993).

⁷⁸ *Bator*, supra n. 16 at 500-501.

⁷⁹ *Brown*, at pg. 498.

Within his concurring opinion, Frankfurter does little, however, to elaborate on what he means by “meritorious claims” of error. Meritorious claims, he writes, concern “rights guaranteed by the Federal Constitution,” for which, in those rare cases, “habeas corpus is the ultimate and only relief....”⁸¹ He does as well provide examples of what he considers to be meritorious claims. In such cases, for instance, when a prisoner is convicted without the benefit of counsel, habeas corpus must be available to correct errors.⁸² Also in circumstances when a prisoner claims that his confession was coerced and improperly admitted into evidence, when the jury selection was racially biased, and when perjured testimony has been knowingly used by the prosecutor,⁸³ the right of habeas corpus must be available to enforce the equal application of constitutional procedures.

The crux of the habeas inquiry is, therefore, procedural fairness. In Frankfurter’s words, the “State cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.”⁸⁴ When prisoners raise questions of procedural constitutional error, the importance of avoiding errors requires the extra scrutiny afforded by federal habeas review.

That procedural errors are intimately connected to questions of justice is made clear by Frankfurter’s endorsement of Judge Learned Hand’s conclusion that habeas corpus is necessary to “prevent a complete miscarriage of justice.”⁸⁵ The focus of the “miscarriage of justice” inquiry is, as it was for Hand,⁸⁶ procedural—and more specifically

⁸⁰ *Id.*, at pg. 558.

⁸¹ *Id.*, at pg. 498, 501.

⁸² *Id.*, at pg. 507-08.

⁸³ *Id.*, at pg. 559 (Frankfurter, J., dissenting).

⁸⁴ *Id.*, at pg. 508.

⁸⁵ *Id.*, at pg. 558 (citing *Kulick v. Kennedy*, 157 F2d 811, 813).

⁸⁶ *Kulick v. Kennedy*, 157 F2d 811, 813.

constitutional–error. Nowhere in his opinion does Frankfurter discuss the question of the defendants’ innocence; erroneous conclusions of guilt were, as they had been throughout the history of habeas corpus, irrelevant to the decision of whether to grant the writ. It is the unfairness associated from errors of procedure that is considered to be an injustice.

What the relation between procedural errors and injustice is, however, remains unclear. Though Frankfurter goes on to speak colorfully regarding the “uniqueness of habeas corpus in the procedural armory of our law,” its central importance in preserving the personal freedom that comprises the “moral health of our kind of society,” and its necessary place as a legal remedy that exists outside rigid rules that would “give spuriously concrete form to wide-ranging purposes or betray the purposes by strangulating rigidities,”⁸⁷ he fails to justify the use of habeas corpus to protect against specifically procedural and constitutional errors. While the connection between injustice, unfairness, and error is apparent to many, Frankfurt never clearly articulates the reason why unfairness manifested in procedural errors is to be specifically equated with injustice.

Partially in response to the breadth of the *Brown* decision and the purported lack of justification for the use of the expanded use of habeas corpus it endorsed, American jurists have sought the cause of these doctrinal changes in the crisis occasioned by the racial situation in the United States. They have constructed a persuasive argument tracing the emergence of habeas corpus as legal device to the need check and correct legal errors associated with persistent racial discrimination in (predominantly southern) state criminal trials. According to this argument, *Brown v. Allen’s* expansion of habeas corpus was part

⁸⁷ *Id.*, at pg. 512, 513.

of a long history, beginning with the post civil war Habeas Corpus Act of 1867, and culminating in the Warren Court's habeas corpus jurisprudence; for the Warren Court, the writ gradually developed into a strategic weapon, the primary purpose of which was to protect (often minority) criminal defendants from "errors and deficiencies in the criminal process."⁸⁸

Aside from this strategic and socio-historical explanation for the constitutional error standard, jurists have also sought jurisprudentially to justify the connection between procedural safeguards and justice. At least two grounds have been advanced for the conviction that important errors in state proceedings occur and, when left uncorrected, result in injustices. Procedural errors are to be avoided first because they reduce the reliability of the substantive outcome. People have a right, it is thought, to criminal procedures that are strict enough that they "attach the correct importance to the risk of moral harm" represented by convicting the innocent.⁸⁹

But procedural errors are also in themselves thought to be substantively unfair. Regardless of the innocence or guilt of a defendant, justice requires that an accused person be tried according to set procedures strict enough to place a proper value on his dignity and on his rights to be heard from before society officially decides upon his guilt or innocence.⁹⁰ The correction of errors, verdict fairness, and equal treatment reflect not mere utilitarian concerns with accuracy, but are themselves substantive principles that

⁸⁸ *Cover and Aleinikoff*, supra n. 29, at 1087.

⁸⁹Ronald Dworkin *Principle, Policy, Procedure*, in *A Matter of Principle* (1985) 89. See also, Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. Cal. L. Rev. 1143, 1148 (1980) (arguing that "the same result for person that gives form to the retributivist substantive limitation on punishment also engenders a super due process procedural limitation.")

⁹⁰ See, e.g., Dworkin, *id.*, at 101-103.

underlie the Constitutional error standard. It is for this reason that habeas corpus is available for any procedural error that may have influenced the outcome of the trial, regardless of whether it in any way concerned the innocence or guilt of the defendant.⁹¹

Frankfurter's rationale for the expansion of habeas corpus and the association of legal errors with miscarriages of justice remains unclear. Through his defense of Sacco and Vanzetti and other political prisoners, he surely was personally aware of the biases and inequalities of the American criminal justice system.⁹² Similarly, his impassioned defense of Sacco and Vanzetti convinced him that, "[g]rave injustices, as a matter of fact, do arise even under the most civilized systems of law and despite adherence to the forms of procedure intended to safeguard against them." He clearly believed fair and equal procedures were necessary in order to prevent the conviction of innocent persons, and that the "capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism."⁹³ Finally, Frankfurter's choice of habeas corpus—a remedy designed to

⁹¹ Only such a rationale seems to explain the Court's decision in *Chapman v. U.S.*, that even errors of procedure which are irrelevant to the defendant's guilt or innocence are grounds for habeas corpus, as long as those errors "affect substantial rights" of a party." See *Chapman v. U.S.*, 386 U.S. 18, 23 (1967).

