Innocent Until Presumed Guilty: Verdicts, Habeas Corpus Law, and Newly Discovered Evidence

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Abstract

It may seem uncontroversial that our law should prevent the execution of an innocent person. There are ‘constitutional safeguards’ in place that maintain this principle, but these safeguards apply to pre-convicted persons – those presumed innocent – through the avoidance of wrongful conviction. Once the conviction is handed down, the safeguards fundamentally change. This is equally true for the most troubling cases in which newly discovered evidence demonstrably proves the factual innocence of a defendant but is discovered post-conviction. Despite the available evidence, such persons do not enjoy constitutional safeguards that prohibit their execution based on their factual innocence. In 2009 the Supreme Court took a step towards establishing federal habeas law as a “capital safety valve” for the demonstrably wrongly convicted. The Court allowed a defendant to appeal his state conviction based on factual evidence and a claim of ‘actual innocence.’ I argue that despite attempts, post-conviction habeas relief for factual claims will necessarily remain limited. Speech act theory and the Toulmin model of arguments show how factual evidence and claims of actual innocence are conceptually incompatible with most post-conviction discourse and procedure. This incompatibility results from 1) an inherent tension between the performative and descriptive functions of verdicts as well as 2) the ambiguity of proof standards which creates uncertainty of established truth values.
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INTRODUCTION

It may seem uncontroversial that our law should prevent the execution of an innocent person. Justice O’Conner called it a “fundamental legal principle that executing the innocent is inconsistent with the Constitution.”¹ There are ‘constitutional safeguards’ in place that maintain this principle, but these safeguards apply to pre-convicted persons² – those presumed innocent – through the avoidance of wrongful conviction.³ Once the conviction is handed down, the safeguards fundamentally change.⁴ This is equally true for the most troubling cases in which newly discovered evidence⁵ demonstrably proves the factual innocence of a defendant but is discovered post-conviction.⁶ Despite the available evidence, such persons do not enjoy

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² Id. at 398 (“A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. Other constitutional provisions also have the effect of ensuring against the risk of convicting an innocent person.”).
³ In re Winship 397 U.S. 358, 363 (1970) (“The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.”).
⁴ Herrera at 398-99 (“Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. . . . Thus, in the eyes of the law, petitioner does not come before the Court as one who is ‘innocent,’ but, on the contrary, as one who has been convicted by due process of law of two brutal murders.”) (citations omitted). For another description of the effect of convictions on fundamental constitutional rights, see Greenholtz v. Inmates of Neb. Penal Code and Correctional Complex, 442 U.S. 1, 7 (1979) (“[T]he conviction, with all its procedural safeguards, has extinguished [the] liberty right: ‘[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.’”)(quoting Meachum v. Fano, 427 U.S. 215, 224 (1976)).
⁵ I use the phrase ‘newly discovered evidence’ throughout to refer to evidence that is discovered post-conviction.
⁶ The most popular examples include DNA evidence, which has brought the issue of wrongful convictions to the forefront. See, e.g., Karen Christian, “And the DNA Shall Set You Free”: Issues surrounding Postconviction DNA Evidence and the Pursuit of Innocence, 62 Ohio St. L.J. 1195 (2001). Many states (though not all) have established new statues for admission of
constitutional safeguards that prohibit their execution based on their factual innocence.⁷

There are some narrow statutory allowances for new evidence to be considered, but these statutes are often too narrow with short temporal windows for appeal.⁸ Innocence Commissions have begun to be established in several states but are in many ways inefficient and ineffective,⁹ and are certainly not a robust safeguard. The Constitution provides the possibility of executive clemency,¹⁰ but this power gives no certain rights to the defendant.¹¹ The defendant can plead for clemency, which pleas may or may not be heard by the executive; this power is too discretionary to be a reliable constitutional safeguard for innocent convicts.¹²

Since states vary with respect to time limitations of post-conviction factual review¹³ and the other remedies are capricious, federal habeas corpus law seems like a viable last resort.¹⁴

DNA evidence.


⁸ See, e.g., Fed. R. Crim. P. 33(b)(1)-(2) (“Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty.”). States have similar statutory time limits for appeal based on new evidence.


¹⁰ U.S. Const. art II, § 2, cl. 1.

¹¹ Solem v. Helm, 463 U.S. 277, 303 (1983) (“The possibility of commutation is nothing more than a hope for an ad hoc exercise of clemency. It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.”) (emphasis in original) (internal quotations omitted).

¹² Herrea v. Collins, 506 U.S. 390, 439-40 (1993) (“The possibility of executive clemency is not sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments. The majority correctly points out: A pardon is an act of grace. . . . The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal.”) (Blackmun, J., dissenting) (internal quotation marks omitted).

¹³ Compare, e.g., Al. R. Crim. P. 32.2(c) with Caitlin v. Superior Court, 245 P.3d 860 (Cal., 2011) (interpreting Cal. Penal Code § 1054.9 (2003)).

doctrine runs deep through the history of Anglo-American law as “the great and efficacious writ, in all manner of illegal confinement.”\[^{15}\] It was included in the Constitution for “every possible case of privation of liberty contrary to the National Constitution, treaties, or laws.”\[^{16}\] But habeas corpus law has not been established as a strong safeguard for the demonstrably innocent convict.\[^{17}\] The privations envisioned by the habeas corpus clause were only errors that somehow “[voided] the trial court’s jurisdiction,” or made the trial an “a mere empty form without legal substance.”\[^{18}\] Factual questions and new evidence are not considered in federal habeas law. Oliver Wendell Holmes wrote for the Supreme Court that in habeas corpus law, “what we have to deal with is not the petitioner’s innocence or guilt but solely the question whether their constitutional rights have been preserved.”\[^{19}\] Holmes apparently admitted that he himself had questioned the guilt of two defendants who were executed after he rejected their habeas claim.\[^{20}\] Indeed, Justice Scalia noted that the Supreme Court “has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.”\[^{21}\]

