Cornell Journal of Law and Public Policy

Volume 23 | Issue 3 Article 4

Case for Actual Innocence

Matthew Aglialoro

NOTE

A CASE FOR ACTUAL INNOCENCE

*Matthew Aglialoro**

In Herrera v. Collins*, the Supreme Court held that a prisoner facing execution could not obtain federal habeas corpus relief for a claim of actual innocence, unless that claim was complemented by an independent constitutional violation. In the course of its opinion, the Court assumed, without explicitly recognizing, that a truly persuasive case of actual innocence would render a defendant's execution unconstitutional. This assumption has caused confusion in the lower courts, and has led to debate over the current status of freestanding claims of actual innocence. Due to developments in DNA technology, as well as the insufficiency of state-court remedies, the time has come for the Court to explicitly recognize a freestanding claim of actual innocence. In doing so, the Court will have to articulate the constitutional basis for entertaining these applications for habeas corpus relief. Although scholars have made several suggestions, both prudential and legal considerations suggest that a court should rely upon the Eighth Amendment. Only the Eighth Amendment offers sufficient protection for defendants raising freestanding claims of actual innocence as the basis for habeas relief.*

* B.A., Baruch College—The City University of New York, 2009; Candidate for J.D., Cornell Law School, 2014; Senior Articles Editor, *Cornell Law Review*, Volume 99. I would like to thank Professor Keir M. Weyble for his insight and helpful comments throughout the editing process. I would also like to thank Sue Pado for her dedication, support, and friendship. I am also extremely grateful for the hard work of the associates and editors of the *Cornell Journal of Law and Public Policy*. Finally, I would like to thank Jade Harry for her unwavering love and never-ending patience.

INTRODUCTION

Imagine a prisoner sitting on death row for a triple homicide. After receiving a fair trial, represented by a competent attorney in state court, the defendant appealed his conviction through every state avenue available to no avail. Imagine then, newly discovered evidence calls the defendant's conviction into doubt. Having exhausted all of his appeals at the state level, the prisoner applies for a writ of habeas corpus in federal court under 28 U.S.C. § 2254, contending that his imprisonment is in violation of the Constitution.[1] Having received a fair trial in state court, the prisoner enters with no claim other than his innocence. Should the court grant relief and overturn the state conviction?

In *Herrera v. Collins*, the Supreme Court held that a prisoner's claim of actual innocence in the face of execution does not entitle him to habeas corpus relief, unless that actual innocence claim was complemented by another claim asserting an independent constitutional violation.[2] Although Herrera alleged that his imprisonment in light of new evidence proving his innocence amounted to violations of the Eighth and Fourteenth Amendments, the Court determined that such violations, if they existed at all, occurred only after his state criminal proceedings. Because the constitutional violations did not impact the fairness of his state court trial, the violations could only serve as the "basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits."[3] Indeed, the Court emphasized that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence."[4]

In rejecting Herrera's freestanding claim of actual innocence, however, the Court did not completely dismiss the possibility that claims of actual innocence could serve as the basis of federal habeas corpus relief.

---

[1] Section 2254 grants federal courts and the justices therein jurisdiction to entertain an application for a writ of habeas corpus from a prisoner in state custody, where the prisoner contends "that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (2011). A writ of habeas corpus cannot be granted under this provision, however, unless the defendant is able to overcome a substantial number of substantive and procedural bars. *See id.* § 2254(b)–(e).

[2] *See* Herrera v. Collins, 506 U.S. 390, 398 (1993) ("[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.").

[3] *Id.* at 416.

[4] *Id.* at 401. The Court's fear seems to be based in disrupting underlying notions of federalism. Further, states have a strong interest in finality of judgments within their respective courts and federal courts should not relitigate final state judgments. *See* Brecht v. Abrahamson, 507 U.S. 619, 635 (1993).

Quite the contrary, in dismissing Herrera's claim the Court "assume[d], for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."[5] Herrera's claim of innocence, the Court stated, "falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist."[6]

Although the Court's assumption was merely dicta, it generated widespread debate over the viability of actual innocence claims.[7] A closer look at the varying opinions in *Herrera* also reveal that even though the holding of the case was announced by five members of the court, a different majority of justices signaled support for the assumption in the opinion of the court. Overall, a larger majority of the Court's members suggested that the execution of a defendant with a truly persuasive case of actual innocence would be unconstitutional, even in the absence of another claim. In a separate concurrence, Justice White explicitly assumed that a truly persuasive claim of actual innocence would entitle a state prisoner to federal habeas corpus relief.[8] Justice Blackmun, joined by two other Justices indicated full support of a claim of actual innocence serving as the basis for federal habeas corpus relief.[9] Indeed, the only justices that explicitly rejected the idea that a truly persuasive case of actual innocence could serve as the basis for federal habeas corpus relief were Justices Scalia and Thomas. Justice Scalia's entire concurrence was devoted to refuting the idea that actual innocence could provide independent relief.[10]

---

5 *Herrera*, 506 U.S. at 417–19.

6 *Id.*

7 *See, e.g.*, William D. Darden, Herrera v. Collins*: The Right of Innocence: An Unrecognized Constitutional Privilege*, 20 J. CONTEMP. L. 258 (1994); Kathleen Cava Boyd, *The Paradox of "Actual Innocence" in Federal Habeas Corpus After* Herrera v. Collins, 72 N.C. L. REV. 479 (1994); Michael J. Muskat, *Substantive Justice and State Interests in the Aftermath of* Herrera v. Collins*: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131 (1996).

8 *See Herrera*, 506 U.S. at 429 (White, J., concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial . . . would render unconstitutional the execution of petitioner."). Although Justice O'Connor joined the majority, she also wrote a concurring opinion, in which she made a similar assumption. *See id.* at 427 (O'Connor, J., concurring) ("Nowhere does the Court state that the Constitution permits the execution of an actually innocent person.").

9 *See id.* at 430–31 (Blackmun, J., dissenting) ("We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. . . . I do not see how the answer can be anything but 'yes.'").

10 *See id.* at 427–28 (Scalia, J., concurring) ("There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to de-

It may seem obvious that executing an innocent prisoner would be unconstitutional, even if innocence was not proven after a full and fair jury trial. In reality, innocence jurisprudence is far more complicated. To start, there is a significant difference between actual innocence and legal innocence. The former has played a very limited role in cases involving review of a defendant's conviction. Rather, courts focus on a prisoner's legal innocence on collateral review, analyzing whether the state provided sufficient process during the defendant's trial.

Nevertheless, *Herrera* left the door open, whether intentional or not, for courts to give greater consideration to actual innocence. As discussed above, even though the majority rejected Herrera's Eighth and Fourteenth Amendment claims,[11] the Court did not completely foreclose a defendant from claiming actual innocence. Further, in the twenty years since *Herrera*, the Supreme Court has articulated only vague and conflicting opinions regarding freestanding claims of actual innocence as the basis for habeas corpus relief.

This Note examines the plausibility of actual innocence claims serving as the basis for habeas corpus review. Part I begins with a brief explanation of innocence in the context of freestanding claims of actual innocence. As noted, courts distinguish between actual and legal innocence, a distinction which makes a difference for prisoners seeking relief. In Part II, I argue that it is time for the Court to rethink its decision in *Herrera*. For one, the Court relied on the availability of state clemency as an avenue of last resort for prisoners claiming actual innocence. However, state clemency is rarely granted, and the decision to grant clemency is largely unrelated to a defendant's innocence. In addition, the last twenty years has seen significant advances in the use of DNA evidence to exonerate the wrongly convicted. When *Herrera* was decided, the use of DNA evidence to exonerate prisoners was almost unheard of. Indeed, not once did the Court in *Herrera* discuss the possibility that DNA evidence could serve as the basis for a freestanding claim of actual innocence. This may suggest that the Court was unable to conceptualize a truly persuasive case of actual innocence, and therefore refrained from extending itself further than it had to on the question. But DNA evidence, unlike any evidence preceding it, can provide near-definitive proof of innocence. As such, the Court should consider the potential of DNA evidence in supporting actual innocence claims. Support for this

---

mand judicial consideration of newly discovered evidence of innocence brought forward after conviction.").

