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## ACTUAL INNOCENCE AND MANIFEST INJUSTICE

LARRY MAY AND NANCY VINER\*

“Are you suggesting . . . [that] even if we find Mr. Amrine is actually innocent, he should be executed?’ [questioned Judge Laura Denvir Stith of the Missouri Supreme Court]. Frank A. Jung, an assistant state attorney general, replied, ‘That’s correct, your honor.’”<sup>1</sup>

“Augustine declares that God himself would be unjust if he should condemn an innocent man.”<sup>2</sup>

### I. INTRODUCTION

One of the most disturbing aspects of the contemporary death penalty jurisprudence in the United States is the reluctance of courts to examine claims of actual innocence of those who are scheduled for execution. To the person on the street, the assumption is that those who are executed are those who are clearly guilty. Yet, as was seen in Illinois in the last few years, it has turned out that many people on death row do not deserve to be there because they did not commit the acts for which they were convicted and sentenced to death. The probability that there will be people executed who are innocent is what caused former Illinois Governor George Ryan to commute the sentences of all of those on death row as he left office. Furthermore, the Missouri Supreme Court has recently overturned the capital conviction of Joseph Amrine, holding that the continued incarceration, and threat of death, of a person who is

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

2. HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* 539 (Francis W. Kelsey trans., Oxford University Press 1925) (1625).

actually innocent is a “manifest injustice.”<sup>3</sup> In this article, we will defend the main argument advanced in the *Amrine* decision, namely, that denying actual innocence claims is a paradigmatic example of manifest injustice and a denial of substantive due process.

It may seem odd to those who do not know this debate that there is even a controversy here. Surely, on common-sense grounds it is odd that anyone would argue in favor of executing the innocent, as seems to have been the position of the Attorney General of Missouri in the *Amrine* case. To motivate consideration of this issue, it is important first to note that the term “legally innocent” could merely be a technical term for someone who has not been convicted by a court of law. Used in this way, there are no cases of “actual innocence” on appeal because either one has indeed been convicted in which case one is not now innocent, or one has not been convicted, in which case one is indeed innocent, but then one is not in need of appeal because one would not be on death row. If a person is “legally innocent,” in this technical sense, then no one would argue that this person should be executed. But the controversy concerns what is sometimes called “factual innocence,” roughly synonymous for “did not commit the act that one is accused of having committed.” There is a way to make sense of this dispute by distinguishing between being “legally innocent” and being “factually innocent,” where the latter status does not turn on what a trial court has decided. Those who argue against appellate review of actual innocence cases often argue that it is inefficient or unfair to the families of victims not to allow finality in these emotionally charged cases where “legal innocence” has been disproved. In what follows, we will be exclusively concerned with actual innocence cases concerning factual innocence. We can then rephrase our question as follows: Should appellate courts seriously consider claims of “factual innocence?” Our answer is yes.

Part II of this article considers the case of Joseph Amrine, recently decided by the Missouri Supreme Court, to set the stage for the normative debate. We then turn to four arguments advanced against having appellate courts seriously consider claims of actual innocence. In Part III, we consider an argument from federalism that is mainly focused on denying *federal* courts appellate review of actual innocence claims. In Part IV, we consider an argument based on finality and efficiency. In Part V, we consider an argument based on procedural due process. And in Part VI, we consider an argument grounded in considerations of deterrence. In all four cases, the arguments are found wanting. Part VII considers the core idea of substantive due process and argues that such an idea is indeed incompatible with executing the innocent. We conclude by briefly presenting the beginnings of an argument about how to fix the system, perhaps by the creation of a special appellate court or permanent special master empowered to consider evidence of “actual innocence.”

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3. State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 543 (Mo. 2003) (en banc).

## II. THE JOSEPH AMRINE CASE

On April 29, 2003, the Missouri Supreme Court decided the fate of Joseph Amrine, who claimed that he was entitled to state habeas relief concerning his conviction and death penalty sentence. In *Amrine v. Roper*, the court was presented with the issue of “whether a Missouri prisoner sentenced to death [can] obtain habeas relief on a claim of actual innocence . . . independent of any constitutional violation.”<sup>4</sup> The Missouri Supreme Court found that Amrine could obtain habeas relief from a judgment of conviction and sentence of death upon a clear and convincing showing of actual innocence. The court ruled in Amrine’s favor, holding for the first time that “the continued imprisonment and eventual execution of an innocent person is a manifest injustice.”<sup>5</sup>

