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

Roger Berkowitz
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Objektivität und Gerechtigkeit haben nichts miteinander zu thun.

—Friedrich Nietzsche1

[Objectivity and justice have nothing to do with one another.]

I. INTRODUCTION

On August 10, 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,”2 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

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to guarantee a fair trial.\(^3\) Massachusetts law at the time stipulated that the only judge to rule on the merits of the appeal could be the trial judge,\(^4\) 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 the governor, that the lawyers—with the execution of Sacco and Vanzetti looming—took the then 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.\(^5\) *Habeas corpus cum caussum* 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.\(^6\) The breadth of the writ extended to many kinds of improper confinements. It provided wives relief from illegal detention by their husbands,\(^7\) it gave persons committed to asylums the right to secure a medical review showing cause for confinement,\(^8\) and it enabled slaves brought into English territory to escape being sent back to slavery in the U.S.\(^9\) 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.”\(^10\)

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3. Of primary importance were the allegations, supported by affidavits, that the prosecution had 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. Commonwealth vs. Sacco and Vanzetti (Robert P. Weeks ed., 1958).

4. 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 (Academic Reprints 1954) (1927).

5. Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 2.2 (2d ed. 1994) [hereinafter Habeas Corpus Practice].


7. Streeter’s Case (1653).

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

9. Ex parte Somerset (1772).

10. The Federalist No. 83 (Alexander Hamilton).
Hailed as the "[g]reat 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;'"\footnote{See George Burton Adams, The Origin of the English Constitution, at 76-77 (cited in Duker, 1980, at 7).} no lesser authority on English law than William Blackstone has hailed habeas corpus as "another Magna Carta,"\footnote{William Blackstone, 3 Commentaries on the Law of England 136 (1770) (cited in Duker, supra note 6, at 7).} 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."\footnote{Brown v. Allen, 344 U.S. 443, 512, 73 S. Ct. 437, 449 (1953) (Frankfurter, J., concurring).} The writ was considered so fundamental a protection of personal liberty that the founding fathers guaranteed its availability in the United States Constitution.\footnote{U.S. Const. art. 1, § 9, cl. 2.} In 1867, more than fifty 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."\footnote{Ex parte Mccardle, 73 U.S. (6 Wall) 318, 326 (1867).} The idea, 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, 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,\footnote{"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)).} but only into whether the detaining authority had the proper legal jurisdiction to adjudicate the proffered cause.\footnote{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, supra note 5, §2.} Habeas corpus was not, until the latter half of the 20th century, a legitimate means of addressing factual or procedural trial error in state courts.\footnote{The 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} Even if, as has been argued recently, the scope

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14. U.S. Const. art. 1, § 9, cl. 2.
15. Ex parte Mccardle, 73 U.S. (6 Wall) 318, 326 (1867).
16. "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)).
17. 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, supra note 5, §2.
18. The 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
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, the fact remained that the writ could neither open an inquiry into the petitioners' innocence, nor could it grant post-conviction relief as a result of mere errors of law. "It is certainly true," Holmes wrote in Moore v. Dempsey, "that mere mistakes of law in the course of a trial are not to be corrected [by habeas corpus]." 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, 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." 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."
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.\textsuperscript{25} 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 proceeding a sham, \textit{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,\textsuperscript{26} 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.\textsuperscript{27} Holmes refused to issue the writ, and Sacco and Vanzetti were executed.\textsuperscript{28}

In his private letters, Holmes makes it clear that he had doubts about their guilt, even writing that “my prejudices are against the conviction.”\textsuperscript{29} Nevertheless, he took a kind of joy in defending his decision. Holmes saw himself as heroic for accepting the necessary fact that the law involves violence and even injustice. Holmes’ favorite judicial maxim is that law has little to do with justice: “I hate justice,” Holmes wrote to the famous jurist Learned Hand.

\textsuperscript{25} Ex parte Watkins, 3 Pet. 183, 202-03 (1830).
\textsuperscript{26} That mere errors would not be grounds for the writ, was, with some exceptions, still the law as late as 1949. Bator, \textit{supra} note 17, at 464. In \textit{Schectman 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:

\begin{quote}
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.
\end{quote}

172 F.2d 339 (2d Cir. 1949).


\textsuperscript{28} The execution was delayed for technical reasons until August 23rd.

"[Justice] is not my job. My job is to play the game according to the rules." Since Sacco and Vanzetti had been tried and convicted according to legal rules, Holmes did not see that the possible execution of innocent persons represented an injustice for which habeas corpus might be a remedy.

Habeas corpus jurisprudence changed radically in the latter half of the 20th century. 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 modern application of habeas corpus as an omnipotent writ of error 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.

