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The Diffusion of Due Process in Capital Cases of Actual Innocence after Herrera

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INTRODUCTION

One of the most fundamental uses of a federal writ of habeas corpus is to save a state prisoner from a scheduled execution in a capital case. However, in Herrera v. Collins, the United States Supreme Court held that a claim of "actual innocence," which is based only on newly discovered evidence, is not a ground for federal habeas relief in a capital case absent meeting an "extraordinarily high" threshold of evidence presentation. This decision bodes ill for the right to seek habeas relief for those convicts who have a substantive actual innocence claim but no procedural error to accompany it.

Because this post-conviction relief was all but denied in Herrera, the Supreme Court found it necessary to offer executive clemency as an alternative to habeas review, holding clemency out as "the historic remedy for preventing miscarriages of justice where [the] judicial process has been exhausted." Thus, in the same breath, the Court in Herrera closed off an entire avenue of habeas review while replacing it

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1. A habeas corpus petition is the principal historical means by which a state prisoner may petition the federal courts for relief on the ground that the state has violated his or her constitutional rights. The writ may only be employed as a final resort once the imprisoned individual has exhausted all available state remedies. See Donald E. Wilkes, Jr., Federal and State Post-Conviction Remedies and Relief §§ 8-2, 8-15 (2d ed. 1987).


4. For purposes of this Note, an "actual innocence" claim denotes a claim of factual innocence of the crime for which the prisoner was convicted, without any accompanying procedural error.

5. Herrera, 113 S. Ct. at 869. Herrera was the first time that the U.S. Supreme Court had the occasion to address a claim of actual innocence without any accompanying procedural error.

6. The right to habeas review of a free-standing actual innocence claim was not absolutely denied by the Court in Herrera, but the "extraordinarily high" threshold that the Court set out for hearing such a claim on the merits makes habeas review highly unlikely. Id.

7. Id. at 866.
with executive clemency as the main procedural safeguard in death row claims of actual innocence.\(^8\)

The Texas case of death row inmate Gary Graham\(^9\) is one of the first state cases after *Herrera* to put the clemency alternative to the test. In that case, the Texas Court of Criminal Appeals\(^10\) stayed Graham's scheduled execution in order to consider whether, in light of *Herrera*, Graham had a constitutional due process right to invoke the clemency process even though the Texas clemency statute does not provide such a right.\(^11\) But rather than rule on the clemency issue, the court in *Graham* actually created a new state habeas procedure so that the petitioner's actual innocence claim could be heard.\(^12\) The *Graham* case is only one example of how *Herrera*'s replacement of habeas review with clemency as the "fail safe" remedy for claims of actual innocence\(^13\) has shifted the responsibility of ensuring due process in capital cases from the federal forum to the executive branch and state courts.

This Note explores how the Supreme Court's decision in *Herrera* has diffused responsibility for ensuring due process in actual innocence claims among alternative forums and whether such relinquishment of the federal habeas power is appropriate.\(^14\) Part I presents an overview of the role of actual innocence claims in the Supreme Court's habeas jurisprudence. Part II deals with executive clemency and is divided into three sections that correspond to the three underlying theories of the clemency power as a (A) "mercy-based" process; (B) "justice-enhancing" process; and (C) "entitlement" under the Due Process Clause.

Part III presents the facts and holdings of the Gary Graham case. Part IV uses the *Graham* case to offer an analysis of how the *Herrera*

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8. *Id.* at 866-68.
10. This is the same court that had heard *Herrera*'s case before it was appealed to the United States Supreme Court.
11. *Third Court of Appeals*, 860 S.W.2d at 873-75.
12. *Honorable Court of Appeals*, 885 S.W.2d at 398-99.
14. Advocates of the death penalty should understand that this Note does not take any stance on the constitutionality or morality of the death penalty itself. It is the wrongful execution of innocent persons that is the true focus of this Note, regardless of the political agendas that underlie either side of the death penalty debate. *See infra* note 359.
decision has shifted responsibility for due process in capital cases of actual innocence to alternative forums. Section (A) discusses what minimal due process protections should be due in cases of actual innocence. The next three sections use this due process framework in order to analyze the shifts from: (B) federal habeas to the executive branch; (C) federal habeas to state habeas review; and (D) these alternative forums back to the federal judicial forum. The Note concludes that the Supreme Court must reassert its jurisdiction over such claims in order to prevent the further diffusion of due process in this area.

I. Actual Innocence and the Habeas Process

Though the problem of convictions of innocent persons is an important one in our criminal justice system, the nineteenth century black letter rule stated that claims of newly discovered evidence of actual innocence were not grounds for postconviction relief. This rule originated because of the natural reluctance of courts to permit collateral remedies to be used merely to relitigate the general issue of guilt or innocence decided in the original criminal proceeding. As a result of this mind set, the writ of habeas corpus has historically been predicated upon constitutional violations of procedural due process rather than any substantive claim of actual innocence. Particularly in regard to death penalty jurisprudence, the Supreme Court has adopted an essentially process-oriented approach toward habeas review. As far back as the early 1960s, the Supreme Court held that a claim of newly discovered evidence of actual innocence was not cogni-

15. See Wilkes, supra note 1, 1-13.
16. Id.
17. Id.
18. The writ is guaranteed by the United States Constitution, Article I, § 9, and by state constitutions. See, e.g., Haw. Const. art. I, § 15; S.D. Const. art. 6, § 8; Tex. Const. art. I, § 12.
19. See, e.g., Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) (Holmes, J.) ("What we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional right[s] have been preserved."); In re Terry, 128 U.S. 289, 305 (1888) ("As the writ of habeas corpus does not perform the office of a writ of error or an appeal, [the facts establishing guilt] cannot be re-examined or reviewed in this collateral proceeding.").
20. Stephen Garvey has expounded two rationales for the Court's decision to restrict the scope of federal habeas review: comity and finality. Stephen P. Garvey, Death-Innocence and the Law of Habeas Corpus, 56 Alb. L. Rev. 225, 259 (1992) [hereinafter Garvey, Death-Innocence]. Under the comity rationale, the Supreme Court wants to afford respect to state court decisions by not reviewing them absent some procedural error of constitutional dimensions. Id. This rationale also produces efficient results as state convictions need not be relitigated in federal or state forums. Id. The Court also wishes to finalize criminal convictions in order to promote general deterrence and repose among the public. Id. at 260. The finality concern also takes into account the money saved in not having to relitigate old state convictions.
zable in a federal habeas proceeding absent some procedural error that bears "upon the constitutionality of the applicant's detention."\textsuperscript{21}

In the 1970s, the Court desired to cut back upon the broad habeas review allowed by its previous decisions.\textsuperscript{22} It was this restriction of its broad habeas jurisprudence that prompted the Court to once again concentrate upon the idea of actual innocence. In \textit{Stone v. Powell},\textsuperscript{23} the Court held that federal habeas review should be limited to constitutional claims that relate to the actual guilt or innocence of the petitioner.\textsuperscript{24} In \textit{Stone}, the petitioner brought a procedural habeas claim under the exclusionary rule of \textit{Mapp v. Ohio}.\textsuperscript{25} The Court refused to hear the petitioner's claim on the merits, holding that the \textit{Mapp} rule served only a deterrent purpose,\textsuperscript{26} but it did not bear upon the petitioner's actual innocence or the basic justice of his incarceration.\textsuperscript{27} However, subsequent cases proved that the holding in \textit{Stone} was not so narrow as to limit habeas review to only those matters relating to the petitioner's actual guilt or innocence, but to other constitutional claims as well.\textsuperscript{28}

Likewise, a series of cases beginning in the late 1970s, in which the Court restricted procedural habeas review, also caused the Court to focus on the idea of actual innocence.\textsuperscript{29} The Court accomplished


\textsuperscript{22.} \textit{See} Brown \textit{v. Allen}, 344 U.S. 443, 482-87 (1953) (allowing habeas review for claims already fully and fairly litigated).

\textsuperscript{23.} 428 U.S. 465 (1976).

\textsuperscript{24.} Prior to this case, the purpose of habeas review had never been posed in terms of factual, rather than legal, innocence.

\textsuperscript{25.} \textit{Stone}, 428 U.S. at 474. The rule provides that property secured through an illegal search or seizure conducted by state police may not be used at trial. \textit{Mapp v. Ohio}, 367 U.S. 643, 655 (1961).

\textsuperscript{26.} \textit{Stone}, 428 U.S. at 491. The rule presumably deters state police from performing an illegal search and seizure of the defendant's property.

\textsuperscript{27.} \textit{Id.} at 491 n.30 & 31. In fact, the Court held that the physical evidence sought to be excluded by the \textit{Mapp} rule is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." \textit{Id.} at 490.

\textsuperscript{28.} \textit{See, e.g.,} Kimmelman \textit{v. Morrison}, 477 U.S. 365 (1986) (holding that Sixth Amendment claim of ineffective assistance of counsel is appropriate for habeas review); Rose \textit{v. Mitchell}, 443 U.S. 545 (1979) (holding that racially discriminatory grand jury is appropriate for habeas review).

\textsuperscript{29.} This line of cases began with the Court's decision in Wainwright \textit{v. Sykes}, 433 U.S. 72 (1977), in which the Court held that habeas petitioners are subject to valid state procedural bars arising from the strategic decisions or oversights of defense lawyers in failing to present claims for resolution by state courts. \textit{See} Hoffman, \textit{Is Innocence Sufficient?}, supra note 21.
these restrictions by imposing the exhaustion,30 successive petition,31 procedural default32 and abuse of the writ33 doctrines, as well as prohibiting the retroactive application of "new" constitutional rules to habeas petitioners under the Teague analysis.34 These doctrines greatly restricted the ability of state prisoners to successfully petition for federal habeas review on procedural grounds.35

In order to reduce the harshness of these restrictive doctrines, the Court decided to provide exceptions for substantive actual innocence claims. For instance, in Kuhlmann v. Wilson,36 the Court created an exception for presenting successive habeas claims where the petitioner could make "a colorable showing of factual innocence."37 Likewise, in Murray v. Carrier,38 the Court held that procedurally defaulted claims could be brought where a "fundamental miscarriage of justice" has occurred and the constitutional violation has "probably resulted" in a mistaken conviction. Similarly, the case of McCleskey v. Zant,39 which established the abuse of the writ doctrine, also mentioned an exception for "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." Even Teague v. Lane40 provides an exception for claims of "funda-

30. Rose v. Lundy, 455 U.S. 509 (1982). This doctrine requires the defendant to exhaust all of his or her state remedies before attempting to obtain federal habeas review.
31. Kuhlmann v. Wilson, 477 U.S. 436 (1986). A "successive petition" raises grounds identical to those raised and rejected on the merits in a prior petition. The Court wished to restrict any habeas petition that had already been rejected by a previous court and that alleged no new grounds in its second claim. Id. at 454.
33. McCleskey v. Zant, 499 U.S. 467 (1991). This doctrine restricts bringing any claim on habeas that could have been but was not raised in a prior habeas petition. Id. at 493.
34. In Teague v. Lane, 489 U.S. 288, 310 (1989), the Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." The rule has had a very restrictive effect on habeas claims and has been justified as producing "finality" in the litigation process. Id. at 308-09.
35. Zimring remarks that at one level, the debate about habeas corpus can be seen as a power struggle between capital defendants and the Supreme Court Justices for control of federal court dockets. It was the potential of multiple habeas procedures to take agenda-setting power out of the hands of the Justices that particularly bothered the Supreme Court and forced it to create these procedural bars to habeas review. See Zimring, supra note 2, at 14.
37. Id. at 454. The Court adopted this standard from a law review article: Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. CHI. L. REV. 142, 160 (1970). According to Judge Friendly's standard, the prisoner must "show a fair probability that, in light of all the evidence . . . the trier of the facts would have entertained a reasonable doubt of his guilt." Kuhlmann, 477 U.S. at 454 n.17 (citing Friendly, supra).
39. 499 U.S. 467 (1991). The Court equated the actual innocence exception with the "fundamental miscarriage of justice exception" set out in Carrier. Id. at 493 (citing Carrier, 477 U.S. at 485).
mental fairness" that concern "the likely accuracy of convictions."\textsuperscript{41}
Thus, it was the harshness of the Court's restrictive doctrines on procedural habeas review that ultimately prompted the substantive merits of the petitioner's actual innocence claim to reappear in federal habeas jurisprudence.\textsuperscript{42}

In \textit{Sawyer v. Whitley},\textsuperscript{43} the Court explicitly set the standard for determining whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim concerning a capital sentencing proceeding has shown that he is "actually innocent of the death penalty" for purposes of avoiding the procedural bar and reaching the merits.\textsuperscript{44} The Court required "clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."\textsuperscript{45}

In \textit{Schlup v. Delo},\textsuperscript{46} the Court explicitly limited the "clear and convincing evidence" standard in \textit{Sawyer} to claims of actual innocence that challenge a constitutional error during the sentencing phase of the trial, but retained the "probably actually innocent" standard of \textit{Carrier} for reaching the merits of claims which challenge the petitioner's underlying conviction. The Court reasoned:

Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that

\textsuperscript{41} Id. at 312-13. \textit{But see} Bruce Ledewitz, \textit{Habeas Corpus as a Safety Valve for Innocence}, 18 N.Y.U. REV. L. & SOC. CHANGE 415, 427 (1990-91) (contending that the second exception in \textit{Teague} affords no special protection to the actually innocent defendant).

\textsuperscript{42} See Hoffman, \textit{Is Innocence Sufficient?}, supra note 21, at 827.

\textsuperscript{43} 112 S. Ct. 2514, 2517 (1992).

\textsuperscript{44} The Court set out three possible ways in which actual innocence might be defined in the context of a capital sentencing proceeding. \textit{Id.} at 2521. The strictest definition would be to limit any showing to negating an essential element of the offense charged. The most lenient definition would concern the "ultimate discretionary decision between the death penalty and life imprisonment" including all relevant aggravating and mitigating factors. \textit{Id.} The third approach takes the middle ground that the showing must bear upon the objective factors or conditions relevant to the defendant's eligibility for the death penalty. Such an approach does not consider mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error. \textit{Id.} at 2523. The Court adopted this last approach in formulating its standard. \textit{Id.}

\textsuperscript{45} \textit{Id.} The Court explained its use of the clear and convincing evidence standard by stating, "If federal habeas review of capital sentences is to be at all rational, petitioner must show something more in order for a court to reach the merits of his claims on a successive habeas petition than he would have had to show to obtain relief on his first habeas petition [meeting the 'cause and prejudice' standard]." \textit{Id.} at 2522. The Court also held that the petitioner's standard "would so broaden the inquiry as to make it anything but a 'narrow' exception to the principle of finality." \textit{Id.} In his concurrence, Justice Stevens, joined by Justices Blackmun and O'Connor, took issue with the "clear and convincing" evidence standard of the majority and suggested instead a standard of "probable actual innocence" or "clearly erroneous" to determine whether the defendant had met the threshold for hearing the habeas claim on the merits. \textit{Id.} at 2530 (Stevens, J., concurring).

\textsuperscript{46} 115 S. Ct. 851, 865 (1995).
focus solely on the erroneous imposition of the death penalty. Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent.

Thus, the Court found that the importance of the greater interest in actual innocence merited the imposition of a “somewhat less exacting standard of proof” than in a case where the petitioner is concededly guilty but is merely challenging the severity of his or her sentence. The Court also went on to define the “probable innocence” standard in Carrier as requiring the petitioner to show that “it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.”