In 1985, Amrine was charged with the murder of a fellow inmate in the Jefferson City Correctional Center.<sup>6</sup> Officer John Noble identified Terry Russell as the perpetrator.<sup>7</sup> When Russell was questioned about the murder, he claimed that Amrine had admitted to the stabbing. Amrine was charged with the murder.<sup>8</sup> Three inmates testified against Amrine, and the jury found Amrine guilty.<sup>9</sup> In 1987, the Missouri Supreme Court affirmed the conviction and sentence on direct appeal.<sup>10</sup> Amrine filed for post-conviction relief, claiming ineffective assistance of counsel and new evidence of two witnesses recanting their trial testimony in which they had identified Amrine as the murderer.<sup>11</sup> The motion court denied Amrine’s petition for relief, and the Missouri Supreme Court affirmed the judgment without review of the recantations.<sup>12</sup> Later, Amrine petitioned for a federal writ of habeas corpus to the United States District Court of the Western District of Missouri arguing that he was actually innocent given the recantations of two witnesses.<sup>13</sup> The court rejected Amrine’s actual innocence claim despite the recantations of two witnesses, because of the continued existence of the incriminating testimony of a third witness, Jerry Poe.<sup>14</sup>

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4. *Id.*

5. *Id.*

6. *Id.* at 544.

7. *Id.*

8. *Amrine*, 102 S.W.3d at 544.

9. *Id.*

10. *State v. Amrine*, 741 S.W.2d 665, 676 (Mo. 1987) (en banc).

11. *Amrine*, 102 S.W.3d at 544 (citing *Amrine v. State*, 785 S.W.2d 531 (Mo. 1990) (en banc)).

12. *Id.* (citing *Amrine*, 785 S.W.2d at 531).

13. *Amrine v. Bowersox*, 128 F.3d 1222, 1225–26 (8th Cir. 1997).

14. *Id.* (citing *Amrine v. Bowersox*, No. 90-0940, slip op. at 15–16 (W.D. Mo. Feb. 26, 1996)).

Amrine obtained new counsel and located the third witness, who then completely recanted his trial testimony.<sup>15</sup> With the new evidence, the Eighth Circuit Court of Appeals ordered a limited remand to the district court to conduct an evidentiary hearing to determine if the evidence was new and reliable, thus warranting habeas relief on the basis of *Schlup v. Delo*.<sup>16</sup> On remand, the district court denied Amrine's claim because only one witness' testimony was new, and the recantation was deemed unreliable.<sup>17</sup> The Eighth Circuit affirmed the district court's judgment and held "that evidence is new only if it was not available at trial."<sup>18</sup> The United States Supreme Court denied certiorari.<sup>19</sup>

In 2003, the Missouri Supreme Court granted habeas relief to review all the evidence available concerning whether Amrine was actually innocent of the murder.<sup>20</sup> In the first impression issue, the court cited *Herrera v. Collins*' discussion of the viability of a freestanding claim of actual innocence. While *Herrera*

determined that federalism concerns militated against recognizing actual innocence as a basis for federal habeas relief, the Court assumed for the sake of argument that: "in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim."<sup>21</sup>

The Missouri Supreme Court noted that, in *Herrera*, "six members of the Court suggested that there may be circumstances in which it would be constitutionally intolerable" to execute an innocent person.<sup>22</sup> Further, the court cited Article 1, section 10 of the Missouri Constitution, which provides that "no person shall be deprived of life, liberty or property without due process of law."<sup>23</sup> This constitutional guarantee allowed the Missouri Supreme Court to "find as a matter of state law that, as the purpose of the criminal justice system is to convict the guilty and free the innocent, it is completely arbitrary to continue to incarcerate and eventually execute an individual who is actually innocent."<sup>24</sup> The court found that an execution would constitute a manifest injustice.<sup>25</sup> The court concluded that it is crucial for state courts "to provide

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15. *Id.* at 1226.

16. *Id.* at 1230 (citing *Schlup v. Delo*, 513 U.S. 298 (1995)).

17. *Amrine v. Bowersox*, 238 F.3d 1023, 1028 (8th Cir. 2001).

18. *Id.* at 1029.

19. *Amrine v. Luebbbers*, 534 U.S. 963 (2001).

20. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. 2003) (en banc).

21. *Id.* at 546 (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993)).

22. *Id.* at 546 n.3.

23. *Id.* at 547 n.3.

24. *Id.*

25. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543-44 (Mo. 2003) (en banc).

judicial recourse to an individual who . . . is able to produce sufficient evidence of innocence to undermine the habeas court's confidence in the underlying judgment that resulted in defendant's conviction and sentence of death."<sup>26</sup>

According to the *Amrine* court, "a freestanding claim of actual innocence is evaluated on the assumption that the trial was constitutionally adequate."<sup>27</sup> The evidence must be "clear and convincing"<sup>28</sup> and "strong enough to undermine the basis for the conviction so as to make the petitioner's continued incarceration and eventual execution manifestly unjust even though the conviction was otherwise the product of a fair trial."<sup>29</sup>

The Missouri Supreme Court found that Amrine met his burden of clear and convincing evidence of actual innocence.<sup>30</sup> The court ordered Amrine "conditionally discharged from . . . custody" in thirty days "unless the state elects to file new charges."<sup>31</sup> Amrine was eventually released from custody.<sup>32</sup>

