

INNOCENCE, FEDERALISM, AND THE CAPITAL  
JURY: TWO LEGISLATIVE PROPOSALS FOR  
EVALUATING POST-TRIAL EVIDENCE OF  
INNOCENCE IN DEATH PENALTY  
CASES

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INTRODUCTION: THE PROBLEM

No one favors the execution of an innocent person.<sup>1</sup> That event represents the ultimate failure of the justice system, both in the view of those who consider the risk of such a failure to be so intolerable as to constitute a reason for abolishing capital punishment altogether<sup>2</sup> and in the view of those who consider it to be an acceptable cost of an otherwise desirable institution.<sup>3</sup>

Yet the danger of wrongful execution is chillingly real. Whether one

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1. I discuss here the class of people who are innocent of the crime of which they have been convicted (although they may be guilty of some lesser offense), not the much more problematic class of people who are "innocent" of the death penalty. In light of the decision in *Penry v. Lynaugh*, 109 S. Ct. 2934, 2944, 2952-53 (1989), to extend *Teague v. Lane*, 109 S. Ct. 1060 (1989) — which evinced a special concern for claims of innocence, see *id.* at 1075-77 — to capital sentencing, the problem of defining this latter class will require sustained attention. See generally Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415 (1990-91); Brief of the ABA as Amicus Curiae at 8, *Sawyer v. Smith*, 110 S. Ct. 2822 (1989) (No. 89-5809), at least until *Teague* is overruled — as it should be. See *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. A.B. OF THE CITY OF N.Y. 852-53 (1989) [hereinafter *Legislative Modification*]. My discussion also excludes cases involving the belated discovery of evidence relevant only to mitigation.

2. See, e.g., C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 44, 64 (2d ed. 1981); Tabak & Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A.L. REV. 59, 114 (1989).

3. See, e.g., Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 123 (1988); van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1665 (1986).

gains insight from scholarly studies,<sup>4</sup> current judicial proceedings,<sup>5</sup> or by experiencing the intensity of community pressures to convict someone — anyone — of these atrocious crimes,<sup>6</sup> it is difficult to deny that there is a special danger of factual error in capital cases. That danger is exacerbated both by the grisly consequence of such errors and by the general tendency of evidence of innocence to emerge only at a relatively late stage in capital proceedings.<sup>7</sup>

Yet the states' corrective mechanisms are simply inadequate. Motions to reopen criminal convictions on the grounds of newly-discovered evidence must overcome understandably heavy policies in favor of finality and must

4. See, e.g., Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

5. See, e.g., Tabak & Lane, *supra* note 2, at 99-114 (listing cases in which Death Row inmates have been released after proof of innocence); *Judge Issues Directed Acquittal to Former Death Row Inmate*, United Press International, Florida Wire, March 14, 1990 (reporting case of Robert Craig Cox); L.A. Times, July 16, 1989, at 1, col. 1 (describing case of Jerry Bigelow, convicted and sentenced to death in California after confessing nine times, but acquitted on retrial). Of course, reported cases often tell only a small part of the story. Compare, e.g., *The Confessions and the Tangle of Doubt*, Wash. Post, Jan. 28, 1987, at D1, col. 1 (raising doubts about guilt of Rolando Cruz) with *People v. Cruz*, 121 Ill. 2d 321, 521 N.E.2d 18, *cert. denied*, 488 U.S. 869 (1988) (reversing conviction on other grounds and holding that guilt presented jury issue). Hence, it seems likely that the incidence of the innocence problem is significantly understated, since relatively few inmates succeed in attracting press attention (a project which requires, among other things, competent attorneys). Thus, for example, although there has been no media coverage until very recently, there is substantial reason to doubt the guilt of Earl Washington, Jr., currently incarcerated on Virginia's death row. The conviction of this mentally retarded black man for the rape and murder of a white woman rests exclusively on his affirmation of statements made to him by law enforcement officials, and is at odds with the physical evidence. See Brief for Appellant at 1-11, *Washington v. Murray* (4th Cir. 1989) (No. 89-4013); Wash. Post, July 2, 1990, at A1, col. 2.