⁹² Throughout his life, Frankfurter was aware of the potential for racially and politically motivated miscarriages of justice. As he said to an interviewer in 1960:

"The Sacco-Vanzetti affair has almost every important, really sizable issue that cuts deeply into the feelings and judgments and conduct of the community, implicates factors that transcend the immediate individuals who, in the main, are instruments of forces that affect many, many beyond the immediate actors in the affair. It involves problems that still gnaw at my curiosity. Few questions bother me more from time to time than what is it that makes people cowardly, makes people timid and afraid to say publicly what they say privately. . . . There are a thousand and one considerations beyond the immediate enslavement of economic dependence which I know make people hesitant, timid, cowardly, with the result however that those who have no scruples, who are ruthless, who don't give a damn, influence gradually wider and wider circles, and you get Hitler movements in Germany, Huey Long ascendancy in Louisiana, McCarthyism cowering most of the Senators of the United States at least to the extent that they didn't speak out, etcetera, etcetera. . . . So the affair like Sacco-Vanzetti for me was a manifestation of what one might call the human situation." Felix Frankfurter, *Reminisces* (1960) 205-206.

⁹³Felix Frankfurter, *The Case of Sacco and Vanzetti*, (1927) 108.

protect against procedural injustices—as a means to correct legal errors, combined with his silence throughout the *Brown* opinion regarding the innocence or guilt of the accused, lends credence as well to the view that procedural errors themselves were thought to be miscarriages of justice.⁹⁴

Whichever of these grounds gird the *Brown* decision, it has been read by the Court, at least until the early 1970s, to hold serious procedural errors to be miscarriages of justice, regardless of their relation to the defendant’s innocence or guilt. The zenith of the Court’s identification of justice with the avoidance of procedural error came in the 1963 decision of *Fay v. Noia*.⁹⁵ As in *Daniels*, *Fay* concerned the refusal of the state courts to hear an appeal, on the grounds that the appeal was untimely. The issue of the availability of habeas corpus to correct procedural errors was even more starkly presented than in *Daniels*, as the state conceded that Fay’s trial had violated constitutionally mandated procedures.⁹⁶ The issue for the Court, therefore, was whether the fact of procedural error was an injustice remediable by a writ of habeas corpus.

In granting Fay a writ of habeas corpus, the Court held that habeas corpus is an original civil remedy brought by a citizen for “the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom....”⁹⁷ Habeas corpus is not simply another step in the criminal justice system’s

⁹⁴ Frankfurter’s expressions of indignance over the procedural errors in his book over the Sacco and Vanzetti proceedings supports this understanding as well. *Id.*

⁹⁵ 372 U.S. 391 (1963).

⁹⁶ Fay was a co-defendant in a trial. After both defendants were convicted and sentenced to prison, Fay declined to appeal, fearing that on appeal his prison term could be extended to a capital sentence. Fay’s co-defendant did appeal, and was successful. Fay’s imprisonment was, therefore, the consequence of a trial that had already been declared unconstitutional. When he tried to appeal his case, New York refused to consider his appeal on the ground that the statute of limitations had already run.

⁹⁷ 372 U.S. 391, 423-424 (1963).

determination of guilt or innocence. It considers instead the “justice of the detention;” One’s right of “personal liberty” is the right to the due process of law, to be tried according to fair and adequate procedures regardless of the question of innocence. The mandate of *Fay*, and the more general expansion of the writ of habeas corpus from *Brown* up until the early 1970s, is clear: “it was the deprivation of constitutional rights that was to be avoided.”⁹⁸

The Gateway of Innocence Standard

In the 1993 case of *Herrera v. Collins*,⁹⁹ the Supreme Court reaffirmed its commitment to the constitutional error principle announced in *Brown v. Allen*. Only when the procedural guarantees of a fair trial are erroneously compromised will the Court grant a writ of habeas corpus. “Federal habeas courts sit,” the Court emphasized, “to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.”¹⁰⁰ Further, the Court has continued to hold that habeas corpus review is intended to correct and prevent miscarriages of justice.¹⁰¹ But the repetition of the constitutional error and the miscarriage of justice standards belies a profound shift of emphasis in the Court’s habeas corpus jurisprudence.¹⁰² Instead of viewing habeas review as means of preventing injustices understood as mere errors of procedure, the Court,

⁹⁸*Cover and Aleinikoff*, supra n. 29, at 1046. As the *Fay* Court held, citing Frankfurter’s original statement of the point in *Brown*, “The State court cannot have the last say when it, though on fair consideration what procedurally may be deemed fairness, may have misconceived a federal constitutional right.” *Fay v. Noia*, 372 U.S. 391, at 422 (1963).

⁹⁹ *Herrera v. Collins*, 506 U.S. 390, 403 (1993).

¹⁰⁰ *Herrera v. Collins*, 506 U.S. 390, 403 (1993)

¹⁰¹*Id.*, at 405.

¹⁰²Jordan Steiker, *Innocence and Federal Habeas Corpus*, 41 U.C.L.A. L.Rev. 303 (1993).

prodded by a number of legal commentators,¹⁰³ began to shift the focus of its inquiry towards the question of verdict accuracy.¹⁰⁴ Inaccuracy, not unfairness, is increasingly held to be the pith of the question of injustice resulting from error.

The turning point in the construction of error in habeas corpus jurisprudence came in 1970 when Henry J. Friendly, a respected Court of Appeals Judge for the 2d. Circuit, published an article entitled, “Is Innocence Irrelevant? Collateral Attack on Criminal Judgments.”¹⁰⁵ According to Friendly, the constitutional error rule ignores the significant interest that the criminal justice system has in the finality of its verdicts.¹⁰⁶ Against the constitutional error rule’s “broad proposition that collateral attack should always be open for the asserted denial of a ‘constitutional’ right,” he argues for the principle that state court convictions should be subject to habeas challenges, “only when the prisoner supplements his constitutional plea with a colorable claim of innocence.”¹⁰⁷ As a general rule, a prerequisite for the habeas corpus inquiry into the existence of constitutional error ought to be the prisoner’s capacity to show a “fair probability” that upon an evaluation of

¹⁰³ See, e.g., Friendly, *supra* n.49; Bator, *supra* n. 16.

¹⁰⁴ Limin Zheng, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Habeas Corpus Petitions*, 90 Calif. L. Rev. 2101, 2118 ff.; Jordan Steiker, *Innocence*, *supra* n. 102; T. Stacy, *The Search for Truth in Constitutional Criminal Law* 91 Columbia L. Rev. 1369.

¹⁰⁵ Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 Univ. Chicago L. Rev. 142 (1970).

¹⁰⁶ Friendly identified five advantages associated with the finality of criminal judgments which are burdened by allowing prisoners to continue their legal battles for decades after their conviction and sentencing. The most important advantage of finality is that it would reduce the drain on the resources of the community, the “most serious single evil” that the proliferation of habeas corpus requests imposes on the criminal justice system. Finality would also help to restore the retributive, deterrent, and educational aims of punishment, and to reestablish trials as the center of the judicial inquiry into guilt. Some measure of finality, he argues, must be sought in criminal trials. *Id.*, at 146-149.