The dissents in *Amrine* did not disagree that Amrine's claim of actual innocence should be heard but instead focused on the issue of credibility. In his dissent, Judge Benton suggested that it is appropriate to appoint a special master to hold a hearing on the new evidence.<sup>33</sup> Judge Benton's main concern was that numerous appeals affirmed the conviction and the post-conviction hearings seemingly deemed the recantations not credible.<sup>34</sup>

A freestanding claim of actual innocence arises when a convicted prisoner presents new evidence of innocence without a separate issue of a constitutional violation. Historically, the federal writ of habeas corpus only addressed federal constitutional claims arising from state or federal courts. The reluctance of many courts to hear freestanding claims of actual innocence stems from the United States Supreme Court decision in *Herrera v. Collins*.<sup>35</sup> There are four major arguments why federal, and many state courts, have limited the review of freestanding claims of actual innocence. Issues of federalism, finality and cost, limited procedural due process, and deterrence all

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26. *Id.* at 547.

27. *Id.*

28. *Id.* at 548. "Evidence is clear and convincing when it 'instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true.'" *Id.* (quoting *In re T.S.*, 925 S.W.2d 486, 488 (Mo. Ct. App. 1996)).

29. *Id.* at 547. See also *Schlup v. Delo*, 513 U.S. 298, 316 (1995); *Simmons v. White*, 866 S.W.2d 443, 446 (Mo. 1993) (en banc).

30. *Amrine*, 102 S.W.3d at 548.

31. *Id.* at 549.

32. Bill Bell Jr., *Amrine is Freed from Jail After Years on Death Row: State Drops Its Case After Court Overturned Conviction Sentence; "I Missed So Much, It's Just Too Much to Say,"* SAINT LOUIS POST-DISPATCH, July 29, 2003, at B1.

33. *Amrine*, 102 S.W.3d at 550–51 (Benton, J., dissenting).

34. *Id.* (Benton, J., dissenting).

35. 506 U.S. 390 (1993).

have limited federal and state habeas corpus review of freestanding claims of innocence. In the bulk of this article, we consider and reject each of these reasons. We then turn to the chief positive reason in favor of exonerating those who are actually innocent, namely that to do otherwise is a violation of substantive due process. We will sketch a view of substantive due process and then argue that this important goal is incompatible with executing the innocent.

### III. FEDERALISM

One commentator has summarized the trend in federal habeas corpus proceedings in the last generation: “Over the course of the following three decades the Burger and Rehnquist Courts have whittled away at the writ’s scope and availability.”<sup>36</sup> Over this period, the Court has generally created more hurdles for state prisoners who seek federal habeas corpus relief. One area where things may be changing concerns capital murder convictions, especially where new evidence surfaces after trial that casts doubt on the soundness of the original conviction and death sentence. But even in this area, federal courts have been very reluctant to intervene because of federalism concerns, especially in criminal cases, which have historically been nearly the exclusive purview of state courts.

The justifications for denying relief are many and include “concerns for the evisceration of comity and the lack of finality in state criminal convictions.”<sup>37</sup> “Advocates of curtailing or even abolishing federal habeas corpus relief for state prisoners have argued that the authority of a federal judge to overturn a state court decision tramples on fundamental principles of respect for local authority and finality.”<sup>38</sup> The *Herrera* court held that federal habeas relief is only warranted when there is “no state avenue open to process such a claim.”<sup>39</sup> This requirement is consistent with goals of federalism and allows the states to have an active role in post-conviction processes.<sup>40</sup> Federal courts cannot evaluate the merits of actual innocence claims as effectively as state courts, and allowing an independent review undermines the state’s interest in guaranteeing the accuracy of its own trial processes in guilty or innocent

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36. Jake Sussman, Article, *Unlimited Innocence: Recognizing an “Actual Innocence” Exception to AEDPA’s Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE, 343, 378 (2001–02).

37. *Id.* at 379.

38. *Id.* at 345 n.13 (citing *Engle v. Isaac*, 456 U.S. 107, 128 (1982)) (“Federal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.”).

39. *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

40. Michael J. Muskat, Note, *Substantive Justice and State Interests in the Aftermath of Herrera v. Collins: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 148 (1996).

verdicts.<sup>41</sup> Fact-finding is a process exclusively reserved to the states and “there is probably no greater cause of tension between the state and federal systems than to allow federal courts to conduct review of a state’s determination of guilt.”<sup>42</sup>

In *Herrera*, Chief Justice Rehnquist “emphasized that the question of guilt or innocence is reserved . . . to the state courts, and before that question is ultimately decided, the State affords a criminal defendant a panoply of constitutional rights which ensure against” conviction of the innocent.<sup>43</sup> Furthermore, the *Herrera* ruling emphasized that states “‘have considerable expertise in matters of criminal procedure,’ and because ‘the criminal process is grounded in centuries of common-law tradition,’ the [Supreme] Court has traditionally exercised ‘substantial deference to [state] legislative judgments in [the criminal] area.’”<sup>44</sup> The principle is also based on the well-grounded rule that federal habeas courts are to “ensure that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact.”<sup>45</sup>