[11] *Id.* at 416 (majority opinion) ("Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations *occurring in the course of the underlying state criminal proceedings*.") (emphasis added).

can be found in recent habeas jurisprudence, which raises significant questions about the staying power of *Herrera*.

If the Court were to reconsider *Herrera*, a freestanding claim of actual innocence would need to serve as the independent basis for relief. Under this interpretation, § 2254 would require the Court to articulate a constitutional ground for entertaining the petitioner's habeas corpus application. That is, the Court would need to determine what constitutional violation is implicated by the detention and execution of a person claiming innocence. Part III analyzes several potential constitutional violations discussed in the current scholarship. Although each of these choices warrants thoughtful consideration, they ultimately all suffer deficiencies that make them unreliable. In Part IV, I recommend that courts look to the Eighth Amendment as the source that courts may rely upon when granting habeas corpus applications for prisoners with freestanding claims of innocence. In addition to not suffering from the same deficiencies as the constitutional provisions discussed in Part III, the Eighth Amendment's history and current understanding support freestanding claims of actual innocence as a basis for entertaining habeas corpus petitions.

I. AN ACTUAL INNOCENCE CLAIM EXPLAINED

Critical to understanding freestanding claims of actual innocence is the distinction between actual innocence and legal innocence. A defendant seeking relief based on legal innocence, or "legal insufficiency," contends that the prosecutor has failed to produce sufficient evidence at a criminal trial to establish guilt beyond a reasonable doubt.[12] Conversely, a defendant seeking relief based on actual innocence contends that he or she did not commit the crime alleged, regardless of the judge or jury's finding of legal innocence.[13] Unlike a legal innocence, actual innocence focuses entirely on the factual predicate of the offense.[14]

---

[12] *See* Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 AM. CRIM. L. REV. 121, 122 (2005); Jennifer Gwynne Case, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 WM. & MARY L. REV. 669, 677–78 (2008).

[13] *See* Lee Kovarsky, *Custodial and Collateral Process: A Response to Professor Garrett*, CORNELL L. REV. ONLINE 1, 14 (2013), http://cornelllawreview.org/files/2013/07/Kovarskyformatted.pdf. Some scholars separate innocence into more than two categories. *See, e.g.*, Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971, 975–79 (2002); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 331 n.4 (1995); Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456 (2001). Others argue that the categorization of innocence is irrelevant. *See* Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1160 (2011) (arguing that distinction between actual and factual innocence fails to capture the legal standards governing the two categories).

[14] *See* Bousley v. United States, 523 U.S. 614, 615 (1998) ("[A]ctual innocence means factual innocence, not mere legal insufficiency.") (internal quotation marks omitted).

Of course, a defendant may raise an actual innocence claim in conjunction with other procedural claims. In such a case, the prisoner ultimately seeks to prove legal insufficiency, but relies partially on evidence of his actual innocence. The Court has held that the convicted prisoner may receive habeas corpus relief if the constitutional violation *more likely than not* resulted in a wrongful conviction.[15] When a defendant claims actual innocence independent and unaccompanied by any other claim, though, it is referred to as a "freestanding" actual innocence claim.[16] For claims of freestanding actual innocence, a prisoner seeks only to rebut the factual findings of the crime for which he was convicted.[17]

A federal habeas corpus court may review a state court's finding of legal guilt based on a claim that the state court failed to provide constitutionally sufficient process.[18] For example, under *Strickland*, a state's failure to provide a defendant effective assistance of counsel would cast doubt on the validity of the state court's guilty verdict.[19] A *Strickland* claim calls into question the defendant's legal guilt because it implicates a potential flaw in the trial process that is constitutionally required to find a defendant guilty beyond a reasonable doubt.[20] In such a case, a defendant's actual innocence is only tangentially related to the *Strickland* claim. That is, although actual innocence may provide a basis under which a defendant can show that the outcome of his trial would have been different but for the procedural error, it is neither sufficient nor necessary to do so succeed on a *Strickland* claim. [21]

---

15 *See* Schlup v. Delo, 513 U.S. 298, 326–27 (1995) ("Accordingly, we hold that the *Carrier* "probably resulted" standard rather than the more stringent *Sawyer* standard must govern the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.").

16 *See* Gregg Walters, *The Freestanding Claim of Innocence—The Supreme Court of Illinois Breaks Lockstep but Leaves Material Issues Unresolved*, 22 S. ILL. U. L.J. 763, 763 n.5 (1998) ("A 'freestanding claim of innocence' is a claim seeking relief based on newly discovered [evidence] that is not being used to supplement an assertion of a constitutional violation in the trial that led to conviction.").

17 *See* John M. Leventhal, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(G-1)?*, 76 ALB. L. REV. 1453, 1455 (2013) ("Claims of actual innocence arise when a petitioner asserts that he is factually innocent of the convicted crime in post-conviction litigation.").

18 *See* 28 U.S.C. § 2254 (2011).

19 *See* Strickland v. Washington, 466 U.S. 668, 684 (1984) ("In a long line of cases . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.").

20 *Id.*

21 *See id.* at 694. Defendant does not need to show that he was actually innocent in order to succeed under *Strickland*. Rather, a defendant need only show that there is a *reasonable probability* that the outcome of his trial would have been different. *Id.*

Under *Herrera*, however, a federal habeas court could not entertain an application for habeas corpus from a prisoner with new evidence that tended to show his innocence, because evidence of actual innocence, by itself, does not entitle a prisoner to habeas corpus relief.[22] Unlike legal innocence, which implicates constitutionally-required processes, the determination of actual innocence is largely a factual inquiry, a function traditionally completed by the state court.[23] Because "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact,"[24] actual innocence is not seen as a proper basis of habeas corpus relief on collateral review. Although one may argue that newly discovered evidence calls into question the sufficiency of the evidence produced at trial, and thus implicates the defendant's legal innocence, sufficiency review only extends to evidence already on the record at the time of trial.[25] Quite counterintuitively then, a prisoner may have a better chance at habeas corpus relief when pursuing a claim implicating procedural deficiency, such as ineffective assistance of counsel, even if a highly factual inquiry is involved, than when pursuing a fairly straightforward, albeit substantive claim of actual innocence.[26]

Nevertheless, the Court in *Herrera* failed to completely foreclose the possibility of habeas corpus relief for freestanding claims of actual innocence in capital cases.[27] A sufficiently persuasive claim of actual innocence would presumably serve as the underlying constitutional claim required for a defendant to receive relief. In other words, a freestanding claim of innocence that is overwhelmingly persuasive, but unaccompanied by a claim of legal insufficiency might qualify a defendant for habeas relief.

II. CASE FOR ACTUAL INNOCENCE

In *Herrera*, the Court only assumed that a truly persuasive case of actual innocence would provide a basis for habeas corpus relief. In rejecting Herrera's claim of actual innocence, the Court relied heavily on the availability of state clemency as a stopgap for faulty verdicts. The reliance on state clemency proceedings, however, is improper for several reasons. In addition, the Court's mere assumption that a persuasive case of actual innocence could serve as the basis for habeas corpus relief

---

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

23 *See* Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (noting that a federal habeas court should only overturn factual determinations by a state court if they are objectively unreasonable).

24 *Herrera*, 506 U.S. at 400.

25 *See id.* at 401–02.

26 *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1638 (2008).

27 *Herrera*, 506 U.S. at 417–19.

could be a result of the Court's inability to imagine a truly persuasive case of innocence. At the time *Herrera* was decided, DNA evidence was rarely used as a tool for exoneration. Today, truly persuasive exonerating evidence is more likely to become available after a state court conviction because of the reliability of DNA evidence. This, along with the insubstantiality of state court clemency, suggest that the Court should reconsider its mere assumption and allow freestanding claims of actual innocence to serve as the basis for habeas corpus relief.