In 2009 the Supreme Court took a step towards establishing federal habeas law as a “capital safety valve”\[^{22}\] for the demonstrably wrongly convicted. The Court in In re Davis allowed a

\[^{15}\] William Blackstone, Commentaries *91 (1908).
\[^{16}\] Ex parte McCordle, 73 U.S. 318, 326 (1876).
\[^{20}\] For a discussion, see supra note 18, at 477-83.
\[^{21}\] In Re Davis at 2 (Scalia, J., dissenting) (emphasis in original).
\[^{22}\] Supra note 14, at 64 (“[The writ of habeas corpus] may be in the midst of a renaissance,
defendant to appeal his state conviction based on factual evidence and a claim of ‘actual
innocence.’

Scholars and others have commended this shift though the exact impact of the ruling for the future of habeas law is uncertain; in March 2011, despite its optimistic beginning, the writ of habeas corpus was eventually denied Davis by the Supreme Court after remand.

I argue that In re Davis is not an exception and that any attempt to expand habeas law to include factual inquiry will result in like manner. Post-conviction habeas relief for factual claims will necessarily remain limited. The reason lies in the meaning and function of verdicts themselves. Speech act theory and the Toulmin model of arguments show how factual evidence and claims of actual innocence are conceptually incompatible with most post-conviction discourse and procedure. This incompatibility results from 1) an inherent tension between the performative and descriptive functions of verdicts as well as 2) the ambiguity of proof standards which creates uncertainty of established truth values. There exists, then, a strong but ambiguous presumption in favor of the verdict that can only be overcome by the most obvious ‘actual

emerging as a last-resort means of averting wrongful executions.”

This was the first time in 50 years that the Supreme Court exercised its original habeas jurisdiction, The jurisdictional question is an interesting one but is not the subject of this note.

Id. at 65 (“[O]riginal habeas should and likely will emerge as a means to ensure that the death penalty is not erroneously imposed.”). See also Ellyde Roko, Finality, Habeas, Innocence, and the Death Penalty: Can Justice be Done?, 85 Wash. L. Rev. 107, (2010).


See infra note 109.
innocence’ habeas cases. All other cases of newly discovered evidence can be better accommodated by statutory rules. This article is divided into two parts; the first argues that verdicts can be modeled and understood in terms of speech act theory. Part II uses the Toumlin model to show how actual innocence claims are fundamentally incommensurable and incompatible with guilty verdicts, resulting in a necessary resistance to newly discovered evidence and actual innocence claims in all appeals, including habeas petitions.

I. MODELING VERDICTS

A. The Fundamental Problem

The Supreme Court dealt at length with the problem of post-conviction factual evidence in the 1993 case Herrera v. Collins. In that case the defendant, Herrera, was convicted of murder. After his conviction, two witnesses submitted affidavits giving evidence that it was not Herrera but rather Herrera’s brother who had committed the crime. Herrera filed a habeas petition on the basis of a claim of actual innocence. It was a fairly simple case in that Herrera was almost assuredly not actually innocent. The new testimonies were unreliable; the affidavits were not filed until after the death Herrera’s (now accused) brother. Yet despite the weakness of Herrera’s claim, five justices wrote lengthy opinions discussing the effects of newly discovered evidence and guilty verdicts. The court had to decide whether actual innocence was itself a constitutional claim that qualified for habeas relief, which was a doctrinal issue. The

29 Id. at 393.
30 Id.
31 Id. at 396.
32 Id. at 396.
33 For a discussion, see supra note 25, at 451-454.
underlying philosophical puzzle, however, was about new evidence and the punishment of the demonstrably innocent convict. Why are there not more internal legal and constitutional safeguards to protect the demonstrably wrongfully convicted if habeas law is not one of them? Finality and judicial economy cannot be the answers; the law is generous in its allowance of non-factual collateral appeals which can extend capital sentence litigation by years and even decades. Even if finality is an important consideration in habeas law, the principle does not discriminate in favor of legal claims over factual claims. Even Judge Friendly, who argued to

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34 *Herrera*, at 427 (Scalia, J., concurring) (“We granted certiorari on the question whether it violated due process or constitutes cruel and unusual punishment for a State to execute a person who, having been convicted of murder after a full and fair trail, later alleges that newly discovered evidence shows him to be ‘actually innocent.’ I would have preferred to decide that question.”).

35 Sanders v. United States, 373 U.S. 1, 24-25 (1963) (“Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.”); Craig M. Jacobs, *The Constitutionality of Collateral Post Conviction Claims of Actual Innocence*, 42 St. Mary’s L.J. 455, 484 (2011) (“[W]hen comparing the government's interests in judicial economy, comity, and finality against a petitioner's right to personal freedom, the need to limit or foreclose claims of actual innocence upon federal habeas review seems far less compelling.”). Cf. *Herrera*, at 417 (“[B]ecause of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold [for allowing habeas relief for factual claims] would necessarily be extraordinarily high.”).

36 See, e.g., Thompson v. McNeil, 129 S.Ct. 1299, 1299 (2009) (“Thirty-two years have passed since petitioner was first sentenced to death.”).