6. See 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 2.2(d), at 22-24 (1988); *Tainted Verdicts Resurrect Specter of Executing the Innocent*, N.Y. Times, May 3, 1989, at A18, col. 1; cf. N.Y. Times, Apr. 26, 1990, at A17, col. 1 (broad public approval for death penalty in Japan, where in last decade four people sentenced to death were later acquitted on the basis of new evidence).

Such pressures lead law enforcement officers to cut constitutional corners. See, e.g., *Bowen v. Maynard*, 799 F.2d 593 (10th Cir.), *cert. denied*, 479 U.S. 962 (1986) (state suppression of exculpatory evidence); *Texas Released from Death Row*, N.Y. Times, Jan. 24, 1990, at A15, col. 1 (describing case of Clarence Lee Brandley in which state destroyed exculpatory evidence and witnesses lied); *Death Row Inmate Freed on Bond Amid New Doubts in Murder Case*, Wash. Post, Aug. 31, 1986, at A3, col. 1 (describing Bowen case). Moreover, these pressures worsen the performances of defense attorneys. For a lawyer, "[t]aking on such a case means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum resources to the prosecution, and where one must endure the draining emotional effects of one's personal responsibility for the outcome." *Legislative Modification*, *supra* note 1, at 854.

7. In particular, because of the pressures already described, see *supra* note 6, it is often only after the passage of time that witnesses — whether law enforcement officers, prosecutors no longer in office, or prisoners released from custody — are willing to come forward. Moreover, the quality of legal representation, which is "generally lamentably low" at capital trials, Tigar, *Lawyers and Death Cases*, 16 LITIGATION 1 (1990), tends to improve somewhat as a prisoner moves through the system, since the insufficiency of legal resources results in a system of triage that generally finds the most qualified lawyers concentrating their efforts on those defendants closest to execution.

meet burdens which require a finding, for example, that the proffered material "would probably have changed the verdict."<sup>8</sup> These standards, of course, are applied by a judge (normally the original trial judge), not by a jury. This practice deprives the defendant of a jury's sensitivity to possible weaknesses in the prosecutor's case on the issue of guilt — a sensitivity that is recognized to act as a safeguard against the return not only of a wrongful conviction but also of a death sentence against the possibly innocent.<sup>9</sup> Moreover, once a conviction becomes final, many states will not permit such claims in the context of a state collateral proceeding<sup>10</sup> — notwithstanding the fact that this is commonly the lengthiest element of the entire capital adjudicatory process, and hence a stage at which new evidence may well emerge.

Compounding the problem, claims of factual innocence are not cognizable on federal habeas corpus.<sup>11</sup> Seeking to discover a rationale for this prohibi-

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8. FLA. R. CRIM. P. 3.600(a)(3) (new trial to be granted if defendant shows discovery of "new and material evidence, that if introduced at trial would probably have changed the verdict or finding of the court, and that the defendant could not with reasonable diligence have discovered and produced [the evidence] upon the trial"); see also *Dick v. State*, 287 S.E.2d 11, 248 Ga. 898 (1982), in which the court held that, when a motion is made more than 30 days after trial, movant must show:

- (1) that the newly discovered evidence has come to his knowledge since the trial;
- (2) that want of due diligence was not the reason that the evidence was not acquired sooner;
- (3) that the evidence was so material that it would probably produce a different verdict;
- (4) that it is not cumulative only;
- (5) that the affidavit of the witness is attached to the motion or its absence accounted for; and
- (6) that the new evidence does not operate solely to impeach the credit of a witness.

*Id.* at 13-14, 248 Ga. at 900 (citations omitted).

9. See *Lockhart v. McCree*, 476 U.S. 162, 181 (1986); see also *Adams v. Texas*, 448 U.S. 38, 49-51 (1980). Because the death penalty system in this country is "starkly sectional," 1 J. Liebman, *supra* note 6, § 26.6, at 409 & n.4, judges in areas of the country where the courts see numerous capital cases may well become calloused, causing them to react with greater skepticism to innocence claims than do jurors, who in all likelihood are sitting on their first capital case.

