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The Constitutionality of Collateral Post-Conviction Claims of Actual Innocence Comment.

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COMMENT

THE CONSTITUTIONALITY OF COLLATERAL POST-CONVICTION CLAIMS OF ACTUAL INNOCENCE

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> I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed—"contrary to contemporary standards of decency," "shocking to the conscience," or offensive to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental[]"—the execution of a legally and factually innocent person would be a constitutionally intolerable event.[1]

I. INTRODUCTION

The notion that an innocent person can be punished by the state necessarily disrupts public confidence in the usefulness of the criminal justice system[2] and calls into question the very purpose it is meant to serve.[3] If by legislative design the criminal justice system is not concerned with or, worse yet, is accepting of a situation in which an innocent person is punished by the state,[4] then should courts not take immediate action to correct the obvious problem? But such a situation, as suggested by Justice Scalia, is not per se prohibited by the Constitution:

> This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is "actually" innocent. Quite to the contrary, we have repeatedly left that

1. Herrera v. Collins, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring) (citations omitted) (internal quotation marks omitted).

2. *Cf.* Republican Party of Minn. v. White, 536 U.S. 765, 817–18 (2002) (Ginsburg, J., dissenting) ("Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe." (citing Mistretta v. United States, 488 U.S. 361, 407 (1989))); Withrow v. Larkin, 421 U.S. 35, 46 (1975) ("Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.'" (quoting *In re* Murchison, 349 U.S. 133, 136 (1955))); Taylor v. Hayes, 418 U.S. 488, 503 (1974) (explaining that the courtroom "is a forum for the courteous and reasoned pursuit of truth and justice").

3. *See* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 323 (1988) ("Although the concept of 'actual innocence' has not explicitly played a part in federal post-conviction jurisprudence until recently, it is obvious that an enlightened system of justice should not tolerate continued incarceration of one who is demonstrably innocent.").

4. *See generally* Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 376–98 (2001) (arguing for a "heightened sensitivity" to claims of innocence in habeas corpus cases because the innocence "doctrine has developed to the point where it is positioned near, if not at, the top of the list of justifications for granting federal habeas corpus review").

> question unresolved, while expressing considerable doubt that any claim based on alleged "actual innocence" is constitutionally cognizable.[5]

Indeed, Justice Scalia has consistently implied that once a criminal defendant exhausts the appellate process, within which every court on direct review has upheld the jury's finding of guilt,[6] a federal habeas court sitting to determine a collateral challenge to the constitutionality of the defendant's imprisonment should not hear a claim of actual innocence.[7]

Such statements may seem shocking, even though they have apparent support under the federal habeas corpus statute as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[8] In relevant part, the AEDPA requires that a federal habeas court deny relief unless a defendant can show that the state court's adjudication of a claim involved an unreasonable or contrary application of clearly established federal law.[9] Therefore, Justice Scalia is correct in a procedural sense because the Court has never explicitly held actual innocence to be a valid claim recognized under the Constitution for federal habeas corpus

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5. *In re* Davis (*Davis VI*), 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting) (citing *Herrera*, 506 U.S. at 400–01, 416–17).

6. For more information on the differences between direct and collateral review of a criminal conviction, see generally Brent E. Newton, *A Primer on Post-Conviction Habeas Corpus Review*, CHAMPION, June 2005, at 16, *available at* 29 Champion 16 (LEXIS).

7. *See Davis VI*, 130 S. Ct. at 3 (Scalia, J., dissenting) ("There is no sound basis for distinguishing an actual-innocence claim from any other claim that is alleged to have produced a wrongful conviction."); *see also Herrera*, 506 U.S. at 427–28 (Scalia, J., concurring) ("There is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.").

8. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, secs. 101–108, 110 Stat. 1214, 1217–26 (codified as amended at 28 U.S.C. §§ 2244, 2253–2255, 2261–2266 (2006)).

9. 28 U.S.C. § 2254(d) (2006). More specifically, the AEDPA provides:

> 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—
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> (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
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id.

review.[10] That is, no ground exists for a federal habeas court to disturb a state court's denial of an actual innocence claim because such a denial does not reflect a contrary or unreasonable application of clearly established federal law.[11] Consequently, actual innocence is not recognized in the habeas context as sufficient to grant the writ absent some other constitutional deficiency.[12] That the Court has never explicitly accepted a standalone actual-innocence claim as valid for federal habeas corpus review, however, should not be grounds for its denial as a constitutionally cognizable basis for habeas relief.[13]

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10. *E.g.*, *Herrera*, 506 U.S. at 401 ("Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence."); *see also* House v. Bell, 547 U.S. 518, 554–55 (2006) (declining the opportunity to recognize that freestanding innocence claims are possible, and failing to articulate "whatever burden a hypothetical freestanding innocence claim would require"). Traditionally, the writ of habeas corpus "had little, if anything, to do with a petitioner's guilt or innocence" and instead focused on curing violations of constitutional rights. Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 377–78 (2001).

11. *See, e.g.*, Ira Kohlman, Annotation, *Actual Innocence Exception to Procedural Bars in Federal Habeas Cases—Supreme Court Cases*, 23 A.L.R. FED. 2d 93, 103–04 (2007) ("The Court has emphasized, however, that demonstrating actual innocence is *not itself a constitutional claim for habeas relief* but, rather, simply a gateway to habeas review of a procedurally defaulted claim. The Court thus distinguishes the actual innocence standard for obtaining habeas review from a freestanding claim of actual innocence without an accompanying constitutional claim for obtaining habeas relief.... Nevertheless, while the Court has indicated that a claim that a petitioner is actually innocent is *not*, standing alone, a claim warranting habeas relief, the Court has acknowledged that a truly persuasive freestanding claim of actual innocence *may* allow for habeas relief in a death penalty case...." (emphasis added)).

12. *Compare* Schlup v. Delo, 513 U.S. 298, 315–16, 331–32 (1995) (examining a petition for habeas corpus in which the claim of innocence was accompanied by "an assertion of constitutional error at trial" and remanding for further consideration under a proper standard of review), *with Herrera*, 506 U.S. at 416–19 (denying a petition for habeas corpus in which the petitioner asserted a freestanding claim of actual innocence unaccompanied by any assertion of constitutional error).

13. For example, one commentator noted that application of the miscarriage-of-justice exception has demonstrated the Supreme Court's acquiescence of federal courts considering actual innocence claims at least within the context of time-barred habeas petitions:

> Though recognizing the need to provide some level of recourse for otherwise-barred innocent prisoners, the Court has never held that an actual-innocence exception is constitutionally required. This is largely because the miscarriage-of-justice exception has always been applied either to overcome procedural hurdles of the Court's own making or as a means of giving substance to a discretionary power vested in the federal courts by statute. That said, the power of habeas corpus courts to vindicate an innocent prisoner's right to freedom and liberty has long been justified

If the writ of habeas corpus is to serve its central purpose of reversing unconstitutional convictions,[14] a claim of actual innocence—while seemingly paradoxical in the post-conviction context[15]—should be a viable claim under federal habeas review.[16] This Comment argues that the Constitution and the fundamental principles it protects should justify presenting evidence of one's actual innocence in a collateral post-conviction proceeding when such evidence was not available upon conviction. Part II addresses how the exclusion of actual innocence claims under general habeas review violates the founding precepts of the American tradition of achieving fundamental justice. Part III specifically discusses the case of federal habeas petitioner Troy

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by the Court, and is now sewn firmly into the fabric of habeas corpus jurisprudence.... [I]t seems clear that there must be an actual-innocence exception to AEDPA's statute of limitations. The pre-AEDPA jurisprudence illustrates that an actual-innocence exception should exist under any circumstances, notwithstanding time limitations.

Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 387–88 (2001) (footnotes omitted).

14. *See* Sawyer v. Whitley, 505 U.S. 333, 360 (1992) (Stevens, J., concurring) (reiterating the long-recognized importance of the writ of habeas corpus to protect against fundamentally unfair convictions); Engle v. Isaac, 456 U.S. 107, 126 (1982) ("The writ of habeas corpus indisputably holds an honored position in our jurisprudence.... Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.'" (quoting Wainwright v. Sykes, 433 U.S. 72, 97 (1977) (Stevens, J., concurring))); Walker v. Wainwright, 390 U.S. 335, 336–37 (1968) (per curiam) (declaring that the "great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention" in light of the Constitution).

15. Statistically, courts have struggled to reach correct verdicts in a "staggering" number of capital cases that were eventually held reversible, revealing the perceived paradox to be an unfortunate reality. *See* Thompson v. McNeil, 129 S. Ct. 1299, 1300 (2009) ("More than 30 percent of death verdicts imposed between 1973 and 2000 have been overturned, and 129 inmates sentenced to death during that time have been exonerated, often more than a decade after they were convicted." (footnotes omitted)), *denying cert. to* Thompson v. Sec'y for the Dep't of Corr., 517 F.3d 1279 (11th Cir. 2008).

16. *Cf. Walker*, 390 U.S. at 336–37 (concluding a court can consider claims for habeas relief, even when the petitioner might still serve a prison term for another crime, because the present confinement would be unlawful if the "conviction was obtained in violation of the Constitution"). Moreover, the public interest in the integrity of the judicial process could suffer if actual innocence is not seen as justifying the reexamination of a case, let alone exoneration of the petitioner. *Cf.* Mayberry v. Pennsylvania, 400 U.S. 455, 467–68 (1971) (Burger, C.J., concurring) (explaining that a judge has discretion to "have counsel participate in the defense even when rejected" by the defendant because "[i]n every trial there is more at stake than just the interests of the accused," "[a] criminal trial is not a private matter," and "the presence and participation of counsel[] ... is warranted in order to vindicate the process itself").

Anthony Davis[17] to analyze why actual innocence claims as a category should be constitutionally cognizable in federal habeas review (without expressing an opinion on the factual or legal merit of Davis's particular claim of actual innocence). Part IV examines the Due Process Clause of the Fourteenth Amendment to demonstrate that the denial of an actual innocence claim upon federal habeas review amounts to an unconstitutional infringement of the fundamental liberty interest in bodily freedom. Part V explores the Eighth Amendment to show that the current system, as limited by the AEDPA, represents an unconstitutional barrier to an actual innocence claim resulting in a proscribed form of cruel and unusual punishment. Finally, given these propositions, Part VI concludes that habeas petitioners like Troy Anthony Davis should, at the very least, be afforded a forum and an opportunity for courts to consider collateral post-conviction claims of actual innocence as a constitutionally cognizable basis for habeas relief.[18]

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17. *See generally* Davis v. State (*Davis I*), 426 S.E.2d 844 (Ga. 1993) (affirming Davis's conviction for the murder of a Georgia police officer).

18. It is important to note at the outset that a habeas petitioner in this context falls within a specific and narrow category of litigant: one who has had a fully and fairly litigated trial, been adjudicated guilty, had his conviction affirmed upon direct appeal, and further seeks collateral review to assert his innocence. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (explaining how the process for collateral habeas attacks on convictions begins "[a]fter trial, conviction, sentence, appeal, [and] affirmance"); Brent E. Newton, *A Primer on Post-Conviction Habeas Corpus Review*, CHAMPION, June 2005, at 16, 16, *available at* 29 Champion 16 (LEXIS) ("After the direct appeal process has been completed, a criminal defendant may file a 'collateral' challenge to his conviction and sentence."). Such a petitioner approaches the court in a posture much different from a litigant who has been merely accused of a crime. *See* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2320 (2009) (observing that, because the "criminal defendant prove[n] guilty after a fair trial does not have the same liberty interests as a free man," the state "has more flexibility in deciding what procedures are needed in the context of postconviction relief"); Herrera v. Collins, 506 U.S. 390, 399–400 (1993) (reviewing a federal petition for habeas corpus from the standpoint that, "in the eyes of the law, petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law"); Jennifer Gwynne Case, Note, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 WM. & MARY L. REV. 669, 697–98 (2008) (explaining that, as the petitioner proceeds further along the post-conviction process, the risk of wrongful conviction decreases with each chance to demonstrate his innocence, conversely resulting in an increased "need for finality, comity, and conservation of judicial resources"). *See generally* Ira Kohlman, Annotation, *Actual Innocence Exception to Procedural Bars in Federal Habeas Cases—Supreme Court Cases*, 23 A.L.R. FED. 2d 93 (2007) (exploring Supreme Court decisions that discuss federal habeas review standards for claims of actual innocence). This Comment does not address the per se constitutionality of punishing

II. THE AMERICAN TRADITION

American society declares that it is free,[19] just, and principled.[20]

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those who are actually innocent. Rather, it narrowly focuses on the idea that one already convicted should not be denied upon habeas review a *forum and opportunity* to assert his actual innocence when he has evidence—either not available or not introduced at trial—that would demonstrate his actual innocence of the crime for which he is presently incarcerated, *notwithstanding* the adequacy and propriety of the conviction or sentence preceding the petition.

19. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law."); *cf.* United States v. Taylor, 30 M.J. 882, 883–84 (A.F.C.M.R. 1990) (explaining how a person involved in a domestic dispute and physical altercation with police has the freedom to act "foolish or irrational" as well as "pig-headed and difficult" and, without more, does not violate the rights of others or commit a criminal offense). In the United States, "liberty" under the Due Process Clause entails the independence to conduct oneself without restriction, to the extent it does not result in a criminal act and subsequent conviction, and no state or statute should disrupt this balance without sufficient justification. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (emphasizing that the Due Process Clause undoubtedly guarantees "freedom from bodily restraint" that "may not be interfered with" by arbitrary or capricious governmental action), *abrogated in part by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Moreover, liberty includes the freedom to marry, raise children, worship, "and generally . . . enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness." *Id.* at 399. The Bill of Rights has long served a venerable role in our society to guarantee liberty that transcends even the Constitution. *See, e.g.*, *Osborne*, 129 S. Ct. at 2334 (2009) (Stevens, J., dissenting) ("The liberty protected by the Due Process Clause is not a creation of the Bill of Rights. Indeed, our Nation has long recognized that the liberty safeguarded by the Constitution has far deeper roots."). Additionally, the Bill of Rights has served to compel courts to ensure for all Americans a free country organized with laws that are justifiable, fair, and necessary. *Cf., e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) ("We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971))). *But see* Grant v. McAuliffe, 264 P.2d 944, 950 (Cal. 1953) (en banc) (Schauer, J., dissenting) (criticizing the majority's suggestion that courts are not "bound to consistent enforcement or uniform application of 'a statute or other rule of law'" but may decide "'according to the nature of the problem' as they view it" because it "strikes deeply at what has been our proud boast that ours was a government of laws rather than of men").

20. *See* M'Culloch v. Maryland, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional."); Tooker v. Lopez, 249 N.E.2d 394, 400 (N.Y. 1969) (reasoning that our legal system is not exclusively concerned with easily applied rules or procedural certainty but rather "with rational and just rules"); *cf.* Michael Anthony Lawrence, *Government As Liberty's Servant: The "Reasonable Time, Place, and Manner" Standard of Review for All Government Restrictions on Liberty Interests*, 68 LA. L. REV. 1, 37–47 (2007) (proclaiming that the government exists primarily to protect our fundamental interest in freedom because the "single irreducible value eclipsing all else under the American constitutional regime is Liberty/Freedom"). Our laws are principled and fairly imposed restrictions on the freedom to act, which are derived not from

Inherent to our national identity is the adamantine belief that those in compliance with the law will not be imprisoned.[21] More specifically, it is the fundamental idea that the government can only incarcerate someone who not only commits a crime but who also is further convicted upon sufficient evidence in a court of law.[22] Thus, American tradition compels courts to neither allow the state to charge someone for a crime with which he has no connection[23] nor countenance the punishment of someone who has not been proven guilty beyond a reasonable doubt.[24] Put

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legislative whim but rather from an informed determination of their necessity for the advancement and betterment of society. *See* Grant Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1044 (1975) ("A reasonably just society will reflect its values in a reasonably just law. The better the society, the less law there will be."). More important, what should be self evident is that a law-based society cannot properly function unless its laws have fair and justifiable purposes, and its administration provides a meaningful opportunity for all to be aware of the laws and the consequences for violating them.

21. *See, e.g.*, House v. Bell, 547 U.S. 518, 541 (2006) (underscoring that "[l]aw and society, as they ought to do, demand accountability when a[n] ... offense has been committed"); *cf.* Robinson v. California, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."). The *Robinson* opinion describes the power of the Constitution to abate any state attempt to imprison a defendant who has not committed what could reasonably constitute a crime. *Robinson*, 370 U.S. at 664–67. Thus, when the state attempts to criminalize that which cannot constitute criminal conduct, federal courts can exercise their constitutional authority to overrule it. *See id.* at 666 ("But, in the light of contemporary human knowledge, a law which made a criminal offense of ... a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

22. *See In re* Winship, 397 U.S. 358, 363 (1970) (noting that an accused should be acquitted unless the evidence "is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged" (quoting Davis v. United States, 160 U.S. 469, 493 (1895)) (internal quotation marks omitted)). When examining the constitutionally mandated standard of proof in juvenile proceedings, the Supreme Court noted the longstanding history of our nation to require proof beyond a reasonable doubt in the criminal context as "basic in our law and rightly one of the boasts of a free society." *Id.* at 359, 361–62 (quoting Leland v. Oregon, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting)) (internal quotation marks omitted). The reasonable doubt standard was "developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty[,] and property." *Id.* at 362 (quoting *Davis*, 160 U.S. at 488) (internal quotation marks omitted).

23. McCleskey v. Kemp, 481 U.S. 279, 307 n.28 (1987) ("If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged.").

24. *See Winship*, 397 U.S. at 364 ("It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."). The stringent beyond a reasonable doubt standard, while a significant burden on the states in criminal proceedings, was adopted in large measure to

differently, ours is a nation that commands the state to leave alone those obeying the law based on a history deeply respectful of the right of individual liberty per se[25]—the freedom of all persons to live without restraint on their body or their movement when they have not violated the law.[26]

In reality, the American form of criminal justice is imperfect in its design just like any other system of justice.[27] Indeed, the very

secure the "moral force" of criminal laws and to avoid "leav[ing] people in doubt whether innocent men are being condemned." *Id.* ("[T]he reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law."); *accord House*, 547 U.S. at 539–41 (emphasizing the importance of evidentiary support beyond a reasonable doubt because "[f]rom beginning to end[,] the case is about who committed the crime"); Schlup v. Delo, 513 U.S. 298, 324–25 (1995) ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent."); Herrera v. Collins, 506 U.S. 390, 398 (1993) ("After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent."); *Davis*, 160 U.S. at 493 ("No man should be deprived of his life . . . unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.").

25. *Cf., e.g.*, Youngberg v. Romeo, 457 U.S. 307, 309–310, 315–16 (1982) (noting that even a mentally challenged person, involuntarily committed because of his parents' inability to provide adequate care and not due to the commission of any crime, maintains a liberty interest in the freedom from bodily restraint). In examining the extent of the substantive due process rights of a special needs individual, the *Youngberg* Court considered its prior decisions and concluded that the liberty interest not only "survives criminal conviction and incarceration" but also protects against arbitrary government decisions made in the "involuntary commitment" context. *Id.* at 316 ("Indeed, 'liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" (quoting Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part))); *accord* Meyer v. Nebraska, 262 U.S. 390, 399–403 (1923) (striking down a state statute that prohibited teaching school subjects in any foreign language as a violation of the liberty interest under the Due Process Clause because it was "arbitrary and without reasonable relation to any end within the competency of the state"), *abrogated in part by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

26. *See* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2334 (2009) (Stevens, J., dissenting) ("The 'most elemental' of the liberties protected by the Due Process Clause is 'the interest in being free from physical detention by one's own government.'" (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion))); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *Youngberg*, 457 U.S. at 315–16 (recognizing that the Court has previously found the right to freedom from bodily restraint to be within the liberty interest protected under the Constitution).

27. *See* Thompson v. McNeil, 129 S. Ct. 1299, 1302 (2009) (Thomas, J., concurring) (acknowledging that "no criminal justice system operates without error"), *denying cert. to* Thompson v. Sec'y for the Dep't of Corr., 517 F.3d 1279 (11th Cir. 2008). There are likely as many criticisms of the American criminal justice system as there are criminals who have

presence of the habeas system recognizes this imperfection,[28] which often produces errors even when the system operates as intended.[29] Despite the best efforts of the courts,[30] there exists ample evidence of innocent people serving sentences for crimes they did not commit.[31] Such errors perpetuate injustice[32] and exact obvious and hidden costs upon both the wrongly convicted[33]

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answered to it. For example, a recent article reported an "emerging consensus" between conservatives and liberals that the criminal justice system is in need of adjustment to rein in the "more than 4,400 criminal offenses in the federal code, many of them lacking a requirement that prosecutors prove traditional kinds of criminal intent." Adam Liptak, *Right and Left Join to Take on U.S. in Criminal Justice Cases*, N.Y. TIMES, Nov. 24, 2009, at A1, *available at* 2009 WLNR 23673580.

28. *See Herrera*, 506 U.S. at 400 (noting the purpose for federal habeas review is "to ensure that individuals are not imprisoned in violation of the Constitution" rather than to ensure the factual accuracy of trials).

29. *See, e.g.*, Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 366 n.104 (2001) (referencing, in the context of capital cases, research showing "that federal habeas corpus courts found serious error in forty percent of the capital judgments they reviewed, despite the fact that these capital judgments previously underwent state direct appeals and state post-conviction reviews"). Mistakes can reflect adversely upon the criminal justice system, and judges and juries, despite their best personal efforts, are no less human and no less capable of error than anyone else. *Cf. Winship*, 397 U.S. at 370–72 (Harlan, J. concurring) (justifying the heavy burden of showing proof beyond a reasonable doubt because "the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions").

30. *See, e.g.*, California v. Trombetta, 467 U.S. 479, 485–86 (1984) (detailing procedural and constitutional safeguards for the defendant's access to evidence aimed at "protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system").

31. At the time of this writing, the Innocence Project reported that there have been 261 people found guilty of a crime who were later exonerated by the use of DNA evidence, seventeen of whom were serving time on death row. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Oct. 22, 2010). Founded in 1992 at the Benjamin N. Cardozo School of Law, the Innocence Project is one of the better-known advocacy organizations focusing on "nothing less than to free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment." *Mission Statement*, INNOCENCE PROJECT, http://www.innocenceproject.org/about/Mission-Statement.php (last visited Oct. 22, 2010).

32. *See* Ernest van den Haag, Commentary, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1663 (1986) (noting the improper distribution of punishment "between the guilty and the innocent is, by definition, unjust").

33. The injustice that attends any wrongful conviction has the obvious and immediate effect of denying to the innocent their constitutional guarantee of freedom. *See* U.S. CONST. amend. XIV, § 1 (guaranteeing the government will not deprive one of his "life, liberty, or property, without due process of law"). Moreover, psychiatric study and analysis of those who have been wrongfully convicted reveals less obvious but nonetheless

and society at large.[34] A building movement to spur change in how state and federal courts handle claims of litigants asserting actual innocence for otherwise valid convictions[35] strengthens the need to re-examine how well the criminal justice system serves its traditional purpose.

Our laws reflect the measured consideration of our legislatures to reasonably restrict conduct that affects others or society as a whole.[36] Yet, to further the Founding Fathers' vision for America as a free nation, courts should protect and promote not only the rule of law but also traditional notions of due process, equality, fairness, and the like,[37] regardless of the difficulty in such an

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substantial incidental harms created by erroneous convictions:

> [T]he forms of suffering and damage experienced by these [wrongfully convicted] men and their families were numerous; they interacted and compounded one another, and led to secondary problems. The life courses of those involved were permanently changed. The men suffered losses—of relationships, prospects, and years of their expected life history. The harms extended over time and generations. The distress was often severe: when families confided that the time since the man's release has been worse than the years of prison, and when the men admitted that sometimes they wished they were back inside, it was a measure of the burdens they experienced.

Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUST. 1, 40–41 (2005).

34. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596 (1980) (Brennan, J., concurring) ("A miscarriage of justice that imprisons an innocent accused also leaves a guilty party at large, a continuing threat to society. . . . Facilitation of the trial factfinding process, therefore, is of concern to the public as well as to the parties.").

35. *See* John Eligon, *Hope for the Wrongfully Convicted*, N.Y. TIMES, Nov. 23, 2009, at A23, *available at* 2009 WLNR 23597359 ("Advocates of the actual innocence doctrine have been riding a swell of momentum over the past several months.").

36. *Cf.* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (explaining that a state has no constitutional duty to secure liberty interests because the Due Process Clause "was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression,'" to arbitrarily restrict individual freedoms (alteration in original) (quoting Davidson v. Cannon, 474 U.S. 344, 348 (1986))); Furman v. Georgia, 408 U.S. 238, 321 n.19 (1972) (Marshall, J., concurring) (suggesting the Eighth Amendment was adopted to prohibit the government from imposing punishments not clearly necessary); *In re* Winship, 397 U.S. 358, 361–62 (1970) (concluding that the historically uniform adherence to the reasonable-doubt standard in all states "reflect[s] a profound judgment about the way in which law should be enforced and justice administered" (quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968)) (internal quotations marks omitted)).

37. For example, courts must at all times remain faithful to the demands of due process and remove any possibility of actual or perceived impropriety. *See In re* Murchison, 349 U.S. 133, 136 (1955) (noting that, because a "fair trial in a fair tribunal is a basic requirement of due process," the legal system "has always endeavored to prevent even the probability of unfairness"); Tumey v. Ohio, 273 U.S. 510, 532 (1927) (declaring any practice or procedure that may tempt the "judge to forget the burden of proof

undertaking.[38] Indeed, as a matter of legitimacy, judges should always strive to secure these very ideals because courts ultimately derive their authority and power from the respect that society places in the legal system.[39] For this reason, the American form of government and concept of justice depend not on the whim of police officers or judges but on the bedrock principles underlying the Constitution,[40] the rule of law,[41] and the courts,[42] which

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required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused[,] denies the latter due process of law"). Similarly, even though it may be a far simpler task for the judge to close his courtroom in a particular instance, the Supreme Court has made clear that any judicial proceeding must maintain a degree of openness to "vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct." Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 508–09 (1984).

38. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring) ("To strive for judicial integrity is the work of a lifetime. That should not dissuade the profession. *The difficulty of the undertaking does not mean we should refrain from the attempt.*" (emphasis added)).

39. *See* Mistretta v. United States, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). Without legitimacy to command the respect of the people and their willingness to abide by court rulings, the judiciary has no independent means to enforce its judgments and is rendered nugatory. *See Republican Party*, 536 U.S. at 793 (Kennedy, J., concurring) ("The power and the prerogative of a court to perform" its duties rests upon the respect it is given by the people, which "depends in turn upon the issuing court's absolute probity."). Respect for the judicial system is derived from a belief that the courts will not unfairly serve or bend to extrajudicial interests and will take every measure to ensure justice prevails. *See id.* at 798 (Stevens, J., dissenting) (distinguishing the work of judges as an obligation to distribute justice and remain "indifferent to unpopularity" in the determination of law and fact rather than accede to personal or public opinion).

40. The Constitution serves as the people's shield against arbitrary government action, forbidding the government from controlling the citizenry in any onerous manner. *Cf.* Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (concluding that laws based merely on "the State's moral disapproval" are at every level contrary to the "values of the Constitution"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849–50 (1992) (plurality opinion) (explaining that courts must exercise "reasoned judgment" to "define the liberty of all" and not allow "basic principles of morality" to control decisions); Dahl v. Sec'y of the U.S. Navy, 830 F. Supp. 1319, 1323 (E.D. Cal. 1993) (noting that any government policy motivated by prejudice is "irrational as a matter of law" and cannot be permitted to give effect to that prejudice); benShalom v. Sec'y of Army, 489 F. Supp. 964, 976 (E.D. Wis. 1980) (illustrating that even though one may view homosexuality as "displeasing, disgusting, and immoral," these personal judgments are "not ingredients for ga[u]ging [the] constitutional permissibility" of government regulation). *But see* Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1238 n.8 (11th Cir. 2004) (proclaiming "the Supreme Court has noted on repeated occasions that laws can be based on moral judgments" (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991); Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973); United States v. Bass, 404 U.S. 336, 348 (1971))).

41. *E.g.*, *Casey*, 505 U.S. at 854 (emphasizing that continuity and the obligation to

adjudge an accused's criminal guilt only upon the measured consideration of his peers.[43]

Moreover, the Constitution and the criminal justice system it guides should, at all times, focus exclusively on ascertaining the truth with the grand aim that fundamental justice—not the ends of finality, comity, or judicial economy—ultimately carries the day.[44]

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follow established legal precedent are indispensable to "the very concept of the rule of law underlying our own Constitution").

42. A fundamental component of American life is the protection of the courts. *See, e.g.*, U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). If one feels his constitutional rights have been violated by enactment of a statute or another act of government, courts stand ready to provide a forum for that individual to challenge the state. *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (proclaiming that "[a]ny law is subject to challenge at any time by any individual who alleges a substantial burden" on his constitutional freedoms). For a criminal trial, there are further safeguards meant to ensure the reliability of convictions, such as the presumption of innocence, a stringent standard of proof, rules of evidence, a robust system of appeals, and, at the most basic level, the rigors of the adversarial system. *See* Herrera v. Collins, 506 U.S. 390, 398–99 (1993) (listing many of the constitutional safeguards that "make it more difficult for the State to rebut and finally overturn the presumption of innocence which attaches to every criminal defendant").

43. *See In re* Winship, 397 U.S. 358, 363 (1970) (asserting that criminal guilt may only be assessed against a defendant when the jurors have determined the Government proved its case beyond a reasonable doubt).

44. *Cf., e.g.*, Jackson v. Virginia, 443 U.S. 307, 323–24 (1979) (reasoning the guilt of every criminal defendant must be proven beyond a reasonable doubt because the adequacy of evidence "is central to the basic question of guilt or innocence" and "[t]he constitutional necessity of proof . . . is not confined to those defendants who are morally blameless"). In examining the nature of habeas corpus jurisprudence, particularly the governmental interests associated with limiting its effect and a prisoner's ability to avail himself of habeas relief, the Supreme Court has often noted the importance of finality and respect for state judgments as sufficient reasons to curtail the protection afforded by the writ of habeas corpus. *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 324 (1995) (stating that, in extraordinary federal habeas cases, "the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice"). However, state interests in promoting the finality of judgments, preserving judicial resources, or maintaining comity should not justify punishing a person for a crime he did not commit because such a result contradicts the fundamental purpose and primary function of the whole criminal justice system, which is to punish the guilty and protect the innocent. *See* House v. Bell, 547 U.S. 518, 540 (2006) ("From beginning to end the case is about who committed the crime."); *Herrera*, 506 U.S. at 398 ("After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent." (citing United States v. Nobles, 422 U.S. 225, 230 (1975))). Stated another way, if the state may use the conservation of judicial resources as sufficient justification to punish the innocent (or continue to punish the innocent in error), what purpose is served by the criminal justice system in the first place? Why expend a certain measure of state resources to convict an actually innocent person and then conclude that further expenditure is per se unjustifiable because of the need to

In this unabated pursuit of truth and justice, neither judge nor statute should bar those actually innocent of their convictions from clearing their name under the law or otherwise impede the courts in declaring actual innocence as an independent ground constitutionally sufficient to mandate an innocent person's exoneration.[45] If the aim of our independence[46] and our Constitution[47] is to protect personal prosperity and freedom, then the contention that actual innocence claims may not be constitutionally cognizable in federal habeas review seems both injurious and antithetical to furthering the founding precepts of the American tradition.

III. THE STORY OF TROY ANTHONY DAVIS

> Even if the court finds that [the AEDPA] applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence.[48]

In 1991, a Georgia jury convicted Troy Anthony Davis of murder and sentenced him to death.[49] Eighteen months later, on

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conserve those very same resources? If the goal of convicting the guilty and freeing the innocent is deemed sufficient to warrant the expenditure of state resources, then any additional expenditure of those very resources should be justified to ensure the goal is accurately met.

45. *Cf. In re* Oliver, 333 U.S. 257, 278–82 (1948) (Rutledge, J., concurring) (stressing the importance of constitutional guarantees over a state's experiment with the convenience of a one-man grand jury procedure that does not "offer promise on the whole of more improvement than harm, either for the cause of perfecting the administration of justice or for that of securing and perpetuating individual freedom").

46. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.... That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.").

47. *See* U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

48. *Davis VI*, 130 S. Ct. 1, 1 (2009) (Stevens, J., concurring).

49. Davis v. Turpin (*Davis II*), 539 S.E.2d 129, 131 (Ga. 2000). More specifically, Davis was found guilty of "murder, obstruction of a law enforcement officer, two counts of aggravated assault[,] and possession of a firearm during the commission of a felony." *Davis I*, 426 S.E.2d 844, 845 (Ga. 1993).

direct appeal, all six participating justices of the Supreme Court of Georgia affirmed Davis's conviction and sentence.[50] According to the Georgia Supreme Court, the evidence supported the contention that on August 19, 1989, shortly after midnight, police officer Mark Allen MacPhail responded to an altercation and was shot multiple times and killed by Davis.[51]

Based on the evidence presented at trial, the incident occurred as follows. On the night of the murder, Officer MacPhail was off duty and working as a security guard at a Greyhound bus station in Savannah, Georgia.[52] MacPhail witnessed Davis strike another man in the head with a pistol in the parking lot of a fast food restaurant adjacent to the bus station.[53] In response, MacPhail ran to the scene—wearing his badge, gun, nightstick, and police uniform—and ordered the fleeing Davis to halt.[54] Davis turned toward MacPhail and shot him in the face.[55] MacPhail fell to the ground, severely injured but alive.[56] "Davis, smiling, walked up to the stricken officer and shot him several more times."[57] Officer MacPhail never drew his revolver from his gun belt.[58]

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50. *Davis I*, 426 S.E.2d at 846, 849 (stating "[t]he evidence supports the conviction on all counts"). Presiding Justice Hunt's opinion was unanimously joined by the five other justices who participated in the matter, while Justice Hunstein did not participate. *Id.* at 845, 849.

51. *Id.* at 845 n.1, 846; *see also* Savannah Morning News, *Troy Davis Case: What Happened*, SAVANNAHNOW.COM (Aug. 24, 2010, 2:20 PM), http://savannahnow.com/troy-davis/2010-08-24/troy-davis-case-what-happened (reporting that officer MacPhail was shot twice "as he rushed to assist a homeless man, Larry Young, under attack over some beer in the parking lot" of the restaurant).

52. *Davis I*, 426 S.E.2d at 846.

53. *Id.*; *see also* Savannah Morning News, *Troy Davis Case: What Happened*, SAVANNAHNOW.COM (Aug. 24, 2010, 2:20 PM), http://savannahnow.com/troy-davis/2010-08-24/troy-davis-case-what-happened (stating testimony showed that "Davis . . . joined in the quarrel" between Young and another man named Sylvester Coles "and struck Young on the side of his right eye with a pistol").

54. *Davis I*, 426 S.E.2d at 846.

55. *Id.* at 846, 848. *But see* Savannah Morning News, *Troy Davis Case: What Happened*, SAVANNAHNOW.COM (Aug. 24, 2010, 2:20 PM), http://savannahnow.com/troy-davis/2010-08-24/troy-davis-case-what-happened (noting that "[p]rosecutors said Davis shot MacPhail once in the heart while he was standing, then a second time in the face as he lay on the asphalt parking lot surface").

56. *Davis I*, 426 S.E.2d at 846, 848.

57. *Id.* at 846.

58. *Davis I*, 426 S.E.2d 844, 846 (Ga. 1993); *see also* Savannah Morning News, *Troy Davis Case: What Happened*, SAVANNAHNOW.COM (Aug. 24, 2010, 2:20 PM), http://savannahnow.com/troy-davis/2010-08-24/troy-davis-case-what-happened (reporting "MacPhail never unholstered his weapon" and "[n]o murder weapon was recovered").

The evidence further showed that, on the following day, Davis remarked to a friend that he initially shot Officer MacPhail because the officer attempted to intervene in an argument between him and another man.[59] Davis was found to have told the friend that he fired the subsequent shots—striking MacPhail's right leg and chest—because he knew the officer had taken a "good look at his face when he shot [the officer] the first time."[60] The bullet in Officer MacPhail's chest penetrated his lung and heart, killing him.[61] Later, Davis repeated this account in similar fashion to a cellmate.[62]

In 1994, following the decision of the Georgia Supreme Court to uphold his conviction, Davis filed for state habeas corpus relief.[63] In 1997, after conducting an evidentiary hearing the prior year, the state habeas court denied Davis's petition on the basis that his claims were either procedurally barred or did not show a constitutional violation.[64] Three years later, the Georgia Supreme Court affirmed these determinations.[65] Davis next filed a petition for federal habeas relief under 28 U.S.C. § 2254, which the district court similarly denied.[66] In this federal habeas petition, Davis raised not only arguments of constitutional violations but also a claim of being actually innocent of the crime for which he was convicted;[67] however, the district court reviewed and rejected his

59. *Davis I*, 426 S.E.2d at 846.

60. *Id.*; *see also* Savannah Morning News, *Troy Davis Case: What Happened*, SAVANNAHNOW.COM (Aug. 24, 2010, 2:20 PM), http://savannahnow.com/troy-davis/2010-08-24/troy-davis-case-what-happened (stating a close friend of Davis testified that Davis said he "finished the job" as a matter of "self-defense" (internal quotation marks omitted)).

61. *Davis I*, 426 S.E.2d at 846; *see also id.* at 848 (noting the shot to the chest inflicted the "fatal wound").

62. *Id.* at 846.

63. *Davis II*, 539 S.E.2d 129, 131 (Ga. 2000).

64. *Id.* at 131–34. In his state habeas petition, Davis argued that death by electrocution is a form of cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 131. The court ruled this claim was procedurally barred. *Id.* Additionally, Davis sought habeas relief on grounds of an unconstitutional conflict of interest between his post-conviction, court-appointed attorney (who handled his claims of ineffective counsel) and the original trial counsel (who still represented him on all other issues). *Id.* at 131–32. On this claim, the court concluded there was no evidence to support that such a conflict existed to deny Davis his Sixth Amendment right to effective assistance of counsel. *Davis II*, 539 S.E.2d at 132–33.

65. *Id.* at 131–34.