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?

And yet, habeas corpus has not lived up to its promise as a sword of justice. This article argues that the evolution of habeas corpus into a super writ of error has, against expectations, helped to reinforce the already widening divorce of law from justice. It begins in Part II with the historical observation that errors in criminal law verdicts


31. But see *Habeas Corpus Practice*, supra note 6, at 67 (arguing that there has been “no revolution” in habeas corpus jurisprudence).


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 systems. Rather, what the historical investigation makes visible is that legal truth was not always understood as the absence of legal error from verdicts.

Part II probes the connection between justice and the uniquely modern obsession with legal error. Since habeas corpus has emerged as an extraordinary means to secure justice by correcting errors, the doctrinal debates around habeas corpus offer insight into how law understands both error and injustice. Error is revealed by the contemporary debates over habeas corpus, to be understood either as the inaccuracy of substantive errors relating to a defendant's guilt or as the unfairness emerging from constitutional errors that infect the procedural determination of guilt. Whether error is understood as inaccuracy or unfairness, the exploration of habeas corpus doctrines shows that the prevention and correction of errors becomes an essential demand of justice.

And yet, as Part IV shows, even as the avoidance of unjust error has come to be a primary concern of habeas corpus doctrine and the legal system as a whole, the Congress and the Supreme Court have worked to mitigate the importance of legal errors. In the last quarter of the 20th century—and especially with the passage of the Antiterrorism and Effective Death Penalty Act in 1996—the Court has shown an increasing willingness to turn a blind eye to claims of both substantive and procedural errors. Modern debates around habeas corpus, therefore, reveal an apparently paradoxical state of affairs in which law is at once obsessed with procedures designed to prevent error and increasingly willing to ignore error as harmless or irrelevant.

To make sense of the Court's apparently contradictory stance toward error requires seeing that the identification of error with injustice has little connection to justice as jurists have traditionally understood it. As is shown in Part V, modern jurisprudence, in seeking justice and truth through the obsessive avoidance of legal error, betrays a commitment to the fairness and legitimacy of verdicts rather than to their justice or truth. When legitimacy replaces justice as the highest goal of law, law comes to be about the law of rules.

The inquiry into habeas corpus in this paper makes manifest a more general transformation in the nature of justice itself. Habeas corpus exists on the border between two contradictory understandings of justice. On the one hand, habeas corpus has a near mythical
connection to justice qua justice: namely, the demand for absolute justice above and beyond legal rules. It is this symbolic resonance that has allowed the evolution of habeas corpus into an extraordinary legal device that privileges an uncompromising concern for justice. By re-visiting cases after they have been decided, habeas corpus makes possible the righting of wrongs that have been committed in the name of the law.

On the other hand, however, habeas corpus also seeks justice in the sense of legitimacy. In this sense, habeas corpus does not commit itself to justice beyond rules, but, instead, redoubles the efforts of the legal system to ensure that the rules are fairly and objectively applied. In subjugating justice to legitimacy, habeas corpus jurisprudence threatens to undo justice even as it seeks to do justice. While legitimacy and legality are often confused with justice, this article argues that as the law increasingly strives for legitimacy it fails to do justice. Once judges forsake the possibility of truth (either objective or otherwise), the need to eradicate error comes to be about the securing of legitimacy and not the pursuit of truth. What matters is not the avoidance of errors (which is impossible) but the perception of fairness. Modern jurisprudence, in other words, shows itself to care about error not as error but as a threat to its legitimate authority. The unintended consequence of privileging legitimacy over justice, however, is that errors, as in pre-modern legal systems, again retreat into the background of legal consideration. Whereas ancient and medieval law accepted errors in the name of a higher truth, modern law makes peace with error in order to enhance the legitimacy on which its power rests. In showing how the Court privileges power over truth in habeas corpus jurisprudence, this paper shows how the great writ of habeas corpus is in danger of losing its once mythical connection to justice.

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," the goal of habeas corpus criminal procedure, as it has been expressed since Justice Frankfurter’s opinion in Brown v. Allen, was to increase the certainty of criminal verdicts and to protect against the possibility of constitutional and procedural errors. 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.

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 commit crimes will be punished; 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.

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. 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 . . . ” The judgment of a

35. Cover & Aleinikoff, supra note 32, at 1045.
36. 344 U.S. 443, 73 S. Ct. 397 (1953) (Frankfurter, J., concurring).
37. Cover & Aleinikoff, supra note 32, at 1042.
42. The criminal appeal in England was first instituted by statute in 1907. Plucknett, supra note 41, 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
jury and its acceptance by a judge were final, a statement of the truth of the matter that could not be legally contested.43

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.44 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 1530.45 Criminal appeals were first instituted in 1877, and even then only for minor cases.46

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.47 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.48 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 be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.49

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44. Löwenstein, *supra* note 41, at 640.

