


1993

Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency

Daniel T. Kobil

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Civil Procedure Commons](#), [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. Rich. L. Rev. 201 (1993).
Available at: <http://scholarship.richmond.edu/lawreview/vol27/iss2/4>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

DUE PROCESS IN DEATH PENALTY COMMUTATIONS: LIFE, LIBERTY, AND THE PURSUIT OF CLEMENCY

*Daniel T. Kobil**

There are things that happen and leave no discernable trace, are not spoken or written of, though it would be very wrong to say that subsequent events go on indifferently, all the same, as though such things had never been.¹

I. INTRODUCTION

The idea of the last-minute reprieve granted by a distant, unknowable dispenser of mercy to a man condemned to death has a powerful hold on our imaginations. Fyodor Dostoevsky's eleventh hour pardon by the czar in many ways shaped his literary career.² The scene of the haunted Death Row prisoner who awaits word from the governor as a ticking clock punctuates his final hours is a stock vignette of Hollywood crime films. Anyone who has ever seized on the slimmest hope, whose fate has been committed to the hands of another — virtually all of us — can identify with the plight of the condemned prisoner. In that moment, the convicted criminal is reinvested with some of the humanity which our imaginations deprived him of when we assayed the horrible and violent acts that warranted his execution by the State.

At the same time, persons vested with the power to decide whether the sentence of death should be carried out become larger than life, almost godlike in their ultimate decisionmaking power. What former California Governor Edmund G. (Pat) Brown referred to as this "awesome, ultimate power over the lives of

* Associate Professor of Law, Capital University Law School. B.A., 1978, J.D., 1983, University of Toledo. I am grateful to Michael Markson for his valuable contributions to the researching and writing of this article. I also appreciate the thoughtful comments and encouragement I received from my colleagues, especially Tim Lytton, the helpfulness of the Capital library staff, and the patient, efficient clerical assistance of Martha Bush. Finally, I would like to thank Sarah DeBruin for her editing skills, friendship, and support.

1. A.S. BYATT, *POSSESSION* 552 (First Vintage International ed. 1991).

2. See Fyodor Dostoevsky, *THE IDIOT* (David Magarshack trans., 1955).

others,"³ is reminiscent of the king's prerogative to decide whether a condemned person lived or died. And like the monarchial power from which it derives, clemency is shrouded in mystery and often fraught with arbitrariness at a time when other aspects of our justice system are becoming more open and fair pursuant to the dictates of the Due Process Clause. Apart from a handful of memoirs by former governors,⁴ executives typically reveal very little about the factors that result in their granting or denying clemency.

In many instances, the secrecy surrounding acts of clemency extends even to the process by which clemency decisions are made. It is often difficult or impossible to ascertain whether, in a particular case, the governor or president has carefully considered all of the available information bearing on clemency, has made a purely self-serving decision to deny or grant clemency, or has flipped a coin. This procedural "blackout" takes on greater significance in view of the increasing willingness of society and the courts to impose the death penalty⁵ and the apparent decline of clemency in capital cases.⁶ If executives do not employ reasonably fair procedures in making clemency decisions, how can we be assured that clemency is fulfilling its function of providing "a final deliberative opportunity to reassess the moral and legal propriety of the awful penalty which [the State] intends to inflict?"⁷

My purpose in writing this article is to discuss whether decisionmakers are bound by the Constitution to employ specific, substantially fair procedures in capital clemency cases.⁸ It appears

3. EDMUND G. (PAT) BROWN & DICK ADLER, *PUBLIC JUSTICE, PRIVATE MERCY* 163 (1989).

4. *Id.* See also Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATH. U. L. REV. 94 (1971) (former Governor of Arkansas); MICHAEL DiSALLE, *THE POWER OF LIFE OR DEATH* 204 (1965).

5. See Stephen P. Garvey, *Politicizing Who Dies*, 101 YALE L.J. 187 (1991) (arguing that the Supreme Court's recent jurisprudence has enhanced the role that politics play in the decision of whether to impose the death sentence, thereby increasing the probability that capital punishment will be imposed).

6. See Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990) (arguing that governors are less willing to commute death sentences because of the perceived fairness of capital penalties and the political risks of granting clemency).

7. Rockefeller, *supra* note 4, at 95.

8. This article is restricted in its scope to consideration of clemency procedures in capital cases because I believe that due to its finality and questionable moral validity, death is different from all other punishments imposed by the State. See also *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (noting that death is a different kind of punishment than any other which may be imposed); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (noting that "death is qualitatively different"). Although employing the procedures I advocate in this

that there is uncertainty among the courts as to the extent to which the procedural component of the Fourteenth Amendment's Due Process Clause applies to decisions to grant or deny clemency. I will first consider federal and state cases which discuss this issue, focusing especially on a pending Nebraska case which hinges on whether procedural due process protections extend to capital clemency decisions. In the next part of the article, I will propose an approach to analyzing this question which considers the "life" interest at stake in capital clemency cases and which takes into account the values underlying the Due Process Clause of the Fourteenth Amendment. I will conclude by arguing that due process protections should properly be extended to the clemency process in capital cases because of the special role clemency plays in our justice system and so that, in Hamilton's words, justice does not "wear a countenance too sanguinary and cruel."⁹

II. DOES THE CONSTITUTION REQUIRE SPECIFIC CLEMENCY PROCEDURES IN CAPITAL CASES?

The due process protections of the Fourteenth Amendment are important to our system of justice for at least two reasons. As Professor Tribe has argued, due process is valuable instrumentally, as a means of ensuring informational accuracy in decisionmaking, and intrinsically, as a necessary opportunity for those affected by governmental processes to express their human dignity.¹⁰ Both of these considerations are significant in the context of capital clemency decisions. Given the harshness and irrevocability of the sanction that will be imposed if clemency is denied, as well as the ultimately dehumanizing nature of capital punishment,¹¹ enhancement of informational accuracy and of personal dignity are surely desirable as matters of policy. Yet under the terms of the Fourteenth Amendment, due process protections are not triggered unless an individual can establish that the government is depriving him of a constitutionally recognized interest in life, liberty, or property. It is

article would probably enhance the quality of all clemency decisions, to the extent that executive resources are limited they should be used to assure that capital punishment is meted out in the fairest manner possible.

9. THE FEDERALIST No. 74, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

10. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 666-67 (2d ed. 1988).

11. See *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) ("The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity.").

here that those arguing for the extension of due process protections to clemency decisions have fallen short.

A. *The United States Supreme Court*

In *Connecticut Board of Pardons v. Dumschat*,¹² the United States Supreme Court considered whether due process protections of the Fourteenth Amendment apply to non-capital clemency decisions. The Court in *Dumschat* reversed a decision of the Second Circuit Court of Appeals¹³ and held that prisoners sentenced to life in Connecticut prisons did not possess a protectable liberty interest in having their sentences commuted and, hence, were not entitled to procedural due process from the Connecticut Board of Pardons.

