
INNOCENT OWNERS AND ACTUAL INNOCENCE: RAISING INNOCENCE AS A CONSTITUTIONAL DEFENSE TO GOVERNMENT PUNISHMENT

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“Fundamental fairness prohibits the punishment of innocent people.”¹

I. INTRODUCTION

It is a generally accepted principle that it is unjust to punish the innocent.² Those who are blameless should not bear the burden of blame; those who have done nothing wrong, who have committed no crime, should not be penalized or treated like criminals.³ In the United States’ justice system, however, this principle is not always upheld.⁴ Of course, no justice system is perfect, but in the United States’ adversarial system, in which fairness—not truth—is the ultimate goal,⁵ even fairly convincing evidence of a person’s innocence is not necessarily an assurance that the person will not be punished under certain circumstances.⁶ This is not because the United

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¹ *Bennis v. Michigan*, 516 U.S. 442, 466 (1996) (Stevens, J., dissenting).

² *See* *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O’Connor, J., concurring) (“[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event.”); *Bennis*, 516 U.S. at 458–59 (“[N]either logic nor history supports [the idea] that [a person’s] complete innocence imposes no constitutional impediment to the seizure of their property . . .”).

³ *See, e.g.*, John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1022 (1999). *But see id.* (also noting strict liability as an exception).

⁴ *See, e.g.*, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (“[T]he innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense.”); *see also Herrera*, 506 U.S. at 404 (“[A]ctual innocence is not itself a constitutional claim . . .”).

⁵ *See, e.g.*, R. J. Gerber, *Victory v. Truth: The Adversary System and its Ethics*, 19 ARIZ. ST. L.J. 4–5 (1987).

⁶ *See* *Patterson v. New York*, 432 U.S. 197, 208 (1977) (“Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.”).

States' system of justice is indifferent to the truth, or to the actual guilt or innocence of a person⁷; rather, this is the result of the philosophical premise that ensuring fairness is the best way to ensure that the truth is revealed.⁸ The philosophy has appeal to be sure, but it can also lead to results that are instinctively unjust to the average person.⁹

This article addresses some of the many issues raised by the tension between the goals of the adversarial system and the principle that the innocent deserve to be free from punishment. There are at least two specific areas of the law in which a person's innocence does not shield that person from punishment. The first is in the realm of civil forfeiture, wherein the owner of property may forfeit his or her right to property seized by the government without compensation due to the criminal actions of a third party.¹⁰ The history of civil forfeiture is rife with seizures of property belonging to persons who are themselves innocent of any wrongdoing.¹¹ Throughout that history property owners have cited their innocence to raise constitutional challenges to the seizures under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.¹²

The second area of the law is in the field of habeas corpus and claims of actual innocence as grounds for relief. The actual innocence of a person in custody has been raised as a ground for habeas relief as a "gateway" around procedurally defaulted claims of other constitutional violations,¹³ and has also been raised as an independent constitutional ground for relief under the Fifth, Eighth, and Fourteenth Amendments.¹⁴

This article argues that these two areas of law must incorporate the fundamental principle that innocence is an absolute defense to punishment. More specifically, this article argues that violating this principle amounts to a constitutional violation regardless of the type of punishment involved, whether it be incarceration, execution, or loss of property. In the civil forfeiture and habeas corpus contexts, the Supreme Court has acknowledged a hypothetical defense based on innocence, but in neither context has the court upheld or explicitly authorized such a defense. The Supreme Court

⁷ See *Herrera*, 506 U.S. at 404.

⁸ See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724–25 (1974).

⁹ See *Bennis v. Michigan*, 516 U.S. 442, 454 (1996) (Thomas, J., concurring).

¹⁰ See *id.* at 448 (majority opinion) (citing *Van Oster v. Kansas*, 272 U.S. 465, 467–68 (1926)).

¹¹ See *Bennis*, 516 U.S. at 446 ("But a long and unbroken line of cases holds that an owner's interest in property may be forfeited . . . even though the owner did not know that it was to be put to such use.").

¹² See *id.* at 446–53.

¹³ See, e.g., *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

¹⁴ See, e.g., *id.* at 393.

should explicitly recognize innocence as a defense in both contexts; in so doing, the Court will reaffirm the principle, fundamental to United States jurisprudence, that the law does not punish the innocent.

II. CIVIL FORFEITURE AND THE GUILTY PROPERTY FICTION

The history of civil forfeiture predates the founding of the United States.¹⁵ England recognized three types of forfeiture at the time of America's founding.¹⁶ The first, "escheat upon attainder," applied only to convicted felons and "traitors."¹⁷ Though this type of forfeiture did not implicate forfeiture of an innocent person's property, it did allow the government to confiscate property that had no connection to the crime charged.¹⁸ The second type of forfeiture, known as "deodand," dated back to at least biblical times¹⁹ and stemmed from the concept that an inanimate object could be forfeited to the crown on the grounds that the object itself was guilty of "directly or indirectly causing the accidental death of a King's subject."²⁰ The owner's property loss was justified by painting the owner as negligent for allowing the property to be put to a use that harmed another.²¹

Statutory forfeiture extended deodand's "guilty property" fiction beyond property that caused an individual harm to include property that was even less "guilty" of violating the King's laws.²² Under this type of forfeiture "offending objects used in violation of the customs and revenues laws" could be forfeited to the Crown.²³

¹⁵ See *Austin v. United States*, 509 U.S. 602, 611 (1993) ("Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States . . .").

¹⁶ See *id.*; Peter David Houtz, Case Note, *The Innocent Owner Defense to Civil Forfeiture Proceedings*, 31 U. RICH. L. REV. 257, 260 (1997) ("Civil forfeiture statutes and the notion of 'guilty property' can be historically traced to three types of forfeiture recognized at English common law . . .").

¹⁷ Houtz, *supra* note 16, at 260.

¹⁸ *Id.*

¹⁹ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).

²⁰ *Id.* at 680-81.

²¹ See *Austin v. United States*, 509 U.S. 602, 611 (1993) ("[S]uch misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture." (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 301) (citation omitted)).

²² *Calero-Toledo*, 416 U.S. at 682 ("Statutory forfeitures [were] . . . likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer.").

²³ *Id.*

A. EARLY-AMERICAN FORFEITURE: THE PALMYRA AND HARMONY V. UNITED STATES

Of the three historic forms of forfeiture, only statutory forfeiture survived into United States jurisprudence.²⁴ Forfeiture became firmly entrenched in American jurisprudence with two nineteenth century maritime cases²⁵: *The Palmyra*²⁶ and *Harmony v. United States*.²⁷

The Palmyra involved an attempt by the United States to seize the ship of an individual accused of privateering.²⁸ The individual challenged the seizure, claiming it was illegal because it was premised upon the ship being involved in privateering, a crime for which none of the ship's sailors had been convicted.²⁹ Justice Story dismissed this argument and upheld the seizure under the guilty property fiction.³⁰ There are many cases, the Court pointed out, where forfeiture is sought without an accompanying criminal charge, and there are many cases where a person is criminally prosecuted without an attempt by the government to seize his property, "[b]ut in neither class of cases has it ever been decided that the prosecutions were dependent upon each other."³¹ Thus, according to the Court, the forfeiture proceeding could proceed independently of any criminal trial for privateering because "[t]he thing [wa]s . . . primarily considered as the offender, or rather the offence [sic] [wa]s attached primarily to the thing . . ."³² In other words, the forfeiture of the ship did not depend upon whether the ship owner had actually been engaged in privateering; rather, the ship was subject to forfeiture because the ship "itself" may have been engaged in privateering.³³ Thus, in *The Palmyra*, the United States Supreme Court made clear that the guilty property fiction, developed in England through deodand, had crossed the Atlantic.

Less than twenty years later, the Court reaffirmed that decision in *Harmony v. United States*.³⁴ In *Harmony*, the owner of a vessel who was

²⁴ See *id.* at 682–83 (noting that escheat upon attainder is constitutionally proscribed and deodand "did not become part of the common-law tradition of [the United States]").

²⁵ *Bennis v. Michigan*, 516 U.S. 442, 446–47 (1996).