A. Clemency Proceedings

The Court in *Herrera* failed to explicitly recognize a freestanding actual innocence claim as the basis for habeas corpus relief. In so doing, the Court relied upon the existence of state clemency proceedings as the primary outlet for prisoners with innocence claims.[28] In fact, the majority iterated that "[e]xecutive clemency has provided the 'fail safe' in our criminal justice system."[29] Since *Herrera*, courts have relied on this reasoning to justify the denial of freestanding claims of actual innocence.[30]

In *Royal v. Taylor*, for example, the court dismissed petitioner's actual innocence claim because "state clemency proceedings provide the proper forum to pursue claims of actual innocence based on new facts."[31] There, the Fourth Circuit implied that federal habeas corpus relief for actual innocence would only be proper if there were no state remedies available. Because Thomas Lee Royal Jr. had Virginia's state clemency proceedings available to him, there could be no habeas relief for actual innocence.

Courts' reliance on state clemency proceedings as a stopgap for habeas corpus relief is improper for several reasons. First, the chances of receiving clemency are very slim. In Virginia, where Royal was denied habeas relief, only eight capital defendants have received clemency since the death penalty was reenacted in 1976.[32] In the same time period, 110 capital defendants were put to death.[33] To shed greater light on the discrepancy, Texas has executed 506 capital defendants since 1976 while only granting clemency to two defendants.[34] The slim chance of receiv-

---

28 *See id.* at 415–17.

29 *Id.* (citing KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989)).

30 *See, e.g.*, Royal v. Taylor, 188 F.3d 239, 243 (4th Cir. 1999); Coleman v. Thaler, 716 F.3d 895, 908 (5th Cir. 2013) ("And we have implied that . . . the availability of clemency in Texas would defeat a freestanding innocence claim.").

31 *Royal*, 188 F.3d at 243.

32 *See State by State Database*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/state_by_state (last visited Mar. 7, 2014).

33 *Id.*

34 *Id.*

ing clemency cautions against relying on such a proceeding as the last hope for the actually innocent. Federal prisoners seeking executive clemency face and equally minute chance of success, as only one defendant has received clemency since the federal government reinstated the death penalty in 1988.[35]

Second, the decision to grant clemency is based largely on politics, rather than the defendant's innocence. In a majority of states, the power to grant clemency lies with the governor, who either has sole discretion or may ignore recommendations from pardon boards. [36] As such, a prisoner's innocence may take a backseat to political considerations.[37] A prominent example of political aspirations undermining an executive's decision on a clemency appeal occurred during the 1992 Presidential primary election. In the winter of 1992, President Clinton, then Governor of Arkansas, refused to issue an order of executive clemency to prevent the execution of convicted murderer Rickey Ray Rector.[38] Mr. Rector was convicted and sentenced to death in 1982 for the murder of two individuals, one of whom was a police officer; after shooting the officer, Mr. Rector shot himself in the head, destroying part of his brain in the process.[39] The court upheld Mr. Rector's death sentence over the objections of defense lawyers who claimed Mr. Rector's impairment made him ineligible for the death penalty.[40] After exhausting all avenues of appeal, Mr. Rector's defense team sought clemency. President Clinton refused to grant clemency, and many argued that doing so was a way for the electorate to view him as tough on crime in the face of a tough primary and general election.[41] In further proof of Mr. Rector's incapacity,

---

35 *See Federal Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/federal-death-penalty?scid=29&did=147#statutes (last visited Mar. 7, 2014).

36 *See Clemency Process by State*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/clemency (last visited Mar. 7, 2014). *See, e.g.*, Cary Aspinwall, *Governor Denies Clemency for Oklahoma Death-Row Inmate*, TULSA WORLD, June 13, 2013, http://www.tulsaworld.com/archives/governor-denies-clemency-for-oklahoma-death-row-inmate/article_773975dc-260a-5c82-8c6a-5013cf8c2a87.html (noting that Governor Fallin of Oklahoma denied clemency to Brian D. Davis, despite a recommendation from the Pardon and Parole Board recommending to commute his sentence by a vote of four to one); *Texas Man Executed After Clemency Denied*, NBCNEWS.COM (Nov. 20, 2009, 2:28:28 AM), http://www.nbcnews.com/id/34041283/#.Unhv77_aZUQ (noting Texas Governor Perry's denial of clemency over the Parole Board's recommendation to commute Robert Lee Thompson's sentence to life in prison).

37 *See, e.g.*, Evelyn Nieves, *Schwarzenegger Clemency Denial Called Politically Safe*, WASH. POST, Dec. 14, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/13/AR20051213.html.

38 Peter Applebome, *Arkansas Execution Raises Questions on Governor's Politics*, N.Y. TIMES, Jan. 25, 1992, § 1, at 8.

39 *Id.*

40 *Id.*

41 *Id.*; *see also* Alexander Nguyen, *Bill Clinton's Death Penalty Waffle*, THE AMERICAN PROSPECT, Dec. 19, 2001, *available at* http://prospect.org/article/bill-clintons-death-penalty-waffle (noting that President Clinton started to change his views on the death penalty after

supporters point to Mr. Rector's last meal, which included pecan pie uneaten by Mr. Rector because he believed that he could save it for after his execution.[42]

Aside from political pressures, governors often apply their personal views in clemency cases, views that are inconsistent with our legal system. Even if governors familiarize themselves with the facts of a particular proceeding, their ability to interpret and apply the law is far from unimpeachable, especially since governors are not experts on the law.[43] In some cases, governors consider extralegal factors, such as prayer or God in their decision to grant or deny clemency.[44]

Last, a state governor's decision to deny executive clemency would not resolve a constitutional deficiency if one existed. That is, if executing a defendant raising a persuasive case of actual innocence was unconstitutional, the governor's failure to grant clemency would not remedy the constitutional violation.[45] Indeed, one of the purposes of federal habeas corpus under § 2254 is to ensure that state law has not violated the Constitution.[46] Therefore, the federal right of an actually innocent person not to be executed exists whether or not the state provides relief.

B. Technological Advancements Since Herrera

Although there are several scenarios that can lead a defendant to raise a freestanding innocence claim, the discovery of new DNA evidence is one of the more persuasive scenarios based on its accuracy. The emergence of DNA evidence is of particular profundity since it can pro-

---

embarrassingly losing his bid for reelection of Governor of Arkansas in 1980 to Republican Frank White who accused him of being soft on crime).

42 *Ricky Ray Rector*, FAMOUS LAST MEALS (Sept. 22, 2010, 8:29 PM), http://www.famouslastmeals.com/2010/09/ricky-ray-rector.html; *see also* CHRISTOPHER HITCHENS, *Chameleon in Black and White, in* NO ONE LEFT TO LIE TO: THE VALUES OF THE WORST FAMILY 35 (2000).

43 Approximately half of U.S. governors attended law school. See NAT'L GOVERNORS ASS'N, GOVERNORS OF THE AMERICAN STATES, COMMONWEALTHS AND TERRITORIES (2013), *available at* http://www.nga.org/files/live/sites/NGA//pdf/BIOBOOK.PDF (providing information on the education of each state's governor).

44 *See, e.g.*, Tony Anaya, *Statement by Toney Anaya on Capital Punishment*, 27 U. RICH. L. REV. 177, 177 (1993) (quoting former governor of New Mexico, who "consistently opposed capital punishment as being inhumane, immoral, *anti-God*, and incompatible with an enlightened society") (emphasis added).

45 *See* Estelle v. McGuire, 502 U.S. 62, 68 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); Williams v. Jones, 571 F.3d 1086, 1090 (10th Cir. 2009) ("We think it axiomatic that the remedy for a properly presented constitutional violation should not be frustrated by the sentencing options available under state law, but rather should be consistent with federal law.").

