

1239C7

**Time of Request:** Wednesday, January 07, 2009 13:37:27 EST  
**Client ID/Project Name:**  
**Number of Lines:** 2174  
**Job Number:** 2862:133382824

Research Information

**Service:** Natural Language Search  
**Print Request:** Current Document: 5  
**Source:** Combined Source Set 5  
**Search Terms:** "Double Helix, Double Bind: Factual Innocence and Postconviction  
DNA Testing" and "Seth Kreimer and David Rudovsky"

**Send to:** WEISS, DANIELLE  
OFC OF JUSTICE PROGRAMS GENERAL COUNSEL  
810 7TH ST RM 5400  
WASHINGTON, DC 20531-0001

5 of 43 DOCUMENTS

Copyright (c) 2002 The Trustees of The University of Pennsylvania  
University of Pennsylvania Law Review

December, 2002

*151 U. Pa. L. Rev. 547***LENGTH:** 26241 words**ARTICLE:** DOUBLE HELIX, DOUBLE BIND: FACTUAL INNOCENCE AND POSTCONVICTION DNA TESTING**NAME:** Seth F. Kreimer+ & David Rudovsky++**BIO:** + Professor of Law, University of Pennsylvania Law School.

++ Senior Fellow, University of Pennsylvania Law School. We gratefully acknowledge the illuminating comments of our colleagues Al Alschuler, Susan Herman, Leo Katz, Stephen Morse, and Leonard Sosnov; the very helpful research assistance of Leonardo Cuello and Vanessa Richards; and the pathbreaking work in DNA exoneration of the Innocence Project at Benjamin N. Cardozo School of Law. Aid from these sources in the development of this Article in no way makes them responsible for any errors of fact or law, which remain the responsibility of the authors alone.

**SUMMARY:**

... In 1995, based on Pennsylvania cases establishing a qualified right to postconviction access to previously untested DNA evidence, Godschalk filed a petition seeking access to the DNA evidence from both incidents still held by the District Attorney. ... The district court ruled that the RookerFeldman doctrine was inapplicable and that the Brady v. Maryland due process duty of disclosure of exculpatory evidence extended to postconviction DNA evidence, regardless of the evidence that supported the conviction. ... In the criminal justice system today, however, the status of postconviction DNA testing is a matter of some contest. ... The Article will then address the principal doctrinal bases for a constitutional right to postconviction disclosure: prisoners' rights of meaningful access to the courts (Part II) and the due process obligations of the state to disclose exculpatory evidence and to avoid arbitrary deprivations of liberty (Part III). ... If the evidence is subjected to DNA testing or retesting, the results will not be relevant to a guilt or innocence determination. ... Applying Brady, courts have found a postconviction right of access to DNA materials in the possession of the prosecutor. ... The analysis that generated Brady - and the fundamental role of innocence in the criminal justice system - extends to postconviction proceedings. ... The issue of postconviction or habeas relief is distinct from the issue of whether a prisoner may seek access to DNA evidence held by the prosecutor postconviction simply to test for evidence of innocence. ...

**TEXT:**

[\*547]

Introduction: A Tale of Two Convictions

A. The Bruce Godschalk Story n1

In the summer of 1986, less than two months apart, two women who lived in the same housing complex in Montgomery County, Pennsylvania, were raped by an assailant who entered their apartments at night. Based on the descriptions provided by the victims, and the similar means of entry into the residences and other actions of the assailant, it appeared highly probable that a single person was responsible for both attacks. The police prepared a composite sketch of the suspect. Several months later, based on a call from Bruce Godschalk's sister informing authorities that her brother looked like the person in the sketch, the police showed a photo spread to the victims, one of whom identified Godschalk. Soon thereafter, the police brought Godschalk into the police district and interrogated him about the incidents.

According to the police, in noncustodial questioning, and with no pressure or coercion, Godschalk readily admitted to the crimes in a taped interview. n2 Indeed, the police claimed that he provided [\*548] details of the assaults that only the victims, the police, and the rapist knew, as the police had not disseminated this information to the public. n3

At trial, the prosecution presented the eyewitness testimony (a complainant testified that she studied and compared the photographs presented to her by the detective), n4 the confession, evidence of the similar modus operandi of the rapist, and a jailhouse informant who testified that Godschalk admitted the crimes to him while in jail awaiting trial. n5

In addition, the prosecutor offered scientific evidence: the semen recovered from the first rape was from a man with type B blood, and Godschalk had type B blood. Godschalk, who had recanted his "confession" pretrial, testified that the detectives tricked him into admitting the crimes and asserted that they provided him with the private details of the assaults. Not surprisingly, with a full confession, modus operandi evidence, eyewitness identification, and blood-type matchings, [\*549] the jury convicted Godschalk of both crimes. In 1987, he was sentenced to a term of ten to twenty years' imprisonment.

In 1995, based on Pennsylvania cases establishing a qualified right to postconviction access to previously untested DNA evidence, n6 Godschalk filed a petition seeking access to the DNA evidence from both incidents still held by the District Attorney. n7 The Superior Court of Pennsylvania denied access on the grounds that the prosecution's case was overwhelming and that it rested on more than contested eyewitness identification. n8

Godschalk then filed a civil rights action under *42 U.S.C. 1983* for access to the DNA evidence, claiming a constitutional right to access and testing as a matter of due process of law. The District Attorney opposed this action, arguing that it was procedurally barred by the Rooker-Feldman doctrine n9 and that there was no constitutional right to access to potentially exculpatory evidence postconviction. In support of the defense to the civil litigation, the district attorney stressed the strength of the State's case at trial and, in particular, Godschalk's confession with its numerous details of facts known only to the complainants, police, and rapist. The district court ruled that the Rooker- [\*550] Feldman doctrine was inapplicable and that the *Brady v. Maryland* n10 due process duty of disclosure of exculpatory evidence extended to postconviction DNA evidence, regardless of the evidence that supported the conviction. n11

The parties then agreed to a protocol under which the DNA evidence was divided for testing by their respective laboratories. Testing at each laboratory confirmed that a single rapist had committed both assaults but that Bruce Godschalk was absolutely excluded as being that assailant. n12 In February 2002, on a petition for postconviction relief, Godschalk was freed and the criminal charges against him were [\*551] dismissed. n13 Bruce Godschalk had served fifteen years of his ten-to-twenty-year sentence. Although he was eligible for parole at his minimum of ten years, in all likelihood he would have served his entire sentence of twenty years. In Pennsylvania, parole in sexual assault cases is largely dependent on the defendant's admission of guilt and participation in sex offender programs, neither of which the innocent Godschalk would accept. Bruce Godschalk thus became one of more than 100 persons exonerated of serious criminal convictions by postconviction DNA testing. n14

#### B. The Frank Lee Smith Story

In early 2000, Florida death row inmate Frank Lee Smith died of cancer. On his deathbed Smith had reasserted his long-held claim to innocence and continued to demand that the State agree to test DNA evidence from the crime scene. Smith had been convicted of the 1985 rape and murder of an eight-year-old girl, based largely on a single eyewitness identification (with no physical evidence of his involvement). In 1989, this sole eyewitness recanted her testimony, alleging that the police had pressured her and had repeatedly told her that "Smith was dangerous." n15 Indeed, at the time of the recantation, the witness named another person, Eddie Lee Mosely, as the killer. Defense lawyers were able to point to other evidence that strongly connected the crime to Mosely, then a prime suspect in a number of sexual assaults and murders. n16

For years, prosecutors had refused defense requests to test existing DNA evidence. As Smith lay dying in pain and delirium in a prison hospital, the slow wheels of justice finally ground to a point where testing was authorized. Ten months after his death in prison, in December of 2000, the test results cleared Smith of any involvement in the crime. n17 Prosecutors had claimed that state law did not permit a postconviction [\*552] challenge based on the outstanding DNA evidence and had accused the defense lawyers of "playing games" to delay Smith's execution. n18 Upon receiving the test results, the prosecutor stated that she would move to vacate Smith's conviction. n19 He spent fourteen years on death row and died with his request for DNA testing still in limbo.

#### C. The Problem

Godschalk and Smith are representative cases in a growing pool of DNA exonerations. n20 They are also representative of the legal struggles over claims to access to DNA for postconviction testing. n21 Comparing [\*553] the ultimate outcomes in the two cases, one might expect moral consensus that Smith is to be avoided and that Godschalk is to be preferred. n22 Few courts or prosecutors directly advance the proposition that the judicial system should permit the incarceration of manifestly innocent individuals. n23 In a system where as a matter of constitutional law "it is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned," n24 this preference has a strong claim to constitutional stature.

In the criminal justice system today, however, the status of postconviction DNA testing is a matter of some contest. It is to that contest that this Article is addressed. In Part I, we will survey the current practices and policies of prosecutors in responding to requests for postconviction DNA testing. As that review reveals, the hurdles faced by Bruce Godschalk and Frank Lee Smith are not inevitable, for many prosecutors view the importance of DNA testing's potential to exonerate the innocent as equal to its role in convicting the guilty. But neither are the dilemmas faced by Godschalk and Smith isolated or [\*554] unique, for hostility to postconviction access typifies an important sector of the prosecutorial community. The Article will then address the principal doctrinal bases for a constitutional right to postconviction disclosure: prisoners' rights of meaningful access to the courts (Part II) and the due process obligations of the state to disclose exculpatory evidence and to avoid arbitrary deprivations of liberty (Part III). In Part IV, we consider the arguments that have been mounted, both substantive and procedural, as balancing factors against the constitutional claims, and conclude that in the cases where DNA is potentially determinatively exculpatory, those factors are unpersuasive.

### I. Prosecution Practices

Before trial, by rules of criminal procedure and federal constitutional mandate, defendants are entitled access to physical evidence for forensic testing. n25 After trial, however, in the states that have not adopted statutes giving convicted defendants the right to seek DNA testing, n26 the disposition of physical evidence rests largely in the discretion of prosecutors, police officers in evidence rooms, and court clerks.

[\*555] For many prosecutors, the possibility of freeing wrongly convicted prisoners is as important an element of the emerging DNA technologies as the possibility of finding and convicting the guilty. Indeed, when an innocent defendant is incarcerated the wrongdoer remains unpunished. In 1996, in response to a National Institute of Justice (NIJ) report, n27 Attorney General Janet Reno appointed a National Commission on the Future of DNA Evidence, composed of representatives of law enforcement, prosecutors, and defense attorneys, to recommend standards for postconviction DNA testing. The Commission developed five categories of cases:

Category 1. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, exclusionary results will exonerate the petitioner.

Example []: Petitioner was convicted of the rape of a sexually inactive child. Vaginal swabs were taken and preserved. DNA evidence that excludes the petitioner as the source of the sperm will be dispositive of innocence. Note that in a case such as this, the victim's DNA--also obtainable from the vaginal swab--operates as a control that confirms that the correct sample is being tested. In addition, the victim's age and sexual status guarantee that the swab contains only biological material related to the crime.

....

Category 2. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, exclusionary results would support the petitioner's claim of innocence, but reasonable persons might disagree as to whether the results rule out the possibility of guilt or raise a reasonable doubt about guilt.

Example []: Petitioner was convicted of a homicide. The prosecution argued in closing that blood on a shirt found at petitioner's home came from the victim. Standard blood typing had shown a match between the sample and the victim's blood. DNA testing that excludes the victim as a source of the bloodstains might be helpful to petitioner's claims but does not prove that he was not guilty.

...

Category 3. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, the results will not be relevant to a guilt or innocence determination.

[\*556]

Example []: Petitioner is presently incarcerated for a gang rape. The victim testified that seven persons were involved but that she is not sure that all actually engaged in sexual intercourse. If the vaginal swabs that were preserved are tested and petitioner's DNA profile is not found, the significance of the results will be minimal. It should be noted, however, that if other participants in the rape can be identified through DNA testing and petitioner can show the unlikelihood that he ever had any contact with the other participants, this case may fall into category 1 or 2.

...

Category 4. These are cases in which biological evidence was never collected, or cannot be found despite all efforts, or was destroyed, or was preserved in such a way that it cannot be tested. In such a case, postconviction relief on the basis of DNA testing is not possible.

Category 5. These are cases in which a request for DNA testing is frivolous.

...

Example []: The trial transcript discloses the existence of other evidence that makes petitioner's claim meaningless, as in a burglary conviction where petitioner was apprehended at the scene of the crime. n28

The Commission recommended full access to DNA evidence without resort to the courts in Category 1 cases, court resolution of any disputes over access in Category 2 cases, and no access in Categories 3, 4, and 5. n29

We do not necessarily agree with this entire formulation as a matter of policy. For example, in Category 2, while the DNA evidence might not be determinative of guilt or innocence, where the prosecutor relied at trial on a theory inconsistent with this evidence it may well be extremely strong proof that the wrong result was reached. In Category 5, if the burglar had cut herself and left blood at the scene, DNA testing might be fully exonerating, even for a suspect found at that location. Moreover, the NIJ formulations were intended to provide guidelines for postconviction testing of DNA

and not to establish constitutional standards. In our view, for the reasons set forth in this Article, postconviction access to DNA evidence is constitutionally mandated in any case in which DNA tests could either (1) definitively demonstrate innocence, or (2) provide substantial grounds for a claim [\*557] of innocence sufficient to permit the defendant to pursue postconviction or habeas relief. n30

Many prosecutors, even without state legislation, have adopted standards similar to those promulgated by the NIJ's Commission. n31 Some prosecutors have gone further in the proactive use of DNA to assure the integrity of the criminal justice system. A leader in this approach has been the District Attorney of San Diego who, in July of 2000, directed a review of the cases of all currently incarcerated prisoners prosecuted by the office in 1992 or earlier to determine whether current DNA technology could provide exonerating evidence. n32 Where the District Attorney's case review disclosed the existence of untested biological evidence that could raise a "reasonable probability that, in light of all the evidence, the defendant's verdict or sentence would have been more favorable if the results had been available at the time of conviction," the San Diego protocol provides for testing of the evidence in a fashion mutually agreed upon by the [\*558] prosecutor's office and defense counsel. n33 George "Woody" Clark, one of the architects of the program, commented, "We're hopeful that there aren't many cases ... . Nonetheless, we think it's so important ... to our community that if it costs that money ... then we're willing to spend it ... ." n34

In Minnesota, Ramsey County Prosecutor Susan Gaertner adopted the San Diego model to review cases prosecuted before 1995, commenting: "'As prosecutors, we have an ethical duty to seek the truth and ensure that justice is done in every case ... . We don't want an innocent person behind bars any more than defense attorneys do. If a mistake has been made, DNA technology can help to establish the truth.'" n35 Similar reviews have been undertaken by district attorneys in Brooklyn; n36 Suffolk County, New York; n37 Nevada; n38 Austin, Texas; n39 and [\*559] Oklahoma County, Oklahoma. n40 Other offices voice sympathy for such "innocence projects" but assert that they are faced with significant competing considerations of cost or other priorities. n41

In September 2000, Orange County, California, District Attorney Tony Rackauckas initiated a program that issued notices in English and Spanish to California prisoners in thirty-three prisons, inviting them to submit applications for forensic testing if they believed that testing could exonerate them. Upon receipt of an application with a plausible claim, the district attorney's office places a hold on physical evidence in the criminal justice system and convenes a review process [\*560] that includes evaluations by a joint panel of representatives of the district attorney's office and the defense bar. n42 According to District Attorney Rackauckas, "'If there's anybody who's been wrongfully imprisoned, and is sitting there in prison, and his or her case could be proven innocent, it's worth this entire project.'" n43 A similar program involving a joint review by prosecutors and defense attorneys is underway in Los Angeles. n44

Not all government officials, however, manifest unalloyed enthusiasm for testing to exculpate the wrongfully convicted. The National District Attorneys Association (NDAA), while avowing support for "the use of DNA testing where such testing proves the actual innocence of a previously convicted individual," hedges that support with an admonition that "post-conviction relief remedies should protect against potential abuse and ... should be subject to limits on the period in which relief may be sought." n45 According to the position paper, these limits should be determined "at the state or local level, where decisions can reflect the needs, resources and concerns of states and communities." n46

[\*561] In 2001, the U.S. Department of Justice [\* announced a program that would have financed postconviction DNA testing, but it has since withdrawn this funding. n47 Attorney General Ashcroft has renounced any intent to reinstate the program. n48

Prosecutors have sought to narrowly constrain the availability of postconviction DNA testing, citing financial concerns, n49 the need for finality in the criminal justice system, n50 the need to protect the system of plea bargaining, n51 and the specter of a wave of frivolous requests. n52

[\*562] Resistance to DNA testing is sometimes couched in sporting metaphors n53 or grounded in an unshakable belief in the accuracy of [\*563] the guilty verdict. n54 Prosecutors have attempted to induce defendants to waive their rights to the maintenance of DNA evidence n55 and have sought to destroy DNA evidence that might exonerate incarcerated defendants. n56

While many prosecutors who refuse testing may be sincerely concerned with administrative issues or finality, other factors may color some decisions. DNA exonerations have disclosed deliberate (and in some cases criminal) police and prosecutorial misconduct in obtaining the tainted convictions. n57 Further, to the extent that DNA exonerations reveal systemic flaws in the criminal justice system (e.g., faulty eyewitness identifications, false confessions, ineffective defense counsel, and unethical police or prosecutors), n58 some prosecutors may believe that exonerations undermine the

credibility of the system. The [\*564] State of Virginia has opposed making DNA evidence available for testing that might exonerate two men the State has already executed. In one case, the state Attorney General's office argued that "continual reexamination of concluded cases brings about perpetual uncertainty ... and disparages the entire criminal justice system." n59 In the other, the argument was less ornate: if the testing proved exculpatory, argued the prosecutor, it "would be shouted from the rooftops that the Commonwealth of Virginia [had] executed an innocent man." n60

The prosecutor in Bruce Godschalk's case reported that he was "urged by colleagues across the country" to refuse requests for DNA testing; fellow district attorneys "did not want him to set a precedent by voluntarily releasing evidence." n61 As he put the matter, "there is a feeling among prosecutors that the integrity of convictions ought to stand unless there is some reason to think the conviction might not be good." n62 Thus, it is not uncommon for convicted individuals to find themselves in a "Catch-22," where the only road to a showing of innocence leads through DNA evidence in the possession of the prosecutor, and the prosecutor refuses to allow access to the evidence in the absence of proof of innocence. n63

[\*565]

## II. DNA Evidence and Access to Courts

In theory, prisoners in the situations of Bruce Godschalk and Frank Lee Smith can approach courts with claims that they have been wrongfully convicted. In practice, their ability to seek relief from incarceration is effectively dependent on access to material in the custody of the government, for there is no source of DNA evidence other than the one that the government has seized. If prosecutors grant access to that material, the prisoner may construct an effective plea for release on the ground that she has been wrongfully convicted; by contrast, if prosecutors deny access, the prisoner is effectively barred from access to the courts or other tribunals on the merits of the case.

This control over uniquely determinative physical evidence places prosecutors in DNA cases astride the only avenue to relief from unconstitutional imprisonment. When prosecutors arbitrarily deny access to that avenue, they implicate a deeply rooted constitutional norm: the assurance, as the Court put the matter in *Wolff v. McDonnell*, that "no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." n64

The right of access to the courts, as the Court recently noted in *Christopher v. Harbury*, stands at the confluence of three lines of doctrine. n65 The First Amendment's right to petition for redress of grievances protects access to the courts; indeed, the Court has recently reaffirmed that the right to petition courts for redress against government wrongdoing is "implied by 'the very idea of a government, republican in form.'" n66 The Court's equal protection jurisprudence [\*566] treats access to courts as a "fundamental interest" that cannot be denied arbitrarily when addressing claims of right over which the state exercises a monopoly. n67 Due process has been held to mandate [\*567] that those whom the state seeks to imprison have "meaningful access" to courts to challenge their imprisonment. n68 All three doctrines are invoked when "systematic official conduct frustrates a plaintiff ... in preparing or filing suits"; they undergird efforts, like Frank Lee Smith's and Bruce Godschalk's, to "place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition is removed." n69

This right of meaningful access to the courts holds special importance for prisoners. Conviction and incarceration isolate prisoners from many of the means to protect rights available to those in society at large. Prisoners cannot vote, their communication with the outside world is limited, their immediate governors are unresponsive, and their opportunities to seek legal or political assistance are constrained by the rules of the institutions in which they are incarcerated. The opportunity to seek the protection of the judiciary is often the only available mode of redress. n70 The possibility of seeking relief from these disabilities is focused on the courts: a prisoner who is denied the opportunity to seek judicial relief can claim no other forum to challenge a wrongful conviction. A state should not be permitted to [\*568] immunize its prison regime from judicial review by the simple expedient of preventing prisoners from reaching the court. And conversely, the availability of review stands as justification for the state's continuing exercise of its punitive authority.

The Court has long held that states may not bolt the door of justice against those in state custody who seek to challenge the terms of their punishment. n71 Half a century ago, *Ex parte Hull* reviewed a procedure in which the Michigan prison system allowed the filing of petitions for habeas corpus only when an "institutional welfare officer" and a "legal investigator to the Parole Board" determined that the petition was "properly drawn." n72 After Michigan authorities refused to mail a petition for habeas corpus drawn by Cleio Hull, and then seized the petition when Hull attempted to send it to court with his father, Hull "prepared another document which he somehow managed to have his father ... file" with the United States Supreme Court. n73 In response to this final effort, the Court unanimously held the Michigan

regulation invalid, declaring that "the state and its officers may not abridge or impair [the] petitioner's right to apply to a federal court for a writ of habeas corpus." n74 Shortly thereafter, the Court unanimously made clear that prisoners' rights of access to the courts applied to state as well as federal postconviction proceedings. n75

[\*569] Prisoners like Bruce Godschalk, of course, are not physically prevented from filing court papers seeking release, but the Supreme Court has recognized that a theoretical opportunity to petition the courts can be made unavailable in practice by government policies that burden or effectively prevent the exercise of that right. It has thus been the rule for a generation that the government may not structure the terms of imprisonment to foreclose "meaningful access" to courts. n76

Even the Justices who are skeptical of any affirmative obligation to provide meaningful access to the courts acknowledge that due process prevents states from arbitrarily obstructing the efforts of prisoners to seek redress for wrongful imprisonment, and that an obstruction need not be total to be unconstitutional. n77 Prisoners like Smith and Godschalk seek no affirmative assistance; they only request that prosecutors not prevent access to evidence in the State's exclusive possession.