²⁶ *The Palmyra*, 25 U.S. (12 Wheat.) 1, 10 (1827).

²⁷ *Harmony v. United States*, 43 U.S. 210, 233–34 (1844).

²⁸ *The Palmyra*, 25 U.S. (12 Wheat.) at 9–10. Though the term and practice are uncommon today, a privateer was a private individual authorized by his or her nation to arm a privately owned ship and attack the trade ships of other nations. BLACK'S LAW DICTIONARY 1195–96 (6th ed. 1991).

²⁹ *The Palmyra*, 25 U.S. (12 Wheat.) at 9–10.

³⁰ *Id.* at 14–15.

³¹ *Id.* at 15.

³² *Id.* at 14.

³³ See *id.*

³⁴ *Harmony v. United States*, 43 U.S. 210, 233–34 (1844).

accused of piracy challenged the ship's forfeiture on the grounds that neither the owner of the ship nor the owner of the cargo authorized, or were even aware of, actions of the crew that violated piracy laws.³⁵ Once again, Justice Story dismissed the argument and directed attention to the guilty property: "[t]he vessel which commits the aggression is treated as the offender . . . without any reference whatsoever to the character or conduct of the owner. . . . In short, the acts of the master and crew . . . bind the interest of the owner of the ship, whether he be innocent or guilty."³⁶ In deciding the case, the Court cited the guilty property fiction articulated in *The Palmyra*³⁷ as binding precedent (at least in admiralty) that the guilt or innocence of a property owner has no bearing on forfeiture proceedings.³⁸

B. TWENTIETH-CENTURY DEVELOPMENT: THE GUILTY PROPERTY FICTION IN NEW CONTEXTS

Civil forfeiture has expanded beyond the admiralty context of *The Palmyra* and *Harmony*.³⁹ The Court has extended the practice of civil forfeiture to vast areas of law and has consistently refused to consider the guilt or innocence of the property owner when determining whether the seizure is lawful.⁴⁰

In *Goldsmith v. United States*, an automobile dealership sold a car to a man and retained title to the car while the man made payments.⁴¹ The man was subsequently arrested for bootlegging⁴² and the government instituted an action for forfeiture of the car.⁴³ The dealership challenged the seizure on the grounds that the use of the car to transport liquor was "without the knowledge of the company or of any of its officers, nor did it or they have any notice or reason to suspect that it would be illegally used" and therefore violated the dealer's due process rights under the Fifth Amendment.⁴⁴

The Court noted the seemingly unjust nature of taking the property of one who is ostensibly innocent, but ultimately followed precedent—and the

³⁵ *Id.* at 230.

³⁶ *Id.* at 233–34.

³⁷ *See id.* ("The same [guilty property] doctrine was held by this court in the case of *The Palmyra* [to apply to revenue seizures]." (citation omitted)).

³⁸ *Id.* ("The same thing applies to proceeding *in rem* or seizures *in the admiralty*." (quoting *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827) (second emphasis added))).

³⁹ *See e.g.*, *Goldsmith v. United States*, 254 U.S. 505, 510–11 (1921) (applying forfeiture to a car bootlegging operation and listing similar cases).

⁴⁰ *See id.*; *see also infra* part II-3.

⁴¹ *See Goldsmith*, 254 U.S. at 509.

⁴² *Id.* at 508–09.

⁴³ *Id.*

⁴⁴ *Id.*

guilty property fiction—and rejected the dealership’s argument that its complete lack of culpability should shield it from forfeiture.⁴⁵ The Court alluded to the notion that the owner’s negligence in selling the car to a criminal could justify the forfeiture,⁴⁶ but recognized that such a justification may not exist in all circumstances.⁴⁷ The Court emphasized that the current forfeiture scheme could lead to absurd results and, importantly, “reserved opinion” on whether there might be some circumstances in which a property owner may be so truly innocent that applying the forfeiture laws would be unconstitutional.⁴⁸

The Court faced the same situation five years later in *Van Oster v. Kansas*, in which a car was subjected to forfeiture after its owner allowed the car dealer to retain possession of the car and the dealer subsequently allowed a third party to use the car to transport liquor.⁴⁹ The car owner asserted that, as an innocent owner, the forfeiture of her car violated her Fourteenth Amendment due process rights.⁵⁰ The Court cited *Goldsmith*, however, and rejected the argument that a property owner’s innocence would implicate due process in such a situation: “[i]t has long been settled that statutory forfeitures of property intrusted [sic] by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment.”⁵¹ The fact that the owner was challenging a state statute with a broader scope than a related federal statute did not change the Court’s Fourteenth Amendment analysis.⁵² Again, however, the Court reserved

⁴⁵ *Id.* at 510–11 (“[Forfeiture law’s] words[,] taken literally[,] forfeit property illicitly used though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that, if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution . . . [but] it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.”).

⁴⁶ *See id.* (citing Blackstone’s negligence justification for forfeiture applied to innocent property owners).

⁴⁷ *See id.* at 512.

⁴⁸ *Id.* (“When such application shall be made it will be time enough to pronounce upon it. And we also reserve opinion as to whether [forfeiture] can be extended to property stolen from the owner or otherwise taken from him without his privity or consent.”).

⁴⁹ *Van Oster v. Kansas*, 272 U.S. 465, 465–66 (1926).

⁵⁰ *Id.* at 466–67.

⁵¹ *Id.* at 468 (“We do not perceive any valid distinction between the application of the Fourteenth Amendment to the exercise of the police power of a state in this particular field and the application of the Fifth Amendment to the similar exercise of the taxing power by the federal government, or any reason for holding that the one is not as plenary as the other.” (citing cases)).

⁵² *Id.* at 468–69 (“We do not perceive any valid distinction between the application of the Fourteenth Amendment to the exercise of the police power of a state in this particular field and the application of the Fifth Amendment to the similar exercise . . . by the federal government, or any reason for

opinion as to whether one who was in no way negligent might be allowed to assert the innocent owner defense in forfeiture cases.⁵³

Goldsmith and *Van Oster* clarified that the Court was unwilling to find that forfeiture of an innocent third-party's property violated due process, at least not when that property was voluntarily entrusted to those who put it to an illegal use.⁵⁴ The Court continued along this line of reasoning in 1974, when it considered another angle on the innocent owner defense: whether civil forfeiture of a third-party's property constituted a taking without just compensation in violation of the Fifth Amendment.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, a boat rental company leased a yacht to vacationers.⁵⁵ Puerto Rican authorities seized the boat after they discovered marijuana onboard.⁵⁶ The Puerto Rican government then instituted forfeiture proceedings against the yacht and the owner challenged the forfeiture as a taking without just compensation.⁵⁷ The Court acknowledged that the owner was "in no way . . . involved in the criminal enterprise carried on by [the] lessee" and "had no knowledge that its property was being used in connection with or in violation of [Puerto Rican Law],"⁵⁸ but the Court ultimately rejected the owner's argument⁵⁹ based on the precedent of the guilty property fiction established in *The Palmyra* to *Van Oster*: "Despite this proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."⁶⁰ Again, the Court cautioned that some set of facts could potentially arise that would render such a forfeiture unconstitutional,⁶¹ but under the facts in *Calero-Toledo*, the Court allowed the innocent party to be punished alongside the guilty.⁶²

holding that the one is not as plenary as the other The mere fact that the statute now in question has a broader scope than [the federal law] authorizing confiscation . . . does not affect its validity."

⁵³ *Id.* at 467 ("It is unnecessary for us to inquire whether the police power of the state extends to the confiscation of the property of innocent persons appropriated and used by the law breaker without the owner's consent, for here the offense . . . was committed by one entrusted by the owner with the possession and use of the [property].").

⁵⁴ *See id.*; *see also* *Goldsmith v. United States*, 254 U.S. 505, 511–12 (1921).

⁵⁵ *Calero-Toledo*, 416 U.S. 663, 665 (1974).

⁵⁶ *Id.* at 665–66.

⁵⁷ *See id.* at 680 ("[F]orfeiture schemes are not rendered unconstitutional because of their applicability to the property interests of innocents . . .").