¹⁰⁷ Friendly, *supra* n. 105, at 154, 142. Judge Friendly acknowledges that post-conviction collateral review by means of habeas corpus is justified irrespective of innocence in certain extraordinary conditions.

all the evidence, including the allegedly unfairly introduced evidence, that a reasonable trier of fact might doubt their guilt.

The argument that a substantial doubt as to the truth of the guilty verdict would be a necessary but not sufficient gateway through which the habeas petitioner must pass before a Court could consider his claim for habeas relief on constitutional error, has proven enormously influential, especially among members of the Rehnquist Court. Thus in *Herrera v. Collins*, the Court held that the claim of innocence is “a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.”¹⁰⁸ Although the Court has not held that a bare claim of innocence, absent a showing of procedural error, merits relief through a writ of habeas corpus, the plausible claim of actual innocence of the convicted person emerged as one preliminary focus of the Court’s habeas jurisprudence.¹⁰⁹

In *Stone v. Powell*,¹¹⁰ for example, the Court held that habeas corpus proceedings could not review errors involving the introduction of evidence that was gained by constitutionally prohibited searches and seizures. The *Stone* decision cannot easily be reconciled with the constitutional error standard. The erroneous use of illegally obtained evidence at trial is unfair; it not only refuses the defendant his right to be tried according to agreed upon norms, but also treats him unequally, in that he is denied procedural protections guaranteed to all others. To the extent that procedural errors themselves are miscarriages of justice remediable by habeas corpus, the mistaken introduction of illegally obtained evidence ought to be grounds for issuing the writ.

¹⁰⁸*Herrera v. Collins*, 506 U.S. 390, 404 (1993).

¹⁰⁹ Limin Zheng, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Habeas Corpus Petitions*, 90 Calif. L. Rev. 2101, 2124; BOYD, 1994.

In refusing to characterize the mistaken introduction of illegal evidence as a miscarriage of justice, the Court in *Stone* reasoned that the exclusion of illegal evidence cannot be thought to protect the innocent. That the evidence is illegally obtained does not reduce its reliability. On the contrary, illegally obtained evidence is “typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.”¹¹¹ While the relevancy of the evidence does not mean that it ought to have been introduced at trial, its illegal introduction, the Court argues, does not qualify as a miscarriage of justice. Procedural errors can only threaten to be a miscarriage of justice, the Court reasons, when they increase the risk of convicting an innocent person. The resort to habeas review for “purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty,” is consequently forbidden.¹¹² The interest in justice that the Court in *Brown* and *Fay* found to lie in a procedurally fair trial is, in *Stone*, reinterpreted as first and foremost a substantive interest in factually accurate trials.

While the Court’s decision in *Stone* has been severely limited,¹¹³ the embrace of actual innocence claims as a gateway to federal habeas corpus has survived. The primary use of the gateway innocence standard is in cases where potential constitutional errors would otherwise not be considered for procedural reasons relating to the filing of the habeas claim. In cases such as *Murray v. Carrier*,¹¹⁴ *Kuhlmann v. Wilson*,¹¹⁵ *McCleskey*

¹¹⁰428 U.S. 465 (1976).

¹¹¹*Id.*, at pg. 490.

¹¹²*Id.*, at pg. 491, fn. 31.

¹¹³ Jordan Steiker *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. Legal. F. 315, 326.

¹¹⁴ 477 U.S. 478 (1986).

¹¹⁵ 477 U.S. 436 (1986).

v. Zant,¹¹⁶ and *Schlup v. Delo*,¹¹⁷ the Court held that claims of factual innocence would trump procedural bars that would otherwise have prevented consideration of a defendant's Constitutional error claim.¹¹⁸ As the Court held in *Schlup*, a habeas petitioner who is otherwise procedurally barred from filing a writ of habeas corpus "may obtain review of his constitutional claims only if he falls within the "narrow class of cases ... implicating a fundamental miscarriage of justice."¹¹⁹ His "claim of innocence," the Court argued, "does not by itself provide a basis for relief. [His] claim of innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."¹²⁰ When conviction of an innocent is at stake, the "ends of justice," the Court held in *Wilson*, require that a claim of Constitutional error be considered regardless of the petition's procedural problems.¹²¹ The "colorable claim of factual innocence,"¹²² therefore, has come to be seen as an essential "safety valve that ensures the availability of the writ to those who are probably innocent."¹²³

The Court's shift, during the 1980s and 1990s, away from an identification of error with a procedurally fair trial toward an equation of error with inaccuracy appears to represent a shift in the Court's understanding of error and its relation to justice. By miscarriage of justice, the Court no longer signals that the absence of procedural

¹¹⁶ 499 U.S. 467 (1991).

¹¹⁷ 513 U.S. 298 (1995).

¹¹⁸ Limin Zheng, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Habeas Corpus Petitions*, 90 Calif. L. Rev. 2101, 2123-24. Joseph L. Hoffmann, *Substance and Procedure in Capital Cases*, 78 Tex. L.Rev. 1771, 1785-86 (2000).

¹¹⁹ 513 U.S. 298, 314-15 (1995).

¹²⁰ *Schlup v. Delo* 513 U.S. 298, 315 (1995) (citing *Herrera v. Collins*).

¹²¹ 477 U.S. 436, 454 (1986).

¹²² *Kuhlmann*, 477 U.S. at 454.

guarantees of fairness results in a “fundamentally defective” trial. Instead, the Court fashions the “miscarriage of justice exception,” to serve “as ‘an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty,’ guaranteeing that the ends of justice will be served in full.”¹²⁴ By miscarriage of justice, the Court clearly intends only those situations in which an innocent person is convicted by a factually inaccurate verdict.¹²⁵

As if in answer to Judge Friendly’s original query, “Is innocence Irrelevant?”, the Court shifts the pith of the habeas corpus inquiry from fairness to innocence. Miscarriages of justice, the Court intones in a literal citation of Friendly’s recommendation, are only present when “‘the prisoner supplements his constitutional claim with a colorable showing of factual innocence.’”¹²⁶ Whereas adherents to the constitutional error doctrine argue that it is the mistaken violation of procedures designed to guarantee a fair trial that demands habeas corpus review in the name of justice, supporters of the gateway-innocence doctrine contend that, except in cases that involve an extraordinary denial of procedural protections, it is the inaccurate conviction of innocent persons that commands habeas corpus review for the ends of justice.