The closest parallel to the problems we address arose in *Procunier v. Martinez*, where the Court invalidated a prison regulation that restricted [\*570] attorney-client interviews with prisoners to members of the bar and licensed investigators. n78 Prisoners theoretically could still consult with counsel, but given the remote location of California penal institutions, the regulation in effect inhibited adequate professional representation, and thus "imposed a substantial burden on the right of access to the courts." n79 Although "prison administrators are not required to adopt every proposal that may be thought to facilitate prisoner access to the courts," an examination of the claimed basis for the prohibition on paralegals and law students "revealed the absence of any real justification." n80 In a unanimous opinion by Justice Powell, the Court declared:

The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. n81

When the state denies access to DNA evidence that could demonstrate innocence, it likewise imposes a substantial burden on the right of access to the courts. The situation faced by prisoners seeking access to DNA evidence is not one in which the government has exercised its power to prevent attorneys from gaining access to prisoners, but one in which the state prevents prisoners and their attorneys from gaining access to the evidence that may determinatively exonerate them. But whether the attorney cannot talk with her client, or cannot examine determinative evidence, the effect is equally to obstruct the availability of effective access to the courts. n82

[\*571] The Supreme Court recently reviewed a line of cases in which courts held that government officials who concealed, destroyed, or altered evidence to prevent victims of government misconduct from claiming relief in court violated the constitutional right of access to courts. n83 The Court confronted claims by an American citizen that U.S. officials had concealed information from her regarding the status and whereabouts of her husband in Guatemala and thereby prevented her from seeking judicial relief to prevent his torture and execution. n84 Although it denied damages for the deceptions before it because appropriate relief could be awarded in an underlying suit for the misconduct in question, the eight-member majority in *Christopher v. Harbury* recognized the strength of the precedents holding that concealment or destruction of evidence may amount to a violation of the constitutional right of access to courts. n85

The leading case in this line is *Bell v. Milwaukee*, which upheld a cause of action for denial of access to the courts against police officers who planted a weapon in the hands of their victim, lied, and conspired with other officers and the district attorney to cover up their killing of an unarmed civilian. n86 Awarding damages to the victim's family, whose civil rights action had been thwarted for twenty years by the perpetrators' efforts, the court observed: "To deny [judicial] access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses. This constitutional right is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress." n87

[\*572] A prosecutor's office that seizes and withholds potentially exculpatory DNA samples does not orchestrate a malign conspiracy. But its policy deprives prisoners of access to crucial evidence, thus denying the opportunity to present claims of innocence.

There are, of course, limits on the obligation of the government to facilitate challenges to custody. The government need not gather evidence in the first instance, n88 and need not provide counsel in postconviction proceedings. n89 In *Bounds v. Smith*, however, the Court traced decisions "requiring remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful," and concluded that states are required to "shoulder affirmative obligations to assure all prisoners meaningful access to the courts." n90 In particular, the Court held that for prisoners "seeking new trials, release from confinement, or vindication of fundamental civil rights," n91 the access right required that prison regimes make available law libraries or other equivalent measures. n92

Prisoners' rights have not been favorites of the Rehnquist Court, and the level of "affirmative obligation" that the access right imposes has been a matter of controversy. In *Lewis v. Casey*, the Court overturned [\*573] a lower court's decree that relied on earlier access cases to guarantee prisoners extensive entitlements to law libraries, law librarians, and legal assistance. n93 The Lewis Court's five-member majority disavowed the proposition that states are required to confer "sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population" n94 regarding an unlimited spectrum of causes of action, and held that in any event the decree failed because no plaintiff had established standing by showing that he had a non-frivolous claim of systemwide constitutional violation the judicial vindication of which could be facilitated by the claimed relief. n95

Lewis substantially limited the assistance that states must provide to inmates, and it imposed the anomalous requirement that inmates identify a legal claim before asserting the right of access to legal assistance in order to determine whether they have a legal claim. Nonetheless, the Lewis Court reaffirmed the proposition that, for prisoners who can identify colorable claims, prison regimes must provide a "'meaningful [right of] access to the courts.'" n96 It limited that right to suits seeking to challenge the fact or terms of a prisoner's confinement. "The tools [*Bounds*] requires to be provided," wrote Justice Scalia for the majority, "are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." n97

[\*574] Some commentators read *Lewis* as the beginning of the end of any constitutional protection of prisoners' access to the courts. n98 They are mistaken. The requirement that plaintiffs demonstrate colorable underlying claims has often stood in the way of broad injunctive relief, but it has not eliminated the substantive obligation to allow prisoners meaningful access when such claims exist. Lower courts have continued to find viable causes of action when prison regimes demonstrably prevent prisoners from seeking redress from unconstitutional confinements. n99

Regardless of the level of affirmative assistance to which prisoners are entitled, under the Court's precedents the government may not "unjustifiably obstruct" n100 access to judicial relief. When the government seizes unique and potentially determinative evidence, making it unavailable to the prisoner whom it may exonerate, a prosecutor cannot constitutionally be empowered to deny access to the evidence for no reason better than a desire to avoid challenge to the verdict she previously won. As we will see in Part IV, a careful examination of the justifications for denial of access will often reveal, as in *Martinez*, an "absence of any real justification" for the government's actions. n101

[\*575] Not every claim of access to DNA is constitutionally protected. The primary significance of *Lewis*, as the Supreme Court recently observed in *Christopher v. Harbury*, lies in its adoption of the proposition that the right of court access is "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." n102 The plaintiff, therefore, "must identify a 'nonfrivolous,' 'arguable' underlying claim" that is burdened by the challenged government restriction. n103 In cases like *Godschalk* and *Smith*, the underlying claim is one of factual innocence, which may be vindicated either in state or federal court if the DNA evidence proves exculpatory.

The parameters of this "nonfrivolous and arguable" test, which serves as the gateway to a right of access, are not clearly articulated in *Harbury*, but the language has a striking parallel in the Court's *in forma pauperis* jurisprudence, which permits dismissal only when the complaint is factually "frivolous" or without arguable merit as a legal matter. n104 The well-settled approach to determining frivolousness in this context allows a court to "dismiss a claim as factually frivolous only if the facts alleged are 'clearly baseless,' a category encompassing allegations that are 'fanciful,' 'fantastic,' and 'delusional.'" n105 The Court has cautioned that an "in forma pauperis complaint may not be dismissed ... simply because the court finds the plaintiff's allegations unlikely." n106 Some improbable allegations might properly be disposed of on summary judgment, but to dismiss them as frivolous without any factual development is to disregard the age-old insight that many allegations might be "'strange, but true; for truth is always strange, stranger than fiction.'" n107

The stories of Bruce Godschalk and Frank Lee Smith counsel a similar caution. It may seem strange that a defendant would confess to a crime he did not commit; it is both strange and unfortunate that an eyewitness can identify definitively, under oath, the wrong person as an assailant. Yet once DNA evidence is subjected to testing, these "strange" claims have been shown to be scientifically and demonstrably true.

[\*576] Denial of access to DNA samples by prosecutors should be subject to special scrutiny for a final reason under the Court's right to access precedents. The Court has recently emphasized the First Amendment concerns that arise when the government can "truncate" the representation of clients challenging government authority: "We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge." n108 So, too, Justice Harlan observed that a system that gave unreviewable discretion to a public defender to deny access to trial transcripts for indigents seeking collateral relief "falls short of the requirements of due process," since "it ignores the human equation not to recognize the possibility" that trial counsel might be reluctant to impeach a verdict in which she participated. n109 Given the tenacious belief that prosecutors often manifest in the accuracy of the verdicts they have won, it would equally "ignore the human equation" to rely entirely on their discretion in granting or denying access to DNA evidence that could demonstrate innocence. n110

### III. DNA Evidence and the Search for Truth

The obligation to allow access to postconviction DNA evidence is supported by a second, complementary set of legal principles arising out of the constitutional commitment to insuring against miscarriages of criminal justice. Although most directly addressed to the obligations of fairness at trial, due process principles that require a prosecutor to disclose exculpatory evidence to accused defendants before conviction extend appropriately to access to DNA evidence that could demonstrate innocence after conviction.

[\*577]

#### A. The Law of Access to Evidence in Criminal Justice

During the last two generations, the Supreme Court has construed the Due Process Clause to establish "what might loosely be called the area of constitutionally guaranteed access to evidence." n111 Moving from a "gladiatorial" model in which each party was free to withhold information from its opponent or the court toward a system in which the goal is "ascertaining the truth about criminal accusations," n112 the Court has constrained prosecutors' previously unfettered discretion by imposing a duty to provide exculpatory evidence to defendants.

In the seminal case of *Brady v. Maryland*, n113 the Court built upon the previously established prosecutorial duty to refrain from the knowing use of perjured testimony and the deliberate suppression of exculpatory evidence, n114 and ruled that as a matter of due process a defendant in a criminal case is entitled upon request to disclosure from the prosecution of all "favorable" and "material" evidence in the State's possession. n115 Suppression of such evidence has been recognized as a violation of due process principles, "irrespective of the good faith or bad faith of the prosecution," n116 since it undermines the fairness of the process by which criminal punishment is imposed. The "Brady rule" has become a key structural element of modern criminal procedure. Along with significant changes in court rules and statutes, it has supplanted prior adversarial leeway in pretrial disclosures in the criminal justice system. n117

[\*578] In the forty years since *Brady*, the Court has continued to hold that due process does not require the prosecution to disclose all information in its possession, stressing that the constitutional mandate is not a substitute for rules of discovery in criminal cases. n118 On the other hand, the cases have defined the concept of "materiality" to cover all evidence that is directly exculpatory, impeaching in nature, or of a quality that could make a probable difference in the trial's outcome. n119

*Kyles v. Whitley* n120 extended *Brady* to information held by police investigators but unknown to prosecutors. Like *Brady*, it was anchored in the "early 20th-century strictures against misrepresentation" n121 and the "suppression by the prosecution of evidence favorable to an accused." n122 The Court emphasized that *Brady* was "triggered by the potential impact of favorable but undisclosed evidence." n123 Notwithstanding the claim that prosecutors had no actual knowledge of the evidence at issue, the Court declared that "the prosecutor had the means to discharge the government's *Brady* responsibility if he [would]." n124

[\*579] Suppression of evidence was held to violate due process principles even if there was otherwise sufficient evidence to convict; the prosecutor has the duty to "learn of any favorable evidence known to ... others acting on the

government's behalf in the case, including the police." n125 The Court did not equivocate regarding the purpose and expected results of this rule:

This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. n126

Most recently, in *United States v. Ruiz*, the Court rejected a defendant's due process-Brady claim that a guilty plea entered without disclosure by the prosecution of "impeaching" material rendered the plea involuntary. n127 As part of a "fast-track" plea bargaining program, the government offered certain defendants reduced sentence recommendations in exchange for a waiver of indictment and trial. n128 Prosecutors committed themselves to disclosing any information relating to the factual innocence of the defendant, but did not reveal impeaching evidence or material that could support an affirmative defense. n129 The Court recognized that the due process considerations that support a right to exculpatory and impeachment material were directly concerned with assuring a fair trial, but, as in other procedural contexts, resolving the question of whether due process mandated disclosure of this information required a balancing of the "private interest" at stake, the "value of the additional safeguard," and the "adverse impact ... upon the Government's interests." n130 The *Ruiz* Court determined that any interest on the defendant's side was outweighed by significant prosecutorial interests, including the possible disruption of ongoing investigations, exposure of witnesses to harm, and the commitment of significant resources that might undermine the plea bargaining program. n131 [\*580] It is noteworthy that the government assured the Court that it would provide evidence of factual innocence, even at the plea stage. n132

In the postconviction context, where a defendant seeks disclosure of specifically identifiable DNA material that could demonstrate innocence, the *Ruiz* balance looks substantially different. As we develop in detail below, the interests of the defendant, though surely diminished by reason of a criminal conviction, still surpass any countervailing interests of the prosecution. Applying *Brady*, courts have found a postconviction right of access to DNA materials in the possession of the prosecutor. n133 If prosecutors must deliver exculpatory evidence to a [\*581] defendant before trial even without request, they should at least be obligated to provide access to evidence that could prove innocence post-trial upon specific request of the convicted defendant. n134

[\*582] Recently in *Harvey v. Horan*, n135 both the procedural and substantive aspects of the *Brady* postconviction DNA disclosure claim generated vigorous debate among the judges of the Fourth Circuit. A majority of the panel that initially heard argument determined that the case was procedurally barred. n136 A concurring judge would have held for the plaintiff on the procedural issues but found the *Brady* theory inapposite. n137 The plaintiff's application for rehearing was ultimately mooted because Virginia adopted a statutory right to DNA testing; however, Judge Luttig wrote a comprehensive concurring opinion supporting the prisoner's constitutional claim, concluding:

At least where the government holds previously-produced forensic evidence, the testing of which concededly could prove beyond any doubt that the defendant did not commit the crime for which he was convicted, the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence. And it does so out of recognition of the same systemic interests in fairness and ultimate truth. n138

It is our view that Judge Luttig and the cases that adopt this theory are entirely correct. Although the problem of DNA evidence requires application of due process principles in a new context, neither the fact that untested DNA evidence is indeterminate, nor the fact that the prisoners have already been convicted dissipates the mandate of due process that the government make the evidence available where it could demonstrate innocence.

#### B. *Brady* and Untested Evidence

*Brady* itself concerns evidence whose meaning is known to prosecutors and whose exculpatory qualities can be evaluated directly by a reviewing court. It thus differs from untested DNA evidence whose evidentiary import is indeterminate. In a series of cases applying the *Brady* rule, however, the Court has faced the issue of the due process [\*583]

implications of potentially favorable evidence whose actual meaning is unknown because it has been lost, destroyed, or withheld. These cases do not abandon the basic Brady rule, but tailor it to assure that the search for truth is not abandoned in the face of uncertainty.

In *United States v. Valenzuela-Bernal*, the government had deported potential witnesses in a criminal case (passengers in the defendant's car) when the defendant was prosecuted for criminal transportation of aliens. n139 The defense had no opportunity to investigate their potential usefulness or to preserve their testimony for trial. n140 The government made what the Court characterized as a "good-faith determination that they possessed no evidence favorable to the defendant in a criminal prosecution," n141 and argued that immediate deportation was otherwise required by the immigration laws and necessitated by jail overcrowding. n142 The defendant responded that by deporting eyewitnesses, the government had deprived him of access to evidence with which to build a defense. n143

The Court recognized that deportation deprived the defendant of the most direct means of showing that he had actually been denied relevant evidence, thus supporting "a relaxation of the specificity required in showing materiality," but the Court refused to relieve the defendant entirely of this burden. n144 Observing that the deportation was mandated by statute, the Court averred that "no onus, in the sense of 'hiding out' or 'concealing' witnesses," attached to the government's actions n145 and held that due process required a balancing of interests to determine whether governmental interference with a defendant's right to access to material witnesses violated the principle that "a criminal defendant ... be treated with 'that fundamental fairness essential to the very concept of justice.'" n146 To make out a due process violation, the defendant was required to provide "some plausible explanation of the assistance he would have received from the [\*584] testimony of the deported witnesses" n147 - a showing that Valenzuela-Bernal failed to make. n148

In *Pennsylvania v. Ritchie*, n149 the defendant in a sexual abuse of a minor prosecution sought disclosure of records maintained by the state's Children and Youth Services agency (CYS) regarding the complainant, arguing that the file might contain exculpatory information regarding witnesses to the incident and other potentially favorable evidence. n150 CYs asserted that the materials were confidential under a state statute and withheld the file from both the prosecution and the defense. n151 The Court observed:

It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment... . At this stage, of course, it is impossible to say whether any information in the CYs records may be relevant ... . n152

The Court ruled, therefore, that due process required in camera review of the file by the trial court to determine "whether it contained information that probably would have changed the outcome of [the] trial." n153 Thus, even without a particularized showing that evidence would be favorable, and in the face of state-created privileges, due process required production of the evidence to determine its import for the guilt or innocence of the defendant. n154

*Arizona v. Youngblood* n155 involved untested evidence that had been destroyed by prosecutorial negligence. In a prosecution for child molestation, the police had seized the complainant's clothes and had [\*585] possession of a rape kit with semen samples. n156 They properly preserved the rape kit, but failed to refrigerate the clothing. n157 The samples from the rape kit were initially analyzed only to determine whether sexual contact had occurred, but no testing for blood grouping was done at that time. n158

Just before trial, the State's expert examined the clothes for the first time and found semen stains. n159 However, due to the lack of refrigeration, the evidence was degraded and the expert was unable to obtain blood groupings or other identifying characteristics. n160 The swabs from the rape kit also tested negative for blood groupings. n161 The state court of appeals determined that proper preservation of the evidence would have produced results that "might have completely exonerated the defendant" n162 and reversed the conviction. n163 The Supreme Court first found that the State had complied with Brady by providing to the defense all expert reports and evaluations of the physical evidence as well as access to the evidence for testing by defense experts. n164 For our purposes, the Court's observation that "access to the swab and to the clothing" was part of the State's compliance with Brady n165 is important, since it is access to material in the current possession of the State that is at issue in the postconviction DNA context.

The Court viewed Youngblood's claim to preservation of evidence as implicating a "constitutional duty over and apart from that imposed by ... Brady." n166 Emphasizing that "'whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed,'" n167 as well as the vast scope of the possible duty to [\*586] preserve all potentially significant mate-

rial, the Court constrained the scope of the State's obligation. While Brady did not turn on the "good or bad faith of the State," n168 the Court denied relief to Youngblood by requiring a showing of bad faith by the State in failing to preserve evidence. n169 Due process is violated only when "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." n170

Youngblood and Ritchie leave little doubt concerning the State's obligation at the trial stage to provide untested DNA evidence that is potentially exculpatory to the defendant. From a constitutional perspective, there is no functional difference between denying access to evidence in the prosecutor's possession and bad faith destruction of that evidence; in both cases, evidence which "could form a basis for exonerating the defendant" has been deliberately denied to the defendant. This, indeed, was the presupposition of Youngblood itself. n171 [\*587] Likewise, Ritchie makes clear that the proper response to arguments about the indeterminate evidentiary value of evidence that the government withholds is to ascertain the real value of the evidence, without any reference to good faith or bad faith. Any potentially determinative DNA evidence seized and held by the police or prosecutor must be made available for testing and use at trial. n172 Suggestions that DNA need not be tested because "it is not now known whether the biological evidence being sought by [the defendant] would be favorable or unfavorable to him" and could have been denied at trial n173 misread Supreme Court precedent and exalt willful ignorance.

Moreover, given the extraordinary exculpatory qualities of DNA evidence, police and prosecutors must adjust their procedures to avoid destruction of this evidence. As the Court explained in Youngblood, the "presence or absence of bad faith ... must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." n174 In an era of universal use of DNA evidence to both implicate and exonerate criminal suspects, it would be disingenuous for the prosecutor to claim that anything short of a truly accidental loss was not strong evidence of bad faith.

### C. Postconviction Access

The strongest conceptual argument against applying disclosure obligations to postconviction access rests on a construction of Brady that limits its protections to the fact-finding process. In the typical case seeking postconviction access, the trial has already occurred, and due process requirements were observed at the time of the trial. Thus, the argument goes, the State cannot be accused of unfairly exploiting [\*588] an informational advantage to obtain a conviction. A number of courts have suggested that these differences are sufficient to free the State from any postconviction constitutional obligations regarding DNA evidence. n175

The disclosure right that lies at the core of the Brady doctrine, however, implicates far more than a formally fair trial. First, the basis of the Brady obligation, like much of the "extratextual" criminal procedure adopted by the Supreme Court, is not the perfection of the rules of a sporting contest, but the achievement of justice. Brady imposed an obligation of disclosure because of a risk that, in the absence of disclosure obligations, innocent defendants would be punished. This risk persists in the postconviction setting. Brady is based on the constitutionalization of a particular role for the prosecution: it cannot be concerned only with convictions, and must take as its motto, "The United States wins its point whenever justice is done its citizens in the courts." n176 That proposition applies to postconviction proceedings, and an obsession with finality to the exclusion of justice is at odds with the legitimate administration of punishment.

Second, a State's decision to deny access to DNA evidence that could demonstrate innocence must be judged against the substantive due process standards of fundamental fairness and prohibitions on arbitrary governmental conduct. In cases like *Godschalk* and *Smith*, denial of access to evidence serves no legitimate purpose sufficient to save it from constitutional arbitrariness.