The respondents had argued successfully in the courts below that life prisoners possessed a due process right to written statements from the Connecticut Board of Pardons explaining why they had been denied commutation of their sentences.¹⁴ The Second Circuit upheld the trial court's ruling that the Board of Pardons had created a legitimate expectation of clemency and release by virtue of the regularity with which the Board granted clemency to "lifers." The appellate court relied on findings that more than seventy-five percent of Connecticut's prisoners serving life sentences had their eligibility for parole accelerated by the Board through a grant of clemency and that ninety percent of those inmates were then granted parole within their first year of eligibility.¹⁵ According to the appeals court, this "almost invariable practice"¹⁶ and the "overwhelming likelihood" that life inmates would be pardoned and released before completing their minimum terms gave them a liberty interest in clemency proceedings.¹⁷

The United States Supreme Court, by a vote of seven to two, overturned the decision of the Second Circuit.¹⁸ Although the

12. 452 U.S. 458 (1981).

13. *Dumschat v. Board of Pardons*, 618 F.2d 216, 218-22 (2d Cir. 1980) (per curiam) (holding that because inmates had demonstrated a legitimate expectation of commutation, procedural due process protections attached).

14. See *id.* at 217-22.

15. *Id.* at 219-20.

16. *Id.* at 220 (quoting *Dumschat v. Board of Pardons*, 593 F.2d 165, 166 (2d Cir. 1979)).

17. *Id.* The Second Circuit remanded to the district court to determine how many years prisoners with life sentences must serve before the probability of clemency became so significant as to give rise to a protected liberty interest. *Id.* at 221.

18. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981).

Court recognized that a state-created right can, in some circumstances, implicate procedural due process protections, the historically high probability of being granted clemency under the generous practices of the State of Connecticut did not give rise to such a right.¹⁹ According to Chief Justice Burger, the respondents and the courts below had misconceived the nature of the clemency decisionmaking process:

In terms of the Due Process Clause, a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope.²⁰

The mere frequency with which commutations were granted did not create a constitutionally protected liberty interest; instead, in the majority's view, such a claim must be based on "statutes or other rules defining the obligations of the authority charged with exercising clemency."²¹ Since the clemency statute did not provide any standards or criteria and effectively conferred unfettered discretion on the Board of Pardons to grant or deny clemency,²² the Court held that the Connecticut law created no constitutionally cognizable entitlement.

Justice Stevens, in a dissenting opinion joined by Justice Marshall, disagreed with the majority's contention that liberty interests are created solely by state law. For the dissenting Justices, it

19. *Id.* at 463-65.

20. *Id.* at 465 (footnote omitted).

21. *Id.* Justices White and Brennan concurred separately in the judgment, but both emphasized that protectable liberty interests may be found in sources other than state statutes or rules. See *id.* at 467 (Brennan, J., concurring) (sources of liberty interests include "statute, regulation, administrative practice, contractual arrangement or other mutual understanding . . . particularized standards or criteria [which] guide the State's decisionmakers"); *id.* at 468 (White, J., concurring) (not "all liberty interests entitled to constitutional protection must be found in state law").

22. The Connecticut statute in question provided:

(a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the board of pardons.

(b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence.

CONN. GEN. STAT. § 18-26 (1981).

was "'self evident' that individual liberty has far deeper roots."²³ Because of its natural law origins, liberty to some extent survives after conviction regardless of whether state law so provides. Thus, the dissenters reasoned, the decision of the Board of Pardons to grant or deny clemency implicates a prisoner's liberty, and the State violates the Due Process Clause when it acts arbitrarily in making this decision.²⁴ Justices Stevens and Marshall believed that prisoners applying for clemency, unlike ordinary litigants, have few procedural protections against arbitrary action, and at a minimum, are entitled to a brief statement of reasons from the Board of Pardons when clemency is denied.

The *Dumschat* decision is relevant to, but not dispositive of, the issue of what procedures are required in capital clemency cases. First, the case suggests that Fourteenth Amendment procedural protections may apply to the clemency decisionmaking process where the discretion of the decisionmaker, unlike Connecticut, is "fettered" as a matter of state law. The Court found it relevant that the Connecticut clemency statute "imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Board."²⁵ By implication, a clemency scheme which included some or all of these strictures would create a constitutional entitlement worthy of due process protections.

Second, the clemency applicants in *Dumschat* were arguing that they actually had an expectation of receiving clemency, and thus, the Board of Pardons had to explain its reasons for denying it. Consequently, *Dumschat* does not answer the question of whether a capital clemency applicant has an expectation of receiving *meaningful consideration* of his clemency request, regardless of whatever substantive decision is ultimately made.

Perhaps most significantly, the reasoning of the Court in *Dumschat* is applicable only to those cases in which a *liberty* interest is at stake. Since *Dumschat*, the Court has not followed Chief Justice Burger's notion that protectable interests are created solely by state law,²⁶ having held in later cases that liberty interests may

23. 452 U.S. at 469 n.1 (Stevens, J., dissenting) (arguing that all persons are endowed with unalienable liberty rights independent of state laws).

24. *Id.* at 470-71 (Stevens, J., dissenting).

25. *Id.* at 466.

26. Chief Justice Burger in his opinion for the majority simply did not respond to Justice Stevens' assertion that individuals possess a residuum of constitutionally protected liberty

also arise from the Due Process Clause itself.²⁷ However, in the case of a clemency request by a prisoner sentenced to death, is it not an interest in *life* that is being asserted, rather than an interest in liberty?²⁸ A life interest would seem to be extant so long as the person draws breath, regardless of state rules or regulations which might be significant in determining whether an interest in liberty continues. This question is discussed more fully in Section III,²⁹ in which I argue that the decisionmaking process in capital clemency cases must include certain procedural safeguards to ensure that clemency decisions are not made arbitrarily.³⁰

B. *Federal and State Courts*

The question of what procedures are required in capital clemency cases is of more than academic interest. Several lower courts have had occasion to consider this issue and its ultimate resolution will affect not only prisoners currently on Death Row, but also the

even while in the custody of the State. 452 U.S. at 469 (Stevens, J., dissenting). Moreover, the majority's contention that the basis for a protectable liberty interest must be found in either state rules or statutes defining the obligations of the clemency authority fails to take into account several cases in which the Court has found a liberty interest in other sources. See *Ingraham v. Wright*, 430 U.S. 651, 672-74 (1977) (child's interest in physical integrity is a liberty interest because it has historically been protected); *Owen v. City of Independence*, 445 U.S. 622, 633 n.13 (1980) (interest in reputation in conjunction with dismissal from employment constitutes a liberty interest); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.").

27. *E.g.*, *Hewitt v. Helms*, 459 U.S. 460, 466 (1983) (liberty interests may arise from two sources: the laws of the states and the Due Process Clause itself).

28. *But cf.* *Bundy v. Dugger*, 850 F.2d 1402, 1423-24 (11th Cir. 1988) (characterizing the interest being asserted as "liberty"); *Spinkellink v. Wainwright*, 578 F.2d 582, 617-19 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979) (rejecting applicability of due process protections to capital clemency request relying on "liberty interest" cases); *Otey v. State*, 485 N.W.2d 153, 166 (Neb. 1992) (finding that clemency procedures did not implicate a "liberty interest"). These cases are discussed in section II.B., *infra*.