⁵⁸ *Id.* at 668 (alteration in original).

⁵⁹ *See id.* at 665–668.

⁶⁰ *Id.* 683.

⁶¹ *See id.* at 688–89 ("This is not to say, however, that the 'broad sweep' of forfeiture statutes . . . could not, in other circumstances, give rise to serious constitutional questions.").

⁶² *See id.* at 689.

C. CIVIL FORFEITURE TODAY: BACK WHERE WE STARTED?

While the Supreme Court continuously rejected the innocent owner defense throughout the 1900s, two cases, decided as the century came to a close, indicated that the Court might change directions on the issue.

1. *Austin v. United States*

In *Austin*, a South Dakota man was indicted on drug charges.⁶³ A month later, federal authorities initiated forfeiture proceedings against the man's home and auto shop.⁶⁴ The man challenged the forfeiture, arguing that it violated the Excessive Fines Clause of the Eighth Amendment.⁶⁵ The circuit court rejected the argument on two grounds⁶⁶: first, the Eighth Amendment's protections did not apply to forfeiture actions in civil proceedings⁶⁷; second, a proportionality analysis was inappropriate because, under Supreme Court precedent, forfeiture concerned only the "guilt" of the property without regard to the guilt or innocence of the property owner.⁶⁸

On appeal, the Supreme Court rejected the contention that Eighth Amendment protections apply only to criminal and not civil proceedings.⁶⁹ Examining clauses in the Fifth and Sixth Amendments, the Court noted that "[s]ome provisions of the Bill of Rights are expressly limited to criminal cases," but "[t]he text of the Eighth Amendment includes no similar limitation. . . . Nor does the history of the Eighth Amendment require such a limitation."⁷⁰ The Court decided that, aside from the Bail Clause, "[t]he purpose of the Eighth Amendment . . . was to limit the government's power to *punish*,"⁷¹ and "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law."⁷² Thus, according to the Court, the question was whether the forfeiture amounted to punishment; if so, it was subject to the limitations of the Eighth Amendment.⁷³

⁶³ *Austin v. United States*, 509 U.S. 602, 604 (1993).

⁶⁴ *Id.* at 604–05.

⁶⁵ *Id.* at 605.

⁶⁶ *Id.* at 605–06.

⁶⁷ See *United States v. One Parcel of Property Located at 508 Depot Street*, 964 F.2d 814, 817 (8th Cir. 1992).

⁶⁸ *Id.*

⁶⁹ *Austin*, 509 U.S. at 622.

⁷⁰ *Id.* at 607–08. This is in contrast to the Fifth Amendment's Self-incrimination Clause and the Sixth Amendment's right to counsel, which are limited to criminal law. See *id.*

⁷¹ *Id.* at 609 (emphasis added).

⁷² *Id.* at 610 (quoting *United States v. Halper*, 490 U.S. 435, 447–48 (1989)).

⁷³ *Id.*

In considering the question, the Court noted that an action can be both remedial *and* punitive⁷⁴ and that historically, forfeiture “was understood, at least in part, as imposing punishment.”⁷⁵ This, the Court decided, was as true today, as it was then.⁷⁶ The Court went on to note that the underlying reason for rejecting the innocent owner defense had been the negligence of the owner, which indicated that seizing the property of an innocent third party was in fact punishment.⁷⁷ The Court elaborated that the failure of the innocent owner defense was due as much to the presumed negligence of the innocent property owner as it was to guilty property fiction; in fact, the fiction rested upon the notion of negligence⁷⁸:

In none of these cases did the Court apply the guilty-property fiction to justify forfeiture when the owner had done all that reasonably could be expected to prevent the unlawful use of his property. . . . If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense.⁷⁹

Thus, the Court seemed to suggest that a “*truly* innocent owner” would be able to overcome a forfeiture action,⁸⁰ but the Court reserved judgment on the issue.⁸¹

2. *Bennis v. Michigan*

In *Bennis*, John Bennis was arrested for engaging in sex with a prostitute while in his car.⁸² Following the arrest, Michigan authorities instituted forfeiture proceedings against the car under Michigan's public nuisance laws.⁸³ Bennis's wife, Tina, owned an equal share in the car and alleged that the forfeiture violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment.⁸⁴ The Mich-

⁷⁴ *Id.*

⁷⁵ *Id.* at 611.

⁷⁶ *Id.* at 619.

⁷⁷ *Id.* at 617–18.

⁷⁸ *Id.* at 618.

⁷⁹ *Id.* at 617 n.10.

⁸⁰ *See id.* at 616–20179. The Court dismissed the notion that either *The Palmyra* or *Harmony* stood for the proposition that the truly innocent could have their property forfeited and noted that more recent cases have consistently reserved the question. *See id.* at 616–17 (“In none of these cases did the Court apply the guilty-property fiction to justify forfeiture when the owner had done all that reasonably could be expected to prevent the unlawful use of his property.”).

⁸¹ *Id.* (emphasis added).

⁸² *Bennis v. Michigan*, 516 U.S. 442, 443 (1996).

⁸³ *Id.* at 443–44.

⁸⁴ *Id.* at 443.

igan courts rejected Tina Bennis's arguments, ordered the car to be sold, and refused to give half of the proceeds to Mrs. Bennis.⁸⁵

The United States Supreme Court, in rejecting Tina Bennis's invocation of the innocent owner defense, reverted back to precedent of the line of cases following *The Palmyra*.⁸⁶ The majority construed the language of *Austin* as dicta implicating the Eighth Amendment only and held that the guilty property fiction rendered Mrs. Bennis's innocence irrelevant.⁸⁷ The Court stated that *Austin* did not open a new door to the innocent owner defense but was instead limited to the narrow question of whether civil forfeiture is completely remedial or partly punishment.⁸⁸

Four Justices disagreed with this result.⁸⁹ In his dissent, Justice Stevens, joined by Justices Souter and Breyer, argued that *Austin's* holding stood for more⁹⁰; namely, that it stood for the proposition that a truly innocent property owner—that is, an owner who is not negligent and has taken all reasonable precautions against the illegal use of the property—is shielded by the Constitution from forfeiture actions.⁹¹ Also dissenting, Justice Kennedy questioned whether culpability and the guilty property fiction were in any way connected when civil forfeiture began in the United States.⁹² He postulated that the guilty property fiction was a creature unique to admiralty, created out of the necessities of the time, when holding the ship was the only way to ensure jurisdiction could be had, and punishments carried out.⁹³ In modern society, Justice Kennedy reasoned, such a harsh, judicially created fiction was hardly justified outside of maritime

⁸⁵ *Id.* at 444–46.

⁸⁶ *Id.* at 446 (“But a long and unbroken line of cases holds that an owner’s interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.”). The Court went on to cite *The Palmyra*, *Van Oster*, *Goldsmith*, and *Calero-Toledo*. See *id.* at 446–49.

⁸⁷ *Id.* at 451–53.

⁸⁸ *Id.* at 452–53 (“There was no occasion in [*Austin*] to deal with the validity of the ‘innocent-owner defense,’ other than to point out that if a forfeiture statute allows such a defense, the defense is additional evidence that the statute itself is ‘punitive’ in motive.”).

⁸⁹ *Id.* at 458 (Stevens, J., dissenting) (joined by Justices Souter and Breyer); *id.* at 472 (Kennedy, J., dissenting).

⁹⁰ *Id.* at 466–67 (Stevens, J., dissenting).

⁹¹ *Id.* at 466 (Stevens, J., dissenting) (“[T]he Constitution bars the punitive forfeiture of property when its owner alleges and proves that he took all reasonable steps to prevent its illegal use.”). According to Justice Stevens, *Austin* and its predecessor cases required reversal in *Bennis* because “[f]undamental fairness prohibits the punishment of innocent people.” *Id.*

⁹² *Id.* at 472 (Kennedy, J. dissenting).

⁹³ *Id.* at 472–73.

law and could not satisfy due process requirements without an innocent owner defense.⁹⁴

Despite the disagreement within the Supreme Court, as the twentieth century closed, the state of the law on the innocent owner defense technically remained as it was from the time of *The Palmyra*. The holding in *Austin* and the dissenting opinions in *Bennis*, however, indicated that the Court's hard-lined rejection of the innocent owner defense was bending and that, at least in some theoretical situation, the Constitution could protect innocent property owners who find themselves the subjects of forfeiture proceedings.