66. Davis v. Terry (*Davis III*), 465 F.3d 1249, 1250–51 (11th Cir. 2006) (per curiam).

67. *Id.* at 1251–52.

constitutional claims without reaching the merits of his innocence claim.[68]

Upon review of the district court's denial of his federal habeas petition, the Eleventh Circuit Court of Appeals noted that Davis's petition did not assert a substantive claim of innocence but "[r]ather . . . argue[d] that his constitutional claims of an unfair trial must be considered, even though they [were] otherwise procedurally defaulted."[69] Thus, even though Davis contended on appeal that "the district court erred in declining to consider evidence of his actual innocence," the Eleventh Circuit held he could not prevail on this argument because "Davis received precisely [the] substantive consideration" of his constitutional claims that he procedurally desired.[70] Accordingly, the appellate court reviewed his claims of a constitutionally unfair trial and, finding no error, affirmed the district court's decision.[71] In 2007, following the decision of the Eleventh Circuit, the Georgia trial court set a new date of execution for Davis.[72]

Davis then "filed an extraordinary motion for new trial, presenting newly discovered evidence" of his innocence.[73] The Georgia state court reviewed this new evidence, consisting of seven affidavits of eyewitnesses *recanting* their trial testimony of Davis's responsibility for the murder; three affidavits that another man, Sylvester Coles, confessed to the murder of Officer

68. *See In re* Davis (*Davis V*), 565 F.3d 810, 813 (11th Cir. 2009) (per curiam) ("The district court did not rule on his actual innocence claim, instead reaching the merits of his constitutional claims and denying his petition.").

69. *Davis III*, 465 F.3d at 1251. The court made clear that Davis's federal habeas petition was to be analyzed under the Supreme Court's decision in *Schlup v. Delo*, which recognized the validity of innocence claims to seek habeas review of convictions resulting from constitutionally unfair trials, rather than the opinion in *Herrera v. Collins*, which left unanswered the viability of freestanding innocence claims to warrant habeas review of convictions resulting from constitutionally fair trials. *Id.* at 1251–53 & nn.1–2. *Compare* Schlup v. Delo, 513 U.S. 298, 313–17 (1995) (reasoning that "Schlup's conviction may not be entitled to the same degree of respect as one[] such as Herrera's" because *Herrera* "was evaluated on the assumption that the trial . . . had been error free"), *with* Herrera v. Collins, 506 U.S. 390, 393, 400–19, 419 (1993) (examining the viability of Herrera's freestanding claim of actual innocence for federal habeas relief and concluding his new exculpatory evidence fell "far short of that which would have to be made in order to trigger . . . [a] constitutional claim").

70. *Davis III*, 465 F.3d at 1253.

71. *See generally id.* at 1253–56 (concluding the petitioner failed to demonstrate that the district court erred in finding no constitutional violation in Davis's trial).

72. *Davis V*, 565 F.3d at 814.

73. *Id.*

MacPhail; affidavits supporting his innocence from eyewitnesses who did not testify at trial; affidavits from experts concerning errors in ballistics information and eyewitness identifications; and other evidence supporting his innocence.[74] In assessing the motion for new trial, "[t]he state trial court concluded that some of the affidavits contained inadmissible hearsay, that the post-trial affidavits by some of the State's witnesses did not constitute cause for a new trial, and that several affidavits were not so material that they would have produced a different result."[75] Consequently, the trial court denied the motion without a hearing, and Davis appealed that decision to the Supreme Court of Georgia.[76]

The Supreme Court of Georgia initially noted the "evidence at trial authorized the jury to conclude beyond a reasonable doubt that Davis ... shot Officer MacPhail."[77] The court further determined that, after examining each type of affidavit submitted, the newly discovered evidence was insufficient to merit the grant of a new trial.[78] Reasoning that "most of the witnesses to the crime who have allegedly recanted have merely stated that they now do not feel able to identify the shooter," the Georgia Supreme Court affirmed the denial of Davis's motion for new trial.[79] The dissent objected to the majority's analysis of the new trial motion[80] and identified the formidable possibility that an

74. *Id.* Notably, Coles was one of the witnesses relied on by the State in securing the conviction against Davis, even though Davis claimed Coles was responsible for the murder. Davis v. State (*Davis IV*), 660 S.E.2d 354, 357 (Ga. 2008). For this motion for new trial, Davis presented affidavits from three different people tending to show that, subsequent to Davis's conviction, Coles admitted he was the one who shot Officer MacPhail. *Id.* at 360–61.

75. *Davis V*, 565 F.3d at 814.

76. *Davis IV*, 660 S.E.2d at 357.

77. *Id.*

78. *See id.* at 358–63 (analyzing each affidavit submitted in Davis's motion for new trial and concluding that the trial court did not err in denying the motion). In reviewing the eyewitness recantation evidence, the court relied on a "purest fabrication" standard, which requires newly presented eyewitness recantation evidence to show no doubt that the State's eyewitness testimony was pure fabrication in every material part. *Id.* at 358–60 (citing Norwood v. State, 541 S.E.2d 373, 374 (Ga. 2001)). Holding each affidavit of eyewitness recantation to this stringent standard, the Georgia Supreme Court agreed with the trial court's determination that this evidence did not merit a new trial. *Id.* at 358–60, 363.

79. *Davis IV*, 660 S.E.2d at 363.

80. *See id.* at 363 (Sears, C.J., dissenting) ("[T]his Court's approach ... is overly rigid and fails to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, as in this case, might be put to

innocent man may face execution, as follows:

> In this case, nearly every witness who identified Davis as the shooter at trial has now disclaimed his or her ability to do so reliably. Three persons have stated that Sylvester Coles confessed to being the shooter. Two witnesses have stated that Sylvester Coles, contrary to his trial testimony, possessed a handgun immediately after the murder. Another witness has provided a description of the crimes that might indicate that Sylvester Coles was the shooter. Perhaps these witnesses' testimony would prove incredible if a hearing were held. Perhaps the majority is correct that the alleged eyewitness's testimony will actually show Davis's guilt rather than his innocence. But the collective effect of all of Davis's new testimony, *if* it were to be found credible by the trial court in a hearing, would show the probability that a new jury would find reasonable doubt of Davis's guilt or at least sufficient residual doubt to decline to impose the death penalty. Accordingly, I would order the trial court to conduct a hearing, to weigh the credibility of Davis's new evidence, and to exercise its discretion in determining if the new evidence would create the probability of a different outcome if a new trial were held.[81]

Having been unsuccessful at trial, on appeal, before state and federal habeas courts, before both courts reviewing the denials of the habeas petitions, and on appeal of the decision to deny him a new trial, Davis was left with few options to further pursue his claim of actual innocence.[82]

In 2008, Davis filed a petition with the Eleventh Circuit Court of Appeals seeking permission to file a second federal habeas corpus petition.[83] In this petition, Davis—for the first time—raised a

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death."). Chief Justice Sears took issue with the majority's reliance on the purest fabrication rule to assess the merits of the evidence, reasoning its rigid application may fail to properly account for the trustworthiness of affidavits not meeting such a stringent standard and result in their categorical exclusion. *See id.* at 363–65 (arguing that new evidence of recantations and confessions to third parties should be assessed under the discretion of the trial court rather than being categorically excluded upon failure to satisfy the purest fabrication standard).

81. *Id.* at 364–65 (footnote omitted).

82. *See* 28 U.S.C. § 2244(a) (2006) (providing that "[n]o circuit or district judge shall be required to entertain an application for a writ of habeas corpus . . . if it appears that the legality of . . . detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus").

83. *Davis V*, 565 F.3d 810, 813 (11th Cir. 2009) (per curiam). Davis filed this petition because, "[b]efore a second or successive [habeas] application . . . is filed in the district court, the applicant [must] move in the appropriate court of appeals for an order

freestanding claim of actual innocence, rather than a claim of constitutional violations accompanied by a claim of actual innocence as in his first habeas petition.[84] Notwithstanding the constitutional propriety that otherwise attended his trial, for this freestanding claim of actual innocence, Davis argued "his execution would violate the Eighth and Fourteenth Amendments because he is actually innocent of the offense of murder."[85] Relying on legislative history, the Eleventh Circuit reasoned that Congress designed the federal habeas statute to prevent prisoners from having an opportunity to relitigate decided claims and minimize the drain on judicial resources caused by the filing of multiple petitions for habeas corpus.[86] The court determined Davis had failed to meet the statutory requirements for a grant of leave to file a second federal habeas petition.[87] Moreover, the court saw no basis for employing its equitable powers to grant Davis leave to file a second federal habeas petition.[88]

Like the prior state supreme court decision denying Davis's motion for new trial, a strong dissent in the Eleventh Circuit opined:

> This case highlights the difficulties in navigating AEDPA's thicket of procedural brambles. While we must deal with the thorny constitutional and statutory questions before us, we also cannot lose sight of the underlying issue in this case. Simply put, the issue is whether Troy Anthony Davis may be lawfully executed *when no court has ever conducted a hearing to assess the reliability of the score of affidavits that, if reliable, would . . . entit*[*e*] *Davis to habeas*

authorizing the district court to consider the application." § 2244(b)(3)(A).

84. *Davis V*, 565 F.3d at 813. In his first federal habeas petition, "Davis did not raise a substantive freestanding claim of actual innocence" but rather claimed numerous constitutional violations, "including: (1) that the prosecution knowingly presented false testimony at his trial . . . ; (2) that the prosecution failed to disclose material exculpatory evidence . . . ; and (3) that his trial counsel was constitutionally ineffective." *Id.*

85. *Id.*

86. *See id.* at 817–18 (emphasizing "a common theme throughout the congressional debates . . . to prevent habeas petitioners from having successive 'bites at the apple'").

87. *See id.* at 824 ("The statute undeniably requires a petitioner seeking leave to file a second or successive petition to establish actual innocence by clear and convincing evidence *and* another constitutional violation.").

88. *See Davis V*, 565 F.3d at 825 ("But even if we could somehow employ our equitable powers as gatekeeper reviewing a successive petition and ignore the plain requirements found in § 2244(b)(2)(B), Davis has not presented us with a showing of innocence so compelling that we would be obliged to act today.").

relief.[89]

Judge Barkett's dissent went on to cogently suggest that executing Davis (without assessing the mounting evidence of his innocence) would be both unconstitutional and unconscionable, and to the extent such a situation was permitted under the AEDPA, the law itself would be unconstitutional.[90]

Following the Eleventh Circuit's decision to deny Davis a second habeas petition, he finally found sanctuary in the Supreme Court, which directed the district court to receive the testimony and make findings of fact as to Davis's innocence.[91] Dissenting from this decision, Justice Scalia suggested that actual innocence might not even be a constitutionally cognizable claim.[92] As this Comment argues, however, the validity of Davis's habeas claim of actual innocence should be recognized to ensure the constitutional guarantees of both due process and the prohibition against cruel and unusual punishment.

IV. DUE PROCESS

Legislative authority to enact new laws, in a criminal, civil, habeas, or other context, is constrained by the tenets of the Constitution, which establish the outer limits of acceptable government action.[93] The Due Process Clause guarantees every

89. *Id.* at 827 (Barkett, J., dissenting) (emphasis added).

90. *Id.* Indeed, after considering Supreme Court precedent and the Constitution's proscription against executing the innocent, Judge Barkett concluded that claims of actual innocence must be constitutionally valid under the miscarriage of justice exception to negate the AEDPA's procedural barrier. *Id.* at 828–31.

91. *Davis VI*, 130 S. Ct. 1 (2009).

92. *See id.* at 3 (Scalia, J., dissenting) ("This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged 'actual innocence' is constitutionally cognizable."). While Justice Scalia stressed the idea that "actual innocence" may not be a constitutionally valid claim, his dissent ultimately turned on the fact that the Court's decision to order a new evidentiary hearing was misguided because, even if the district court determined Davis to be innocent, such a finding would not establish a ground for habeas relief. *See id.* at 2–4.

93. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 104 (1958) ("When it appears that an Act of Congress conflicts with one of [the constitutional] provisions, we have no choice but to enforce the paramount commands of the Constitution."); *see also* Troxel v. Granville, 530 U.S. 57, 67–69 (2000) (reviewing the constitutionally permissible extent of state interference with the parental right to rear children); Witt v. Dep't of Air Force, 527 F.3d

individual in the United States the qualified right to exercise his or her freedom without governmental interference.[94] The liberties assumed within this freedom and protected by due process are not fixed or susceptible to exhaustive delineation but fall along a continuum, with the exercise of some liberties more closely guarded than others.[95] In essence, the Due Process Clause guarantees the government will not impose upon the exercise of one's liberty interests arbitrarily or restrict such exercise purposelessly.[96]

When examining any statute, courts have "the duty of implementing the constitutional safeguards that protect individual rights."[97] The judiciary is thus bound to examine the constitutionality of government action,[98] but it may not substitute its own judgment for that of the legislature.[99] In passing the AEDPA, Congress inherently invoked the imprimatur of the Constitution

806, 809, 821 (9th Cir. 2008) (assessing the constitutionality of the military's "Don't Ask, Don't Tell" policy, promulgated pursuant to the congressional power to regulate the armed forces), *superseded by statute*, Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. § 654); Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1233, 1235, 1250 (11th Cir. 2004) (determining the constitutionality of an Alabama law prohibiting the sale of sexual devices); Watson v. Perry, 918 F. Supp. 1403, 1407, 1412–18 (W.D. Wash. 1996) (examining the constitutionality of the military's "Don't Ask, Don't Tell" policy), *superseded by statute*, Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. § 654). The Constitution establishes the outermost boundaries of what is permissible governmental conduct, leaving the states free to impose their own more protective standards. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986) (underscoring that "[t]he Due Process Clause demarks only the outer boundaries" of what is constitutional, while "Congress and the states, of course, remain free to impose more rigorous standards"); Weems v. United States, 217 U.S. 349, 379 (1910) (noting that legislatures "have no limitation . . . but constitutional ones").

94. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847–48 (1992) (plurality opinion) (describing the nature of liberties secured by the Due Process Clause and noting that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter").

95. *Id.* at 848–49 (citing Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

96. *Id.*

97. *Trop*, 356 U.S. at 103.

98. *See id.* ("We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution.").

99. *See* Weems v. United States, 217 U.S. 349, 379 (1910) ("The function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitation . . . but constitutional ones, and what those are the judiciary must judge.").

such that the statute must comport, in all instances, with constitutional guarantees[100] as well as the central intent behind the writ of habeas corpus[101] and the fundamental purpose of the criminal justice system.[102] Therefore, when challenging the constitutionality of the AEDPA, the task of the court is to determine if the statute oversteps the bounds of permissible government action as defined by the Constitution, and to the extent the statute in fact oversteps those bounds, if it is unconstitutional.

A. *Judicial Review for Substantive Due Process*

There are two "primary features" of judicial review in the realm of substantive due process analysis: (1) identification of a fundamental right or liberty interest that is "deeply rooted in this Nation's history and tradition"—a right "implicit in the concept of ordered liberty"; and (2) "a careful description of the asserted fundamental liberty interest" using the first prong as a guidepost.[103] These requirements underscore the care that must be taken in defining the interests at stake in substantive due process analysis[104] because, in determining a statute's consti-

100. *See, e.g.*, U.S. CONST. amend. XIV, § 1 (mandating that a state cannot infringe on a person's liberty "without due process of law").

101. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 126 (1982) ("The writ of habeas corpus indisputably holds an honored position in our jurisprudence.... Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.'" (quoting Wainwright v. Sykes, 433 U.S. 72, 97 (1977) (Stevens, J., concurring))); *cf.* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2334–35 (2009) (Stevens, J., dissenting) ("Our cases have recognized protected interests in a variety of post-conviction contexts, extending substantive constitutional protections to state prisoners on the premise that the Due Process Clause ... requires States to respect certain fundamental liberties in the post[-]conviction context.").

102. As previously explained, the central purpose of the criminal justice system is to convict the guilty and free the innocent. *See* House v. Bell, 547 U.S. 518, 540 (2006) ("From beginning to end[,] the case is about who committed the crime."); Herrera v. Collins, 506 U.S. 390, 398 (1993) ("After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent."); *In re* Winship, 397 U.S. 358, 362 (1970) (recounting an expansive history of Supreme Court cases holding proof beyond a reasonable doubt is constitutionally required to rebut the presumption of innocence because "[t]his notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process").

103. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969); Reno v. Flores, 507 U.S. 292, 302 (1993)) (internal quotation marks omitted).

104. *See id.* at 722 (recognizing "a tradition of carefully formulating the interest at stake in substantive-due-process cases").

tutionality, the appropriate level of scrutiny to be applied depends on the nature and quality of the activity that the statute seeks to address.[105]

If an act of Congress infringes a liberty interest deemed fundamental, the appropriate level of review is strict scrutiny; if the act infringes a lesser liberty interest, then rational basis scrutiny generally applies.[106] When a statute or government action infringes upon a right that does not rise to the fundamental level but is in some way constitutionally suspect, the court applies an intermediate level of scrutiny that lies between the extremes of strict scrutiny and rational basis review.[107] Thus, due process analysis requires identifying the nature of the liberty interest asserted in a claim of actual innocence to, in turn, determine the appropriate level of judicial review to apply to the AEDPA.[108]

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105. Certain activities, such as marriage, raising children, using contraceptives, abortions, and refusing unwanted medical treatment, are so significant to the "liberty" protected under the Constitution that statutes which seek to infringe them face the strictest constitutional scrutiny, whereas other activities considered to have less protection are subject to a much less intensive level of scrutiny. *See, e.g.*, *id.* at 720 (explaining the established tradition within substantive due process jurisprudence of carefully describing putative liberties because, when the Court identifies a liberty interest or fundamental right protected by the Due Process Clause, the Court largely "place[s] the matter outside the arena of public debate and legislative action"); *cf.* Rostker v. Goldberg, 453 U.S. 57, 67–70 (1981) (noting that careful description of an asserted substantive due process right is required, even in the military context where courts generally defer to congressional judgment, because "[s]imply labeling the legislative decision 'military' on the one hand or 'gender-based' on the other does not automatically guide a court to the correct constitutional result").

106. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 593–94 (2003) (Scalia, J., dissenting) (discussing when the strict scrutiny test applies and when the rational basis test applies); *see also* Watson v. Perry, 918 F. Supp. 1403, 1416 (W.D. Wash. 1996) (explaining that the level of judicial constitutional review depends upon determining the nature of the interest the government action regulates), *superseded by statute*, Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. § 654).

107. *See* Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 189–90 (1997) (applying intermediate scrutiny in the context of a content-neutral regulation of speech); Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008) (applying an intermediate level of scrutiny and noting Supreme Court authority that "lies between strict scrutiny and rational basis"), *superseded by statute*, Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; Witt v. Dep't of Air Force, 527 F.3d 806, 813 (9th Cir. 2008) (holding that Supreme Court precedent requires "something more than traditional rational basis review" for analyzing the challenged "Don't Ask, Don't Tell" policy), *superseded by statute*, Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

108. *Cf., e.g.*, *Glucksberg*, 521 U.S. at 722–28 (analyzing whether a statute that prohibited a person from aiding another to commit suicide infringed a fundamental "right to die" because, "by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a

B. *Nature of the Right Implicated in Claims of Actual Innocence—The Freedom from Bodily Restraint*

Petitioners claiming actual innocence in their federal habeas petitions seek, at a basic level, freedom from bodily restraint.[109] This right "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[110] Indeed, recognizing that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,"[111] the Supreme Court has described freedom from bodily restraint as a fundamental right or liberty interest that is "deeply rooted in this Nation's history and tradition."[112] Therefore, if habeas petitioners can clearly establish their actual innocence,[113] they can demonstrate an infringement of their interest in freedom from bodily restraint—a right protected by the Due Process Clause.[114]

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legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case").

109. *Cf.* Foucha v. Louisana, 504 U.S. 71, 73, 80 (1992) (addressing the challenged confinement of a criminal defendant in a mental hospital as asserting a liberty interest in freedom from bodily restraint).

110. *Id.* at 80 (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

111. Addington v. Texas, 441 U.S. 418, 425 (1979).

112. *Glucksberg*, 521 U.S. at 720–21 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)) (internal quotation marks omitted). Moreover, the Court's decision in *Glucksberg* endorses the notion that freedom from bodily restraint is a central command of substantive due process in stating "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Id.* at 719.

113. Nearly forty years ago, Judge Friendly advanced a cogent definition of what constitutes innocence in the realm of collateral attack with what he described as a "colorable showing of innocence." Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970). This standard would limit collateral attack to situations in which the petitioner can demonstrate to a habeas court "a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted . . . and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." *Id.*

114. *See* Herrera v. Collins, 506 U.S. 390, 435–36 (1993) (Blackmun, J., dissenting) (noting that a habeas petitioner's claim of actual innocence falls within the constitutional scheme for a substantive due process challenge); *cf.* Schlup v. Delo, 513 U.S. 298, 325 (1995) ("Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" (quoting *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)); Jackson v. Indiana, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of

Given the importance and fundamental nature of this right, strict scrutiny judicial review should apply to the AEDPA, insofar as it precludes an innocent person's exercise of the right to bodily freedom. However, the Court has been clear that a "careful description" of the asserted fundamental liberty interest is mandatory in substantive due process analysis,[115] leaving the possibility that such a due process challenge to the AEDPA could be viewed as asserting a less than fundamental right that calls for a lower standard of judicial scrutiny. For this reason, this Comment addresses the validity of collateral post-conviction claims of actual innocence under the strict scrutiny standard as well as the heightened, intermediate level of judicial review.[116]

C. *Under Strict Scrutiny Review*

Due process is not a formula but rather a balancing of interests between the government's interest in enforcing a statute and the individual's interest in the exercise of fundamental liberties.[117] In order to sustain constitutionality, the more a statute restricts protected liberty interests, the more significant the governmental interest must be and the more narrowly tailored the statute must be.[118] The federal habeas statute should be subject to strict scrutiny to the extent it bars federal habeas courts from considering claims of actual innocence because the petitioners who

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commitment bear some reasonable relation to the purpose for which the individual is committed.").

115. *Glucksberg*, 521 U.S. at 721.

116. This Comment does not discuss the rational basis test under the assumption that the AEDPA would likely survive rational basis review.

117. *See, e.g.*, *Glucksberg*, 521 U.S. at 765–68 (Souter, J., concurring) (illustrating that due process decisions strike a balance between individual liberties and "the demands of organized society" (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877–78 (1992) (plurality opinion) (reasoning that a law which creates a substantial obstacle in the exercise of a fundamental liberty interest requires overwhelmingly profound state justification to sustain constitutionality); Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008) (summarizing the need, under the intermediate scrutiny test for substantive due process analysis, to balance the "strength" of the governmental interest against the "degree of intrusion" into the liberty interest); *cf.* benShalom v. Sec'y of Army, 489 F. Supp. 964, 976–77 (E.D. Wis. 1980) (noting that even without infringing a fundamental liberty interest, due process will not countenance government action unless and until the government can prove a nexus between the proscribed conduct and the governmental interest).

118. *Cf., e.g.*, Sell v. United States, 539 U.S. 166, 177–81 (2003) (reasoning a state's interest in medicating prisoners for competency to stand trial is only sufficiently important to deny liberty interests in limited circumstances).

make such claims essentially assert a fundamental liberty interest: the freedom from bodily restraint.[119] Under strict scrutiny review, a challenged statute must be "narrowly tailored" to achieve a "compelling" government interest, and to the extent it fails to meet these stringent requirements, the statute is an unconstitutional violation of substantive due process.[120]

The government undeniably has important interests at stake when it seeks to limit the availability of habeas review in the federal context.[121] "Federal intrusions into state criminal trials

119. *See* Youngberg v. Romeo, 457 U.S. 307, 316 (1982) (noting that the interest in freedom from bodily restraint is the core guarantee of liberty under the Due Process Clause and "survives criminal conviction and incarceration").

120. *See* Reno v. Flores, 507 U.S. 292, 301–02 (1993) (referring to a "line of cases [that] interpret[] the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest").

121. Permitting the filing of endless successive petitions for habeas relief by prisoners serving long sentences, who often have no better way to pass the time, not only risks imposing a substantial burden on the judicial system but also threatens the principles of finality and comity for state court judgments. *See* Schlup v. Delo, 513 U.S. 298, 318 (1995) ("To alleviate the increasing burdens on the federal courts and to contain the threat to finality and comity, Congress attempted to fashion rules disfavoring claims raised in second and subsequent petitions."). Without limits, the filing of habeas petitions can be unnecessarily detrimental to scarce judicial resources, public confidence in the administration of justice, and the utility of collateral attacks on criminal convictions. *See, e.g.*, Jennifer Gwynne Case, Note, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 WM. & MARY L. REV. 669, 697–98 (2008) (arguing that the further along a petitioner is in the habeas corpus process, "the greater the need for finality, comity, and conservation of judicial resources" because, "[a]s these needs increase, the risk that justice will not be served decreases" and, "[a]t some point, in order to achieve a balance between these concerns, the gateway for endless appeals and petitions must close"); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 149 (1970) (noting that "it is difficult to urge public respect for the judgments of criminal courts in one breath and to countenance free reopening of them in the next"). *But see* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2337–38 (2009) (Stevens, J., dissenting) ("[F]inality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens.... It seems to me obvious that if a wrongly convicted person were to produce proof of his actual innocence, no state interest would be sufficient to justify his continued punitive detention."); *cf. In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("In a criminal case, ... we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.... I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1635 (2008) ("The Supreme Court's failure to recognize a constitutional innocence claim has created

frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."[122] When a conviction results from a fair trial, the State has presumably satisfied the constitutional burden necessary to convict the defendant for the charged crime.[123] However, the matter is not settled

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substantial pressure on the states that have faced firsthand embarrassment from more than two hundred post-conviction DNA exonerations.").

Thus, the government must have a system that prevents endless habeas petitions in order to conserve scarce judicial resources, support the finality of criminal judgments, promote good federal-state relations, and instill confidence in the criminal justice system; nevertheless, courts should employ every measure to ensure innocent people are not unnecessarily punished. *Compare* Jennifer Gwynne Case, Note, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 WM. & MARY L. REV. 669, 688 (2008) (declaring "the volume of habeas petitions in federal courthouses has increased greatly because of petitioners filing a large number of frivolous petitions," and that "[t]his increase in petitions 'has delayed the administration of justice, prevented the finalization of verdicts, frustrated federal-state relations, and undermined public confidence in the criminal justice process'" (quoting Mark M. Oh, Note, *The Gateway for Successive Habeas Petitions: An Argument for* Schlup v. Delo *'s Probability Standard for Actual Innocence Claims*, 19 CARDOZO L. REV. 2341, 2342 (1998))), *and* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970) ("Indeed, collateral attack may have become so much a way of prison life as to have created its own self-generating force: it may now be considered merely something done as a matter of course during long incarceration."), *with Schlup*, 513 U.S. at 324–25 ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." (footnote omitted)), *and* Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 502 (1996) ("Another startlingly obvious principle, which has difficulty finding legal recognition, is that the judicial system should not participate in the execution of innocent people. When a doctrine permits a result so far removed from our collective sense of justice, it is time to re-examine that doctrine.").