In Herrera v. Collins, the Supreme Court had an opportunity to relegate substantive actual innocence claims from the backburner of constitutional jurisprudence to the forefront. Herrera presented to the Court for the first time the issue of whether a convicted death row inmate could petition for habeas relief by relying solely upon a claim of actual innocence based on newly discovered evidence without any accompanying procedural violation. On the basis of proof that included two eyewitness identifications, numerous pieces of circumstantial evidence, and Herrera’s handwritten letter impliedly admitting his guilt, Herrera was convicted of the murder of a police officer and sentenced to death in January 1982. Herrera unsuccessfully challenged his conviction on direct appeal, in two state habeas petitions to the

47. The Court rationalized, “Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare.” Id. at 853.
48. Id. at 866.
49. Id.
50. Id. at 857. According to the Court, such a standard is higher than a showing of mere “prejudice” under Strickland v. Washington, 466 U.S. 668, 694 (1984), but imposes a lower burden of proof than the “clear and convincing evidence” standard of Sawyer. Id.
51. 113 S. Ct. 853 (1993). In fact, some legal scholars believed the Court in Herrera would take that next step and allow a freestanding claim of actual innocence to be heard on the merits. See, e.g., Hoffman, Is Innocence Sufficient?, supra note 21, at 832-33.
52. Herrera, 113 S. Ct. at 859. The Court in Jackson v. Virginia, 443 U.S. 307 (1979), had considered on habeas review the case of a defendant’s actual innocence claim. In Jackson, the Court found that based upon the evidence in the trial court record, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Id. at 324. However, the Jackson holding only provides a very narrow precedent for actual innocence claims because it involved only the review of evidence already in the trial record. Id. It was not until Herrera that the Court was able to decide a case of actual innocence involving newly discovered evidence obtained after the completion of the trial below. 113 S. Ct. at 853.
53. Herrera, 113 S. Ct. at 857. In July 1982, Herrera pled guilty to the capital murder of another police officer in an earlier related incident. Id.
Texas courts and in a federal habeas petition.\textsuperscript{54} Ten years after his conviction, in February 1992, he filed a second federal habeas petition based on a claim of actual innocence.\textsuperscript{55} He supported his claim with affidavits tending to show that his now-dead brother had committed both murders.\textsuperscript{56} Herrera argued that his actual innocence claim deserved the protection of both the Eighth Amendment’s Cruel and Unusual Punishment Clause and the Fourteenth Amendment’s Due Process Clause.\textsuperscript{57}

Justice Rehnquist, speaking for the Court,\textsuperscript{58} refused to hear Herrera’s petition on the basis that a claim of actual innocence, absent an independent constitutional violation occurring in the underlying state criminal proceeding, did not constitute a constitutional violation worthy of federal habeas relief.\textsuperscript{59} The Court explained that this rule is grounded in the principle that “federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.”\textsuperscript{60} The Court rejected Herrera’s Eighth Amendment claims by distinguishing the cases upon which he had relied,\textsuperscript{61} and then went on to dismiss his due process claims.

\textsuperscript{54} Id. at 858.  
\textsuperscript{55} Id.  
\textsuperscript{56} Id. Among the affidavits were those of Hector Villarreal, an attorney who had represented Herrera’s brother, Raul Sr., and Juan Franco Palacious, one of Raul Sr.’s former cellmates. Id. Both of these individuals claimed that Raul Sr., who died in 1984, had told them that he—and not Herrera—had killed the two police officers. Id.  
\textsuperscript{57} Id. at 856-57.  
\textsuperscript{58} Justices O’Connor and Kennedy filed a concurring opinion, as did Justices Scalia, Thomas, and White. Justices Blackmun, Stevens and Souter dissented.  
\textsuperscript{59} Herrera, 113 S. Ct. at 860 (citing Townsend v. Sain, 372 U.S. 293, 317 (1963), overruled in other respects by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992)).  
\textsuperscript{60} Id. In support of this proposition, the court also cited to Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) (Holmes, J.) (“[W]hat we have to deal with [on habeas review] is not the petitioners’ innocence or guilt but solely the question whether their constitutional rights have been preserved.”).  
\textsuperscript{61} Herrera had argued that Ford v. Wainwright, 477 U.S. 399, 411 (1986), supported his position that he should receive an evidentiary hearing on his claim of actual innocence because it held that the Eighth Amendment prohibited the execution of insane persons unless an evidentiary hearing was held as to the person’s sanity. But Justice Rehnquist distinguished Ford on the basis that Ford had challenged his sentence while Herrera was challenging his conviction. Herrera, 113 S. Ct. at 863.

Likewise, Herrera cited Johnson v. Mississippi, 486 U.S. 578 (1988), where the Court “held that the Eighth Amendment requires reexamination of a death sentence based in part on a prior felony conviction which was set aside ... after the capital sentence was imposed.” Herrera, 113 S. Ct. at 863. But Justice Rehnquist also distinguished this case by saying that in Johnson, similar claims had previously been considered under state law by writ of error coram nobis so that there was no need to override the state law to consider Johnson’s claim on the merits. Id. at 864. By contrast, Herrera was attempting to seek to override the law of Texas by attempting to introduce new evidence after the thirty day limit imposed by statute, and thus could not claim protection under the Eighth Amendment. Id.
The Court held that once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.\textsuperscript{62} Thus, because Herrera had already been convicted beyond a reasonable doubt in a full and fair trial with no procedural errors, he did "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."\textsuperscript{63} As a result, Herrera was not entitled to the due process protection afforded to a person presumed "innocent."\textsuperscript{64} The Court explained that the question was "not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his 'actual innocence' claim" and determined that "[t]his issue is properly analyzed only in terms of procedural due process."\textsuperscript{65} The Court concluded by setting an "extraordinarily high" threshold showing for actual innocence claims as a prerequisite to reaching the merits of the habeas petition.\textsuperscript{66}

Justice O'Connor, joined by Justice Kennedy, concurred in the result, but wrote to make it clear that she could not "disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."\textsuperscript{67} On the matter of the threshold level for hearing such claims, O'Connor agreed with Rehnquist that the showing must be "extraordinarily high" and a "truly persuasive demonstration of 'actual innocence'" in order to avoid frivolous claims.\textsuperscript{68}

Justice Scalia, joined by Justice Thomas, also concurred in the result, but held that no actual innocence claim should ever be heard on federal habeas review regardless of the persuasiveness of the evidence presented.\textsuperscript{69} He explained, "There is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a

\begin{itemize}
  \item \textsuperscript{62} Herrera, 113 S. Ct. at 860.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Id. at 864 n.6.
  \item \textsuperscript{65} Id. The Court also stated that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence." Id. at 861.
  \item \textsuperscript{66} The Court stated: [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 showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold. Id. at 869.
  \item \textsuperscript{67} Id. at 870 (O'Connor, J., concurring).
  \item \textsuperscript{68} Id. at 874.
  \item \textsuperscript{69} Id. at 874-75 (Scalia, J., concurring).
\end{itemize}
right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.\textsuperscript{70}

Justice White wrote his own concurring opinion. Rather than setting the threshold level for hearing an actual innocence claim as "extraordinarily high," Justice White set out a clearer standard: based on the newly discovered evidence and the entire record before the jury, "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt."\textsuperscript{71}

In a vehement dissent, Justice Blackmun, joined by Justices Stevens and Souter, stated that "[n]othing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent."\textsuperscript{72} The dissent found that the execution of an innocent person violates both the Eighth Amendment's Cruel and Unusual Punishment Clause\textsuperscript{73} and the Fourteenth Amendment's Due Process Clause.\textsuperscript{74} The dissent also found the Court's decision "perverse" when viewed in light of its recent habeas jurisprudence that allowed exceptions for actual innocence in hearing procedurally defaulted claims.\textsuperscript{75} The dissent proposed an alternative to the "extraordinarily high" threshold of the majority.\textsuperscript{76} This alternative threshold would require a showing "that there probably would be a reasonable doubt" in the jurors' minds

\textsuperscript{70} Id.

\textsuperscript{71} Id. at 875 (White, J., concurring) (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

\textsuperscript{72} Id. at 876 (Blackmun, J., dissenting) (internal citations omitted).

\textsuperscript{73} The dissent argued that the "protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced." Id. at 877.

\textsuperscript{74} The dissent claimed that the majority had put "the cart before the horse" by denying Herrera the opportunity to bring a substantive due process claim of actual innocence simply because a previous jury without the benefit of this new evidence had found that he was not actually innocent. Id. at 878 n.5. It explained the position of the majority as follows:

[H]aving held that a prisoner who is incarcerated in violation of the Constitution must show he is actually innocent to obtain relief, the majority would now hold that a prisoner who is actually innocent must show a constitutional violation to obtain relief. The only principle that would appear to reconcile these two positions is the principle that habeas relief should be denied whenever possible. Id. at 880-81.

In response to this attack, Justice Rehnquist included a footnote in the majority opinion stating that the dissent "puts the cart before the horse" by resting its due process analysis on the assumption that the petitioner is in fact actually innocent. Id. at 864 n.6. The Court explained that the question before it was "not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his 'actual innocence' claim. This issue is properly analyzed only in terms of procedural due process." Id.

\textsuperscript{75} Id. at 880 (Blackmun, J., dissenting) (citing Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion); Murray v. Carrier, 477 U.S. 478, 496 (1986); Smith v. Murray, 477 U.S. 527, 537 (1986); and Mc Cleleskey v. Zant, 499 U.S. 467 (1991)).

\textsuperscript{76} Id. at 882 (Blackmun, J., dissenting).
based on the newly discovered evidence of innocence.\textsuperscript{77} The dissent passionately concluded that the execution of a person who can show that he is innocent "comes perilously close to simple murder."\textsuperscript{78}

In rejecting Herrera's habeas claim of actual innocence, the Court strongly suggested that an alternative "fail safe"\textsuperscript{79} to the judicial process was available to him, that of the executive clemency process.\textsuperscript{80} The next section explores the nature of executive clemency and the arguments made in \textit{Herrera} for and against its use as a viable alternative to federal habeas review.

\section*{II. Executive Clemency}

Historically, the institution of clemency seems to have had more to do with power than justice.\textsuperscript{81} The clemency power is a relic from the days when an all-powerful monarch possessed the authority to remit punishment as an act of mercy.\textsuperscript{82} In \textit{Biddle v. Perovich},\textsuperscript{83} the United States Supreme Court characterized the earliest pardons as "private act[s] of grace from an individual happening to possess power."\textsuperscript{84}

The Supreme Court has traditionally described the clemency power as an "act of grace"\textsuperscript{85} rather than relating it to any notions of justice such as retribution or the "just-dessert" theory. In England, the King used clemency in order to ensure that justice was administered with mercy.\textsuperscript{86} However, according to Blackstone, the true purpose of the King's use of the clemency power was to "endear the sovereign to his subjects" and to achieve a favorable political atmosphere from his population.\textsuperscript{87} Thus, the decision to extend "mercy"

\textsuperscript{77} Id. (Blackmun, J., dissenting) (citing \textit{Carrier}, 477 U.S. at 496, and \textit{McCleskey}, 111 S. Ct. at 1470).
\textsuperscript{78} Id. at 884 (Blackmun, J., dissenting).
\textsuperscript{79} Id. at 868.
\textsuperscript{80} Id.
\textsuperscript{81} \textit{See} Daniel T. Kobil, \textit{The Quality of Mercy Strained: Wresting the Pardonning Power From the King}, 69 TEX. L. REV. 569, 583-84 (1991) [hereinafter Kobil, \textit{Mercy Strained}].
\textsuperscript{82} Id. at 575; \textit{see also} Elkan Abramowitz & David Paget, \textit{Executive Clemency in Capital Cases}, 39 N.Y.U. L. REV. 136, 138 (1964) (stating history reveals that "the sovereign, whether monarchical or other, which defines the criminal act has the power to pardon").
\textsuperscript{83} 274 U.S. 480 (1927).
\textsuperscript{84} Id. at 486.
\textsuperscript{85} United States v. Wilson, 32 U.S. 150, 160 (1833) (Marshall, J.).
\textsuperscript{87} Kobil, \textit{Mercy Strained}, supra note 81, at 586; \textit{Ehrlich, supra} note 86, at 964.
through clemency has historically been guided by the political process.88

The concept of executive clemency in the United States derives from our English heritage.89 Most of the colonial charters bore some provision for the exercise of the clemency power.90 The repose of the clemency power in the absolute discretion of state governors was almost uniformly the scheme provided for by state constitutions soon after the formation of the United States.91 The twentieth century has provided a trend toward the creation of advisory pardon boards to either assist the governor in clemency determinations or to restrain the governor's actions by requiring joint approval with the board in order to grant clemency.92

Each governor has different ideas about the function of executive clemency, and the rate of granting clemency accordingly varies from administration to administration,93 and from state to state.94 There are no established standards that an executive official is bound to follow in deciding whether to grant clemency, and executive officers have expounded various grounds for their clemency decisions.95 Among the grounds for clemency relief is that the offender's innocence has been established or at least that his or her guilt is in doubt.96

88. The "essential contention of a clemency petition is that the public interest would be better served by sparing the life of the condemned than by taking it." Deborah Leavy, A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings, 90 YALE L.J. 889, 893 (1981).

89. See Abramowitz & Paget, supra note 82, at 140. Until modern times, most felonies in Anglo-American jurisprudence were punishable not by imprisonment but by death, so that clemency provided the principal opportunity for relief in capital cases. Leavy, supra note 88, at 895. Today, "[i]t is as routine for a condemned prisoner to seek clemency... as it is for him or her to seek appellate review." Id. at 896.

90. Abramowitz & Paget, supra note 82, at 140.
91. Id. at 141.
92. Id. As of 1991, twenty-nine states placed the clemency power in the governor alone, although most states include a parole board which issues non-binding recommendations. Sixteen states require the approval of the parole board before any action by the governor may be taken, and five states employ an administrative panel appointed by the governor to make the entire clemency decision. Kobil, Mercy Strained, supra note 81, at 605.
93. Kobil, Mercy Strained, supra note 81, at 605-06; see also J. L. Gillin, Executive Clemency in Wisconsin, 42 J. CRIM. L., CRIMINOLOGY & POL. SCI. 755, 757-58 (1951) (describing variations in the clemency practices of several Wisconsin governors).
94. Kobil, Mercy Strained, supra note 81, at 606.
96. Id. at 260.
Against this backdrop, the Court in *Herrera* decided to propose executive clemency as a viable alternative\(^9\) to habeas review for free-standing claims of actual innocence.\(^8\) The Court stated that clemency was “deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”\(^9\) The Court then went through a brief history of clemency, noting that in England, clemency “provided the principal avenue of relief for individuals convicted of criminal offenses—most of which were capital—because there was no right of appeal until 1907.”\(^10\) The Court also mentioned that “[t]oday, all 36 States that authorize capital punishment have constitutional or statutory provisions for clemency,”\(^11\) and it concluded that executive clemency “has provided the ‘fail safe’ in our criminal justice system.”\(^12\) In support of its holding, the Court argued that “history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.”\(^13\) The Court then held that the “Texas clemency procedures contain specific guidelines for pardons on the ground of innocence” and found that Herrera had yet to apply for a clemency hearing.\(^14\) Therefore, that avenue was still open to him.

In her concurrence, Justice O’Connor held that if “the safeguards of clemency and pardon fulfill their historical mission, [the question of actual innocence] may never require resolution at all.”\(^15\) Likewise, Justice Scalia concurred, “With any luck, we shall avoid ever having to face this embarrassing question [of actual innocence] again, since it is

97. *Herrera* v. Collins, 113 S. Ct. 853, 866 (1993). The Court stated: “This is not to say, however, that petitioner is left without a forum to raise his actual innocence claim. For under Texas law, petitioner may file a request for executive clemency.” *Id.*

98. *Id.* at 869.

99. *Id.*

100. *Id.* at 866-67 (citing 1 L. Radzinowicz, A History of English Criminal Law 122 (1948)).

101. *Id.* at 867.

102. *Id.* at 868 (citing Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989)).

103. *Id.* The Court cited a case study by Professor Edwin Borchard in which it was determined that out of sixty-five cases of newly discovered evidence of innocence, clemency was granted in forty-seven of them and the remaining cases ended in judgments of acquittal after new trials. *Id.* (citing E. Borchard, Convicting the Innocent (1932)). The Court also pointed to a recent study which found that clemency has been exercised frequently in capital cases in which demonstrations of actual innocence have been made. *Id.* (citing M. Radelet et al., In Spite of Innocence 282-356 (1992)).

104. *Id.*

105. *Id.* at 874 (O’Connor, J., concurring).
improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.”