#### 1. Constitutional Importance of Innocence in Criminal Justice

The protection of innocence has been the touchstone of due process in the criminal justice system. The central and common ground for declaring certain rights fundamental under the Due Process Clause is the protection those rights provide against conviction of innocent [\*589] persons. n177 As the Court has declared in the last half century, due process prohibits state and federal governments from criminally punishing an individual without proving guilt beyond a reasonable doubt. n178 Despite the absence of an explicit textual warrant for this proposition in the Bill of Rights, the Court observed that "the reasonable-doubt standard plays a vital role in the American scheme of criminal procedure." n179 The Court continued:

[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. n180

Nor is the issue merely one of the proper instructions for a finder of fact, since constitutional due process requires that the evidence submitted actually support the guilt of the individual to be punished. For instance:

The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury... Under Winship, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand. n181

[\*590] This principle is not merely an artifact of the Warren Court, nor is it extinguished by the fact of a final criminal conviction affirmed by state courts. Just last Term, in *Fiore v. White*, the Court unanimously granted relief to a habeas petitioner who proved that no trial evidence supported an element of the crime of which he was convicted, despite the affirmance of his conviction by state appellate courts. n182 It reaffirmed that when proof beyond a reasonable doubt does not support each element of a crime, as a matter of due process, the continued incarceration of the individual is unlawful. n183

To be sure, the standards demanded by due process apply differently once a defendant has been convicted. The Court has not resolved the question of whether a post-trial demonstration of factual innocence beyond the trial record can be the basis for a habeas petition, but it has held that such a claim of actual innocence cannot impeach a criminal verdict in the absence of a "truly persuasive" demonstration of factual error. n184 It is precisely such a demonstration that the denial of DNA evidence makes impossible.

The right to disclosure of favorable evidence emanates from correlative due process protections: by making available exculpatory evidence, [\*591] disclosure serves to ensure that the innocent are not wrongfully punished. n185 *Brady* and its progeny are premised on the principle that suppression of material evidence poses a significant risk of punishing the innocent, and, when post-trial access to DNA evidence can establish that this risk has become manifest, *Brady's* fundamental principles are implicated.

As the *Brady* doctrine has evolved, the Court has imposed duties previously thought to be incompatible with the adversarial system. Prior to *Brady* not only was there no tradition or history of mandated disclosure of favorable evidence, but discovery in criminal cases was severely restricted in most jurisdictions. n186 The Court has relied upon general principles of fairness, and rudimentary demands of justice, and the specific goal of avoiding conviction and incarceration of the innocent as the grounds for the disclosure mandate. As the Court stated: "A prosecution that withholds evidence on demand of an accused which ... would tend to exculpate him ... does not comport with standards of justice ... ." n187

Like the requirement of proof beyond a reasonable doubt, the *Brady* rule is not based upon any specific textual requirement of the Constitution. Rather, it is grounded in the broad concerns of fundamental fairness. In the pre-*Brady* period, the Court ruled that due process prohibited the use of perjured testimony by the government; such conduct was said to be "inconsistent with the rudimentary demands of justice," and, hence, proscribed by a conception of due process that "embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." n188 So too, the Court determined that a failure to correct inaccurate statements by a prosecution witness violated due process, observing that "the principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, [is] implicit in any concept of ordered liberty." n189 The disclosure obligation germinated in a period defined by evolving standards of liberty and justice; the prosecutor's [\*592] obligations were tied directly to the protection against conviction and incarceration of the innocent.

*Brady* itself was decided in the "incorporation era" during which specific guarantees of the Bill of Rights were made applicable to the states under the Due Process Clause of the Fourteenth Amendment. n190 But *Brady* drew on an earlier, and less textually focused, methodology, for none of the more specific provisions of the Bill of Rights are di-

rectly implicated by the issue of disclosure of exculpatory material. Brady's due process analysis rested upon concerns of the reliability of the fact-finding process and the legitimate role of the government in exercising its police power. As the Court explored the obligations that flowed from Brady and faced issues relating to the loss or destruction of potentially exculpatory evidence, "free-standing due process" principles designed to assure the accurate imposition of criminal punishment continued to dominate its analysis. n191 Professor Israel has commented that "free-standing due process rulings might be characterized as 'narrow' in that they tend to focus on the value of adjudicatory fairness (looking primarily to protect against the conviction of the innocent), rather than on the broader range of values reflected in the whole of the specific guarantees." n192

The analysis that generated Brady - and the fundamental role of innocence in the criminal justice system - extends to postconviction proceedings. When the government possesses previously secured DNA evidence that could demonstrate innocence, the principles of fundamental fairness that coalesced to produce the Brady doctrine maintain their force. Just as the constitutional status of the "reasonable doubt" requirement forbids the continued incarceration of a convicted defendant when it becomes clear after trial that the evidence against her fails to sustain the elements of a crime, n193 the State [\*593] should not be free to deny post-trial access to evidence that can definitively negate guilt.

To be sure, as Justice White observed in *Patterson v. New York*:

Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person. Punishment of those found guilty by a jury, for example, is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail. n194

It is only the failure to provide the constitutional minima necessary to assure "fundamental fairness" that offends the Constitution.

The proper mode of analysis for "fundamental fairness" in criminal due process has been a matter of some disagreement on the Court. n195 Given the fact that Brady "requires States to institute procedures that were neither required at common law nor explicitly commanded by the text of the Constitution," n196 it would seem that a narrow historical analysis is simply inapposite to determining the scope of the Brady obligations. Indeed, in examining the reach of [\*594] Brady in *United States v. Ruiz*, n197 Justice Breyer, writing for eight Justices, made no mention of history. Instead, he engaged in a balancing of interests, including the importance of avoiding the conviction and incarceration of innocent individuals, the value of the proposed additional safeguards, and the adverse impact of the proposed obligations on governmental interests. n198 Determining whether "fundamental fairness" demands access to DNA evidence thus requires an evaluation of both the degree of protection access provides against punishment of the innocent and the burden such protection casts on the State.

Where the State gains exclusive access to evidence that can demonstrate innocence, the concerns of "fundamental fairness" militate strongly in favor of releasing that evidence. n199 The marriage of new and uniquely powerful exonerating forensic science to the historic fundamental due process guarantees against conviction of the innocent commands disclosure at any point in the continuum of the criminal process. There can be no exaggerating the unique and unprecedented power of DNA forensic science to determine guilt or innocence in serious criminal cases. Eyewitness testimony, confessions or other admissions of guilt, and other forms of direct and circumstantial evidence of guilt or innocence present issues of credibility that turn largely on subjective evaluations as to perception, memory, articulation, bias, motive, and self-interest. Forensics have provided strong evidence in certain areas (e.g., blood alcohol tests for DUI and radar for speeding cases), but this evidence often concerns comparatively minor charges, and even with this evidence, there is rarely proof of guilt or innocence beyond all doubt. n200 The analysis we have set forth would apply as well to equally compelling and determinative [\*595] evidence, whether currently existing or of a new technology not yet developed. However, it is important to note the limitation we would impose: the evidence would have to be comparable to DNA in its exculpatory power.

Recent disclosures in cases in which DNA evidence has exonerated persons on death row or serving long prison sentences demonstrate that the evolving technology can hold the key to justice for the convicted innocent. n201 In scores of cases where convictions appeared to be based on solid, and in some circumstances overwhelming, evidence, DNA evidence has proven actual innocence. By the same token, DNA evidence now serves as a critical and essential filter in the investigative phase of criminal proceedings. Thus, it is difficult to imagine a case today that would result in charges being pressed when DNA evidence excludes the suspect (even in the face of otherwise compelling evidence of

guilt); conversely, where DNA demonstrates that the suspect was the perpetrator, even with no other evidence, the prospects for conviction are virtually ensured. n202 No other evidence known to the criminal justice system has this broadly applicable and uniquely dispositive power. n203 Providing access to such evidence imposes [\*596] no burden on legitimate state interests. Where DNA demonstrates innocence, a central reason for respecting finality of criminal judgments - that retrying a case years later will yield no objectively sounder result than the initial trial--is not implicated. Where new evidence is secured, whether it be direct evidence of innocence or impeachment of the State's case at trial, there is usually no certainty of its exculpatory value. Witnesses may change stories for truthful or invidious reasons, and attacks mounted years after trial on the integrity of witnesses or other evidence may raise doubts but not prove innocence. DNA, by contrast, can demonstrate innocence; as we discuss below, it does so without trespassing on any other interest that supports finality of judgments. n204

Brady v. Maryland and its progeny rest on the premise that the prosecutor as a representative of the government is obligated to see that justice is done. As the Court stated:

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty ... does not comport with standards of justice ... n205

The obligations that the Court imposed ensure that the prosecutor is "the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." n206 While these commitments were enunciated [\*597] in the context of trial proceedings, there is no reason to believe that they evaporate upon conclusion of trial. It would be inconsistent with the constitutionally mandated role of the prosecutor to offer fabricated evidence on appeal or in postconviction proceedings. It is no less an abdication of the obligation to ensure "that justice shall be done" for a prosecutor to seek to maintain the effect of a verdict she has won by denying access to evidence that could show such a verdict to be unjust. n207 And, as we will see, it is primarily a claimed interest in "finality" that undergirds the opposition to postconviction DNA testing.

## 2. Constitutional Arbitrariness and Due Process

General due process principles provide a second basis for preventing prosecutors from denying post-trial access to potentially exculpatory DNA. By refusing access to DNA samples in cases like *Godschalk* and *Smith*, prosecutors make it impossible for prisoners to prove their innocence in any venue. The government thereby imposes a postconviction risk that innocent prisoners will continue to suffer confinement. Several courts have recognized that this imposition of risk violates the minimal demands of the Due Process Clause. n208

[\*598] The Supreme Court has not ruled definitively on the disconcerting question of whether a State violates the minimal demands of due process when it continues to punish a convicted prisoner who can conclusively demonstrate factual innocence. In *Herrera v. Collins*, a death row inmate sought to present newly discovered evidence in federal postconviction proceedings that he claimed exonerated him of the murders for which he faced execution. n209 Writing for three Justices in dissent who would have entertained the claim, Justice Blackmun viewed the question as whether it was contrary to "contemporary standards of decency" to "execute a person who is actually innocent." n210 The dissenters would have ruled that under the Eighth Amendment the "legitimacy of punishment is inextricably intertwined with guilt" n211 and that the execution of an innocent person is an "arbitrary imposition" that would violate the demands of substantive due process. n212

The balance of the Court rejected this characterization. The majority acknowledged the importance of factual guilt for criminal punishment. n213 But according to the majority, "petitioner [did] not come [\*599] before this Court as an innocent man, but rather as one who has been convicted by due process of law of two capital murders." n214 In this view, the issue was the procedural one of whether, at the instance of postconviction review, a federal court must entertain the claim that could once again convert the petitioner into one who is "innocent in the eyes of the law." n215 The majority assumed "for the sake of argument in deciding [the] case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," and went on to assume that this showing would "warrant federal habeas relief if there were no state avenue open to process such a claim." n216

Herrera harbors deep philosophical issues. n217 The majority's approach rests on assumptions about the fallibility of the search for [\*600] truth: an individual may be innocent in some ultimate sense of committing the act for which she has been charged, yet not "innocent in the eyes of the law" because the "truth" that has emerged from her trial holds her to be guilty. We as a society must live with that result in the absence of epistemologically privileged access to past reality. The driving moral force of the Herrera opinion comes from the concern that "there is no guarantee that the guilt or innocence determination would be any more exact" in a second trial, and as between first and second trials, "the passage of time only diminishes the reliability of criminal adjudications." n218 The majority's arguendo exception for "truly persuasive" showings of innocence responds to this concern. In this regard, the capacity to analyze DNA evidence - a capacity that did not exist at the time of the Herrera decision - can be dispositive, for it would stretch legal fiction beyond the breaking point to characterize a prisoner as scientifically innocent, but not "innocent in the eyes of the law."

The years since Herrera have also strengthened the legal theories of the dissenters. Shortly before Herrera, Justices Scalia and Rehnquist contended that the Eighth Amendment contained no proportionality principle requiring that punishment be related to culpable guilt, n219 and Justices Kennedy, O'Connor, and Souter emphasized the "narrowness" of Eighth Amendment proportionality review in upholding a life sentence for possession of 650 grams of cocaine. n220 In the intervening decade, the Court has been willing to invalidate punishments on the basis of independent "judicial determinations that the punishments were "grossly disproportional to the gravity of ... defendant[s'] offenses." n221 Where it can be scientifically proven that the [\*601] defendant has committed no crime, his continued incarceration cannot be anything but "disproportional" to his offense. n222

So, too, the Court has reiterated the importance and viability of "substantive due process" limits on arbitrary governmental conduct that "shocks the conscience of the court." n223 While Justice Scalia's concurrence in Herrera disdained an appeal to the conscience of the court n224 - a position consistent with his general distrust of substantive due process analysis - six members of the Court, in *County of Sacramento v. Lewis*, reaffirmed the importance of substantively safeguarding against arbitrary uses of governmental power. n225 These safeguards are directly implicated by arbitrary denial of access to DNA evidence.

Finally, Judge Luttig has expressed the view that one who has been convicted retains "a protected liberty interest in his core right to freedom from bodily restraint ... [and] a protected liberty interest to pursue his freedom from confinement, though obviously after conviction [\*602] these interests are residual and considerably reduced." n226 When the State provides--as all states do n227 - a legal entitlement to postconviction relief upon a specified factual showing, it establishes a positive law liberty interest that grounds due process constraints on the grant or denial of relief. n228 While the due process obligations are not identical to those that attach at the initial trial, the State may not dispose of the prisoner's interests in a constitutionally arbitrary fashion.

In Herrera, the Court observed that even when postconviction judicial review is unavailable, "executive clemency has provided the 'fail safe' in our criminal justice system." n229 Denial of access to evidence that makes possible this "fail safe" remedy can constitute a deprivation of an important liberty interest. Though the matter is not entirely free from doubt, in its most recent examination of the scope of the clemency interest in *Ohio Adult Parole Authority v. Woodard*, n230 five Justices joined in the proposition that due process constrains the denial of parole.

When a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished. But it is incorrect ... to say that a prisoner has been deprived of all interest ... . Thus, although it is true that "pardon and commutation decisions have not traditionally been the business of courts" ... some minimal procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant [\*603] clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process. n231

These precedents converge on the proposition that the State may not arbitrarily deny access to DNA evidence that could free an innocent prisoner. At their core, the constitutional protections of life and liberty prevent the State from consciously and without justification harming innocent individuals. n232 It would, presumably, provoke no great disagreement to find that a State that continued to incarcerate a convicted defendant after performing a determinatively exculpatory DNA test would violate the Constitution. n233 But in cases like *Godschalk and Smith*, since no test had been performed, there is no deliberate imprisonment of the innocent, and the question of what actions short of such deliberately wrongful deprivations violate due process is less clearly determined by precedent.

As we have discussed, the Supreme Court has recently advised that "the touchstone of due process is protection ... against arbitrary action of government," n234 "the exercise of power without any reasonable justification," n235 or "egregious" and "abusive executive action" that "shocks the conscience." n236 "Negligently inflicted harm," by contrast, [\*604] "is categorically beneath the threshold of constitutional due process." n237 In *Lewis*, the Court defined constitutional arbitrariness as an "exercise of power without any reasonable justification in the service of a legitimate governmental objective." n238

The denial of access to potentially exculpatory DNA evidence in the government's custody is not an act of negligence; *Godschalk* and *Smith* were faced with a deliberate and unilateral prosecutorial decision that assured their continued incarceration. Under Supreme Court precedent, therefore, the question of whether that decision rises (or sinks) to the level of arbitrariness that "shocks the conscience of the court" turns on the degree to which the State can claim "reasonable justification in the service of a legitimate governmental objective." n239

The Court has had relatively few opportunities to address the question of the continual confinement of persons who present verifiable claims of innocence, for most government officials acting in good faith are not so callous as to imprison the innocent out of deliberate indifference. One of those few opportunities arose in *Baker v. McCollan*, where the Dallas Police Department refused for three days to examine its files to determine the validity of the arrestee's claim that he was not the person named in a valid arrest warrant. n240 In fact, the individual incarcerated was not the person named in the warrant, but the Court held that the detention for three days over a New Year's weekend did not rise to the level of a due process violation. n241 The Court did, however, acknowledge:

Depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of "liberty ... without due process of law." n242

[\*605] Lower courts have regularly held that extended and deliberate refusal to examine easily available material that would lead to a prisoner's release violates due process. n243

In one dimension, the actions of custodians of DNA evidence in the cases at issue are less culpable than those of pretrial custodians in this line of cases, for prosecutors rely not simply on an initial arrest warrant, but on a judgment of conviction by which guilt was adjudicated beyond a reasonable doubt. But in another dimension, their actions are significantly more culpable. Unlike the prison custodian who simply declines to check her files, the prosecutor who refuses to release DNA for testing makes it impossible for the defendant to prove innocence in any alternative fashion. Absent countervailing state interests, such an action is at odds with the minimum standards of fairness that condition the exercise of the state's police power. As Judge Luttig stated:

Excepting those Justices peculiarly inured [to] what can be the ways of bureaucracy, that it could indeed be thought shockingly arbitrary that the government would literally dispose of the evidence used to deny one of his liberty (if not his right to life) before it would turn that evidence over to the individual, when he steadfastly maintains his factual innocence [\*606] and asks only that he be allowed to subject that evidence to tests which, it is conceded, given the evidence introduced at trial in support of conviction, could prove him absolutely innocent of the crime. n244

As we will see, the justifications given for denial of access in most cases amount to nothing more than bureaucratic inertia.

#### IV. The Limited Burdens of DNA Testing

Each of the arguments canvassed above regarding access to courts and the due process right to exculpatory evidence could be rebutted if the burdens imposed on the state by DNA production sufficiently outweighed the usefulness of access to DNA evidence in avoiding the risk of imprisoning the innocent. In arguing against the imposition of a postconviction constitutional duty to permit access to DNA evidence, courts and prosecutors have asserted the state's interests in finality of criminal judgments, avoidance of administrative burdens, and federalism. None of these arguments survives scrutiny.

##### A. Finality

It cannot be denied that finality is a value in the criminal justice system. The Supreme Court has regularly proclaimed that finality is essential to both the retributive and deterrent functions of the criminal law and to the interests of victims of crimes in obtaining closure. n245 [\*607] Reliance upon considerations of finality and the limited power of the courts to grant new trials in cases like *Smith and Godschalk*, however, puts the cart of collateral attack before the horse of access to evidence. The threshold issue of whether due process or the right of access to the courts require postconviction access to DNA evidence does not entail of its own force any question of judicially ordered release from custody or the grant of a new trial. n246 The evidence may inculpate, rather than exonerate; if exculpatory, relief may be provided by voluntary dismissal of charges or by state clemency proceedings, which may be granted notwithstanding the finality of the underlying conviction.

The issue of postconviction or habeas relief is distinct from the issue of whether a prisoner may seek access to DNA evidence held by the prosecutor postconviction simply to test for evidence of innocence. In this context, "finality" has far less weight than in collateral challenges to convictions. Testing itself has no impact whatsoever on victims, witnesses, or complainants, unless it actually exonerates an innocent individual. The request does not implicate any of their interests in repose or privacy since the question of the relevance of the evidence to the claim of innocence can be decided without reference to testimony or the submission of any further evidence from victims or other witnesses. And if the testing demonstrates innocence, neither the State's nor the victim's interests in retribution, deterrence, or incapacitation are served by continued incarceration.

If an attack on the underlying conviction eventuates, while the State's interest in finality is at its apogee following exhaustion of available postconviction and habeas relief, finality has never served as an absolute bar to constitutional claims, even when they have been procedurally defaulted. n247 In the context of federal habeas proceedings, while both Congress and the Court have placed great weight on finality in restricting challenges to convictions, the issue of factual innocence [\*608] is of substantial significance in determining access to the writ. n248 In particular, the Court has adopted Judge Friendly's view that finality should not bar review when a prisoner can make a colorable showing of innocence. n249 As Justice Powell wrote:

The prisoner may have a vital interest in having a second chance to test the fundamental justice of his incarceration. Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however, to prisoners whose guilt is conceded or plain. n250

In *Herrera v. Collins*, a plurality of the Court ruled that in the absence of extraordinarily powerful proof of innocence "a claim of 'actual innocence' is not itself a constitutional claim." n251 But whatever the merits of this position, n252 the Court has assumed that execution of the demonstrably innocent would be a constitutional violation. It would be anomalous to find no violation when an innocent person is [\*609] sentenced to a substantial period of incarceration. n253 As the Supreme Court of South Dakota observed in a comparable context:

The results of DNA testing reconcile two competing goals ... . The first goal is to prevent the conviction of an innocent person. The second goal is the finality of judgments. Admitting DNA evidence meets both goals. If the evidence exonerates the defendant, then the goal of not allowing an innocent person to stand convicted is served. If the evidence incriminates the defendant, then the goal of finality of judgments is met by adding certainty to the result. n254

Finally, the usual concerns raised by collateral attacks on convictions about the reliability of witnesses who come forward years after conviction are lacking in the DNA context. n255 As contrasted with the potentially elusive, stale, and subjective testimony of witnesses who change their testimony or who come forward years after a trial, DNA evidence provides morally certain proof and not simply grounds upon which to question the validity of the conviction. n256 Moreover, this evidence is truly "newly discoverable" where DNA testing was unavailable at the [\*610] time of trial. n257 Thus, there can be no question of the diligence of trial counsel's efforts, "sandbagging" by the defendant, or purposeful delay. In these circumstances, "fundamental fairness" should require postconviction relief.

## B. Administrative Issues

Prosecutors have argued that allowing access to DNA evidence will divert scarce resources from other tasks and bury prosecutors beneath a tidal wave of frivolous requests. n258 In reality, the administrative burdens of allowing access to DNA evidence are negligible. Prosecutors and police would have to retain biological evidence (that has not previously been discarded), but this places no significant administrative burden on the State since the evidence is already in its possession. At most, the State would be prohibited from destroying the evidence in the future. To the extent prosecutors or police act under regulations or standards requiring destruction of evidence, they would be required to exempt biological evidence from this process.