29. See *infra* pp. 214-25 and notes 61-120.

30. In his short concurring opinion in *Dumschat*, Justice Brennan stated that the clemency decisionmaker "can deny the requested relief for any constitutionally permissible reason or for no reason at all." *Dumschat*, 452 U.S. at 467 (Brennan, J., concurring). Thus, he believed that no liberty interest in a pardon existed and due process would not be implicated.

However, it seems unlikely that Justice Brennan would have extended such reasoning to clemency decisions in capital cases. For example, could a decision to deny capital clemency be made in an entirely arbitrary manner? Notwithstanding the vast discretion typically vested in clemency decisionmakers, surely a governor or pardon board could not decide to spare the life of every person whose name begins with the first ten letters in the alphabet. While this might arguably provide a basis for an equal protection challenge, such a practice would most clearly run afoul of the Due Process Clause of the Fourteenth Amendment.

manner in which the death penalty is administered for years to come.

Most state and federal courts which have considered whether the Fourteenth Amendment's Due Process Clause requires that fair procedures be used in ruling on capital clemency requests have answered this question in the negative. In the pre-*Dumschat* case of *Spinkellink v. Wainwright*,³¹ the Fifth Circuit held that an unfavorable clemency decision of the Governor and cabinet of Florida did not infringe or "implicate any interest protected by the Due Process Clause."³² The court essentially relied on two Supreme Court cases in reaching its conclusion. It first cited *Schick v. Reed*,³³ a case which does not pertain to procedural due process, for the proposition that the president has vast "substantive discretion" in exercising the federal clemency power.³⁴ The Fifth Circuit then looked to *Meachum v. Fano*,³⁵ in which the Supreme Court held that a Due Process liberty interest was not implicated by a transfer of a state prisoner to a less comfortable, higher security facility. Based on this authority, the Fifth Circuit held that procedural due process protections did not apply to clemency decisions because such discretionary matters are "not the business of judges."³⁶

The *Spinkellink* court failed to recognize that the commitment of broad substantive discretion in clemency decisions to the executive does not necessarily insulate the decisionmaking process from constitutional strictures. Indeed, the passage from *Schick* quoted by the court suggests that the federal clemency power is subject to limits imposed by the Constitution: "the pardoning power is an enumerated power of the Constitution and . . . its limitations, if any, must be found in the Constitution itself."³⁷ While judges may well be ill-equipped to make substantive judgments about the clemency power, the issue of procedural fairness is plainly the forte

31. 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

32. *Id.* at 619.

33. 419 U.S. 256 (1974).

34. *Spinkellink*, 578 F.2d at 618. The court quoted extensively from *Schick*, in which the Supreme Court held that the President could commute a sentence of death to life imprisonment without possibility of parole.

35. 427 U.S. 215 (1976).

36. *Spinkellink*, 578 F.2d at 619. The court in *Spinkellink* also briefly considered *Sullivan v. Askew*, 348 So. 2d 312 (Fla. 1977), in which the Florida Supreme Court held that separation of powers principles precluded the judiciary from reviewing the executive clemency procedures adopted in capital cases.

37. *Id.* at 618 (quoting *Schick*, 419 U.S. at 267).

of the judiciary. So long as judicial review is limited to process, the discretion of executive decisionmakers to decide whether to grant clemency would be unaffected. In addition, the *Spinkellink* court considered neither the values underlying the Due Process Clause, nor whether clemency decisionmakers have traditionally employed substantially fair procedures in capital cases.³⁸ Thus, its examination of whether due process protections apply in capital clemency cases is incomplete at best.

Nevertheless, the Eleventh Circuit relied on *Spinkellink* in *Bundy v. Dugger*³⁹ and held that due process protections do not apply to requests for clemency in capital cases. The court characterized the interest being asserted by Bundy as one of "liberty" and held that neither Florida law nor the Due Process Clause itself created such an interest.⁴⁰ Thus, according to the court, the Governor did not need to hold a hearing nor make any factual findings in order to deny clemency to a capital defendant. In reaching its conclusion that Florida law did not create a protectable due process interest, the court largely ignored the very detailed procedures required under executive rules adopted by the Governor and the Cabinet in capital clemency cases.⁴¹ Furthermore, it adopted with-

38. Inasmuch as the Supreme Court has looked to tradition to determine whether the dictates of due process are satisfied, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) ("[A] process of law, which is not otherwise forbidden, *must* be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country. . . .") (quoting *Hurtado v. California*, 110 U.S. 516, 528-529 (1884)) (emphasis added); see also, 495 U.S. at 635 (Brennan, J., concurring) (historical background is "relevant" in determining whether due process is satisfied), it would seem reasonable in determining whether an application for clemency in capital cases triggers a protectable interest to determine whether decisionmakers have traditionally utilized basically fair procedures. Although an examination of the process historically followed in capital clemency cases is beyond the scope of this article, it is my sense that most decisionmakers charged with the responsibility of such a weighty decision probably have employed fair procedures. See DiSALLE, *supra* note 4 (describing the comprehensive procedures followed by former Ohio governor Michael DiSalle in making capital clemency decisions); cf. *Solesbee v. Balkcom*, 339 U.S. 9, 13 (1950) (noting that "most if not all governors, like most if not all judges, would welcome any information which might be suggested in cases where human lives depend upon their decision").

39. 850 F.2d 1402 (11th Cir. 1988).

40. *Id.* at 1423-24.

41. These rules may have satisfied due process requirements, but the conclusion that no protected interest is implicated prevented the court from reaching this issue. Appendix A to Justice England's concurring opinion in *Sullivan v. Askew*, 348 So. 2d 312, 319-25 (Fla. 1977), sets forth the rules regarding clemency procedures originally promulgated in 1976 by the Governor and the Cabinet, all of whom are charged with making clemency decisions. Rule 7, *id.* at 321-23, specifically governs capital clemency procedures. The Florida rules have been recently revised. See Joseph B. Schimmel, Comment, *Commutation of the Death*

out examination the *Spinkellink* court's largely unsubstantiated holding that the Due Process Clause itself creates no protectable interest in capital clemency cases.⁴²

Hopefully, the paucity of analysis offered by the Fifth and Eleventh Circuits will not be mirrored by the Eighth Circuit Court of Appeals when it considers this issue in the highly publicized case of Harold Lamont Otey. A federal district court stay of execution based on allegations that the State of Nebraska violated due process in ruling on his clemency request is the only obstacle to Otey becoming the first person executed in Nebraska since 1959.⁴³ Harold Otey was convicted in 1978 of the sexual assault and first degree murder of Jane McManus.⁴⁴ Thereafter, his case worked its way through state appellate and federal habeas processes without success. Finally, on June 7, 1991, two days before his scheduled execution, Otey's attorneys filed an application for commutation of his sentence with the Nebraska Board of Pardons,⁴⁵ a constitutionally created body consisting of the Governor, the Attorney General, and the Secretary of State.⁴⁶

The Board considered Otey's application after a two-day public hearing which allowed unlimited time for attorneys for Otey, attorneys for the State, and the victim's family members to make presentations, and which permitted other interested persons to make five-minute presentations.⁴⁷ The Pardon Board also consid-

Sentence: Florida Steps Back from Justice and Mercy, 20 FLA. ST. U. L. REV. 253, 263-64 (1992). These detailed rules may well create a due process liberty interest under the reasoning of *Dumschat*.