10. Examples include Arkansas, in proceedings under ARK. R. CRIM. P. 37.1; Florida, in proceedings under FLA. R. CRIM. P. 3.850; and Virginia, in proceedings under VA. CODE ANN. § 8.01-654 (1984). See *Dumond v. State*, 743 S.W.2d 779, 782, 294 Ark. 379, 385 (1988), *federal habeas relief granted sub nom. Dumond v. Lockhart*, 885 F.2d 419 (8th Cir. 1989); *Fitzgerald v. Bass*, 366 S.E.2d 615, 619, 6 Va. App. 38, 45 (1988), *cert. denied*, 110 S. Ct. 354 (1989); *Hicks v. State*, 400 So. 2d 955, 959 (Fla. 1981).

11. See *Townsend v. Sain*, 372 U.S. 293, 317 (1963) ("[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus"); *Armstead v. Maggio*, 720 F.2d 894, 896-97 (5th Cir. 1983) (federal habeas relief unavailable despite affidavit of another confessing to crime and exculpating petitioner). The issue is discussed with customary thoroughness and insight by Professor Liebman in 1 J. LIEBMAN, *supra* note 6, § 2.2(c), at 12-21.

Notwithstanding this principle, the "Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 442 U.S. 307, 309 (1979) (citing *In re Winship*, 397 U.S. 358 (1970)). A federal habeas corpus petitioner is, therefore, entitled to "relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324. However, because the habeas court applying this decision is confined to an examination of the record of the original trial, *id.* at 322, the rule provides little help in the context of raising a claim of innocence based on new evidence.

tion among the cases, one is likely to find oneself soon lost among a wilderness of antiquarian legalisms — for instance, that federal habeas corpus only examines the “jurisdiction” of the convicting court to detain the prisoner.<sup>12</sup> Clearly, such explanations fail to account for the modern role of federal habeas corpus in the justice system.<sup>13</sup>

### CHOOSING A SOLUTION

One obvious solution to the innocence problem would be simply to provide, by judicial decision or statute, that claims of factual innocence may indeed be raised on federal habeas corpus. While this would certainly be a direct solution (and one which would have the benefit of making these brief remarks even briefer<sup>14</sup>), it would ultimately raise more problems than it would solve. The reason is federalism.

Over the last generation, federalism has had a bad reputation among social reformers. Championed by those resisting racial integration, and appropriated by conservative politicians,<sup>15</sup> it has lost much of the promise it once held for social change<sup>16</sup> — notwithstanding the more recent efforts of some liberals to point to its potential.<sup>17</sup>

When discussing federalism, it is critical to distinguish between two types. Horizontal federalism sees the possibility of social progress in the states' capability to experiment with and compete in devising varying solutions to social problems.<sup>18</sup> Vertical federalism, regardless of differences between states, seeks to protect the liberties of the citizen by delegating power downwards to the most local, and therefore most politically accountable, level.<sup>19</sup>

Those who seek to reform or to abolish the current death penalty system generally disfavor horizontal federalism. The performance of the states in the area of capital punishment has been such as to justify a concern that any com-

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12. See *Ex Parte Craig*, 282 F. 138, 148-49 (2d Cir. 1922); 1 J. LIEBMAN, *supra* note 6, § 2.2(b), at 11-12.

13. See *Kuhlmann v. Wilson*, 477 U.S. 436, 445-48 (1986) (plurality opinion).

14. See generally Church, *A Plea for Readable Law Review Articles*, 1989 WISC. L. REV. 739.

15. See, e.g., Bush, *Federalism: Restoring the Balance*, 18 CUMBERLAND L. REV. 125 (1987).

16. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try social and economic experiments without risk to the rest of the country.”).

17. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 217-19 (1989). See generally Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19 (1989).

18. See *supra* note 16.

19. See THE FEDERALIST NO. 46, at 316 (J. Madison) (J. Cooke ed. 1961) (noting a closer connection between the people and their state government than between the people and the federal government).

petition among them will be a race to the bottom.<sup>20</sup> Even if the outlook for positive political change were more optimistic,<sup>21</sup> the idea of permitting the states to experiment with a process that determines whether a person lives or dies is, or should be, unacceptable.

Vertical federalism, however, is another matter. In embracing it, death penalty reformers lose little by way of prospects for favorable federal action,<sup>22</sup> while perhaps gaining support from significant conservative elements that would otherwise oppose them.<sup>23</sup> More significantly, the dangers of central

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20. See Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 16 N.Y.U. REV. L. & SOC. CHANGE 797 (1986).