37 See, e.g., Teague v. Lane 489 U.S. 288, 308-309.

38 *Contra Herrera*, at 403(1993) (“[T]here is no guarantee that the guilt or innocence determination would be any more exact [in a new trial granted post-conviction]. To the contrary, the passage of time only diminishes the reliability of criminal adjudications. When a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication. Under the dissent's approach, the District Court would be placed in the even more difficult position of having to weigh the probative value of "hot" and "cold" evidence on petitioner's guilt or innocence.”) (citations omitted). While this may be true in certain circumstances and with certain types of evidence, this is clearly not true with regard to all
severely limit post-conviction collateral attacks in general, believed that when collateral attacks are allowed they should necessarily be accompanied by “a colorable claim of innocence.” 39 Yet he pointed out the “astonishing” fact that “the one thing that is almost never suggested on collateral attack is that the prisoner was innocent of the crime.” 40 What makes new evidence of actual innocence different, and why this hesitancy to consider new exculpatory factual evidence? When we examine guilty verdicts in light of speech act theory and the Toulmin model of arguments, we see that it is almost impossible to incorporate new factual evidence into post-conviction discourse and procedure, a problem that is not present in purely legal appeals. This explains why factual collateral attacks on guilty verdicts have been unsuccessful in the past and will continue to be unsuccessful under habeas law in the future. Part B argues that verdicts can be modeled using traditional speech act theory. Part C applies the model to guilty verdicts to demonstrate material and unique characteristics of guilty verdicts. Part D uses these characteristics to show how guilty verdicts make post-conviction factual claims logically problematic.

B. Speech Act Theory

Consider now Herrera’s guilty verdict. What does the verdict mean? This can be restated as several different component questions. First, to what does the guilty verdict refer? It intends to refer to past events and facts (‘Herrera shot a police officer’), but how well can a verdict represent reality the of past? To what extent is this reality distorted by the trial process and

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40 Id. at 145.
shaped by the content of the law? Second, what does the guilty verdict do? What is its function within the legal system?

These questions can be analyzed within the framework of J.L. Austin’s theory\(^{41}\) of speech acts.\(^{42}\) Any speech act has three components; 1) the uttering of words (the ‘utterance act’); 2) referring and predicating (the ‘propositional act’); and 3) performing some kind of work (the illocutionary act).\(^{43}\) With respect to guilty verdicts, the utterance act is straightforward: the verdict is typically pronounced both orally and in writing. The propositional act is the act of referring to people, actions, circumstances, etc. We will look at this in Part II. For the moment, we will determine the illocutionary act that a guilty verdict performs.

“The theory of speech acts starts with the assumption that the minimal unit of human communication is not a sentence or other expression, but rather the performance of certain kinds of acts, such as making statements, giving orders [etc].”\(^{44}\) These are ‘illocutionary acts.’\(^{45}\) Austin divided illocutionary acts\(^{46}\) into two categories, constative and performative utterances.\(^{47}\)

\(^{41}\) J.L. Austin, How to do things with Words (1955).

\(^{42}\) The specifics of Austin’s theory have been criticized and revised by many, including Searle whom I cite below. Nevertheless, the fundamentals of Austin’s theory are still valid and useful in answering certain questions. Dennis Kurzon, It is Hereby Performed . . . Explorations in Legal Speech Acts 1 (1986) (“Although the theory [of speech acts] has been thoroughly worked out, expanded, criticized and even rejected, over the last twenty years or more, this does not mean that there are no problems left nor that the classical theory is not effective enough to describe and explain various phenomena. Legal utterances analyzed within the framework of the classical theory may have features which point to interesting and subtle pragmatic problems;”).


\(^{44}\) J. R. Searle et al., Speech Act Theory and Pragmatics, at vii (J. R. Searle et al. eds., 1980).

\(^{45}\) Id.; Stephen R. Schiffer, Meaning 91 (1972) (“The key notion of Austin’s theory of Speech Acts is, of course, his concept of the illocutionary act.”).

\(^{46}\) Austin in fact distinguished between locutionary, illocutionary and perlocutionary in a
Constatives are descriptive statements intended to “correspond with the facts.”\footnote{Supra note 41, at 3-6.} These statements can be either true or false, or in other words can be assigned a truth value.\footnote{Id. at 139.} The phrase ‘it rained yesterday’ is an example of a constative, and is either true or false. ‘My son has the flu’ is also a constative and has a range of possible truth values between 0 and 1, true and false,\footnote{Mats Furberg, Saying and Meaning: A Main Theme in J. L. Austin’s Philosophy 116 (1963).} because there is always some uncertainty in these types of statements. The symptoms may suggest that he has the flu but it may turn out to be something worse. The truth value of the proposition may be very high; it may be very unlikely that he has a more severe problem, and so we see no need at the time to take him to the hospital. We have a high confidence level of the truth of the proposition.

Performative utterances, in contrast with constatives, consist in “not merely, saying something but doing something.”\footnote{Supra note 50, at 25.} They perform an action beyond merely referring to some fact situation. An example of a performative is the phrase “I name this ship Queen Elizabeth.”\footnote{Supra note 50, at 5.} It is neither true nor false, and therefore has no truth value. Further, performatives have felicity

\begin{footnotes}
47 Supra note 41, at 3-6.
48 Id. at 139.
50 Siegfried Gottwald, Many-Valued Logic, Stanford Encyclopedia of Philosophy (2009) (“Many valued logics are… similar to classical logic because they accept the principle of truth-functionality . . . but they differ from classical logic by the fundamental fact that they do not restrict the number of truth values to only two [0 and 1]: they allow for a larger set W of truth degrees.”), http://plato.stanford.edu/entries/logic-manyvalued/#SysManValLog
51 Supra note 50, at 25.
52 Supra note 50, at 5.
\end{footnotes}
conditions which are necessary for their validation.\textsuperscript{53} Simply saying ‘I do’ does not make me lawfully wedded unless such a phrase is accompanied by the necessary formalities. Single words can be speech acts,\textsuperscript{54} and some phrases can simultaneously be constative and performative. Because every utterance necessarily performs some kind of illocutionary act,\textsuperscript{55} judicial verdicts can be viewed through speech act theory to examine both their truth value and function within the legal system.