The obligations that flow from the arguments canvassed above impose no constitutional requirement to test any biological evidence absent a specific request on behalf of a convicted individual. Indeed, even on request, an obligation would arise only if the DNA existed and would, if tested, demonstrate innocence. The number of cases in which any prosecutor's office would have to search for and eventually provide the defense access to testing is not likely to be very high. Prosecutors who have announced the availability of potentially exculpatory DNA evidence on request have not found themselves subject to any overwhelming burden; n259 indeed, even those offices which have conducted proactive searches for exculpatory DNA have found only a handful of cases where testing is appropriate. n260 There is a distinct disincentive to the filing of false claims: prisoners who know that the DNA will confirm their guilt risk prejudicing other legal claims they may have regarding the fairness of their trial or their access to probation or clemency. Moreover, by seeking DNA testing, guilty prisoners [\*611] affirmatively place their own DNA profiles in the hands of law enforcement officials who may use that information to connect them to other crimes. And, as time goes by the universe of cases where blood or semen samples were not initially tested will diminish. n261

In cases where the defendant has offered to pay the costs, there will be no financial burden on the State unless the defense's testing provides exonerating evidence. n262 At that point, there will be compelling proof of innocence and the prosecutor will not be able to complain legitimately that testing the evidence in the State's laboratory would be an unacceptable burden. In cases in which the defendant is indigent, equal protection and due process principles may well require state-funded testing, but once again the burden will be quite modest. n263 And, as technology advances, the costs and administrative burdens will continue to ease. In light of the extraordinary power of DNA, a fair balance of interests cannot defeat the right to access.

## C. Federalism and Democracy

### 1. Substance

In *Harvey v. Horan*, Chief Judge Wilkinson advanced the claim that Congress or state legislatures, and not the federal courts, should [\*612] promulgate standards relating to access to DNA evidence. n264 Specifically, he asserted that the federal courts are ill-suited to address the questions of which prisoners are entitled to testing; whether a threshold showing would be required (such as contesting identity at trial); what degree of proof of innocence the DNA evidence would provide; whether a statute of limitations should be interposed; and who should pay for the testing, obligations to maintain DNA evidence, and appointment of counsel for indigent prisoners. n265 He echoed the position of the National District Attorneys Association that decisions should be made "at the state or local level, where decisions can reflect the needs, resources and concerns of states and communities." n266

These issues are suitable for legislative resolution, and many states and prosecutors have provided access to DNA. But the freedom of states to structure their criminal processes is not unbounded, and the objections to judicial intervention on "deference" grounds are unpersuasive where defendants merely seek access to potentially determinative exculpatory evidence that rests in the exclusive possession of the State. States may not authorize the use of deadly force on fleeing shoplifters, n267 detain arrestees indefinitely without arraignment, n268 or physically prevent prisoners from challenging their custody in court after conviction, n269 no matter how much the "concerns of states and communities" may dictate such policies. So, too, arbitrary denial of access to DNA evidence that could demonstrate innocence falls outside of the sphere of local autonomy. As we discussed in the previous Section, resolution of these issues on a constitutional level is not difficult, as the administrative concerns are distinctly limited.

Ultimately, the various concerns raised by Chief Judge Wilkinson and others fail to account for the powerful exonerating quality of DNA testing. Chief Judge Wilkinson asserts:

It is certainly true and a cause for celebration that DNA testing holds much promise. And there is no question that accused individuals and convicted inmates, as well as prosecutors, should reap the benefits of it. Indeed, many scientific advances promise substantial advantages. But this does not mean that we are free to constitutionalize a right of access [\*613] to the fruits of scientific discoveries. There are often trade-offs to be faced when science advances. Scientific progress frequently presents questions of resource allocation, interpretation, application, privacy, and ethics. Balances must be struck between societal risks and benefits, between alternative ways of understanding and employing new techniques, and between permissible and impermissible uses. n270

Whatever the merit of these concerns with respect to new sciences, they are largely irrelevant here. There are no difficult "trade-off" issues - not as to "privacy," "societal risks," "alternative ways of understanding and employing new techniques," or "ethics," and none thus far has been demonstrated as to "resource allocation." To suggest that constitutionalization of postconviction DNA testing poses any of these concerns is to misunderstand the power and accuracy of this new science.

## 2. Procedure

In a strict sense, the issue of the constitutional right to access to DNA evidence postconviction is purely one of substantive doctrine. If the right exists, it is enforceable in state or federal court, and, depending on the forum that is chosen to litigate the claim, the issue of federalism may not even be germane. n271 However, since a primary means of presenting the federal constitutional issues is by suit under the federal civil rights act, *42 U.S.C. 1983*, federalism issues are often implicated. In the context of a federal suit for injunctive relief to compel [\*614] production or testing of the DNA material, a series of "federalism" objections have been interposed. Chief among these are judicial and legislative policies requiring submission of certain federal constitutional claims to the state judicial system in the first instance.

The arguments that derive from principles requiring exhaustion of state remedies rest primarily on the interplay of *Heck v. Humphrey*, n272 *Preiser v. Rodriguez*, n273 and the Court's insistence on providing the state courts with the initial and primary responsibility for resolving federal constitutional issues relating to state criminal convictions. In *Preiser*, the Court held that when "a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." n274 The Court was particularly concerned that 1983 not be used to circumvent the exhaustion requirement of federal habeas corpus, as 1983 suits can come immediately to federal court without any need to exhaust state remedies. n275 Accordingly, a 1983 suit could not be brought to mandate release from custody based on an underlying constitutional violation in the state criminal proceedings. n276

While a few courts have found *Preiser* to bar a 1983 suit for disclosure or testing of DNA evidence, n277 we do not believe that *Preiser* mandates dismissal. The claimant is not by such an action presently [\*615] challenging the fact or duration of her confinement. She challenges only the decision by state administrators to bar access to potentially determinative evidence, and success in the civil rights action achieves access to evidence, nothing more. Depending upon the results of testing, state or federal postconviction remedies of release or a new trial may be available, but those questions will be part of an entirely separate proceeding. And even if judicial relief is barred, the results of the tests may aid in appeals for clemency.

In *Heck v. Humphrey*, the Court ruled that 1983 suits brought by persons convicted of criminal offenses were barred if the relief requested would "necessarily imply the invalidity of [the plaintiff's] conviction or sentence." n278 This doctrine was intended to prevent prisoners from avoiding the exhaustion requirements of federal habeas corpus by requiring them to challenge their convictions by state appeals or collateral review before seeking federal court intervention. However, *Heck* applies only when the ruling in a civil rights action would have the effect of "necessarily implying" that the conviction was unconstitutional. n279 An order for DNA testing has no direct, much less necessary, impact on a conviction. n280 The results may be inculpatory (thereby supporting the conviction), exculpatory, or inconclusive. But if exculpatory, there is still no judgment by a court undermining the conviction.

To be sure, the evidence could then be used to seek collateral relief, but that is true with respect to any newly discovered evidence that is of sufficient weight to provide grounds for a constitutional challenge [\*616] to the conviction. The claim of a constitutional right to DNA postconviction testing is entirely separate from and antecedent to a challenge to the conviction. Any question concerning whether the DNA evidence is sufficiently exonerating to merit a postconviction hearing will be presented in the context of the later postconviction petition. At that time, a court can decide, based on an analysis of the DNA results and the prosecution's theory of guilt, whether a new trial or dismissal is warranted. If the DNA evidence does not exonerate, no further proceedings will be necessary. Thus, in the typical case, the only state

interest asserted is that the mere disclosure of already secured evidence upsets an interest in finality. In the words of Judge Luttig, the asserted interest in assuring state authority over finality is "non-existent." n281

#### Conclusion

Not every good idea or morally correct position is enforceable as a matter of constitutional law. In this Article, we have set out to determine whether the moral intuition that a State may not withhold previously untested DNA evidence that could fully exonerate one convicted of a crime can be established as a constitutional claim. Our investigation has disclosed that settled due process principles regarding access to exculpatory evidence and access to the courts provide a firm doctrinal foundation for these claims.

DNA evidence is unique in its potential exonerating force in the most serious of criminal cases. The right of access to the courts cannot be defeated by the decision of prosecutors not to risk their verdicts by disclosing potentially exculpatory evidence. Due process jurisprudence, as reflected in four decades of litigation following *Brady v. Maryland*, n282 mandates fair procedures to protect against conviction [\*617] and incarceration of the innocent. Prosecutors have a special duty to ensure against wrongful convictions, and applying the Brady rule n283 in the postconviction context, when a claim of innocence is made on the basis of existing DNA evidence, strongly advances the private interest in liberty while imposing no discernible impact on any legitimate governmental interest. With over 100 persons exonerated of serious criminal convictions, including capital offenses, finality does not demand - and the Constitution does not tolerate - willful refusal to allow access to potentially exculpatory DNA evidence.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Prisoner Rights Access to Courts Criminal Law & Procedure Postconviction Proceedings Imprisonment Evidence Procedural Considerations Exclusion & Preservation by Prosecutor

#### FOOTNOTES:

n1. In the interest of full disclosure, it should be noted that the authors are part of the team of counsel that represented Bruce Godschalk in this case and that currently seeks to obtain damages for his wrongful incarceration. This team also includes Peter Neufeld and Barry Scheck from the Innocence Project at Cardozo Law School.

n2. *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 368-69 (E.D. Pa. 2001). The police questioned Godschalk for approximately two hours before he gave a statement; only the formal "confession" was taped. *Id.* at 368.

n3. *Id.*

n4. In recent studies, the dangers of witnesses making false identifications as a result of photospreads shown in groups have been well documented. Witnesses in such situations may select the person who most closely resembles the assailant, even if they cannot independently identify that person. Furthermore, unless they are informed that the investigation will continue even if they do not make an identification, many will believe that the matter will be dropped if they do not identify a suspect. See Nat'l Inst. of Justice, U.S. Dept. of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* 19 (1999) (outlining basic procedures to obtain the most reliable and accurate information from eyewitnesses), available at <http://www.ncjrs.org/pdffiles1/nij/178240.pdf>; Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *Law & Hum. Behav.* 603, 629 (1998) (detailing instructions that should be given to eyewitnesses when viewing lineups or photospreads). See generally Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal* 4 (3d ed. 1997) (identifying ways to prevent mistaken identification). Some observers recommend that witnesses be informed that the investigation will continue regardless of their ability to identify, that the detective showing the photographs not know the "prime suspect," and that the photographs be shown sequentially to avoid the comparison process. Wells et al., *supra*, at 627.

n5. The unreliability of jailhouse informants' testimony has been well documented. See, e.g., Report of the Illinois Governor's Commission on Capital Punishment (Apr. 15, 2002) (containing recommendations for specific improvements to the capital punishment system in Illinois), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission report/complete report.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission%20report/complete%20report.pdf). Police use of jailhouse informants is subject to some constitutional limitations, but informants' testimony is generally admissible and issues of credibility are left to the jury. See *Kuhlmann v. Wilson*, 477 U.S. 436, 455 (1986) (holding that a prisoner who made statements to a jailhouse informant was not entitled to relief because there was overwhelming evidence of the prisoner's guilt and his constitutional claim did not "itself raise any question as to his guilt or innocence"). But see *United States v. Henry*, 447 U.S. 264, 274 (1980) (holding that a prisoner's statements to an informant should not have been admitted at trial).

n6. See *Commonwealth v. Reese*, 663 A.2d 206, 210 (Pa. Super. Ct. 1995) (affirming grant of prisoner's request for postconviction relief and DNA testing, and granting a new trial on the basis of test results); *Commonwealth v. Brison*, 618 A.2d 420, 425 (Pa. Super. Ct. 1992) ("Principles of justice require us to vacate appellant's conviction and remand to the trial court for the performance of DNA analysis on the samples taken from the victim.").

n7. In the first rape, the police had seized semen samples from the carpet, and the prosecutors used the evidence at trial to prove the blood type of the perpetrator. The police also had semen samples from a rape kit for the victim, including a vaginal swab. In the second rape, the police had semen evidence from the victim (vaginal swab) and her clothing.

n8. *Commonwealth v. Godschalk*, 679 A.2d 1295, 1296 (Pa. Super. Ct. 1996). As the court stated: "Appellant's conviction rests largely on his own confession which contains details of the rapes which were not available to the public." *Id.* at 1297.

n9. The Rooker-Feldman doctrine prohibits a federal court from adjudicating a claim previously decided in the state courts, but only when the identical claim had been adjudicated in the state courts or when the "federal claim is inextricably intertwined with the state-court judgment [so that] the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Centifanti v. Nix*, 865 F.2d 1422, 1430 (3d Cir. 1989) (quoting *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring)); see *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 473 (1983) (holding that federal courts, other than the Supreme Court, lack jurisdiction to hear appeals from state court decisions); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415-16 (1923) ("It was the province and duty of the state courts to decide [the constitutional questions] ... . Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character.").

n10. 373 U.S. 83 (1963).

n11. *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001). Although the district attorney initially appealed the trial court's ruling, he ultimately withdrew the appeal.

n12. The laboratory reports are on file with the authors. The extraordinary scientific advances in forensic DNA technology and research have provided genetic "fingerprinting" techniques that can definitively differentiate one person from another. The two most commonly used tests (Restriction Fragment Length Polymorphism ("RFLP") testing and Polymerase Chain Reaction ("PCR") testing) can make distinctions even between people who are related. Nat'l Comm'n on the Future of DNA Evidence, U.S. Dep't of Justice, Postconviction DNA Testing: Recommendations for Handling Requests 26-28 (1999), available at <http://www.ncjrs.org/pdffiles1/nij/177626.pdf>. Moreover, very few cells are needed to conduct the testing, and

Short Tandem Repeat ("STR") testing can produce reliable results even with degraded samples. *Id.* at 23. In *Harvey v. Horan*, Judge Luttig explained the power of current DNA testing technology:

The current standard STR test examines 13 independent regions of DNA ("loci"), see [Nat'l Inst.] for Justice, *Improved Analysis of DNA Short Tandem Repeats 2* (2001), although testing at just 8-10 loci usually is sufficient to distinguish between any two persons who are not identical twins. See [B.] Devlin et al., *Statistical Evaluation of DNA Fingerprinting: A Critique of the NRC's Report*, 259 [Sci.] 748 (1993). In fact, researchers have found that the probability that any two unrelated individuals match at 9 specific loci (the "matching probability") is approximately 1 in 740 billion. See Lucia Sacchetti et al., *Efficiency of Two Different Nine-Loci Short Tandem Repeat Systems for DNA Typing Purposes*, 45 *Clinical Chemistry* 178, 182 (1999). Because the standard test probes 13 loci (not 8 or 9), it should be correspondingly more powerful. Even the most conservative estimates have placed this matching probability as high as 1 in 100 billion, see [Nat'l Inst. for Justice, *supra*, at 15]. It is also worth noting that some current generation STR systems have matching probabilities on the order of 1 in 1 quadrillion. See Mark Benecke, *DNA Typing in Forensic Medicine and in Criminal Investigations: A Current Survey*, 84 *Naturwissenschaften* 181, 183 (1997). For purposes of understanding the magnitude of these figures of probability, it is estimated that there are only 6 billion persons on the planet. See [<http://www.un.org/esa/population/publications/wpp2000/highlights.pdf>].

*Harvey v. Horan*, 285 F.3d 298, 305 n.1 (4th Cir. 2002) (Luttig, J., concurring) (citation omitted).

n13. The district attorney initially refused to agree to release or dismiss the charges, stating that he believed that the tests were "flawed." However, he could provide no basis for this claim other than the assertion that he believed in his detective and had a full confession. Sara Rimer, *Convict's DNA Sways Labs, Not a Determined Prosecutor*, N.Y. Times, Feb. 6, 2002, at A14.

n14. See Innocence Project, at <http://www.innocenceproject.org> (reporting that, as of November 26, 2002, 116 persons were exonerated).

n15. Sydney Freedberg, *DNA Clears Inmate Too Late*, St. Petersburg Times, Dec. 15, 2000, at 1A.

n16. *Id.*

n17. *Id.*

n18. *Id.* Under Florida law, there was no right to postconviction access to DNA evidence, even when the evidence could exonerate by proving complete innocence. The legislature had refused to reform the law prior to Smith's exoneration, and even after this event Florida's DNA testing statute retains substantial limitations on the circumstances under which prisoners may be entitled to test potentially exculpatory DNA evidence. See *Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So. 2d 633, 635 (*Fla. 2001*) (per curiam) (discussing new state rules governing DNA testing in criminal cases); *id.* at 636 (Anstead, J., concurring in part and dissenting in part) (criticizing DNA testing rules for excluding those convicted through plea bargaining because "plea bargaining often results in many cases of pleas of convenience or best interests where ... the uncertain risk of trial on ... more serious charges compels him to accept conviction ... even while maintaining innocence").

n19. Freedberg, *supra* note 15.

n20. See Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence* 246 (2000) (discussing the most common factors that led to sixty-two wrongful convictions); Sharon Cohen & Deborah Hastings, *Stolen Lives in Prison: DNA Evidence Is Setting Free the Wrongfully Convicted. But What Happens to Them Then?*, Conn. L.

Trib., June 24, 2002, at 1 (detailing an Associated Press study of 110 inmates exonerated by postconviction DNA testing). The Innocence Project keeps a current count of the number of exonerations nationwide on its website. Innocence Project, at <http://www.innocenceproject.org> (last visited Nov. 26, 2002).

n21. See, e.g., *Bradley v. Pryor*, 305 F.3d 1287, 1290-92 (11th Cir. 2002) (holding that prisoner's 1983 claim seeking DNA evidence was not procedurally barred); *Boyle v. Mayer*, No. 02-3124, 2002 U.S. App. LEXIS 19654, at 2-4 (6th Cir. Sept. 17, 2002) (denying postconviction effort to obtain DNA on procedural grounds); *Kutzner v. Montgomery County*, 303 F.3d 339, 341 (5th Cir. 2002) (per curiam) (denying postconviction effort to obtain DNA samples on procedural grounds); *Harvey v. Horan*, 278 F.3d 370, 380 (4th Cir. 2001) (denying postconviction request for access to DNA), reh'g denied, 285 F.3d 298 (4th Cir. 2002); *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001) ("[Prisoner] has a due process right of access to the genetic material for the limited purpose of DNA testing."); *Lee v. Clark County Dist. Attorney's Office*, 145 F. Supp. 2d 1185, 1187-88 (D. Nev. 2001) (dismissing postconviction effort to obtain DNA samples as unripe, in light of available state court procedure); *State v. El-Tabech*, 610 N.W.2d 737, 746 (Neb. 2000) (holding that defendant could not bring request under postconviction statute for DNA testing that would allegedly show actual innocence, in absence of a showing of constitutional violation); cf. *Clason v. McKenzie*, No. 8:02CV206, 2002 U.S. Dist. LEXIS 13044, at 10 (D. Neb. July 12, 2002) (granting access to DNA samples to test origin of inculpatory urine in parole revocation proceeding). For a fuller account, see *infra* note 133.

n22. Preferred, of course, only with respect to the order for disclosure before *Godschalk* completed his sentence.

n23. There are, however, a complex set of procedural barriers to access to the courts to prove innocence. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (holding that federal habeas courts may not review a state court's denial of a state prisoner's federal constitutional claim if the state court decision rested on a state procedural default); *McCleskey v. Zant*, 499 U.S. 467, 503 (1991) (finding prisoner's failure to raise his Massiah claim in his first federal habeas petition constituted abuse of the writ). The 1996 amendments to the federal habeas statute, 28 U.S.C. 2241-2255 (2000), in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.), severely restricted access to habeas corpus. See James S. Liebman & Randy Hertz, *Federal Habeas Corpus, Practice and Procedure* 83 (4th ed. 2001) (giving an overview of the federal habeas corpus process under AEDPA). Indeed, it is not entirely clear that a claim of "factual innocence" is cognizable in federal habeas corpus. See *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (finding that, even if there were an actual innocence federal habeas claim, the threshold would be "extraordinarily" high and that the prisoner's case fell "far short of any such threshold"); *Burton v. Dormire*, 295 F.3d 839, 848 (8th Cir. 2002) (holding that a state prisoner was not entitled to federal habeas relief based on his claims of factual innocence); see also *infra* Part III (discussing the status of claims of factual innocence).

n24. *In re Winship*, 397 U.S. 358, 364 (1970); see *id.* at 372 (Harlan, J., concurring) (invoking the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"); see also *infra* Part III (discussing the importance of protecting the innocent in our criminal justice system).

n25. See, e.g., *Fed. R. Crim. P. 16(a)(1)(C)-(D)* (requiring the state to provide documents, tangible evidence, and scientific reports to defendants in criminal cases); Pa. R. Crim. P. 573(B)(1) (requiring the state to provide the defendant with tangible evidence, among other things); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."); see also *infra* Part III (describing the state's obligation to provide exculpatory evidence).

n26. Cf. *Freeing Offenders with Science*, CJ Letter: News on Crim. Just. Issues (Nat'l Conference of State Legislatures, Washington, D.C.), Nov. 2001, at 1-2 (detailing legislation in twenty-five states providing for

postconviction DNA testing in some circumstances), <http://www.ncsl.org/programs/cj/cjl31101.htm>; Innocence Project, Legislation, at <http://www.innocenceproject.org/legislation/display legislation.php> (last visited Oct. 12, 2002) (listing twenty-nine state statutes and six pending state statutes providing for postconviction DNA testing in some circumstances). Even where statutes provide some access to postconviction DNA testing, the access may be constrained by short time limits, the exclusion of guilty pleas, or procedural bars.