46 *See* 28 U.S.C. § 2254(a) (2011) ("The Supreme Court . . . shall entertain an application for a writ of habeas corpus . . . only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.").

vide near definitive proof of innocence after a defendant has been convicted and sentenced to death in an otherwise error-free trial.[47]

The use of DNA evidence to exculpate suspects is by no means new by today's standards. When the Court decided *Herrera* in 1993, however, DNA testing was still in its infancy.[48] It was not until the mid-to-late 1990's that DNA testing emerged as a viable tool for exoneration.[49] It is reasonable, therefore, that the Court failed to recognize or discuss the possibility that DNA evidence could serve as overwhelming proof that a defendant's claim of innocence was more than just persuasive. Nevertheless, the Court's failure to foresee the rise of DNA evidence represents a fatal flaw in its discussion of freestanding claims of actual innocence. The Court even reasoned that relying on habeas corpus as a venue for retrials was unreliable due to the significant passage of time, the fading of memories and the degradation of evidence.[50] While this is true for many types of evidence, including witness testimony and physical evidence, DNA evidence is an important exception to the rule. Although the degradation of physical evidence may lead to unreliable DNA results, DNA evidence can remain pristine and accurate for a number of years if the biological material is properly stored.[51]

Even though Herrera's innocence claim was not based on DNA evidence, the Court's failure to address the issue while analyzing actual innocence claims is striking evidence that the Court failed to consider the advances in the field and the impact it would have on proving innocence.

---

47 *See* Melissa Duncan, *Finding a Constitutional Right to Access DNA Evidence: Post-conviction*, 51 S. TEX. L. REV. 519, 522 (2009) ("[T]he reliability of DNA evidence will permit it to exonerate some people who would have been wrongfully accused or convicted without it." (quoting NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996))); Jennifer Eckroth, *Tainted DNA Evidence and Post-conviction Reversals in Houston, Texas: Suggested Solutions to Curb DNA Evidence Abuse*, 31 AM. J. CRIM. L. 433, 437 (2004) (describing the accuracy of DNA evidence).

48 *See* Garrett, *supra* note 26, at 1658–59.

49 *See id.* at 1669.

50 *See* Herrera v. Collins, 506 U.S. 390, 403–04 (1993) ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." (quoting McCleskey v. Zant, 499 U.S. 467, 491 (1991) (internal quotation marks omitted)).

51 *See* Amy Dunn, *Criminal Law—Statutes of Limitation on Sexual Assault Crimes: Has the Availability of DNA Evidence Rendered Them Obsolete?*, 23 U. ARK. LITTLE ROCK L. REV. 839, 860 (2001) ("Both the accuracy and longevity of DNA evidence are far superior to that of any other type of evidence . . . ."); *see* Rich Phillips, *Florida Man Exonerated, Freed from Prison After 35 Years*, CNN (Dec. 17, 2009), http://www.cnn.com/2009/CRIME/12/16/florida.dna.exoneration/.html (describing how DNA evidence was used to exonerate a falsely-convicted prisoner); *New DNA Testing Frees Convicted Colorado Rapist, Killer*, NBCNEWS (Apr. 30, 2012), http://usnews.nbcnews.com/_news/2012/04/30/-new-dna-testing-frees-convicted-colorado-rapist-killer?lite (describing how DNA evidence was used to exonerate a prisoner after more than sixteen years in jail).

The *Herrera* Court's failure to foresee the rise of DNA evidence indicates that they were perhaps unable to conceptualize a truly persuasive case of actual innocence. This would explain why the Court merely assumed that a strong showing of innocence would render a defendant's execution unconstitutional. Data since *Herrera* shows that DNA evidence has played a significant role in the upward trend of exonerations each year.[52] In 1993, there were less than five exonerations by way of DNA.[53] In each subsequent year since, there have been at least five DNA exonerations, with most years ranging between fifteen and twenty-five.[54]

C. Lower Court Rulings on Actual Innocence

Since *Herrera*, courts have adopted varying approaches to claims of actual innocence. Some circuits continue to insist that there can be no habeas relief based solely on a claim of actual innocence.[55] Still, many other courts support, at least in theory, a freestanding claim of actual innocence despite the availability of state court remedies.[56]

In *Felker v. Turpin*, the court recognized two distinct reasons for denying the petitioner's habeas claim.[57] First, the petitioner had failed to

---

52 *See Fact Sheets*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php# (last visited Nov. 2, 2013) (claiming that there have been 311 post-conviction DNA exonerations in the United States, 244 of them occurring since 2000).

53 *See DNA Exoneree Case Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited Nov. 2, 2013).

54 *See id.*

55 *See, e.g.*, Royal v. Taylor, 188 F.3d 239, 243 (4th Cir. 1999) ("Because federal habeas relief exists to correct constitutional defects, not factual errors, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" (quoting *Herrera*, 506 U.S. at 400)); Graves v. Cockrell, 351 F.3d 143, 151 (5th Cir. 2003) ("The Fifth Circuit has . . . held that claims of actual innocence are not cognizable on federal habeas review."); United States v. Evans, 224 F.3d 670, 674 (7th Cir. 2000) ("We know from *Herrera v. Collins* that a conviction does not violate the Constitution (or become otherwise subject to collateral attack) just because newly discovered evidence implies that the defendant is innocent.").

56 *See, e.g.*, Robinson v. Dinwiddie, No. CIV-07-432-D, 2009 WL 2778657, at *5 (W.D. Okla. Aug. 31, 2009) ("Even if a freestanding actual innocence claim in a non-capital case were cognizable in a federal habeas action, a review of the record demonstrates that Petitioner has failed to make the required 'extraordinarily high' showing." (citing *Herrera*, 506 U.S. at 417)); Tomlinson v. Burt, 509 F. Supp. 2d 771, 776 (N.D. Iowa 2007) ("While the Supreme Court did not clearly articulate the quantum of proof necessary for a claim based solely on actual innocence . . . , it is evident that such claims require that the court be 'convinced that those new facts unquestionably establish [the defendant's] innocence.'" (citing Schlup v. Delo, 513 U.S. 298, 317 (1995))); *In re* Davis, 565 F.3d 810, 817 (11th Cir. 2009) ("We likewise have recognized the possibility of freestanding actual innocence claims . . . ." (citations omitted)).

57 *See* Felker v. Turpin, 83 F.3d 1303, 1312 (11th Cir. 1996)

pursue all of the state remedies that were available to him.[58] This argument is similar to the one adopted in *Royal*.[59] However, the court also recognized that petitioner's actual innocence claim "failed to persuasively demonstrate his actual innocence."[60] Reliance on both the availability of state court remedies and the failure to raise a truly persuasive claim of innocence suggests that the court was willing to consider a freestanding claim of actual innocence, *even if* state remedies failed to provide relief. The availability of state clemency, therefore, would not prevent a petitioner from relief if the petitioner presented a truly persuasively claim of actual innocence.[61]

Several other recent cases come to a similar conclusion. At first, these courts state that they cannot grant relief based on freestanding claims of actual innocence.[62] The courts then go on to assume, however, that a truly persuasive claim of actual innocence may warrant relief, but that defendants failed to meet the high standard.[63]

---

[58] *Id.*

[59] *See Royal*, 188 F.3d at 253.

[60] *Felker*, 83 F.3d at 1312.

[61] Even assuming that actual innocence can provide an independent basis of relief, a widely debated topic is what the threshold showing must be to succeed on a claim of actual innocence. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 442 (1993) (Blackmun, J., dissenting) (arguing for a "probably is innocent" standard); Garrett, *supra* note 26, at 1636–37 ("The Court's 'more likely than not' standard in *Schlup* already provides a logical standard of review for [an actual innocence] claim."). Most courts that have recognized actual innocence claims rely on *Herrera*'s "truly persuasive" standard. *See* White v. Keane, 51 F. Supp. 2d 495, 504 (S.D.N.Y. 1999); *In re* Davis, No. CV409-130, 2010 WL 3385081, at *30 (S.D. Ga. Aug. 24, 2010) ("The consensus among the states appears to be that a truly persuasive demonstration of innocence subsequent to trial renders punishment unconstitutional."). Some courts, however, have evinced a slightly different standard. *See* Enoch v. Gramley, 861 F. Supp. 718, 731 (C.D. Ill. 1994) ("Upon reviewing the evidence presented by Petitioner as well as the record as a whole, the Court finds that Petitioner has failed to show that in light of all the evidence, he is probably innocent."); Marino v. Miller, No. 97-CV-2001(JG), 2002 WL 2003211, at *10 (E.D.N.Y. Aug. 22, 2002) (adopting a fundamental fairness test). Although this is outside the realm of this Note, any standard evinced by the Court would have to be a relatively high one to balance the values of comity and finality. *See Herrera*, 506 U.S. at 417. That being said, new DNA evidence tending to show one's innocence would almost certainly meet any standard that the Court expresses.