122. Engle v. Isaac, 456 U.S. 107, 128 (1982) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 263–65 (1973) (Powell, J., concurring)). In *Engle*, the Court opined that a liberal standard for habeas corpus petitions could potentially erode the sanctity of trials, by giving trial participants little reason to adhere to constitutional safeguards, or "reward the accused with complete freedom from prosecution," by ordering retrials when critical evidence has been lost with the passage of time. *Id.* at 127–28.

123. Our system of criminal justice requires the State to meet a very difficult burden of showing that the accused is guilty beyond a reasonable doubt. *See Winship*, 397 U.S. at 363 (stating that the reasonable doubt standard of proof "has [a] vital role in our criminal procedure for cogent reasons"). As the Court has explained:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without

for either the habeas petitioner who seeks to challenge his conviction or the State which must respond to a convicted defendant's claims for post-conviction relief.[124] At this stage, because the petitioner has been afforded a full complement of procedural safeguards at trial as well as during the appellate process, the government has provided a strong measure of process, creating a significant interest in limiting the availability of habeas review.[125] Yet, when comparing the government's interests in

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convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364. Thus, in the post-conviction context, after the State has met the stringent reasonable doubt standard to the satisfaction of the jury at the trial level, a habeas petitioner does not approach the court with the presumption of innocence that attaches to anyone accused of a crime. *See* Jennifer Gwynne Case, Note, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 WM. & MARY L. REV. 669, 673 (2008) ("After conviction, habeas petitioners do not enjoy a presumption of innocence, as they are no longer merely individuals accused of a crime. To the contrary, having been found guilty beyond a reasonable doubt, the habeas petitioner faces the court with a strong presumption of guilt."); *see also Osborne*, 129 S. Ct. at 2320 (explaining that a convicted person is not constitutionally entitled to the presumption of innocence and, therefore, approaches the court with the presumption of guilt because the "criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man"); Herrera v. Collins, 506 U.S. 390, 398 (1993) ("A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt."). Moreover, in addition to the reasonable doubt standard, criminal procedure provides other "constitutional safeguards" designed to make it "more difficult for the State to rebut and finally overturn the presumption of innocence [that] attaches to every criminal defendant." *Herrera*, 506 U.S. 390 at 399. These additional safeguards include the right to effective assistance of counsel, the right to a trial by jury, mandatory disclosure by the prosecution of exculpatory evidence, the right to a trial that manifests an appearance of fairness, the right to confront adverse witnesses, and other protections. *Id.* at 398–99. A conviction obtained in compliance with all these safeguards, therefore, establishes convincing proof of a habeas petitioner's actual guilt and seriously undermines the force of a claim of actual innocence.

124. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) ("After trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process, in Winston Churchill's phrase, has not yet reached the end, or even the beginning of the end, but only the end of the beginning.").

125. *Cf. Osborne*, 129 S. Ct. at 2320 (noting the state has "more flexibility in deciding what procedures are needed in the context of postconviction relief" because the habeas petitioner does not approach the court with a presumption of innocence); *Herrera*, 506 U.S. at 399–400 (concluding that a habeas "petitioner does not come before the [c]ourt as one who is 'innocent[]' but, on the contrary, as one who has been convicted by due process of law"); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 146–49 (1970) (propounding the "many reasons[] collateral attack on criminal convictions carries a serious burden of justification"). Briefly,

judicial economy, comity, and finality against a petitioner's right to personal freedom, the need to limit or foreclose claims of actual innocence upon federal habeas review seems far less compelling.

Assuming for the sake of argument that these governmental interests are compelling enough, the denial of such claims is still not narrowly tailored to achieve those interests. That is, a myriad of other means could be employed to achieve the same objectives. For example, the statute could bar any claims of actual innocence not based upon newly discovered evidence. It could also require that all such claims be first directed to a trial court, or it could require a finding of a lower court that the underlying conviction has been called into doubt. All of these alternatives would be more narrowly tailored to the government's interest in limiting the availability of habeas review while simultaneously acknowledging the constitutionality of a claim of actual innocence. Thus, to the extent that AEDPA limits the right of a petitioner to assert his fundamental interest in bodily freedom, the statute should fail to muster constitutionality under strict scrutiny review.

D. *Under an Intermediate Level of Judicial Review*

As noted, strict scrutiny is not the only level of judicial review in substantive due process jurisprudence. Were a court to decide, in reviewing a constitutional challenge of the AEDPA's effect to bar consideration of actual innocence claims, that the asserted liberty interest does not rise to the level of a fundamental right, then the lower, intermediate level of judicial review could apply. Under the intermediate scrutiny standard, the Court in *Sell v. United States*[126] specified three factors for the balancing of government and individual interests required in such due process chal-

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Judge Friendly identified five reasons why courts should not entertain collateral attacks on convictions: (1) they impede the prisoner's realization that he needs rehabilitation and, therefore, one purpose for punishing the guilty; (2) they often take a considerable amount of time to complete and, therefore, make factual determinations less reliable the longer the delay; (3) they exact a serious "drain upon the resources of the community—judges, prosecutors, and attorneys appointed to aid the accused, and even the oft overlooked necessity, courtrooms"; (4) they risk burying meritorious claims "in a flood of worthless ones"; and (5) they do not satisfy "the human desire that things must sometime come to an end." *Id.* Despite these concerns, however, Judge Friendly did not advocate for an outright prohibition on collateral attacks on convictions and relying "solely on executive clemency." *Id.* at 151. Instead, he stated: "If mine is not the best mousetrap, perhaps it may lead others to develop a better one." *Id.*

126. Sell v. United States, 539 U.S. 166 (2003).

lenges.[127] That is, to sustain constitutionality, the court must determine that: (1) "*important* governmental interests are at stake"; (2) the statute "*significantly further*[*s*] those [governmental] interests"; and (3) the statute "is *necessary* to further those interests."[128]

Again, it may be conceded that governmental interests in judicial economy, comity, and finality are vitally important. Yet, even under an intermediate level of judicial scrutiny, the process already provided to a federal habeas petitioner should be held constitutionally insufficient to the extent it denies a legitimate claim of actual innocence.[129] As the explicit purpose of the writ of habeas corpus is to remedy unconstitutional detentions,[130] and punishing innocent persons necessarily deprives them the exercise of their freedom in violation of the Constitution,[131] it necessarily

127. *See id.* at 180–81 (detailing the relevant factors to consider in a constitutional challenge of state action to involuntarily medicate a defendant for trial competency); Witt v. Dep't of Air Force, 527 F.3d 806, 818–19 (9th Cir. 2008) (adopting the *Sell* factors to determine whether government intrusion of a liberty interest, subject to heightened scrutiny, was necessary to advance and significantly further an important governmental interest), *superseded by statute*, Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. Because the *Sell* opinion dealt with the substantive due process rights of a litigant who was forced to take drugs that rendered him competent to stand trial, it also listed a fourth factor requiring the administered drugs to be medically appropriate. *See Sell*, 539 U.S. at 181 (stating that the drugs must be "in the patient's best medical interest in light of his medical condition"). However, this fourth factor is not germane outside the context of involuntary medication.

128. *Sell*, 539 U.S. at 180–81.

129. *But see* McCleskey v. Zant, 499 U.S. 467, 491 (1991) (holding that the writ of habeas corpus "strikes at finality," which is "[o]ne of the law's very objects"). As the Court reasoned in *McClesky*, if the availability of post-conviction collateral attack and habeas review means that convictions can never be final, laws will mean "little" because "the State[s] cannot enforce them." *Id.* In addition, the Court noted that habeas review "extracts further costs" by placing a "heavy burden on scarce federal judicial resources" and possibly provides "litigants incentives to withhold claims for manipulative purposes and . . . disincentives to present claims when evidence is fresh." *Id.* at 491–92.

130. *See* 28 U.S.C. § 2254(a) (2006) (stating that courts "shall entertain an application for a writ of habeas corpus . . . only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States"); *Herrera*, 506 U.S. at 400 (explaining that "federal habeas courts sit to ensure . . . that individuals are not imprisoned in violation of the Constitution").

131. While it may be reasonable to deny a convicted petitioner additional process or other means to collaterally attack an otherwise valid and reliable judgment of conviction, a longstanding view supports that the Constitution would undeniably abhor the needless and unjustifiable punishment of one who has not in fact broken the law. *See* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2338 (2009) (Stevens, J., dissenting) ("It seems to me obvious that if a wrongly convicted person were to produce proof of his actual innocence, no state interest would be sufficient to justify his continued punitive

follows that there should be an avenue within the federal habeas setting to assert new evidence of actual innocence. Put differently, actual innocence claims accompanied by competent, newly discovered evidence should be recognized in federal habeas review because their outright denial neither furthers nor is necessary to advance the AEDPA's express purpose of abating unconstitutional convictions, tipping the balance toward protecting due process liberties.

E. *As Applied to Davis*

In "expressing considerable doubt that any claim based on alleged 'actual innocence' is constitutionally cognizable,"[132] Justice Scalia failed to consider not only the fundamental liberty interest at stake but also the extent of Davis's evidence to outweigh the interests of the state. When a petitioner like Davis approaches a federal habeas court with evidence which may prove his innocence,[133] it is incumbent upon that court to review the

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detention."); Schlup v. Delo, 513 U.S. 298, 324–25 (1995) ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." (footnote omitted)); *Herrera*, 506 U.S. at 431 (Blackmun, J., dissenting) ("[I]t plainly is violative of the Eighth Amendment to execute a person who is actually innocent."); Furman v. Georgia, 408 U.S. 238, 321 n.19 (1972) (Marshall, J., concurring) ("There is also evidence that the general opinion at the time the Eighth Amendment was adopted was that it prohibited every punishment that was not evidently necessary." (internal quotation marks omitted)).

132. *Davis VI*, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting).

133. In modern times, newly discovered or newly tested DNA evidence is the most obvious and conclusive proof for claims of actual innocence. *See generally* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008) (detailing the changes DNA science has brought to the criminal justice system). However, because DNA evidence is lacking in most cases, credible evidence of witness recantations, subsequent eyewitness admissions, newly discovered confessions, evidence of falsified or misleading testimony, tainted physical evidence, and many other types of evidence have the potential to sufficiently demonstrate to a federal habeas court that a petitioner is actually innocent of the crime for which he was convicted. *See generally* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655 (2005) (analyzing methods for prisoners to use to pursue claims of actual innocence based on newly discovered non-DNA evidence). Such discoveries should justify acknowledging actual innocence as a valid claim in federal habeas review lest the innocent be mistakenly punished. Echoing the words of Judge Friendly, the point is that collateral attack of valid convictions based on claims of innocence should be endorsed in situations where the petitioner has demonstrated "a colorable showing of innocence." Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970). Accordingly, if the

evidence to determine the constitutionality of his continued incarceration. Whether the court has doubts as to his guilt or can be convinced of his innocence, there exists a real and substantial possibility that he may remain incarcerated under an erroneous conviction without adequate justification or purpose to continue his confinement. Though not every erroneous conviction may be unconstitutional, a meaningful opportunity to correct an erroneous conviction should be recognized in federal habeas review as necessary for guaranteeing a person like Davis's substantive due process right to freedom from bodily restraint.

Balancing Davis's fundamental liberty interest in freedom from bodily restraint against the interests of the government, Davis's right should carry the day because he possesses sufficient evidence that may prove his actual innocence. The interests in finality of judgments, conservation of scarce judicial resources, or respect in the federal system for the judgments of state courts, however important and adequate to otherwise justify the limited availability of federal habeas review, should not outweigh the overwhelmingly compelling interest of the convicted and of society in the correct judicial determination of a petitioner's guilt. Because the balance should favor the protection of personal liberty rather than the protection of finality, comity, or judicial resources, actual innocence should be recognized as a viable constitutional claim upon federal habeas review. Therefore, the federal habeas statute as limited by the AEDPA should be held unconstitutional as applied to Davis and others who wish to present newly discovered evidence of their actual innocence.

V. CRUEL AND UNUSUAL PUNISHMENT

> [This Court] has held that death is an excessive punishment for rape, and for mere participation in a robbery during which a killing takes place. If it is violative of the Eighth Amendment to execute someone who is guilty of those crimes, then it plainly is violative of the Eighth Amendment to execute a person who is actually innocent. Executing an innocent person epitomizes "the purposeless and needless imposition of pain and suffering."
>
> The protection of the Eighth Amendment does not end once a

habeas court then determines that the evidence, in whatever form, sufficiently establishes the petitioner's innocence, the court should be constitutionally bound to exonerate the petitioner.

defendant has been validly convicted and sentenced.[134]

The Framers of the Constitution included in the Bill of Rights the prohibition against "cruel and unusual punishments."[135] Applicable to the states,[136] the Eighth Amendment operates not to limit or control the state's power to punish the guilty but rather to limit the manner in which punishment may be enforced.[137] Thus, concern arises regarding whether the continued incarceration of an innocent person, who with exculpatory evidence has been denied a forum and opportunity to assert his actual innocence upon habeas review, amounts to cruel and unusual punishment violative of the Eighth Amendment.