While there are hundreds of verbs that can accurately describe different illocutionary acts (calling, naming, questioning, ordering, etc.), Searle defined five fundamental categories of illocutionary acts as displayed below.

\textsuperscript{53} \textit{Supra} note 41 at 8. For a discussion on the felicity conditions necessary for judges to rule and, more particularly, overrule earlier decisions, see Pintip Hompluem Dunn, \textit{Note, How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis}, 113 \textit{Yale L.J.} 493 (2003).

Assertives and expressives are constatives; directives, commissives and declarations are performatives. These two distinctions are useful in that they help us differentiate between propositions that have a truth value and those that do not.\footnote{Supra note 49, at 116 (“What characterizes constatives is that they are typically either true or false,” as opposed to performatives).}
According to the elements of speech act theory, any verdict can be modeled like this:

\[ f(p) \]

where

\[ f = \text{the illocutionary act (or force)} \]
\[ p = \text{the objects or facts referred to.} \]

Searle identifies 12 criteria to describe and distinguish between the five types of illocutionary acts. We will focus on two of them. The first is the sincerity or belief condition. Assertives contain varying degrees of belief in the proposition being made. Commissives and expressives similarly have varying degrees of sincerity. These are probability conditions in the sense that the propositional content has some probability of being either true or false. We can add this condition to our formal structure like this:

\[ f(p)\Pi \]

where

63 While this formal symbolic structure is the same as Searle’s, I will deviate from his later on to better suit the purposes of this note.
64 C.f. supra note 48, at 23. The examples given of utterances that do not have the form \( f(p) \) are not relevant to verdicts since all verdicts necessarily contain some proposition, \( p \).
65 The existence of the phrase presupposes satisfaction of the utterance act.
Π = the probability of p being true.

This probability condition can be thought of as the truth value of proposition p, ranging from 1 (true) to 0 (false), and anywhere in between.

Another fundamental criteria of illocutionary categories is what Searle calls the direction of fit between words and the world. “Some illocutions have as part of their illocutionary point to get the words to match the world, others to get the world to match the words. Assertions are in the former category, promises and requests are in the latter.” If I am making a statement that is intended to accurately describe the factual world, then that statement has a words-to-world direction of fit. If I am saying something in order to change the world, such as ordering my son to clean his room, that statement has a world-to-words direction of fit. We can add this element to our model like this:

\[ \downarrow f(p)\Pi \text{ or } \uparrow f(p)\Pi \]

where

\[ \downarrow = \text{words to world direction of fit; and} \]
\[ \uparrow = \text{world to words direction of fit.} \]

Using the speech act paradigm above, we can model verdicts to demonstrate both their meaning and their function. By doing so we will see, as demonstrated in section I.C, that verdicts have a peculiar structure that distinguishes them from simple statements and which generates

\[ \text{Id. at 1-7.} \]
\[ \text{Id. at 3.} \]
complexity underlying some post-conviction remedies.

C. Categorizing Verdicts

Austin’s primitive taxonomy had a separate illocutionary category for verdicts called verdictives which “consist in the delivering of a finding, official or unofficial, upon evidence or reasons as to value or fact.”68 Examples of verbs in this class are “acquit, hold, calculate, describe, analyze, estimate, date, rank, assess and characterize.”69 When Searle modified Austin’s taxonomy, he argued alternatively that verdicts are not their own distinct category of illocutionary act, but instead overlap between two of Searle’s own basic categories.

“Some members of the class of declarations overlap with members of the class as assertive. This is because in certain institutional situations we not only ascertain the facts but we need an authority to lay down a decision as to what the facts are after the fact-finding procedure has been gone through. The argument must eventually come to an end and issue in a decision, and it is for this reason that we have judges and umpires. Both, the judge and the umpire, make factual claims; “you are out”, “you are guilty”. Such claims are clearly assessable in the word-to-world dimension. Was he really tagged off base? Did he really commit the crime? . . . But, at the same time, both have the force of declarations. If the umpire calls you out (and is upheld on appeal), then for baseball purposes you are out regardless of the facts in the case, and if the judge declares you guilty (and is

68 Supra note 48 at 152.
69 Supra note 43, at 8.
Verdicts, then, fall into a sixth category, a compound category identified by Searle as *assertive declarations* which have characteristics of both performative and constative utterances. Unlike pure declarations, verdicts have a words-to-world direction of fit and a probability condition (or truth value). I cannot be factually incorrect in nominating you for a position (declaration) but an umpire may be factually incorrect in declaring a runner safe (assertion). On the other hand, unlike pure assertives, declarations have a world-to-words direction of fit. If I say that it rained yesterday (assertion), nothing changes in the world as a result of this utterance. When an official confers a title on someone the utterance does affect a change in the world. Therefore we may model a verdict like this:

\[ \downarrow \uparrow f(p) \Pi \]

where

\[ \downarrow = \text{the words-to-world direction of fit}; \]
\[ \uparrow = \text{the world-to-words direction of fit}; \]
\[ f = \text{the illocutionary force (assertive declaration)}; \]
\[ p = \text{the facts referred to in the verdict}; \]
\[ \Pi = \text{the probability that those facts are true, or the truth value of the proposition} \]

The difficulty inherent in guilty verdicts is the tension between the two simultaneous types of direction of fit and the probability condition, or truth value. In a guilty verdict the court makes a statement of belief about past factual events, an attempt to refer to and properly convey the

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70 Id. at 19.
objective truth. On the other hand, a guilty verdict is declarative of those facts. Just as the runner who is called safe is safe for purposes of baseball regardless of whether he actually beat the throw, if I am found guilty of a crime I am, in one sense, actually guilty of that crime: I have been so found by a court of law.