The dissent argued fervently against the Court's reliance upon executive clemency as a viable alternative to the judicial process of habeas review, stating, “[O]ne thing is certain: The possibility of executive clemency is not sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments... 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.” The dissent then argued that, “[i]f the exercise of a legal right turns on 'an act of grace,' then we no longer live under a government of laws.” The dissent quoted West Virginia State Board of Education v. Barnette for the proposition that the “very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”

There are at least three grounds upon which clemency may properly be based. First, clemency may be a “mercy-based” process that has no real relation to the formal judicial system. Second, clemency may constitute a “justice-enhancing” process that is intrinsically related to the issue of fairness and the judicial process. Third, clemency may constitute a “justice-enhancing” process that is intrinsically related to the issue of fairness and the judicial process.

106. Id. at 875 (Scalia, J., concurring).
107. Id. at 881 (Blackmun, J., dissenting). The dissent relied upon Ford v. Wainwright, 477 U.S. 399, 416 (1986), in which the Court had explicitly rejected the argument that executive clemency was adequate to vindicate the Eighth Amendment right not to be executed if one is insane. The dissent also argued that executive clemency “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.” Herrera, 113 S. Ct. at 881 (Blackmun, J., dissenting) (quoting Solem v. Helm, 463 U.S. 277, 303 (1983)).
111. The term “mercy” here does not necessarily denote the sympathetic emotion of pity; rather, it refers to the use of clemency for any purpose unrelated to formal notions of justice.
112. Stephen Garvey has distinguished between “dessert-innocence” in which the court assesses the defendant’s moral dessert based upon notions of justice under the law, and “mercy-innocence” in which arbitrary mercy is dispensed regardless of whether justice requires it. Garvey, Death Innocence, supra note 20, at 246 n.90. Garvey claims that the clemency power falls within the “mercy-innocence” category and is unrelated to notions of justice. Id.
113. Bedau classifies this “justice-enhancing” category into two separate categories: (1) a “quasi-judicial” rationale, in which clemency is viewed as providing the opportunity for one final review, much like an appellate hearing, and (2) a “purely retributive” rationale in which the clemency power should only be used as a “check” upon the powers of the judiciary when retributive justice has not been fully achieved. Under this second subcategory, pardons are “duties of justice, not supererogatory acts [like mercy].” See Bedau, Decline of Executive Clemency, supra note 95, at 257-58. This second subcategory, defining clemency in terms of strict justice, seems quite outlandish in light of the historical origin and uses of the clemency process as an extrajudi-
ency may constitute an "entitlement" under the Due Process Clause of the Fourteenth Amendment. Each of these views will be explored in more detail in the following sections.

A. Clemency as a "Mercy-Based" Process

The clemency process has historically been depicted as an act of private mercy that is unrelated to any formal notions of justice. The main characteristic of the view of clemency as a "mercy-based process" is that it is essentially arbitrary. Though we might be able to study the reasons behind the pardoning of sentences for the sake of mercy, they would be as varied as the individual cases that have led to death row convictions.

Mercy may be arbitrarily bestowed because of the particular moral circumstances of the case. For instance, crimes committed out of necessity, such as a mother who steals food for her children, can be justified as a higher moral imperative that should trump strict adherence to traditional legality. More recently, the "battered woman syndrome" has been the focus of executive clemency review, especially in cases in which such a "moral" defense was not allowed to be raised in the courts. Another case for the application of mercy

116. Id.
117. See Kobil, Mercy Strained, supra note 81, at 630-31.
118. The "battered woman syndrome" refers to the defense raised by abused spouses that it was necessary to kill their abusive husbands in order to prevent a reasonably certain, but non-imminent, threat to life. See Richard A. Rosen, On Self-Defense, Imminence, and Women Who Kill Their Batters, 71 N.C. L. REV. 371, 391 (1993).
119. For instance, in December 1990, Governor Richard F. Celeste of Ohio granted clemency to twenty-six women who had been convicted of killing or assaulting their batters, and in February 1991, Governor William D. Schaefer of Maryland commuted the prison terms of eight women who had been similarly imprisoned. See Tamar Lewin, More States Study Clemency for Women Who Killed Abusers, N.Y. TIMES, Feb. 21, 1991, at A19. More recently, Illinois Governor Jim Edgar has granted clemency to six convicted women under the "battered spouse" rationale since he came into office in 1991; four of these pardons occurred in 1994. See Cynthia G. Bowman, Spouse Abuse: A Disparity of Power, CHI. TRIB., June 23, 1994, at 27; Julie Irwin and Susan Kuczka, A Defense That Could Be Abused; Battered Woman Syndrome Isn't An Open-Shut Case, CHI. TRIB., May 14, 1994, at 1.
120. In granting clemency to twenty-six female prisoners, Governor Celeste gave great weight to the fact that these women had not had the opportunity to present evidence of either battered woman syndrome or a history of abuse at their trials. Lewin, supra note 119, at A19.
has been where the death row prisoner has shown signs of rehabilitation during his long stay in prison, and the governor or parole board decides that the convict no longer deserves to be executed.\textsuperscript{121} Many other reasons for the clemency decision can be imagined that play up to the humane and moral side of the clemency-granting authority.\textsuperscript{122}

The personal preferences and characteristics of the governor or other official within whose hands the clemency power rests may also arbitrarily affect the outcome of the clemency process. In\textit{ United States v. Wilson}, Chief Justice Marshall described the power to pardon as “an act of grace” that is “private.”\textsuperscript{123} It is this “private” aspect of the clemency power that allows for the injection of personal preference into the clemency process because no external explanation need be made for the use of such power. Some governors approve of the death penalty while others detest it as inhumane.\textsuperscript{124} The clemency power may be utilized to express the governors’ views on this issue by either granting an excessive number of pardons\textsuperscript{125} or none at all. Thus, personal preferences may arbitrarily be applied to death row convicts in different states and during different terms of office in the same state.

Political considerations also play an important role in the decision to grant clemency, thus making the process more arbitrary than a politically immune system of rules. It is no secret that governors, as
elected officials, are accountable to their constituents and must please them if they desire to remain in office.126 When public sentiment vehemently shows support or hatred for a particular death row convict, the political official in charge of the clemency process would be politically foolish to make a decision that did not comply with the public's wishes.127 This "rule by the mob" adds to the arbitrariness of the decision to grant clemency.

Another characteristic of the view of clemency as a "mercy-based" process is the lack of a formal and systematic approach with regard to the clemency process itself. As opposed to the judicial system, clemency hearings are not bound by the legal rules of evidence or civil procedure.128 For instance, with regard to the testimony it may hear, the clemency board is not limited by the doctrine of hearsay.129 Cross-examination of witnesses may also not be required, or even allowed, in clemency hearings. In the judicial system, these rules and processes ensure the reliability of the testimony and evidence presented.130 Additionally, unlike the results of a judicial hearing, the results of a clemency hearing are unappealable131 so that any systematic review of decisions may not be imposed. This also enhances the

126. Even in Roman times, Pontius Pilate's pardon of Barabas rather than Jesus suggests that Roman leaders used the clemency power to achieve political rather than moral ends. See Kobil, Mercy Strained, supra note 81, at 584. Moreover, in the Middle Ages, the King of England only used the clemency power to endear himself to his constituents. See supra notes 87-88 and accompanying text.

127. Attorneys have described their role as defense counsel in a commutation proceeding as that of an organizer and agitator of public opinion. See Abramowitz & Paget, supra note 82, at 172. It is in this atmosphere of a political circus that politicians usually make the decision to grant clemency. On the other hand, the prevalence of public support for the death penalty suggests to clemency authorities that the safest course of action is to avoid the exercise of their clemency powers. Thus, "[p]risoners scheduled to be executed shortly before election day are particularly vulnerable to denials of clemency." Paul W. Cobb, Jr., Reviving Mercy in the Structure of Capital Punishment, 99 YALE L.J. 389, 394 (1989).

128. See Bedau, Decline of Executive Clemency, supra note 95, at 257 ("Clemency decisions—even in death penalty cases—are standardless in procedure, discretionary in exercise, and unreviewable in result.").

129. Such lack of regard for evidentiary rules also applies to the judicial process at the admissibility stage. See Fed. R. Evid. 104(a) (1984 & Supp. 1994). However, in the judicial setting, the evidence is later subjected to the scrutiny of the trier of fact who may weigh the conflicting factors and either believe or disbelieve it. But a clemency hearing goes farther than this by combining the admissibility and weight criteria into a single decision. The clemency board is thus more liable to make an erroneous decision based on unreliable information.

130. The procedural requirements of cross-examination and the hearsay doctrine have been extolled as a bulwark of our liberty because of their great impact on reliability and the truth-finding process. See, e.g., United States v. Inadi, 475 U.S. 387, 403 (1986) (Marshall, J., dissenting) (holding that "confrontation and cross-examination of the declarant in open court are the most trusted guarantors of the reliability that is the primary concern of the Confrontation Clause."); California v. Green, 399 U.S. 149, 158 (1970) (holding out cross-examination as the "greatest legal engine ever invented for the discovery of truth").

131. See Bedau, Decline of Executive Clemency, supra note 95, at 257.
arbitrary nature of the clemency process as individual decisions may not be corrected or criticized from one case to the next.

B. Clemency as a “Justice-Enhancing” Process

The Court in Herrera stated that executive clemency is the “fail-safe” in our criminal justice system, and is “the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.” The Court thus implies that executive clemency enhances the criminal justice system by repairing the injustices that have resulted from the fallibility of the formal judicial process. There is some historical basis for this view of clemency as a “justice-enhancing” process. As Alexander Hamilton wrote in the Federalist Papers, “The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.” Likewise in Wilson, Chief Justice Marshall held that the power to pardon is a “constituent part of the judicial system.” In fact, the Supreme Court in Gregg v. Georgia declined to hold that the discretion inherent in clemency is unconstitutionally arbitrary, and instead it determined that the imposition of capital punishment without clemency “would be totally alien to our notions of criminal justice.”

According to this view, it would be incorrect to say that executive clemency is completely removed from the issue of justice and fairness. The clemency power is used largely to make up for any gross

133. The Court admitted that “[i]t is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.” Herrera 113 S. Ct. at 868.
134. See Abramowitz & Paget, supra note 82, at 178.
138. Id. at 199; see also Leavy, supra note 88, at 890 n.5.
139. Gregg, 428 U.S. at 199 n.50.
140. See Kobil, Mercy Strained, supra note 81. In a recent study of commutation decisions, it was found that out of seventy grants of clemency between 1973 and 1992, forty-one were for purposes of “judicial expediency” while twenty-nine were classified as “justice enhancing.” Michael L. Radelet and Barbara A. Zsembik, Executive Clemency in Post-Furman Capital Cases, 27 U. Rich. L. Rev. 289, 297 & tbl. 1 (1993). Of these “justice enhancing” commutations, five were classified as “unqualified mercy”; nine concerned lingering doubt about the defendant’s guilt; seven involved the defendant’s mental problems; five involved equity in sentencing; and another five were categorized as “other reasons.” Id. at 300 & tbl. 2.

However, at least one scholar argues that clemency may never transcend its “mercy-based” role to achieve justice. “An exercise of clemency is an expression of mercy, an act of grace, an
errors that have occurred in the criminal justice system, rather than simply being used in an arbitrary fashion unrelated to the notions of justice. In fact, legislators who draft and revise criminal codes rely upon the existence of executive clemency as a safeguard to their death penalty legislation, and some analysts hypothesize that many jurors and prosecutors believe that clemency may provide a remedy when imposing the death penalty. In addition, clemency is an integral part of the capital punishment system in that the State may not take an offender's life through judicial processes until the executive authority has completed its clemency evaluation.

Executive clemency, under the “justice-enhancing” view, ideally serves two important functions in the imposition of capital punishment that may not have adequately occurred in the formal judicial process. First, clemency provides individualized sentencing on a case-by-case basis that may take into account factors not capable of being considered by the courts. For instance, where a mother has run over her own child and is convicted of negligent homicide, a plea by the mother that she has suffered enough by losing her own child may prompt a governor or parole board to pardon her for her crime as a logical extension of retributive justice. Additionally, clemency for the “battered woman” who has killed her abusive spouse may not only be considered a moral imperative, but also an extension of the law that provides a more “fair” result in such cases.

acknowledgment of the insufficiency of rules. It cannot be transformed into its opposite without abandoning its distinctive claim to advance a radically different conception of justice.” Peter H. Schuck, When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process, 1984 Duke L.J. 163, 179 (1984). According to this view, the arbitrary mercy which provides clemency with its identity and is its most powerful asset, would be greatly diminished if clemency were constrained by any notions of traditional justice or “fairness.” Id.

141. The act of clemency requires no special justification to overcome the potential separation of powers in allowing the executive branch to override a judicial decision. Because clemency lightens the burden placed on a convicted offender, such an act employs the popular liberal political theory that absent any overriding reasons to the contrary, the government should always employ the least restrictive means to achieve its presumably valid objectives. See Bedau, Retributive Theory, supra note 113, at 189.

142. According to the Radelet and Zsembik study, twenty-four out of the twenty-nine “justice enhancing” commutation decisions involved factors other than mere “unqualified mercy.” See Radelet and Zsembik, supra note 140, at 300.

143. Leavy, supra note 88, at 897.

144. Id. at 897-98.

145. Id. at 905.

146. See Kobil, Mercy Strained, supra note 81, at 633. Such an example of “poetic justice” would make any further punishment of the defendant superfluous. Id.

147. See supra notes 118-20 and accompanying text.

148. Margaret Byrne of the Illinois Clemency Project for Battered Women recently asked Illinois Governor Jim Edgar to grant clemency for twelve battered women convicted of first or
Secondly, the clemency process protects against informational error by providing its own further investigation of the facts surrounding the convicted criminal's case, including otherwise inadmissible mitigating factors.\textsuperscript{149} Investigation by clemency officials might also include interviewing the jurors in the case, the convict's family and friends, and the convict him or herself in order to get "a more complete understanding of the defendant as a human being."\textsuperscript{150} By expanding these mechanisms for procedural review of errors in the judicial process, the clemency process becomes intimately related to the criminal justice system and enhances the procedural protections it is designed to afford.

\textbf{C. Clemency as an Entitlement Under the Due Process Clause}

Some prisoners have argued that the Due Process Clause of the Fourteenth Amendment provides procedural protections in the form of an entitlement\textsuperscript{151} to a "fair" clemency process. Such an argument relies upon the "special role" that clemency plays in the judicial process under the "justice enhancing" view.\textsuperscript{152} Under this view, if clemency is part of the formal justice system, then it must be able to provide "fair" procedures by which to govern that process.\textsuperscript{153} For instance, in \textit{McGee v. Arizona State Board of Pardons and Paroles},\textsuperscript{154} the Supreme Court of Arizona held that a death row inmate had a right to compel the Board of Pardons and Paroles to hold a hearing on the commutation of his death sentence. The Court reasoned that the Board had "failed to comply with the minimal requirements of the second degree murder charges. As her rationale, Byrne stated, "We believe the law was too harsh because the abuse each of these women suffered was not adequately considered at trial, at her plea or at sentencing." Julie Irwin, \textit{Pardons Sought For 12 Women Who Killed Alleged Abusers}, Chi. Trib., Feb. 19, 1994, at 5; see supra notes 119-20. See also Linda L. Ammons, \textit{Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women}, 3 J.L. & Pol'y 1 (1994).