III. THE WRIT OF HABEAS CORPUS: JUDICIAL INDIFFERENCE TO ACTUAL INNOCENCE

Like civil forfeiture, the writ habeas corpus predates the founding of the United States.⁹⁵ Carried into U.S. law from England and dating at least as far back as the *Magna Carta*, habeas corpus was originally a tool of the English Crown to ensure the courts worked properly by giving courts a means to force jurors, witnesses, and others into court.⁹⁶ By the time habeas corpus was included in the United States Constitution, however, it had developed into a means for courts to assess the lawfulness of a person's incarceration by government authorities and order the person's release if the incarceration is deemed unlawful.⁹⁷ Over time, the writ has come to be the "primary method for state prisoners to challenge the legality of their convictions in federal court[s]."⁹⁸ Today, those in government custody may invoke the writ in order to challenge their incarceration as a violation of the Constitution or laws of the United States.⁹⁹ A federal court must then consider whether a state has violated the rights of the prisoner, and if so, order a new trial or the prisoner's release.¹⁰⁰

As a general rule, prisoners who invoke the writ of habeas corpus are not alleging their innocence¹⁰¹; rather, the prisoners commonly invoke the

⁹⁴ *Id.* at 473 ("This forfeiture cannot meet the requirements of due process.").

⁹⁵ See Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 377-78 (1998).

⁹⁶ See *id.*

⁹⁷ See *id.* at 378; 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, 674 (2008).

⁹⁸ See *id.* at 672.

⁹⁹ See *id.*; 28 U.S.C. § 2254(a) (2006).

¹⁰⁰ See, e.g., *Lonchar v. Thomas*, 517 U.S. 314, 332 (1996).

¹⁰¹ See, e.g., *Ex parte Quirin*, 317 U.S. 1, 25 (1942).

writ to allege that their conviction was the result of some error in the trial process.¹⁰² Ineffective assistance of counsel or violations of the prisoner's Fifth Amendment rights during investigation are typical examples of errors alleged in habeas petitions.¹⁰³ Under a long line of precedent, the United States Supreme Court has articulated several grounds on which a prisoner may have the original conviction ruled unconstitutional and receive a new trial.¹⁰⁴ The Court has also ruled that habeas may be used to nullify a sentence if the prisoner demonstrates an error during sentencing hearings.¹⁰⁵ The possibility of nullification does not extend to errors earlier in the trial, however.

Thus, in theory, the writ of habeas corpus affords the defendant a new sentencing hearing even if the defendant's guilt of the underlying crime is not in doubt.¹⁰⁶ In practice, however, a petition for habeas corpus rarely results in so much as a hearing, much less a new trial.¹⁰⁷ A habeas petition is even less likely to secure an order of release.¹⁰⁸ Nonetheless, the habeas corpus procedure remains as an important safeguard for those few instances where a violation of a defendant's constitutional rights resulted in an unlawful incarceration by state or federal authorities.

A. INTRODUCING THE QUESTION OF GUILT INTO HABEAS: *JACKSON V. VIRGINIA*

The closest habeas courts have come to considering the innocence of the petitioner as a ground for nullifying a state criminal conviction was in *Jackson v. Virginia*, in which the United States Supreme Court questioned whether the record provided sufficient evidence for a trier of fact to find the petitioner guilty beyond a reasonable doubt.¹⁰⁹ The defendant had been convicted of first-degree murder, which, under Virginia law, required a

¹⁰² See Steven Wisotsky, *Miscarriages of Justice: Their Causes and Cures*, 9 ST. THOMAS L. REV. 547, 558 (1997).

¹⁰³ *Id.*; see e.g. Price v. Vincent, 538 U.S. 634, 636 (2003) (double jeopardy); McCleskey v. Zant, 499 U.S. 467, 472 (1991) (jailhouse informant working with state officials in violation of right to counsel); Strickland v. Washington, 466 U.S. 668, 675 (1984) (ineffective assistance of counsel).

¹⁰⁴ See Schlup v. Delo, 513 U.S. 298, 317–27 (1995) (examining past decisions on various grounds for habeas corpus).

¹⁰⁵ See Sawyer v. Whitley, 505 U.S. 333, 347 (1992).

¹⁰⁶ See *id.*

¹⁰⁷ See Ronald J. Tabak, *Capital Punishment: Is there Any Habeas Left in this Corpus?*, 27 LOY. U. CHI. L.J. 523, 526 (1996); *id.* at 525–26 (“It is difficult for a prisoner to get a claim considered in habeas corpus, and even more difficult to secure relief.”).

¹⁰⁸ See *id.* at 525.

¹⁰⁹ *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979).

showing of intent.¹¹⁰ At trial, the defendant claimed that he was too intoxicated to have formed intent, but the jury nevertheless found the defendant guilty of first-degree murder.¹¹¹ In his habeas petition, the defendant did not argue that he was innocent, but that the state had not met its burden of proving the defendant's guilt beyond a reasonable doubt.¹¹²

The circuit court ruled for the state, accepting the argument that the question was whether there was "any" evidence that the defendant had committed first-degree murder.¹¹³ The Supreme Court disagreed: the Court held that the Fourteenth Amendment required proof beyond a reasonable doubt, and the question in habeas petitions was not whether there was "any" evidence of guilt, but whether there was "sufficient" evidence of guilt.¹¹⁴ The Court was clear, however, that this new standard did not involve determining whether a prisoner was *actually* guilty or innocent, but simply whether, upon the "evidence adduced at the trial[,] no rational trier of fact could have found proof of guilt beyond a reasonable doubt."¹¹⁵ The Court also instructed that, in making this determination, the evidence should be viewed "in the light most favorable to the prosecution."¹¹⁶

Jackson advances the Court's habeas jurisprudence by instructing courts to consider whether a prisoner has been properly *proven* guilty, focusing on the sufficiency of the evidence rather than the factual innocence of the accused. The holding of *Jackson* does not allow a defendant to later invoke his or her factual innocence as a ground for habeas relief, even with new evidence: the concern in *Jackson* was limited to whether the evidence "*adduced at trial*" was sufficient to support the conviction.¹¹⁷ Thus, under the standard pronounced in *Jackson*, federal courts hearing habeas petitions are empowered to consider whether the state provided sufficient evidence to prove guilt, but the courts' analyses must stop short of determining whether the defendant was *actually* guilty.¹¹⁸

¹¹⁰ *Id.* at 309.

¹¹¹ *Id.* at 311. Under Virginia law at the time, intoxication was not a defense to murder, but it was material to the question of premeditation. *Id.* at 311 n.2.

¹¹² *Id.* at 313.

¹¹³ *Id.* at 312.

¹¹⁴ *Id.* at 318–19.

¹¹⁵ *Id.* at 323–24.

¹¹⁶ *Id.* at 319.

¹¹⁷ *See id.* at 324 (emphasis added); *see also* *Hazel v. United States*, 303 F. Supp. 2d. 753, 759 (2004) ("[A]s a general rule, a claim of actual innocence, standing alone, is not a sufficient ground for habeas corpus relief . . .").