In Herrera, Justice O’Conner alluded to the idea of multiple senses of the word innocent when she wrote “[d]ispositive to this case…is [a] fundamental fact: petitioner is not innocent in any sense of the word. . . . [P]etitioner is not innocent in the eyes of the law because, in our system of justice, the trial is the paramount event for determining the guilt or innocence of the defendant.”71 According to Justice O’Conner, there are different senses of the word innocent. I argue that there are different senses of the word guilty as well. One refers to objective truth, the other refers to the declaration of the court. A court, in other words, makes someone guilty of a crime by so declaring. This is the declarative power of the verdict. The legal status of the defendant then changes, as do his rights and privileges.

“Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. . . . The purpose of the trial stage from the State’s point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt.”72

The obvious problem with verdicts is that they can be wrong on several dimensions: they can be invalid for procedural error, they can misapply relevant law, and they can be factually

incorrect. These probabilities are intimately linked to proof standards.

D. Probabilities and Proof Standards

“The basic purpose of a trial is the determination of truth.” 73 Rule 102 of the Federal Rules of Evidence states that the rules exist “to the end that truth may be discerned.” 74 This purpose is frustrated by several things including “nonepistemic policy values” 75 as well as the epistemic limitations of the trial process itself. Trial courts do not have access to the absolute truth of past events. 76 Since actual proof can rarely (if ever) be obtained, the law settles on the standard of reasonable doubt.

There is always an epistemological gap between a verdict and objective truth. While a verdict may be masked as an assertion of actual past events, it is not intended to be an omniscient statement of absolute truth; it cannot be. It is only a statement about what has or has not been proven to a specified degree. 77 If person X is convicted of murder, the verdict does not state that it is unquestionably true that person X committed that murder. Instead, it says that in light of the available evidence, it is beyond a reasonable doubt that person X committed the murder.

To demonstrate this gap, consider again the verdict in Herrera. Because the verdict

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72 Id. at 399 (citing Ross v. Moffit, 417 U.S. 600, 610 (1974)) (emphasis added).
75 Larry Lauden, Truth, Error, and Criminal Law 2 (2006). These values include protecting the rights of the innocent as well as judicial economy, finality and the like.
possibilities ‘guilty’ and ‘not guilty’ are binary oppositions, we can use the Greimasian semiotic square to determine the “underlying structure of signification” or meaning of the verdict. Leonel Torres Herrera was convicted for the murder of Texas Department of Safety Officer David Rucker. Rucker was killed by a bullet to the chest allegedly fired by Herrera during a traffic stop. After the conviction, Herrera raised an actual innocence claim based on the newly acquired affidavits. Two witnesses who had earlier identified Leonel as the murder recanted their testimonies and later claimed that it was in fact Leonel’s deceased brother, Raul, who had killed the officer.

The accusation that Leonel Herrera shot and killed the officer is either true or false. Consider figure 1.

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81 *Id.*
82 *Id.* at 396.
This picture represents the possibilities of the objective truth of the accusation. There are two options, true and false. The negation of “A: True,” strictly speaking, is “O: Not true,” and the same with “E: False” and “I: Not False.” While there are four theoretical possibilities in the ontological sphere, there are really only two possible outcomes, true or false. This is because the meanings of I and O are identical to the meanings of A and E, respectively. Anything that is not true is false, and anything that is not false is true.

In terms of an ontology of guilt and innocence, the propositions can be framed like this.

Either Herrera is guilty of the crime or he is innocent. Like in figure one, A and I are synonymous, as are E and O. Therefore there are only two available options. The legal system, however, does not have direct access to this ontology. Instead it must develop a picture, through the trial process, of the case that represents the following cognitive claim structure.

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Any alternatives should be excluded from our analysis here. We are not thinking about whether or not he may have been an accomplice, or may have lacked the requisite mens rea. All of those elements can be subsumed under this example as either true or false, guilty or not guilty.
Figure 3: The Cognitive Claim

The cognitive claim structure represents a fact finder’s possible knowledge of the actual facts. Some things may be known, others may be unknown. Unlike the ontological claim structure, there are more than 2 possible outcomes. The negation of “A: Known to be true” is “O: Not known to be true.” O, however, is not synonymous with “E: Known to be false.” Some proposition may not be known to be true, but that does not mean that it is known to be false. The same is true of I and A. So at first glance, we have 4 distinct possibilities, but the picture must necessarily include a fifth option, point Y, not known to be true or false.

This figure better represents the knowledge of fact finders in the legal system. Instead of a true/false dichotomy where there are only two options, there are 5 possible options. In general, finders of fact are almost assuredly at point Y because of the epistemic limitations of the trial process. Within point Y, one could imagine an even more complex cognitive structure.
considering epistemic probabilities. For example, something may be known to be 70% likely to be true, and so on. However, the available verdicts in the legal system do not allow for the more detailed (and accurate) results of this cognitive claim structure. There are only two possible verdicts, guilty or not guilty, and thus the diagram of verdicts looks like this, resulting in two possible outcomes (as the negations are again redundant).

The judge or jury must commit to either one of the verdict possibilities, guilty or not guilty, resulting in a framework that looks like the ontology of figures 1 and 2. But because of uncertainty, verdicts are not a statement about ‘actual’ truth; indeed, they cannot be. A finder of fact is not capable of making the ontological claims in figures 1 or 2. So while the form of possible verdicts looks like the ontological claim, the meaning of the terms used represent a malformed version of the cognitive claims.