45. Id.

46. D.J.G. zu Dohna, *Berufung in Strafsachen* 3 (1911). 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* note 41, at 640.

47. 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 ludges then present shall actually dissent.” General Laws and Liberties of 1648, Massachusetts Bay Colony, Boston, 1648, at 2.

48. See *Ex parte Kearney*, 7 Wheat. 38, 42 (1822); see generally Hart and Wechsler, *supra* note 33.

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' lack of procedures to protect against errors in criminal cases is, "how did these pre-modern legal systems understand the truth of legal verdicts?" The answer is not to be found in nineteenth and twentieth 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 later 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. Critics against criminal appeals include the fear of weakening the faith in criminal verdicts, and the need to finalize the verdict quickly so that the criminal can adequately repent. These arguments appear as post facto justifications for a problematic and not fully comprehensible precedent, what Justice Felix Frankfurter
called a "jejune abstraction." By the nineteenth 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.54

Even after the religious presuppositions supporting the ordeal disappeared, English criminal procedure retained the belief in the truthfulness, inscrutability, and thus the finality of criminal jury verdicts.55 A jury verdict (vrie-dire in law French) was a saying of the truth of the matter.56 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.”57 Since juries spoke the truth in a “language used in and of the acted world” that is, “an inhabited language, not an objective one,”58 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.59

54. 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 6 (1976). See also Sir Frederick Pollock & William Maitland, The History of English Law 598–99 (1980).
55. See generally John H. Baker, An Introduction to English Legal History 157–58 (2d ed. 1990) (“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.”).
58. Constable, supra note 57, at 40.
59. 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.
In European *ius commune* as well, a premium was placed on the true verdict, though no cognizance of errors in past verdicts was permitted. 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 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. Since two living witnesses to a crime are rarely present, the principal method of proof in medieval criminal procedure remained the confession. Even when witnesses were present, the accused had to confess their crimes. 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.” 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 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

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60. 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).


62. Langbein 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, *supra* note 61, at 7. Liepmann calls confessions the “chief means of proof of the old process.” *Id.* at 889.


64. *Id.* at 38.
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.

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, 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 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. 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. 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 errorcentricity, it is necessary first to ask after the construction of error.

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65. 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.
68. Langbein, *supra* note 54.
Nowhere in American jurisprudence is the problem of error more searchingly debated 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 miscarriages of justice and must be prevented whenever possible. Asking how habeas corpus jurisprudence conceives of error can 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 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.

A. 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, 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. 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 denied him the due process of law guaranteed by the Fourteenth Amendment. The North

69. 344 U.S. 443, 73 S. Ct. 399.
70. Hart, supra note 18, at 106.
Carolina Supreme Court denied his appeal,\textsuperscript{71} and the United States Supreme Court then denied Brown a writ of \textit{certiorari},\textsuperscript{72} 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.\textsuperscript{73} Brown then brought his application for the writ to the Supreme Court. While the narrow issue in \textit{Brown} concerned the district and appellate courts’ use of the Supreme Court’s denial of \textit{certiorari} 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.\textsuperscript{74} The North Carolina Supreme Court refused to hear Daniels’ appeal and the United States Supreme Court denied \textit{certiorari}. 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 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 \textit{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 \textit{Brown} explicitly held that federal courts are empowered to reexamine constitutional issues even

\begin{thebibliography}{9}
\bibitem{71} State v. Brown, 63 S.E.2d 99 (1951).
\bibitem{72} 341 U.S. 943, 71 S. Ct. 1012 (1951).
\bibitem{73} Speller v. Allen, 192 F.2d 477 (4th Cir. 1951), affirming 98 F. Supp. 866 (E.D.N.C. 1951).
\bibitem{74} 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. Hart, \textit{supra} note 18, at 107.
\end{thebibliography}
after trial and full appellate review.\textsuperscript{75} Habeas corpus, according to the \textit{Brown} decision, is an appropriate remedy to correct constitutional errors of procedure in otherwise final state trials.

While the \textit{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 \textit{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.\textsuperscript{76} The majority opinion, written by Justice Reed, abstains from any discussion of the justification of the expansive interpretation of habeas corpus. And Justice Frankfurter’s concurring, yet authoritative,\textsuperscript{77} opinion reputedly limits its arguments to statements of conclusion.\textsuperscript{78}

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.\textsuperscript{79} 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.\textsuperscript{80} Further, though already in force for eighty-five years, the Act had never been interpreted by the Supreme Court to give the federal courts the

\textsuperscript{75} Brown is considered to hold that, “habeas lies to correct any constitutional error addressed in state-court proceedings.” Bruce Friedman, \textit{A Tale of Two Habeas}, 73 Minn. L. Rev. 247, 264 (1988). \textit{See also} Hart, \textit{supra} note 18, at 106. (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).