42. The Eleventh Circuit also relied on *Spinkellink* in *Smith v. Snow*, 722 F.2d 630, 632 (11th Cir. 1983), to hold that due process protections do not attach to capital clemency proceedings.

43. *High Court Rejects Nebraska's Bid to Hold First Execution in 33 Years*, HOUSTON POST, Aug. 6, 1992, at A21 [hereinafter *High Court Rejects*].

44. *Otey v. State*, 485 N.W.2d 153, 159 (Neb. 1992).

45. *Id.* at 160. Otey himself contends that he is not guilty despite having given a detailed confession at the time of the murder. *48 Hours: Death By Midnight* (CBS television broadcast, Dec. 2, 1992) [hereinafter *48 Hours*]. However, Otey's attorneys argued for commutation on the basis that he is a "different man than the man fourteen years ago," essentially conceding the issue of guilt. *Otey*, 485 N.W.2d at 160. His case attracted the support of famous writers, including Maya Angelou, Arthur Miller, and Yevgeny Yevtushenko, who joined in an appeal for clemency by the PEN American Center. *Writers Pen Appeal for Death Row Inmate*, ORLANDO SENTINEL, at A2.

46. NEB. CONST. art. IV, § 13. Under Nebraska law, the filing of a clemency application in a capital case stays the execution until the Board issues a ruling. NEB. REV. STAT. § 83-1,132 (1987).

47. *Otey*, 485 N.W.2d at 159-60. The hearing became something of a media event, with many local journalists attending the proceedings, as well as a national news crew from the

ered an investigative report about Otey prepared by the Board of Parole, but a Pardon Board member specifically directed the Parole Board not to give a recommendation regarding clemency.⁴⁸ The Pardon Board was not limited by formal rules of evidence in conducting the hearing and considered various materials presented by attorneys from the Nebraska Attorney General's office, including photographs of the crime scene and Otey's audiotaped confession to police.⁴⁹ Following the close of the hearing, the Board of Pardons voted two to one to deny Otey's commutation application.⁵⁰

After clemency was denied, Otey commenced an action that ultimately reached the Nebraska Supreme Court, alleging that the procedures used in the clemency application process violated, among other things, his due process rights.⁵¹ Otey argued that the procedure used violated the requirements of the Fourteenth Amendment in at least two respects. First, he contended that the presence of Attorney General Stenberg as a decisionmaker on the Board of Pardons was improper because attorneys from his office had appeared on behalf of the State in the proceeding, thereby making Stenberg both prosecutor and arbiter of Otey's clemency request. Second, Otey asserted that by directing the Board of Parole to not make a recommendation regarding Otey's clemency application (in non-capital clemency cases, the Parole Board ordinarily made a recommendation), the Pardon Board deprived him of his due process rights.⁵²

The Nebraska Supreme Court flatly rejected Otey's claims. It held, like the federal courts mentioned above, that the capital clemency application process "does not implicate any interest protected by the Due Process Clause."⁵³ The court relied on *Dumschat* for the proposition that so long as a state does not create an entitlement to receive clemency (as opposed to merely a right to seek clemency), no protected liberty interest exists which triggers due process protections. The court then examined the Nebraska

CBS program *48 Hours*, which devoted an entire program to the Otey case and clemency hearing. *48 Hours*.

48. *Otey*, 485 N.W.2d at 160.

49. *Id.* at 160-61.

50. *Id.* at 161.

51. Otey also alleged that the procedure used violated his right to equal protection guaranteed by the federal and state constitutions. *Id.*

52. *Id.*

53. *Id.* at 165.

Constitution and state statutes governing clemency and determined that because the Board of Pardons has "unfettered discretion to grant or deny a commutation . . . for any reason or for no reason at all," Otey did not have a "liberty interest" in the commutation hearing beyond the right to file an application.⁵⁴

As has been dramatically recounted in the CBS news program, *48 Hours*,⁵⁵ shortly before the scheduled execution, Otey's attorneys filed a petition for a writ of habeas corpus in United States District Court alleging that the commutation hearing was unconstitutional. At the last minute, the district court stayed the execution in order to allow time for briefing and deciding the issues raised in the petition.⁵⁶

The State of Nebraska sought to have the stay lifted by the United States Court of Appeals for the Eighth Circuit, arguing that Otey's claims were disposed of by the *Dumschat* case discussed previously.⁵⁷ By a two to one vote, an Eighth Circuit panel rejected this argument and became the first appellate court to recognize that *Dumschat* did not deal with the question of whether the Fourteenth Amendment protects the right of an individual to receive a fair clemency process:

Dumschat dealt with a very limited argument that there was an expectation of actually receiving a commutation and the state had to explain its reasons for denying the commutation. Otey's argument is far different as it is based on the expectation of receiving a meaningful commutation process, which he argues was denied him by the actions of the Attorney General. . . . We reject the argument that *Dumschat*, with its differing facts, requires us to vacate the stay
. . . .⁵⁸

54. *Id.* at 166. The court then added in dicta that even if Otey was entitled to due process protections at his clemency hearing, the participation of two assistant Attorney Generals did not violate the Fourteenth Amendment because he did not show that he was prejudiced by their participation. Furthermore, he was procedurally barred from raising the issue of whether Stenberg should disqualify himself as a member of the Board of Pardons. *Id.* at 166-67.

55. *48 Hours*, *supra* note 45.

56. *Otey v. Hopkins*, 972 F.2d 210, 211-12 (8th Cir. 1992).

57. *See supra* text accompanying notes 12-30.

58. *Otey*, 972 F.2d at 212. Judge Bowman dissented, interpreting *Dumschat* to mean that due process protections do not apply to the capital clemency process. *Id.* at 213-14 (Bowman, J., dissenting).

Finally, a day before the execution was scheduled to take place, the State of Nebraska sought vacation of the stay by the United States Supreme Court. Attorney General Don Stenberg, whose participation in the commutation hearing Otey contends violated due process, argued the case for the State, asserting that if the Court did not lift the stay it would open a whole new area of appeals for Death Row inmates.⁵⁹ By a six to three vote, the Court refused to vacate the stay.⁶⁰

Otey's case is currently pending before the United States District Court for Nebraska. Regardless of the lower court's decision, the United States Court of Appeals for the Eighth Circuit, and perhaps the United States Supreme Court, will ultimately rule on the issue of whether capital clemency applicants such as Otey are entitled to a constitutionally fair clemency process.

The resolution of this issue is significant because if the capital clemency process is deemed to be subject to Fourteenth Amendment protections, most states and the federal government will be required to reevaluate, and perhaps, overhaul their clemency procedures. It may also mean that in many death penalty cases, an additional layer of state and federal appeals will be added. On the other hand, if the Due Process Clause is held to be inapplicable to capital clemency procedures, future capital clemency applicants could be subjected to more arbitrary or summary procedures when they petition for commutation of their death sentence. The following section considers how this question might best be analyzed in light of Supreme Court precedent and the values underlying the Due Process Clause.