[62] *See* Garcia v. Cash, No. EDCV 11-1869 GAF FFM, 2013 WL 1010368 (C.D. Cal. Jan. 29, 2013), *report and recommendation adopted*, No. EDCV 11-1869 GAF FFM, 2013 WL 1087350 (C.D. Cal. Mar. 13, 2013); Pringle v. Runnels, No. 07cv1960-LAB POR, 2011 WL 129427 (S.D. Cal. Jan. 13, 2011) *certificate of appealability denied*, 767 F. Supp. 2d 1142 (S.D. Cal. 2011) ("[I]t is doubtful whether *Herrera* actually permits habeas petitioners to bring stand-alone claims of actual innocence in non-capital cases."); Nixon v. McQuiggin, No. 2:10-CV-14652, 2012 WL 5471146 (E.D. Mich. Sept. 28, 2012), *report and recommendation adopted* No. 10-14652, 2012 WL 5471128 (E.D. Mich. Nov. 9, 2012).

[63] *See Garcia*, 2013 WL 1010368, *report and recommendation adopted*, 2013 WL 1087350; *Pringle*, 2011 WL 129427, at *2 ("Assuming [a freestanding actual innocence claim to be possible,]. . . the standard would be 'extraordinarily high,' and a petitioner must demonstrate that he is probably innocent." (citing Carriger v. Stewart, 132 F.3d 463, 476–77 (9th Cir. 1997) (en banc)); *McQuiggin*, 2012 WL 5471146, at *7 *report and recommendation adopted*,

***

The advancements in DNA technology call into question the underlying basis of *Herrera*. This is not only evident in the major advances in DNA technology, but also in the *Herrera* decision itself, where the court was unwilling to foreclose the possibility of truly persuasive claim of actual innocence serving as the basis for habeas corpus relief. Courts that have addressed freestanding claims of actual innocence are far from agreement. While some courts still insist that actual innocence cannot serve as the basis of habeas corpus relief, they generally rely on the availability of state court remedies. However, as discussed above, such reasoning is questionable because the availability of, for example, state clemency, is far from a legal remedy. Furthermore, state clemency would not necessarily cure a federal constitutional deficiency. Indeed, courts recognize that even if state clemency is a remedy for actual innocence, a truly persuasive case of actual innocence would still provide a basis for habeas corpus relief.

III. AVENUES OF UNCONSTITUTIONALITY

Even if actual innocence could serve as the basis for habeas corpus relief, on what part of the Constitution could an actual innocence claim be based? The need for an underlying constitutional violation is a threshold requirement for federal habeas relief.[64] Scholars have made several suggestions. In the following Part, I explore several of them.

A. Habeas Corpus Under the Constitution

The Constitution states, "The Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[65] Commonly referred to as the Suspension Clause, this is the source of constitutional habeas. Constitutional habeas dates back to early England and the Magna Carta.[66] The purpose was to ensure that "no person could be imprisoned or punished 'excepting by

2012 WL 5471128 ("[E]ven if such a claim were cognizable, petitioner's evidence falls far short of that necessary to establish that he is innocent.").

64 *See* Townsend v. Sain, 372 U.S. 293, 317 (1963) ("[New] evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."); Moore v. Dempsey, 261 U.S. 86, 87–88 (1923) (noting that habeas claims deal with "not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved").

65 U.S. CONST. art. I, § 9, cl. 2.

66 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring) ("[W]e are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons' insistence, confined executive power by 'the law of the land.'").

the legal judgment of his peers, or by the laws of the land.' "[67] Constitutional habeas, therefore, gives the courts the power to call upon the jailor to explain the legal basis for a prisoner's detention.[68] Substantively, it protects citizens from attempts by the executive to imprison people without a basis in the law.[69]

Even though the Great Writ is viewed as "the best and only sufficient defense of personal freedom,"[70] there has been significant disagreement as to whether there is any affirmative guarantee of habeas corpus under the Suspension Clause.[71] At times, the Court had determined that the wording of the Suspension Clause does not guarantee an affirmative right to habeas relief; rather, it simply provides a negative command to Congress.[72] If there is no affirmative guarantee of habeas corpus under the Constitution, relief can only come through congressional acts.[73] While the Court confirmed this interpretation in *Ex Parte Bollman*,[74] it has recently reversed course by reading an affirmative right to habeas corpus into the Suspension Clause.[75]

Even if constitutional habeas does provide affirmative protection, there is a more fundamental flaw with relying on it as a basis for state

---

67 *See* Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 61 (2012).

68 *See Ex parte* Burford, 7 U.S. 448, 452 (1806) ("The question is, what authority has the jailor to detain him?"); Kovarsky, *supra* note 13, at 10 ("[H]abeas process is an Article III power of judges over jailors, not an individual right of prisoners.").

69 *See* Boumediene v. Bush, 553 U.S. 723, 743 (2008) ("That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension."); *Hamdi*, 542 U.S. at 536 ("[T]he Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2032 (2007) ("The Great Writ of habeas corpus is the procedural mechanism through which courts have insisted that neither the King, the President, nor any other executive official may impose detention except as authorized by law.").

70 *See Ex parte* Yerger, 75 U.S. 85, 95 (1868); *see also* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980).

71 *Compare* David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 64 (2006) (viewing the Great Writ as an affirmative right), *with* RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1369 (4th ed. 1996) (noting that the Suspension Clause "does not confer a right to habeas relief, but merely sets forth when the 'Privilege of the Writ' may be suspended").

72 *See* I.N.S. v. St. Cyr, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting) ("A straightforward reading of [the Suspension Clause] discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended.").

73 *See Ex parte* Bollman, 8 U.S. 75 (1807).

74 *Id.* at 94 ("[T]he power to award the writ by any of the courts of the United States, must be given by written law.").

75 *See* Boumediene v. Bush, 553 U.S. 723 (2008); *see generally* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 Colum. L. Rev. 537, 548–557 (2010) (addressing the innovations to the Suspension Clause after *Boumediene*).

prisoners' claims of actual innocence. Constitutional habeas was never understood to provide a basis for collateral review of state prisoners.[76] Since constitutional habeas corpus derives its remedial power from the Suspension Clause, the scope of protection would be similar to what it was intended to protect at the time of passage.[77] The exact scope of the Suspension Clause is still debated today. While some argue that the protection provided by the Suspension Clause would only extend to what was protected at the time of ratification, the Court (and scholars) have appeared willing to expand the Suspension Clause's scope of protection.[78]

Even if the Suspension Clause is broadly interpreted today, the core of its protection was understood to protect citizens from unlawful executive detention.[79] It is unlikely that the Suspension Clause could be read to protect state prisoners on collateral review after receiving a fair state trial.[80] Aside from this being inconsistent with an historical reading of the Suspension Clause, there would be practical obstacles in interpreting the Suspension Clause to extend to collateral review of state proceedings. For one, statutory grants of habeas corpus jurisdiction would act only to expand and never to contract jurisdiction. This is because once habeas corpus jurisdiction is granted, say under a provision like § 2254, Congress may only suspend the jurisdictional grant in times of rebellion or invasion.[81] This would unduly handcuff Congress' power to legislate.[82] Ultimately, it is more consistent to view habeas corpus review of state prisoners as "a purely statutory remedy that is fundamentally different from the traditional habeas corpus remedy whose suspension is prohibited by the Constitution."[83]

---

76 *See* Office of Legal Policy, U.S. Dep't of Justice, *Report to the Attorney General on Federal Habeas Corpus Review of State Judgments*, 22 U. MICH. J.L. REFORM 901, 903 (1989) [hereinafter *Report to the Attorney General*].

77 *See St. Cyr*, 533 U.S. at 301 ("[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789.") (internal quotation marks omitted).