149. See Leavy, supra note 88, at 904-05.
150. See Abramowitz & Paget, supra note 82, at 183-84.
151. Procedural due process has been employed to establish an entitlement to continued government employment. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972). It has also been used to establish an entitlement to government disability benefits. See, e.g., Mathews v. Eldridge, 424 U.S. 319 (1976). Moreover, when such benefits are terminated, due process may require a hearing and explanation of the reasons for the decision. \textit{Id.} at 333.
152. For a more thorough discussion of clemency's "special role" and the cases cited in this section of the Note, see Kobil, \textit{Due Process, supra} note 114.
153. \textit{Id.} at 213-17.
law" under the mandatory language of the commutation statute.\textsuperscript{155} The Court also stated that "[t]he unlawful taking of a human life has from time immemorial been considered immoral . . . . If it is to be justified under the law, it must not be done with less formality than the spirit and traditions of the law contemplate."\textsuperscript{156}

However, all of the cases subsequent to this decision have come down against affording due process protection to clemency petitioners. In \textit{Spinkellink v. Wainwright},\textsuperscript{157} the Fifth Circuit held that an unfavorable clemency decision in a capital case did not "implicate any interest protected by the Due Process Clause."\textsuperscript{158} Later, in \textit{Connecticut Board of Pardons v. Dumschat},\textsuperscript{159} the United States Supreme Court held that a life inmate had no constitutional "liberty" interest or entitlement in receiving commutation or requiring the Board of Pardons to provide him with a written statement of reasons for denying such commutation. The Court reasoned that the commutation statute provides "unfettered discretion" to the State Board of Pardons.\textsuperscript{160} The Court also held that the mere frequency with which other prisoners' sentences were commuted did not create an expectation of an entitlement.\textsuperscript{161}

Most recently, the Eighth Circuit in \textit{Otey v. Hopkins},\textsuperscript{162} distinguished \textit{Dumschat} in a capital case\textsuperscript{163} by stating that \textit{Dumschat} "dealt

\textsuperscript{155} \textit{Id.} The Arizona statute provided that "every prisoner confined upon an indeterminate sentence, whose minimum term of sentence has expired, shall be given an opportunity to appear and apply for . . . an absolute discharge," \textit{Id.} at 780 (citing \textit{Ariz. Rev. Stat. Ann.} § 31-411). While no specific procedure was required for such a commutation hearing, the statute also provided that the Board was authorized to create rules and regulations, \textit{id.} (citing \textit{Ariz. Rev. Stat. Ann.} § 31-403), but none were on file at the time of the petitioner's appeal. \textit{Id.}

\textsuperscript{156} \textit{Id.} at 781.

\textsuperscript{157} 578 F.2d 582, 619 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

\textsuperscript{158} \textit{See also} Bundy v. Dugger, 850 F.2d 1402, 1423-24 (11th Cir. 1988), cert. denied, 488 U.S. 1034 (1989) (relying upon \textit{Spinkellink} to hold that due process protections do not apply to clemency petitions in capital cases); Smith v. Snow, 722 F.2d 630, 632 (11th Cir. 1983) (same).

\textsuperscript{159} 452 U.S. 458, 466 (1981).

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{Id.} at 465. "No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution." \textit{Id.}

\textsuperscript{162} 972 F.2d 210, 212 (8th Cir. 1992).

\textsuperscript{163} Kobil cites three ways in which \textit{Dumschat} can be distinguished in capital cases. First, whereas the Court in \textit{Dumschat} found it relevant to its decision that the state statute provided "unfettered discretion" to the Board of Pardons, 452 U.S. at 466, it can be argued that \textit{Dumschat} does not control where the statute does "fetter" the discretion of the pardon authority. Second, the petitioner in \textit{Dumschat} argued that he had an expectation of actually receiving clemency, and thus, the Board of Pardons had to explain its reasons for denying it, 452 U.S. at 464; however, this arguably does not cover situations where the petitioner is only asking for "meaningful consideration" of his clemency petition. Third, since \textit{Dumschat}, the Court has changed its views about due process and held that protectable interests are not only created by state laws, but also by the Due Process Clause of the U.S. Constitution itself. \textit{See} Kobil, \textit{Due Process, supra} note

with a very limited argument that there was an expectation of actually receiving a commutation" whereas Otey's argument was based on the expectation of receiving only a "meaningful commutation process." Therefore, the court decided to stay Otey's execution until the facts of Otey's claim were further developed and a potential evidentiary hearing held. Otey then brought a section 1983 claim against the Nebraska Attorney General claiming that his right to both substantive and procedural due process had been violated by the procedure used by the Nebraska Board of Pardons. But the Eighth Circuit held that no procedural or substantive right existed to create a protected interest in clemency because "[d]eposition is lacking." The court reasoned that the commutation statute did not constrain the discretion of the Board of Pardons; thus, "[l]ike the clemency statute at issue in Dumschat, the Nebraska clemency statute also is standardless" and was not deserving of due process protection.

Judge Gibson dissented from the holding, stating that Otey's right to substantive due process had been deprived by the Attorney General's dual role as prosecutor and Board member. Judge Gibson relied on the Supreme Court's holding in Herrera that executive clemency is the appropriate forum in which to raise claims of actual innocence. Judge Gibson reasoned:

By relying on the existence of executive clemency to justify excluding certain kinds of claims from judicial scrutiny, the Court recognized that clemency procedures are an important last step of an

114, at 206-07. Moreover, in a capital case, such an interest might be stronger because it involves the prisoner's "life" interest in addition to "liberty." Id. at 207.

164. Otey's underlying argument was that his due process right to "meaningful consideration" of his clemency petition was being denied to him because the Attorney General who had convicted him sat on the Board of Pardons that heard and decided his clemency petition. Otey, 972 F.2d at 211.

165. Id. at 212.

166. Otey alleged that five of his fundamental rights were violated as a result of the Attorney General's dual role as prosecutor and Pardon Board member: (1) right to life; (2) a fair decisionmaker; (3) a majority vote; (4) a parole board recommendation; and (5) failure to follow the Board of Pardon's policies. Otey v. Stenberg, 34 F.3d 635, 637 (8th Cir. 1994).

167. Id. at 636.

168. Id. at 637. The court also relied upon Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), and Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988), cert. denied, 488 U.S. 1034 (1989), to arrive at its decision. Otey, 34 F.3d at 638.

169. Id. at 637 (quoting Whitmore v. Gaines, 24 F.3d 1032, 1034 (1994)). The court also noted that a "review of Nebraska's Constitution, statutes, and procedures reveals that no right has been conferred upon Otey beyond the right to seek a commutation. He was afforded this right." Id.

170. Id. at 637. The court concluded, "To agree with Otey would hardly be federalism at its best." Id. at 638.

171. Id. at 639 (Gibson, J., dissenting).

172. Id. at 639 (citing Herrera v. Collins, 113 S. Ct. 853, 868-69 (1993)).
effort to avoid execution. This newly recognized and emphasized significance of the clemency process illuminates the constitutional deficiencies in the clemency proceedings.\textsuperscript{173}

Judge Gibson also remarked that in light of recent Supreme Court jurisprudence, he was “unpersuaded by the argument . . . that substantive due process requires a liberty interest other than that found in the due process clause itself.”\textsuperscript{174}

III. THE GARY GRAHAM CASE

On October 28, 1981, the 182nd Judicial District Court in Harris County, Texas, convicted Gary Graham of the offense of capital murder, and punishment was assessed as death.\textsuperscript{175} But before his scheduled execution date,\textsuperscript{176} Graham filed a writ of habeas corpus to the Texas Court of Criminal Appeals\textsuperscript{177} on four grounds,\textsuperscript{178} two of which involved claims of actual innocence based on newly discovered evidence. On April 27, 1993, in a per curiam order, the court, sitting en banc, denied him relief on all four grounds.\textsuperscript{179}

However, Judge Maloney dissented in light of the Herrera decision and stated that Graham did have a valid allegation in his fourth ground of actual innocence that should be examined more closely.\textsuperscript{180} Judge Maloney found that additional facts needed to be developed regarding Graham’s ineffective assistance of counsel claim and the af-

173. Id. The majority had raised Herrera in its opinion, but they merely dismissed it by stating that, “Otey makes no such showing [of actual innocence].” Id. at 636.


175. Ex Parte Graham, 853 S.W.2d 564, 564-65 (Tex. Crim. App.) (en banc), cert. denied, 113 S. Ct. 2431 (1993). The court convicted Graham of the 1981 murder and robbery of Bobby Lambert outside a Houston grocery store. Graham confessed to ten other similar armed robberies that occurred within a two-week period of Lambert’s death, but he insisted that he was innocent in the Lambert case. Graham was convicted based on the testimony of a single eyewitness. No physical evidence existed to link him to the crime. Christy Hoppe, \textit{State Appeals Court Heats Graham Bid For Hearing}, \textit{The Dallas Morning News}, Dec. 2, 1993, at 27A.

176. The trial court scheduled Graham’s execution to be carried out on or before sunrise, April 29, 1993. Graham, 853 S.W.2d at 565.

177. This is the highest criminal court in the state of Texas.

178. Graham, 853 S.W.2d at 565. These four grounds were: (1) request for a stay of execution pending the outcome of Johnson v. Texas, 113 S. Ct. 2658 (1993), in the United States Supreme Court; (2) request that the court determine the trial court’s reliance on Teague v. Lane, 489 U.S. 288 (1989), and Ex parte Acosta, 672 S.W.2d 470 (Tex. Crim. App. 1984); grounds (3) and (4) concerned constitutional protections against the execution of an “innocent person.” Id. Graham was attempting to present evidence from ten new witnesses that he said would prove his innocence. See Hoppe, supra note 175, at 27A.

179. 853 S.W.2d at 565.

180. Id. (Maloney, J., dissenting).
fidavits that were presented to show his actual innocence.\textsuperscript{181} Judge Baird also dissented on the basis that the court should decide whether the admission of newly discovered evidence is a subject fit for the exercise of habeas powers in light of the fact that the Court of Criminal Appeals is permitted to make "public policy" determinations on behalf of the State.\textsuperscript{182}

Graham filed a motion for reconsideration on the same four grounds he had alleged in his habeas petition.\textsuperscript{183} On July 5, 1993, on its own motion, the court granted a thirty day stay of execution based on Graham's first ground for relief, whether youth could be used as a mitigating factor in capital sentencing.\textsuperscript{184} Judge Maloney concurred in the result to stay the execution, but once again dissented on the ground that further relief should be granted Graham in the form of a new evidentiary hearing based upon Graham's actual innocence claim.\textsuperscript{185} Relying upon the dissenting opinion in \textit{Herrera},\textsuperscript{186} Judge Maloney explained that the proper threshold standard to be applied to actual innocence claims should be "whether the newly discovered evidence, if true, would create a doubt as to the efficacy of the verdict to the extent that it undermines our confidence in the verdict and that it is probable that the verdict would be different."\textsuperscript{187} Once this threshold question is met, "due process demands the attention of a forum for further consideration of the evidence."\textsuperscript{188}

Judge Maloney then argued that the three mechanisms conceivably available under Texas law for addressing such a claim were all inadequate.\textsuperscript{189} A motion for new trial was not available more than 30 days after conviction.\textsuperscript{190} Newly discovered evidence was not cognizable in an application for habeas corpus in the Texas Court of Criminal Appeals.\textsuperscript{191} And most importantly, "the process for seeking executive

\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.} Judge Baird cited Gonzales \textit{v. State}, 818 S.W.2d 756, 765 (Tex. Crim. App. 1991), for the latter proposition. Judge Clinton also held, without opinion, that he would grant the stay. \textit{Graham}, 853 S.W.2d at 565.
\textsuperscript{183} \textit{Ex parte} Graham, 853 S.W.2d 565, 566 (Tex. Crim. App. 1993) (en banc).
\textsuperscript{184} \textit{Id.} The court decided to wait until the outcome of the United States Supreme Court case, Johnson \textit{v. Texas}, 113 S. Ct. 2658 (1993). \textit{Graham}, 853 S.W.2d at 566-67. However, the court refused to consider the merits of Graham's second, third, and fourth grounds for reconsideration, the latter two of which involved his actual innocence allegations. \textit{Id.} at 566.
\textsuperscript{185} \textit{Id.} at 567 (Maloney, J., concurring).
\textsuperscript{187} \textit{Graham}, 853 S.W.2d at 567 (Maloney, J., concurring).
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.} at 567-68.
\textsuperscript{190} \textit{Id.} at 567. \textit{See} \textit{Tex. R. App. P.} P. 31 (West 1994).
\textsuperscript{191} \textit{Graham}, 853 S.W.2d at 567 (citing \textit{Ex parte} Binder, 660 S.W.2d 103, 105-06 (Tex. Crim. App. 1983)).
clemency was inadequate for testing the credibility of newly discovered evidence of innocence due to the lack of formal procedures controlling its use." Judge Maloney also quoted the dissent in *Herrera*, which had argued against using executive clemency as a viable alternative to a judicial hearing of new evidence of actual innocence. He concluded that because a claim of actual innocence "ultimately turns upon the credibility of witnesses and further development of the facts, it needs to be evaluated in an adversary setting before a judicial trier of fact and law." Judge Maloney stated that even accepting the high threshold standard in *Herrera*, he believed that Graham had met such a standard and was entitled to a hearing.

Judge Clinton also concurred in the result to stay the execution and agreed with Judge Maloney that Graham's actual innocence grounds for relief should be reconsidered. He expressed the view that the "Executive Department is constitutionally required to adopt and follow rules that comport with due process and due course of law." He also stated that based upon the Supreme Court's opinion in *Herrera*, the Court of Criminal Appeals had the "duty and responsibility to assure that due process" was met in cases of actual innocence.

On July 7, 1993, when the thirty day stay of execution had expired, the judge of the convicting trial court ordered that the sentence of death be carried out before sunrise of August 17, 1993. Graham requested an executive clemency hearing from the Texas Board of Pardons and Paroles, but was denied such a hearing. Graham subsequently filed a civil suit on July 21, 1993, in the 200th Judicial District Court of Travis County against the Texas Board of Pardons and

192. *Id.* at 567-68.
195. *Id.* at 569.
196. *Id.* Judge Maloney provided a long list of evidence that made Graham's case for actual innocence much stronger than that of *Herrera* so that he concluded that the "extraordinarily high" threshold level of *Herrera*, 113 S. Ct. at 869, had been met. *Graham*, 853 S.W.2d at 568-69. Thus, he argued, Graham was entitled to a new judicial evidentiary hearing on the merits of his actual innocence claim, the results of which should be forwarded to the Criminal Court of Appeals so that they could determine whether a new trial was merited. *Id.*
197. *Id.* at 570 (Clinton, J., concurring).
198. *Id.*
199. *Id.*
201. *Id.*
Paroles. On August 9, 1993, the civil court ordered a temporary injunction upon Graham's execution on the basis that the Board intended "to refuse to grant Plaintiff a due course of law hearing on his post-conviction claim of innocence or to stay . . . Plaintiff's execution, pending a due course of law hearing, as required by the Texas Constitution." In response, the Attorney General of Texas appealed the civil court's ruling to the Court of Appeals for the Third District. On August 13, 1993, the Court of Appeals granted a temporary injunction prohibiting the State officials and their agents from executing Graham until final disposition of the appeal.

The District Attorney of Harris County and the Attorney General of Texas then turned back to the Texas Criminal Court of Appeals for leave to file a petition for writ of mandamus directed to the civil court of appeals to stay the temporary injunction so that Graham's execution could proceed as scheduled. Judge Miller concurred in the opinion, noting that his real concern was to address whether Graham had a viable means by which to raise his actual innocence claim. Judge Miller explained that the Texas statute regarding the process by which to obtain executive clemency was unclear and inadequate. In order to apply for a clemency hearing, the statute requires one of two items: a written recommendation of the current trial officials of the court of conviction; and/or a certified order or judgment of a court having jurisdiction accompanied by a certified copy of the findings of fact (if any); and

202. Id. Jim Harrington, Gary Graham's lawyer, explained that because the clemency process was a civil procedure that was spelled out in the state Constitution, a civil remedy was appropriate to insure Graham's right to a hearing. Harrington also said that he had no choice but to file a civil case because Texas law limits how new evidence in criminal cases can be presented and because "[b]asic human justice requires" a parole board hearing in the face of the newly discovered evidence of innocence. "And what does it bother the board to spend two or three hours (holding a hearing) than to stain our hands with the blood of an innocent man?" Harrington told the court. See Hoppe, supra note 175, at 27A.

203. Third Court of Appeals, 860 S.W.2d at 874 (citing civil court decision granting Graham a temporary injunction of his execution).

204. Id.

205. Id.

206. Id.

207. Id. at 873.

208. Id. at 878 (Miller, J., concurring). Judge Miller cited Herrera v. Collins, 113 S. Ct. 853, 866-68 (1993), at length to establish that clemency was the only viable form of relief that remained to ensure fundamental fairness in actual innocence claims. Third Court of Appeals, 860 S.W.2d at 875-76.