¹²³ Limin Zheng, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Habeas Corpus Petitions*, 90 Calif. L. Rev. 2101, 2124.

¹²⁴ *McCleskey v. Zant*, 499 U.S. 467, 495 (1991).

¹²⁵ Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 28 Rev. L. & Soc. Change 415 (1990).

¹²⁶ *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). See also Ledewitz, *id.*, at 442-443.

The Antiterrorism and Effective Death Penalty Act and Habeas Corpus

The shift in the pith of the habeas corpus inquiry into unjust legal error from its focus on Constitutional error to its more recent insistence on substantive injustice as a gateway, has not been free from politics. On the contrary, the widespread political view that Federal justices were overusing their powers to grant habeas corpus and interfering with the states, has led the Court and conservative members of Congress to be increasingly suspicious of habeas claims.¹²⁷ One result of this increasing distrust of habeas corpus petitions is that on April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act (AEDPA).¹²⁸

The AEDPA brought with it what has been called “the most significant habeas reforms since 1867.”¹²⁹ The act, passed amidst the groundswell of anger that followed the Oklahoma City bombing, “dramatically altered federal habeas corpus practice,” making it much harder for convicted criminals to challenge their convictions through post-conviction petitions for habeas corpus.¹³⁰ Many of the Act’s effects further strengthened the procedural barriers against habeas corpus. For example, the act instituted a one-year statute of limitations on habeas corpus claims;¹³¹ it also severely restricts the rights of prisoners to file successive and subsequent habeas corpus petitions, by creating a presumption of dismissal of all new claims in successive applications, albeit with token

¹²⁷ See Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. “Process”*, 74 NYU L.Rev. 313, 315 ff. (1999).

¹²⁸ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

¹²⁹ Joseph L. Hoffmann, *Substance and Procedure in Capital Cases*, 78 Tex. L.Rev. 1771, 1790 (2000).

¹³⁰ Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U.L. Rev. 699, 702 (2002).

¹³¹ 28 U.S.C. §2244(d)(1) (Supp. IV 1998).

exceptions.¹³² These and other procedural limits were part of the AEDPA's political embrace of the Court's effort to limit extended habeas litigation in capital cases.¹³³

As radical as the AEDPA was in its effort to limit the availability of habeas corpus, however, the act largely leaves in place the two understandings of legal error that have come to define the Court's habeas jurisprudence. As Larry Yackle has argued, the AEDPA "clearly acknowledges and reinforces the federal courts' longstanding jurisdiction to entertain habeas petitions from state prisoners and to award habeas relief to prisoners who are found to be in custody in violation of federal law."¹³⁴ Although there has been fear on the part of some and hope in the hearts of others that the AEDPA would end the use of habeas corpus as a super writ of error, the Court has reaffirmed its basic commitment to habeas corpus. In a series of cases since the passage of the Act, the Court has "rejected government suggestions that the statute be interpreted to preclude habeas petitioners from obtaining federal review of their claims."¹³⁵ Even after the AEDPA, habeas corpus remains available as a remedy for certain kinds of erroneous convictions.

At the heart of the AEDPA's reform of habeas corpus is section 2254(d), which has rightly been called "[t]he centerpiece of the [AEDPA's] habeas reforms."¹³⁶ Section 2254(d) reads:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

¹³² 28 U.S.C. §2244(b) (Supp. IV. 1998).

¹³³ Hoffmann, *Substance and Procedure in Capital Cases*, 78 Tex. L.Rev. 1771, 1790 (2000).

¹³⁴ Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buffalo Law Review 381, 398 (1996).

¹³⁵ Hofmann, *Substance and Procedure in Capital Cases*, 78 Tex. L.Rev. 1771, 1791 (2000).

¹³⁶ Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. Legal. F. 315, 334. Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buffalo Law Review 381, 382-84 (1996).

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding.¹³⁷

The statute leaves untouched the basic authority of federal courts to grant habeas relief even as it defines and limits the circumstances in which a habeas claim will be awarded. If subsection one limits relief to instances of legal error, subsection two suggests that a habeas writ can be granted for factual errors as well. Section 2254 seems consistent with the Court's fundamental understanding that both constitutional (procedural) and factual (substantive) errors are, to some degree, remediable through habeas corpus.

In the years since the passage of the AEDPA, the attention of the courts and most commentators has focused on subsection one of §2254(d). This makes sense since most habeas petitions are grounded on procedurally timely claims of constitutional error absent a further claim of innocence or factual error. While the AEDPA has been held to make the granting of writs of habeas corpus based on constitutional error more difficult, it has not done away with the interest in remedying constitutional errors.

In the Court's most careful consideration of section 2254(d)(1) in *Williams v. Taylor*,¹³⁸ it held that "Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court." (405) Writing for a 5-4 majority, Justice O'Connor held: "Under

¹³⁷ 28 U.S.C. §2254.

¹³⁸ 529 U.S. 362 (2000) (For purposes of the interpretation of §2254, Justice O'Connor writes the majority opinion).

the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) “*contrary* to... clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) “involved in an unreasonable application of ... clearly established Federal law....”¹³⁹ Importantly, the court limits the “*contrary to*” clause, to those cases where a state court expressly deviates from a Supreme Court opinion or “decides a case differently than this Court on a set of materially indistinguishable facts.”¹⁴⁰ In the more likely situation, where a state court “identifies the correct governing legal principle from this Court’s decision but unreasonably applies that principle to the facts of the prisoner’s case,” O’Connor argues that a writ of habeas corpus should only be granted when the state court’s decision is “unreasonable.”¹⁴¹ What the AEDPA changes is that a federal habeas court must now ask not merely whether the state-court’s application of federal law to the facts was incorrect or erroneous, but whether it was objectively unreasonable.¹⁴²

Taken literally, O’Connor’s distinction between incorrect and unreasonable decisions seems to bring about a shift away from the Court’s traditional concern with using habeas corpus to overturn convictions based on constitutional errors. While she admits that the “term “unreasonable” is no doubt difficult to define,” O’Connor concludes that “[f]or purposes of today’s opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of

¹³⁹ 529 U.S. 362, 404-405; 412-413 (2000) (O’Connor’s majority opinion) (emphasis in original).

¹⁴⁰ 529 U.S. 362, 413 (2000).

¹⁴¹ 529 U.S. 362, 413 (2000).

¹⁴² 529 U.S. 362, 410, 411 (2000). See Hofmann, *Substance and Procedure in Capital Cases*, 78 Tex. L.Rev. 1771, 1791-92 (2000).

federal law.”¹⁴³ Under the “unreasonable application” clause of §2254(d)(1), therefore, a federal judge may not issue a writ of habeas corpus based on its “independent judgment” that the state court was in error, but must conclude that the state court’s application of the law was unreasonable.¹⁴⁴ According to the Court, it is not enough for a state court’s decision to have been wrong; its mistake must also have been made in an unreasonable way before a federal writ of habeas corpus can be granted.