Following *Herrera*, many federal circuit courts have rejected innocence claims of death row inmates who after trial discovered strong evidence of innocence.<sup>46</sup> In *Schlup v. Delo*, the Eighth Circuit Court of Appeals reiterated its impatience with actual innocence claims of death row inmates, stating, “Federal habeas . . . does not provide a forum for the retrial of a convicted felon.”<sup>47</sup> As seen in *Herrera*’s progeny, courts have followed Chief Justice Rehnquist’s opinion that the claim of innocence is not a constitutional issue.<sup>48</sup> The Supreme Court emphasized that “federal habeas courts sit . . . to ensure that the states preserve[] federal constitutional rights, ‘not to correct errors of fact,’ such as those involving guilt or innocence.”<sup>49</sup> “[T]he majority stressed the ‘very disruptive effect’ that entertaining claims of actual innocence, unaccompanied by underlying constitutional claims, would have on the need for finality, as well as the overwhelming burden that having to retry cases, often based on stale evidence, would have on the states.”<sup>50</sup>

41. *Id.* at 164. “The states’ sovereignty is affirmed through independent consideration of bare innocence claims because they have an overwhelming interest in maintaining the accuracy of their own trial processes and in assuring correct guilt or innocence determinations.” *Id.*

42. *Id.*

43. Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims after Herrera v. Collins*, 71 TEMP. L. REV. 489, 494 (citing *Herrera v. Collins*, 506 U.S. 390, 398–99, 401 (1993)).

44. *Id.* at 494 (citing *Herrera*, 506 U.S. at 407).

45. *Herrera*, 506 U.S. at 400 (citing *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923)).

46. *See, e.g.*, *Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir. 2001); *Schlup v. Delo*, 11 F.3d 738 (8th Cir. 1993).

47. *Schlup*, 11 F.3d at 741.

48. *See* Muskat, *supra* note 40, at 150–57.

49. Anderson, *supra* note 43, at 494 (quoting *Herrera*, 506 U.S. at 400–01).

50. *Id.* at 495 (quoting *Herrera*, 506 U.S. at 400–01).



State sovereignty involves significant interests in preserving the accuracy of a state's own trial process and in ensuring the correct determination of guilt or innocence according to state law.<sup>51</sup> Commentators have maintained that state, rather than federal, courts should review actual innocence claims. The primary purpose of state trial courts is fact-finding on issues of guilt or innocence. Vivian Berger "notes that federal courts have only limited expertise in the definition of state offenses and the application of state procedural and evidentiary law, making the evaluation of post-conviction challenges based on newly discovered evidence more difficult for the federal judiciary."<sup>52</sup>

We partially have sympathy for this set of arguments. It is indeed difficult for federal courts to consider factual and legal issues that arise in the context of the criminal laws of a particular state. But it is a serious deprivation of due process for the actually innocent to be executed. If it is indeed quite significant, and if the particular state court is unwilling or barred from considering actual innocence claims, then should federalism prohibit such actual innocence claims from being considered by a federal district or circuit court of appeals? In these limited circumstances, federal courts should seriously consider actual innocence claims so that the general fidelity and respect for law, which is clearly an important federal issue, is not undermined. Indeed, this is the result reached by the *Herrera* court. However, the better strategy is to have actual innocence claims heard by state courts, rather than through federal oversight, given the hurdles that federalism poses to such federal oversight.

#### IV. FINALITY AND EXPENSE

Finality has also been considered one of the standard principles that guide and shape habeas jurisprudence. In *Calderon v. Thompson*, the Supreme Court emphasized "enduring respect for '[a] State's interest in the finality of convictions that have survived direct review within the state court system.'"<sup>53</sup> Since *Herrera*, courts have continually debated arguments of finality and expense. "Critics of state-prisoner access to federal habeas corpus relief argue that [allowing access] creates 'an expensive, time-consuming, and redundant enterprise that frustrates law enforcement and needlessly injects the federal courts into matters better left to the states.'"<sup>54</sup> The U.S. Supreme Court has

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51. Muskat, *supra* note 40, at 164.

52. Anderson, *supra* note 43, at 499 (citing Vivian Berger, *Herrera v Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads to Nowhere*, 35 WM. & MARY L. REV. 943, 1009 (1994)).