209. Id. at 876-77.

210. Title 37, § 143.2 of the Texas Administrative Code provides as follows:

[The Board of Pardons and Paroles] will only consider applications for recommendation to the governor for full pardon upon receipt of:

(1) a written unanimous recommendation of the current trial officials of the court of conviction; and/or

(2) a certified order or judgment of a court having jurisdiction accompanied by a certified copy of the findings of fact (if any); and
dation from the current trial officials of the convicting court or a certified order accompanied by findings of fact and affidavits from witnesses "upon which the finding of innocence is based." Judge Miller asserted that the language "finding of innocence" suggests that a hearing on the claim of actual innocence must have been held at some time prior to the filing of the application for clemency. Thus, the real issue was one of due process. If Herrera requires clemency to be the "fail-safe" for actual innocence claims, then a prisoner must be able to at least apply for such clemency. However, Texas law did not seem to provide a procedure by which a prior "finding of innocence" could be established in order to meet the application requirements. Judge Miller concluded that the State had the burden of proving that Graham had an adequate avenue open to him to obtain a "finding of innocence" so that he could apply for clemency under the Texas statutory scheme.

On November 9, 1993, the Court of Criminal Appeals, on its own motion, reconsidered its earlier ruling and decided to grant the Attorney General leave to petition for the mandamus order enjoining the Civil Court of Appeals from proceeding. On April 20, 1994, the court ruled in favor of the State in its mandamus action and enjoined the Third Court of Appeals from staying Graham's execu-

(3) affidavits of witnesses upon which the finding of innocence is based.

211. Third Court of Appeals, 860 S.W.2d at 876-77 n.3 (Miller, J., concurring).
212. Id. at 877.
213. Judge Miller posed the question as one of procedural due process, id., but refused to answer the question "whether it is a violation of substantive due process to execute an innocent person." Id. at 877 n.6 (Miller, J., concurring).
214. Id.
215. Id.
216. Id. at 878.
217. State ex rel. Holmes v. Honorable Court of Appeals for the Third Dist., 885 S.W.2d 386, 386 (Tex. Crim. App. 1993) (en banc). The basis for such reconsideration was the finding that the civil Court of Appeals had no jurisdiction to issue an injunction staying Graham's execution. Id.
218. State ex rel. Holmes v. Honorable Court of Appeals for the Third District, 885 S.W.2d 389, 396 (Tex. Crim. App. 1994) (en banc). The Court of Criminal Appeals found that because the stay of a death row inmate's execution is a "criminal law matter," it had appropriate mandamus power under the Texas Constitution, Tex. Const. art. V, § 5. Honorable Court of Appeals, 885 S.W.2d at 394. The court further found that "[a]ny order by another state court which purports to stay a scheduled execution circumvents our decision and disobeys our mandate." Id. at 395-96.
But the court went on to answer the State's contention that Graham's only remedy now was through state habeas review.220

In Ex parte Binder,221 the Court of Criminal Appeals had ruled that a freestanding claim of actual innocence based on newly discovered evidence was not cognizable on state habeas review. The Graham court first established that state habeas will lie "only to review jurisdictional defect[s] or denials of fundamental or constitutional rights."222 The court then stated, "[F]rom our reading of Herrera, we understand six members of the Supreme Court to have recognized the execution of an innocent person would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution."223 The court therefore overruled Binder and held that state habeas was an appropriate avenue for Graham's claim of actual innocence.224

The court then adopted the threshold standard previously suggested by Judge Maloney: "whether the newly discovered evidence, if true, would create a doubt as to the efficacy of the verdict to the extent that it undermines our confidence in the verdict and that it is probable that the verdict would be different."225 The court then adopted Justice White's threshold standard from Herrera as the burden of proof for deciding Graham's actual innocence claim on the merits: "based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find

219. Id. at 396. However, the court made clear that the mandamus was limited to the Third Court of Appeals' jurisdiction to enjoin Graham's execution. The opinion does not preclude Graham from addressing the issues raised by the Board of Pardons nor does it preclude Graham from "continuing to seek civil review of the clemency process." Id. at 396 n.11.

The writ of mandamus was made conditional in order to afford an opportunity to the Third Court of Appeals to conform its actions prior to the issuance of the writ. Id. at 399. Relying upon the Criminal Court of Appeal's opinion, the Third Court of Appeals voluntarily dissolved its temporary injunction staying Graham's execution, but retained jurisdiction over Graham's civil claim concerning the clemency process. Texas Bd. of Pardons and Paroles v. Graham, 878 S.W.2d 684, 686 & n.4 (Tex. Ct. App. 1994). Because the jurisdictional concerns in the Graham case were alleviated by this action, this Note will not discuss the various concurrences and dissents which dealt with this issue.

220. Honorable Court of Appeals, 885 S.W.2d at 396.
222. Honorable Court of Appeals, 885 S.W.2d at 397 (quoting Ex parte Bravo, 702 S.W.2d 189, 193 (Tex. Crim. App. 1982)).
223. Id. (citing Herrera v. Collins, 113 S. Ct. 853, 869, 875, 876 (1993)). The six members of the Court to whom the Texas court referred were Justices O'Connor, Kennedy, White, Blackmun, Stevens, and Souter. Id. Apparently, the court thought that Justice Rehnquist agreed with Justices Scalia and Thomas that no due process right existed for claims of actual innocence.
224. Id. at 397-98.
proof of guilt beyond a reasonable doubt."

The court concluded that this threshold standard and burden of proof used on state habeas review "will satisfy the Due Process Clause of the Fourteenth Amendment."

Judge Campbell concurred, stating:

Certainly, the execution of an innocent person would offend the most basic principles, deeply rooted in our civilization, that the innocent must not be punished . . . . Given the interests at stake and the relatively slight cost to the government of litigating those few claims that will meet the minimum threshold set by the Court today, due process of law requires that a judicial forum be available for the assertion of such claims.

Moreover, Judge Campbell stressed that when the United States Supreme Court in *Herrera* relied upon the Texas clemency procedure as a "fail safe," it did not realize that the decision in *Binder* rendered such a procedure useless in claims of actual innocence. Thus, such a misunderstanding necessitated the instant decision in order to correct the constitutional error in the clemency process.

Judge White dissented from the court's expansion of the state habeas power and called it an "unnecessary and dangerous" remedy. Judge White reasoned that because *Herrera* pointed to clemency as the historic remedy for actual innocence claims, the Texas Court of Criminal Appeals should not "add a layer of protection for Fourteenth Amendment claims between this state's executive clemency procedures and the federal habeas system." Judge White also stated that, "this Court is certainly 'not beholden to the federal courts' to review federal constitutional claims on collateral attack."

Further, Judge White described the danger of the new state habeas being used as a "crowbar to open the door to a state forum in our trial

226. *Id.* at 399 (citing *Herrera*, 113 S. Ct. at 875 (White, J., concurring)). Judge Clinton's dissent posited that such a burden would be impossible by definition to meet. *Id.* at 417. According to Judge Clinton, "any evidence sufficient to support a jury's verdict beyond a reasonable doubt at trial will also be sufficient to support a rational jury's guilty verdict even after adding the most compelling newly discovered evidence to the mix." *Id.* For further discussion of this criticism, see infra notes 335-39 and accompanying text.

227. *Id.* at 399.

228. *Id.* at 400 (Campbell, J., concurring).

229. 113 S. Ct. at 868.

230. *Honorable Court of Appeals, 885 S.W.2d at 400-01. See supra* notes 214-16 and accompanying text.

231. *Id.*

232. *Id.* at 402 (White, J., dissenting).

233. 113 S. Ct. at 866.

234. *Honorable Court of Appeals, 885 S.W.2d at 401-02.*

235. *Id.* at 403 (citing *Ex parte Dutchover, 779 S.W.2d 76, 78* (Tex. Crim. App. 1989) (Clinton, J., concurring)).
courts for every inmate to relitigate his conviction years after he or she has already enjoyed every protection our criminal justice system extends."\textsuperscript{236}

IV. ANALYSIS

Rather than resolving the question of actual innocence in capital cases, the Supreme Court's decision in \textit{Herrera} has resulted in a diffusion of due process protections by resorting to alternative state forums. The Gary Graham case provides an excellent example of such diffusion because it relies upon \textit{Herrera} to extend due process protections to both executive clemency and state habeas review. This section will analyze whether these alternative forums are appropriate for review of actual innocence claims and consequently, whether due process protections should be extended to these forums after \textit{Herrera}. But in order to perform this analysis, it is first necessary to determine what minimal due process protections are due a prisoner on death row who brings newly discovered evidence of actual innocence.

A. Minimal Due Process in Capital Cases of Actual Innocence

Upon a quick reading of Justice Rehnquist's opinion in \textit{Herrera},\textsuperscript{237} one might come away with the impression that the Court completely rejected the idea that procedural or substantive due process protections\textsuperscript{238} attach to freestanding claims of actual innocence.\textsuperscript{239} The Court devoted a good portion of its opinion to the development of executive clemency as an alternative to federal habeas review of actual innocence claims.\textsuperscript{240} As a result of such judicial rhetoric, one would think that the Court's holding would be that claims of actual innocence should never be cognizable on federal habeas review under

\textsuperscript{236} Id.
\textsuperscript{239} See \textit{Herrera}, 113 S. Ct. at 859-60 (citing Townsend v. Sain, 372 U.S. 293, 317 (1963), overruled in other respects by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992)) ("[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"); \textit{Id.} at 860 ("[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact"); \textit{Id.} at 861 ("Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.").
\textsuperscript{240} \textit{Id.} at 866-69.
any circumstances. Yet, Justice Rehnquist ended his opinion by assuming, for the sake of argument, that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Moreover, such a demonstration of innocence would "necessarily be extraordinarily high" in light of the state's interest in finality of its convictions.

The only rational explanation for ending the opinion with such a hypothetical is that *some* due process protection does attach to capital claims of actual innocence. By admitting that the Court might accept the claim on habeas review if no state avenue were open to process it, the Court is really saying that the due process concerns in cases of actual innocence have not been dismissed entirely but have merely been shifted to the states' executive clemency processes. The Court makes this even clearer when it asserts executive clemency to be the "'fail safe' in our criminal justice system." Such language implies that clemency serves as an integral part of achieving fairness in the justice system. In order for this statement to be true, executive clemency, and presumably other state forums, must provide the same level of due process protections that federal habeas review of actual innocence claims would provide.

It is this inconsistency between the Court's rhetoric that no due process rights attach to a claim of actual innocence and its final holding that reserved a judicial forum for "extraordinarily high" evidence

241. This was the holding of Justices Scalia and Thomas in their concurrence. *Id.* at 874-75.
242. *Id.* at 869.
243. *Id.*
244. *Id.*
245. *Id.* at 868.
246. *Id.* It could be argued that because the Court denied Herrera due process protections in the federal habeas forum, *id.* at 860, the Court never intended to afford Herrera such due process protections in the executive clemency forum either. But this analysis of *Herrera* would only make sense if the Court had considered executive clemency an arbitrary, "mercy-based" process undeserving of due process protections. By framing clemency as the "'fail safe' in our criminal justice system," *id.* at 868, the Court explicitly relied upon clemency as a "justice-enhancing" process, thus implicating due process concerns.
247. In order for the petitioner to have a chance to meet the "extraordinarily high" threshold on federal habeas review, there must be no state avenue open to process such a claim. *Id.* at 869. It is logical, then, to assume from this statement that whenever some state avenue is open to hear the petitioner's claim, the minimal due process requirements have been met. In other words, if the existence of executive clemency did not provide due process protections, there would be no reason for the federal courts to allow the petitioner habeas review when no alternative state avenue exists to hear the claim.
of innocence\textsuperscript{248} that seems to have caused confusion among the lower courts and the subsequent diffusion of due process in this area. By implicitly admitting that due process does attach to a certain class of actual innocence claims,\textsuperscript{249} it was logical for lower courts to assume that the Supreme Court did not wish to abrogate such due process protections even in the alternative forums of executive clemency or state habeas review. In light of these reasons, our analysis concerning the viability of alternative state forums to federal habeas review must begin with the assumption that the same due process protections that apply to federal habeas review should also apply to these state forums.\textsuperscript{250}

But beyond the inconsistencies within 	extit{Herrera} itself, traditional notions of fairness under the Fourteenth Amendment and punishment under the Eighth Amendment seem to dictate in favor of applying due process protections\textsuperscript{251} to death row inmates who challenge their convictions on the basis of actual innocence. Despite the Court's express

\textsuperscript{248} \textit{Id.} The concurring opinion of Justices O'Connor and Kennedy furthered the notion that due process protections still remain. O'Connor could not "disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution." \textit{Id.} at 870. However, O'Connor avoided entirely the impact of her statement when she noted, "[n]o matter what the Court might say about claims of actual innocence today, petitioner could not obtain relief." \textit{Id.} at 871.

\textsuperscript{249} \textit{See id.}

\textsuperscript{250} For a discussion of the viability of these alternative forums as guarantors of due process, see parts IV.B. and IV.C. infra.

\textsuperscript{251} Such protections seem to arise from concerns for procedural, rather than substantive, due process. Substantive due process prevents the government from engaging in conduct that "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325-26 (1937). A claim of wrongful execution in a capital case of actual innocence would certainly seem to fall on the extreme end of the "rational continuum which... includes a freedom from all substantial arbitrary impositions and purposeless restraints." Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2805 (1992) (citing Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)); see also 	extit{Herrera}, 113 S. Ct. at 879 (Blackmun, J., dissenting) ("Execution of an innocent person is the ultimate 'arbitrary imposition.'").

However, the Supreme Court has been reluctant to extend such fundamental due process rights beyond those of privacy, family, and personal autonomy. \textit{See, e.g.,} 

rejection of such rationales, this holding has been subject to much criticism by scholars and judges alike for placing form over substance. By attempting to replace federal habeas review of actual innocence claims with the alternative forum of executive clemency, the Supreme Court is merely using clemency as a scapegoat for its process-oriented death penalty jurisprudence, which refuses to take into account the fundamental problems of potentially executing an innocent person. The Court justifies its decision in Herrera by argu-

252. The Court "refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus" under the Eighth Amendment's Cruel and Unusual Punishment Clause. Herrera, 113 S. Ct. at 863 (quoting Murray v. Giar-ratano, 492 U.S. 1, 9 (1989) (plurality opinion)). Moreover, the Court rejected Herrera's Fourteenth Amendment due process claim on the basis that refusing to hear new evidence eight years after a conviction does not "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id. at 864-66. The Court relied upon the historical background of federal and state motions for new trial, none of which allowed for such a long-term relitigation of one's conviction. Id.


254. See Herrera, 113 S. Ct. at 880-81 (Blackmun, J., dissenting).

255. Garvey argues that the modern system of capital punishment diffuses and fragments the power to decide who dies. Because the system is composed of multiple actors, no single actor bears the burden of undivided power and responsibility. In the end, "nobody actually seems to do the killing." Stephen P. Garvey, Politicizing Who Dies, 101 YALE L.J. 187, 187 (1991) [hereinafter Garvey, Politicizing]. The Supreme Court's suggestion of clemency as an alternative displaysc precisely this mode of reasoning. The Court is trying to absolve itself of any wrongdoing in unduly restricting habeas review of actual innocence claims by suggesting another branch of government which is an inadequate alternative. In this manner, the Court attempts to place the blame upon the clemency authority because it made the final decision to allow the execution. This sly avoidance of its own responsibility under the Constitution must be exposed for what it is: an attempt to value efficiency over due process.

256. Chief Justice Rehnquist has used the goals of efficiency and finality in attempting to cut off federal habeas review of state claims. Rehnquist contends that "the flaw in the present system is not that capital sentences are set aside by federal courts, but that litigation ultimately resolved in favor of the state literally takes years and years and years." Paul Marcotte, Rehn-quist: Cut Jurisdiction, A.B.A. J., Apr. 1989, at 23.