The decision in *Williams* seems to suggest that the Constitutional error standard has been replaced by an inquiry into the reasonableness of the state court decision. However, a question remains regarding how a decision can be erroneous and yet reasonable. This is especially true because the Court specifically rejected a subjective inquiry into the state Court’s reasonableness.¹⁴⁵ The claim that a state court decided unreasonably must be a claim that the decision was objectively unreasonable; yet how the Court can claim that a decision was objectively unreasonable without being erroneous, or vice versa, remains an open question.

It is unclear what effect the *Williams* Court’s distinction between unreasonable and incorrect judgments will have. Six of the Justices in *Williams* found that the Virginia state court had been *both* contrary to clearly established Federal law and involved an unreasonable application of the Court’s clearly established precedent.¹⁴⁶ Similarly, in the recent case of *Wiggins v. Sewall*, the Court found that the Maryland Court as well offered an “objectively unreasonable” application of its earlier decisions.¹⁴⁷ While the verdict is

¹⁴³ 529 U.S. 362, 410 (2000).

¹⁴⁴ 529 U.S. 362, 411 (2000).

¹⁴⁵

¹⁴⁶ 529 U.S. 362, 397-98, 413 (2000).

¹⁴⁷ 2003 U.S. Lexis 5014, * 32 (not yet published).

still out on how greatly the *Williams* decision will effect habeas corpus, it is clear that the combined force of the “contrary to” and “unreasonable application” clauses means that habeas corpus is still available as a way to overturn decisions predicated on constitutional errors.

It is worth noting that there has been little attention given to §2254(d)(2) which seems to “invite[] the federal courts to reopen a state court’s adjudication of the facts underlying a federal claim in order to determine whether the state court reasonably assessed the evidence.”¹⁴⁸ This neglect may partially be a result of the fact that the AEDPA has not been understood to challenge the *Herrera* and *Schlup* standards for the introduction of factual evidence as an innocence gateway to the consideration of constitutional claims of error.¹⁴⁹ The question remains, however, whether the statute does open the door to federal habeas corpus being used as a means to consider the reasonableness of state court’s factual findings as a violation of the law itself, absent the claim of a separate constitutional error.

* * * *

The above discussion shows that the judicial debate over the characterization of error in habeas corpus proceedings appears to split into two fundamentally opposing positions. On the one hand, error is understood by some as a matter of unfairness. Error, in other words, is conceived as procedural error, the misinterpretation or denial of procedural safeguards designed to ensure the equal and fair treatment of all persons.

¹⁴⁸ Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 *Buffalo Law Review* 381, 382 (at n. 4) (1996). The Court’s one tentative effort to employ §2254(d)(2) was inconclusive. See *Wiggins v. Sewall*, 2003 U.S. Lexis 5014, * 33-34 (not yet published).

¹⁴⁹ See *Sistrunk v. Armenakis*, 292 F.3d 669, 672-73 n.3(2002) (assuming but not deciding that the gateway innocence standard still applies after the AEDPA); *Majoy v. Roe*, 296 F.3d 770 (2002).

These constitutionally guaranteed procedures of due process fix the risk of inaccurate convictions at an acceptably stringent level and are, therefore, the bedrock of a just legal system. To the extent that justice is identified with the fair and equal treatment of persons, the violation of these procedures is in itself thought to be a substantive moral injustice. Error is, on the other hand, increasingly understood to be substantive inaccuracy. When one is erroneously convicted and punished for a crime one did not commit, the verdict is considered unjust.

Both types of errors, unfairness and inaccuracy, are understood within the habeas corpus discourse as examples of injustice. That error is understood as injustice, however, begs the question: What is justice? Since justice, as it was understood in pre-modern law, excludes the consideration of error, the modern belief in a close relation between justice and error suggests a shift in the understanding of justice. Justice retains its connection to truth, but this modern connection reveals a specific understanding of truth.

IV. Error and Truth

The debate between unfairness and inaccuracy as two types of error appears to reflect a profound difference in the way injustice is understood. This appearance of difference, however, masks an equally if not more important sameness. Unfairness and inaccuracy, the two opposing understandings of error and injustice in the habeas corpus legal debates, are actually two ways to speak about the absence of objectivity in criminal convictions. The debate over error and justice, therefore, presents itself as a debate over how best to secure the objective truth of legal judgments.

For those who argue that justice is accuracy, objectivity means the conformity of verdict result with some actual event. Jurists who argue that justice is fairness are also speaking about objectivity, albeit objectivity understood to mean the guarantee of neutral and unbiased procedures. The debate over how to construct error in habeas corpus proceedings, therefore, reveals itself to be an internal debate between two competing ways of securing just legal verdicts through objective certainty. The goal of both sides of the debate is the objectivity of legal judgments.

The identification of just verdicts with objective truth represents a shift from the pre-modern understanding of truth and justice, and the way that they are manifested through legal verdicts. Pre-modern criminal verdicts strove after truth in the sense of right, i.e. as the saying of the truth of the matter. Modern criminal law seeks instead to guarantee to the objectivity of verdicts. But objectivity is not the same as truth. Whereas truth is immeasurable—that before which we stand awestruck in silence,¹⁵⁰—objectivity demands criteria of measurement, either by a correspondence with facts that are out there, or by a set of rules that ground the quality of our beliefs.¹⁵¹ The Court’s rhetorical positioning of error as a failure of legal objectivity suggests that contemporary

¹⁵⁰ The awe-inspiring power of law is best expressed in Kant’s feeling of reason, the finding of rationality and thus of autonomy (auto-nomos) that sets one before the truth of law and renders one awestruck (*Die Achtung vor dem Gesetz*). Immanuel Kant, *Grundlegung der Metaphysik der Sitten* (1965). The “Achtung” or “awe” that I feel before the greatness of the law, is, in Heidegger’s language, the call of silence (“*Die Geläut der Stille*”) in the face of the *Ereignis*, the “*es gibt*” of law. Martin Heidegger, *Unterwegs zur Sprache* (1959) 30. See generally, Philippe Nonet, *Judgment* 48 *Vanderbilt L. Rev.* 987, 996-1002 (1995).