¹¹⁸ *See id.* at 321 ("[I]t is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have . . . [found] guilt beyond a reason-

B. THE MISCARRIAGE OF JUSTICE EXCEPTION AND PROCEDURAL
DEFAULT

In most cases, a federal court will grant a writ of habeas corpus if a prisoner can show that his or her constitutional rights were violated during the trial.¹¹⁹ In some instances, however, if a prisoner fails to adhere to state procedural rules—for example, by missing deadlines or failing to introduce evidence at a specific time—even evidence of a clear constitutional violation may not provide relief for the prisoner.¹²⁰ In such a case, the prisoner is said to be in “procedural default,” and cannot present the constitutional violation unless the prisoner can show “cause and prejudice” or actual innocence, either of which allows the prisoner to present the constitutional violation under the “miscarriage of justice exception.”¹²¹

The actual innocence defense allows a prisoner in procedural default to use a “colorable claim of factual innocence” as a gateway around the prisoner’s default status so that a court can consider the prisoner’s allegations of an independent constitutional violation.¹²² The gateway concept indicates an understanding that factually innocent persons should not be prohibited from challenging their punishment simply due to a procedural default.¹²³ That the exception is limited to instances in which there is a constitutional violation *independent* of the petitioner’s factual innocence suggests that the petitioner’s innocence is itself a constitutional violation. This notion is supported by the cases laying out the rules for escaping procedural default, which repeatedly express the view that the innocence of the accused is a constitutional concern.¹²⁴ According to the narrow holdings of these cases, a petitioner’s alleged innocence is not an independent ground for habeas relief; rather the petitioner’s “colorable claim of factual innocence” must be accompanied by an independent constitutional violation at

ble doubt has stated a federal constitutional claim. . . . [And] it follows that such a claim is cognizable in a federal habeas corpus proceeding.”)

¹¹⁹ See Tabak, *supra* note 107, at 525 (explaining that a prisoner may secure relief if his or her rights were “so seriously violated as to constitute harmful error”).

¹²⁰ See *Dretke v. Haley*, 541 U.S. 386, 392 (2004).

¹²¹ See *id.* at 392–93; *id.* at 393 (“The cause and prejudice requirement shows due regard for the States’ finality and comity interests while ensuring that ‘fundamental fairness [remains] the central concern of the writ of habeas corpus.’” (quoting *Strickland v. Washington*, 466 U.S. 668, 697 (1984))).

¹²² *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986); see *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (explaining that a writ of habeas corpus may be granted if an innocent person is convicted, even without a showing of procedural default); Case, *supra* note 97, at 677–78 n.45 (citing *Hubbard v. Pinchak*, 378 F.3d 333, 338 (3d Cir. 2004)).

¹²³ See, e.g., *Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Dretke*, 541 U.S. at 393.

¹²⁴ See *Schlup*, 513 U.S. at 321; *Dretke*, 541 U.S. at 393.

trial.¹²⁵ In other words, the petitioner's innocence claim allows the petitioner to present allegations of a constitutional violation, but does not, by itself, represent a ground for habeas relief.¹²⁶ In this respect, actual innocence, within the miscarriage of justice exception to procedural default, is no more than a means of overcoming procedural bars in order to have a court consider an alleged constitutional violation.¹²⁷

1. Actual Innocence as an Independent Constitutional Claim

a. *Herrera v. Collins*

Herrera v. Collins was the first case in which an incarcerated prisoner claimed his actual innocence as an independent substantive ground for habeas relief.¹²⁸ Herrera, the petitioner, was convicted of capital murder and sentenced to death.¹²⁹ He challenged his conviction under state remedies and a federal habeas petition, but was unsuccessful in obtaining relief.¹³⁰ Herrera later filed a second federal habeas petition arguing that new evidence not produced at trial proved he was factually and legally innocent of the crime for which he was convicted.¹³¹ Unlike the actual innocence claim under the miscarriage of justice exception, Herrera argued not that there was some error in his trial, but that even if his original trial was entirely fair, he was innocent of the crime and thus entitled to relief because executing an innocent person would violate the Eighth Amendment.¹³²

The Court rejected this argument, but of the six-Justice majority, five issued concurring opinions.¹³³ Justice Rehnquist, writing for the majority, stated that the petitioner did not give adequate grounds for relief: “[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”¹³⁴ The Court referenced the miscarriage of justice exception to procedural default as evidence that innocence was sometimes relevant, but the

¹²⁵ *Schlup*, 513 U.S. at 315.

¹²⁶ *See id.*

¹²⁷ *See id.* (“[The defendant’s] claim of innocence is thus ‘not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.’” (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993))).

¹²⁸ *Herrera v. Collins*, 506 U.S. 390, 396–98 (1993).

¹²⁹ *Id.* at 393.

¹³⁰ *Id.*

¹³¹ *Id.* at 396.

¹³² *Id.* at 398.

¹³³ *Id.* at 419 (O’Connor, J., concurring) (joined by Justice Kennedy); *id.* at 427 (Scalia, J., concurring) (joined by Justice Thomas); *id.* at 429 (White, J., concurring).

¹³⁴ *Id.* at 400 (majority opinion).

Court maintained that “‘actual innocence’ is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.”¹³⁵ Therefore, the Court reasoned, because no independent constitutional violation accompanied Herrera’s claim of actual innocence, Herrera’s freestanding claim of actual innocence did not state a ground for relief.¹³⁶

Still, the Court refused to completely close the door on the constitutional question: the majority “assume[d], for the sake of argument . . . that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief *if there were no state avenue open to process such a claim.*”¹³⁷ Three concurring justices stated their positions more explicitly: Justice O’Connor, joined by Justice Kennedy, called the execution of a person who was actually innocent a “constitutionally intolerable event.”¹³⁸ Justice White expressed the same opinion, though less forcefully: “a persuasive showing of ‘actual innocence’ . . . would render unconstitutional the execution of [a prisoner].”¹³⁹ The Justices explained that they concurred with the result reached by the majority because Herrera cited evidence that was inadequate to prove his actual innocence.¹⁴⁰

In dissent, Justice Blackmun, joined by Justices Stevens and Souter, declared that the Court should clearly and unequivocally announce the principle that the execution of one who is actually innocent violates the Eighth¹⁴¹ and Fourteenth Amendments.¹⁴² Justice Blackmun dismissed the majority and the government’s reasoning regarding the applicability of the

¹³⁵ *Id.* at 404.

¹³⁶ *Id.* at 404–5. Moreover, the Court continued, the truly innocent person is not without recourse, even if the original trial contained no independent constitutional error, because the petitioner could apply for executive clemency, which the Court described as “the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.” *Id.* at 411–12. The Court was rather confident that innocent prisoners could obtain clemency, claiming that, “history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.” *Id.* at 415.

¹³⁷ *Id.* at 417 (emphasis added). Presumably, executive clemency is such a “state avenue.” *Id.* at 411.

¹³⁸ *Id.* at 419 (O’Connor, J., concurring).

¹³⁹ *Id.* at 429 (White, J., concurring).

¹⁴⁰ *See id.* at 419 (O’Connor, J., concurring) (“Dispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word.”); *Id.* at 429 (White, J., concurring) (“[P]etitioner’s showing [of innocence] falls far short of satisfying [the necessary] standard.”).

¹⁴¹ *Id.* at 431 (Blackmun, J., dissenting) (“[I]t plainly is violative of the Eighth Amendment to execute a person who is actually innocent.”).

¹⁴² *Id.* at 435 (“Execution of the innocent is equally offensive to the Due Process Clause of the Fourteenth Amendment.”).

Eighth Amendment—that the Eighth Amendment was inapplicable because Herrera was challenging his guilt and not his punishment¹⁴³—and rejected the view that it does not offend substantive due process to convict an innocent person so long as a constitutional error at trial did not violate procedural due process.¹⁴⁴

In refusing to rule that actual innocence could stand alone as a ground for relief in a federal habeas proceeding, the Court in *Herrera* followed the same trend that it has in the civil forfeiture context culminating in *Bennis*. The principle that punishing the innocent violates the Constitution has been acknowledged by the Court as theoretically valid, but thus far, no case has inspired the Court to actually give the principle the force of precedent.

b. *House v. Bell*

More than ten years after *Herrera*, the Supreme Court addressed the validity of the actual innocence defense once again, in *House v. Bell*.¹⁴⁵ In *House*, the defendant was convicted of murder and sentenced to death, but during the interim between the sentencing and execution, forensic and testimonial evidence was uncovered that severely undermined the evidence presented at trial.¹⁴⁶ The defendant's habeas petition was procedurally barred by state law,¹⁴⁷ so the defendant asserted his innocence as both a gateway around the procedural default and as a valid defense in itself.¹⁴⁸

The new evidence presented by the defendant persuaded the Court to open the gateway around procedural default and hear his independent constitutional claims.¹⁴⁹ The Court found that the evidence was substantial enough that “no reasonable juror” could have found the defendant guilty beyond a reasonable doubt.¹⁵⁰ Despite such persuasive evidence, the Court held that it was insufficient to satisfy the “extraordinarily high” threshold of a “hypothetical” freestanding actual innocence claim.¹⁵¹ In other words, an actual innocence claim, if one exists, requires *more* than just a showing

¹⁴³ *Id.* at 433–34. According to Justice Blackmun, “Whether petitioner is viewed as challenging simply his death sentence or also his continued detention, he is still challenging the State’s right to punish him” and thus there is no distinction in challenging guilt and punishment in a case of actual innocence. *Id.*

¹⁴⁴ *Id.* at 435–36.