\textsuperscript{76} See, e.g., Bator, \textit{supra} note 17, at 501–03; Hart, \textit{supra} note 18.

\textsuperscript{77} 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. 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. As a result, any attempt to understand how Brown and its subsequent extension have helped to determine what kind of errors are subject to post-conviction collateral habeas corpus review must begin with his opinion. \textit{See generally} Hart and Wechsler, \textit{supra} note 33.

\textsuperscript{78} Bator, \textit{supra} note 17, at 500–01.

\textsuperscript{79} Brown, 344 U.S. at 499, 73 S. Ct. at 442.

sweeping habeas powers that Frankfurter claims, and he offers no arguments in support of his interpretation.\(^8\)

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 undiscriminating generalities."\(^8\) It is clear that by "undiscriminating generalities" Frankfurter means the common law rule, that "jejune abstraction,"\(^8\) that has prevented the granting of habeas corpus to prisoners already convicted in state courts. 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 . . . ."\(^8\) 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.\(^8\) 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,\(^8\) 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, "[t]he State court 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."\(^8\) 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."\(^8\) The focus of the "miscarriage of justice" inquiry is, as it was for Hand,\(^8\) procedural—and more specifically constitutional—error. Nowhere in his opinion does

81. Bator, supra note 17, at 500–01.
82. Brown, 344 U.S. at 498, 73 S. Ct. at 442.
83. Id. at 558, 73 S. Ct. at 436.
84. Id. at 498, 501, 73 S. Ct. at 442–43.
85. Id. at 507–08, 73 S. Ct. at 446–47.
86. Id. at 449, 73 S. Ct. at 436 (Frankfurter, J., dissenting).
87. Id. at 508, 73 S. Ct. at 447.
88. Id. at 558, 73 S. Ct. at 436 (citing Kulick v. Kennedy, 157 F.2d 811, 813 (2nd Cir. 1946)).
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,"

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, Frankfurter 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 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 a legal device to the need to 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 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."

Aside from this strategic and socio-historical explanation for the constitutional error standard, jurists have also sought to explain the development of the habeas corpus jurisprudentially, as a consequence of procedural ideas of justice. At least two grounds have been advanced for the conviction that important procedural 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

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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.\(^{92}\)

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.\(^ {93}\) The correction of errors, verdict fairness, and equal treatment do not reflect merely utilitarian concerns with accuracy, but are themselves substantive principles that 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.\(^ {94}\)

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.\(^ {95}\) Similarly, his

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\(^{93}\) *See, e.g.,* Dworkin, *supra* note 92, at 101–03.

\(^{94}\) 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, 87 S. Ct. 824, 828 (1967).

\(^{95}\) 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 ascendency in Louisiana, McCarthyism cowing most of the Senators of the United States at least to the extent that they didn’t speak out, etcetera, etcetera . . . . So the affair
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." Finally, Frankfurter's choice of habeas corpus—a remedy designed to 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 he saw procedural errors themselves as miscarriages of justice.

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. 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. 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 . . . ."

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like Sacco-Vanzetti for me was a manifestation of what one might call the human situation.

Phillips, supra note 2, at 205–206.

96. Frankfurter, supra note 4, at 108.

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


99. 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.

Habeas corpus is not simply another step in the criminal justice system’s 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."

B. The Gateway of Innocence Standard

In the 1993 case of Herrera v. Collins, 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." Further, the Court has continued to hold that habeas corpus review is intended to correct and prevent miscarriages of justice. 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. Instead of viewing habeas review as a means of preventing injustices understood as mere errors of procedure, the Court, prodded by a number of legal commentators, began to shift the focus of its inquiry towards the question of verdict accuracy. Inaccuracy, not unfairness, has been 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 Second Circuit, published an article entitled, "Is Innocence Irrelevant? Collateral Attack on Criminal

101. Cover and Aleinikoff, supra note 32, 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 of what procedurally may be deemed fairness, may have misconceived a federal constitutional right." Fay, 372 U.S. at 422, 83 S. Ct. at 840.

103. Id. at 403, 113 S. Ct. at 862.
104. Id. at 404–05, 113 S. Ct. at 862–63.
105. Steiker, supra note 80.
106. See, e.g., Friendly, supra note 50; Bator, supra note 17.
Judgments.” According to Friendly, the constitutional error rule ignores the significant interest that the criminal justice system has in the finality of its verdicts. 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.” 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 when presented with all the evidence 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.” 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.