¹⁵¹ Karl Popper provides a clear taxonomy of the difference between objectivity as correspondence and objectivity as grounds for belief, though he assigns the former access to absolute truth. Even, Popper, however, realizes that truth, which cannot be recognized by any general criteria, is something to be searched for. Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (1992) 224-228. For a discussion of the relation between truth and objectivity, see, Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (1994) esp. chp. 4.

jurisprudence, at least within the debates over habeas corpus, speaks about legal error without speaking about truth.¹⁵²

Rather than justice and truth, the habeas corpus debates over legal error display a concern for the legitimacy of verdicts. Legitimacy is not truth, but rather the belief in the authority of the legal system.¹⁵³ This is not to say, as some have, that authority is never legitimate.¹⁵⁴ Rather, it is to recognize that the law seeks the authority of legitimacy at the same time as law and justice cease to make a claim to truth. The modern debate about error in habeas corpus reveals that truth and justice, as legal ideals, have been supplanted by the belief in the legitimacy of authority. The Court, by treating error as a lack of objectivity, drops truth as well as justice out of the picture.¹⁵⁵ The rise of legitimacy guaranteed by objective verdicts follows, therefore, the loss of truth and justice as meaningful legal ideals.

Within the habeas corpus jurisprudence, the move from finding justice in the truth of a verdict to locating justice in the legitimacy of belief is illustrated in the case of *Herrera v. Collins*.¹⁵⁶ Leonel Torres Herrera was convicted of a double murder by a Texas jury in 1982, and sentenced to the death penalty. After a series of unsuccessful appeals, Herrera filed a federal writ of habeas corpus charging constitutional error regarding the identifications offered against him at trial. His habeas petition was also denied, and the Supreme Court refused to hear his claim in 1990. In 1992 Herrera filed a

¹⁵² Marianne Constable, *The Modern American Jury: Fact and Law in Law and Society*, 15 *Journal of American Culture* 37, 43 (1992).

¹⁵³ For a discussion of the difference between belief and truth, see Barbara Herrnstein Smith, *Belief and Resistance: A Symmetrical Account*, in *Questions of Evidence* (1994).

¹⁵⁴ See, e.g., Robert Paul Wolff, *In Defense of Anarchism* (1976).

¹⁵⁵ See, e.g., Marianne Constable, *The Modern American Jury: Fact and Law in Law and Society*, 15 *Journal of American Culture* 37 (1992).

second habeas corpus petition, this time alleging no constitutional errors, but claiming instead that new evidence had surfaced proving his innocence. Mindful of the Court's shifting focus towards the recognition of inaccuracy as the core of habeas corpus doctrine, he argued that the 14th Amendment's Due Process Clause forbid the execution of an innocent citizen.

The Supreme Court agreed to hear Herrera's appeal, and to decide the question of whether a claim of actual innocence, absent an independent constitutional violation, is grounds for habeas relief. In Justice Rehnquist's majority opinion, however, the Court avoids ruling on this issue; it does so by arguing that Herrera is undoubtedly guilty.¹⁵⁷ In support of its claim of Herrera's guilt, the Court offers two arguments. First Rehnquist rehearses in depth the overwhelming evidence of Herrera's guilt.¹⁵⁸ Herrera's proffer of new evidence is considered and refuted as well.¹⁵⁹ These substantive and factual claims of guilt, however, are importantly marginal to the Court's decision.¹⁶⁰

The Court concedes the proposition that the U.S. Constitution forbids the execution of a person who is innocent of the crime for which he was convicted, has, "elemental appeal."¹⁶¹ Against this feeling, the Court opposes the rationality of a "system of criminal justice," in which "'innocence' or 'guilt' must be determined in some sort of a judicial proceeding."¹⁶² The second and controlling argument that the Court offers for

¹⁵⁶ 506 U.S. 390 (1993).

¹⁵⁷ *Id.*, at pgs. 398-99, 421.

¹⁵⁸ *Id.*, at pgs. 393-97.

¹⁵⁹ *Id.*, at pgs. 417-18.

¹⁶⁰ The claim of Herrera's substantive guilt is, however, the central holding of O'Connor's concurrence. See *Id.*, at pg. 419 (O'Connor, J., concurring).

¹⁶¹ *Id.*, at pg. 398.

¹⁶² *Id.*

denying Herrera's habeas corpus claim, therefore, is the purely procedural ground that he had already been adjudged guilty in a proper trial.¹⁶³

Since the Court accepts Herrera's guilt as already decided, it never reaches the merits of his claim that his conviction was substantively in error. The Court's explicit endorsement of the rule that "evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus," is surely mitigated, even enabled, by the marginal yet omnipresent evidence of his guilt. Herrera's guilt, however, is precisely what the Court was asked to reconsider. Absent the assuredness of Herrera's guilt, the Court would have been forced to answer the embarrassing question it bends over backwards to avoid,¹⁶⁴ namely whether it is unjust to execute an innocent man who has been convicted by fair and just procedures.

The Court's hesitancy to use habeas corpus to protect an innocent man is somewhat surprising, especially considering its increasing endorsement of the principle that "the central purpose of any system of criminal justice is to convict the guilty and free the innocent."¹⁶⁵ As the Court rightly contends, the recent trend in habeas corpus jurisprudence, as described in Section III above, has hardly been blind to the question of innocence. Nevertheless, the Court stops short of finding the execution of an innocent a fundamental miscarriage of justice. Instead, "The fundamental miscarriage of justice

¹⁶³*Id.*, at pg. 399.

¹⁶⁴ The court found the question of whether habeas corpus could be used to prevent the execution of a person who made a strong claim of innocence "a sensitive and, to say the least, troubling one." *Id.*, at 421 (O'Connor, J., concurring). The majority opinion and the concurrence by Justice White assume, "for the sake of argument in deciding this case," that if a truly persuasive demonstration of "actual innocence" were made, federal habeas corpus relief might be available. *Id.*, at pg. 418. Three dissenting justices expressed their belief that executing an innocent man was a violation of the Constitution. The remaining Justices refused to state an opinion on the matter.

¹⁶⁵*Id.*, at 398.

exception is available ‘only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.’”¹⁶⁶ Claims of purely substantive errors regarding innocence and guilt are, absent an additional assertion of procedural error, not cognizable as miscarriages of justice.

A clue as to why the Court finds itself compelled to proclaim and then reject the elemental appeal of the principle against executing erroneously convicted persons is its continued use of scare quotes whenever it speaks about innocence and guilt. Rehnquist repeatedly speaks of “‘innocence’ or ‘guilt’”¹⁶⁷ and “‘actual innocence,’”¹⁶⁸ in quotation marks, as if guilt and innocence were spectres from another world. Innocence and guilt, in Rehnquist’s opinion, are rejected, or at least abandoned, as actual concepts. Knowledge of innocence, like knowledge of truth, is beyond the ken of human capacity; all that is left, therefore, is the belief in the capacity of legal procedures to discover the truth and to do justice. Innocence and guilt, Rehnquist argues, “must be determined in some sort of a judicial proceeding;” they have no meaning outside their legal determinations.¹⁶⁹ The Court need not inquire into Herrera’s innocence, therefore, because he comes before the Court “as one who has been convicted by due process of law.”¹⁷⁰ Since the belief in truth and guilt can only be reliably secured by dependence upon procedurally fair trials, a post conviction challenge on the basis of innocence

¹⁶⁶*Id.*, at 404 (citing *Kuhlmann*, 477 U.S. 436, at 454.)