The way verdicts are transformed from the cognitive structure to the ontological structure is
through proof standards. The verdict A: Found Guilty does not necessarily mean that the fact finder has concluded that the ontological claim of actual guilt can be made. Instead, the verdict means that, in her mind, it has been proven likely with respect to the available evidence and an acceptable standard of proof that the defendant is guilty. On the other hand, the verdict E: Not Found Guilty does not mean that the ontological claim of innocence can be made, either. It simply means that the standard of proof for guilt has not been met. In this way, the judicial process offers verdicts that function as ontological propositions but are not necessarily congruent with a true ontology. Just as the purpose of the trial is to “convert a criminal defendant from a person presumed innocent to one found guilty,”\(^84\) the result of the trial is the conversion of a probabilistic cognition into an officially endorsed ontology through the declarative power of the verdict. So the fact finder must examine all of the evidence in context, decide on some probability of the truth of claims, and decide whether that probability value reaches an established proof standard – beyond a reasonable doubt.

The reasonable doubt standard is ambiguous at best.\(^85\) “[T]he concept of proving guilt beyond a reasonable doubt . . . is obscure, incoherent, and muddled . . . . [J]urors have only the haziest notion of what a ‘reasonable doubt’ is.”\(^86\) Attempts to define what the reasonable doubt standard means have been frankly characterized as comical.\(^87\) We represented the probability

\(^84\) Supra note 71.
\(^86\) Supra note 75, at 30-31.
\(^87\) Supra note 77, at 200 (2010) (“[Landen] demonstrates the deep conceptual problems in the current understanding of proof beyond a reasonable doubt, ranging from the legal system’s refusal to be clear about what it means to the, as Landen presents them, almost comically inappropriate descriptions of what it might mean. How, for example, could a juror both presume
condition as $\Pi$. It is unclear exactly what $\Pi$ should be to reach a guilty verdict. Does beyond a reasonable doubt mean that $\Pi$ must equal .7 or .9? Thus, even when an official, finalized verdict has been declared the truth value of the verdict is fundamentally ambiguous. Instead of making a statement about what was actually discovered and what the probability of guilt is (as in figure 3), the court declares a verdict that resembles figure 4. Whatever probability of truth that was apparent in figure 3 is now disguised in figure 4. When a verdict is handed down, it is unclear what the court found to be the probability of guilt as well as what standard was used as a ‘reasonable doubt.’

The reasonable doubt standard of proof is intentionally high;\(^{88}\) it is higher than the preponderance standard used in civil cases.\(^{89}\) The reason is to distribute error in favor of acquitting the guilty rather than wrongly convicting the innocent.\(^{90}\) The pre-convicted defendant who is presumed innocent enjoys this and other constitutional protections.\(^{91}\) So while we know that a guilty verdict represents a factual proposition with some significant level of certainty, we don’t know the actual level of certainty. All we know is that it was, at the time of the trial and according to the finder(s) of fact, sufficiently high for the prosecution to overcome its burden of proof. Recalling, then, that the verdict is represented with two combined components as

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\(^{90}\) Supra note 75, at 29.
we see the inherent tension that underlies the guilty verdict. It is a statement that refers to the past. As such, it has a words-to-world direction of fit and a probability of correctness represented as

\[ \downarrow f(p) \Pi \]

(Component 1: Assertion)

Yet it simultaneously declares certain facts to be accepted as ontological propositions, defining the past and employing a world-to-words direction of fit, represented as

\[ \uparrow f(p) \Pi. \]

(Component 2: Declaration)

These two components of a verdict create ambiguity in the exact meaning of a verdict in a particular case. The declarative component of the verdict derives from the authority of the court and gives the verdict legal force; it allows the legal system to grant and deny rights and privileges. Yet the assertive component of the verdict demonstrates how the verdict may be incorrect; it has a truth value or probability that is perhaps never equal to 1. The function of the verdict then is to establish a presumption. The declarative component of a verdict creates a presumption concerning the truth of the assertive component. This presumption is rebuttable, since many kinds of appeals are allowed, but because the proof standard in reaching the verdict is fundamentally ambiguous, the strength of the presumption is fundamentally ambiguous as well. It is impossible to know when challenging a verdict how strong the verdict is and how

\(^{91}\text{Id.}\)
strong the evidence must be to change the probability of guilt from beyond a reasonable doubt to below a reasonable doubt. The guilty verdict effectively transforms an ambiguous presumption of innocence into an ambiguous presumption of guilt.

It has been argued that within the meaning of the presumption of innocence, “factual innocence plays an insubstantial role.” The presumption of innocence, rather than having a meaning with respect to factual innocence, is a proxy for a procedural safeguard against convicting the innocent. Likewise, the presumption of guilt created by a guilty verdict effectively relates to procedure and not to an ontology of true factual guilt. A claim of actual innocence is incommensurable with an ambiguous presumption of guilt. A claim of actual innocence is a claim about objective truth; the guilty verdict says nothing about objective truth, but rather probative truth and procedure. This makes appealing a guilty verdict on factual grounds logically difficult.

Appeals of verdicts should be divided into two categories. They are often thought of as appeals of ‘legal’ and ‘factual’ issues, but the next section argues that this distinction is misleading and proposes an alternative.

II. THE TOULMIN MODEL

A. Syllogisms and Backing Facts

Verdicts create a presumption with regard to proposition p. Proposition p includes both legal and factual propositions, but the fact/law distinction is misleading. Now that we have identified (or rather proven the ambiguity) of the probability condition (truth value), we must examine the propositional content to which the probability condition refers and understand how different
types of appeals attack different types of propositions.

The typical picture of a legal case is the syllogistic model. The law is the major premise, a universal proposition that has the form “All A’s are B’s,” as in the proposition “all men are mortal.” A fact of the case is the minor premise and is a singular proposition. It has the form \( x \) is an A, or for example, “Socrates is a man.” So we have the following:

\[
\begin{align*}
\text{All men are mortal} & \quad \text{major premise} & \quad \text{law} \\
\text{Socrates is a man} & \quad \text{minor premise} & \quad \text{fact} \\
\text{Therefore:} & \quad \text{Socrates is mortal} & \quad \text{conclusion} & \quad \text{verdict}
\end{align*}
\]

The verdict is the conclusion. Consider the syllogism model in a typical murder case.