In Stone v. Powell, 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

108. Friendly, supra note 50.
109. 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 146–49.
110. Id. 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.
112. Zheng, supra note 107, at 2124.
evidence at trial is unfair; it not only deprives the defendant of 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.

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."114 While not all relevant evidence is permitted to be introduced at trial, the fact of its illegal introduction does not qualify as a miscarriage of justice. Procedural errors such as the illegal introduction of evidence 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.115 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,116 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*,117 *Kuhlmann v. Wilson*,118 *McCleskey v. Zant*,119 and *Schlup v. Delo*,120 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.121 As the Court held in *Schlup*, a habeas petitioner who is otherwise procedurally barred from

114. *Id.* at 490, 965 S. Ct. at 3050.
115. *Id.* at 49 n.31, 965 S. Ct. at 3051 n.31.
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.'" His "claim of innocence," the Court argued, "does not by itself provide a basis for relief. [His] claim is thus 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" 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. The "colorable claim of factual innocence," therefore, has come to be seen as an essential "safety valve that ensures the availability of the writ to those who are probably innocent."

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 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." By miscarriage of justice, the Court clearly intends only those situations in which an innocent person is convicted by a factually inaccurate verdict.

As if in answer to Judge Friendly's original query, "Is Innocence Irrelevant?", the Court shifts the pith of the habeas corpus inquiry from procedural demands for fairness to substantive claims of 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." Whereas adherents to the

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125. Id., 106 S. Ct. at 2627.
126. Zheng, supra note 107, at 2124.
129. 477 U.S. at 454, 106 S. Ct. at 2627 (1986). See also Ledewitz, supra note 128, at 442–43.
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 demands habeas corpus review for the ends of justice.

IV. DOES ERROR MATTER? THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

The above-described shift in the pith of the habeas corpus inquiry 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.130 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).131

The AEDPA brought with it what has been called "the most significant habeas reforms since 1867."132 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.133 Many of the Act's effects further strengthened the already emerging procedural barriers against habeas corpus. For example, the Act instituted a one-year statute of limitations on habeas corpus claims;134 it also severely restricted 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 exceptions.135 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.136 In effect, the AEDPA has, in conjunction with recent Court

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132. Hoffmann, supra note 121, at 1790.
135. Id. at (b).
136. Hoffmann, supra note 121, at 1790.
decisions,\textsuperscript{137} limited the Court’s willingness to consider claims of error brought before it through writs of habeas corpus.

The political and judicial interest in limiting habeas corpus as a means to respond to legal errors raises the question of the importance of error as a problem for the law. The Court has not yet resolved this question for itself. As radical as the AEDPA was in its effort to limit the availability of habeas corpus, 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.”\textsuperscript{138} 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.”\textsuperscript{139} 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.”\textsuperscript{140} Section 2254(d) reads:

\begin{quote}
(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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.\textsuperscript{141}
\end{quote}

\begin{itemize}
\item \textsuperscript{137} See, e.g., Brecht v. Abrahamson, 508 U.S. 968, 113 S. Ct. 1710 (1993) (harmless error that does not substantially influence a jury verdict will not invalidate final albeit erroneous verdicts).
\item \textsuperscript{138} Larry W. Yackle, \textit{A Primer on the New Habeas Corpus Statute}, 44 Buff. L. Rev. 381, 398 (1996).
\item \textsuperscript{139} Hoffmann, \textit{supra} note 107, at 1791.
\item \textsuperscript{140} Steiker, \textit{supra} note 18, at 334; Yackle, \textit{supra} note 138, at 382–84.
\item \textsuperscript{141} 28 U.S.C. § 2254.
\end{itemize}
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. Further, 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." 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.

In the Court's most careful consideration of section 2254(d)(1) in Williams v. Taylor, 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." Writing for a 5-4 majority, Justice O'Connor held: "Under 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 . . . "145 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."146 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 be granted only when the state court's decision is "unreasonable."147 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.148

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 federal law."149 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.150 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. 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.

145. Id. at 404-05, 120 S. Ct. at 1519.
146. Id. at 413, 120 S. Ct. at 1523 (2000).
147. Id., 120 S. Ct. at 1523 (2000).
148. Id. at 410-11, 120 S. Ct. at 1522. See Hoffmann, supra note 107, at 1791-92.
149. Williams, 529 U.S. at 410, 120 S. Ct. at 1522 (2000).
150. Id. at 411, 120 S. Ct. at 1522.
It is unclear what effect the 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.151 Similarly, in the recent case of *Wiggins v. Sewall*, the Court found that the Maryland Court offered an "objectively unreasonable" application of its earlier decisions.152 While the verdict is still out on how greatly the *Williams* decision will affect 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.