¹⁴⁵ *House v. Bell*, 547 U.S. 518 (2006).

¹⁴⁶ *Id.* at 521; *id.* at 540–53.

¹⁴⁷ *Id.* at 522.

¹⁴⁸ *Id.* at 554.

¹⁴⁹ *Id.* at 555.

¹⁵⁰ *Id.* at 553–54. As previously discussed, this standard was first adopted in *Jackson v. Virginia*. See *supra*, note 128 and accompanying text.

¹⁵¹ *House*, 547 U.S. at 553–54.

that the defendant could not have been convicted on the evidence presented at trial.¹⁵²

IV. OVERSIMPLIFIED PRECEDENT AND MISAPPLIED LAW

The Court's rulings on the innocent owner and actual innocence defenses all rest on plausible readings of precedent. In the civil forfeiture context, it is true that a "long and unbroken line of cases holds" that the guilt or innocence of a property owner in a forfeiture case has no bearing on the constitutionality of the forfeiture.¹⁵³ It is also true that, in the case law analyzing the writ of habeas corpus, "[c]laims of actual innocence . . . have never been held to state a ground for federal habeas relief" without an independent constitutional violation.¹⁵⁴ But the Court ignores important subtleties and distinctions buried in the reasoning of each of those precedential decisions, which indicates that past applications of the law will continue to dictate the results of future cases without regard to potential constitutional violations.¹⁵⁵

In finding that neither the innocent owner defense nor the actual innocence habeas claim is required under the Constitution, the Court has oversimplified extremely complex questions. The Court has adopted wholesale the rules from the oldest forfeiture cases—despite their unique application to maritime law and the social realities of that time period—and has hardened civil forfeiture into a rigid process that ignores principles of liberty and fairness that are central to the United States' justice system.¹⁵⁶ The Court has done the same thing to habeas procedures by adhering to technical rules while ignoring broader principles and changing technological realities.¹⁵⁷

¹⁵² *Id.* at 554–55. In refusing to decide the defendant's *Herrera* claim, the Court not only highlighted that it had never held such claims possible but repeatedly referred to the issue as being both "hypothetical" and "implied." *Id.*

¹⁵³ *Bennis v. Michigan*, 516 U.S. 442, 446–47 (1996) (citing cases).

¹⁵⁴ *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

¹⁵⁵ Consider, for example, the Court's statement in *Goldsmith*, later cited approvingly in *Bennis*, that "whether the reason for [civil forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to now be displaced." *Goldsmith*, 254 U.S. at 511; *Bennis*, 516 U.S. at 448.

¹⁵⁶ See *Austin v. United States*, 509 U.S. at 602, 616–18 (1993) (Blackmun, J., dissenting) (considering each of the cases later cited by Justice Rehnquist in *Bennis* and arguing that none contained the simplistic holding that a truly innocent person's property was subject to forfeiture; rather, each dealt with narrower issues or expressly reserved answering that particular question).

¹⁵⁷ See *Herrera*, 506 U.S. at 431 (Blackmun, J., dissenting) ("The Eighth Amendment prohibits 'cruel and unusual punishments.' This proscription is not static but rather reflects evolving standards of decency. I think it is crystal clear that the execution of an innocent person is 'at odds with contempo-

Commentators have criticized the Court for these actions, particularly in light of new advances in areas like forensic science.¹⁵⁸ Greater understanding of DNA evidence has the potential to prove a previously convicted prisoner's innocence, for example, but the Court has refused to explicitly accept an individual's actual innocence based on new evidence as an independent ground for habeas relief.¹⁵⁹ And the problem extends beyond simply DNA: *Herrera's* rule, that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus,"¹⁶⁰ prevents courts from considering *any* new evidence to determine whether the persons imprisoned—and in some instances, sentenced to death—are in fact guilty of the crimes for which they have been convicted.¹⁶¹

A careful reading of the Court's prior cases and a comprehensive structural analysis of its recent decisions indicate that the most recent, controlling cases could have been decided differently. In each case the Court could have taken steps to protect the principle that punishment should be levied only upon the guilty, a principle that the cases seem to acknowledge, but ultimately avoid.¹⁶² The Court can and should retreat from the over-

rary standards of fairness and decency.' Indeed, it is at odds with any standard of decency that I can imagine." (citations omitted)).

¹⁵⁸ See Sophia S. Chang, *Protecting the Innocent: Post-Conviction DNA Exoneration*, 36 HASTINGS CONST. L.Q. 285, 303 (2009) (discussing the limits *Herrera* places on opportunities to use DNA evidence to free prisoners); Marc Price Wolf, *Habeas Relief From Bad Science: Does Federal Habeas Corpus Provide Relief For Prisoners Possibly Convicted on Misunderstood Fire Science?*, 10 MINN. J.L. SCI. & TECH. 213, 244–47 (2009) (discussing procedural default and actual innocence claims and their limitations in light of *Herrera*).

¹⁵⁹ See Chang, *supra* note 158, at 286 (noting that at least eight states do not allow convicted criminals access to DNA evidence and that the Court's refusal to make innocence an independent constitutional claim does not encourage those states to change).

¹⁶⁰ *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (quoting *Townsend v. Sain*, 372 U.S. 293, 317 (1963)).

¹⁶¹ See Wolf, *supra* note 158, at 244–46 (noting that if an arsonist can show his conviction is based on faulty fire science, while that may be enough to satisfy the *Schlup* standard for procedural default, it does nothing for the person who has no other independent constitutional error at trial because it does not satisfy *Herrera*).

¹⁶² For example, the *Herrera* majority opinion depended on the concurrence of Justices O'Connor, Kennedy, and White, all of whom shared Justice O'Connor's conviction that "executing the innocent is inconsistent with the Constitution." *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring). Whether that position is limited only to death penalty cases is unclear, but Justice Blackmun stated that the principle may extend beyond execution to at least include imprisonment. *Id.* at 432 n.2 (Blackmun, J., dissenting). The same type of language can be found in the forfeiture context. See *Bennis v. Michigan*, 516 U.S. 442, 466 (1996) ("we have consistently recognized an exception for truly blameless individuals. . . . [e]stablish[ing] the proposition that the Constitution bars the punitive forfeiture of property when its owner alleges and proves that he took all reasonable steps to prevent its illegal use."); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689–90 (1974) ("[I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture. . . . not only [was] unin-

simplified treatment of innocence in the civil forfeiture and habeas corpus contexts. By explicitly upholding the innocent owner defense and actual innocence habeas claim, the Court can make a clear pronouncement that the Constitution protects the innocent from government punishment.¹⁶³

Considering the underlying themes embodied in the cases discussed above, two things become evident. First, the Court has always believed that innocence is not just relevant, but dispositive, in forfeiture and habeas cases. Second, the Court has simply misapplied precedent and then, in part because few cases have facts that could force a direct decision on the issue, the Court has perpetuated the misapplication in the name of *stare decisis*.

A. INNOCENT OWNER DEFENSE: WHAT HAPPENED TO THE ROLE OF NEGLIGENCE?

Since the 1920s, a recognition that the innocent owner defense may be constitutionally required in some circumstances has been woven in to the “long and unbroken line of cases”¹⁶⁴: The Court has repeatedly “reserved opinion” on the direct question of whether innocence of any crime makes punishment for that crime constitutionally impermissible,¹⁶⁵ yet in each instance, the Court has indicated that, if presented with the question directly, the answer would have to be an unequivocal “yes.”¹⁶⁶ In *Goldsmith*, the Court noted that the rigid rule against the innocent owner defense risked intolerably extreme results, such as an entire train being seized because one package of liquor was illegally transported on it, or a person’s property be-

involved in and unaware of the wrongful activity but also . . . had done all that reasonably could be expected to prevent the proscribed use of his property . . .”).