Eric Freedman interestingly notes that while at first glance it might seem that eliminating the procedural bars to habeas review would produce extensive new opportunities for delay, "sober second thought should suggest the contrary." See Eric M. Freedman, Innocence, Federalism, and the Capital Jury: Two Legislative Proposals For Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases, 18 N.Y.U. REV. OF L. & SOC. CHANGE 315, 321 (1990-91). Presently, Freedman explains, claims of innocence on federal habeas corpus are asserted on procedural grounds that the Court considers "true" constitutional errors. Id. But this roundabout manner of addressing actual innocence claims on habeas increases the procedural complexity and causes more delay than the more direct proposal suggested by Freedman and in this Note. Id.; see also Hoffman, Is Innocence Sufficient?, supra note 21, at 822 ("[T]he Court has done what most lawyers tend to do—it has tried to find procedural solutions for a substantive problem.").

257. The Court in Herrera cites studies which state that clemency hearings have provided relief for many cases in which newly discovered evidence of actual innocence was brought up after conviction. 113 S. Ct. at 868 (citing E. Borchard, Convicting the Innocent (1932) and M. Radelet et al., In Spite of Innocence 282-356 (1992)). In response to a study cited by the dissent that twenty-three innocent persons have been executed in the United States this century despite the safeguards of clemency, id. at 876 (citing H. Bedau & M. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 STAN. L. REV. 21 (1987)), the Court noted that scholars have taken issue with that study. Id. at 868 n.15 (citing Markman & Cassell, Protecting...
ing that due process protections no longer apply because the petitioner “does not come before this Court as an innocent man.” The circular reasoning evinced in statements such as this fails to acknowledge the possibility that factual exculpatory evidence may come to light after the defendant’s original trial, and values “legal innocence” over actual innocence.

Capital punishment is unique because it is irrevocable once performed. Therefore, it is incumbent upon a civilized society to make judicial procedures for capital punishment fundamentally fair and nonarbitrary. But the Court’s disposition in Herrera leaves the superficial impression that claims of actual innocence are less meritorious in the eyes of the Court than claims of “technical” or procedural

the Innocent: A Response to the Bedau-Radelet Study, 41 STAN. L. REV. 121 (1988)). The problem with relying upon such studies is that none of them are going to be completely accurate and the issue of the fallibility of the clemency system will be avoided altogether by citing statistics for and against that proposition. In fact, the Court in Herrera admitted that it did not “doubt that clemency—like the criminal justice system itself—is fallible.” Id. at 860, 864 n.6.

258. Id. at 860, 864 n.6.
259. Cobb, supra note 127, at 402 n.72.
260. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”).


The Court in Herrera responds to this line of cases by stating that “it is far from clear that a second trial 10 years after the first trial would produce a more reliable result.” 113 S. Ct. at 863. This statement already assumes that the newly discovered evidence of innocence is not reliable simply because it would be difficult for a federal court to make such a factual determination. But federal courts perform such factual analyses daily when they review the judgments of state courts. See Lay, supra, at 1047 (“Federal judges have the experience and capacity to adjudicate federal constitutional claims without excessive examination of procedural barriers. Federal judges can readily recognize frivolous claims . . . . It is time to simplify federal habeas procedures.”). Even the sufficiency of the evidence standard of Jackson v. Virginia, 443 U.S. 307, 324 (1979), requires analysis of the underlying facts upon which the conviction is based. Moreover, the Court never had a problem with federal courts making an actual innocence analysis when such factual determinations constituted a “gateway” through which the habeas petitioner could pass to reach his or her procedural claims. See, e.g., McCleskey v. Zant, 499 U.S. 467, 493 (1991); Murray v. Carrier, 477 U.S. 478, 495-96 (1986); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986).
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violations of the rights of an accused. Such a holding is most hypocritical of the Court in light of the use of actual innocence exceptions to allow habeas review of procedural claims that would otherwise have been barred by restrictive doctrines. By reaching the merits of a habeas petition otherwise procedurally defaulted through a "colorable showing of factual innocence," the Court has acknowledged that in such cases, the interests of justice trump those of federalism and finality. Thus, what relevant distinction can the Court make to justify its decision in Herrera that a freestanding claim of actual innocence does not also trump such state interests?

Even if such a distinction can be made between isolated claims of actual innocence and those which serve as a "gateway" to avoid procedural error, how can the Court in good conscience refuse to hear such claims in light of the requirements of both the Eighth and Fourteenth Amendments? The two major rationales for affording due process of law under the Fourteenth Amendment are actual assurance of fairness through a valid truth-seeking process and the creation of an outward appearance that justice has been done. As will be seen in

262. See Hoffman, Is Innocence Sufficient?, supra note 21, at 818. Hoffman argues that: nothing could be more disruptive of our federal system than the present world of federal habeas litigation in capital cases—a bizarre world in which state-court judgments are stayed for years, even decades, while defendants argue procedural Eighth Amendment issues unrelated to the factual correctness of their convictions and sentences, and states' attorneys respond by raising technical habeas defenses similarly unrelated to the merits of the case.

Id. at 834.


264. Herrera, 113 S. Ct. at 880 (Blackmun, J., dissenting). Professor Bator most eloquently explains the inconsistency of the Supreme Court's process-oriented habeas jurisprudence:

If a state prisoner claims that he confessed after he was interrogated for six hours, not (as the state court found) for four, the law says he may relitigate the issue and, perhaps, gain release as a consequence, even though the evidence of guilt may be overwhelming. But if a defendant is convicted of murder and ten years later another person confesses to the crime, so that we can be absolutely certain that the defendant was innocent all the time, the law says that he must rely on executive clemency. Why? Why should we pay so little attention to finality with respect to constitutional questions when, in general, the law is so unbending with respect to other questions which, nevertheless, may bear as crucially on justice as any constitutional issue in the case?


266. The Court does attempt to make the distinction that federal habeas review of state convictions has traditionally been limited to claims of procedural constitutional violations occurring in the course of the underlying state criminal proceeding. Herrera, 113 S. Ct. at 860. However, such a tradition has arguably existed only because the issue of freestanding evidence of actual innocence had never been directly addressed before Herrera.

the next two sections, the Supreme Court’s relinquishment of the federal habeas power over actual innocence claims to alternative state forums greatly impairs the reality as well as the appearance of fairness in the eyes of the American public. In the next three sections, we shall explore this diffusion of due process in the area of actual innocence and decide upon the best solutions to remedy it.

B. From Federal Habeas Review to Executive Clemency

This section will first use the assumption established above that the same due process protections that apply to federal habeas review should also apply to executive clemency, to determine whether the clemency process may constitute a viable alternative to federal habeas review under any of its three underlying theories: (1) “mercy-based” process; (2) “justice-enhancing” process; and (3) entitlement. Next, it will decide whether, despite its deficiencies, executive clemency should still constitute an entitlement in light of the decision in Herrera.

The rationale behind the Fourteenth Amendment’s grant of due process protection rests upon the reality and appearance of “fairness” in the guilt-determining process. The view of clemency as a “mercy-based” process is antithetical to this notion of fairness and due process. Under this view, clemency is completely arbitrary. The decision-making process is based upon personal preferences, political

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268. See infra parts IV.B. and IV.C.
269. See supra text accompanying notes 248-50.
270. See supra part II.
271. “Fairness” is the catch-phrase of the Supreme Court in evaluating due process violations. It is the central theme around which such constitutional claims are litigated. See, e.g., International Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding that due process involves “traditional notions of fair play and substantial justice”).
273. See supra notes 123-25 and accompanying text.
pressures, and lack of systematic rules and appellate review. Because procedural fairness under the Fourteenth Amendment depends upon set standards of treatment that guarantee a person's due process rights, it is irrational to consider an arbitrary, "mercy-based" clemency process to be the "fail safe" in our criminal justice system.

The view of clemency as a "justice-enhancing" process promotes more serious discussion concerning the propriety of executive clemency as a viable alternative to federal habeas review of actual innocence claims. Under this view, the clemency process is intricately related to the issues of fairness inherent in the criminal justice system. However, the practical question remains whether it is realistic to see the executive clemency process as a truly workable enhancement of the criminal justice system capable of ensuring the same due process protections as in federal habeas review.

274. See supra notes 126-27 and accompanying text. Many critics feel that clemency is simply too vulnerable to the pressures of politics and majoritarian rule. See, e.g., Garvey, Death-Innocence, supra note 20, at 264 n.177; Herrera v. Collins, 113 S. Ct. 853, 880 (1993) (Blackmun, J., dissenting). The plight of innocent death row convicts is made more apparent by the following statistic: In 1974, about one out of every four or five death row inmates had his or her sentence commuted to life in prison. But in 1988, the frequency of commutations had dwindled to barely one in forty, a reduction by a factor of ten. See Bedau, Decline of Executive Clemency, supra note 95, at 266. These statistics may be the result of the high level of apparent public support for capital punishment, and the proven willingness of gubernatorial candidates to use a rival's opposition to the death penalty as evidence of being "soft on crime." Id. at 268.

On the other hand, even publicity of one's innocence will not guarantee an executive pardon. Gary Graham is one of the best examples of this. To date, Graham has not received clemency despite his appearance on television talk shows, a clemency petition signed by 15,000 people, open support from twenty Texas bishops, and various celebrities including Harry Belafonte, Ossie Davis, Danny Glover, Kenny Rogers and former first lady Rosalynn Carter. See "Day One," Reasonable Doubt? (ABC television broadcast, May 16, 1993); Nightline (ABC television broadcast, Aug. 16, 1993); UNITED PRESS INT'L, Austin Judge Rejects Graham's Request, Sept. 12, 1994 (all sources also available in LEXIS, News Library, CRTNWS file).

275. See supra notes 128-30 and accompanying text.

276. See supra note 131 and accompanying text.


279. The fact that clemency has traditionally been looked upon as merely a "mercy-based" process should not preclude an extension of due process to clemency procedures in light of the modern death penalty scheme. See, e.g., Bruce Ledewitz & Scott Staples, The Role of Executive Clemency in Modern Death Penalty Cases, 27 U. RICH. L. REV. 227, 233 (1993) (arguing that the traditional role of mercy in commutation has little place in the modern death penalty structure); Kobil, Due Process, supra note 114, at 203 (arguing for an extension of due process protections to the clemency process in capital cases); Daniel Lim, Note, State Due Process Guarantees For Meaningful Death Penalty Clemency Proceedings, 28 COLUM. J.L. & SOC. PROBS. 47 (1994).

280. See supra part II.B.
Proponents of the “justice-enhancing” view argue that clemency provides additional procedural protections in death penalty cases by providing individualized sentencing and minimization of informational error that could not be afforded through the criminal justice system. One method of acquiring such additional information is the investigative power of the clemency authority. However, in all too many states, the investigation exists in name alone; it proceeds barely beyond the point of compiling data which has already been filed by other agencies.

This fact should come as no surprise when one considers that even as a “justice-enhancing” process, clemency is subject to the political influences upon the clemency authority. Lack of funding for investigations is the inevitable result of placing the clemency process on the political agendas of state governors. Funding in the state political arena is lobbied for by many factions and those politically accountable will not want to use valuable resources for a process that they feel only rarely provides a chance of acquittal. Former Governor of Arkansas, Bill Clinton, once stated that the “appeals process, although lengthy, provides many opportunities for the courts to review sentences and that’s where these decisions should be made.”

This type of sentiment among governors that clemency is an extraneous process, combined with the political pressures for funding in other

281. See Leavy, supra note 88, at 906. Part of Leavy’s rationale for imposing due process protection upon the clemency process is that the Supreme Court in Gregg v. Georgia, 428 U.S. 158, 199 n.50 (1976), stated in dicta that capital punishment without a clemency provision “would be totally alien to our notions of criminal justice.” Leavy seems to believe that this statement by the Supreme Court gives clemency the “justice-enhancing” function necessary to regard it as a fundamental part of the American criminal justice system. Leavy, supra note 88, at 906. Leavy’s argument becomes even stronger in light of Herrera’s express reliance upon executive clemency as the “fail safe in our criminal justice system.” 113 S. Ct. at 866-68.

282. Leavy, supra note 88, at 905.

283. In almost every state some form of investigation precedes the substantive clemency consideration. See Abramowitz & Paget, supra note 82, at 148. The investigation may involve interviewing many different parties including the prosecutor, jurors, witnesses, and family members of the convict, as well as seeking new evidence that would change the status of the prisoner’s case from its position at trial. Id. at 149.

284. Id. at 183, 186.

285. Id. In many states, the clemency authority does not even conduct a field investigation that includes interviewing those people most associated with the petitioner’s conviction. Id.

286. Andrea Neal, Clemency Becoming Rare as Executions Increase, Corrections Dig., July 8, 1987, at 2; see also Cobb, supra note 127, at 394 (“Clemency authorities repeatedly have relied on the accuracy of the legal process afforded capital defendants to justify denials of clemency.”).

287. When courts instruct jurors to ignore mercy, sympathy, and sentiment in sentencing others to die, and when governors rely exclusively on the judicial system in reviewing those sentences, capital punishment truly becomes a bureaucracy of death, with internally-imposed norms and without personal reflection. Cobb, supra note 127, at 404. Cobb suggests that the legislature should insulate executive clemency from political pressures through some sort of stat-
areas of the state's operations, make a thorough clemency investigation almost always a low priority. Thus, the additional investigative process, of which proponents of the "justice-enhancing" view boast, is, in all practical aspects, inadequate to truly advance any due process protection not already afforded the convict through the formal judicial system. Clemency is not a truly "justice-enhancing" process but rather the result of an allocation of resources based upon political pressures. Under this scenario, the clemency decision is controlled by majoritarian representation and state officials will bow to the pub-

utory scheme. *Id.* at 406. But in light of the political accountability of elected officials, isolation from political pressure would be practically impossible. *Id.*

288. To enhance this investigative process, as some scholars suggest, would also seem impracticable in light of the political pressures at work. *See, e.g.*, Leavy, *supra* note 88, at 908-10; Kobil, *Mercy Strained, supra* note 81, at 633-35. But Leavy argues that due process protection must be afforded to clemency hearings. *Leavy, supra*, note 88, at 908-10. She suggests the following changes: (1) ability of all actors involved in the clemency process to make a public comment about the case; (2) publicity of all clemency decisions; (3) guaranteed assistance of counsel; (4) petitioner's personal appearance before the decisionmaker; and (5) assistance by experts and specialists. *Id.*

But all of Leavy's solutions involve issues which either have no bearing on the fairness of the hearing or are too expensive for the State to implement effectively. Leavy's first two points both relate to publicity which returns to the problem of the arbitrary nature of decisions based upon public sentiment rather than truth or fairness. The appointed counsel suggested by the third point is likewise of little relevance to any traditional notions of fairness. Because clemency authorities are not bound by formal evidentiary rules, the lawyer's main purpose in a clemency hearing would be to raise public outcry about the case. Leavy's fourth point about the petitioner making a personal appearance would only enhance the "mercy" aspect of the petitioner's case rather than any traditional notions of fairness or justice. Leavy's final point about assisting the petitioner with experts and specialists would cost more money to the State than is available in the foreseeable future. In addition, if such evidence would have made a difference, it should have been presented in the trial or appellate stages of the case.

289. This scenario is opposed to that of the judicial process in which the court is largely unassociated with political pressures. Of course, majoritarian pressures exist in the election of state judges, but the pressure is more diffuse and indirect than in the case of the governor's clemency review.
lic's views on clemency much like under the "mercy-based" view of clemency.

Because of these flaws in the "mercy-based" and "justice-enhancing" views of clemency, it seems a noble but misguided purpose to attempt to guarantee a constitutional "entitlement" to clemency. The same inherent flaws of arbitrariness and political considerations that bode against the feasibility of clemency as an alternative forum to federal habeas review also mar the possibility that any due process protections may be imposed under the rhetoric of an "entitlement." If the only remaining forum to hear claims of actual innocence is that of executive clemency, it is inevitable that an innocent victim will more likely be executed because of the arbitrary decisionmaking and lack of funding for a proper investigation. A due process right to a clemency hearing cannot solve what the clemency hearing itself lacks: some relation to the issue of fairness. Thus, it is incongruous to create a constitutional entitlement to be placed into a forum which in practicality cannot guarantee a fair result.