53. 523 U.S. 538, 555 (1998) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

54. Sussman, *supra* note 36, at 345 n.13 (quoting Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 8 N.Y.U. REV. L. & SOC. CHANGE 637, 638 (1990-91)).

imposed many procedural obstacles for obtaining relief through the writ of habeas corpus and has justified these decisions in several ways.<sup>55</sup>

The Supreme Court has enumerated finality, expense, and parameters of procedural due process as reasons for not allowing actual innocence claims to be heard by federal habeas courts. State courts can provide efficient review of actual innocence claims by maintaining control over their criminal judgments via “case law, court rules, and statutes to ensure that their legal systems function as efficiently as possible so cases do eventually come to an end.”<sup>56</sup> Since *Herrera*, states bear most of the responsibility for providing post-conviction review of actual innocence claims. This responsibility was codified by the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which “denies a federal habeas court jurisdiction in a capital case” if the convicted does not raise the claim first in state court.<sup>57</sup>

Further, petitioners are afforded several state remedies, such as a motion for new trial, claims of direct appeal, or state clemency. State habeas corpus relief can be the answer to post-conviction relief for bare innocence claims of state prisoners. It is in the states’ best interest to provide their own post-conviction procedures to review claims of innocence. Since *Herrera*, several courts, such as the *Amrine* court, have offered additional rights under state constitutions to handle freestanding claims of actual innocence.<sup>58</sup>

Due process requires weighing the values of finality, administrative convenience and the right not to be wrongly executed. Further, perhaps one could argue that finality is so important because of the closure and satisfaction it gives to the families of the victims. Inherent in our criminal justice system is the notion that when a fair trial has a legal finding of guilt, a victim’s family no longer has to worry or relive the crime. The principle of finality may also be important because it “defines what is ‘enough’ procedure,” and this may “outweigh[] the importance of ensuring that an innocent person not be executed.”<sup>59</sup> Finality is needed not only for administrative concerns but also to

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55. See 28 U.S.C. § 2244 (2000). The Antiterrorism and Effective Death Penalty Act (AEDPA) requires petitioners to exhaust state remedies. There is a one-year period of limitation for application of writ of habeas corpus. 28 U.S.C. § 2244(d)(1) (2000). Furthermore, the AEDPA prohibits filing previously raised claims in second or successive federal habeas petitions unless the claim falls under Section 2244 (b), which includes an exception for petitioners who seek to file claims not previously raised if they can make a particular showing of innocence. 28 U.S.C. § 2244(b)(2)(B)(ii) (2000).

56. Anderson, *supra* note 43, at 500.

57. *Id.* at 498.

58. State *ex rel.* Amrine v. Roper, 102 S.W.3d 541 (Mo. 2003) (en banc); People v. Washington, 665 N.E.2d 1330 (Ill. 1996); Summerville v. Warden, State Prison, 641 A.2d 1356 (Conn. 1994).

59. Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 509 (1996).

bring about an end to an emotionally charged event that has affected the family and friends of the victim.

Lurking behind all of this is the idea that it would somehow be unfair to require the federal or state courts to be open to the possibility of re-prosecuting someone who the state has already successfully prosecuted. The principle of double jeopardy holds that it is patently unfair to re-prosecute a defendant for the same offense once a court has reached a determination of innocence.<sup>60</sup> Similarly, the United States Supreme Court seems to have articulated a similar principle for the state: It is patently unfair to make the federal or state courts re-prosecute for the same offense once a court has reached a determination of guilt.<sup>61</sup> The problem is that the government, whether federal or state, is not in any particular jeopardy when a conviction is overturned in a manner similar to the way a defendant is in jeopardy of loss of liberty and life when an actual innocence claim is not considered. While considerations of efficiency and finality are important, a basic sense of fairness seems to dictate that no stone be unturned in determining if a person about to be executed really did commit the crime for which he or she stands accused.

#### V. LIMITED PROCEDURAL DUE PROCESS

Legally, a petitioner can never again be presumed innocent once he or she has been convicted. Once the defendant is afforded a fair trial and convicted, the “presumption of innocence disappears” and the state has accomplished its goal of converting that individual from one “presumed innocent to one found guilty beyond a reasonable doubt.”<sup>62</sup> According to *Herrera*, the question of judicial review of an actual innocence claim should be “analyzed only in terms of procedural due process.”<sup>63</sup> Chief Justice Rehnquist argued that: “[t]he question before us . . . is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his ‘actual innocence’ claim.”<sup>64</sup> The question of whether substantive due process prohibits the execution of an innocent person was never addressed in *Herrera*.

Rehnquist observed that “the trial is the paramount event for determining the guilt or innocence of the defendant.”<sup>65</sup> Additionally, “there is no established constitutional right to direct appeal from a conviction.”<sup>66</sup>

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60. *Arizona v. Washington*, 434 U.S. 497, 503 (1978).

61. *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

62. *Herrera v. Collins*, 506 U.S. 390, 399 (1993) (quoting *Ross v. Moffitt*, 417 U.S. 600, 610 (1974)).

63. *Id.* at 408 n.6.

64. *Id.*

65. *Id.* at 418.

66. *Bandes, supra* note 59, at 507.