While the AEDPA has not eliminated habeas corpus as a means of preventing legal errors, it has put the Court in the awkward position of saying that certain kinds of errors are acceptable. In coming to accept the possibility of erroneous and yet just verdicts, the decision in *Williams* advances the trend in habeas corpus jurisprudence to downplay the importance of error as a mark of injustice.

As part of its increasing acceptance of errors, the Court has increasingly established procedural barriers to the consideration of habeas petitions. In *Wainwright v. Sykes*, for example, the Court rejected a writ of habeas corpus that argued that statements used at trial had been acquired unconstitutionally.153 Because the defendant did not object to the testimony at trial, the Court held that he had procedurally defaulted his constitutional claim.154 Similarly, in *Teague v. Lane*, the Court announced that once a defendant is found guilty and has exhausted his appeals, he cannot benefit from a later interpretation of a law or constitutional provision that would have offered him a defense.155

In these and other cases156 the trend in habeas corpus jurisprudence is to downplay the importance of error as a mark of injustice. Even as legal error is admitted to be a problem that is remediable through habeas proceedings, the Court has increasingly concluded that the problem posed by error is insubstantial enough

151. *Id.* at 397–98, 413, 120 S. Ct. at 1515, 1523 (2000).
154. *Id.* at 87, 97 S. Ct. at 2506.
concluded that the problem posed by error is insubstantial enough that errors can, in many cases, be ignored. Although non-harmless errors may and do result in erroneous convictions, these errors will not invalidate a judicial verdict as long as they are reasonable errors. Paradoxically, even as the concern with error has blossomed throughout the 20th and 21st centuries, there has emerged a seemingly opposing trend that seeks to render error harmless in the furtherance of a hard-nosed law-and-order politics.

* * * *

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. 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, 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. And yet, the AEDPA is just one example of the trends in the Court’s habeas jurisprudence to repress the concern with the injustices associated with legal error. Indeed, as Judge Harry T. Edwards has recently argued, there is an ever-increasing trend for the Court to render “an error harmless so long as the appellate court remains convinced of the defendant’s guilt.” 157 Without denying that law-and-order politics can explain some of the pressure on the Court to accept erroneous verdicts, the question remains: how is it that error is at once associated with injustice and, at the same time, increasingly overlooked?

To explain this apparent paradox requires an exploration into the modern conception of justice that animates law. The claim that error is understood as injustice merely raises 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.

V. ERROR AND TRUTH: THE VICTORY OF LEGITIMACY OVER 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—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.

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 30 (1959). See generally Nonet, supra note 66, at 996–1002.

Karl Popper provides a clear taxonomy of the difference between objectivity as correspondence and objectivity as grounds for belief, though he
Court's rhetorical positioning of error as a failure of legal objectivity suggests that contemporary jurisprudence, at least within the debates over habeas corpus, speaks about legal error without speaking about truth.  

Rather than justice and truth, the habeas corpus debates over legal error display a concern for the legitimacy of verdicts. Legitimacy is not justice, but rather the belief in the authority of the legal system. As Drucilla Cornell has argued, "the idea of legitimacy as understood within any given legal system ... cannot be identified as justice." This is not to say, as some have, that authority is never legitimate. Nor is it to say that all claims to legitimacy are suspect. Rather, it is to recognize that the law seeks the authority of legitimacy at the same time as law ceases to make a claim to truth and justice as absolute ideals. The embrace of legitimacy as a ground for law arises only once law's natural, traditional, and insightful authority comes to be questioned. The fact that the granting of habeas corpus has come to be determined by the desire for legitimacy reveals that truth and justice, as legal ideals, have been supplanted by the belief in the legitimacy of authority. The Court, by treating justice as objectivity, drops truth as well as justice out of the picture. 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*. 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 second habeas corpus petition, this time alleging no

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 224–28 (1992). For a discussion of the relation between truth and objectivity, see Constable, supra note 56.

160. Constable, supra note 57, at 43.

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


164. See, e.g., Constable, supra note 57.

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 Fourteenth Amendment's Due Process Clause forbids 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. 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. Herrera's proffer of new evidence is considered and refuted as well. These substantive and factual claims of guilt, however, are importantly marginal to the Court's decision.