On the other hand, perhaps the holding in Herrera itself establishes an "entitlement" to due process in clemency. Despite the flaws in the clemency process, Herrera expressly established clemency as the

290. There is ample commentary that politicians use a pro-death penalty stance to their own political advantage by meeting the public's desire for a hard line against crime. For instance, at the end of Bill Clinton's first term in office as Governor, he commuted a number of death sentences. After being defeated for re-election in 1980, Clinton staged a comeback bid in 1982, promising "not to commute so many sentences if... given another chance." Wendell Rawls, Jr., Arkansas Gubernatorial Candidates in Close Race, N.Y. TIMES, Oct. 28, 1982, at B10. As President of the United States, Clinton continued to remind the American public that he had carried out the death penalty before and would impose a tough standard of justice upon criminals. Linda Diebel, A Tougher, Meaner America: Bill Clinton Launches a Republican-Style Attack on the People Middle America Fears, THE TORONTO STAR, Jan. 27, 1994, at A21.

Likewise, California Governor Pete Wilson organized a two-day crime summit in a Hollywood church to mobilize popular and political support for a "get-tough" attitude toward criminals and to launch his own uphill campaign for re-election. In the opening event, a memorial service to murder victims was held in which the chapel was decorated with photos of young victims, and survivors tearfully praised Wilson for leading anti-crime efforts. Governor Wilson has presided over two executions during his first term in office and is expected to speak poorly of his opponent in the election, Kathleen Brown, who is personally opposed to capital punishment. Dan Walters, Crime Raised to Top Billing, SACRAMENTO BEE, Feb. 8, 1994, at A3.

291. See supra notes 273-74 and accompanying text. Garvey notes that "when politics selects the constitutional norms meant to confine the death penalty, the Eighth Amendment is drained of its integrity as a constitutional principle." Garvey, Politicizing, supra note 255, at 205.

292. See supra part II.C.

293. The Supreme Court perhaps recognized clemency's lack of connection to the formal justice system when it decided that Warren McCleskey should be executed despite his convincing argument that he could not obtain an impartial clemency hearing based on threats by state officials against the Board of Pardons. See McCleskey v. Bowers, 501 U.S. 1281, 1282 (1991) (Marshall, J., dissenting from denial of stay of execution); Sawyer v. Whitley, 112 S. Ct. 2514, 2529 (1992) (Blackmun, J., concurring).
alternative to federal habeas review in capital cases of actual innocence. By relying on the existence of executive clemency to justify excluding actual innocence claims from judicial scrutiny, the Court emphasized the significance of the clemency process and illuminated the constitutional deficiencies in clemency proceedings.

But the question remains: what degree of due process should be afforded to clemency review? Courts have generally refused to find an "entitlement" under the Due Process Clause for a right to be granted clemency, to receive a statement of reasons denying clemency or to receive "meaningful consideration" of one's clemency petition. However, Gary Graham's clemency claim can be distinguished from all of these cases because it only requests the right to apply for clemency under Texas law. The Texas clemency statute required a certified judgment or order of a court having jurisdiction as to the "finding of innocence" before Graham could apply for a clemency hearing. Because the Supreme Court in Herrera had virtually cut off federal habeas review of actual innocence claims and no state habeas forum allowed for such a "finding of innocence," Graham was precluded from even applying for clemency under the Texas statute. In such a case, it was arguably appropriate for the Texas

295. In deferring to the power of clemency, the majority in Herrera relied on the "politically flimsy prospects for executive intervention in the most inflammatory criminal prosecutions." See Sullivan, supra note 263, at 323.
296. Otey v. Stenberg, 34 F.3d 635, 639 (8th Cir. 1994) (Gibson, J., dissenting). For the counterargument to this view, see Milone v. Camp, 22 F.3d 693, 705 (7th Cir. 1994), cert. denied, No. 94-138, 1994 WL 397194 (U.S. Jan. 9, 1995). In Milone, the Seventh Circuit held that "there is no constitutional right to a clemency hearing" and cited to Herrera, 113 S. Ct. at 867, as support for this proposition. 22 F.3d at 705. The court was presumably citing to the statement in Herrera that, "Although the Constitution vests in the President a pardon power, it does not require the States to enact a clemency mechanism." 113 S. Ct. at 867. But reliance upon such an isolated statement seems erroneous in light of the very next sentence in Herrera that states, "Yet since the British Colonies were founded, clemency has been available in America." Id. Thus, it is still possible to argue that Herrera creates a new due process right to a clemency hearing.
297. See supra part II.C.
299. Dumschat, 452 U.S. at 466.
300. Otey v. Stenberg, 34 F.3d 635, 637 (8th Cir. 1994).
Court of Criminal Appeals to expand state habeas review of actual innocence claims in order to allow Graham his right to file a clemency petition\textsuperscript{305} which might actually entitle him to some relief.\textsuperscript{306}

\textbf{C. From Federal Habeas to State Habeas Review}

The decision in the Graham case to expand state habeas review to include freestanding claims of actual innocence in capital cases\textsuperscript{307} has also contributed to the diffusion of due process in such cases. This section will first analyze the appropriateness of state habeas as an alternative forum to federal habeas review of capital claims of actual innocence.\textsuperscript{308} Second, it will answer the question whether, despite any deficiencies it might have, it could still be considered a viable alternative forum in light of the decision in \textit{Herrera}.

There are at least two major problems in allowing state habeas to replace federal habeas review as the primary guarantor of due process under the Fourteenth Amendment to the United States Constitution. First, since the American Civil War, the federal courts have been the primary guarantors of individual constitutional rights.\textsuperscript{309} This jurisprudential scheme arose out of the civil rights statutes,\textsuperscript{310} passed after

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\textsuperscript{305} State \textit{ex. rel.} Holmes v. Honorable Court of Appeals for the Third Dist., 885 S.W.2d 389, 400-01 (Tex. Crim. App. 1994) (Campbell, J. concurring). Even the Eighth Circuit in Otey v. Stenberg, 34 F.3d 635, 637 (8th Cir. 1994), conceded that, “Otey had no state-created right other than the right to ask for mercy.” (emphasis added).

\textsuperscript{306} On September 12, 1994, Judge Pete Lowry, the civil judge in Graham’s case, rejected Graham’s “entitlement” argument to a clemency hearing precisely because the Court of Criminal Appeals had created an alternative venue for Graham’s claim of actual innocence. Christy Hoppe, \textit{Clemency Hearing Denied for Inmate Gary Graham Judge Cites New Venue for Presenting Evidence}, The \textit{Dallas Morning News}, Sept. 13, 1994, at 24A. Judge Lowry stated, “Gary Graham doesn’t have the same argument this year that he had last year. Now there is a remedy.” \textit{Id.} Such a judgment seems to recognize that Graham’s receipt of a state judicial forum for his newly discovered evidence was a better path to asserting his innocence than a right to clemency could ever be.

\textsuperscript{307} \textit{Honorable Court of Appeals}, 885 S.W.2d at 398-99.

\textsuperscript{308} This section will not deal with the Graham court’s rationale that state habeas be expanded in order to assure due process in the executive clemency process. \textit{Id.} at 400-01 (Campbell, J., concurring). That analysis was already covered in the preceding section on clemency as an “entitlement.” \textit{See supra} notes 301-306 and accompanying text. Rather, this section concerns the majority opinion in the Graham case which held that state habeas review should be expanded in order to satisfy the requirements of the Due Process Clause in light of \textit{Herrera}. \textit{Honorable Court of Appeals}, 885 S.W.2d at 397-99. As with executive clemency above, we are operating under the assumption that state habeas must provide the same due process protections as federal habeas review in order to be considered a viable alternative forum. \textit{See supra} notes 248-50 and accompanying text.


\textsuperscript{310} An example of such a statute is section 1983. Originally written as section 1 of the Civil Rights Act of 1871, it is currently classified as 42 U.S.C. § 1983 (1994).
the Civil War, which offered a “uniquely federal remedy” against incursions of individual rights under the claimed authority of state law. In light of this historical fact, it would indeed be strange for federal courts to relinquish their powers over capital claims of actual innocence to the states. Such a peculiarity becomes even more striking when one considers that it was the state courts that originally convicted the prisoner for his or her crime, and would be more predisposed to uphold that judgment on direct or collateral review than would federal courts.

The second problem in relying upon state habeas to replace federal habeas review in the area of actual innocence is the lack of uniformity among different states in providing such due process protections. Though the Texas Court of Criminal Appeals in the Graham case might have decided to expand its state habeas review to include claims of actual innocence, other state courts may not have such power or may expressly choose not to employ it. One valid reason for refusing to expand state habeas review is that it is the legislature’s job to do so, not the courts. Another reason is that the state court might determine that the procedural protections currently in place on direct or collateral state review are sufficient to meet the due process requirements of the United States Constitution. This lack of uniformity among various state courts regarding the expansion of state habeas review resembles the arbitrary nature of the executive clemency system, and it weighs against shifting due process protections of federal habeas to the alternative forum of state collateral review.

However, just as in the executive clemency context, the decision in Herrera, which makes it almost impossible for a state prisoner

311. The Fourteenth Amendment was ratified July 9, 1868, and had much to do with this change in American jurisprudence. See Mitchum, 407 U.S. at 238-39 (citing the Fourteenth Amendment as the “centerpiece” of the new law in the post-Civil War era).
312. Id. Thus, Congress provided that federal courts should play a major role in providing a check upon unwarranted state power.
313. Of course, such logic only rings true if one accepts the assumption that state courts are not as competent or unbiased as federal courts to decide federal constitutional claims under their concurrent jurisdiction.
314. See Kelli Hinson, Comment, Post-Conviction Determination of Innocence For Death Row Inmates, 48 SMU L. REV. 231, 254-56 (1994) (arguing that in the Graham case, the costs in finality, federalism, judicial resources and potential for abuse by defendants outweigh the small risk that the system will allow an innocent individual to be executed and thus decides against an expansion of the state habeas power).
315. See supra part II.A. If the United States Supreme Court attempted to solve this uniformity problem by forcing state courts to adopt an expanded habeas remedy, this would be even more intrusive in terms of federal-state comity than merely preserving the issue in the federal habeas forum.
316. See supra notes 294-96 and accompanying text.
to bring a freestanding claim of actual innocence on federal habeas review\textsuperscript{317} may actually endorse the expansion of the state habeas power in this area. Despite its deficiencies, state habeas review appears to be a better forum for hearing capital cases of actual innocence than the alternative of executive clemency posed by the Court in \textit{Herrera}.\textsuperscript{318} At least with state habeas review, the petitioner is entitled to a judicial forum\textsuperscript{319} for hearing his or her factual evidence of actual innocence rather than an arbitrary, underfunded clemency system.\textsuperscript{320} Thus, state habeas seems to be the lesser of the two evils in terms of the due process present in alternative forums to federal habeas review.

\subsection*{D. Back to the Federal Forum With a Clearer Threshold Standard?}

The diffusion of due process protections in cases of actual innocence from the federal courts to alternative state forums is problematic. In addition to the reasons stated above for rejecting executive clemency and state habeas review as primary insurers of due process,\textsuperscript{321} there exists a more rudimentary problem: the United States Supreme Court appears to have relinquished its essential role as the ultimate arbiter of a federal question of constitutional dimensions,\textsuperscript{322} namely, the execution of an innocent person.

Speaking for the Court, Justice Rehnquist attempts in \textit{Herrera} to transfer due process protections over actual innocence claims to the state clemency forum while preserving certain "extraordinarily high"

\begin{footnotesize}
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\item \textsuperscript{317} Herrera v. Collins, 113 S. Ct. 853, 869 (1993).
\item \textsuperscript{318} \textit{Id.} at 866-68.
\item \textsuperscript{319} \textit{See Ex parte} Graham, 853 S.W.2d 565, 569 (1993) (en banc) (Maloney, J., concurring and dissenting) ("[B]ecause such a claim ultimately turns upon the credibility of witnesses and further development of the facts, it needs to be evaluated in an adversary setting before a judicial trier of fact and law. It is only in that setting that credibility can be determined."). The importance of providing some sort of judicial habeas review in death penalty cases cannot be more stressed. Federal district and circuit court judges were the most important restraint on the number of executions during the seven years after 1984 when the uptrend in executions was effectively halted. \textit{See} Zimring, \textit{supra} note 2, at 19.
\item \textsuperscript{320} \textit{See supra} notes 271-78, 284-91 and accompanying text. \textit{See also} note 306 \textit{supra}.
\item \textsuperscript{321} \textit{See supra} parts IV.B. and IV.C.
\item \textsuperscript{322} \textit{See Dixon v. Duffy}, 344 U.S. 143, 145-46 (1952). The Court stated:

\begin{quote}
We granted certiorari in this [habeas] case ‘because of a serious claim that petitioner had been deprived of his rights under the Federal Constitution.’ This Court, alone, is the final arbiter of such a claim, and our grant of certiorari should entitle petitioner to the chance to have the matter resolved by this Court . . . .
\end{quote}

\textit{Id.} (internal citation omitted). Such an abdication of power would be allowable if the Supreme Court had ruled that no constitutional protections whatsoever should attach to the execution of an innocent person. \textit{See} Herrera v. Collins, 113 S. Ct. 853, 874-75 (1993) (Scalia, J., concurring). However, the Court's opinion in \textit{Herrera} does implicitly recognize such a constitutional interest by retaining some level of judicial scrutiny for freestanding claims of actual innocence. \textit{Id.} at 869. \textit{See supra} text accompanying notes 237-47.
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\end{footnotesize}
threshold claims for the Court’s review. But this is an intellectually dishonest approach. The Court rejects Justice Blackmun’s dissenting view that the Fourteenth and Eighth Amendments produce a due process violation; yet, it refuses to accept Justice Scalia’s view that no due process protections whatsoever attach to freestanding claims of actual innocence. The question thus remains: on what basis could the Court have retained some power of judicial review over actual innocence claims if the Fourteenth and Eighth Amendments do not apply to such claims? The simple answer is that the Fourteenth and Eighth Amendments do apply to such claims, as the dissent argued, but the Court did not want to admit that fact for fear that it would open the federal courts to a flood of frivolous litigation. Yet, this subterfuge has only confused the lower courts about the practical implications for judging freestanding claims of actual innocence.

Justice Rehnquist is not wrong to take the middle ground in Herrera; the strong competing interests of federalism and individual rights

325. Id. at 869.
326. This confusion is further aggravated by the differing standards set out by the other Justices in Herrera. See, e.g., Blair v. Delo, 999 F.2d 1219, 1220 (8th Cir. 1993) (“While we question whether Blair’s claim survives Herrera, because of the differing views of the several Justices, we cannot conclude without more detailed study that Blair’s claim is ‘frivolous and entirely without merit’ or that there is not a substantial question upon which relief might be granted.”). Different lower court rulings have employed the Court’s “extraordinarily high” language, Spencer v. Murray, 5 F.3d 758, 766 (4th Cir. 1993), cert. denied, 114 S. Ct. 1208 (1994); Payne v. Thompson, 853 F. Supp. 932, 937 (E.D. Va. 1994), Justice White’s concurring standard, Williams v. Warden, State Prison, No. CV 91 1342 S, 1994 WL 516554, at *4 (Conn. Super. Ct. Sept. 13, 1994), and the dissent’s “probably actually innocent” standard. Drew v. Scott, 28 F.3d 460, 463 (5th Cir.), cert. denied, 115 S. Ct. 5 (1994); Enoch v. Gramley, 861 F. Supp. 718, 730 (C.D. Ill. 1994). In Enoch, the court explained:

Although the Court feels that the burden of proof should be higher, the use of this relatively minimal standard comports with a majority of those justices who appear willing to recognize this assumed claim [internal citation omitted]. As such, the Court deems this the appropriate standard to be used until that time when the Supreme Court explicitly recognizes a claim of actual innocence and explicitly sets forth its accompanying burden of proof.

Id.