For reviews of state statutes regulating access to evidence for forensic testing, see Rochelle L. Haller, The Innocence Protection Act: Why Federal Measures Requiring Post-Conviction DNA Testing and Preservation of Evidence Are Needed in Order to Reduce the Risk of Wrongful Execution, *18 N.Y.L. Sch. J. Hum. Rts.* 101, 122-31 (2001) (reviewing New York, Virginia, California, Illinois, and Texas legislation); Jerilyn Stanley, DNA: Law Enforcement's Miracle of Technology: The Missing Link to Truth and Justice, *32 McGeorge L. Rev.* 601, 603-09 (2001) (reviewing California legislation); Karen Christian, Note, "And the DNA Shall Set You Free": Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence, *62 Ohio St. L.J.* 1195, 1202-08 (2001) (reviewing New York and Illinois legislation).

n27. Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (Nat'l Inst. of Justice, Series No. 161258, 1996), <http://www.ncjrs.org/txtfiles/dnaevid.txt>.

n28. Nat'l Comm'n on the Future of DNA Evidence, *supra* note 11, at 4-6.

n29. *Id.* at 35.

n30. As a shorthand, we will use the term "demonstrate innocence" to refer to evidence that would meet either prong.

n31. See, e.g., Mark Hansen, DNA Reviews Afoot, *A.B.A. J.*, Apr. 2001, at 40, 40 ("Prosecutors in several jurisdictions, from Long Island, N.Y., to Austin, Texas, will allow any inmate who requests it access to DNA evidence that could establish his or her innocence."); Steve Berry, Cooley's First Year Produces Few Highs or Lows, *L.A. Times*, Dec. 3, 2001, at B2 (describing Los Angeles County's forensic science section, which "streamlines testing requests from inmates who claim they are innocent"); Joe Lambe, Inmate Wins Fight to Obtain DNA Test, *Kan. City Star*, Mar. 11, 2000, at A1 ("Jackson County Prosecutor Bob Beard offered to provide evidence in the case for a DNA test. 'He may not have a clear legal right,' Beard said, 'but he has a clear moral right.' Beard said he would allow defense lawyers to obtain tests in cases with critical DNA evidence."); Paula McMahon, State High Court Won't Extend DNA Testing, *Sun-Sentinel* (Ft. Lauderdale), Oct. 19, 2001, at 1A ("The Broward State Attorney's Office has agreed to do DNA testing in all Death Row cases where the inmate has requested it."); Jonathan D. Rockoff, 1989 Murder Case Puts DNA to the Test in R.I., *Providence J.-Bull.*, June 25, 2001, at A1 ("[Rhode Island Attorney General's guidelines] order a prosecutor to review each request for DNA testing with the defense lawyer making the request. If testing is warranted, they would meet with a forensic DNA expert to determine the kind of test."); Telephone Interview with Mitchell Morrissey, Chief Deputy District Attorney, Denver, Colo. (Apr. 29, 2002) (on file with the authors) (describing the District Attorney's office policy of allowing postconviction testing upon request where evidence could prove exculpatory).

n32. Special Directive from Gregory Thompson, Assistant District Attorney, Office of the District Attorney, County of San Diego, to all District Attorney Staff 2 (July 13, 2000) (on file with the authors); see J. Harry Jones, DNA May Shed New Light on Old Case: DA Program Is Reviewing Man's Murder Conviction, *San Diego Union-Trib.*, Apr. 8, 2002, at A1 ("Almost 600 cases have been scrutinized, with three qualifying for further investigation ..."). After 1992, DNA testing was routinely utilized before trial in San Diego. *Id.*

n33. Special Directive from Gregory Thompson, *supra* note 32, at 3.

n34. NBC Today: Woody Clark, San Diego Deputy District Attorney, Discusses San Diego Prosecutors Offering Free DNA Testing to Inmates (NBC television broadcast, July 28, 2000).

n35. Paul Gustafson, DNA Tests May Help Inmates Prove Innocence; Ramsey County Is Reviewing Old Convictions to See if New Tests Might Change Outcomes, *Star Trib.* (Minneapolis), Mar. 2, 2001, at 1B (quoting Susan Gaertner).

n36. See Daniel Wise, Brooklyn Prosecutors Find Convictions Pass DNA Test, *N.Y. L.J.*, Aug. 6, 2001, at 1 (describing Brooklyn District Attorney's review of 703 cases in search for exonerating DNA evidence). However, the review program (at last report) had uncovered no erroneous convictions:

In 403 (or 57 percent) of the 703 cases reviewed so far, the office concluded that the testing of DNA evidence, even if it were available, would offer no hope of exonerating an inmate. In another 266 cases (or 38 percent), no forensic evidence that might yield DNA evidence was discovered. And in 21 cases where forensic evidence was tested - all of them sex crimes - no genetic material was identified.

The bottom line is that of the 703 cases reviewed to date, only two are still being actively examined ... .

Id.

n37. See Tina Kelley, L.I. Prosecutor to Review Cases that DNA Tests Could Reverse, *N.Y. Times*, Dec. 20, 2000, at B5 (reporting on the Suffolk County District Attorney's decision to review convictions using DNA evidence).

n38. See Glenn Puit, Prosecutors Examining Need for DNA Testing in Murder Cases, *Las Vegas Rev.-J.*, Sept. 16, 2001, at 1B (discussing decision of the Southern Nevada District Attorney's office to evaluate whether DNA testing is warranted for past capital murder cases). The article went on to report:

The district attorney's office has implemented a protocol for scrutinizing all 60 of Southern Nevada's capital murder cases to see if DNA testing could have made a difference in the outcome... .

"If there is someone in prison that doesn't belong there, we want them out as much as anyone else," District Attorney Stewart Bell said.

Id.

n39. See Ed Timms, Travis Completing DNA Review; Wrongful Convictions Prompted Inquiry, Unprecedented in Texas, *Dallas Morning News*, Mar. 24, 2002, at 45A (describing Travis County District Attorney's decision to review 450 cases to ascertain whether DNA evidence could be exculpatory). The program in Austin also yielded very few applications of testing:

Faced with every prosecutor's nightmare - a succession of defendants in high-profile cases who served time for crimes they didn't commit - Travis County District Attorney Ronnie Earle took an unusual step 1 1/2 years ago.

His office began a review of old cases in which DNA evidence might be available to determine whether other defendants were wrongfully convicted.

"We wanted to make sure that, insofar as it was possible for us to ascertain, that had not happened to anybody else," Mr. Earle said.

....

A panel ... focused their [sic] attention on 450 convictions before the mid-1990s... [It] has identified three cases that merited DNA testing of the 388 cases reviewed so far.

Id.

n40. See Good Move: DNA Testing Project Under Way, *Tulsa World*, Apr. 16, 2002, at A8 (noting Oklahoma County District Attorney's decision to review old cases to see if DNA testing might make a difference).

In Oklahoma, the review followed a scandal in which police forensics perjury tainted the convictions of hundreds of Oklahoma inmates. See Arnold Hamilton, Chemist's Errors Stir Fear: Were Innocent Executed? Questions Force Oklahoma to Dig Through 1,197 Cases, *Dallas Morning News*, Oct. 22, 2001, at 1A ("Earlier this year, an FBI review of eight cases revealed significant flaws in [the chemist's] analysis. Since then, state lawmakers provided \$ 650,000 for DNA testing, and Gov. Frank Keating ordered the Oklahoma State Bureau of Investigation to review all criminal cases involving [the chemist]."); see also *Mitchell v. Gibson*, 262 F.3d 1036, 1044 (10th Cir. 2001) (describing a federal district court's grant of relief on rape and forcible sodomy convictions because of errors in the expert testimony of Oklahoma's forensic chemist).

n41. See Telephone Interview with Mitchell Morrissey, *supra* note 31 (describing Morrissey's desire to implement a program similar to the one in San Diego despite the lack of time to devote to the project); cf. Laura Bauer Menner, Counties, Inmates Receive Aid Paying for Pricy Tests, *Springfield News-Leader* (Mo.), Oct. 21, 2001, at 10A (quoting district attorneys who had hoped to use a now-revoked federal grant proposal to provide postconviction DNA testing); Richard Willing, Inmate Genetic Testing Scrapped, *USA Today*, Dec. 26, 2001, at 1A (reporting Ramsey County, Minnesota, Prosecutor's disappointment in the Justice Department's decision not to provide grants for testing convicted rapists and murderers who claimed to have been wrongfully identified, and providing her statement that "maintaining public confidence in our criminal justice system through DNA is apparently not on [Attorney General] Ashcroft's screen").

n42. In cases handled initially by private counsel, a representative of the public defender takes part in the review; in cases handled by public defenders, a private defense attorney sits on the review panel. Telephone Interview with Camille Hill, Deputy District Attorney and Project Coordinator, Orange County, Cal. (Apr. 30, 2002) (on file with authors); see Stuart Pfeifer, Team Gets 80 Requests that Convictions Be Reviewed, *L.A. Times*, Mar. 28, 2001, at B1 (describing panels, composed of prosecutors and defense attorneys, that are reviewing convictions).

n43. Cathy Franklin, Innocence Project, *City News Service*, Sept. 20, 2000, LEXIS, CNS File; see Stuart Pfeifer, O.C. Aims to Unearth Wrongful Convictions, *L.A. Times* (Orange County Ed.), Sept. 21, 2000, at A1 (reporting Orange County Sheriff's Department lab director Frank Fitzpatrick's assertion that DNA testing would

cost \$ 2500 per test, but "it's a worthwhile expense ... because it could help free an innocent man and perhaps identify a criminal who has gone unpunished").

n44. See Anna Gorman, Taking a New Look at Old Cases with DNA, L.A. Times, Oct. 12, 2001, at B2 ("[Assistant District Attorney Lisa] Kahn has also started a post-conviction team to handle requests from convicted felons who claim they are innocent... . The post-conviction, or innocence, project consists of Kahn and three defense attorneys, including Deputy Public Defender Jennifer Friedman.").

n45. Nat'l Dist. Attorneys Ass'n, Policy Positions on DNA Technology 8-9 (2001), <http://www.ndaa-apri.org/pdf/7.22.01.DNA%20Policy%20Position.pdf>.

n46. Id. at 9. The NDAA policy reiterates the suggestion that "DNA testing, in most cases, should be afforded only where such testing was not previously available to the defendant," and five times stresses the need for postconviction testing programs to adhere to principles of "finality." Id. at 8. While the NDAA policy "supports the decisions of individual prosecution offices to initiate post-conviction DNA testing programs," it cautions that such programs "should recognize the need for finality" and that they are "not the best approach for all offices." Id. at 10. It goes on to advance the proposition that "law enforcement should be permitted to destroy biological samples from closed cases" with notice to defendants. Id. at 9.

n47. The Department of Justice announced initially that the \$ 500,000 (later increased to \$ 750,000) of budgeted funding had been diverted by the National Institute of Justice to assist in the use of DNA technologies to identify victims of the World Trade Center attack on September 11. Willing, *supra* note 41; cf. id. (noting that Justice Department sources report NIJ has played only "a limited role in identifying bodies in New York").

In correspondence to Senator Patrick Leahy, the Justice Department identified four programs to which the \$ 750,000 funding was diverted: an "expert panel" that met monthly to consult with New York officials; "consultant fees" to a computer expert who "consulted with the panel"; a pamphlet called "How DNA Can Help Identify Individuals"; and a project entitled "Innovative Hybridization DNA Typing for Forensic Applications," which, "if successful," would be of use in future mass disasters. Letter from Daniel J. Bryant, Assistant Attorney General, to Senator Patrick J. Leahy (Feb. 25, 2002) (on file with authors).

n48. In response to Senator Leahy's question, "How is it that the Department cannot find \$ 750,000 in a \$ 30.2 billion budget" to fund postconviction testing, Attorney General Ashcroft responded that "the Department does not plan to undertake a national effort to promote and fund post-conviction DNA." See Facsimile from Manu Bhardwaj, to Tara Magner & Julie Katzman (Apr. 24, 2002) (on file with authors) (outlining Ashcroft's response to Leahy's question).

n49. See, e.g., Letter from Tom Feeny, Speaker of the Florida House of Representatives, to the Florida Supreme Court 3 (Aug. 14, 2001) (opposing extension of DNA testing because of "unknown and potentially significant fiscal impact" on the state's budget), <http://www.law.fsu.edu/library/flsupct/sc01-363/comment10.pdf>; All Things Considered: The Right to DNA Testing (NPR radio broadcast, Apr. 17, 2001) (paraphrasing Ronald Eisenberg, Deputy for Law of the Philadelphia District Attorney's office, as saying, "Given the limited resources of prosecutors and forensic scientists who test the DNA, it's not fair to move convicted felons to the front of the line"), <http://discover.npr.org/features/feature.jhtml?wflD=1121639>.

n50. See, e.g., *In re Braxton*, 258 F.3d 250, 257 (4th Cir. 2001) (reviewing the argument by the warden of the Sussex State Prison in Virginia that disclosure of postconviction DNA evidence would wreak "undeniable damage to federalism and finality"); Letter from Tom Feeny, *supra* note 49, at 4 ("The ability to reopen pleas, years later, on evidentiary issues, greatly compromises the interest in finality that is essential to the continued operation of our criminal justice system."). As was recently reported in Louisiana:

Pete Adams, executive director of the [Louisiana] District Attorneys Association ... said the state cannot be forced to pay for legitimate errors in the legal system.

"If the DA does a job within his scope of duties, and the police do theirs, then through an innocent mistake the wrong guy is incarcerated ... why should the person be compensated?" ... .

....

... "I don't want to appear callous, but when you're making public policy, you're setting precedent for the future."

Tom Guarisco, Compensation Sought for Ex-Inmate, *Advoc.* (Baton Rouge), May 23, 2001, at 1B.

n51. See *Response Brief of Amicus Curiae Florida Prosecuting Attorneys Association, Inc. at 8, Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So. 2d 633 (Fla. 2001) (Nos. SC01-363 & SC01-1649), <http://www.law.fsu.edu/library/flsupct/sc01-363/comment4.pdf> (opposing postconviction testing for defendants who pled guilty because "to allow a defendant to rescind his or her plea after this exhaustive effort makes a mockery of our judicial system ... [and to allow such defendants to obtain postconviction testing] would make our system meaningless, and fraught with fraud"). We wonder whether allowing the continued incarceration of factually innocent defendants who pled guilty might not also "make[] a mockery of our judicial system."

n52. See, e.g., *Braxton*, 258 F.3d at 259 (concluding that, although the warden argues that a testing order will "open the floodgates," he "offers no support for that stark assertion"); Tom Campbell, DNA Retest Not Blocked, *Richmond Times-Dispatch*, July 10, 2001, at B5 (reporting the view of the Virginia Attorney General that releasing DNA evidence would be improper because the "finality of a criminal trial and verdict should be maintained" and to do otherwise risks opening the floodgates to "a host of similar ill-advised demands"); Brooke A. Masters, Two Conservative Jurists Back DNA Testing, *Wash. Post*, Mar. 29, 2002, at A7 ("Joshua Marquis, an Oregon prosecutor and board member of the National District Attorneys Association, warned that inmates would abuse a blanket rule on DNA testing... . 'It's dangerous when the courts say, 'This is really cool, and therefore we're going to raise it to a constitutional right.'"); Amy Upshaw, Judge Thinks Retroactive Genetic-Testing Law Is Constitutional, *Ark. Democrat-Gazette*, Feb. 16, 2002, at B1 (quoting Pulaski County Prosecuting Attorney Larry Jegley's justification of his efforts to declare a postconviction DNA testing statute unconstitutional on the grounds that "inmates whose cases have long been closed will take advantage of any opportunity to get a free ride to Little Rock or to do something to break up the mundane existence they created for themselves when they broke the law").

For an interesting perspective on the "abuse of testing" argument, compare *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996) (reviewing prosecutors' opposition to postconviction DNA testing ordered in a federal habeas case because "granting the motion "would open the flood gates for DNA testing"), with Tim Bryant, Innocent Man "Elated" to Be Free; Vows He Won't "Dwell on the Negative" of 13 Years in Prison, *St. Louis Post-Dispatch*, July 17, 1996, at 1A (detailing the exoneration of Steven L. Toney, who was proven innocent of the rape charges for which he had been sentenced to two life sentences).

n53. All Things Considered: The Right to DNA Testing, *supra* note 49 (reporting that Ronald Eisenberg, Deputy for Law of the Philadelphia District Attorney, suggested that "felons can do an end run around the state criminal courts and have their cases reopened," and theorized that "they're just coming in and saying, "Well, let's take a look... . I rolled the dice at trial and I lost. And now I'm going to try another tactic").

n54. For example, in Mr. Godschalk's case, after testing DNA evidence provided over district attorney opposition that eventually exonerated the defendant,

the Montgomery County district attorney, Bruce L. Castor Jr., whose office convicted Mr. Godschalk, ... refused to let Mr. Godschalk out of prison, saying he believed that Mr. Godschalk [was] guilty and that the DNA testing [was] flawed.

Asked what scientific basis he had for concluding that the testing was flawed, Mr. Castor said in an interview today: "I have no scientific basis. I know because I trust my detective and my tape-recorded confession. Therefore the results must be flawed ... ."

Rimer, *supra* note 12; cf. *Watkins v. Miller*, 92 F. Supp. 2d 824, 828, 836 (S.D. Ind. 2000) (stating that after postconviction DNA testing exonerated the defendant, the state "clung to the theoretical possibility" of a theory "completely inconsistent with the theory of the case that the prosecution presented to the jury"); *id.* at 840 ("No one should be sentenced to 60 days in prison, let alone 60 years, on the theory and evidence the state relies upon in this case to keep Jerry Watkins in prison.").

n55. See Lauren Kern, *Waivering Rights: Are Prosecutors Circumventing the New Law Designed to Preserve DNA Evidence?*, Hous. Press, July 12, 2001, LEXIS, HOUPRS File ("The passage of the DNA bill and other judicial reforms prompted D.A. Chuck Rosenthal to tell the Houston Chronicle, "This session is going to rank among the worst in 25 years."); *id.* (noting that the district attorney's office proceeded to "craft[] a waiver that [sought] to have defendants sign away their rights - not just to the preservation of biological evidence but also to any notice of its destruction and to any related objections in the future").

n56. See *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 782 (E.D. Va. 2000) (recounting the prior destruction of DNA evidence at the direction of the state Attorney General's office and issuing an order forbidding the destruction of evidence in light of "the Commonwealth's history of destroying evidence").

n57. See Dwyer, Neufeld & Scheck, *supra* note 20, at 172-82 (discussing instances of "broken oaths" by police and prosecutors).

n58. See *id.* at xv ("Sometimes eyewitnesses make mistakes. Snitches tell lies. Confessions are coerced or fabricated. Racism trumps the truth. Lab tests are rigged. Defense lawyers sleep. Prosecutors lie.").

n59. Brooke A. Masters, *New DNA Testing Urged in Case of Executed Man*, Wash. Post, Mar. 28, 2001, at B1 (omission in original) (quoting Virginia Senior Assistant Attorney General Katherine Baldwin's argument in opposition to a petition by four newspapers and a charity to obtain DNA evidence that could exonerate Roger Coleman, who had been executed ten years earlier); see Frank Green, *DNA Tests Not Likely After an Execution*; Va. *Opposing Third Request of Its Kind*, Rich. Times Dispatch, Mar. 26, 2001, at A1 (quoting Virginia Attorney General's spokesperson that testing after Roger Coleman had been executed "shows disrespect for the finality of convictions and undermines our criminal justice system"). The Supreme Court of Virginia subsequently held that the newspapers and charity were not entitled to Coleman's DNA evidence. *Globe Newspaper Co. v. Commonwealth*, Nos. 012682 & 012683, 2002 Va. LEXIS 156, at 14-15 (Nov. 1, 2002).

n60. Roger Parloff, *Gone but Not Forgotten*, Am. Law., Jan.-Feb. 1999, at 5, 6 (quoting Deputy Chief Commonwealth Attorney Albert Alberi's argument in opposition to the testing of potentially exculpatory DNA evidence in the case of Joseph O'Dell III, who had been executed in July 1997).

n61. Ralph Vigoda, *Silent Witness*, Phila. Inquirer Sunday Mag., June 9, 2002, at 12, 15.

n62. *Id.*

n63. Nationally, roughly half of the prisoners exonerated by DNA testing have been able to obtain access to DNA evidence with the consent of district attorneys, and half, like Bruce Godschalk, have had to litigate to obtain access to the exculpatory evidence that set them free. Innocence Project, Causes & Remedies, DNA, at <http://www.innocenceproject.org/causes/dna.php> (last visited Oct. 20, 2002).

n64. *418 U.S. 539, 579 (1974)*. See generally Larry Yackle, *Congressional Power to Require DNA Testing*, 29 *Hofstra L. Rev.* 1173, 1180-82 (2001) (discussing the right to postconviction testing). The Court has twice recognized during the past Term the constitutional stature of the right to seek judicial redress for wrongs. *BE & K Constr. Co. v. NLRB*, 122 *S. Ct.* 2390, 2395-96 (2002) (recognizing the constitutional importance of the right to seek redress of grievances); *Christopher v. Harbury*, 122 *S. Ct.* 2179, 2185, 2186 *n.12* (2002) (detailing the constitutional roots of the right of access).

n65. See *Harbury*, 122 *S. Ct.* at 2185, 2186 *n.12* (explaining that the right of access to the courts is grounded in the First Amendment Petition Clause, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment).