Intentional and inexcusable killing is murder \( \text{(law)} \)
Alan killed Bob intentionally and inexcusably \( \text{(fact)} \)
Alan is guilty of murder \( \text{(verdict)} \)

This syllogism model is sufficient for simple cases, but these cases do not represent real life scenarios. The syllogism demonstrates the fact/law distinction, but in actual cases this distinction itself is often a difficult one to make. The Supreme Court stated once that “[in the context of the present case], as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive.”


\[93\] Obviously this quantifier may be different, such as “none,” “some,” etc.

been noted by commentators,\(^{95}\) and any attempt to distinguish between the two has been called “doomed from the start.”\(^{96}\)

The Toulmin model describes the relation of facts and law more accurately than does the syllogistic model. In basic form, facts are what Toulmin calls data which when combined with laws (which Toulmin calls warrants) lead to a conclusion. In a typical murder case, the data includes the fact that the criminal intentionally and inexcusably shot the victim. The warrant is the rule that when people shoot other people, they are guilty of murder. This allows us to reach the conclusion that the individual criminal is guilty of murder. Up to this point, this model is not materially different from the syllogistic model, but the Toulmin model allows for additional elements.\(^{97}\) Material to our present discussion is the addition of backing facts. These are facts that justify the application of the warrant to the datum in question. The Toulmin model may be diagrammed as follows:

\[
\begin{align*}
\text{Data} & \quad \rightarrow \quad \text{Conclusion} \\
\text{Since} & \quad \text{Warrant} \\
\text{On account of} & \quad \text{Backing facts}
\end{align*}
\]

In the murder example, backing facts include how we define intent and excuse, how and when a warrant should be applied, and justifications for why the data combined with a warrant produces


\(^{96}\) Id. at 1770.

\(^{97}\) There are several different elements, of which I am only including one.
a particular conclusion. The proper use of these backing facts is an essential component to legal reasoning, interpretation and application. What does it mean for something to be intentional? How what counts as an excuse, and how is it determined? These are sometimes thought of as ‘legal’ questions but are fundamentally factual inquiries by nature.\textsuperscript{98} These factual inquiries are not clearly delineated in the syllogism model. “The form of statement ‘All A’s are B’s’ is as it stands deceptively simple: it may have in use both the force of a warrant and the factual content of its backing, two aspects which we can bring out by expanding it in different ways.”\textsuperscript{99} Laws are not well portrayed as major premises in the syllogism model but are defined in the Toulmin model and distinguished from data and backing facts.

B. Proposition

The Toulmin model also helps us avoid another ambiguity: to what exactly does the probability condition refer? What exactly is contained in the proposition, p, of a verdict? The Toulmin model shows how the proposition p can be thought of as referring to two different things which coincide with the two main categories types of appeals. This distinction demonstrates why certain types of appeals (commonly known as ‘factual’) are resisted while other types of appeals (commonly known as ‘legal’) are accommodated by the legal system at great length.

These two types of propositions are not mutually exclusive. They exist simultaneously and produce distinct properties of verdicts and appeals. First, the probability condition can refer to the probability that the reasoning process behind the verdict was sound and that formal

\textsuperscript{98} Supra note 63.
procedures were correct and valid. This is the probability that assuming the truth of the data, the correct conclusion has been reached. Appeals that challenge the probability of truth of these propositions include appeals on procedural issues, constitutional issues, or the reasoning process. In these types of attacks, the probability condition refers to the data, warrants and backing facts combined through the trial process. In other words, p may refer to the validity of the Toulmin structure as a whole which ultimately relies on the truth of the backing facts. Table 3 describes different types of appeals and how they are fundamentally challenges to the truth of backing facts.

<table>
<thead>
<tr>
<th>Backing Fact Challenge</th>
<th>Examples of Appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. A law supersedes and proscribes W</td>
<td>- Constitutional challenges</td>
</tr>
<tr>
<td>2. D does not fall under a category defined by W</td>
<td>- Disputed interpretation of legal terms and meanings - Disputed characterization of facts</td>
</tr>
<tr>
<td>3. D should not have been considered under W</td>
<td>- Procedural error - Disputed reliability of evidence</td>
</tr>
</tbody>
</table>

Table 3: Backing Facts and Appeals

The notion of a fair trial is a paramount concern of the law. In other words, we want the probability of truth (or correctness, validity) of the backing facts to be as close to 1 as possible.

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100 25 Fed. Proc., Law. Ed. § 58:12 (“A new trial is warranted if the jury verdict is contrary to the clear weight of the evidence such that upholding the verdict will result in a miscarriage of justice.”).
This ensures that correct procedure has been complied with, laws have been correctly applied and legal institutions have correctly performed their functions. Thus, the legal system welcomes appeals that that could possibly increase the value of this probability condition, which include those listed in table 3 above. There is no ambiguity or standard of proof relating to these truth values. The truth values are constantly flexible and challengeable. This is why ‘legal’ appeals are so easily incorporated into post-conviction procedure.

On the other hand, the probability condition may refer to the truth of the data only. In Herrera, this probability condition would be the probability that Herrera fired the gun at the officer, Herrera’s state of mind, and the surrounding circumstances. The probability of these facts does not need to be as close to 1 as possible. This is where the proof standard comes in, and the law settles for some value of $\Pi$ that is beyond a reasonable doubt. Once that standard is met, the law satisfied. Factual appeals based on new evidence are attempts to increase or decrease this probability, but the presumption of truth of the data is established through the declarative power of the verdict. New evidence may alter the truth value, but since we don’t know the original truth value (as it was disguised in the conversion to the binary guilty/not guilty verdict) nor whether the new evidence decreases the truth value to below a reasonable doubt (since we don’t know what the reasonable standard was to begin with).