Some lower courts have merely compared the facts of Herrera to those of their own case and concluded that the threshold standard had been met. See, e.g., Ex parte Graham, 853 S.W.2d 565, 569 (Tex. Crim. App. 1993) (en banc) (Maloney, J., concurring and dissenting); Blair, 999 F.2d at 1221 (Heaney, J., concurring). The United States Supreme Court appears to desire such a factual comparison when it serves to dismiss a claim of actual innocence. In Delo v. Blair, 113 S. Ct. 2922, 2923 (1993), the Court vacated a stay of execution by the Eighth Circuit on the basis that, “It is an abuse of discretion for a federal court to interfere with the orderly process of a state’s criminal justice system in a case raising claims that are for all relevant purposes indistinguishable from those we recently rejected in Herrera.” Because the district court had stated that the “facts in Herrera mirror those in the present case,” the Supreme Court held that there was no need for the Court of Appeals to proceed on the claim any further. Id. (internal citations omitted).
mandate such a compromise. But rather than rejecting the dissent's due process concerns outright and creating a vague exception for those claims meeting an "extraordinarily high" threshold, the Court more properly should have concluded that due process concerns are implicated and then proceeded to create a clearly delineated standard that takes into account the competing interests at stake. Such a standard would reclaim the due process safeguards in actual innocence cases to the federal judicial forum where they truly belong, and it would also alleviate the confusion among lower courts concerning the method by which to adjudicate freestanding claims of actual innocence.

The Court need not admit any analytical error in the Herrera opinion in order to create such a new standard; rather, it need only define its vague "extraordinarily high" threshold in clearer terms. This threshold standard must accommodate the competing state interests in finality and comity, yet be accessible enough to create the reality and appearance of fairness. The opinions of the concurring and dissenting Justices in Herrera do not seem to provide a workable standard that may be used to define the "extraordinarily high" threshold of the Court. Justice Scalia's concurring opinion in Herrera can be

327. Herrera, 113 S. Ct. at 869.

328. Of course, such a standard must be balanced against the competing factors of finality and federalism that weigh against reopening a fully and fairly litigated trial. As of 1991, habeas petitions from state prisoners made up only five percent of the civil caseload of the federal district courts. Lay, supra note 261, at 1043 & n.162 (citing 1991 DIRECTOR OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS ANN. REP. 190-91). In stark contrast to this relatively low figure is the high success rate in capital habeas petitions—fifty to seventy percent. Id. at 1044 n.166. Thus, such a balance weighs in favor of allowing federal habeas review of capital cases of actual innocence.

329. 113 S. Ct. at 869. In formulating such a clearly delineated standard, we must utilize "[t]he Due Process Clause [which] sets the minimum standard of proof required in [a] particular context[ ] based on consideration both of the respective interests of the State and individual and of the risk of erroneous decisions." Heller v. Doe, 113 S. Ct. 2637, 2644 n.1 (1993). The function of a standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Addington v. Texas, 441 U.S. 418, 423 (1979).

330. The imperative of finality appears to be the real animating force behind the Court's habeas revolution. See Garvey, Death-Innocence, supra note 20, at 259. Finality is valued because it brings with it a sense of repose. Id. at 260. However, as Garvey argues, the real virtue of finality lies not simply in more and faster executions by leaving questionable convictions in place, but rather in the repose it brings in the security that justice has properly been served. Id. at 263-64. In other words, as long as there is some lingering doubt about a convict's guilt, true finality cannot be achieved by merely imposing procedural bars to the hearing of such claims. On the other hand, it is not clear that Garvey's conception of finality can be equated with the State's interest which is more concerned with avoiding the additional expenditure of relitigating a conviction.

331. In re Gault, 387 U.S. 1, 26 (1967).
ruled out because it imposes no standard at all; rather, it attempts to deny any claim of actual innocence whatsoever.\(^{332}\)

Similarly, the dissent's "probably actually innocent" standard\(^{333}\) fails for three reasons. First, it would be anomalous to define the Court's "extraordinarily high" standard in the dissent's own terms when they were rejected by a majority of the Justices in *Herrera*. Second, the state arguably has a greater interest in preventing the disruption of a final conviction that was achieved without procedural error as opposed to one in which procedural error did play a part. Third, if there is any merit to the Court's historical distinction between claims of actual innocence accompanied by procedural error and those that are freestanding,\(^{334}\) it is rational to impose a higher threshold standard for freestanding claims of actual innocence.

Justice White's concurring standard in *Herrera*, which states that based on the newly discovered evidence and the entire record before the convicting jury, "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt,"\(^{335}\) also proves to be inappropriate for use in cases of actual innocence. Justice White borrowed this standard from *Jackson v. Virginia*.\(^{336}\) which involved the determination of whether the record evidence presented in the trial below was sufficient to find a conviction "beyond a reasonable doubt."\(^{337}\) However, as Justice Rehnquist explained in *Herrera*, *Jackson* does not apply to cases of newly discovered evidence because such an analysis goes beyond determining the sufficiency of the record evidence\(^{338}\) and strays into a balancing test between the old evidence of the trial and new evidence acquired after trial.\(^{339}\) Furthermore, as Judge Clinton pointed out in the Graham case, such a burden would be impossible by definition to meet because "any evidence sufficient to support a

332. *Herrera*, 113 S. Ct. at 874-75 (Scalia, J., concurring).
333. *Id.* at 882 (Blackmun, J., dissenting).
337. *Id.* at 318.
339. Of course, the Court could seek to redefine this standard in order to take into account the fact that the newly discovered evidence may work to negate the old incriminating evidence against the petitioner. However, this would necessitate a different application of the standard in the context of a sufficiency of the evidence claim under *Jackson*, 443 U.S. at 324, and the context of a claim of newly discovered evidence of actual innocence. Such disparate application might prove just as confusing as the current "extraordinarily high" standard and may not be worthwhile pursuing.
jury’s verdict beyond a reasonable doubt at trial will also be sufficient to support a rational jury’s guilty verdict even after adding the most compelling newly discovered evidence to the mix.”

Because none of the other articulated standards in *Herrera* validly define the Court’s “extraordinarily high” threshold standard, it is necessary to develop a new standard which incorporates all of the individual and state interests at stake. Such a standard should be whether, based on the newly discovered evidence and the entire record before the convicting jury, the petitioner can prove by clear and convincing evidence that no reasonable juror would find him guilty beyond a reasonable doubt. This standard incorporates portions of various other standards in the Supreme Court’s jurisprudence but tailors them to the specific inquiry of a freestanding claim of actual innocence.

The “clear and convincing evidence” threshold level is borrowed from the Court’s definition of actual innocence in *Sawyer v. Whitley.* While *Sawyer* dealt with a claim of “actual innocence of the death penalty” in the capital sentencing phase of a trial that was accompanied by a claim of procedural error, *Herrera* involved a claim of actual innocence from the underlying conviction that was not accompanied by a claim of procedural error. Because the actual innocence claim in *Sawyer* was accompanied by procedural error while the claim in *Herrera* was not, one might assume that the threshold standard should be higher in *Herrera.* Yet, balanced against the equally or more important distinction between true claims of actual innocence and other newly discovered claims, the new standard is not necessarily higher.

The Florida Supreme Court requires that, “in order to provide relief, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial.” *Jones v. State,* 591 So.2d 911, 915 (Fla. 1991). The court established this standard for writs of error coram nobis and relied upon the fact that “this is the standard currently employed by the federal courts.” *Id.* Notably, even after the decision in *Herrera,* the Ninth Circuit Court of Appeals still continues to use this standard on federal habeas review. *See,* e.g., *Jeffries v. Blodgett,* 5 F.3d 1180, 1187-88 (9th Cir. 1993), cert. denied, 114 S. Ct. 1294 (1994); *Swan v. Peterson,* 6 F.3d 1373, 1384 (9th Cir. 1993), cert. denied, 115 S. Ct. 479 (1994). *But see Milone v. Camp,* 22 F.3d 693, 700 n.5 (7th Cir. 1994), cert. denied, No. 94-138, 1994 WL 397194 (U.S. Jan. 9, 1995) (refusing to believe that the “acquittal upon retrial” standard can survive *Herrera*).


341. Other possible standards include those adopted in the California and Florida state courts. The California Supreme Court has held that “newly discovered evidence is a basis for relief only if it undermines the prosecution’s entire case.” *In re Clark,* 855 P.2d 729, 739 (Cal. 1993) (en banc). The court explained that it was not sufficient that the evidence “might have weakened the prosecution’s case or presented a more difficult question for the judge or jury.” *Id.* Rather, the evidence must cast “fundamental doubt on the accuracy and reliability of the proceedings.” *Id.*

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innocence, which challenge the petitioner’s underlying conviction (as in Herrera), and those claims merely challenging the severity of a concededly guilty defendant’s sentence (as in Sawyer), freestanding claims of actual innocence should be entitled to at least the same “clear and convincing evidence” standard as in Sawyer. The Supreme Court in Schlup v. Delo345 clearly favored claims of actual innocence over those challenging a convict’s sentence because they “pose less of a threat to scarce judicial resources and to principles of finality and comity” since they are asserted much less frequently.346 Moreover, the Court held that the “overriding importance of this greater individual interest” in avoiding injustice in actual innocence claims merits the imposition of a “less exacting standard” than one merely challenging the convict’s sentence.347

The suggested standard also takes into account the Court’s concern that there should be a relatively higher threshold standard for freestanding claims of actual innocence than for those accompanied by procedural error.348 Here, the “clear and convincing evidence” standard replaces the “more likely than not” formulation under the Carrier “probably resulted” standard.349 Moreover, because the “clear and convincing” standard has been used in a variety of other contexts,350 including protecting particularly important individual interests in various civil cases,351 there should be existing case law to

346. Id. at *12.
347. Id. at *13. Of course, whether the reader accepts such a balance depends upon the relative weight given one distinction over the other. But the great importance which the Court in Schlup attaches to claims of actual innocence as the “quintessential miscarriage of justice,” id., arguably weighs at least as much as the Court’s interest in avoiding review of freestanding claims of actual innocence. This holds especially true where the Court appears to concede that some level of judicial scrutiny is appropriate for such claims. See supra notes 248-50 and accompanying text.
348. See Herrera, 113 S. Ct. at 860.
349. See Murray v. Carrier, 477 U.S. 478, 495-96 (1986) (holding that a “fundamental miscarriage of justice exception” applies where the constitutional violation has “probably resulted” in a mistaken conviction); Schlup, 1995 WL 20524, at *14 (defining the Carrier standard as requiring the petitioner to show that “it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence”).
350. One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. Addington v. Texas, 441 U.S. 418, 424 (1979). The standard is also used to establish the affirmative defense of insanity in a federal criminal trial. See Legal Insanity Defense Reform Act, 18 U.S.C. § 17 (Supp. 1995); United States v. Crow, 37 F.3d 1319, 1323 (8th Cir. 1994); United States v. Barton, 992 F.2d 66, 68 (5th Cir. 1993).
guide the judge about the quantum of evidence needed to meet this standard.

Furthermore, while the suggested standard draws upon Justice White’s sufficiency of the evidence standard in *Herrera*, it avoids the problems inherent in using that standard in the context of newly discovered evidence of actual innocence by substituting the phrase “could have convicted” with “would have convicted.” As the Court explained in *Schlup*, by using the word “could,” *Jackson* limits the inquiry to the power of the trier of fact to reach its conclusion; thus, either the trier of fact has the power as a matter of law to convict or he does not. On the other hand, use of the word “would” focuses the inquiry on the likely behavior of the trier of fact, including any credibility determinations which might have occurred at the original trial. Thus, the term “would have convicted” makes the inquiry more probabilistic and allows a weighing of the old and newly discovered evidence rather than allowing the mere sufficiency of the evidence below to be determinative of the petitioner’s claim.

In addition to the standard suggested above, a useful caveat would be that the newly discovered evidence “must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known them by the use of diligence.” By restricting newly

352. 113 S. Ct. at 875 (White, J., concurring).
353. *See supra* notes 335-40 and accompanying text.
355. *Id.*
356. *Id.* Yet, deference to the original conviction is preserved by imposing the “clear and convincing evidence” standard on review rather than some lower standard such as “more likely than not” or “probably actually innocent.”
357. *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991); *see also* Friendly, *supra* note 37, at 159 n.11 (requiring that consideration of the newly discovered evidence be limited to that evidence “which could not have been presented in the exercise of due diligence”).

But must the “lack of due diligence” by trial counsel rise to the level of a Sixth Amendment ineffective assistance of counsel claim before a habeas petitioner may use such newly discovered evidence? In *Strickland v. Washington*, 466 U.S. 668, 689 (1984), the United States Supreme Court held, “Judicial scrutiny of counsel’s performance must be highly deferential... [A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” In light of this increasing deference to lawyers’ conduct and the consequent difficulty in succeeding upon such Sixth Amendment claims, it appears that some less stringent standard of “diligence” should be employed concerning claims of newly discovered evidence of actual innocence. Such a high standard may also be questionable on the basis that an ineffective assistance of counsel claim merely imposes yet another procedural barrier toward reaching the merits of the petitioner’s substantive argument.

The *Strickland* standard is also inappropriate in the actual innocence context because it requires that “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* at 690-91. In a system where the professional norm for court-appointed counsel means very little investigation due to lack of time and financial resources, this standard is patently
discovered evidence to its plain meaning, federal-state comity will be preserved. But even if this suggested standard and caveat are not used, the Supreme Court must clearly define its vague "extraordinarily high" threshold in some clear manner. By refusing to do so, the Court perpetuates the diffusion of due process in actual innocence claims to inappropriate forums and ultimately undermines the public's faith in our criminal justice system.

CONCLUSION

The Supreme Court's decision in Herrera to restrict the scope of federal habeas review for freestanding claims of actual innocence has resulted in a diffusion of due process protections to inappropriate alternative forums. Executive clemency does not deserve the constitutional protection of the Fourteenth Amendment because it involves arbitrary preferences that are irrelevant to the issue of fairness in the guilt-determining process. Because of political pressures and the lack of resources for an adequate investigation by the clemency authority, the clemency process will never be able to ensure the same procedural protections that traditional trial courts can. Moreover, because the federal courts have historically been the primary guarantors of individual constitutional rights and states exhibit a lack of uniformity in...

358. A federal court's intervention into the finality of a state conviction only upsets federal-state comity when it is based upon evidence which could previously have been brought to a state court's attention. See, e.g., Murray v. Carrier, 477 U.S. 478 (1986) (establishing doctrine of procedural default). But where the evidence is actually acquired after the state judicial processes have been exhausted, no such interests are implicated.

359. Another important factor to consider in determining which threshold standard is most appropriate is that a higher standard will likely serve as the actual "burden of proof" at the hearing. The various standards to be used at the hearing stage were not addressed in Herrera and are beyond the scope of this Note. For an interesting suggestion concerning hearings in cases of actual innocence, see Freedman, supra note 256.

360. As Hoffman notes:

The specter of the execution of an innocent person... should haunt both supporters and opponents of capital punishment. For opponents, it is often one of the main reasons to seek abolition of the death penalty. For supporters, it would be the single event most likely to cause a dramatic shift in public opinion against the death penalty. It could even lead to the abolition of capital punishment altogether.


Bedau and Radelet also state that recent survey research indicates that fifteen percent of those who oppose the death penalty cite as a rationale the possibility of wrongful conviction. Hugo Adam Bedau & Michael L. Radelet, The Myth of Infallibility: A Reply to Markman and Cassell, 41 STAN. L. REV. 161, 165 n.31 (1988) (citing Gallup Report, Jan.-Feb. 1985, at 3). Thus, it is clear that the issue of execution of the innocent affects the hearts and minds of all Americans, regardless of their political stance on the death penalty.
terms of due process protections, state habeas also can not replace federal habeas review as an appropriate forum for hearing newly discovered evidence of actual innocence.

Thus, the Court in *Herrera* is wrong to suggest these forums as alternatives to federal habeas review in capital cases of actual innocence. Because the issue of "fairness" is so important to our societal notions of justice, especially on the fundamental question of the guilt or innocence of a death row inmate, we cannot allow the Supreme Court to substitute an inferior process to replace its own system of habeas review. The faulty assumption among lower courts that these forums are constitutionally adequate must be rebutted so that attention can more productively be focused upon providing appropriate federal judicial remedies.

The Supreme Court has imprisoned itself in a web of conflicting habeas jurisprudence. The simplest solution is for the Court to clearly define its "extraordinarily high" threshold standard for actual innocence claims. If no change occurs in the near future and the confusion over this most fundamental issue continues to plague the lower state and federal courts, an innocent person may be executed. This would be the worst possible violation of our Constitution and of the American public's faith in our criminal justice system to provide a fair forum in determining a person's guilt or innocence.