¹⁶⁷*Id.*, at 398.

¹⁶⁸*Id.*, at 395, 404, 408.

¹⁶⁹*Id.*, at 398.

¹⁷⁰*Id.*, at 407 fn. 6.

commits the justice system to an inquiry that all but paralyzes the capacity for final judgments.¹⁷¹

Justice Blackmun's dissent decries as "fatuous" Rehnquist's absolute reliance on the trial verdict's judgment as a determination of guilt.¹⁷² According to Blackmun, Herrera's claim that he had new evidence proving his innocence demands a factual determination of his guilt on the basis of the notion of substantive due process; substantive due process "prevents the government from engaging in conduct that 'shocks the conscience.'"¹⁷³ Since Herrera seeks an objective (i.e. accurate) determination of his innocence, Rehnquist's appeal to the objective (i.e. fair) procedures of his trial ignores the substance of his claim.

The dispute between Rehnquist and Blackmun quickly degenerates into a judicial spat. Rehnquist charges Blackmun with putting "the cart before the horse" for his willingness to entertain Herrera's claim of innocence. Since Herrera is already proven guilty, the question is not the substantive inquiry into whether the Constitution permits the execution of an innocent man, but rather the procedural question of whether the determination of Herrera's guilt was fair. Not to be outdone, Blackmun responds that the majority's acceptance of the procedural determination of guilt as having priority over the substantive question of actual guilt, "to borrow a phrase, this 'puts the cart before the horse.'"¹⁷⁴ He argues that to accept the trial outcome as more certain than a substantive

¹⁷¹*Id.*, at 399.

¹⁷²*Id.*, at 435, fn. 5 (Blackmun, J., dissenting).

¹⁷³*Id.*

¹⁷⁴*Id.*

inquiry into the actual innocence is an affront against basic principles of substantive justice.¹⁷⁵

Concealed beneath the Court's bickering is the debate between the objectivity of unfairness and the objectivity of inaccuracy. Simply put, Blackmun and Rehnquist disagree about which kind of objectivity is more objective--and thus more legitimate. Neither claims the possibility of actual objectivity, i.e. of perfect certainty. Blackmun, for example, argues that it shocks the conscience to put an innocent person to death without arguing that Herrera is in fact innocent. He insists that the most basic requirement of a legitimate legal system is that it be as sure as possible that the persons it convicts and sentences to death are actually guilty.¹⁷⁶ Legitimacy, he suggests, requires an objective as possible determination of the defendant's actual guilt.

Rehnquist also denies the possibility of absolutely objective procedures, while at the same time arguing that the legitimacy of a conviction depends on the belief in procedural objectivity. Since the determination of guilt is never a matter of certainty, and since there is no guarantee that the Supreme Court's determination of guilt or innocence would be any more objective than the trial court's, Rehnquist rejects any extra-judicial determinations of guilt. The legitimacy of criminal convictions demands respect for the criminal jury trial as the adequate time and space for the determination of guilt.¹⁷⁷ It is the trial, with the constitutionally guaranteed protections of due process of law, that must remain the source of the legitimacy of criminal verdicts. Objective procedures that

¹⁷⁵ It is, in Blackmun's words, "contrary to contemporary standards of decency." *Id.*, at 430 (Blackmun, J., dissenting).

¹⁷⁶ Blackmun's express formulation of the standard to determine actual innocence after one has already been convicted by a trial, is that the petitioner must show that he is "probably innocent." *Id.*, at 442.

guarantee certain determinations of guilt remain the goal of the legal process not because they promise certainty, but rather because they assure continued belief in the system's legitimacy.

The identification of the belief in objectivity with legitimacy means that the Court, as do social scientists, replaces truth with a belief in legitimacy. Since truth is unknowable, the Court jettisons the effort to speak true verdicts. Instead, truth is reduced to a claim of legitimacy, and the objectivity of procedures become the only source of truth, i.e. of legitimacy.

The demand for the legitimacy of objective verdicts is grounded on the overriding demand, heard both from legal and non-legal corners, for fairness. But fairness "(like objectivity, which is not quite truth) is not quite justice."¹⁷⁸ Fairness, as can be heard in the expressions, a "fair answer," or "a fair youth," names the mean, a middling and inoffensive leveling. The core thought of fairness, and the reason that it has become the central concern of modern criminal law, is equality.¹⁷⁹ As opposed to the striving after justice in the particular case as it is demanded by the ancient principle: *Suum cuique tribuere* (to give to each his own), the modern doctrine of fairness counsels: treat people as equals even when they are different. Because fairness treats people like objective science treats facts, equally and according to neutral principles, it cannot do justice to the individual differences that inevitably exist. What the effort to eradicate unfairness from

¹⁷⁷ Herrera, at pg. 401.

¹⁷⁸ Marianne Constable, *The Modern American Jury: Fact and Law in Law and Society*, 15 *Journal of American Culture* 37 (1992).

¹⁷⁹ For an account of modern law that centers on the principles of equality and fairness, see Ronald Dworkin, *Law's Empire* (1986).

legal verdicts seeks to accomplish, therefore, is neither a just nor a true criminal justice system, but rather a legitimate legal system.

V. Conclusion: Error and Law

Habeas corpus became the vehicle in which late 20th century American law dedicated itself to the avoidance of legal error. It is strange, therefore, that after 30 years of considering the merits of petitioners' claims of legal error, the Court in *Herrera* refused to reach the merits of a claim of factually erroneous conviction, a claim that stands in the center of the Court's construction of errors. The initial strangeness becomes more unsettling when one considers that the refusal to reach the merits of error claims under habeas corpus has become almost standard in the Court's habeas jurisprudence.¹⁸⁰ Although the Court continues to describe habeas corpus as a remedy for legal errors, its willingness to address the merits of error-claims has retreated behind a veil of procedural rules.¹⁸¹

The refusal to consider the merits of error claims is understandable, however, once the truth of a legal verdict comes to be seen as a belief in the always questionable legitimacy of the judgment. Since the authority of law itself comes to depend on the authority of judges and the persuasiveness of their judgments, claims of error, i.e. of objective unfairness or uncertainty, lose their persuasiveness. Since judgments make

¹⁸⁰ See *Teague v. Lane*, 489 U.S. 288 (1989). See especially Linda Meyer's discussion of *Teague* and its progeny demonstrating *Teague's* reliance on a positive law model. Linda Meyer, "Nothing We Say Matters": *Teague* and *New Rules*, 61 U. Chi. L. Rev. 423 (1994).