21. The 1990 political races only reinforced the thesis that state politics will not soon lead to death penalty reform. Competing gubernatorial aspirants in Florida, Texas, and California engaged in vigorous efforts to persuade the electorate that voting for them was the surest way to maximize the number of executions. See *The Political Stampede on Execution*, N.Y. Times, April 4, 1990, at A16, col. 1; *The Politics of Death*, The Economist, Mar. 24, 1990, at 25, col. 1; see also Baker, *At the End of the Polls*, N.Y. Times, May 2, 1990, at A27, col. 6 ("Capital punishment is the perfect cause for today's pol who lives by the polls.")

22. Without discussing in detail the current outlook for legislative action on the federal level, see Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245 (1990-91); Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1990-91); Mello & Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451 (1990-91), it is clear that any solutions along federal lines will involve significant elements of compromise. Death penalty reformers are not likely to succeed in turning outright defeats in the states into outright victories in Congress.

The trend in the federal courts is strongly towards restricting, not expanding, the scope of the federal habeas corpus remedy. See Amsterdam, *Foreword* to 1 J. LIEBMAN, *supra* note 6, at v-vi. A stark recent example is *Butler v. McKellar*, 110 S. Ct. 1212 (1990) (5-4 opinion), which explicitly adopts the view that the citizens of a state (in this case, those citizens sentenced to death), and not its government, must bear the risk that a course their state chooses to pursue violates the Constitution. See *id.* at 1214 (if outcome of case "was susceptible to debate among reasonable minds," decision was a "new rule" and hence ordinarily not to be applied retroactively). Cf. *Legislative Modification*, *supra* note 1, at 853 (describing such risk-shifting as "simply perverse").

Nonetheless, whatever the prospect of its current acceptance by the courts, a strong legal argument exists that the execution of a prisoner violates the eighth amendment's requirements of a comprehensive, reliable, individualized sentencing determination where newly-acquired evidence, never considered by the sentencing jury, creates a reasonable doubt as to guilt. See *Petition for a Writ of Certiorari to the Criminal District Court for the Parish of Orleans, Louisiana*, at 16-18, *Monroe v. Butler* (U.S. No. 88-1154) (January 11, 1989) (making this argument on behalf of Ronald Monroe). Although Monroe's case built a Bleak House of state and federal proceedings, its essence was simple: following Monroe's conviction, the state learned of the plausible confession of another man to the crime but suppressed it. See *id.* at App. D - E (reprinting federal factual findings). Nevertheless, the federal courts rejected Monroe's claim under *Brady v. Maryland*, 373 U.S. 83 (1963) (defendant's right to fair trial violated when prosecution suppresses evidence favorable to accused), and refused to overturn either the conviction or the sentence. See *Monroe v. Blackburn*, 748 F.2d 958, 960-62 (5th Cir. 1984), *cert. denied*, 476 U.S. 1145 (1986); *Monroe v. Butler*, 690 F. Supp. 521 (E.D. La.), *aff'd*, 853 F.2d 924 (5th Cir.), *habeas corpus petition denied*, 883 F.2d 331 (5th Cir.), *cert. denied*, 487 U.S. 1247 (1988). After extensive press coverage, the Governor of Louisiana commuted Monroe's sentence. Tabak & Lane, *supra* note 2, at 106-07; see also *infra* note 35.

23. It is worth noting that conservatives are divided between libertarian and statist camps,

government power in this area are disturbingly real. If factual innocence in death penalty cases were cognizable on federal habeas corpus, the federal government would be responsible for the accuracy of capital convictions. The record of government abuse of the execution power around the world<sup>24</sup> hardly suggests that — in the age of Willie Horton<sup>25</sup> — we should experiment here with centralizing it.<sup>26</sup> In order to protect individual liberty, our system seeks slower but surer government action rather than placing its highest value on efficiency.<sup>27</sup> Thus, we must seek a more roundabout, but safer, solution.

One such approach is embodied in the following tentative proposals for legislative change, one federal and one for the states. Either proposal could be implemented alone to achieve some benefits. The adoption of both together would create a smoothly integrated mechanism that would largely resolve the innocence problem without the danger of doing more harm than good.