III. TOWARD AN UNDERSTANDING OF THE RELATIONSHIP BETWEEN DUE PROCESS AND THE CLEMENCY PROCESS

The question of whether the protections of the Due Process Clause apply to procedures governing the grant of clemency in capital cases is much more challenging than courts have yet acknowledged. I believe that this underestimation stems from a basic and pervasive misunderstanding about the nature of clemency. Owing to its ancient origins and the traditional lack of standards gov-

59. See *High Court Rejects*, *supra* note 43.

60. *Hopkins v. Otey*, 113 S. Ct. 5 (1992) ("The application to vacate the stay of execution of sentence of death . . . is denied. The Chief Justice, Justice Scalia and Justice Thomas would grant the application.").

erning its exercise, the clemency power is often viewed as arbitrary in its very essence, the embodiment of chance or even God's will.⁶¹ This conception continues today, with observations such as this one by the Nebraska Supreme Court being typical: "[t]he exercise of clemency authority 'is not a right given for a consideration to the individual by the legislature but a free gift from the supreme authority, confided to the chief magistrate, and to be bestowed according to his own discretion.'"⁶²

The notion of clemency as a boon to be magnanimously or arbitrarily bestowed on the condemned by the supreme ruler has outlived its usefulness and should be interred with other relics of monarchical power. As Justice Holmes observed, clemency is now an integral part of our system of justice:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.⁶³

The clemency power exists because "the administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt."⁶⁴ It plays a particularly important role in death penalty cases, for it provides the State with a final, deliberative opportunity to reassess this irrevocable punishment.⁶⁵ Indeed, a system which included capital punishment but did not provide for executive clemency would be,

61. Historically, chance has been thought to play a significant role in the granting of clemency. See 3 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 13-14, 43 (1939) (describing early systems in which chance has played a role in the clemency process, such as the Roman practice of pardoning by chance encounters with vestal virgins and the Germanic practice of pardoning after the criminal manages to survive in a leaky or rudderless vessel).

62. *Otey v. State*, 485 N.W.2d 153, 163 (Neb. 1992) (quoting with approval *Pleuler v. State*, 10 N.W. 481, 489 (Neb. 1881)); see also *Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977) (relying on *American Jurisprudence* for the proposition that the executive clemency power is absolute and may be abused in the grossest fashion without interference by the judiciary).

63. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

64. *Ex parte Grossman*, 267 U.S. 87, 120-21 (1925).

65. *Rockefeller*, *supra* note 4, at 95; see also *DiSALLE*, *supra* note 4, at 6 (former Governor of Ohio noting that the possibility of irrevocable error in death penalty cases prompted him to personally visit condemned prisoners before deciding on clemency).

according to the United States Supreme Court, "totally alien to our notions of criminal justice."⁶⁶

The role of clemency as an integral part of our justice system was recently reaffirmed by the Supreme Court in its opinion in *Herrera v. Collins*.⁶⁷ In *Herrera*, the Court considered whether the Due Process Clause of the Fourteenth Amendment entitled the petitioner to a new trial or to vacation of his death sentence in light of newly discovered evidence supporting his claim that he was innocent. By a six to three vote, the Court held that the Constitution did not require that Herrera's execution be stayed pending an evidentiary hearing on his innocence. The Justices in the majority wrote four separate opinions, three of which focused primarily on what the Justices considered to be the overwhelming evidence of Herrera's guilt.⁶⁸ However, Chief Justice Rehnquist in his opinion for the Court suggested that Herrera was not entitled to a new trial on due process grounds because of the availability of clemency: "[c]lemency is 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."⁶⁹ Thus, executive clemency, which is available in all thirty-six states which authorize capital punishment, is the "'fail safe' in our criminal justice system."⁷⁰ Justice Scalia similarly observed that although the Constitution would allow the execution of an innocent person who had received all of the process that our society has traditionally deemed adequate, convincing evidence of innocence would undoubtedly result in an executive pardon being granted.⁷¹

The Court's reasoning in *Herrera* suggests that due process protections apply to capital clemency decisions. Chief Justice Rehnquist's reliance on clemency as the historical "fail safe" in our justice system is justified only if *meaningful* review of capital clemency requests is mandated by the Constitution. The petitioner

66. *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976)(opinion of Justices Stewart, Powell, and Stevens).

67. 113 S. Ct. 853 (1993).

68. Chief Justice Rehnquist delivered the opinion of the court, with Justice O'Connor concurring and filing an opinion in which Justice Kennedy joined, Justice Scalia concurring and filing an opinion in which Justice Thomas joined, Justice White concurring in the judgment, and Justice Blackmun dissenting and filing an opinion in which Justices Stevens and Souter joined in part. *Id.*

69. *Id.* at 866 (footnotes omitted).

70. *Id.* at 867-68 (quoting KATHLEEN D. MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989)).

71. *Id.* at 875.

in *Herrera* had not yet availed himself of a Texas procedure for seeking clemency because of innocence.⁷² But what if the State of Texas failed to provide a fair procedure for considering capital clemency applications and simply decided whether to grant such requests by lottery?

Given that clemency is an essential part of our system of justice, the assumption that it could be wielded in a blatantly arbitrary or discriminatory manner is simply anachronistic. An analogy can be drawn to executive discretion in deciding whether to prosecute a particular case. Although the executive has broad, some might say "unfettered," discretion to determine whether to enforce the laws in a specific case, it cannot exercise this discretion in a selective manner that violates the Equal Protection Clause of the Fourteenth Amendment.⁷³ In like fashion, the broad executive discretion that exists at the other end of the punishment continuum to decide after conviction whether to commute a sentence does not mean that the clemency authority can be exercised in an arbitrary or discriminatory fashion.⁷⁴ The Supreme Court implicitly recognized as much when it noted that the president may freely exercise the clemency power in a manner "which does not otherwise offend the Constitution."⁷⁵

In view of existing constitutional precedent and the important role clemency plays in our system of justice, it appears that due process protections do apply to clemency procedures, at least in capital cases. *Kentucky Department of Corrections v. Thompson*⁷⁶ is illustrative of the analysis currently employed by the Supreme Court in procedural due process cases. The Court in *Thompson* utilized a two-step test, asking first whether there exists "a liberty

72. *Id.* at 868-69.

73. *Wayte v. United States*, 470 U.S. 598, 607-09 & n.9 (1985) (holding that, although the executive has broad discretion as to whom to prosecute, a decision to prosecute selectively may violate "ordinary equal protection standards"); *United States v. Batchelder*, 442 U.S. 114, 125 & n.9 (1979) (holding that selectivity in the enforcement of federal criminal laws is subject to equal protection constraints).

74. *But cf. Solem v. Helm*, 463 U.S. 277, 301 (1983) (asserting that an executive "may commute a sentence at any time for any reason without reference to any standards").

75. *Schick v. Reed*, 419 U.S. 256, 266 (1974); see also Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569, 617-18 (1991) (arguing that equal protection constraints apply to use of the clemency power); Elkan Abramowitz & David Paget, Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 181-82 (1964) (suggesting that racial discrimination in granting clemency may give rise to an action for violation of constitutional rights).