Therefore, “Rehnquist’s argument appears to be that the petitioner has received all the process that he is due” and, hence, *Herrera* never reached the issue of “substantive entitlement to life.”<sup>67</sup> Furthermore, Justice Scalia’s concurrence, joined by Justice Thomas, states, “There is no basis in text, tradition, or even contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.”<sup>68</sup> Post-*Herrera*, the Second Circuit Court of Appeals stated, “[I]t is lawful under the Due Process Clause to end the judicial review process at some point, despite the purely theoretical possibility that the defendant might have been able to demonstrate his innocence in the future.”<sup>69</sup>

The argument concerning procedural due process has many aspects. One of the most important is that the presumption of innocence is extinguished once there has been a conviction based on a procedurally fair trial and that in its place is a presumption of guilt. In response, we wish to draw on the distinction between “legal innocence” and “factual innocence” which we developed earlier in our article. It may be that the presumption in favor of innocence has indeed been rebutted once a judgment has been reached at the end of a trial. Why, however, think that this requires a presumption in favor of guilt rather than no presumption on either side? And, in the kind of cases we are considering, why not assume the possibility that new post-trial evidence might call into question the soundness of the judgment reached on the basis of the facts known at the time of trial but now found to be incomplete?

## VI. DETERRENCE

“The Court has often emphasized that finality is integral to both the retributive and the deterrent functions of criminal law, and serves to maintain the federal balance.”<sup>70</sup> Regarding deterrence, lack of finality could breed a lack of concern that executions will ever happen, thus nullifying the positive deterrence value of the threat of execution in capital cases. Retribution is even more likely to be potentially stymied since the person who has already been determined to be guilty will not get what he or she deserves if the trial court’s judgment is not upheld.

Deterrence is based on the idea that rational individuals will make decisions that maximize their overall well-being. “The deterrence theory

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67. *Id.*

68. Tara L. Swafford, Note, *Responding to Herrera v. Collins: Ensuring that Innocents are not Executed*, 45 CASE W. RES. L. REV. 603, 612 (1995) (quoting *Herrera*, 506 U.S. at 427–28 (Scalia, J., concurring)).

69. *United States v. Quinones*, 313 F.3d 49, 68 (2d Cir. 2002).

70. Anderson, *supra* note 43, at 496 (citing *Calderon v. Thompson*, 523 U.S. 538, 555 (1998)).

assumes that a rational person will avoid criminal behavior if the *severity* of the punishment for that behavior and the perceived *certainty* of receiving the punishment combine to outweigh the benefits of the illegal conduct.<sup>71</sup> Of course there are well-known problems with such a view, not the least of which is the often unwarranted assumption that a person will indeed act rationally.<sup>72</sup> In addition, people who are rational often lack the ability or will to calculate effectively, especially when placed into highly stressful situations.<sup>73</sup> Nonetheless, the general idea is hard to dispute. People will be dissuaded from doing something that they want to do if taking action is highly likely to produce additional consequences that are more undesirable than the positive consequences they desire by performing the conduct.

When a judicial system allows for seemingly endless appeals of death penalty sentences, the deterrent effect of capital punishment is adversely affected because the “certainty” of receiving the horrible punishment is thought to diminish.<sup>74</sup> Indeed, as the number of bases for appeal increases, the perception that death is not at all certain if one commits capital murder also seems to increase.<sup>75</sup> This also affects the issue of severity because a highly certain sentence of life without parole may be seen as more severe than a less-certain death sentence. If the death penalty is to be reserved for those cases where deterrence is most needed, there is some reason to think that any weakening of the death penalty’s deterrence should be avoided.

Such arguments need not deter us from our main goal because the cases that we are considering in this article are cases of actual innocence. If a person has not committed the proscribed act, it is hardly an argument against releasing him that he is not sufficiently deterred from doing that act again. In addition, the main argument against the deterrence theory is that there is a similarly important countervailing idea, namely one concerned with manifest injustice based on denial of substantive due process. If we are willing to protect the

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71. RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 73 (1994).

72. See, e.g., Michael Edmund O’Neill, *Irrationality and the Criminal Sanction*, 12 SUP. CT. ECON. REV. 139, 178 (2004) (“Although public policy may often be based upon the assumptions employed by classical economics, it may need to take into account the fact that some individuals will not respond to utility maximization.”).

73. *Id.* at 143 (noting that scholars have observed “that real people often behave irrationally in that they are prone to become emotional, they accede to costly social norms, and they both make logical errors and base decisions on false (or incomplete) premises.”).

74. For a critique of studies of perceptual deterrence, see Steven Klepper & Daniel Nagin, *The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 CRIMINOLOGY 721, 721 (1989) (noting that some studies have “generally suggested that certainty but not severity of punishment deterred crime . . .”).