### 1. Proposal One

The federal habeas corpus statute<sup>28</sup> should be amended to allow the prisoner in a capital case to make the claim that, because of new evidence bearing on guilt, excusably discovered since trial, there is now probable cause to believe that a new jury might reach a different outcome on either guilt or sentence.

This standard is deliberately phrased in the same probable cause terms used in the federal and many state systems to bind over criminal defendants

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just as liberals are split between libertarian and socialist camps. See Safire, *The Big-Gov Right*, N.Y. Times, May 11, 1990, at A35, col. 6.

24. Every reader will find it easy to supply her own list of examples: China, Iraq, Liberia in one year, Saudi Arabia and Iran in another, the Soviet Union and South Africa in yet another. See generally Freedman, *Crime in a Society Governed by Laws*, N.Y. Times, Dec. 14, 1979, at A30, col. 2 (letter to the editor).

25. See generally Savitz & Katz, *Sound Bites Have Teeth*, N.Y. Times, Mar. 26, 1990, at A17, col. 1; *Toward a Campaign of Substance in '92*, N.Y. Times, Mar. 26, 1990, at C16, col. 4.

26. The Framers would certainly have agreed. They sought to protect the people from possible abuses of power by the national government, a project based on the premise "that officeholders were not to be trusted and that the corrupting effect of power would inevitably cause them to seek their own aggrandizement at the expense of citizens' liberty." Freedman, *Freedom of Information and the First Amendment in a Bureaucratic Age*, 49 BROOKLYN L. REV. 835, 836 (1983) (citing contemporary sources); see 3 J. ELLIOTT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 563 (2d ed. 1836) (remarks of William Grayson to the Virginia ratifying convention, June 21, 1788: "[P]ower ought to have such checks and limitations as to prevent bad men from abusing it. It ought to be granted on a supposition that men will be bad; for it may eventually be so.").

The recent resurrection of the federal death penalty, see 21 U.S.C.A. § 848(e) (1991 Supplement), illustrates the greater danger posed by a federalization of capital punishment. Federal death penalty defendants wishing to challenge their convictions by means of habeas corpus petitions will receive only one layer of review — at the federal level — while state death penalty defendants are able to mount collateral challenges first at the state and then at the federal level. In addition, a federal death penalty statute extends capital punishment to states whose politics have otherwise rejected it.

27. See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 80 (1980).

28. 28 U.S.C. § 2254(a) (1988).

for plenary trials. The idea is that a federal judge's use of this well-developed body of law will encourage her to leave ultimate resolution of the matter to state processes and to avoid reliance on her own predictions of the eventual outcome of those processes.<sup>29</sup>

If the federal habeas judge found that probable cause existed,<sup>30</sup> she would certify this finding, issue a stay of execution, and remand the case to the convicting state to be dealt with in accordance with that state's existing procedures on motions for new trials.<sup>31</sup>

While a first reaction to this proposal might be that it provides prisoners with extensive new opportunities for delay, sober second thought should suggest the contrary. Presently, claims of innocence are made on federal habeas corpus but are asserted on other grounds. Examples include claims of ineffective assistance of counsel, *Brady* violations, and sentencing errors.<sup>32</sup> This results in more procedural complexity, and more delay, than would exist under my proposal.

Moreover, nothing in this first proposal would prevent a state that now places serious obstacles in the path of such motions<sup>33</sup> from continuing to do so; a state court could summarily reject the claim even after federal certification. But there are good reasons to believe that state officials who failed to take such matters seriously would face a significant public outcry. First, the issuance of such a certificate by a federal court would likely be an event of sufficient importance, particularly in the affected state, to generate the press coverage that is often critical to bringing these injustices to public attention.<sup>34</sup> Second, those who support the death penalty do not want to give its opponents the ammunition that a wrongful execution would provide. Hence, advocates of capital punishment are often among the most vocal of those demanding corrective action when it appears that an error has been committed.<sup>35</sup> The possibility of a wrongful execution tends to generate strong political pressure on — and to provide political cover for — state authorities who would otherwise be unwilling to act.

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29. See *supra* notes 8-10 and accompanying text (describing state processes).