¹⁸¹ In addition to the procedural ducking of the error claim in *Herrera*, the Court has used the procedural rule against retroactive decisions and the "new rules" rule of *Teague* to avoid consideration of the merits of habeas corpus claims. Meyer, *Id.*, esp. 455-459.

claims to neither truth nor objective certainty, error, as in the pre-modern criminal justice system, ceases to be a primary concern.

But this unwillingness to consider the merits of error claims does not at all signal a return to the values and presuppositions of pre-modern justice. On the contrary, the gesture of considering claims of error and the simultaneous avoidance of addressing these claims heralds a uniquely modern system of law. The authority and thus the legitimacy of law comes to inhere in neither a (foreclosed) understanding of the truth of the matter, nor in the (unattainable) objectivity of judgments, but rather in the presumed or cultivated authority of the judge.¹⁸² When justice and truth are secured only through the legitimate authority of the judicial utterance, law, as Justice Oliver Wendell Holmes Jr. rightly perceived, becomes what judges say it is.¹⁸³

Law is, in such a world, reduced to positive law. To speak about positive law is to invite confusion. Positive law is typically used in at least three different senses. On the one hand, positive law is simply the approximate spoken or written expression of the natural law.¹⁸⁴ In this sense of positive law, the posited law, what *is*, is determined, or at least guided by,¹⁸⁵ the *ought* of natural law. A second sense of positive law has more modern roots. In this sense, posited law, the *is*, is separated from the moral world of natural law and governed purely by the willful commands of sovereign authorities.¹⁸⁶ Related to this separation of the *is* from the *ought* is a third sense of positive law in which

¹⁸² For a discussion of the possibility of judicial authority within positive law, see Roger Berkowitz, *The Judge as Captain*, in *Europäische und Amerikanische Richterbilder* (1996).

¹⁸³ O.W. Holmes, *The Path of Law* (1996).

¹⁸⁴ Such a view can be attributed to Thomas Aquinas.

¹⁸⁵ For example, by a Kantian idea of a regulative principle.

the *is* itself is transformed into the *ought*.¹⁸⁷ The entire realm of natural law, of transcendence and of truth, is shattered, and the claims of what *is* become claims of right.¹⁸⁸

The second and third sense of positive law both are characterized by the collapse of the moral into the posited world. What determines positive law in these two senses, as Niklas Luhmann has perceptively described, is a decision.¹⁸⁹ By decision is not meant the historical fact of a decision, i.e., the act of a judge positing the law. Not only modern positivist judges, but also Roman law praetors, English jurors, and late German *Volksgesetze*, make decisions regarding the law. Rather, what is characteristic of a positive law decision is the fact that the law it announces only becomes valid by the power of this decision.¹⁹⁰ Within a world of positive law, law becomes, in its nature, a decision, changeable, and subject to the willfulness of the legislator. The changeability of law is legalized and its existence is, by necessity, always contingent and alterable.¹⁹¹

What is “won” by such a flexible, changeable, and provisional concept of law is, of course, an increase in the usefulness of law. Since law is always decided anew, law today can conform to specific social needs that yesterday were not apparent; law becomes “more and more an instrument of planned changes of reality in a fullness of

¹⁸⁶ Martin Luther’s theory of the two realms is one of the earliest expressions of the separation of the *is* and the *ought* characteristic of the modern idea of positive law. See also John Austin, *The Province of Jurisprudence Determined* (1995).

¹⁸⁷ A leading proponent of the sociology of law in this sense is Niklas Luhmann. See, e.g., Niklas Luhmann, *Rechtssoziologie* (1987).

¹⁸⁸ What is described here is the reign of the sociology as it is expressed by Friedrich Nietzsche in the fifth stage of his history of the world as an error. Nietzsche, *Götzen-Dämmerung* (1985) 31.

¹⁸⁹ Luhmann, *supra* n. 187 at 207 ff. All translations of German texts are my own.

¹⁹⁰ *Id.*, at pgs. 208-09.

¹⁹¹ *Id.*, at pg. 210.

particularities.”¹⁹² Law itself, as Luhmann recognizes, undergoes a “radical inner inversion” and sacrifices the characteristic “of being anchored in a true world order with invariable natural and moral groundings of law.”¹⁹³ Law loses both its temporality, its materiality, and its force; it disappears into a sea of social dimensions, and becomes a tool of societal ends as opposed to the expression of a foundational saying of the truth of a people.¹⁹⁴ Positive law is a technical law that is created by man in the interests of social ends.

Positive law is therefore trivial law.¹⁹⁵ As Friedrich Carl von Savigny observed, “What comes before us as made by human hands will always be distinguished in the feeling of the people from that whose origin is not so visible and graspable.”¹⁹⁶ Law in the modern age loses its weight, what Friedrich Nietzsche calls the *Schweregewicht*¹⁹⁷ by which it stamps its presence, its importance, and its holiness, and by which it demands obedience. In such a world, statements of law cease to matter almost as soon as they are handed down.¹⁹⁸

The very triviality of positive law, its temporality, instability and weightlessness, suggests that error would once again cease to be a problem. Claims of error are not rejected, they are ignored. Error becomes a disturbance, a reminder of the tenuous legitimacy of positive law. In the Court’s recent habeas corpus jurisprudence, therefore,

¹⁹² Id., at pg. 211.

¹⁹³ Id., at pg. 212.

¹⁹⁴ Id., at pg. 216.

¹⁹⁵ Id., at pg. 255.

¹⁹⁶Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (1973) 43: “Was so vor unsern Augen von Menschenhänden geschaffen ist, wird im Gefühl des Volkes stets von demjenigen unterschieden werden, dessen Entstehung nicht eben so sichtbar und greifbar ist.”

¹⁹⁷Nietzsche, *Jenseits von Gut und Böse*, in *Kritische Studien Ausgabe*, para. 341 (Giorgio Colli & Mazzino Montinari eds., 1988).

error disappears not, as in pre-modern legal systems, because verdicts are true; on the contrary, claims of error disappear precisely because the truth of verdicts is considered to be irrelevant.

¹⁹⁸Linda Meyer, *“Nothing We Say Matters”: Teague and New Rules*, 61 U. Chi. L. Rev. 423, 424 (1994).