75. See Danya W. Blair, *A Matter of Life and Death: Why Life Without Parole Should be a Sentencing Option in Texas*, 22 AM. J. CRIM. L. 191, 205 n.70 (noting that “the possibility of executing criminal defendants is certainly slight, given the extensive appeals process . . .”).

innocent by setting the standard of proof in criminal cases so high as to risk letting the guilty go free, surely we should also be willing to risk diminishing the deterrent effect of capital punishment to make sure that the innocent are not executed. In the end, deterrence must be seen as just one of the many goals of criminal law. To hold otherwise is to abandon our long cherished principles of humane treatment of prisoners.<sup>76</sup>

## VII. SUBSTANTIVE DUE PROCESS

It is commonplace to distinguish procedural from substantive due process, but it is sometimes not so easy to provide a conceptual basis for distinguishing these categories of due process. One could maintain that procedural due process concerns only whether existing rules were followed, whereas substantive due process concerns whether a correct result was reached. Substantive due process is meant to guarantee that judicial decisions conform to standards of justice (commonly called natural justice) so that punishment be awarded only where it is due.<sup>77</sup> The idea of substantive justice can historically be traced back to the idea of equity that not only allowed for gaps in the law to be filled but also for black letter law to be overruled when fundamental fairness would be infringed.<sup>78</sup>

Paul M. Bator expresses the idea behind procedural due process by arguing that it should be thought of:

in terms of the conservation of resources — and I mean not only simple economic resources, but all of the intellectual, moral, and political resources involved in the legal system. The presumption must be, it seems to me, that if a job can be well done once, it should not be done twice.<sup>79</sup>

The idea behind procedural due process is that if a fair set of rules have been followed once, then justice has been done. It does not matter what result was reached by following those rules. Substantive due process, on the other hand, is result oriented. Fair rules can be followed and yet a morally or politically unjust result can be reached.

The Supreme Court has found that substantive due process prohibits conduct by the government that interferes with fundamental rights or “shocks the conscience.”<sup>80</sup> Some commentators have distinguished between two

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76. For example, if the only goal were deterrence, the less human treatment of prisoners would probably increase the deterrent effect as well. Thus, deterrence is only one goal of criminal law and cannot justify all means to the end.

77. See generally LON FULLER, *THE MORALITY OF LAW* (2d ed. 1969).

78. See LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* 235–54 (2005).

79. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963).

80. Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bills of Rights*, 103 COLUM. L. REV. 833, 841 (2003).

branches of substantive due process. Peter Rubin has recently expressed the distinction in the following way:

[A governmental action] can be arbitrary in the sense that is irrational and cannot be justified; such action is prohibited by the substantive due process rational basis test. And it can be arbitrary in the sense that it is brutal or despotic; this is action that is prohibited by the “shocks the conscience” or “arbitrary in the constitutional sense” test.<sup>81</sup>

The “fundamental liberty interest” branch of substantive due process has been acknowledged in a recent Supreme Court decision. In 1997, Chief Justice Rehnquist stated in *Washington v. Glucksberg*:

The Due Process Clause guarantees more than fair process, and the “liberty” it protects includes more than the absence of physical restraint . . . [I]n addition to the specific freedoms protected by the Bill of Rights, the “liberty . . . includes the rights to marry, to have children, to bodily integrity, and to abortion.”<sup>82</sup>

In the case of actual innocence, the fundamental right to live is a “liberty” that should be protected, which, if not protected, would constitute arbitrary treatment by the government. The “rights” or “liberties” of substantive due process have been defined by the Court as protected liberty interests and fundamental rights that are “implicit in the concept of ordered liberty” and “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>83</sup> Certainly the preservation of life is a constitutional guarantee under substantive due process that should override any argument that the procedural aspects of the trial were constitutional. This is why the *Amrine* decision was correct in recognizing the “manifest injustice” of execution or continued incarceration of an innocent person regardless of whether there was a procedurally “fair” trial.<sup>84</sup>

Considerations of substantive due process, or considerations of “manifest injustice,” are often controversial but can be defended normatively. Lon Fuller has said that there are basic principles of natural justice that must be adhered to in order to subscribe to the rule of law.<sup>85</sup> While most of these considerations are procedural, such as the prohibitions against ex post facto proceedings or secret witnesses, there are a few substantive principles that the courts have discussed under the label of fundamental principles of ordered liberty. For example, while there may be a procedurally fair system of slavery, it seems uncontroversial that such a system would violate substantive standards of justice. Again, while acknowledging that some of the principles of substantive

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81. *Id.* at 847.

82. 521 U.S. 702, 719–20 (1997) (citations omitted).

83. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

84. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. 2003) (en banc).

85. *See generally* FULLER, *supra* note 77.

due process are controversial, it would seem to us that the main consideration is that liberty, and certainly life, should not be taken by the state unless it is deserved. This is wholly consistent with principles of retribution, which are also ultimately grounded in what people deserve for the actions that they have taken.