78 *See Boumediene*, 553 U.S. at 746 ("The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.").

79 *See supra* note 69.

80 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *132 ("[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.").

81 *See* U.S. CONST. art. I, § 9, cl. 2.

82 *See* District of Columbia v. John R. Thompson Co., 346 U.S. 100, 114 (1953) ("The repeal of laws is as much a legislative function as their enactment.").

83 *Report to the Attorney General*, *supra* note 76, at 903. Further proof of constitutional habeas' original purpose is its placement in the Constitution in Section 9 of Article 1, an enumeration of federal limitations of government power, rather than in Section 10 of Article 1, an enumeration of state limitations of government power. *See id.* at 918–19. *See also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 172 (1970).

B. Right to Jury Trial

The Sixth Amendment guarantees that all defendants subjected to a criminal trial have the right to be tried by a jury.[84] In *Apprendi v. New Jersey*, the Court held that a jury must find all elements of a crime beyond a reasonable doubt in order to convict a defendant.[85] This right applies not only to the punishment phase of a trial, but to the sentencing phase as well.[86] A defendant seeking habeas relief for a freestanding claim of actual innocence would presumably argue that his state court conviction violated the Sixth Amendment as follows: a jury fails to find all the elements of a crime (for which the defendant was convicted) beyond a reasonable doubt when those findings are based on an incomplete or erroneous set of facts. Since any new and relevant facts that come to light after trial (i.e., DNA evidence) could presumably raise reasonable doubt among the jury, the defendant's right to a jury trial was not fulfilled.

This constitutional avenue also has several flaws. First, the failure of the jury to hear all relevant evidence does not always guarantee that a court will find a violation of a defendant's jury right. Indeed, where a defense attorney makes a strategic choice to withhold evidence from the jury, the fact that the jury did not have the opportunity to consider that evidence does not represent a per se violation of the defendant's jury right.[87]

Second, the temporal restraints implied by the Sixth Amendment may prove to be a roadblock for defendants. That is, the Sixth Amendment only requires that a jury find all elements of a crime beyond a reasonable doubt *as they existed at the time of trial*. Like due process, there is an implied temporal relationship between the violation of the right and the cause of that violation.[88] Where claims of freestanding actual innocence are involved, the defendant received a fair trial at the time of conviction and sentencing.

Lastly, the Sixth Amendment fails to encompass the nature of the constitutional violation at issue in claims of freestanding actual innocence. The right to a jury trial is intended to serve the interests of fairness and reliability, values that have "always outweighed the interest in

---

84 U.S. CONST. amend VI.

85 *See* 530 U.S. 466, 477 (2000).

86 *See* Ring v. Arizona, 536 U.S. 584 (2002). In *Ring v. Arizona*, the Court found that capital defendants were entitled to a trial by jury, and also for that jury to "find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609.

87 *See, e.g.*, Florida v. Nixon, 543 U.S. 175 (noting that a defense council's decision to concede guilt at the guilt phase of trial without express consent of defendant is not always automatic reversible error).

88 *See infra* note 101–102 and accompanying text.

concluding trials swiftly."[89] A defendant claiming that he is actually innocent is not claiming that he has received an unfair trial, but claiming that the verdict is unreliable due to newly discovered evidence. In essence, the failure of the jury to consider newly discovered evidence creates the possibility of reasonable doubt. But the jury right is intended to "'guard against a spirit of oppression and tyranny on the part of rulers,'" and is seen "'as the great bulwark of [our] civil and political liberties.'"[90] The jury right best serves this purpose by protecting process, not outcome. Where claims of actual innocence are involved, however, a defendant has presumably received a fair trial, but through no fault of the criminal justice system, ultimately received an unfair verdict.

C. Due Process

Scholars, as well as defendants, have also suggested that freestanding innocence claims could be grounded in the Due Process Clause of the Fourteenth Amendment.[91] The Due Process Clause provides both procedural and substantive protection.[92] Although the procedural and substantive protections often overlap, the Court has analyzed the two doctrines separately.[93]

Procedural due process is unlikely to provide the grounds for habeas corpus relief for a prisoner's claim of freestanding actual innocence. For a procedural due process claim to be meritorious, a convicted prisoner needs to show that he or she was deprived of a liberty or life interest without receiving the minimum measure of procedural protection required by the Constitution.[94] Although prisoners claiming innocence can show that their execution would deprive them of their interest in life, such deprivation would be viewed as proper from a strictly procedural due process view, so long as those prisoners received a full and fair trial on the merits. Because prisoners who raise freestanding claims of actual innocence have received trials free of procedural deficiencies, success on

---

89 *See* United States v. Booker, 543 U.S. 220, 244 (2005).

90 Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

91 *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 393 (1993); Garcia v. Cash, No. EDCV 11-1869 GAF (FFM), 2013 WL 1010368 (C.D. Cal. Jan. 29, 2013) *report and recommendation adopted*, No. EDCV 11-1869 GAF (FFM), 2013 WL 1087350 (C.D. Cal. Mar. 13, 2013). *See also* Kovarsky, supra note 13, at 15–16.

92 *See* McKinney v. Pate, 20 F.3d 1550, 1555 (11th Cir. 1994).

93 *See* Albright v. Oliver, 510 U.S. 266, 301 (1994) (Stevens, J., dissenting) ("The Fourteenth Amendment contains only one Due Process Clause. Though it is sometimes helpful, as a matter of doctrine, to distinguish between substantive and procedural due process, the two concepts are not mutually exclusive, and their protections often overlap.").

94 *See* Humphries v. Cnty. of Los Angeles, 554 F.3d 1170, 1184 (9th Cir. 2009) *rev'd and remanded sub nom.* Los Angeles Cnty., Cal. v. Humphries, 131 S. Ct. 447, 178 L. Ed. 2d 460 (U.S. 2010).

procedural due process grounds is unlikely. Further, the Constitution does not guarantee, nor does it reference, any right to receive a new trial.[95]

The hallmark of the substantive due process analysis is protection against arbitrary government action.[96] Whether it is phrased as arbitrary, "contrary to contemporary standards of decency,"[97] or "shocking to the conscience,"[98] the idea remains the same: if the state action would be so fundamentally unfair that it would offend a sense of justice, the state has violated the prisoner's due process rights.[99] A defendant raising a free-standing claim of actual innocence, therefore, would contend that his execution in light of newly discovered evidence proving his innocence would offend a sense of justice sufficient to violate substantive due process.

This argument has the benefit of clarity, and many scholars have advocated for this position.[100] However, even if the argument is substantively sound, practical considerations warn against relying on substantive due process. First, the Court in *Herrera* specifically addresses substantive due process, raising a temporal objection against it.[101] When addressing Herrera's substantive due process claim, the Court stated a defendant "puts the cart before the horse," since the defendant's argument is premised on his innocence before he has proved his innocence.[102] Whether or not a proponent of substantive due process agrees with this argument, it serves as a significant roadblock that does not exist for the Eighth Amendment.[103]

In addition, even if substantive due process has significant appeal, the Court has consistently held that where a specific constitutional amendment is on point, the claim should be analyzed under that provi-

---

95 *See Herrera*, 506 U.S. at 407 n.6.

96 *See* Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV. 1359, 1367 (2004).

97 *Herrera*, 506 U.S. at 430 (Blackmun, J., dissenting) (citing Ford v. Wainwright, 477 U.S. 399, 406 (1986)).

98 *Id.* (citing Rochin v. California, 342 U.S. 165, 172–73 (1952)).

99 *See* Brown v. State of Mississippi, 297 U.S. 278, 285–86 (1936).

100 *See, e.g.*, Larry May & Nancy Viner, *Actual Innocence and Manifest Injustice*, 49 ST. LOUIS U. L.J. 481, 482 (2005) ("[D]enying actual innocence claims is a paradigmatic example of manifest injustice and a denial of substantive due process."); Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279, 1281 (2010) ("To execute a person with a compelling claim to innocence would also shock the conscience sufficiently to violate substantive due process."); Bernard A. Williams, *Guilty Until Proven Innocent: The Tragedy of Habeas Capital Appeals*, 18 J.L. & POL. 773, 776 (2002) ("[E]vidence of actual innocence discovered post-conviction establishes a prima facie Fourteenth Amendment substantive due process violation.").