76. 490 U.S. 454 (1989).

or property interest which has been interfered with by the State," and second, "whether the procedures attendant upon that deprivation were constitutionally sufficient."⁷⁷

Applying this test to the process employed when determining whether to commute a death sentence, the question arises, is the applicant asserting a "liberty" interest, or an interest in life itself? As the above quotation from *Thompson* illustrates, the Court has omitted mention of the protection of life from most discussions of procedural due process. Moreover, virtually all lower courts that have considered due process challenges to capital clemency procedures have analyzed the interest being asserted as one in "liberty."⁷⁸ Generally, these courts rely on *Connecticut Board of Pardons v. Dumschat*,⁷⁹ which characterized the respondents' alleged interests in commutation of their life sentences as "liberty interests."⁸⁰ In *Dumschat*, the Court held that the respondents' interests in liberty via commutation could only be revived by state rules or statutes creating a "right" to clemency.⁸¹ Because no state statute created such a right, the respondents lacked the requisite liberty interest and due process protections were therefore not triggered.

By contrast, it is difficult to say that one who seeks commutation of a sentence of death lacks the requisite protectable interest. An unfavorable decision by the clemency authority will deprive him of life, an interest he presently has (unless we are prepared to make the harrowing admission that for purposes of the Due Process Clause he is already dead).⁸² Justice Stevens' natural law argument

77. *Id.* at 460 (citations omitted).

78. See *supra* text accompanying notes 31-60 discussing *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) *cert. denied*, 440 U.S. 976 (1979), *Bundy v. Dugger*, 850 F.2d 1402 (11th Cir. 1988), and *Otey v. State*, 485 N.W.2d 153 (Neb. 1992).

79. 452 U.S. 458 (1981). See *supra* text accompanying notes 12-30 for a discussion of *Dumschat*.

80. Based on the facts of *Dumschat*, in which the respondents were seeking relief from their confinement, rather than preservation of their life or protection of their property, the Court undoubtedly was correct in identifying the asserted interest as one in "liberty."

81. *Dumschat*, 452 U.S. at 464-65. Presumably this is because, as later cases have indicated, prisoners' liberty diminishes following incarceration. *Hewitt v. Helms*, 459 U.S. 460, 467 (1983). Later cases suggest that liberty interests may also be created independently of state law by the Due Process Clause itself. *E.g.*, *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

82. Along this line, one might argue that once an individual has been convicted and sentenced to death in accord with constitutional procedures, his life is effectively forfeited. Thus, in order to be protected by due process, his "life interest" (as distinct from mere life) must be resurrected through some reasonable expectation based on state rules or statutes or

in *Dumschat*, that a liberty interest continues while one is in the legal custody of the state, has greater force with respect to a "life" interest, since life quite obviously has its "roots" in a source deeper than state law or rules.⁸³ Consequently, the clemency process in a capital case would implicate an interest specifically protected by the Fourteenth Amendment, and any procedure employed in deciding whether to grant clemency would have to comport with due process.

However, even if the Court was to determine that capital clemency decisions implicate "liberty" interests, I believe that procedural due process requirements are nevertheless applicable. *Dumschat* is not dispositive of the issue of whether a capital clemency applicant has a right to fair procedure. As the Eighth Circuit pointed out in *Otey v. Hopkins*,⁸⁴ the respondents in *Dumschat* were alleging that, because of the frequency with which clemency was granted in Connecticut, the Board of Pardons had to explain its reasons for denying commutation in a particular case.⁸⁵ By contrast, the argument for procedural due process advanced in this article is not based on any expectation by the applicant of actually receiving clemency. The relevant expectation which triggers the Due Process Clause is that his capital clemency request *will be given meaningful consideration* by the ultimate decisionmaker.⁸⁶ Such an expectation may be rooted either in the Due Process

the Fourteenth Amendment. Such an argument, as my colleague William Bluth has dryly remarked, would seem to be the ultimate legal fiction.

83. *Dumschat*, 452 U.S. at 468-69 (Stevens, J., dissenting). Recognition that the asserted interest is in life also vitiates what Justice Stevens has characterized as the unsatisfactory distinction, employed for purposes of determining when due process is triggered, between losing what one has and not getting what one wants. *Id.* at 470 (Stevens, J., dissenting). Under this approach, originally put forward in *Greenholtz v. Inmates of the Neb. Penal and Correctional Complex*, 442 U.S. 1, 9-10 (1979), when one is denied what one has (i.e. when punishment is imposed), due process applies, but when one is denied what one wants (i.e. when commutation is denied), due process is not triggered. A capital clemency applicant clearly still has his life, the loss of which will directly and inevitably follow a denial of clemency.

84. 972 F.2d 210, 212 (8th Cir. 1992).

85. The majority in *Dumschat* responded to this argument by noting that, although commutations in the past may have been readily forthcoming, the absolute discretion of the Board to grant or withhold clemency undercut the prisoners' assertion that they had a right to clemency which triggered due process. 452 U.S. at 465-67.

86. In *Otey v. State*, 485 N.W.2d 153, 166 (Neb. 1992), the Nebraska Supreme Court held that the relevant expectation is merely to "seek a commutation." However, such a right to "seek" clemency would be empty indeed if it did not presuppose that an application for capital clemency will receive meaningful consideration.

Clause itself or in specific state procedures used in evaluating requests for clemency in capital cases.

At the outset, it should be noted that there is something of a "chicken or egg" problem inherent in determining whether the Due Process Clause itself creates a liberty interest, which in turn triggers application of the procedural protections of the Due Process Clause. Often, the Court engages in so-called "substantive" due process analysis to determine whether a particular interest is sufficiently important or fundamental to warrant receiving the procedural protections of the Fourteenth Amendment.⁸⁷ When interpreting the Due Process Clause in order to decide whether a protected interest exists, the Court looks to history,⁸⁸ tradition (including existing state practices),⁸⁹ the values underlying the Due Process Clause,⁹⁰ or, occasionally, its own unsubstantiated assertions.⁹¹

Although the United States Supreme Court has never held that a capital clemency applicant has a liberty interest in his request being given meaningful consideration, the Court should recognize such an interest under the Due Process Clause or the Eighth Amendment.⁹² Because clemency is an integral part of our federal

87. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307 (1981) (recognizing due process-based liberty interests in being free from bodily restraint and in being confined in safe conditions); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (recognizing a historic liberty interest in being free of unjustified intrusions on personal security).

88. *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (noting historic roots of liberty interest in being free from bodily restraint and punishment); see also *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (noting that the Due Process Clause "embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history").

89. *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990).

90. See *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 797-801 (1980) (Blackmun, J., concurring in the judgment) (relying on the values of accurate decisionmaking and generating the feeling that justice has been done in order to determine whether a Fourteenth Amendment property interest exists).

91. For example, in *Meachum v. Fano*, 427 U.S. 215, 225 (1976), Justice White wrote for the majority, "[n]either, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system." The majority opinion made no reference to history or prior caselaw to support this conclusion.