30. The determination of probable cause would, of course, be one of law, and reviewable accordingly by the Circuit Courts of Appeals.

31. A variation might be for the federal judge to remand only the innocence issue to state court while federal litigation would proceed on the remaining issues. Or perhaps the determination to follow one course or the other could be left to the trial judge.

32. For discussions of these problems, see *infra* note 36 (innocence cast as ineffective assistance of counsel); *supra* note 22 (procedural complexity when innocence litigated in context of *Brady* claim); *Legislative Modification, supra* note 1, at 864 n.44 (prisoners with claim of innocence likely to state it as attack on sentence).

33. See *supra* notes 8-10 and accompanying text.

34. See *supra* note 5.

35. Thus, for example, Ronald Monroe, whose case is described *supra* note 22, was particularly benefitted by the support he received from those who generally favor the death penalty. See, e.g., Buckley, *But Did They Get the Right Man?*, Wash. Post, Aug. 16, 1989, at A21, col. 1; *One Last Chance to Save a Life*, N.Y. Daily News, Aug. 3, 1989, at 48, col. 1.

## 2. Proposal Two

Under the second proposal, each death penalty state would adopt a uniform standard for dealing with innocence claims in capital cases, whether those claims arise on motions for new trials (which should be limited to the period prior to affirmance on direct appeal), on state habeas corpus (where the attack should be cognizable), or pursuant to federal certification.<sup>36</sup> In any event, once a judge determines that the failure to raise the claim earlier was not due to deliberate withholding by the defendant,<sup>37</sup> the defendant should be entitled to a jury determination on the probable cause issue.

Specifically, a panel acting like a grand jury should decide whether there is probable cause to believe that a new jury might reach a different outcome on either guilt or sentence on the basis of the new evidence regarding guilt. This proposal is designed to achieve the benefits of the jury's judgment and the grand jury's historic role as a protector of liberty,<sup>38</sup> while accommodating the states' interest in avoiding frivolous delays. Because the issues in dispute will be relatively narrow, focusing on the significance of the particular newly-available evidence, the new proceeding should be a streamlined one, combining elements of grand jury practice with features of the summary jury trial com-

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36. The states' incentive for becoming more hospitable to these claims would be the prospect of their earlier resolution. Proposal One can be adopted with or without the states' cooperation, and, in light of its minimal interference with state prerogatives, and the obvious injustice which is being attacked, it might be. As things now stand, Proposal One would inevitably create delay. If, however, the prisoner had received a continuing opportunity to make the claim in state court, then, on federal habeas corpus, it would be far more vulnerable to the normal rules of exhaustion and procedural default. Moreover, if a state court granted a hearing, its findings would be entitled to the usual presumption of correctness under 28 U.S.C. § 2254(d) (1988). These advantages have not been lost on the states in the past and perhaps will not be in the future.

In addition, the states' adoption of Proposal Two would lessen any tendency on the part of federal judges to apply a more lenient standard to non-innocence claims where those claims raised doubts as to guilt. One common example is an ineffective assistance of counsel challenge based on a failure to uncover exculpatory evidence. As things now stand, the federal judge cannot be sure whether the real attack is on counsel or on the verdict; to prevent injustice, she may be tempted to give more weight to the former attack if the latter appears meritorious, even though counsel could not reasonably have prevented the outcome on the facts that were then available. If a corrective mechanism were in place on the state level, this problem would not exist. An additional desirable consequence would probably be to render attacks on the performance of counsel fewer and better focused.

37. I adopt here the subjective bad faith standard of *Fay v. Noia*, 372 U.S. 391 (1963), simply because that standard is the only appropriate one to apply in a context where the error to be avoided is the most serious injustice our system of laws can commit. See Catz, *The Death Penalty and Federal Habeas Corpus: A Modest Legislative Proposal*, 20 CONN. L. REV. 895, 914-15 (1988).