101 *See Herrera*, 506 U.S. at 407 n.6.

102 *Id.*

103 *See infra* notes 143–144 and accompanying text.

sion rather than due process.[104] Because the Eighth Amendment provides a constitutionally concrete basis for review, the courts should not rely upon substantive due process.

IV. RECOMMENDATION

The Eighth Amendment provides that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[105] Defendants seeking habeas corpus relief for freestanding claims of actual innocence have consistently relied on the Eighth Amendment.[106] The Eighth Amendment's prohibition of "cruel and unusual punishment" is intended to protect the "dignity of man," recognizing that "the State has the power to punish, [but] . . . that this power [must] be exercised within the limits of civilized standards."[107] Rather than remaining the same from its enactment, the scope of the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[108]

Scholars that argue that the Eighth Amendment should serve as the underlying constitutional basis for freestanding claims of actual innocence contend that it is unconstitutional to execute a prisoner who is actually innocent.[109] In essence, a challenge based on the Eighth Amendment "calls into question the permissibility of capital punishment based upon a characteristic of the offender: a total lack of culpability, which is demonstrated through a showing of factual innocence based upon evidence discovered subsequent to a full and fair trial."[110] To succeed on this challenge, proponents are first required to show that the execution of an innocent person would be against the national consensus based on "objective indicia of society's standards, as expressed in legislative enactments and state practice."[111] Then, guided by its "own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its

---

104 *See* United States v. Lanier, 520 U.S. 259, 272 n.7 (1997) ("*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.").

105 U.S. CONST. amend. VIII. The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 675 (1962) (Douglas, J., concurring).

106 *See, e.g.*, *Herrera*, 506 U.S. 390; *In re* Davis, No. CV409-130, 2010 WL 3385081, at *39–43 (S.D. Ga. Aug. 24, 2010).

107 Trop v. Dulles, 356 U.S. 86, 99–100 (1958).

108 *Id.*; *see also In re Davis*, 2010 WL 3385081, at *39–43.

109 *See, e.g.*, Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 108 (2003)

110 *In re Davis*, 2010 WL 3385081, at *40 (footnote omitted).

111 Graham v. Florida, 130 S. Ct. 2011, 2022 (2010) (quoting Roper v. Simmons, 543 U.S. 551, 563 (2005)).

own independent judgment whether the punishment in question violates the Constitution."[112]

In *In re Davis*, the court found that executing an innocent person is clearly against the national consensus because state legislatures are near unanimity in providing prisoners a state avenue to prove that their convictions were incorrect.[113] This indicates, the court argued, that states "are showing an increased concern for protecting legally convicted individuals whom are shown to be factually innocent subsequent to a trial."[114] Although there are other measures of the national consensus besides legislation,[115] they are difficult to measure. An attempt to compile statistics on the number of actually innocence defendants that have been executed, for example, would be impossible to accurately assess.[116]

Regardless of the national consensus, interpretation of the Eighth Amendment "remains in the hands of the federal courts."[117] As such, the second step in determining whether the Eighth Amendment has been violated requires the courts, while keeping in mind the national consensus, to make a determination of the constitutionality of the punishment at issue.[118] Those in favor of relying on the Eighth Amendment to support freestanding claims of actual innocence point to a long line of Supreme Court precedent that proscribes punishment of the innocent.[119] In addition, scholars are in near agreement that the execution of the innocent persons is purposeless, needless, arbitrary, and excessive.[120]

It is also hard to imagine how executing an innocent person meets either penological goal of capital punishment.[121] The Supreme Court has long held that the principal penological goals that capital punishment is intended to serve are deterrence and retribution.[122] Although the great

---

112 *See id.* (citing *Roper* 543 U.S. at 563 (2005).

113 *See In re Davis*, 2010 WL 3385081, at *40 n.29–30 (compiling state statutes that provide for post-conviction procedures to help prove innocence).

114 *Id.* at *41.

115 *See* Graham v. Florida, 130 S. Ct. 2011, 2023 (2010) (quoting Kennedy v. Louisiana, 554 U.S. 407, 433 (2008)).

116 In addition, punishment of an innocent person has long been held to be unconstitutional. *See* Robinson v. California, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

117 *See In re* Davis, 2010 WL 3385081, at *41 (citing *Graham*, 130 S. Ct. at 2026).

118 *See supra* note 112.

119 *See, e.g.*, *In re* Davis, 2010 WL 3385081, at *41(compiling cases).

120 *See, e.g.*, Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279, 1308 (2010); Rosen, *supra* note 109.

121 *See* Furman v. Georgia, 408 U.S. 238, 312–13 (White, J., concurring) (noting that capital punishment violates the Eighth Amendment if the execution no longer serves penological goals).

122 *See* Kennedy v. Louisiana, 554 U.S. 407, at 420; Roper v. Simmons, 543 U.S. 551, 593 (2005); Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

bulk of empirical evidence regarding capital punishment's deterrent impact have been inconclusive,[123] the Supreme Court has recognized that "the death penalty undoubtedly is a significant deterrent" for certain types of murder, "such as murder for hire, where the possibility of death may well enter into the cold calculus that precedes the decision to act."[124]

With respect to retribution, capital punishment is said to be "an expression of society's moral outrage at particularly offensive conduct."[125] Although criminal law has long since moved away from retribution as its primary objective,[126] "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."[127]

Capital punishment serves neither deterrence nor retribution, however, when the primary target is a defendant who is factually innocent. Capital punishment can only serve as a deterrent "when it will send a message to potential murderers that society will respond harshly to their actions."[128] Although capital punishment's deterrent impact is questionable, there is no doubt that executing a defendant who is actually innocent does not serve to deter future crimes. In fact, the conviction of the innocent could lead to a reduced deterrent effect.[129]

---

123 *Compare* H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453, 474 (2003) (concluding that capital punishment has a deterrent effect), *with* Peter Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61, 79 (1975) (concluding that there is no evidence that capital punishment has a deterrent effect), *and* Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 504 (2009) (concluding that the majority of criminologists believe that the deterrent effect of capital punishment is a myth).

124 *Gregg*, 428 U.S. at 185–86.

125 *Id.* at 183. However, it is important to note that the "value of retributive punishment . . . is internal to its practice and is not contingent upon the achievement of some future benefit to others outside the relationship of punisher and punished." Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1176 n.53 (2009). In other words, a defendant is punished not to benefit society, but to ensure that the defendant receives his just deserts. *See id.* at 1180; Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451 (1990)

126 *Gregg*, 428 U.S. at 183 (quoting Williams v. New York, 337 U.S. 241, 248 (1949)).

127 *Id.* at 184.

128 Lawrence A. Vanore, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 766 (1986).

129 *See generally* Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321, 1323 (2003) (arguing that the increased incarceration of the innocent may lead to an overall reduction of incarceration's deterrent effect).

Moreover, theories of positive and negative retributivism "decr[y] the punishment of an innocent person."[130] While positive retributivists argue that "an innocent person [must] never be punished," negative retributivists take the stronger view "that it is morally wrong to punish an innocent person even if society might benefit from the action."[131] The execution of a prisoner who persuasively argues innocence would therefore be counter to either theory of retribution.

On a more intuitive level, the execution of an innocent person in light of persuasive evidence of his innocence feels offensive to basic notions of fairness protected by the Constitution. This is evident in the *Herrera* opinion itself, where the Court, in addressing the Eighth Amendment claim, focused on policy interests in finality and comity rather than attempting to make a substantive argument supporting the execution of the innocent.[132] Instead, the Court declined to argue the merits, holding that Herrera sought to relitigate the guilt-innocence question—a question that was not appropriate for habeas review.[133]

By assuming arguendo that a truly persuasive claim of innocence would provide the basis for habeas corpus relief, however, the majority failed to completely ignore the merits.[134] This assumption, even if just dicta, suggests that the Court, at the very least, did not foreclose the possibility of actual innocence serving as the basis for habeas corpus review. For if defendants were truly unable to relitigate the guilt-innocence question during habeas review, then there would be no need for an arguendo assumption, because new evidence of innocence would never serve as the basis for an Eighth Amendment violation.[135] Instead, the Court hedged, seemingly to avoid completely foreclosing the possibility of a freestanding claim of actual innocence serving as the basis for habeas relief.[136]

Although it is speculative, the Court would likely be willing to find a truly persuasive case of innocence violative of the Eighth Amendment. As Justice O'Connor stated in concurrence, "the execution of a legally

---

130 Judith M. Barger, *Innocence Found: Retribution, Capital Punishment, and the Eighth Amendment*, 46 LOY. L.A. L. REV. 1, 15 (2012).