C. Actual Innocence Claims and New Evidence

We can classify cases of new evidence under two categories. The distinction can be drawn between circumstances in which newly discovered evidence merely changes the balance or weight of evidence supporting conviction (i.e. $\Pi$ falls from .9 to .6 ) and those in which the
evidence is clearly exculpatory ($\Pi$ falls to 0). For example, in case number one, a key witness recants her testimony, underlying a substantial part of the prosecution’s case. In case number two, DNA evidence shows that it was a person other than the accused who committed a crime. In the former case, the new evidence would change the result of a trial had it been introduced during the trial. The previous body of evidence gave a probability of actual guilt that rose above the proof standard. The new evidence reduces that probability to some point below the proof standard.

It is questionable why the law does not and should not reconsider such cases.\textsuperscript{102} Again, practical reasons give little support considering the many non-guilt-relevant appeals that are entertained despite their impracticality. There is no doubt that the law attempts to avoid these situations altogether, not only through liberal and extensive discovery but through the reasonable doubt standard itself.\textsuperscript{103} Inherent in the reasonable doubt standard is the idea that witnesses are not likely to recant their testimonies in the future. If a testimony is shown to be unreliable, it is not relied upon.\textsuperscript{104} So again, the reasonable doubt standard creates a strong presumption, but the presumption is still fundamentally ambiguous. If new evidence decreases the $\Pi$ value, we don’t know where it decreased it from, where it stands at the moment, and whether the value fell below

\textsuperscript{102} See supra note 40, at 160 (“Perhaps a good formulation of the criterion as any [for reconsidering guilty verdicts] is that the petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that [which had] become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.”).

\textsuperscript{103} See supra text and footnotes accompanying footnote 3.

\textsuperscript{104} See, e.g., Cool v. United States, 409 U.S. 100, 104 (1972) (“We held in In re Winship, that the Constitution requires proof of guilt beyond a reasonable doubt. It is possible that [a particular witness’s] testimony would have created a reasonable doubt in the minds of the jury, but that it was not considered because the testimony itself was not believable beyond a reasonable doubt.”) (citation omitted).
the standard used at trial. Judges may do their best to interpret new evidence in light of past proceedings\textsuperscript{105} but this is logically impossible to do in a coherent and consistent manner.

In the second case, claims of actual innocence do not assert that the probability of the truth of the data is less than a reasonable doubt; actual innocence claims assert that the probability of the truth of the existing data is 0. These are the only situations in which new evidence can be incorporated into a verdict, altering the outcome. The Supreme Court noted in \textit{In re Davis} that habeas relief in cases of new evidence are limited to situations that are “sufficiently exceptional.”\textsuperscript{106} In dicta, the court spoke of new evidence that “conclusively and definitively [proves], beyond any scintilla of doubt,”\textsuperscript{107} that the convict is innocent. Because of logical limitations, post-conviction habeas relief will be limited to these exceptional cases in which the evidence is clearly exculpatory. \textit{In re Davis} eventually demonstrated this very point. Upon remand, Davis’s habeas claim was not one of the obvious cases and was denied. Subsequently, on March 28, 2011, the Supreme Court also denied the petition for writ of habeas corpus.\textsuperscript{108}

**CONCLUSION**

The law has been so reluctant to accept new factual evidence and claims of actual innocence because there is almost no coherent way to do so except for in the most obvious of cases. Cases involving DNA are an example of an obvious case, and DNA exonerations have pushed the

\textsuperscript{105} Herrera v. Collins, 506 U.S. 390, 398 (1993) (“Petitioner's showing of innocence, and indeed his constitutional claim for relief based upon that showing, must be evaluated in the light of the previous proceedings in this case, which have stretched over a span of 10 years.”).

\textsuperscript{106} In re Davis, 130 S.Ct. 1 (2009) (internal quotations omitted).

\textsuperscript{107} Id.

\textsuperscript{108} In re Davis, 131 S.Ct. 1808 (2011).
occurrence of wrongful conviction to the public spotlight,\(^\text{109}\) where serious attention on actual innocence claims has risen in only the last few decades. This recent response may explain why the law has been slow to introduce these types of safeguards in the past, but is questioning how to do so now.

States have begun to pass statues that allow the introduction of new evidence.\(^\text{110}\) But if it is indeed a “fundamental legal principle that executing the innocent is inconsistent with the Constitution,”\(^\text{111}\) in contrast with Holmes’ views,\(^\text{112}\) then perhaps federal habeas law should be broadened to include factual claims in the set of “every possible case of privation of liberty contrary to the National Constitution, treaties, or laws.”\(^\text{113}\) Perhaps federal habeas law should be established as a constitutional safeguard against executing the actually (and factually demonstrable) innocent.

However, if habeas law does evolve to allow factual inquiry, it will be limited to the most obvious cases. Beyond the most obvious cases, it is inherently problematic to introduce new evidence and claims of actual innocence into post-conviction procedure; there is a logical incommensurability between the competing propositions. The procedural purpose of a guilty verdict is to convert a presumption of innocence into a presumption of guilt. The exact meaning and strength of that presumption is unclear. So while habeas law is attractive in that it seems to have the most bite, its logical limitations should not be forgotten. Because of the unknown truth


\(^{110}\) See *supra* text at footnote 6.

\(^{111}\) *Herrera*, at 419.

\(^{112}\) See *supra* text and footnote at note 19.

\(^{113}\) *Ex parte* McCardle, 73 U.S. 318, 326 (1876).
value of verdicts, statutory rules may provide a better pathway for the innocent convict.