¹⁶³ See, *supra* notes 126–127.

¹⁶⁴ See *Van Oster*, 272 U.S. at 467; *Goldsmith*, 254 U.S. at 512.

¹⁶⁵ See *Herrera*, 506 U.S. at 417 (“[a]ssum[ing], for the sake of argument” that such a claim exists); *id.* at 418–19 (“[T]his showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist.”); *id.* at 427 (O’Connor, concurring) (“Accordingly, the Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence.”); *Austin v. United States*, 509 U.S. 602, 617 (“The more recent cases have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner.”).

¹⁶⁶ See *Herrera* 506 U.S. at 417 (“We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.”); *id.* at 430–31 (Blackmun, J., dissenting) (“We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. Despite the State of Texas’ astonishing protestation to the contrary, I do not see how the answer can be anything but ‘yes.’” (citations omitted)); *Bennis*, 516 U.S. at 466 (Stevens, J., dissenting) (“Even assuming that strict liability applies to ‘innocent’ owners, we have consistently recognized an exception for truly blameless individuals.”).

ing seized after it was stolen and used for illegal purposes.¹⁶⁷ Thus, at this early stage, in 1921, the Court was already moving away from the strict and unbending rule of maritime law, recognizing the special circumstances present in admiralty cases.

A few years later, in *Van Oster*, the Court officially rejected the innocent owner defense again,¹⁶⁸ but echoed *Goldsmith's* qualification that the ruling did not mean there could never be a truly innocent owner, again using the owner of stolen property as an example.¹⁶⁹ Similarly, in *Calero-Toledo*, the Court rejected the defense¹⁷⁰ but cited instances where the defense might be constitutionally required, including case of the property owner whose property was taken without consent, and also the case where the property owner who “was uninvolved in and unaware of the wrongful activity [and] also . . . had done all that reasonably could be expected to prevent the proscribed use of his property.”¹⁷¹ So while the Court continued to hold that guilt or innocence was irrelevant, its reasoning evolved to distinguish between property owners who were innocent but negligent, and property owners who were *truly* innocent.

By the time it decided *Austin*, the Court had apparently accepted that the guilty property fiction was based primarily on negligence and could not justify forfeiture of an innocent owner's property.¹⁷² The Court did not make this explicit, however, and in *Bennis*, it continued to hold that innocence was irrelevant in civil forfeiture.¹⁷³ Tina Bennis, as the law-breaker's wife, could in no way be considered negligent for allowing her husband to use their jointly owned car.¹⁷⁴ Justice Stevens called on the Court to follow the logic, culminating in *Austin*, that it violates the Constitution to deprive an innocent property owner of his or her property,¹⁷⁵ but the Court robotically reverted to the rigid “innocence is irrelevant” reasoning.¹⁷⁶

¹⁶⁷ See *Goldsmith*, 254 U.S. at 512.

¹⁶⁸ *Van Oster*, 272 U.S. at 468.

¹⁶⁹ *Id.* at 467.

¹⁷⁰ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690 (1974).

¹⁷¹ *Id.* at 688–90.

¹⁷² See *Austin v. United States*, 509 U.S. 602, 616 (“[T]he Court has understood this fiction to rest on the notion that the owner who allows his property to become involved in an offense has been negligent.”).

¹⁷³ See *id.* at 617.

¹⁷⁴ *Bennis v. Michigan*, 516 U.S. 442, 453 (1996); see *id.* at 466 (Stevens, J., dissenting) (“It is conceded that petitioner was in no way negligent in her use or entrustment of the family car.”).

¹⁷⁵ See *id.* at 466–68.

¹⁷⁶ *Bennis*, 516 U.S. at 453.

B. ACTUAL INNOCENCE DEFENSE: HYPOTHETICAL OR IMPOSSIBLE?

The Court has similarly reverted to its strict rejection of innocence as a defense in the habeas corpus context. The Court's holdings in this area appear to undermine the principles expressed by the individual Justices. In *Herrera*, every Justice, with the exceptions of Scalia and Thomas, agreed on the assumption that it would violate the Constitution to execute an innocent person.¹⁷⁷ Three Justices went a step further: Justices O'Connor, Kennedy, and White clearly state their position that such an event was unquestionably unconstitutional.¹⁷⁸ In his dissent, Justice Blackmun took even more of a hard-lined approach, maintaining that mere imprisonment of an actually innocent person may violate the Constitution, reminding the Court that it had already ruled that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."¹⁷⁹

Even more troubling than the seeming contradictions of *Herrera* is the language of the majority opinion in *House*. Despite the Court's somewhat muddled conclusion—that "it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt"¹⁸⁰—the Court held that the defendant's actual innocence claim fell short of the "extraordinarily high" threshold for a "hypothetical freestanding innocence claim."¹⁸¹ It is difficult to imagine exactly what kind of proof would meet this "extraordinarily high" threshold: if a defendant who has proved that no reasonable juror could have convicted him *still* has not satisfied the evidentiary requirement, then the standard for a freestanding actual innocence claim may be so high that it is not practical for the Court to explicitly recognize it as an independent ground for relief. But why, then, does the

¹⁷⁷ Compare *Herrera v. Collins*, 506 U.S. 390, 417 (majority) (stating that a "truly persuasive demonstration of 'actual innocence' . . . would render the execution of a defendant unconstitutional"); *and id.* at 419 (O'Connor, J., concurring) (joined by Justice Kennedy) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); *and id.* at 429 (White, J., concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial . . . would render unconstitutional the execution of petitioner in this case."); *and id.* at 430 (Blackmun, J., dissenting) (joined by Justices Stevens and Souter) (answering the question of whether it is unconstitutional to execute someone who can prove his or her innocence: "I do not see how the answer can be anything but 'yes'") *with id.* at 428-29 (Scalia, J., concurring) (joined by Justice Thomas) ("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.").

¹⁷⁸ *Id.* at 419 (O'Connor, J., concurring); *id.* at 429 (White, J., concurring); *see supra*, notes 141-43 and accompanying text.

¹⁷⁹ *Id.* at 432 n.2 (Blackmun, J., dissenting) (quoting *Robinson v. California*, 370 U.S. 660, 667 (1962)).

¹⁸⁰ *House v. Bell*, 547 U.S. 518, 554 (2006).

¹⁸¹ *Id.* at 555.

Court continue to recognize that such a claim is constitutionally required in certain cases?¹⁸² Or, more to the point, why has the Court continually rejected actual innocence as a defense to punishment when it clearly believes that the defense is constitutionally required?

C. THE FUTURE OF INNOCENCE AS A DEFENSE TO PUNISHMENT

It is tempting to blame the slow development of the innocence defense on the cases themselves: perhaps the facts of the cases that have made it before the Supreme Court have forced the Court to rule in this particular way. After all, the facts of *Herrera* could hardly inspire the Justices to create a “new” constitutional ground to challenge incarceration.¹⁸³ This answer is incorrect, however. *House* provided a clear opportunity to move the actual innocence defense from the hypothetical to practical because it involved both substantial evidence of innocence and the death penalty,¹⁸⁴ the most serious consequences possible in United States jurisprudence. Yet, instead of finally establishing innocence as a defense to punishment, the Court granted relief on the basis of the procedural default defense, and the role of innocence remained unchanged.¹⁸⁵ Similarly, in the civil forfeiture context, the facts of *Bennis* seemed to fit snugly within the Court’s hypotheticals: Tina Bennis was an innocent owner who was in no way negligent, but again the Court was unmoved.¹⁸⁶

Given the right set of circumstances, the Court should, and likely will, reverse its stance on innocence as a constitutional defense to punishment. The absurd seizures imagined in *Bennis* may never come to be because the actions involved in those hypothetical situations would likely be too extreme even for governmental authorities, but the time will come when a forfeiture will go too far and the injustice will inspire the Court to make clear what is already true: punishing the innocent owner of property for the actions of another party violates the Fifth, Eighth, and Fourteenth Amend-

¹⁸² See *id.* (“[W]hatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it.”).