38. A recent comprehensive study has highlighted the considerable practical importance of this role in the context of the realities of the death penalty today. It calls for a reworking of legal doctrine so as to allow the grand jury to resume "its historic protective functions in safeguarding the administration of modern systems of capital punishment." Acker, *The Grand Jury and Capital Punishment: Rethinking the Role of an Ancient Institution under the Modern Jurisprudence of Death*, 21 PAC. L.J. 31, 118 (1989).



monly employed as an alternative dispute resolution technique.<sup>39</sup>

The panel would determine whether a new trial were appropriate. A judge who disagreed with its determination could grant a new panel hearing on the same basis as a new trial in a civil action, *i.e.*, a discretionary determination that this course would be in the interests of justice.<sup>40</sup> If neither event occurred, the defendant could only successfully appeal the ruling by meeting the strict standards applicable to judgments notwithstanding the verdict.<sup>41</sup>

### CONCLUSION

Plainly, these proposals are not detailed legislation. Just as plainly, they would entail some delay. But they would significantly ameliorate what all agree to be a problem of serious concern. "If there must indeed be some trade-off between speed and justice, we [sh]ould prefer a slower but fairer death penalty system to its opposite."<sup>42</sup>

Whatever the merits of these particular suggestions, they contain a broader lesson: improvements in the death penalty system need not be divisive. Fairness is desirable whether one's ultimate goal is to abolish capital punishment altogether<sup>43</sup> or to make the system process more cases expedi-

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39. For example, as in summary jury trials, voir dire should be compressed in recognition of the panel's limited function. See Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 483 (1984). Similarly, the new panel should not re-hear the evidence previously considered. That evidence could be put before the jury as in summary jury trials, through the presentations of counsel, or it could be done through an agreed written statement. Or perhaps, as in the grand jury room, evidentiary rules could be relaxed to permit one witness to summarize testimony that several would be needed to present at an ordinary trial. The only feature critical to the structure of my proposal is that the panel hear in full evidentiary form the newly-discovered exculpatory evidence, as well as any responsive proof offered by the government. After that, it might be appropriate for the panel to be given the opportunity, as a grand jury is, to request the production of additional evidence.

Credit for inventing the summary jury trial is generally given to Judge Thomas D. Lambros of the Northern District of Ohio, who has described in a number of articles the procedures he employs. See Lambros, *The Summary Jury Trial — An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 288-90 (1986); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, *supra*, at 470-71; Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 46-51 (1980). Building in part on the summary jury model, a very suggestive student piece has argued that a number of areas of current legal sensitivity, including capital punishment, might benefit if judges made wider use of their broad discretionary powers to employ advisory juries. Note, *Practice and Potential of the Advisory Jury*, 100 HARV. L. REV. 1363, 1373-74 (1987).

40. See, *e.g.*, Ford v. Robinson, 403 So. 2d 1379, 1382 (Fla. Dist. Ct. App. 1981) ("power of the trial judge to order a new trial derives . . . from the equitable concept that neither a wronged litigant nor society itself can afford to be without some means to remedy a palpable miscarriage of justice").

41. See, *e.g.*, Hendricks v. Dailey, 208 So. 2d 101, 103 (Fla. 1968) (judge may grant a judgment notwithstanding the verdict "only if there is no evidence or reasonable inferences to support the opposing position").

42. *Legislative Modification*, *supra* note 1, at 851.

43. Of course, it is theoretically possible that those who wish to abolish the system might find it politically more valuable to sacrifice some innocent prisoners as martyrs to the cause than to save them through improved procedures; but such a strategy would not be moral, practicable, or promising.

tiously.<sup>44</sup> Governors may become prisoners, and prisoners governors; any of the citizens in whose name an execution is carried out today may be wrongly accused of a crime tomorrow.<sup>45</sup>

The incorporation of this sobering realization into our legal system is, as a matter of practical politics, most likely to be achieved by basing reform proposals on bedrock principles — such as the central roles of federalism and the jury in preserving liberty in this country — that transcend ideological differences.

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44. See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT AND PROPOSAL OF THE AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES 7 (1989) (“The fundamental requirement of a criminal justice system is fairness.”); *Toward a More Just and Effective System of Review in State Death Penalty Cases*, A.B.A. TASK FORCE ON DEATH PENALTY HABEAS CORPUS 6 (1989).

45. Cf. J. RAWLS, A THEORY OF JUSTICE 136-42 (1971) (fundamental to a just society is its creation by parties behind “the veil of ignorance” so that principles are generated independent of personal station).