Perhaps we can gain insight by looking at what is called manifest injustice in international criminal law. When interpreting the superior orders defense, it is claimed that no reasonable person could think that it is right to do what one was ordered to do if it involved manifest illegality.<sup>86</sup> The Rome Statute of the International Criminal Court, for example, categorizes crimes against humanity and genocide as “manifestly unlawful” for the purpose of superior orders.<sup>87</sup> Similarly, it could be said that it is manifestly unjust for an innocent person to be executed even if the execution was based on a procedurally fair trial. Courts should be able to see that, as in the case of slavery, procedural due process is not determinative of ultimate fairness. In the international criminal law case, the fact that a superior order has been given should not count as a justification for genocidal killing. Similarly, in the capital murder context, the fact that a trial court has reached a procedurally fair determination of guilt does not count as a justification for executing the innocent. The idea is that certain results are so clearly and patently wrong (morally or politically) that they cannot stand.<sup>88</sup>

The purpose behind the high standard of proof in criminal cases is to try to make sure that the innocent are not convicted, even at the cost of letting many of the guilty go free. Indeed, it is hard to find a better example of manifest injustice or a violation of substantive due process than executing the innocent. This is the holding of the Missouri Supreme Court in the *Amrine* opinion.<sup>89</sup> Even if the trial was procedurally correct, it would still violate our implicit understanding of due process if adhering to the verdict would allow an innocent person to be executed. Hence, it is hard to fathom why some commentators have argued against the right to even have a hearing on actual innocence claims, let alone to be exonerated on the basis of demonstrating one’s actual innocence.

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86. See William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 849 n.632 (2004).

87. Rome Statute of the International Criminal Court, July 17, 1998, art. 33, para. 2, UN Doc. A/CONF. 183/9\*, reprinted in 37 I.L.M. 1002 (1998).

88. Another interesting parallel with international law, suggested to us by David Sloss, is the way that the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights emphasize that judicial review of death penalty cases requires a “heightened level of scrutiny” because the right to life is the “supreme right” upon which all other rights depend. *Garza v. United States*, Case 12.243, Report No. 52/01, Inter-Am. Ct. Hum. Rts., OEA/ser. L/V/II.111 Doc. 20 rev. at 1255, para. 70 (Apr. 4, 2001).

89. *Amrine*, 102 S.W.3d 541.



## VIII. A FEW PRACTICAL CONCLUSIONS

In this final part we briefly propose one possible way to resolve this problem, namely through the creation of a special state appellate court or permanent special master authorized to hear “new” facts that are discovered after the initial trial. Here we follow the sage advice provided by most of the judges on the Missouri Supreme Court in *Amrine*. Three dissenting judges argued for a special master or other basis for determining if the new evidence was indeed reliable and dispositive.<sup>90</sup> One of the concurring judges called for a new trial.<sup>91</sup> The majority held that the prosecutor could proceed to a new trial, but if that option was not pursued, that *Amrine* should be released due to the weakness of the remaining evidence.<sup>92</sup>

In his concurring opinion in *Amrine*, Judge Wolff recognized that both the majority opinion and dissents found “that the state court’s writ of habeas corpus is the appropriate remedy in cases of actual innocence.”<sup>93</sup> In the dissent, Judge Price concurs with Judge Benton and would refer this case to a special “master for a hearing to determine, as a matter of fact and in light of all of the evidence, whether Mr. Amrine is actually innocent and, accordingly, whether he is entitled to relief from his conviction under habeas corpus.”<sup>94</sup> As in *Amrine*, if credibility is the key to a case claiming “actual innocence,” a separate hearing would correctly evaluate all the evidence. Another alternative is a new trial, although this has serious drawbacks if the case is old and the original witnesses are now hard to locate. Merely sending the case back to the original trial court for rehearing also poses problems because trial court judges are often reluctant to reverse themselves. If there were a specific appellate court or special master that could provide a hearing to consider the reliability of new evidence, the Missouri Supreme Court would not have had to assess the evidence on its own or remand the matter back to the original trial court.

It could be argued that adding a new appellate court or even a permanent special master would add new costs to a judicial system already hard-pressed for funds to support its existing institutions. We recognize this problem and yet think that the price of justice must often be paid, especially when we are dealing with cases in which death is involved. In addition, calling for a complete retrial is an extremely inefficient way to determine the reliability of one or two new pieces of evidence. A new state appellate court or a permanent special master should be empowered to provide an evidentiary hearing on the reliability of newly discovered evidence.

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90. *Id.* at 550–52 (Benton, J., dissenting) (Price, J., dissenting).

91. *Id.* at 550 (Wolff, J., concurring).

92. *Id.* at 549.

93. *Id.* at 550 (Wolff, J., concurring).

94. *Amrine*, 102 S.W.3d at 552.

As the Missouri Supreme Court recognized, it seems clear from the arguments considered that state appellate courts should hear habeas petitions alleging actual innocence. Habeas corpus petitions were first designed to give prisoners an avenue to prove that they were being unjustly incarcerated and punished. If claims of actual innocence, especially in capital cases, are not claims that fall under habeas review, it is unclear what complaints would ever properly fall under habeas review. Contrary to what the assistant attorney general argued in the *Amrine* case, and consistent with a long line of theorists who have considered this issue, everything possible should be done to make sure that the state does not execute the innocent.