A. *Defining Punishment As Cruel and Unusual*

The term "cruel and unusual" first appeared in England in 1689[138] and has since been invoked in a wide variety of contexts,[139] finding common usage in the habeas petitions of

134. *Herrera*, 506 U.S. at 431–32 (Blackmun, J., dissenting) (citations omitted) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion)). *See generally* Triestman v. United States, 124 F.3d 361, 378–80 (2d Cir. 1997) ("[W]e find that serious Eighth Amendment and due process questions would arise with respect to the AEDPA if we were to conclude that, by amending § 2255, Congress had denied [petitioner] the right to collateral review in this case.").

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

136. *See, e.g.*, Robinson v. California, 370 U.S. 660, 667 (1962) (holding a state law that imprisoned a person for merely being a drug addict as "inflict[ing] a cruel and unusual punishment in violation of the Fourteenth Amendment").

137. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards.").

138. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976) ("The phrase [cruel and unusual] first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary."). The basic concept of the Eighth Amendment, which is "nothing less than the dignity of man," finds its roots in the Magna Carta. *Trop*, 356 U.S. at 100.

139. For example, the Eighth Amendment has been invoked to challenge the death sentence as a form of cruel and unusual punishment. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the execution of mentally challenged criminals will not "measurably advance the deterrent or the retributive purpose of the death penalty"); *Gregg*, 428 U.S. at 187 (declaring that death sentences imposed for murder convictions do not, in all circumstances, violate the Eighth Amendment). *See generally* Kristen Nugent, *Proportionality and Prosecutorial Discretion: Challenges to the Constitutionality of Georgia's Death Penalty Laws and Procedures Amidst the Deficiencies of the State's Mandatory Appellate Review Structure*, 64 U. MIAMI L. REV. 175, 175–211 (2009) (examining Georgia death penalty cases and laws that have "shaped the constitutional

prisoners asserting a claim of actual innocence.[140] The meaning of

jurisprudence applicable to capital-punishment cases nationwide," and dissecting the "grave and constitutionally impermissible flaws" therein); Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CONST. L. 57, 73–77 (2009) (discussing the "debatable" ramifications of a Supreme Court ruling that held a statute violated the Eighth Amendment when it gave full discretion to the jury in determining whether a defendant faces the death penalty); Benjamin J. Flickinger, Note, Kennedy v. Louisiana*: The United States Supreme Court Erroneously Finds a National Consensus Against the Use of the Death Penalty for the Crime of Child Rape*, 42 CREIGHTON L. REV. 655, 676–87 (2009) (analyzing the role of the Eighth Amendment in the Supreme Court's determination that imposing a capital sentence for raping a child is unconstitutional). Beyond the capital punishment context, there are also cases where the Eighth Amendment was invoked to challenge a punishment for reasons other than imposition of the death penalty. *See* Farmer v. Brennan, 511 U.S. 825, 847 (1994) (announcing that prison officials who knowingly subject inmates to a substantial risk of serious harm during their confinement without taking reasonable measures to abate such risk may be held liable under the Eighth Amendment for denying prisoners humane conditions of confinement); Helling v. McKinney, 509 U.S. 25, 31 (1993) (warning that both the "treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment"); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 198 n.5 (1989) (noting that a state prison's "mere negligent or inadvertent failure to provide adequate care is not enough" to constitute an Eighth Amendment violation); Solem v. Helm, 463 U.S. 277, 284–88, 290 (1983) (discussing the proportionality required by the Eighth Amendment between the severity of a sentence and the severity or seriousness of the crime committed for a repeat felon); Estelle v. Gamble, 429 U.S. 97, 102–03 (1976) (explaining the elementary principles of the Eighth Amendment "establish the government's obligation to provide medical care for those whom it is punishing by incarceration"); *Robinson*, 370 U.S. at 666–67 (holding unconstitutional a state law that criminalized the mere status of being a drug addict, regardless of any actual use or possession of narcotics, as a violation of the Eighth Amendment's prohibition against cruel and unusual punishments); *Trop*, 356 U.S. at 101 (determining the use of denationalization as a punishment, though involving no physical torture or physical mistreatment, to be a form of cruel and unusual punishment in violation of the Eighth Amendment because loss of citizenship manifests a "total destruction of the individual's status in organized society"); *cf.* Weems v. United States, 217 U.S. 349, 365–67, 382 (1910) (ruling a sentence of twelve years in irons at hard and painful labor for the crime of falsifying records to be cruel and unusual punishment). *See generally* Joseph Rikhof, *War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context*, 21 INT'L J. REFUGEE L. 453 (2009) (comparing the different approaches of the United States and four other countries in dealing with criminal refugees who would likely face cruel and unusual punishment if they were forced to return to their native states); Christopher Quinn, Note, *The Right to Refuse Medical Treatment or to Direct the Course of Medical Treatment: Where Should Inmate Autonomy Begin and End?*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 453, 456–57 (2009) (illustrating the sometimes antithetical interests of personal autonomy and the proscription of cruel and unusual punishment in the context of prison inmates' medical treatment).

140. *See* Myrna S. Raeder, *Postconviction* Claims *of Innocence*, CRIM. JUST., Fall 2009, at 14, 24 ("Innocence claims brought in habeas petitions typically allege violations of

the prohibition against cruel and unusual punishment is a constitutional area difficult to precisely define,[141] particularly given the variable and evolving nature of the term[142] and the fact that the Court has encountered little opportunity to consider its meaning.[143] However, that difficulty does not detract from the potency of the Eighth Amendment to challenge government imposed punishments.[144]

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due process under the Fifth or Fourteenth Amendments, and claim cruel and unusual punishment under the Eighth Amendment.").

141. *See* Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878) ("Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture ... and all others in the same line of unnecessary cruelty, are forbidden ...."); *see also* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (plurality opinion) (explaining the need to readdress what is required by the Eighth Amendment because earlier attempts were "scarcely the expression of clear and well accepted constitutional law"); Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring) ("The Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition.").

142. *See Gregg*, 428 U.S. at 171 ("[T]he Court has not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner."). The Supreme Court has noted that Eighth Amendment challenges "cannot be considered in the abstract." *Robinson*, 370 U.S. at 667. For example, a ninety-day prison sentence would not necessarily constitute a cruel and unusual punishment in the abstract, but just "one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* In addition, the Supreme Court has long held that the scope of punishments subsumed within any prohibition against cruel and unusual punishments "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems*, 217 U.S. at 378. In other words, the scope of the Eighth Amendment's prohibition "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. "Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.... But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive." *Gregg*, 428 U.S. at 173.

143. *See Furman*, 408 U.S. at 282 (Brennan, J., concurring) (noting in 1972 that the Court "has adjudged only three punishments to be within the prohibition of the Clause"); *Trop*, 356 U.S. at 100 ("This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising."); *cf. Robinson*, 370 U.S. at 666 ("It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease.").

144. *Cf. Trop*, 356 U.S. at 99–100 (declaring the "basic policy reflected in the[] words" of the Eighth Amendment "is firmly established in the Anglo-American tradition of criminal justice"). *But see Gregg*, 428 U.S. at 174–75 (conceding that "the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts" to "not act as judges as we might as legislators" but presume the validity of "a punishment selected by a democratically elected legislature against the con-

"The question is whether th[e] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."[145] The answer lies in the Amendment's cornerstone principle: "nothing less than the dignity of man."[146] To determine whether a statute is respectful of human dignity, courts must look to prevailing contemporary values for guidance in defining the term.[147] "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[148] Therefore, the AEDPA provisions that, when applied, may result in the continued incarceration of a habeas petitioner should respect and honor the bounds of human decency or otherwise be held unconstitutional.[149]

A practice of imprisoning the innocent has no place in modern society and weakens respect for the criminal justice system.[150] There should be little doubt that a contemporary American citizen would be seriously concerned with the notion that he could one day be falsely imprisoned for a crime he did not commit.[151] Such

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stitutional measure").

145. *Trop*, 356 U.S. at 99; *accord Furman*, 408 U.S. at 257 (Brennan, J., concurring) ("The question presented in [capital punishment] cases is whether death is today a punishment for crime that is 'cruel and unusual' and consequently, by virtue of the Eighth and Fourteenth Amendments, beyond the power of the State to inflict.").

146. *Trop*, 356 U.S. at 100.

147. *See* Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 . . . or when the Bill of Rights was adopted[] but rather by those that currently prevail."); Helling v. McKinney, 509 U.S. 25, 36 (1993) (acknowledging that there is no violation of the Eighth Amendment's proscription of cruel and unusual punishments unless the punishment complained of is not tolerated by contemporary society).

148. *Trop*, 356 U.S. at 101.

149. *See Furman*, 408 U.S. at 270 (Brennan, J., concurring) ("At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State . . . must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."); *id.* at 271 (noting the "primary principle" of the Eighth Amendment is that "a punishment must not be so severe as to be degrading to the dignity of human beings"); *cf.* Robinson v. California, 370 U.S. 660, 678 (1962) (Douglas, J., concurring) (agreeing that a statute criminalizing the sickness of drug addiction is unconstitutional because "[t]his age of enlightenment cannot tolerate such barbarous action").

150. *Cf. In re* Winship, 397 U.S. 358, 364 (1970) (stating "use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law" and not "leave[] people in doubt whether innocent men are being condemned").

151. *Cf. id.* at 363–64 (1970) (declaring "a society that values the good name and

concern would arguably be amplified upon discovering that federal habeas courts are either unable to hear his exculpatory evidence or prone to reject the constitutionality of actual innocence claims. Consequently, any statute or its interpretation indifferent to the possible execution of an innocent person would seem to contravene the Eighth Amendment because such a law or interpretation would fail to account for contemporary, civilized society's utmost respect for human decency.

At the threshold, there should be little doubt that evolving standards of decency, based on the contemporary views of society, would be undermined by the incarceration of one who has evidence sufficient to establish his complete innocence but is nonetheless denied an opportunity to present his evidence of actual innocence to a federal habeas court.[152] If "[t]he question is whether th[e] penalty subjects the individual to a fate forbidden by the principle of civilized treatment,"[153] then claims of actual innocence should be recognized in federal habeas review. In a modern and enlightened pursuit of justice, such a practice of denying claims of actual innocence in federal habeas review necessarily discredits our criminal justice system and demeans our moral strength.[154] Punishing a person for a crime he did not commit wrongfully devalues his intrinsic worth as a human being.[155] There are certainly wise and just reasons to limit the availability of habeas review, such as finality, comity, and the like, but to suggest that the Constitution does not recognize actual innocence as a valid claim on habeas review is to circumscribe the essential mandate of the Eighth Amendment—that the state respect human dignity when it punishes. Therefore, to maintain and bolster respect for human dignity, claims of actual innocence should be

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freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt").

152. *Cf.* Herrera v. Collins, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring) (contending "the execution of a legally and factually innocent person would be a constitutionally intolerable event" under the "contemporary standards of decency" test).

153. *Trop*, 356 U.S. at 99.

154. *Cf. Winship*, 397 U.S. at 364 (stressing the importance of the reasonable doubt standard to maintain society's "respect and confidence . . . in applications of the criminal law" and the "moral force of the criminal law").

155. *See id.* at 363 ("The accused during a criminal prosecution has at stake [an] interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.").

recognized as valid for federal habeas review.[156]

B. *Justice Brennan's Four Principles of Human Dignity*

In *Furman v. Georgia*,[157] Justice Brennan's concurring opinion set forth four principles "to provide means by which a court can determine whether a challenged punishment comports with human dignity."[158] According to Justice Brennan, a punishment that satisfies these requirements comports with human dignity and is, therefore, not a cruel and unusual punishment proscribed by the Eighth Amendment.[159] The first principle, which "supplies the essential predicate for the application of the others, is that a punishment must not by its severity be degrading to human dignity."[160] Severe punishments that degrade human dignity are not only those that inflict physical or mental pain but also those that fail to recognize the importance and worth of the one punished "as a member of the human community."[161] "[E]ven the vilest criminal remains a human being possessed of common human dignity."[162] Because it is unlikely that a state in modern times would inflict a punishment so severe as to violate the first principle, Justice Brennan felt that the "more significant function" of the Eighth Amendment was "to protect against the danger of [a punishment's] arbitrary infliction."[163] Thus, the second principle is that the Eighth Amendment is violated by "a severe punishment that is obviously inflicted in [a] wholly arbitrary fashion."[164] In

156. It is important to note the critical difference between electing to consider exculpatory evidence, before deciding to keep a prisoner confined, and categorically refusing to examine such exculpatory evidence when reviewing a federal habeas petition; the former recognizes man's dignity, the latter rejects it. *Cf.* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2338 (2009) (Stevens, J., dissenting) ("It seems to me obvious that if a wrongly convicted person were to produce proof of his actual innocence, no state interest would be sufficient to justify his continued punitive detention.").

157. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

158. *Id.* at 281–82 (Brennan, J., concurring).

159. *See id.* at 270 (announcing that "[a] punishment is 'cruel and unusual[]' . . . if it does not comport with human dignity" and certain principles, inherent to the Eighth Amendment and recognized in existing cases, are "sufficient to permit a judicial determination whether a challenged punishment comports with human dignity").

160. *Id.* at 281.

161. *Id.* at 271–74 (noting that a punishment may be degrading to human dignity "simply by reason of its enormity" if it lacks a component of humanity).

162. *Furman*, 408 U.S. at 273.

163. *Id.* at 277.

164. *Id.* at 274–77, 281.

addition, punishments "clearly and totally rejected throughout society" fail the third principle.[165] Finally, the fourth and perhaps most important principle, in the context of actual innocence, is that a punishment must not be excessive, which is to say it must not be unnecessary.[166] Any pointless or unnecessary punishment fails to respect human dignity, violates the fourth principle, and offends the Eighth Amendment.[167]

Applying these principles in *Furman* led Justice Brennan to conclude that capital punishment is a cruel and unusual punishment in modern society.[168] In this determination, he integrated his four principles into the following test:

> If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the [Cruel and Unusual Punishments] Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.[169]

Thus, according to this test, all four principles must be considered for a punishment to comport with the Eighth Amendment.

The federal habeas statute as limited by the AEDPA should be viewed as violative of the Eighth Amendment to the extent it fails Brennan's test. Under the first principle, a refusal to entertain claims of actual innocence for federal habeas review manifests a punishment that by its severity fails to adequately recognize and comport with human dignity.[170] This conclusion alone could be sufficient to establish a violation of the Eighth Amendment. However, while reasonable minds could differ on the proposition that the punishment of those actually innocent (despite being

165. *Id.* at 277–79, 281.

166. *Id.* at 279–80.

167. *See* Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring) ("A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering.").

168. *Id.* at 271–82, 286.

169. *Id.* at 282.

170. *Cf. id.* at 273–74 (reiterating that "a denial by society of the individual's existence as a member of the human community" is "degrading simply by reason of its enormity").

found guilty at trial) disregards human dignity, the remaining three principles nonetheless appear to directly support the need to permit actual innocence claims for federal habeas review.

Turning to the second principle, it must be noted that the incarceration of the innocent serves no identifiable deterrent, rehabilitative, or retributive purpose,[171] and worse, leaves the guilty to roam free in society.[172] Thus, to ensure that the incarceration of any person is *not* arbitrary, actual innocence should be recognized as an independent constitutional claim in the federal habeas context. Otherwise, those who are actually innocent of their convictions, but who are only able to prove their innocence on federal habeas review (and not at the trial stage or on direct appeal), may remain in state custody in violation of the Eighth Amendment.

In considering the third principle, it stands to reason that members of society have a great interest in ensuring the accuracy of criminal convictions, if for no other reason than an underlying desire not to find oneself falsely convicted of a crime.[173] In this regard, American society implicitly rejects the punishment of innocent people.[174] Thus, denying a habeas petitioner the opportunity to present his actual innocence evidence, which was not available at trial, would create a substantial risk of perpetuating a

171. *Cf.* United States v. Giraldo, 822 F.2d 205, 210 (2d Cir. 1987) ("The proper purposes of the sentencing of criminal offenders are generally thought to encompass punishment, prevention, restraint, rehabilitation, deterrence, education, and retribution. A sentence imposed for an improper purpose is subject to vacation on appeal." (citation omitted)); United States v. Carlston, 562 F. Supp. 181, 183–85 (N.D. Cal. 1983) (analyzing whether the sentence, when properly imposed, served the purposes of deterrence, restraint, and rehabilitation).

172. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596 (1980) ("A miscarriage of justice that imprisons an innocent accused also leaves a guilty party at large, a continuing threat to society.").

173. *See* Teague v. Lane, 489 U.S. 288, 312 (1987) (recognizing that the purpose of habeas review was to assure that convictions do not "create[] an impermissibly large risk that the innocent will be convicted" (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)) (internal quotation marks omitted)); c*f. In re* Winship, 397 U.S. 358, 364 (1970) (stressing the importance of the reasonable doubt standard of proof to "command the respect and confidence of the community" and not "leave[] people in doubt whether innocent men are being condemned").

174. *See* Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)) (internal quotation marks omitted)).

form of punishment clearly rejected by society.

Finally, the fourth principle speaks directly to the necessity for considering actual innocence claims in federal habeas review. The needless, mistaken, and purposeless punishment of an innocent person serves no justifiable end and is, therefore, unnecessary.[175] An unnecessary punishment is an excessive and pointless infliction of suffering that fails to respect human dignity.[176] Claims of actual innocence should be recognized as constitutionally valid, when presented against continued imprisonment upon federal habeas review, to militate against unnecessary incarcerations that violate the Eighth Amendment.

C. *Proportionality Between Crime and Punishment*

Beyond the compulsory respect for human dignity that must attend any incarceration, there is an additional component to the ban on cruel and unusual punishments. The Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."[177] In 1910, the Supreme Court declared in *Weems v. United States*[178] that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[179] In support of this proportionality requirement, the Court explained that both statutory and constitutional laws were borne "from an experience of evils but [their] general language should not, therefore, be necessarily confined to the form that evil had theretofore taken."[180] In the many years following *Weems*, the Court has applied the proportionality principle in assessing the constitutional propriety of sentences imposed for violation of a narcotics statute[181] and nonviolent felony convictions,[182] as well as the con-

175. *See Furman*, 408 U.S. at 279 (Brennan, J., concurring) ("The final principle . . . is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary.").

176. *Id.*

177. Solem v. Helm, 463 U.S. 277, 284 (1983).

178. Weems v. United States, 217 U.S. 349 (1910).

179. *Id.* at 367.

180. *Id.* at 373.

181. *See* Robinson v. California, 370 U.S. 660, 676–78 (1962) (Douglas, J., concurring) ("A punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual' punishment.").

182. *See Solem*, 463 U.S. at 279, 284–90 ("The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.").

stitutionality of capital punishment for the mentally challenged[183] and minors.[184] However, the requirement of proportionality between the punishment and the offense may rest on tenuous grounds.

In 1991, The Eighth Amendment's requirement of proportionality was obscured by *Harmelin v. Michigan*.[185] In a fractured opinion written by Justice Scalia and joined only by then Chief Justice Rehnquist, the Court held "the Eighth Amendment contains no proportionality guarantee."[186] Justices Kennedy, O'Connor, and Souter, while concurring in the judgment, disagreed with the quoted portion of Justice Scalia's opinion and reaffirmed the requirement of proportionality found in the Eighth Amendment.[187] Justice White's dissent, joined by Justices Blackmun and Stevens, expressed that, because there was "no justification" for overruling existing precedent, "[t]o be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt."[188] Yet, despite ambiguity in the Court's treatment of proportionality since *Harmelin*, the Court has upheld proportionality review as a component of Eighth Amendment scrutiny as recently as May 2010, in a majority opinion written by Justice Kennedy.[189]

Evolving standards of decency compel the proposition that any punishment of an innocent individual is disrespectful of human dignity and a violation of the Eighth Amendment.[190] Similarly,

183. *See* Atkins v. Virginia, 536 U.S. 304, 311–13 (2002) ("We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment.").

184. *See* Roper v. Simmons, 543 U.S. 551, 564–71 (2005) (excluding capital sentencing as a form of constitutionally acceptable punishment of minors under the Eighth Amendment because of the disproportionate benefit gained by the most severe penalty).

185. Harmelin v. Michigan, 501 U.S. 957 (1991) (plurality opinion).

186. *Id.* at 961, 965.

187. *Id.* at 997 (Kennedy, J., concurring in part and concurring in judgment) ("Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle.").

188. *Id.* at 1009, 1021–23 (White, J., dissenting).

189. *See* Graham v. Florida, 130 S. Ct. 2011, 2017, 2021–22 (2010) ("The concept of proportionality is central to the Eighth Amendment.... The controlling opinion [in *Harmelin*] concluded that the Eighth Amendment contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (quoting *Harmelin*, 501 U.S. at 999, 1000–01 (Kennedy, J., concurring in part and concurring in judgment))).

190. *Cf.* Schlup v. Delo, 513 U.S. 298, 324–25 (1995) (explaining that the "quintessential miscarriage of justice is the execution of a person who is entirely

because there can logically be no punishment proportional to the absence of a crime, no form of punishment can be proportional when applied to an innocent person who has been falsely convicted. Moreover, punishing an innocent person can have no legitimate "penological justification" to achieve retribution, deterrence, incapacitation, or rehabilitation, and a "sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[191] Because continued incarceration of the innocent manifests an utter disregard for the decency of man, and can never be proportional to his "crime" no matter the situation, the Eighth Amendment compels the recognition of actual innocence claims in the federal habeas setting. After all, if the Eighth Amendment proscribes the punishment of the innocent, then claims of actual innocence should be constitutionally recognized in federal habeas review to advance the writ of habeas corpus's central purpose of remedying any detention violative of the Constitution.[192]

D. *As Applied to Davis*

In "expressing considerable doubt that any claim based on alleged 'actual innocence' is constitutionally cognizable,"[193] Justice Scalia failed to appreciate the "dignity of man" concept central to the constitutional prohibition against cruel and unusual punishments.[194] While perhaps not a model citizen, Davis is nonetheless a human being worthy of the basic respect and consideration accorded to all people.[195] Because Davis is "possessed of common human dignity,"[196] he should qualify for

innocent").

191. *Cf. Graham*, 130 S. Ct. at 2028–30 (analyzing how "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders").

192. *See* 28 U.S.C. § 2254(a) (2006) (providing that federal courts "shall entertain an application for a writ of habeas corpus . . . only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States").

193. *Davis VI*, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting).

194. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

195. *Cf.* Furman v. Georgia, 408 U.S. 238, 272–73 (1972) (Brennan, J., concurring) (noting that punishments that "treat members of the human race . . . as objects to be toyed with and discarded . . . are inconsistent with the fundamental premise of the [Cruel and Ununsual Punishments] Clause").

196. *Cf. id.* at 273 ("[E]ven the vilest criminal remains a human being possessed of common human dignity.").

an opportunity to present his claim of actual innocence. Moreover, the likelihood that Davis can prove his actual innocence arguably makes his confinement just as likely to be arbitrary, unnecessary, and a punishment clearly rejected by society. Similarly, the duty of courts to ensure the state punishes proportionately to the crime further justifies recognizing the validity of Davis's actual innocence claim. Ultimately, his actual innocence evidence may establish that someone else shot Officer MacPhail or it may not. The essential point is that Davis should have a constitutional right to prove his actual innocence to a federal habeas court. Otherwise, the greater the possibility of Davis's actual innocence, the greater the risk that his continued confinement amounts to a prohibited form of cruel and unusual punishment for a crime he did not commit.

VI. CONCLUSION

While "history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence,"[197] "[n]othing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent."[198] Accepting that the incarceration of innocent persons denied an avenue to prove their innocence violates both the substantive due process right to freedom from bodily restraint and the Eight Amendment's proscription of cruel and unusual punishment, the statutorily compelled exclusion of actual innocence claims upon federal habeas review is difficult to defend. After all, "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution."[199] When couched in terms of an available habeas claim to vindicate the wrongly convicted, rather than merely a procedural vehicle to correct constitutional errors made at trial, actual innocence seems worthy of endorsement. To propose that a habeas petitioner should be denied review of newly available exculpatory evidence based upon "doubt that any claim . . . [of] 'actual innocence' is constitutionally cognizable"[200] ignores both the Due Process and

197. Herrera v. Collins, 506 U.S. 390, 415 (1993).
198. *Id.* at 430 (Blackmun, J., dissenting) (citations omitted).
199. *Id.* at 400 (majority opinion).
200. *Davis VI*, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting).

Cruel and Unusual Punishments Clauses and consequently subverts the central purpose of the writ of habeas corpus, which is to reverse unconstitutional convictions.[201] As Justice Stevens stated in the case of Anthony Troy Davis: "[I]magine a petitioner in Davis's situation who possesses new evidence conclusively and definitely proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning."[202] Had the majority been unwilling to recognize and accept the unremarkable proposition that our courts should countenance a degree of nuisance in the post-conviction setting to ensure the innocent are set free, our society would face a substantial possibility of acquiescing to the execution of an innocent person.

201. *See Herrera*, 506 U.S. at 400 (stating a federal habeas court must hear evidence that could not have been brought in state court if this evidence "bear[s] upon the constitutionality of the applicant's detention" (quoting Townsend v. Sain, 372 U.S. 293, 317 (1963)) (internal quotation marks omitted)); *see also* Walker v. Wainwright, 390 U.S. 335, 336–37 (1968) (per curiam) (declaring that the purpose of habeas review is to "test the legality" of a party's conviction under the Constitution).

202. *Davis VI*, 130 S. Ct. at 2 (Stevens, J., concurring).