n66. *BE & K Constr. Co.*, 122 *S. Ct.* at 2396 (quoting *United States v. Cruikshank*, 92 *U.S.* 542, 552 (1876)); see also *Turner v. Safley*, 482 *U.S.* 78, 84 (1987) ("Prisoners retain the constitutional right to petition the government for the redress of grievances ... ." (citing *Johnson v. Avery*, 393 *U.S.* 483 (1969))); *Hudson v. Palmer*, 468 *U.S.* 517, 523 (1983) ("Like others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts."); *In re Primus*, 436 *U.S.* 412, 426, 431 (1978) (holding that the ACLU's participation in the suit invoked the First Amendment right to petition); *Cruz v. Beto*, 405 *U.S.* 319, 321 (1972) ("Persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes "access of prisoners to the courts for the purpose of presenting their complaints." (quoting *Avery*, 393 *U.S.* at 485)); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 *U.S.* 508, 513 (1972) ("Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers."); *Mine Workers v. Ill. Bar Ass'n*, 389 *U.S.* 217, 222 (1967) ("We start with the premise that the right ... to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights."); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 *U.S.* 1, 5 (1964) (holding that railroad workers' First Amendment right to meet and gain legal assistance "cannot be seriously doubted"); *NAACP v. Button*, 371 *U.S.* 415, 437-38 (1963) (ruling that a Virginia law criminalizing the act of telling another person that her legal rights have been infringed and referring her to certain attorneys, such as the NAACP, violates the First Amendment); cf. *Bill Johnson's Rests., Inc. v. NLRB*, 461 *U.S.* 731, 741, 743 (1983) (recognizing a "First Amendment right to petition the Government for redress of grievances" but construing that right to exclude "suits based on insubstantial claims"). See generally Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 *Ohio St. L.J.* 557, 580-96, 625-68 (1999) (exploring the use of the Petition Clause to gain access to courts in the first instance); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 *Nw. U. L. Rev.* 899, 903-62 (1997) (discussing the history of the First Amendment right to petition).

n67. See *M.L.B. v. S.L.J.*, 519 *U.S.* 102, 113, 136 (1996) (extending the Court's "narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees" to parental rights termination); *Mayer v. City of Chicago*, 404 *U.S.* 189, 195-96 (1971) (holding that the State must provide record for an indigent defendant); *Williams v. Oklahoma City*, 395 *U.S.* 458, 458-59 (1969) (per curiam) (holding that a transcript needed to perfect an appeal must be furnished at state expense to an indigent defendant sentenced to ninety days in jail and a fifty-dollar fine for drunk driving); *Long v. Dist. Court of Iowa*, 385 *U.S.* 192, 192-94 (1966) (per curiam) (holding that a transcript must be furnished at state ex-

pense to enable an indigent state habeas petitioner to appeal denial of relief); *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) (holding that an indigent's right to a transcript at state expense for appeal purposes can apply in civil cases if the interest is sufficiently strong); *Smith v. Bennett*, 365 U.S. 708, 708-09 (1961) (holding that a filing fee to process state habeas application must be waived for indigent prisoner); *Burns v. Ohio*, 360 U.S. 252, 258 (1959) ("The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."); see also *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (stating that the right of "meaningful access to courts" arises from the Equal Protection Clause).

n68. *Wolff*, 418 U.S. at 576; see *Murray v. Giarratano*, 492 U.S. 1, 11 n.6 (1989) ("The prisoner's right of access has been described as a consequence of the right to due process of law and as an aspect of equal protection." (citations omitted)); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (discussing First Amendment and due process rights of court access); *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971) (holding that the refusal to allow appellants into court for divorce proceedings denied them due process); see also *Little v. Streater*, 452 U.S. 1, 13-17 (1981) (holding due process requires that the State must pay for blood grouping tests sought by an indigent defendant to enable him to contest a paternity suit). As the Court observed in *M.L.B.*, "'due process and equal protection principles converge'" in these cases. 519 U.S. at 120 (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983)).

n69. *Harbury*, 122 S. Ct. at 2185-86. These claims were distinguished in *Harbury* from the class of claims that seek damage relief for "specific cases that cannot now be tried ... no matter what official action may be in the future." *Id.* at 2186. The *Harbury* Court assumed without deciding that such claims were viable, noting that the claims had been sustained only in circuit courts. *Id.* at 2186 n.9.

n70. See, e.g., *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) ("Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most "fundamental political right, because preservative of all rights." (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886))); *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring) ("Inasmuch as one convicted of a serious crime and imprisoned usually is divested of the franchise, the right to file a court action stands, in the words of *Yick Wo v. Hopkins*, as his most "fundamental political right, because preservative of all rights." (citation omitted)); *Wolff*, 418 U.S. at 579 ("The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often "totally or functionally illiterate," were unable to articulate their complaints to the courts.").

n71. Unlike the rights of access to evidence under *Brady v. Maryland* reviewed in Part III below, the right of access to the courts has never been subject to the claim that a completed trial extinguishes the right. Compare *infra* note 82 (evaluating claims that *Brady* is only a "trial" right), with cases cited *infra* notes 133-34 (applying right of access to claims for postconviction relief).

n72. 312 U.S. 546, 548 (1941).

n73. *Id.*

n74. *Id.* at 549.

n75. See *Cochran v. Kansas*, 316 U.S. 255, 257-58 (1942) (stating that a state prison's suppression of appeal documents would violate the Fourteenth Amendment); see also *Gardner v. California*, 393 U.S. 367, 370-71 (1969) (ruling that the denial of access to a transcript in a second state habeas corpus action was unconstitutional where the "practical effect denied effective appellate review to indigents"); *Long v. Dist. Court*, 385 U.S. 192,

194 (1966) (holding that a state may not effectively deny access to habeas relief by denying an indigent prisoner access to a free transcript); *Lane v. Brown*, 372 U.S. 477, 479-81 (1963) (holding that a state may not make the availability of transcripts to indigent defendants seeking a writ of error coram nobis dependent on the discretion of the public defender); *Smith v. Bennett*, 365 U.S. 708, 709 (1961) (holding that a state may not make habeas relief available only to those who can pay the necessary filing fee); *White v. Ragen*, 324 U.S. 760, 762 n.1 (1945) (noting that a warden's refusal to allow prisoners access to the courts unless they procured counsel contravened Ex parte Hull).

Then-Justice Rehnquist had previously taken the position in dissent that even a right of physical access to the courts arises only by virtue of the preemptive effect of federal habeas corpus statutes, and is thus inapplicable to access to state court proceedings. *Bounds v. Smith*, 430 U.S. 817, 839 (1977) (Rehnquist, J., dissenting) (arguing that there is no fundamental constitutional right of access to the courts); *Cruz v. Beto*, 405 U.S. 319, 325 n.3 (1972) (Rehnquist, J., dissenting) (suggesting that right of access is only a matter of preemption grounded in the federal habeas statute). Such an approach would require the reversal of precedents dating back to the mid-1940s that protect access to state habeas proceedings.

n76. In *Johnson v. Avery*, the Court confronted a rule of prison administration forbidding prisoners from assisting other prisoners in "preparing writs." 393 U.S. 483, 484 (1969). Emphasizing the "fundamental importance of the writ of habeas corpus in our constitutional scheme," the Court reasoned that "since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id.* at 485. Notwithstanding the fact that the state prisons in Tennessee both permitted prisoners to file their own writs physically unmolested and made available free notarization, *id.* at 488-89, the Court observed that the effect of the prohibition of inmate assistance was to "forbid[] illiterate or poorly educated prisoners to file habeas corpus petitions," *id.* at 487. The rule was unconstitutional because it "in substance, deprived those unable themselves, with reasonable adequacy, to prepare their petitions, of access to the constitutionally and statutorily protected availability of the writ of habeas corpus." *Id.* at 489. In *Wolff v. McDonnell*, the Court rejected the proposition that the right of access was limited to habeas petitions, recognizing that, like habeas petitions, actions brought under federal civil rights statutes "serve to protect basic constitutional rights." 418 U.S. 539, 579 (1974).

n77. Although Justice Thomas's concurrence in *Lewis v. Casey* expressed "doubts about the validity of *Bounds*," even he recognized a constitutional barrier to states "imposing arbitrary obstacles to attempts by prisoners" to challenge their convictions; he approved cases holding that states may not "abridge or impair" or "deny or obstruct" the capacity to seek habeas relief. 518 U.S. 343, 365, 379-80 (1996) (Thomas, J., concurring).

n78. 416 U.S. 396, 419 (1974).

n79. *Id.* at 420.

n80. *Id.* at 420-21.

n81. *Id.* at 419.

n82. In Part III, we address the due process claim to this evidence under *Brady v. Maryland* and its progeny, which establish a right to disclosure of exculpatory evidence. It is important to note that the claims are constitutionally distinct. The *Brady* line of cases focuses on the duty to disclose exculpatory evidence to prevent the conviction and incarceration of the innocent and to ensure that justice is done in criminal cases. In our view, the *Brady* principles apply in the postconviction context with respect to DNA evidence. But even if that claim is rejected on the theory that *Brady* is limited to the trial context, the right to access to the courts would still provide a viable constitutional claim.

n83. *Christopher v. Harbury*, 122 S. Ct. 2179, 2185 n.7 (2002).

n84. *Id. at 2181-83.*

n85. *Id. at 2186-87.* Justice Thomas filed a lone concurrence in the result, asserting that the majority's analysis was unnecessary on the ground that he could "find no basis in the Constitution for a "right of access to courts." *Id. at 2190* (Thomas, J., concurring).

n86. *746 F.2d 1205, 1260-65, 1279-80 (7th Cir. 1984)*, cited in *Harbury, 122 S. Ct. at 2186.*

n87. *Id. at 1261.* In a similar line of reasoning, the Sixth Circuit stated:

The right of access in its most formal manifestation protects a person's right to physically access the court system. Without more, however, such an important right would ring hollow in the halls of justice... . To what avail would it be to arm a person with such a constitutional right, when the courtroom door can be hermetically sealed by a functionary who destroys the evidence crucial to his case.

*Swekel v. City of River Rouge, 119 F.3d 1259, 1262 (6th Cir. 1997)*; see also *Harrell v. Cook, 169 F.3d 428, 432 (7th Cir. 1999)* ("Destruction of evidence can sabotage a case just as effectively as the conduct described in *Bell*, if it effectively deprives the plaintiff of essential proof."); *Delew v. Wagner, 143 F.3d 1219, 1222 (9th Cir. 1998)* ("The defendants violated the [plaintiffs'] right of meaningful access to the courts by covering up the true facts surrounding [the death of one of the plaintiffs]."); *Nielsen v. Clayton, Nos. 94-1620, 94-1765 & 94-1766, 1995 U.S. App. LEXIS 17126, at 19 (7th Cir. July 11, 1995)* (holding that a violation of the right of access to the courts may exist even if a party has successfully accessed a court, if that access was ineffective due to concealment of the facts); *Chrissy F. v. Miss. Dep't of Pub. Welfare, 925 F.2d 844, 851 (5th Cir. 1991)* (holding that a child's allegations that the welfare department failed to report her repeated statements that she had been sexually abused could state a valid claim of denial of access to the courts); *Ryland v. Shapiro, 708 F.2d 967, 974-75 (5th Cir. 1983)* (holding that the eleven-month concealment alleged in the complaint was sufficient for a jury to find a denial of constitutional rights). But see *Vasquez v. Hernandez, 60 F.3d 325, 329 (7th Cir. 1995)* (holding that not every deception rises to the level of a constitutional violation).

The position of Judge King, concurring in *Harvey v. Horan* that the access claim was barred because, "even without access to the evidence, [the prisoner] is fully capable of taking advantage of postconviction legal options such as habeas corpus and clemency," *278 F.3d 370, 386 (4th Cir. 2002)* (King, J., concurring), adopts a formalistic approach to the right of access that is wholly at odds with the case law.

n88. See *California v. Trombetta, 467 U.S. 479, 488-89 (1984)* (holding that police had no duty to preserve breath samples taken to establish a DWI violation).

n89. See *Murray v. Giarratano, 492 U.S. 1, 10 (1989)* (holding that the right to appointed counsel extends only to the first appeal, even when the death penalty is imposed); *Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)* (holding that the right to appointed counsel extends no further than the first appeal).

n90. *430 U.S. 817, 822, 824 (1977).*

n91. *Id. at 827.*

n92. *Id. at 826-30.*

n93. *518 U.S. 343, 346-48 (1996).* As the majority described the decree, it governed

the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled (10 per week), the minimal educational requirements for prison librarians (a library science degree, law degree, or paralegal degree), [and] the content of a videotaped legal-research course for inmates ... . With respect to illiterate and non-English-speaking inmates, the injunction declared that they were entitled to "direct assistance" from lawyers, paralegals, or "a sufficient number of at least minimally trained prisoner Legal Assistants" ... .

*Id.* at 347-48 (quoting the injunction issued by the United States District Court for the District of Arizona).

n94. *Id.* at 354.

n95. *Id.* at 360.

n96. *Id.* at 351 (quoting *Bounds*, 430 U.S. at 830); see *id.* at 350 (acknowledging the "(already well-established) right of access to the courts" (emphasis omitted)).

n97. *Id.* at 355; see also *Shaw v. Murphy*, 532 U.S. 223, 231 n.3 (2001) ("Inmates have a right to receive legal advice from other inmates only when it is a necessary "means for ensuring a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."") (quoting *Lewis*, 518 U.S. at 350-51 (quoting *Bounds*, 430 U.S. at 825))).

This limit on the constitutional claims that can command a right of access is consistent both with the Court's historical concern (as a matter of due process) with ensuring that prisoners' claims of abuse are not stifled by the alleged perpetrators and with treating access claims of the civilian population, in cases such as *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), as particularly important for the protection of fundamental rights.

n98. See, e.g., Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 *Or. L. Rev.* 1229, 1262-64 (1998) (discussing the possibility that Congress might be able to restrict prisoners' access to the courts for all but the "core areas the Court favors"); Christopher E. Smith, *The Malfeasance of Constitutional Doctrine and Its Ironic Impact on Prisoners' Rights*, 11 *B.U. Pub. Int. L.J.* 73, 90-91 (2001) (arguing that the decision in *Lewis* created a "Catch-22" situation by imposing a strict standing requirement that prisoners must first file legal papers to demonstrate they lack the resources and the capability to file such papers).

n99. See, e.g., *Cody v. Weber*, 256 F.3d 764, 769 (8th Cir. 2001) (holding that a cause of action existed when a prisoner's legal papers were searched and read); *Gomez v. Vernon*, 255 F.3d 1118, 1127-28 (9th Cir. 2001) (holding that a prisoner's First Amendment rights were violated when the Idaho Department of Corrections tried to transfer him after he complained about the law library); *Allah v. Seiverling*, 229 F.3d 220, 224-25 (3d Cir. 2000) (finding a cause of action when a prisoner was segregated from the general inmate population after filing civil rights lawsuits); *May v. Sheahan*, 226 F.3d 876, 883 (7th Cir. 2000) (holding that a cause of action existed when a prisoner detained in a hospital was prevented from making a court appearance); *Thaddeus-X v. Blatter*, 175 F.3d 378, 395 (6th Cir. 1999) (holding that a cause of action existed when a prisoner was harassed by prison officials after helping another prisoner gain access to the courts); *Goff v. Nix*, 113 F.3d 887, 892 (8th Cir. 1997) (holding that a prisoner's rights were violated when his legal papers were taken, thereby denying him access to the courts).

n100. *Procunier v. Martinez*, 416 U.S. 396, 419 (1974).

n101. *Id. at 421*; see discussion *infra* Part IV (evaluating the opposing arguments grounded in finality, avoidance of administrative burdens, and federalism).

n102. *Christopher v. Harbury*, 122 S. Ct. 2179, 2186-87 (2002).

n103. *Id. at 2187* (quoting *Lewis*, 518 U.S. at 353 & n.3).

n104. See 28 U.S.C. 1915(e)(2)(B)(i) (2000) (providing for dismissal of frivolous actions in in forma pauperis proceedings).

n105. *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992) (quoting *Neitzke v. Williams*, 490 U.S. 319, 325-28 (1989)).

n106. *Id. at 33*.

n107. *Id.* (quoting Lord Byron, Canto XIV, in 3 Byron's *Don Juan* 410, 455 (Truman Guy Steffan & Willis W. Pratt eds., Univ. of Tex. Press 1957) (1823)).

n108. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001).

n109. *Lane v. Brown*, 372 U.S. 477, 485 (1963) (Harlan, J., concurring); see *id.* (Stewart, J.) ("The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all.").

n110. Cf. *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971) ("Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule [requiring neutral magistrates to issue search warrants] is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations ... ."); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (holding that probable cause must be determined by neutral magistrates and not "judged by the officer engaged in the often competitive enterprise of ferreting out crime").

n111. *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988) (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)).

n112. *Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995).

n113. 373 U.S. 83 (1963).

n114. See *Mooney v. Holohan*, 294 U.S. 103, 110-12 (1935) (holding that the use of perjured testimony and suppression of exculpatory evidence amounted to a denial of due process).

n115. *Brady*, 373 U.S. at 87.

n116. *Id.*

n117. For early accounts advocating broader pretrial disclosures, see William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 *Wash. U. L.Q.* 1, 15-16 (1990); William

J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 *Wash. U. L.Q.* 279, 282; Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *Yale L.J.* 1149, 1180-85 (1960); Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 *N.Y.U. L. Rev.* 228, 229-30 (1964). But see *United States v. Garsson*, 291 *F.* 646, 649 (S.D.N.Y. 1923) (Hand, J.) (denying the defendant's motion to inspect the grand jury's minutes); *State v. Tune*, 98 *A.2d* 881, 886-91 (N.J. 1953) (Vanderbilt, C.J.) (holding that the defendant did not have the pretrial right to see either the statements of others to the prosecution or his own confession). In the Nuremberg War Crimes Trials, American prosecutors faced the embarrassment of a Soviet protest that American rules of discovery were unfair to defendants. See Hon. Robert H. Jackson, *Some Problems in Developing an International Legal System*, 22 *Temp. L.Q.* 147, 150-52 (1948) (commenting on the validity of the Soviet objections).

n118. See *United States v. Bagley*, 473 *U.S.* 667, 675 (1985) ("[The Brady rule's] purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."). Historically, discovery in criminal cases was quite limited. See, e.g., *Harvey v. Horan*, 285 *F.3d* 298, 317 (4th Cir. 2002) (Luttig, J., concurring) (discussing the traditional adversarial practices of "concealment" and "gamesmanship"). While modern rules have generally expanded the scope of discovery, and courts now reject the "sporting theory of justice," there is no requirement that all investigative material in the possession of the police or prosecutor be disclosed. Judge Luttig suggests that perhaps there should be. See *id.* (Luttig, J., concurring) (explaining that, in cases in which exculpatory evidence would prove beyond any doubt the innocence of the defendant, the principle of elementary fairness requires post-trial production).

n119. See *Kyles v. Whitley*, 514 *U.S.* 419, 432-38 (1995) (tracing the history and scope of the Brady line of cases); cf. *United States v. Ruiz*, 122 *S. Ct.* 2450, 2455-57 (2002) (finding no due process obligation on the part of the prosecution to disclose "impeaching" material prior to entering a plea agreement with the defendant when the government has provided all information regarding the defendant's "factual innocence").

n120. 514 *U.S.* 419 (1995).

n121. *Id.* at 432.

n122. *Id.* (quoting *Brady v. Maryland*, 373 *U.S.* 83, 87 (1963)).

n123. *Id.* at 434.

n124. *Id.* at 438.

n125. *Id.* at 437.

N126. *Id.* at 439-40 (omissions in original) (citations omitted) (quoting *Berger v. United States*, 295 *U.S.* 78, 88 (1935)).

n127. 122 *S. Ct.* 2450, 2453 (2002).

n128. *Id.*

n129. *Id.*

n130. *Id.* at 2456.

n131. Id.

n132. Id.

n133. E.g., *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 369-70 (E.D. Pa. 2001) (finding a right to postconviction DNA testing despite the defendant's "confession"); *Harvey v. Horan*, No. 00-1123-A, 2001 U.S. Dist. LEXIS 9587, at 15-16 (E.D. Va. Apr. 16, 2001) ("Denying the plaintiff access to potentially powerful exculpatory evidence would result in ... a miscarriage of justice."), rev'd, 278 F.3d 370 (4th Cir.), reh'g denied, 285 F.3d 298 (4th Cir. 2002); *Charles v. Greenberg*, No. 00-958, 2000 U.S. Dist. LEXIS 18349, at 12 (E.D. La. Dec. 13, 2000) (noting that the court previously refused to dismiss the defendant's complaint for injunctive relief and that this sparked negotiations between the parties that ultimately led to the defendant's access to the rape kit and to a finding that he had been wrongfully incarcerated); *State v. Hammond*, 604 A.2d 793, 806-07 (Conn. 1992) (granting access to DNA where there was reason to doubt that the evidence would be cumulative); *People v. Johnson*, No. 85134, 2002 Ill. LEXIS 301, at 14 (Ill. Apr. 18, 2002) (considering the defendant's claim that the United States Constitution mandates access to exculpatory evidence on collateral review, but ultimately ordering access to DNA evidence on the basis of a state statute); *Sewell v. State*, 592 N.E.2d 705, 707-08 (Ind. Ct. App. 1992) (allowing postconviction DNA testing on fundamental fairness grounds); *Dabbs v. Vergari*, 570 N.Y.S.2d 765, 768 (N.Y. Sup. Ct. 1990) (holding that any evidence with "high exculpatory potential" should be discoverable after conviction); *Commonwealth v. Reese*, 663 A.2d 206, 208 (Pa. Super. Ct. 1995) (allowing postconviction DNA testing where identification was at issue and no other physical evidence connected the defendant to the scene); *Commonwealth v. Brison*, 618 A.2d 420, 423-25 (Pa. Super. Ct. 1992) (allowing postconviction DNA testing with the assumption that the samples still exist); cf. *Clason v. McKenzie*, No. 8:02CV206, 2002 U.S. Dist. LEXIS 13044, at 10 (D. Neb. July 12, 2002) (granting access to DNA samples to test origin of inculpatory urine in parole revocation proceeding); *Lee v. Clark County Dist. Attorney's Office*, 145 F. Supp. 2d 1185, 1188 (D. Nev. 2001) (abstaining from adjudication of access complaint). But see *State v. Frazier*, No. 30805884DI, 1995 Del. Super. LEXIS 474, at 14 (Aug. 3, 1995) ("In general, there is no Constitutional right to DNA testing ..."); *State v. El-Tabech*, 610 N.W.2d 737, 747-48 (Neb. 2000) (denying postconviction DNA testing because "there is no existing procedure" to permit testing and "there is no constitutional right to testing").