¹⁸³ The evidence against the defendant was overwhelming and his “new” evidence consisted only of affidavits blaming a dead relative. *Herrera*, 506 U.S. at 393; see *id.* at 421 (O’Connor, J., concurring) (“The record overwhelmingly demonstrates that petitioner deliberately shot and killed [two police officers]; [his] new evidence is bereft of credibility. . . . [I]ndeed . . . not even the dissent expresses a belief that petitioner might possibly be actually innocent.”).

¹⁸⁴ *House*, 547 U.S. at 521.

¹⁸⁵ See *id.* at 555.

¹⁸⁶ The car forfeited in *Bennis* was worth only \$600 and was not even the Bennis’ only car. *Bennis v. Michigan*, 516 U.S. 442, 457–58 (Ginsburg, J., concurring).

ments.¹⁸⁷ And the time will come when the Court will be faced with such overwhelming evidence of actual innocence, unaccompanied by an independent procedurally defaulted claim, that it will have no choice but to give force to its assumptions in *Herrera*: that the actual innocence of a prisoner is a substantive constitutional ground for a habeas corpus petition because imprisoning of an innocent person violates the Fifth, Eighth, and Fourteenth Amendments.¹⁸⁸

There are several possible avenues that could lead to the proper test case that will allow the Court to make its assumptions in *Herrera* the controlling precedent regarding actual innocence in habeas cases.¹⁸⁹ The “extraordinarily high” standard necessary to satisfy *Herrera* is most likely to be met by new forensic evidence that comes to light as a result of improvements in the knowledge and reliability of forensic science.¹⁹⁰

The Supreme Court’s recent habeas order in the case of *In re Troy Anthony Davis* may indicate its first significant step toward recognizing a freestanding innocence claim since *Herrera*.¹⁹¹ The Court, in an extraordinary move, used its original habeas jurisdiction to order a habeas corpus hearing in the district court,¹⁹² based not on scientific evidence, but on the relatively “old-fashioned” recanted testimony of trial witnesses.¹⁹³ The ruling, coming in the very early stages of the *Davis* case’s federal habeas ef-

¹⁸⁷ See, e.g., *Bennis*, 516 U.S. at 458 (Stevens, J., dissenting). Justice Stevens imagined the seizure of an airline’s planes because passengers carried marijuana in their luggage, the seizure of a hotel because some guests committed theft, and even the seizure of a stadium because some sports spectators carried concealed weapons. *Id.* Justice Stevens argued that the reasoning of the majority in *Bennis*, taken to its logical conclusion, would allow for these extreme examples. *Id.* at 459.

¹⁸⁸ For a discussion of the emergence of DNA evidence as a tool to prove the innocence of those wrongly convicted, see generally Chang, *supra* note 158 at 288–91, which discusses the difficulties getting access to the evidence at the state level and new federal regulations allowing for access.

¹⁸⁹ See Chang, *supra* note 158, at 303 (noting that the holding of *Herrera* is in conflict with the possibility of clearly reliable DNA evidence that proves an individual’s innocence and that in at least eight states, *Herrera* could prevent that evidence from freeing innocent people who cannot obtain habeas review in federal courts); Wolf, *supra* note 158, at 246–47 (noting, similarly, that a prisoner falsely accused of arson but convicted based on clearly wrong fire science evidence will be unable to have the conviction reviewed based on his or her actual innocence because the prisoner cannot point to a procedural or substantive error occurring during the original trial).

¹⁹⁰ See *supra*, note 189 and accompanying sources and text.

¹⁹¹ *In re Davis*, 130 S. Ct. 1 (2009).

¹⁹² *Id.* at 1.

¹⁹³ *Id.* (Stevens, J., concurring). Stevens questions the legitimacy of assuming Davis’ guilt given the fact that “seven of the State’s key witnesses have recanted their trial testimony; several individuals have implicated the State’s principal witness as the shooter; and ‘no court,’ state or federal, ‘has ever conducted a hearing to assess the reliability of the score of [post-conviction] affidavits that, if reliable, would satisfy the threshold showing for a truly persuasive demonstration of actual innocence.’”

forts,¹⁹⁴ is not comprehensive enough to indicate whether it will lead to the eventual establishment of *Herrera* innocence claims as freestanding grounds for habeas, but it is significant that the court ordered the hearing, not on any independent claim of constitutional error at trial but rather based on the possibility that an innocent man faces execution for a crime that he did not commit.¹⁹⁵

The United States District Court for the Southern District of Georgia conducted the evidentiary hearing ordered by the Supreme Court in the summer of 2010. Following the presentment of Mr. Davis' new evidence, Judge William T. Moore, Jr. explicitly held that the execution of an innocent person violates the constitution.¹⁹⁶ The court also looked to the status of the law among the states and determined that "[t]he consensus ... appears to be that a truly persuasive demonstration of innocence subsequent to trial renders punishment unconstitutional."¹⁹⁷ The court nevertheless found that Davis had not met the high burden required to obtain habeas relief.¹⁹⁸ Because the case is likely to make its way back to the Court¹⁹⁹ given the district court's findings, it may in fact be just the case necessary for the Court to pronounce what it has been hinting at for years: that punishing the innocent is unconstitutional.

¹⁹⁴ *In re Davis*, 565 F.3d 810, 813 (11th Cir. 2009) (describing the prior denied habeas petition and noting that it is with the second that he raised an actual innocence claim).

¹⁹⁵ *In re Davis*, 130 S. Ct. at 1 (Stevens, J., concurring) ("The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing.").

¹⁹⁶ *In re Troy Davis*, 2010 WL 3385081 1, 43 (S.D. Ga. Aug. 24, 2010). Judge Moore's analysis not only accepted the principle that punishment of the innocent is a constitutional violation, his decision made the rather bold pronouncement that "[i]t has long been established that the constitution prohibits states from punishing the innocent" and cited *Herrera* as evidence. *Id.* at 40.

¹⁹⁷ *Id.* at 43.

¹⁹⁸ *Id.* at 61. The court determined that Davis must show "by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence"; adopting the standard as the only one capable of meeting the "extraordinarily high" requirement discussed by the Supreme Court in *Herrera*. This standard however, is lower than that announced in *Jackson v. Virginia* because, the court reasoned, in a case alleging a *Jackson* violation, the jury is presumed to have heard *all* of the evidence whereas in *Davis*, the claim of innocence rests necessarily, upon new evidence that was not presented to the jury during trial. *id.* at 44-45.

¹⁹⁹ The unusual procedural posture of the case makes it unclear where a likely appeal will be heard next. As the judge noted in his decision, the fact that the case came to his court via the Supreme Court's original jurisdiction, created a situation where the district court was acting more in the role of a magistrate for the Supreme Court than as a district court. As such, the judge theorized that any further hearings would be appealed directly to the Supreme Court, but could find no precedent on point. *Id.* at 1.

V. CONCLUSION

While one may be optimistic that fate will present the Court with an opportunity to rectify its currently erroneous position that the innocence of a person does not provide constitutional protection from punishment, the reality is that the Court's current rules on innocence, in both forfeiture and habeas corpus law, should be changed. The Court has had multiple opportunities to clarify the law on innocence, but its reluctance to make bold pronouncements has inhibited it from doing so up to now. The development case law on both forfeiture and writs of habeas corpus indicates that the innocence of a person does in fact provide him or her with constitutional protection from governmental punishment, in any form. As Justice Blackmun so aptly wrote about the government in his dissent in *Herrera*, what the Court "fail[s] to recognize is that the legitimacy of punishment is inextricably intertwined with guilt."²⁰⁰ After nearly a century of deferring the issue, the time has finally come for the Court to heed Justice Blackman's words and give the innocent the legal protection demanded by the Constitution and our nation's most basic notions of fairness, liberty, and justice.

²⁰⁰ *Herrera v. Collins*, 506 U.S. 390, 433–34 (1993) (Blackmun, J., dissenting).