92. The Due Process Clause seems to be the most logical source of such a right. However, in its recent death penalty jurisprudence the Court has used the Eighth Amendment's proscription of "cruel and unusual punishment" to impose procedural requirements on the use of capital punishment. E.g., *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). Thus, any challenge to capital clemency procedures should also take into account the protections of the Eighth Amendment.

constitutional scheme and all state systems of justice, it ought to function in a meaningful way. If a criminal punishment system which includes the death penalty, but not executive clemency, is indeed "totally alien" to American notions of justice,⁹³ then it would seem that the dispensing of clemency must be more than a sham or perfunctory exercise.⁹⁴ This is particularly true in death penalty cases where there is a heightened need to be sensitive to the values underlying the Due Process Clause and where clemency is historically the vehicle for preventing miscarriages of justice.⁹⁵ Justice Harlan remarked in *Reid v. Covert*⁹⁶ that capital cases stand on entirely different footing than other offenses, and thus the law is especially concerned with procedural fairness in these cases. Just as the process afforded to one faced with a fine or prison offense may not satisfy the requirements of the Constitution in a capital case, so too due process interests may be implicated in a capital clemency case that are not extant in other clemency requests. Such a distinction is neither "novel, nor is it negligible, being literally that between life and death."⁹⁷

Recognition of the unique nature of the death penalty underlay the Arizona Supreme Court's decision in *McGee v. Arizona State Board of Pardons and Paroles*,⁹⁸ which held that a prisoner applying for commutation of a death sentence is entitled to due process in the form of notice, an opportunity to be heard, and a meaningful hearing. The court noted that if the State is to justify taking a human life, an act that has long been considered immoral, "it must not be done with less formality than the spirit and the traditions of the law contemplate."⁹⁹ Evidently, the *McGee* court believed

93. *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (Stewart, Powell, and Stevens, JJ.).

94. The Court has held that a condemned prisoner has no due process right to an adversarial hearing when the governor has the sole responsibility for determining the sanity of a person as a prerequisite to execution. *Solesbee v. Balkcom*, 339 U.S. 9 (1950). However, *Solesbee* would not be controlling in the context of an executive clemency decision in a capital case today. The Supreme Court effectively overruled *Solesbee* in *Ford v. Wainwright*, 477 U.S. 399 (1986), in which it held that the Eighth Amendment prevents states from executing insane prisoners; thus, the state must employ substantial procedural protections, including an adversarial hearing, when making a sanity determination. 477 U.S. at 416-18. Justice Frankfurter's careful, well-reasoned dissent in *Solesbee*, which relied heavily on historical analysis and the practices used by most states, clearly has more vitality than Justice Black's terse majority opinion.

95. *Herrera v. Collins*, 113 S. Ct. 853, 866 (1993).

96. 354 U.S. 1, 77 (1957) (Harlan, J., concurring).

97. *Id.*

98. 376 P.2d 779, 781 (Ariz. 1962) (en banc).

99. *Id.*

that imposing formal procedural protections benefits not only the individual, but society as well, for these protections give the condemned "his full measure in the struggle against the public's will."¹⁰⁰ Therefore, the court ordered that the Board of Pardons and Parole grant McGee a hearing at which he would be allowed to present evidence that had bearing upon his application for commutation.

Although the opinion in *McGee* does not offer a wealth of reasons supporting its holding, the court appears to have been concerned with the intrinsic value of due process in "generating the feeling, so important to a popular government, that justice has been done."¹⁰¹ As Justice Blackmun has noted, imposing procedural protections may enhance our sense of a decision's legitimacy.¹⁰² And society, no less than the prisoner condemned to death, has an interest in ensuring that capital clemency applicants are "personally *talked to* about the decision rather than simply being *dealt with*."¹⁰³

Just as importantly, procedural protections serve society's interest in assuring that accurate decisions are made in cases involving deprivations of important rights.¹⁰⁴ Generally, in capital proceedings the Court has required that procedures aspire to a higher standard of reliability because death is "the most irremediable and unfathomable of penalties."¹⁰⁵ Thus, due process should require meaningful consideration of capital clemency requests because such decisions are the last chance for the State to identify instances of wrongful conviction or other circumstances that would merit remission of this absolute punishment.

Although a review of past and present clemency procedures in state and federal jurisdictions is far beyond the scope of this article, I believe that traditionally capital clemency requests have been given meaningful consideration by decisionmakers. Undoubtedly, vast majority of states have either formally or informally employed practices designed to ensure that requests for remission of the

100. *Id.*

101. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

102. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 801 (1980) (Blackmun, J., concurring in judgment).

103. TRIBE, *supra* note 10, § 10-7, at 667 (emphasis in original).

104. *Id.* at 666-67.

105. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

death penalty are fairly considered. Anecdotal reports by former governors indicate that they typically take great care to employ fair procedures and obtain as much information as possible when ruling on capital clemency requests.¹⁰⁶ Moreover, a 1988 survey of clemency practices and procedures indicates that while specific procedures vary, most jurisdictions "employ a specific application and investigation process to clemency cases."¹⁰⁷ Thus, in determining whether procedural due process protections apply to capital clemency decisions, courts and litigants should consider historical as well as current practices employed within relevant jurisdictions.

Based on the foregoing, a liberty interest in meaningful consideration may be found in the Due Process Clause itself, thereby triggering its procedural protections. However, as discussed above, it is also possible for state rules and regulations to create a liberty interest that would implicate due process protections. As is true when analyzing the interests inherent in the Due Process Clause, the conclusion one draws concerning creation of a liberty interest by state rules or statutes depends primarily on how the clemency applicant's expectation is characterized. If the condemned is deemed to be asserting an interest in actually receiving clemency, a liberty interest probably will not be found because no state or federal law creates standards which mandate that clemency be granted in a particular case.¹⁰⁸ Thus, as the Fifth and Eleventh Circuits have held,¹⁰⁹ there is no liberty interest because state law

106. See generally *supra* note 4 and sources cited therein.

107. NAT'L GOVERNORS' ASS'N CENTER FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES 9 & Table 8 (1988) [hereinafter GUIDE TO STATE CLEMENCY].

108. Even states which have promulgated standards or guidelines applicable to clemency decisions still permit the decisionmaker absolute discretion in deciding whether to grant clemency. See, e.g., COLO. REV. STAT. § 16-17-102 (1986) (providing that the governor may give weight to a petitioner's "[g]ood character previous to conviction, good conduct during confinement in the correctional facility, the statements of the sentencing judge and the district attorneys . . . and any other material concerning the merits of the application" when making the determination of whether a pardon should be granted); MINN. STAT. § 638.02 (1990) (providing that the Board of Pardons has the discretion to grant a pardon if a petitioner has "been convicted of no criminal acts other than the act upon which such conviction was founded and is of good character and reputation"); WASH. REV. CODE ANN. § 9.94A.150(4) (West 1988 & Supp. 1990) (providing that the governor, upon recommendation from the clemency and pardons board, may grant a pardon "for reasons of serious health problems, senility, advanced age, extraordinary meritorious acts, or other extraordinary circumstances").

109. See *supra* text accompanying notes 30-42.

does not elevate the applicant's asserted interest to more than a "unilateral hope."¹¹⁰

On the other hand, if the interest asserted is characterized as an expectation of receiving meaningful consideration of a capital clemency request, then a liberty interest is much more readily found. Most states have promulgated procedures designed to assure that clemency requests receive meaningful consideration.¹¹¹ Without doubt, an empirical study of clemency practices in jurisdictions which employ the death penalty would demonstrate that virtually all capital clemency requests are closely scrutinized by the decisionmaker. Thus, it hardly seems to be a one-sided hope on the condemned applicant's part that his request will receive meaningful consideration.