Courts have held that, as of 1994 and 1997, there was not a "clearly established" right to DNA testing. See *Harrison v. Abraham*, No. 96-4262, 1997 U.S. Dist. LEXIS 6894, at 53 (E.D. Pa. May 16, 1997) (granting qualified immunity to police officers who had a duty to provide evidence to the prosecutor and not the defendant); *Roberts v. Toal*, No. 94-CV-0608, 1997 U.S. Dist. LEXIS 1836, at 17 (E.D. Pa. Feb. 20, 1997) (granting qualified immunity in damages claim by exonerated plaintiff, but noting that defendants did not affirmatively deny access to tests); *Brison v. Tester*, No. 94-2256, 1994 U.S. Dist. LEXIS 18193, at 4 (E.D. Pa. Dec. 21, 1994) (granting qualified immunity in damages claim by exonerated defendant).

Student commentators have uniformly approved the extension of Brady to postconviction production of DNA samples. See, e.g., Jennifer Boemer, Student Article: Other Rising Legal Issues, In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates, 27 *Wm. Mitchell L. Rev.* 1971, 2001 (2001) (concluding that there are no justifications for barring postconviction DNA testing); Cynthia Bryant, Note, When One Man's DNA Is Another Man's Exonerating Evidence: Compelling Consensual Sexual Partners of Rape Victims to Provide DNA Samples to Postconviction Petitioners, 33 *Colum. J.L. & Soc. Probs.* 113, 122-25 (2000) (explaining the difficulties in obtaining postconviction testing through standard procedural methods); Donna Buchholz, Comment, Modern Day Chateau D'If in Florida? Collecting Dust on the Shelves of Justice: Potentially Exculpatory DNA Evidence Waits for a Turn in the Florida Sunshine, 30 *Stetson L. Rev.* 391, 423-26 (2000) (urging that the quest for truth should be paramount in postconviction evidentiary disputes); *Christian*, *supra* note 25, at 1240-41 (arguing that the potential exculpatory value of DNA trumps finality concerns); David DeFoore, Comment, Postconviction DNA Testing: A Cry for Justice from the Wrongly Convicted, 33 *Tex. Tech L. Rev.* 491, 525-27 (2002) (listing concerns that legislators should address in fashioning appropriate remedies); Developments in the Law - Confronting the New Challenges of Scientific Evidence, 108 *Harv. L. Rev.* 1481, 1572-73 (1995) (describing the resistance that defendants have met in seeking postconviction DNA testing). Professor Yackle has also argued that DNA's dispositive quality may compel postconviction testing.

See Yackle, *supra* note 64, at 1180-82 (arguing that DNA's dispositive quality makes its use constitutionally compelling).

n134. Indeed, precedent supports an affirmative disclosure obligation when exculpatory evidence surfaces after conviction. See *Monroe v. Blackburn*, 476 U.S. 1145, 1149 (1986) (Marshall, J., dissenting) ("It would hardly make sense to hold the State to a special duty to disclose exculpatory evidence in any adversarial proceeding and then permit the State to avoid this obligation by suppressing the very evidence that would enable a defendant to trigger such proceedings."); see also *Watkins v. Miller*, 92 F. Supp. 2d 824, 849 n.15 (S.D. Ind. 2000) (recognizing district court opinions extending the Brady obligations through proceedings for post-trial motions); *Monroe v. Butler*, 690 F. Supp. 521, 525 (E.D. La. 1988) (rejecting, on remand, the argument that Brady is limited to preconviction processes).

The Court's balancing of the State's interests and private interests in *Ruiz*, 122 S. Ct. at 2453, points in the same direction. Even when physical evidence does not by itself demonstrate innocence in particular cases, the balance could mandate disclosure when the burdens on the prosecution are negligible and the probative force of the evidence is powerful but not determinative. The recent developments in the Central Park jogger case in New York City exemplify such a situation. See Robert D. McFadden & Susan Saulny, DNA in Central Park Jogger Case Spurs Call for New Review, N.Y. Times, Sept. 6, 2002, at B1 (discussing DNA evidence that implicated a new suspect who confessed to the crime but would not determinatively exculpate the five men convicted of the rape).

n135. 278 F.3d 370 (4th Cir.), reh'g denied, 285 F.3d 298 (4th Cir. 2002).

n136. See *id.* at 379 (Wilkinson, C.J.) (dismissing prisoner's action "as a successive [habeas] petition brought without leave of court"). The opinion also expressed the view that the grant of testing was substantively improper, a view which appears technically to be dicta. But see *Harvey*, 285 F.3d at 311-12 nn.2-3 (Luttig, J., concurring) (interpreting this view as a holding).

n137. See *Harvey*, 278 F.3d at 385 (King, J., concurring) (finding that prisoner was not denied access to Brady material).

n138. *Harvey*, 285 F.3d at 317 (Luttig, J., concurring).

n139. 458 U.S. 858, 861 (1982).

n140. *Id.*

n141. *Id.* at 872.

n142. *Id.* at 865.

n143. *Id.* at 861.

n144. *Id.* at 870.

n145. *Id.* at 866.

n146. *Id.* at 872 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)).

n147. *Id.* at 871.

n148. *Id.* at 872.

n149. *480 U.S. 39 (1987)*.

n150. *Id.* at 43-45.

n151. *Id.* at 43.

n152. *Id.* at 57 (citations omitted).

N153. *Id.* at 58-59.

n154. The Court has overridden other privileges when a defendant has demonstrated that a fair trial requires disclosure of the witness or evidence protected by the privilege. See, e.g., *United States v. Nixon*, *418 U.S. 683, 713-16 (1974)* (ordering production of presidential documents over claim of executive privilege); *Davis v. Alaska*, *415 U.S. 308, 315-20 (1974)* (deciding juvenile records of prosecution's main witness must be disclosed to defense to show bias or motive); *Roviaro v. United States*, *353 U.S. 53, 63-66 (1957)* (finding informant's privilege trumped by due process right to evidence from eyewitnesses to alleged criminal event); cf. *Chambers v. Mississippi*, *410 U.S. 284, 302-03 (1973)* (overriding a state rule that prevented the impeachment of a party's own witness).

n155. *488 U.S. 51 (1988)*.

n156. *Id.* at 53.

n157. *Id.*

n158. *Id.*

n159. *Id.* at 54.

n160. *Id.*

n161. *Id.*

n162. *State v. Youngblood*, *734 P.2d 592, 597 (Ariz. Ct. App. 1986)*.

n163. *Id.*

n164. *Youngblood*, *488 U.S. at 55*; see also *id.* at 58 ("None of this information was concealed from respondent at trial, and the evidence - such as it was - was made available to respondent's expert ...").

n165. *Id.* at 55.

n166. *Id. at 56.*

n167. *Id. at 57-58* (quoting *California v. Trombetta*, 467 U.S. 479, 487 (1984)). The Court in *Trombetta* ruled that the Due Process Clause did not require the State to preserve breath samples in order to introduce breath-analysis results at trial. 467 U.S. at 491. These samples were obtained and tested to determine the blood alcohol level of a DUI suspect. *Id. at 482*. The State's duty to preserve evidence was "limited to evidence that might be expected to play a significant role in the suspect's defense." *Id. at 488*. With respect to breath sample testing, the "intoxilyzer" used by the State to measure blood alcohol content was reviewed and certified for accuracy by the state department of health, and any faulty operational factors could be raised at trial without regard to testing of other samples. *Id. at 489-90*. Accordingly, the defendant failed to show either that the material possessed an exculpatory value or that he did not have alternative means of demonstrating unreliable results. *Id. at 489*. By contrast, in a case addressing postconviction DNA access, the prosecutor has refused to test or disclose evidence in her possession. *Trombetta* is entirely consistent with the application of Brady principles to postconviction DNA access.

n168. *Youngblood*, 488 U.S. at 57.

n169. *Id. at 58.*

n170. *Id.* The Court observed with unintentional irony: "In the present case, the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in *Trombetta* ... ." *Id. at 56*. The subsequent developments in Mr. Youngblood's case were narrated by Justice Feldman of the Arizona Supreme Court:

Youngblood was found guilty beyond a reasonable doubt, and his conviction was ultimately upheld by this court on a 3-to-2 vote. Years later, advances in science permitted testing of what evidence remained. Those tests revealed that Youngblood, who served some seven years in prison, was not the perpetrator. The convictions were vacated in 2000. See Thomas Stauffer & Jim Erickson, DNA Test Clears Tucsonan Convicted in Molestation, [Ariz.] Daily Star, Aug. 9, 2000, at A1 (county attorney "sorry" that Youngblood was "incarcerated for an offense for which he was not guilty").

*State v. Harrod*, 26 P.3d 492, 505-06 (Ariz. 2001) (Feldman, J., concurring) (footnote omitted).

n171. As the Court stated:

There is no question but that the State complied with Brady and [*United States v. Agurs*, 427 U.S. 97 (1976)] here. The State disclosed relevant police reports to [the defendant], which contained information about the existence of the swab and the clothing, and the boy's examination at the hospital. The State provided ... the laboratory reports and notes prepared by the police criminologist, and respondent's expert had access to the swab and to the clothing.

*Youngblood*, 488 U.S. at 55.

n172. See *Brewster v. Shasta County*, No. 00-17105, 2001 U.S. App. LEXIS 27544, at 10-12 (9th Cir. Dec. 28, 2001) (finding pretrial denial of access to DNA samples would have been a constitutional violation). In *Brewster*, the allegation that the failure to obtain tests of potentially exculpatory samples was in bad faith was supported by the allegation that the sheriff's department failed to inform the laboratory of available evidence, or to return the laboratory's calls. *Id.* at 12; cf. *Young v. State*, 746 N.E.2d 920, 923 (Ind. 2001) ("We think it is ob-

vious that it would be an abuse of discretion to deny an impecunious defendant funding for a potentially exculpatory DNA test.").

n173. *Harvey v. Horan*, 278 F.3d 370, 385 n.6 (4th Cir. 2002) (King, J., concurring).

n174. 488 U.S. at 57 n..

n175. E.g., *Harvey*, 278 F.3d at 378-79 (rejecting prisoner's Brady claim since he "received a fair trial and was given the opportunity to test the DNA evidence ... using the best technology available at the time").

n176. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (reciting the inscription on the walls of the U.S. Department of Justice); cf. *State v. Hammond*, 604 A.2d 793, 806 (Conn. 1992) (noting that, if the prosecution "made a tactical choice not to have the samples tested prior to the verdict," then "such a tactical choice would plainly have been a breach of the prosecutor's ethical duty to pursue relevant evidence even if it may be exculpatory"); ABA, Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11(c) (3d ed. 1993) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

n177. Many of the Supreme Court's criminal due process cases are based on the historically recognized right to a reliable adjudication of guilt or innocence. See, e.g., *Manson v. Brathwaite*, 432 U.S. 98, 110-14 (1977) (requiring the totality of the circumstances approach to the identification of witnesses); *In re Winship*, 397 U.S. 358, 362-64 (1970) (concerning the right to proof beyond a reasonable doubt); *United States v. Wade*, 388 U.S. 218, 223-38 (1967) (requiring prosecutors to use fair identification procedures); *Gideon v. Wainwright*, 372 U.S. 335, 338-45 (1963) (establishing the defendant's right to appointed counsel); *Mooney v. Holohan*, 294 U.S. 103, 106 (1935) (establishing the prohibition against use of perjured testimony).

n178. See, e.g., *Winship*, 397 U.S. at 361-64 (discussing the necessity of proof beyond a reasonable doubt in criminal cases).

n179. *Id.* at 363.

n180. *Id.* at 364; see *Patterson v. New York*, 432 U.S. 197, 211 (1977) ("Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt.").

n181. *Jackson v. Virginia*, 443 U.S. 307, 316-18 (1979) (footnotes omitted).

n182. 531 U.S. 225, 228-29 (2001).

n183. *Id.*; see also *Schlup v. Delo*, 513 U.S. 298, 325 (1995) (noting that "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system" and crafting an exception to the procedural default rules to allow a habeas petition with an appropriate showing of actual innocence when a petitioner is "alleging a fundamental miscarriage of justice" rather than "alleging that his sentence is too severe").

n184. *Herrera v. Collins*, 506 U.S. 390, 417 (1993). *Herrera* did not resolve the question of whether a post-trial demonstration of actual innocence renders criminal punishment unconstitutional. Chief Justice Rehnquist's majority opinion assumed "for the sake of argument" that a "truly persuasive" showing would have that effect; however, it concluded that no such showing had been made. *Id.* In this proposition, he was joined by separate concurring opinions by Justice O'Connor, writing for herself and Justice Kennedy, *id.* at 419-27 (O'Connor, J.,

concurring), and by Justice White, *id.* at 429 (White, J., concurring). The dissent by Justice Blackmun, joined by Justices Stevens and Souter, would have held that a "truly persuasive demonstration of "actual innocence" would make execution of the petitioner unconstitutional, and remanded for investigation of petitioner's claim on that standard. *Id.* at 441 (Blackmun, J., dissenting). Only Justices Scalia and Thomas would have found no due process concerns presented by newly discovered evidence of innocence. *Id.* at 428-29 (Scalia, J., concurring).

Fiore, likewise, did not resolve the question, since it was a clarification of the state's interpretation of its law, rather than a supervening demonstration of fact, that led the Court to overrule the *Third Circuit*. 531 U.S. at 228-29; see also *Schlup*, 513 U.S. at 315-16 (distinguishing the claim in *Schlup* from the claim in *Herrera* based primarily on the fact that *Schlup* asserted a constitutional error at trial and was thus permitted to make a lesser showing of innocence).

n185. *United States v. Bagley*, 473 U.S. 667, 675 (1985) ("[The] purpose [of Brady] is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.").

n186. See *supra* text accompanying note 112 (describing the hyper-adversarial state of criminal law that existed before Brady); see also *Harvey v. Horan*, 285 F.3d 298, 317-18 (4th Cir. 2002) (Luttig, J., concurring) (rejecting the history of concealment in favor of full disclosure of evidence that might prove innocence).

n187. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

n188. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

n189. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

n190. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (incorporating the Sixth Amendment's guarantee of trial by jury); *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (finding that the Fourteenth Amendment guarantees defendants the protection of the Fifth Amendment's privilege against self-incrimination in state courts); *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963) (incorporating the Sixth Amendment's guarantee of the right to counsel).

n191. See Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 *St. Louis U. L.J.* 303, 383 (2001) (discussing the development of fundamental fairness in the post-incorporation era).

n192. *Id.* at 397-98 (footnote omitted).

n193. See *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (holding that the defendant could not continue to be incarcerated when the prosecution failed to prove an element of the crime).

n194. 432 U.S. 197, 208 (1977).

n195. For example, in *Medina v. California*, 505 U.S. 437, 445-47 (1992), Justice Kennedy's majority opinion rejected the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), as a template for determining "fundamental fairness" for purposes of criminal procedure. Instead, it adopted an analysis that looked first to historical practice and then to "'fundamental fairness' in operation." *Medina*, 505 U.S. at 448 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)). Justices O'Connor and Souter concurred in the judgment, but argued that the "balancing of equities is inappropriate in evaluating whether state criminal procedures amount to due process." *Id.* at 453 (O'Connor, J., concurring).

In *Montana v. Egelhoff*, Justice Scalia, writing for four Justices, took the position that "our primary guide in determining whether the principle in question is fundamental is ... historical practice." 518 U.S. 37, 43 (1996). By contrast, Justice O'Connor, writing for four Justices in dissent, maintained that proper analysis "requires that the competing interests be closely examined." *Id.* at 67 (O'Connor, J., dissenting) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). Justice Souter focused on whether the challenged practice was "rational in today's world." *Id.* at 74-75 (Souter, J., dissenting).

In *Cooper v. Oklahoma*, a unanimous Court looked to both historical practice and "whether the rule exhibited 'fundamental fairness' in operation" in invalidating a procedural system that "imposed a significant risk of an erroneous determination" when "injury to the State ... [was] modest." 517 U.S. 348, 362-65 (1996).

Judge Luttig has suggested that the balancing test set forth in *Mathews v. Eldridge* provides "the proper analytical framework for determining whether there exists a procedural due process right to [DNA] access," because the asserted right does not challenge a conviction. *Harvey v. Horan*, 285 F.3d 298, 315 n.6 (4th Cir. 2002) (Luttig, J., concurring).

n196. *Medina*, 505 U.S. at 454 (O'Connor, J., concurring).

n197. 122 S. Ct. 2450 (2002).

n198. *Id.* at 2456-57. In setting forth the standard of analysis in *Ruiz*, the Court relied on *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ruiz*, 122 S. Ct. at 2456. In *Ake*, the Court applied a *Mathews* analysis to a question of criminal procedure. 470 U.S. at 77.

n199. The Court has applied due process or equality principles to avoid fundamental unfairness in a variety of contexts. See, e.g., *Rock v. Arkansas*, 483 U.S. 44, 56-62 (1987) (concluding that per se exclusion of defendant's hypnotically refreshed testimony violated defendant's right to testify on her own behalf); *Webb v. Texas*, 409 U.S. 95, 97-98 (1972) (holding that the defendant was denied due process when a defense witness decided not to testify following the trial judge's threat of a perjury prosecution); *Washington v. Texas*, 388 U.S. 14, 22-23 (1967) (finding unconstitutional a state statute that rendered accomplices incompetent to testify for one another, though competent to testify for the State).

n200. Cf. *United States ex rel. Almeida v. Baldi*, 195 F.2d 815, 820 (3d Cir. 1952) (holding that it violated the defendant's due process rights for the prosecution to suppress physical evidence that could have determinatively exonerated him).

n201. See Dwyer, Neufeld & Scheck, *supra* note 20, at 246 (describing the types of cases where innocent people were wrongly convicted and later exonerated). Since DNA evidence has been routinely used in the investigative process of criminal cases, it has resulted in the clearance of prime suspects in twenty-five percent of cases. Peter Neufeld & Barry C. Scheck, Foreword to Connors et al., *supra* note 27, at xxviii, xxviii; see also *Developments in the Law - Confronting the New Challenges of Scientific Evidence*, *supra* note 133, at 1577-78 (noting that even if a defendant has been found innocent through DNA evidence, she may still face difficulties achieving her freedom); cf. *supra* note 47 (recounting the use of DNA evidence to identify World Trade Center victims).

n202. See Marjory Fisher, *Procedural Issues Surrounding Post-Conviction DNA Testing*, 35 *New Eng. L. Rev.* 621, 622 (2001) (explaining that prosecutors use DNA to inculcate and exonerate defendants). Indeed, DNA evidence is so reliable that some states permit "John Doe" indictments when DNA evidence exists but no suspect has been identified. See Meredith A. Bieber, Comment, Meeting the Statute or Beating It: Using "John Doe" Indictments Based on DNA to Meet the Statute of Limitations, 150 *U. Pa. L. Rev.* 1079, 1083 (2002) (noting DNA-based indictments without a suspect in New York, Wisconsin, and New Mexico).

n203. In some jurisdictions, the right to access DNA postconviction is based on an analysis of the "strength" of the State's case at trial. Thus, in some cases, it is only when the State relied on disputed eyewitness testimony as opposed to a confession of the defendant that DNA testing has been ordered. See *Commonwealth v. Godschalk*, 679 A.2d 1295, 1297 (Pa. Super. Ct. 1996) (finding that DNA evidence was not required because the defendant's conviction was based primarily on his "confession"); *Commonwealth v. Brison*, 618 A.2d 420, 425 (Pa. Super. Ct. 1992) (holding that principles of justice required the case to be remanded for DNA testing, given that the State's only evidence was an eyewitness account). But given the dispositive "strength" of DNA evidence, this approach is seriously flawed. Indeed, twenty-four percent of DNA exonerations involve "confessions." See Dwyer, Neufeld & Scheck, *supra* note 20, at 246 (breaking down the reasons for the wrongful convictions of those exonerated through DNA testing). Once DNA excludes a defendant, no matter how strong the case appeared at trial, we know to a moral certainty that the defendant is innocent.

n204. See *infra* Part IV (arguing that DNA disclosure neither practically nor theoretically interferes with the State's interest in finality).

n205. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); see also *Giles v. Maryland*, 386 U.S. 66, 100 (1967) (Fortas, J., concurring) ("A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim.").

n206. *United States v. Agurs*, 427 U.S. 97, 111 (1976) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); see *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (explaining that the special role of the prosecutor, as "the representative ... of a sovereignty ... whose interest ... [is] that justice shall be done," is the reason behind requiring prosecutorial disclosure (quoting *Berger*, 295 U.S. at 88)); *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) ("By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model."); see also *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (concluding that disclosure on the part of the prosecutor serves "to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done" (quoting *Berger*, 295 U.S. at 88)).

n207. See *State v. Thomas*, 586 A.2d 250, 252 (N.J. Super. Ct. App. Div. 1991) ("We can conceive of no greater injustice, when that evidence is available, of depriving a convicted defendant of access to it. The prosecutor, the court, and the judicial system have an obligation to protect the innocent which is no less fundamental than the obligation ... to punish the guilty."); *Sewell v. State*, 592 N.E.2d 705, 707 (Ind. Ct. App. 1992) (concluding that Brady can require disclosure of evidence that was not available at the time of the defendant's trial for DNA comparison, stating that there would be "no greater injustice" than depriving a convicted defendant of access to available evidence (quoting *Thomas*, 586 A.2d at 252)). The court in *State v. Hammond* admonished the prosecution for possibly not testing DNA material prior to the verdict. 604 A.2d 793, 806 (Conn. 1992). According to the court:

Such a tactical choice would plainly have been a breach of the prosecutor's ethical duty to pursue relevant evidence even if it may be exculpatory. "It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused."