The Court concedes the proposition that the Constitution of the United States forbids the execution of a person who is innocent of the crime for which he was convicted, has, "elemental appeal." 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." The second and controlling argument that the Court offers for denying Herrera's habeas corpus claim, therefore, is the purely procedural ground that he had already been adjudged guilty in a proper trial.

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, namely whether it is unjust to

166. Id. at 398–99, 421, 113 S. Ct. at 859–60.
167. Id. at 393–97, 113 S. Ct. at 856–57.
168. Id. at 417–18, 113 S. Ct. at 869.
169. The claim of Herrera's substantive guilt is, however, the central holding of O'Connor's concurrence. See id. at 419, 113 S. Ct. at 870 (O'Connor, J., concurring).
170. Id. at 398, 113 S. Ct. at 859.
171. Herrera, 506 United States at 398, 113 S. Ct. at 859.
172. Id. at 399, 113 S. Ct. at 859–60.
173. The court found the question of whether habeas corpus could be used 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." 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, "[t]he fundamental miscarriage of justice exception is available 'only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.'" 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'" and "'actual innocence," 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. The Court need not inquire into Herrera's innocence, therefore, because he comes before the Court

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174. Id. at 398, 113 S. Ct. at 859.
175. Id. at 404, 113 S. Ct. at 862 (citing Kuhlmann, 477 United States at 453, 106 S. Ct. at 2627).
176. Herrera, 506 United States at 398, 113 S. Ct. at 859.
177. Id. at 395, 404, 408, 113 S. Ct. at 858, 862, 864.
178. Id. at 398, 113 S. Ct. at 859.
as one who has been convicted by due process of law.' 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 commits the justice system to an inquiry that all but paralyzes the capacity for final judgments. Justice Blackmun's dissent decries as "fatuous" Rehnquist's absolute reliance on the trial verdict's judgment as a determination of guilt. 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.'" 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.'" He argues that to accept the trial outcome as more certain than a substantive inquiry into actual innocence is an affront against basic principles of substantive justice.

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. Legitimacy, he suggests, requires an objective as possible determination of the defendant's actual guilt.

179. Id. at 407 n.6, 113 S. Ct. at 864 n.6.
180. Id. at 399, 113 S. Ct. at 859.
181. Id. at 435 n.5, 113 S. Ct. at 878 n.5 (Blackmun, J., dissenting).
182. Herrera, 506 United States at 435 n.5; 113 S. Ct. at 853 n.5.
183. Id., 113 S. Ct. at 878 n.5.
184. It is, in Blackmun's words, "contrary to contemporary standards of decency." Id. at 430, 113 S. Ct. at 876 (Blackmun, J., dissenting).
Rehnquist also denies the possibility of absolutely objective procedures, even as he insists on the objectivity of criminal trials. The legitimacy of criminal convictions demands respect for the criminal jury trial as the adequate time and space for the determination of guilt. 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 guarantee 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.

At the core of the debate in Herrera is the problem not of justice but of legitimacy. The demand for legitimacy is grounded on the overriding demand, heard both from legal and non-legal corners, for objectivity and fairness. Fairness has become identified with justice. Playing fair is playing by the rules. As a rulebound measure, fairness is grounded in the identification of justice with objectively true verdicts. To the extent possible, verdicts should be objectively accurate. However, since absolute certainty is impossible, fairness settles for the probabilistic legitimacy of procedurally fair trials. In either case, fairness stands against the idea of justice beyond the rules.

The demand for the legitimacy of objective verdicts is grounded on the overriding demand, heard both from legal and non-legal corners, for fairness. Contra Rawls, however, fairness is not the same as justice. As Marianne Constable has argued, fairness “(like objectivity, which is not quite truth) is not quite justice.” Fairness, as can be heard in the expressions, a “fair answer,” or “a fair effort,” 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. 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 legal verdicts seeks to accomplish, therefore, is neither a just nor a true criminal justice system, but rather a legitimate legal system.

185. Id. at 401, 113 S. Ct. at 860.
187. Constable, supra note 57.
188. For an account of modern law that centers on the principles of equality and fairness, see Ronald Dworkin, Law’s Empire (1986).
VI. CONCLUSION: ERROR, LAW, AND THE POSSIBILITY OF JUSTICE

Habeas corpus became the vehicle in which late twentieth century American law dedicated itself to the avoidance of legal error. It is strange, therefore, that after thirty years of considering the merits of petitioners' claims of legal error, the Court in Herrera and the Congress with the AEDPA have sought to hide errors behind a veil of procedural rules. 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. 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.

While admitting that error remains a problem for the law, the Court's increasing understanding of error as threatening the legitimacy rather than the justice of verdicts helps explain why error need not be taken seriously. Instead of an example of injustice, error becomes a disturbance, a reminder of the tenuous legitimacy of positive law. As a symptom of the Court's ever tenuous legitimacy, error is more easily ignored than remedied. In the Court's recent habeas corpus jurisprudence, therefore, 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 to their legitimacy.