For example, Florida has promulgated rules governing the procedure for considering death penalty commutation requests.¹¹² These rules, although less comprehensive than the ones previously in force, still provide for a thorough investigative report by the Parole Commission, a hearing before the Clemency Board with requisite notice to the condemned inmate's attorney, and an opportunity for the applicant to present evidence at the hearing.¹¹³ However, the rules also specify that they are not to be construed as limiting in any way the powers of the Pardon Board and they suggest that the investigation and hearing provisions are triggered only at the Governor's discretion.¹¹⁴ Suppose that the Governor, for whatever reason — personal animus, political expediency, or perhaps administrative oversight — did not request that an investigation and hearing be conducted by the Clemency Board in a capital clemency case. In such an event, would the Constitution allow the application to be summarily denied? I do not believe that it would. Since the State has raised an expectation that requests for commutation of the death sentence will be meaningfully considered, the Due Process Clause imposes a requirement that procedures to ensure meaningful consideration be employed.

110. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981).

111. See generally GUIDE TO STATE CLEMENCY, *supra* note 107.

112. 1992 Florida Rules of Executive Clemency applicable to commutation of death sentences reproduced as Appendix to *Schimmel*, *supra* note 41.

113. *Id.*

114. *Id.* at Rule 15 ("The investigation shall begin immediately after the Commission receives a written request from the Governor.").

Likewise in the *Otey* case,¹¹⁵ by setting up what were obviously intended to be fair and open procedures for the review of Otey's capital clemency request,¹¹⁶ the State of Nebraska created a legitimate expectation on Otey's part that his application would be meaningfully considered. Having created this expectation, the State cannot deviate from minimum constitutional standards of fairness by, as Otey alleges, having the State represented by attorneys who are assistants to one of the clemency decisionmakers.¹¹⁷ In essence, Otey is arguing that the Fourteenth Amendment prohibits states from a sort of procedural "bait and switch": creating an appearance of fairness in clemency procedures, and then failing to provide constitutionally adequate due process.¹¹⁸ This argument has force and the Eighth Circuit was justified in upholding the district court's stay of execution so that these issues could be given careful study.

Finally, if procedural due process is applicable to capital clemency proceedings, exactly what process is due? Moreover, what will be the effect of imposing minimal due process requirements on clemency decisionmakers? Although a comprehensive discussion of these questions is beyond the scope of this article, I would like to touch on them.

Courts engaged in determining the particular process that is due should keep in mind the dual goals of the Due Process Clause: enhancing informational accuracy and creating a sense that justice has been done.¹¹⁹ Due process requires, at a minimum, notice and a hearing at which the applicant is given an opportunity to introduce any arguably pertinent evidence. One of the functions of the clemency process is to allow representatives of the State to consider information which might be relevant to the mitigation of punishment, but which may have been excluded under evidentiary or procedural rules. Thus, the applicant should have broad latitude in

115. *Otey v. Hopkins*, 972 F.2d 210 (8th Cir. 1992). See *supra* text accompanying notes 43-60 for a discussion of the history of this case.

116. See *Otey v. State*, 485 N.W.2d 153, 159-61 (Neb. 1992) (describing application and hearing procedures approved by the Board of Pardons).

117. *Id.* at 161.

118. It would not have been difficult for the State of Nebraska to have remedied this problem. It could have contracted with lawyers independent of Attorney General Stenberg to represent the state in the clemency proceeding.

119. For a thoughtful discussion of what process might be due under the Fourteenth Amendment see Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889 (1981).

introducing evidence so as to further the informational accuracy values of the Due Process Clause. To this end, counsel should be appointed to assist the applicant in making his presentation. Although providing counsel will burden state resources, the added benefits of focusing the clemency hearing on the most significant issues and thereby enhancing informational accuracy justify such an expenditure. In addition, considerations of fairness require that the hearing should take place before an unbiased decisionmaker. Finally, if clemency is denied, a short statement of reasons for the denial will promote both the applicant's and society's sense that the decision has been a considered one and that the applicant has been heard and talked to, rather than simply "dealt with."¹²⁰

The effect of imposing due process protections on capital clemency proceedings would not be as striking as might seem to be the case at first glance. Because most states typically provide meaningful clemency procedures in capital cases, there would not be a profound impact in those jurisdictions. However, where capital clemency review is perfunctory or arbitrary, the upheaval that would occur is absolutely essential in order to assure that clemency functions as a final, deliberative opportunity to consider whether the sentence of death should be imposed, considering all of the circumstances.

One foreseeable danger inherent in imposing due process protections on clemency proceedings is that decisionmakers may lose a sense of the awesome, final responsibility that rests with them to determine whether to commute a sentence of death. They may feel that if they make a mistake, the courts can always correct it. This is a significant concern that can best be met by courts restricting their review of the clemency decision to the *process* by which it occurred, in no way shading into the *substance* of the decision made. Thus, the natural inclination to avoid responsibility when it is diffused among many could be averted.

It is also probable that an effect of imposing the procedural protections of the Fourteenth Amendment on capital clemency proceedings would be the addition of another layer of appeals in some cases. Because requests for commutation of the death penalty are usually not considered until all appeals have been exhausted, this would mean (as it has in the *Otey* case) that the courts could be asked to review what until now has been the "last word" on the

120. TRIBE, *supra* note 10, § 10-7, at 667.

case. Additional delay in imposing the death penalty may be seen as undesirable by many, and perhaps even as enhancing the cruelty of capital punishment. However, once the minimum procedures required under the Constitution have been delineated by the courts, a condemned prisoner presumably would have difficulty in obtaining a stay of execution unless the clemency process employed by the State was highly irregular or patently unfair. Where the condemned could not show any likelihood of success on his procedural due process claim, no stay would be forthcoming and his execution would be delayed slightly, if at all. Thus, the courts should not be hesitant to apply the protections of the Due Process Clause to the capital clemency process.

IV. CONCLUSION

In past ages, those sentenced to death who sought clemency could fuel their faint hopes with belief in favoritism, arbitrariness, divine intervention, or chance. Perhaps on the way to the gallows, they would encounter a vestal virgin; maybe the rope that was to break their neck would itself snap at the final instant, and they would go free. Or perhaps the king would be exceedingly good humored, or seeking to impress a royal consort on the day of execution.

Today, the hopes for clemency of those condemned by the State to die often rest on arbitrariness of a different sort: popular opinion or some subtle combination of the political aspirations and moral courage of the decisionmaker. However, in most instances, the applicant for clemency has open to him an established, regularized procedure whereby he can at least have his case meaningfully considered by those charged with ultimate power of life and death.

It is in supplying both the appearance and essence of fair procedure that I believe the exercise of a clemency today differs from its past haphazard implementation. I have argued in this article that such procedural fairness is not only desirable, but is required by the Due Process Clause of the Fourteenth Amendment. It is my hope that we, as a society, acting through those who execute the laws and those who enforce the Constitution, will not waver in our commitment to fair process, even for those we have judged to be undeserving of life.