Id. (quoting 1 ABA, Standards for Criminal Justice 3-3.11(c) (2d ed. 1980)).

n208. See, e.g., *Lambert v. State*, 1999-CA-00395-SCT, P 21 (Miss. 2001), 777 So. 2d 45, 49 ("We cannot say with definite and firm conviction that a mistake has not been made. The least we can do now is allow [the defendant] to apply modern science to the evidence used against him."); *State v. Velez*, 746 A.2d 1073, 1078 (N.J. Super. Ct. App. Div. 2000) ("We recognize the importance of finality. However, the objective of the criminal justice system is the fair conviction of the guilty and the protection of the innocent. The system fails if an innocent person is convicted."); *Thomas*, 586 A.2d at 254 ("We would rather tear at [the] roots [of the defense

bar's trial responsibility] ... than sit by while an innocent man ... "languishes in prison while the true offender stalks his next victim." (quoting *id. at 255* (Baime, J., dissenting)); *Jenner v. Dooley*, 1999 SD 20, P 19, 590 N.W.2d 463, 471-72 (stating that "when newly developed scientific procedures can establish innocence[,] ... elementary fairness may compel the new testing" and that prisoners are entitled to testing when such evidence "would most likely produce an acquittal in a new trial" and costs are not "exorbitant"); *Julian v. State*, 966 P.2d 249, 254 (Utah 1998) (rejecting a restrictive interpretation of a state postconviction statute and stating: "If a statute of limitations alone could be applied to dismiss such a petition, a person who has spent years in prison who could show his innocence - e.g., by new DNA evidence ... could never be exonerated and obtain freedom from wrongful incarceration."). Also, as the court noted in *Grinols v. State*:

[A] defendant who obtained clear genetic evidence of their [sic] innocence would be barred from presenting this evidence to the courts if the defendant had already sought post-conviction relief on any other ground. In such circumstances, we believe that the Alaska Constitution's guarantee of due process of law would require the courts to hear the defendant's petition even though the statute seemingly prohibits it.

10 P.3d 600, 617 (Alaska Ct. App. 2000).

n209. 506 U.S. 390, 393, 397 (1993).

n210. *Id. at 430* (Blackmun, J., dissenting).

n211. *Id. at 434* (Blackmun, J., dissenting).

n212. *Id. at 437* (Blackmun, J., dissenting).

n213. See *id. at 404* (asserting that federal habeas jurisprudence does not cast "a blind eye toward innocence"); see also *id. at 419* (O'Connor, J., concurring) ("Execution of a legally and factually innocent person would be a constitutionally intolerable event."). Justice Scalia, in a concurrence joined by Justice Thomas, took the position that the absence of support for postconviction reviews of innocence in constitutional text or historical practice meant that there was no constitutional bar to the execution of any person claiming actual innocence after conviction. 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 demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.").

n214. *Id. at 407 n.6*.

n215. *Id. at 419* (O'Connor, J., concurring) (characterizing the majority's position).

n216. *Id. at 417*. Justice O'Connor, writing for herself and Justice Kennedy in concurrence, took the position that "execution of a legally and factually innocent person would be a constitutionally intolerable event," *id. at 419*, but left open the question of the availability of habeas relief, since the defendant had not made the "extraordinarily high" and "truly persuasive" demonstration of innocence that would be the minimum necessary to trigger such relief on any theory, *id. at 426-27*. Similarly, Justice White's concurrence "assumed that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case." *Id. at 429*.

In *Schlup v. Delo*, 513 U.S. 298, 313-17 (1995), Justice Stevens, joined by Justices O'Connor, Souter, Ginsburg, and Breyer, emphasized that Herrera established a minimum evidentiary standard for bare innocence

claims, but only accepted their constitutional viability arguendo, leaving the substantive question open. The Court denied relief, however, because no "truly persuasive" demonstration was forthcoming. *Id.* at 312.

n217. The majority's approach to the question of innocence in *Herrera* sometimes reads as if it subscribes to postmodern concepts of socially constructed reality. In fact, the approach mirrors the analysis advanced by Professor Bator in 1963, grounded on the positivist epistemology of Karl Popper. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 *Harv. L. Rev.* 441, 446-49 (1963) (denying that the goal of post-trial criminal procedure can be to determine whether facts as found are "really" true and the law "really" correctly applied); *id.* at 448 n.12 (relying on Karl Popper for the proposition that the suggested approach assumes the existence of truth, but asserts fallibility in perceiving it). Our own presuppositions are resolutely pre-postmodern; we write under the assumption that the identity of the perpetrator of a crime is a "real" fact, and that continuing to punish an individual on the ground that she is the perpetrator when that proposition is scientifically false is "really" unjust. These presuppositions undergird much of the jurisprudence of modern criminal procedure. Our approach is compatible with Popperian epistemology: we need claim only that DNA exonerations are a more reliable guide to truth than a jury verdict or a guilty plea.

n218. *Herrera*, 506 U.S. at 403.

n219. *Harmelin v. Michigan*, 501 U.S. 957, 975-84 (1991) (Scalia, J., joined by Rehnquist, C.J.).

n220. *Id.* at 996-1001 (Kennedy, J., concurring).

n221. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434 (2001) (alterations & omission in original) (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)); see also *Atkins v. Virginia*, 122 S. Ct. 2242, 2246 (2002) (invalidating the imposition of capital punishment on a mentally retarded defendant, holding "'that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense' [and] we have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment." (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910))); *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (discussing the Eighth Amendment's prohibition against grossly disproportionate sentences); *Solem v. Helm*, 463 U.S. 277, 284 (1983) (stating that the Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed), overruled by *Harmelin*, 501 U.S. at 965; *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that even though a ninety-day prison term was neither cruel nor unusual in the abstract, the facts in that case rendered the sentence violative of the Eighth Amendment).

We may learn more on this topic when the Court addresses the question of proportionality (with respect to California's "Three Strikes" law) in its review of *Andrade v. Attorney General*, 270 F.3d 743 (9th Cir. 2001), cert. granted sub nom. *Lockyer v. Andrade*, 122 S. Ct. 1434 (2002).

n222. For a prisoner who is entirely without guilt, no punishment could be constitutional. See *Atkins*, 122 S. Ct. at 2247 ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." (quoting *Robinson*, 370 U.S. at 667)).

n223. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

n224. *Herrera*, 506 U.S. at 428.

n225. See 523 U.S. 833, 847 n.8 (1998) (rejecting Justice Scalia's position in *Herrera*). Lewis established a high burden of proof - intent to harm - in cases where police are acting in situations (a high speed chase in *Lewis*) that give them little time to deliberate. One of the authors has previously argued that the constellation of opinions in *Washington v. Glucksberg*, 521 U.S. 702 (1997), indicates a growing consensus within the Court that

arbitrary interferences with bodily liberty are subject to substantive due process review, see Seth F. Kreimer, *The Second Time as Tragedy: The Assisted Suicide Cases and the Heritage of Roe v. Wade*, 24 *Hastings Const. L.Q.* 863, 866 (1997) (analyzing the status of substantive due process in the Court), and that invalidation of violations of minimal moral norms plays a legitimate and increasingly large role in our constitutional jurisprudence, see Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 *Wm. & Mary Bill Rts. J.* 427, 510-19 (1997) (discussing the essential moral norms that necessarily limit the exercise of governmental powers).

n226. *Harvey v. Horan*, 285 F.3d 298, 313 (4th Cir. 2002) (Luttig, J., concurring).

n227. See *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 402 (2001) ("Each State has created mechanisms for both direct appeal and state postconviction review ... ." (citing Larry Yackle, *Postconviction Remedies* 1, 13 (1981 ed. & Supp. 2000))).

n228. See *Evitts v. Lucey*, 469 U.S. 387, 387-88 (1985) (holding that, even though not constitutionally required, when a State provides for appellate review of a criminal conviction, it must, under federal due process principles, accord all defendants the process guaranteed by the Constitution); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (deciding that state laws guaranteeing a defendant procedural rights at sentencing may create a liberty interest protected by the Due Process Clause of the Fourteenth Amendment against arbitrary deprivation); *Vansickel v. White*, 166 F.3d 953, 957 (9th Cir. 1999) (stating that the right to peremptory challenges is a state-created liberty interest protected by the Fourteenth Amendment); *Burkett v. Love*, 89 F.3d 135, 139 (3d Cir. 1996) (asserting that the arbitrary denial of parole is a substantive due process violation).

n229. *506 U.S. at 415* (quoting Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* 131 (1989)).

n230. *523 U.S. 272* (1998).

n231. *Id. at 289* (O'Connor, J., concurring, joined by Souter, Ginsburg, & Breyer, JJ.) (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)). Justice Stevens adopted a similar position. See *id. at 291* (Stevens, J., dissenting in part) (arguing that fundamental fairness constrains the exercise of pardon power and stating that "deliberate fabrication of false evidence" in a clemency proceeding would violate due process). Chief Justice Rehnquist's plurality opinion (with Justices Scalia, Thomas, and Kennedy) would have placed clemency proceedings wholly beyond the reach of due process constraints. *Id. at 279*.

n232. E.g., *Hope v. Pelzer*, 122 S. Ct. 2508, 2514 (2002) (examining the cruel and unusual punishment inflicted on petitioner by handcuffing him to a hitching post); *County of Sacramento v. Lewis*, 523 U.S. 833, 854 (1998) (discussing the implications of a high speed police chase on the decedent's Fourteenth Amendment rights).

n233. Cf. *Kennell v. Gates*, 215 F.3d 825, 826 (8th Cir. 2000) (finding that continued detention after being informed that prisoner's fingerprints did not match those of the suspect violated due process); *Summerville v. Warden*, 641 A.2d 1356, 1369 (Conn. 1994) ("Even the strong interest in the finality of judgments and the state's interest in retrying a defendant with reasonably fresh evidence does not require the continued imprisonment of one who is actually innocent."); *People v. Washington*, 665 N.E.2d 1330, 1335 (Ill. 1996) (arguing that as a matter of state constitutional law, "imprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process").

n234. *Lewis*, 523 U.S. at 845.

n235. *Id.* at 846.

n236. *Id.*; see *id.* at 857 (Kennedy, J., concurring) ("History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("The Doctrine of Due Process ... was ""intended to secure the individual from the arbitrary exercise of the powers of government."" (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819))))).

n237. *Lewis*, 523 U.S. at 849.

n238. *Id.* at 846.

n239. *Id.*

n240. 443 U.S. 137, 141 (1979).

n241. *Id.* at 145-47.

n242. *Id.* at 145 (omission in original); see also *id.* at 148 (Blackmun, J., concurring) (suggesting that "a sheriff who deliberately and repeatedly refused to check the identity of a complaining prisoner against readily available mug shots and fingerprints" has engaged in an actionable due process violation).

n243. For example, the court in *Fairley v. Luman*, 281 F.3d 913, 915 (9th Cir. 2002) (per curiam), considered a situation in which police neither ran a fingerprint comparison nor a DMV check in the face of the defendant's protests of innocence. The court held that his twelve-day detention violated due process, since it would have imposed only a minimum burden on the city to "institute readily available procedures for decreasing the risk of erroneous detention," and the failure to do so constituted deliberate indifference. *Id.* at 918; see also *Wilson v. Lawrence County*, 260 F.3d 946, 957 (8th Cir. 2001) (stating that state officials' failure to follow an obvious lead that resulted in erroneous conviction and nine years of false imprisonment may have been reckless and, if so, would violate due process); *Lee v. City of Los Angeles*, 250 F.3d 668, 685 (9th Cir. 2001) (holding that plaintiff had a viable due process claim when the Los Angeles Police Department failed to compare the fingerprints and physical characteristics of the plaintiff with those from New York and ignored the "obvious mental incapacity" of the plaintiff, resulting in two years of false imprisonment); *Armstrong v. Squadrito*, 152 F.3d 564, 568 (7th Cir. 1998) (reversing summary judgment for defendants when, due to the loss of his paperwork, plaintiff remained in detention for fifty-seven days despite his daily oral inquiries and written request forms regarding the status of his case); *Gray v. Cuyahoga County Sheriff's Dep't*, 150 F.3d 579, 583 (6th Cir. 1998) (determining that where the plaintiff's brother had used his name, but the physical description and photo of the wanted man looked nothing like the plaintiff, deliberate indifference in failing to ascertain identity would make out a constitutional violation); *Cannon v. Macon County*, 1 F.3d 1558, 1563-64 (11th Cir. 1993) (finding that where the plaintiff shared a name with the legitimate subject of an arrest warrant, but did not share the same identifying traits - hair and eye color, age, birthday, or social security number - the arresting officer's deliberate indifference to these facts violated due process).

n244. *Harvey v. Horan*, 285 F.3d 298, 319-20 (4th Cir. 2002) (Luttig, J., concurring). Assuming that the courts would recognize a right to postconviction DNA testing on the grounds discussed in this Article, it would appear to follow that the prosecutor (or police) would be under a constitutional duty not to deliberately destroy evidence post-trial. Cf. *Kyles v. Whitley*, 514 U.S. 419, 421-22 (1995) (holding that the prosecutor is responsible for any failure to disclose evidence to the defense and that, if such a failure raises the probability that disclosure would have produced a different outcome, the defendant must have a new trial); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (holding that the Due Process Clause of the Fourteenth Amendment does not require the State to preserve semen samples for testing without a showing of bad faith on the part of the police); *United States v.*

*Valenzuela-Bernal*, 458 U.S. 858, 874 (1982) (finding no violation of respondent's Fifth or Sixth Amendment rights as he failed to demonstrate the materiality of evidence unavailable to him at the time of trial).

n245. E.g., *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (noting that the limits imposed on the discretion of federal courts to grant habeas relief "reflect our enduring respect for "the State's interest in the finality of convictions" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993))); *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992) (reiterating the Court's recognition of the State's interest in finality of convictions); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7 (1992) (stating that finality of state criminal convictions is "a matter of particular importance in a federal system"); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (noting the significance of finality when there is a federal challenge to a state criminal conviction); *Murray v. Carrier*, 477 U.S. 478, 487 (1986) (acknowledging the value of finality inherent in state court criminal convictions).

n246. See *Harvey*, 285 F.3d at 321-25 (Luttig, J., concurring) (arguing that the majority confused a cause of action under 1983 with habeas corpus).

n247. See *Schlup v. Delo*, 513 U.S. 298, 318-20 (1995) (emphasizing that justice often requires review of successive and abusive habeas claims). The 1996 amendments to the federal habeas statute, Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 106, 110 Stat. 1214, 1220-21, preclude granting of a petition except where (1) the Supreme Court has made a new constitutional rule retroactive, or (2) new facts not discoverable by due diligence would show by clear and convincing evidence that no reasonable jury would find the defendant guilty, 28 U.S.C. 2244(b)(2) (2000).

n248. See *Schlup*, 513 U.S. at 321 (asserting that when a constitutional violation results in the conviction of one who is actually innocent, a federal habeas court may grant the writ without showing cause for the procedural default).

n249. *Kuhlmann v. Wilson*, 477 U.S. 436, 454 & n.17 (1986) (plurality opinion); see Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 *U. Chi. L. Rev.* 142, 142 (1970) (arguing that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence"). In *Teague v. Lane*, 489 U.S. 288 (1989), the Court ruled that habeas petitions that would result in the establishment of new constitutional protections were barred unless the new rule placed "certain kinds of ... conduct beyond the power of the [State]" or was of the kind that was "implicit in the concept of ordered liberty." *Id.* at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692-93 (1971)).

n250. *Kuhlmann*, 477 U.S. at 452 (emphasis added).

n251. 506 U.S. 390, 404 (1993). A showing of actual innocence provides a "gateway" to federal habeas review of otherwise defaulted claims. *Schlup*, 513 U.S. at 315 (quoting *Herrera*, 506 U.S. at 404); see *Burton v. Dormire*, 295 F.3d 839, 849 (8th Cir. 2002) (denying federal habeas petition notwithstanding "mounting evidence that [the petitioner's] conviction was procured by perjured or flawed eyewitness testimony" because the petitioner's claims were without merit).

n252. See *Herrera*, 506 U.S. at 426 (O'Connor, J., concurring) (noting that without a high threshold of actual innocence, the federal courts would be inundated with frivolous claims); *id.* at 437 (Blackmun, J., dissenting) (maintaining that the Eighth and Fourteenth Amendments require hearing actual innocence claims).

n253. See *Harvey v. Horan*, 285 F.3d 298, 314 (2002) (Luttig, J., concurring) (arguing that the Court refused to distinguish between the "constitutionally-protected, post-conviction interests of the capital and the non-capital prisoner"); see also *Herrera*, 506 U.S. at 405 ("It would be a rather strange jurisprudence ... which held that under our Constitution he could not be executed, but that he would spend the rest of his life in prison.").

n254. *Davi v. Class*, 2000 SD 30, P 23, 609 N.W.2d 107, 113; see also *In re Braxton*, 258 F.3d 250, 259 (4th Cir. 2001) (refusing to issue mandamus against DNA testing order because, ""although the notion of "finality" is important, such finality is not desirable when the result is the "finality" of the deprivation of liberty at the expense of a constitutional right"" (quoting *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 784 (E.D. Va. 2000))). In fact, the court-ordered postconviction DNA testing in *Davi* decisively inculpated the prisoner, a result that obtains in roughly half of postconviction testings. See Brooke A. Masters, DNA Testing Confirms Man's Guilt in Va. Rape, Wash. Post, May 16, 2002, at B1 ("About half of all conclusive postconviction tests inculpate the inmate, rather than prove his innocence.").

n255. See Akhil Reed Amar, A Safe Intrusion: We Could "Fingerprint" Everyone's DNA and Still Protect Privacy - If Doctrinal Obstructionists Would Just Get Out of the Way, Am. Law., June 2001, at 69, 69 ("If the DNA casts strong doubt on - or indeed conclusively disproves - the convict's guilt, the state's true interests are ill served by suppressing [DNA] information."); Developments in the Law - Confronting the New Challenges of Scientific Evidence, supra note 133, at 1577-78 (arguing that prosecutors' objections to DNA testing have little merit and that all problems would be solved if a larger DNA database were created).

n256. See Developments in the Law - Confronting the New Challenges of Scientific Evidence, supra note 133, at 1578 ("Although other relevant evidence may be elusive or stale when such [newer forms of] scientific evidence [are] unearthed, this problem is of less concern given the remarkably high degree of certainty provided by exculpatory DNA tests.").

n257. See id. ("These kinds of test results were literally undiscoverable at the time of trial and thus, the diligence of the defendant's investigation cannot be questioned.").

n258. See supra notes 49, 52 (discussing state budget limitations and the possibility of abuse as reasons for preventing access to DNA evidence).

n259. See supra notes 42-43 and accompanying text (describing practices in Orange County, California).

n260. See supra notes 32, 36, 39 (describing experiences in San Diego, Brooklyn, and Austin).

n261. As DNA technology becomes even more sophisticated, otherwise untestable samples, including hair samples, may be subject to analysis, thus for a period of time increasing the potential pool of cases. See Nat'l Comm'n on the Future of DNA Evidence, U.S. Dep't of Justice, The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group 28 (2000) (noting that better technology will improve testing of DNA samples that are badly damaged or are currently too small to be analyzed), <http://www.ojp.usdoj.gov/nij/pubs-sum/183697.htm>.

n262. One prominent laboratory, Orchid Cellmark, has quoted the following prices for DNA testing: for 13 STR CODIS Core Loci involving Known Samples, \$ 1095 per sample; for Y-Chromosome STR Testing, \$ 1275 per sample. Orchid Cellmark Fee Schedule, available at [http://www.cellmark-labs.com/pdf/fee schedule2002.pdf](http://www.cellmark-labs.com/pdf/fee%20schedule2002.pdf) (July 1, 2002).

n263. If the arguments in favor of access are otherwise sufficient to compel a finding that the due process right is fundamental, the modest costs of testing cannot be grounds for denial. See supra note 262 (discussing the cost of DNA testing at one laboratory). Due process and equal protection principles provide firm grounds for mandated state testing. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 86-87 (1985) (holding that the State's refusal to provide the defendant with a psychiatrist constituted a denial of due process); *Little v. Streater*, 452 U.S. 1, 17

(1981) (concluding that the State had to provide "blood grouping" tests to a putative father in paternity actions in accordance with the due process protection in the Fourteenth Amendment).

n264. 285 F.3d 298, 304 (4th Cir. 2002) (Wilkinson, C.J., concurring).

n265. *Id.* at 300-01 (Wilkinson, C.J., concurring).

n266. *Nat'l Dist. Attorneys Ass'n*, *supra* note 45, at 9.

n267. See *Tennessee v. Garner*, 471 U.S. 1, 20-22 (1985) (prohibiting officers' use of deadly force against nonviolent, fleeing felons).

n268. *County of Riverside v. McLaughlin*, 500 U.S. 44, 58-59 (1991).

n269. *Ex parte Hull*, 312 U.S. 546, 549 (1941); see also *supra* note 251 (discussing the required showing of "actual innocence" for habeas review).

n270. *Harvey*, 285 F.3d at 301 (Wilkinson, C.J., concurring).

n271. It is important to note that the due process and access to the courts arguments may also be presented to state courts as a matter of state constitutional law. Over the past several decades, state courts have developed state constitutional law principles in a manner that often provides greater protections to individuals by interpreting state constitutional provisions more broadly than the U.S. Supreme Court has c [MISSING TEXT]

1239C7

\*\*\*\*\* Print Completed \*\*\*\*\*

Time of Request: Wednesday, January 07, 2009 13:37:27 EST

Print Number: 2862:133382824

Number of Lines: 2174

Number of Pages:

Send To: WEISS, DANIELLE  
OFC OF JUSTICE PROGRAMS GENERAL COUNSEL  
810 7TH ST RM 5400  
WASHINGTON, DC 20531-0001