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. When justice and truth are secured only through the legitimate authority of the judicial utterance, law, as

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190. 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, supra note 155, at 455–59.

191. 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).
Justice Oliver Wendell Holmes, Jr. rightly perceived, becomes what judges say it is.\textsuperscript{192}

To say that law is whatever judges say it is is to say that law is 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.\textsuperscript{193} In this sense of positive law, the posited law, what \textit{is}, is determined, or at least guided by,\textsuperscript{194} the \textit{ought} of natural law. A second sense of positive law has more modern roots. In this sense, posited law, the \textit{is}, is separated from the moral world of natural law and governed purely by the willful commands of sovereign authorities.\textsuperscript{195} Related to this separation of the \textit{is} from the \textit{ought} is a third sense of positive law in which the \textit{is} itself is transformed into the \textit{ought}.\textsuperscript{196} The entire realm of natural law, of transcendence and of truth, is shattered, and the claims of what \textit{is} become claims of right.\textsuperscript{197}

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.\textsuperscript{198} 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 and early English jurors 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.\textsuperscript{199} 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.\textsuperscript{200}

What is "won" by such a flexible, changeable, and provisional concept of law is, of course, an increase in the usefulness of law.

\begin{itemize}
\item \textsuperscript{192} O.W. Holmes, The Path of Law (1996).
\item \textsuperscript{193} Such a view can be attributed to Thomas Aquinas.
\item \textsuperscript{194} For example, by a Kantian idea of a regulative principle.
\item \textsuperscript{195} Martin Luther's theory of the two realms is one of the earliest expressions of the separation of the \textit{is} and the \textit{ought} characteristic of the modern idea of positive law. See also John Austin, The Province of Jurisprudence Determined (1995).
\item \textsuperscript{196} A leading proponent of the sociology of law in this sense is Niklas Luhmann. See, e.g., Niklas Luhmann, Rechtsoziologie (1987).
\item \textsuperscript{197} 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 31 (1985).
\item \textsuperscript{198} Luhmann, supra note 196, at 207 ff. All translations of German texts are my own.
\item \textsuperscript{199} \textit{Id.} at 208–09.
\item \textsuperscript{200} \textit{Id.} at 210.
\end{itemize}
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 particularities." 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." Law loses 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. Positive law is a technical law that is created by man in the interests of social ends.

Positive law is therefore trivial law. 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." Law in the modern age loses its weight, what Friedrich Nietzsche calls the Schwergewicht 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.

Against the ever-growing dominance of positive law, I have tried to suggest that the writ of habeas corpus offers one way for the law to hold onto an ideal of justice beyond the legitimacy of written rules and spoken decisions. Since habeas corpus straddles justice and legitimacy as two opposing ideas of justice and law, it can and ought to serve as an escape hatch through which justices can flee when the otherwise legitimate application of the laws threatens to lead not merely to error, but also to injustice. What makes habeas corpus the great and efficacious writ is its power as a writ of unfettered justice. To the extent that habeas corpus is an extraordinary legal writ for the doing of justice, habeas corpus has important and largely unnoted parallels with the pardon. Habeas corpus is, at least potentially, a legal procedure that aims to accomplish what the pardon conceives as a "lawful alegality." Given my argument that habeas corpus...
jurisprudence has continually retreated from imagining habeas corpus as an extraordinary legal means for the doing of justice beyond the laws, it should not be surprising that the use of pardons has suffered a radical decline during the twentieth century. For both the executive pardon and the judicial writ of habeas corpus, the conflation of injustice with error has made the appeal to an ideal of justice beyond legitimacy difficult if not impossible. However, I suggest that habeas corpus, at its best, offers a vision of law that refuses to expel the ideals of justice, mercy, and grace from an increasingly positivistic understanding of the law as a set of valid and authoritative rules.

Sacco and Vanzetti were executed 75 years ago because Justice Holmes insisted that habeas corpus could not be used to prevent an unjust yet legally valid verdict. Just nine years ago, Leonel Herrera was executed because the Supreme Court insisted that habeas corpus did not permit inquiry into new evidence of a convicted man's innocence unless that evidence was also accompanied by claims of constitutionally invalid procedural errors. Although habeas corpus had evolved in the intervening years into the equivalent of a super writ of error, the inquiry it sanctions brings law no closer to the imperative of justice. Instead, the error-centricity of habeas jurisprudence maintains Holmes' original focus on the rule of law as a law of rules.