131 Dressler, *supra* note 125, at 1451.

132 *See* Herrera v. Collins, 506 U.S. 390, 417 (1993).

133 *Id.*at 393; *see* Kathleen Callahan, *In Limbo:* In re Davis *and the Future of* Herrera *Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629, 641 (2011).

134 *See Herrera*, 506 U.S. at 400–01.

135 *See id.* This is the sum and substance of Justice Scalia's concurrence; he mocks the majority's discrepancy, but nevertheless concurs. *See id.* at 428–29 (Scalia, J., concurring).

136 *See generally id*. Assuming procedural soundness, the substantive argument against the Eighth Amendment claim is more difficult to express. That is, executing an actually innocent person is neither cruel nor unusual. It is hard for one to rationally make this argument because it would entail admitting that a prisoner, who is in fact innocent, is nevertheless executable.

and factually innocent person would be a constitutionally intolerable event."[137] Indeed, when totaling the number of Justices in favor of relief for one claiming actual innocence, six Justices showed some support for a truly persuasive claim of actual innocence.[138]

Ultimately, relying on the Eighth Amendment as the underlying basis for habeas corpus relief has other benefits. For one, the Eighth Amendment is designed to protect categories of crimes or defendants, which makes it well-suited to protect the innocent or falsely accused.[139] As an example, the Supreme Court has found that the death penalty is an excessive punishment for any defendant convicted of rape.[140] Similarly, the Court has found that the death penalty is an inappropriate punishment for juveniles.[141]

Protection of categories of defendants makes the Eighth Amendment uniquely suited to protect the innocent or falsely accused. Actually-innocent defendants can be viewed as a category of defendants. Like juveniles, actually innocent defendants share a common characteristic unique to other defendants. That is, there is persuasive evidence of their innocence. Furthermore, because the death penalty is only reserved "for a narrow category of crimes and offenders,"[142] those with persuasive evidence of their innocence cannot be said to fall within that narrow category.

In addition to protecting categories of defendants, the Eighth Amendment does not have the same temporal limits that due process and the Sixth Amendment share. The Eighth Amendment protects a defendant from execution even if the defendant does not fall into a protected category until after conviction. For example, defendants who become mentally incompetent after their conviction may not be executed if their incompetence makes them "unaware of the punishment they are about to

---

137 *Id.* at 419 (O'Connor, J., joined by Kennedy, J., concurring).

138 *See id.* ("[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event."); *id.* at 429 (White, J., concurring) ("[A] persuasive showing of 'actual innocence' made after trial . . . would render unconstitutional the execution of [a federal habeas petitioner]."); *id.* at 430 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting) ("Nothing could be more contrary to contemporary standards of decency or more shocking to the conscience . . . than to execute a person who is actually innocent.") (citations omitted).

139 *See* Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 330 (2010) (noting that the Supreme Court has recently used the Eighth Amendment to declare "several categories of prisoners . . . to be categorically ineligible for capital punishment . . . ").

140 *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion). The death penalty has also been found excessive for "mere participation in a robbery during which a killing takes place." *Herrera*, 506 U.S. at 431 (citing Enmund v. Florida, 458 U.S. 782, 797 (1982)).

141 *See* Roper v. Simmons, 543 U.S. 551, 568 (2005). Similarly, in *Atkins v. Virginia*, the Court concluded that "death is not a suitable punishment for a mentally retarded criminal." 536 U.S. 304, 321 (2002).

142 *Roper*, 543 U.S. at 569.

suffer and why they are to suffer it."[143] Of course, "[t]he State . . . may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process."[144] There nevertheless remains protection from execution under the Eighth Amendment if the defendant can overcome the presumption in favor of sanity.

Like mental incompetence occurring after a conviction, a freestanding claim of actual innocence involves a claim that could not be substantiated until after a conviction. Defendants seeking habeas relief based solely on actual innocence do not suffer from ineffective counsel or bad strategic choices at trial, but from the inability to discover the requisite evidence to prove their innocence. If such evidence comes to light, though, those defendants join a category of defendants protected by the Eighth Amendment. Of course, unlike defendants suffering from mental incompetence, defendants claiming that they are actually innocent fully understand the punishment they are receiving. However, the similarity between defendants claiming incompetence and defendants claiming innocence is not one that depends on the characteristics of particular defendants, but rather on the *category* of defendants. That is, even though defendants claiming incompetence and defendants claiming innocence are different in many ways, as a category, they share an important likeness: both types of defendants rely on facts that, through no fault of their own, were unavailable at the time of trial and which should make them ineligible for the death penalty.

CONCLUSION

The law surrounding freestanding claims of actual innocence is still very much in flux. Because the Court failed to provide a clear rule in *Herrera*, lower courts have failed to come to any sort of consensus on how to deal with freestanding claims of actual innocence. That being said, twenty years have passed since the Court's decision in *Herrera*. A lot has changed since then, and advancements in DNA technology appear to provide a scenario under which actual innocence may be persuasively presented. Although there are a number of constitutional provisions that a defendant presenting a persuasive case of actual innocence may rely upon as the basis for habeas corpus relief, the Eighth Amendment is the clearest and most logical choice.

This is certainly not the end of the debate. Even if those claiming actual innocence are granted relief from capital punishment based on an Eighth Amendment analysis, questions remain as to the proper remedy.

---

143 Ford v. Wainwright, 477 U.S. 399, 422 (1986) (Powell, J., concurring).
144 *Id.* at 426.

Courts that implicitly recognize actual innocence claims have never enunciated a standard.[145] Further, if capital defendants are permitted to present freestanding claims of actual innocence, what should stop other defendants from doing so?[146] The Court certainly has frowned upon the imprisonment of innocent persons, even contending that "one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[147] Needless to say, there is still a lot to be decided, and further work will be necessary to answer these questions. However, the first step is for the Court to explicitly recognize a freestanding claim of actual innocence for capital defendants.

---

[145] In most capital cases in which the Court has found violations of the Eighth Amendment, the Court has chosen to set aside the sentence and leave the conviction intact. *See, e.g.*, *Roper*, 543 U.S. at 578–79 (2005); *Atkins*, 536 U.S. at 321 (2002); Coker v. Georgia, 433 U.S. 584, 600 (1977) (reversing the Georgia Supreme Court's upholding of the death sentence, only). However, because life imprisonment is so disproportionate to a defendant's innocence, such a result would appear to implicate a continuing Eighth Amendment violation. *See* infra note 140. As such, one can argue that the only proper remedy could be immediate release and a new trial.

[146] An argument for applying the above analysis only to capital cases is to rely upon the age-old adage that death is different. *See* Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different."); Harmelin v. Michigan, 501 U.S. 957, 994 (1991). Indeed, the Court has previously held that because of death's finality and solemnity, it has "imposed protections that the Constitution nowhere else provides." *Id.* That being said, the Eighth Amendment is not toothless when it comes to non-capital cases. Even though "the length of the sentence actually imposed is purely a matter of legislative prerogative," *id.* at 962 (quoting Rummel v. Estelle, 445 U.S. 263, 274 (1980)), there still remains a general principle of proportionality that must be applied. Another argument against applying the Eighth Amendment to non-capital cases is that doing so would result in overloaded federal dockets, and fail to give proper deference to state courts. Ultimately, whether the above analysis would apply to noncapital cases requires further discussion.

[147] *See* Robinson v. California, 370 U.S. 660, 667 (1962).