Protecting the Innocent: Post-Conviction DNA Exoneration

by SOPHIA S. CHANG*

Introduction

In New Jersey, March of 1988, Byron Halsey was convicted for the brutal rape and murder of a seven-year-old girl and an eight-year-old boy.[1] The evidence used to convict Halsey was his supposed confession, which he gave after over thirty hours of interrogation and sleep deprivation.[2] Halsey had to "guess several times" before he could correctly describe to police how the crime occurred and other key facts.[3] However, the police-prepared final written confession contained only the information that Halsey finally guessed correctly, with no indication of any previous inaccurate statements.[4] The jury convicted him using that evidence.[5] After nineteen long years in prison, newly analyzed DNA test results proved Halsey's innocence and implicated the actual killer.[6]

In the state of Alabama, Thomas Arthur was convicted of murder.[7] At the time of investigation, the victim's wife initially reported that a stranger, who was not Arthur, broke into their home, raped her, and killed her

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1. Press Release, Innocence Project, After 19 Years in Prison for One of the Most Heinous Crimes in NJ History, Byron Halsey Is Proven Innocent through DNA (May 15, 2007), *available at* http://www.innocenceproject.org/Content/583.php.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Press Release, Innocence Project, Alabama Governor's 45-Day Stay of Execution for Thomas Arthur Should Immediately Lead to DNA Testing, Innocence Project Says (September 27, 2007), *available at* http://www.innocenceproject.org/Content/904.php.

husband.[8] The police did not believe her story, and she was eventually charged and convicted of murdering her husband.[9] Later, she changed her version of the events and claimed that Arthur was the actual murderer; and, as a result of her testimony, the victim's wife was released earlier than her original sentence required.[10] Implicated by the victim's wife, Arthur was convicted and now faces the death penalty.[11]

One cannot deny the possibility that the victim's wife lied. She obviously had a strong motive—to get out of prison. There is, however, one way to determine if the victim's wife's story was false. Samples of DNA saved from the crime scene might show that Arthur was not responsible for the murder. Analysis of the DNA evidence may prove that Arthur did not commit the crime, and Arthur could be exonerated. The DNA evidence could lead to Arthur's salvation. It would be an easy and simple solution. Unfortunately, we may never know the truth. The state of Alabama does not allow prisoners access to their DNA evidence, even if it could demonstrate their innocence and serve as the key to set them free.[12]

Eight states—Alabama, Alaska, Massachusetts, Mississippi, Oklahoma, South Carolina, South Dakota and Wyoming—do not have laws that allow convicted inmates access to DNA evidence.[13] They remain the only states in the entire nation to deny post-conviction exoneration through DNA evidence.[14] The eight states not allowing DNA access are exercising their sovereign rights contrary to the constitutional due process rights of its citizens. Certainly, each state has the authority to enact its own criminal laws and procedures. However, it does not serve justice when states maintain policies that keep innocent people in prison. How unlucky of people, like Thomas Arthur, to have the misfortune of living in one of those states. If born in any other state, a wrongfully convicted person might find exculpatory evidence that could prove his or her innocence. However, if convicted in one of the above-named eight states, an innocent prisoner has no chance of redemption. One can only imagine being wrongfully convicted, forced into incarceration, and then told that the very evidence that could lead to freedom is forbidden. It is a clear example of injustice.

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* Solomon Moore, *Exoneration Using DNA Brings Change in Legal System*, N.Y. TIMES, Oct. 1, 2007, *available at* http://www.nytimes.com/2007/10/01/us/01exonerate.html?ei=5090&en=4d3ce598c8354964&ex=1348891200&adxnnl=1&partner=rssuserland&emc=rss&pagewanted=all&adxnnlx=1194498112-0sr/j+UC0BXAXYP12nwW/A.

13. *Id.*

14. *Id.*

Even though every state has the right to enact its own laws, the laws on post-conviction DNA evidence access should not be so different that some states deny constitutional rights. The DNA evidence policies of all of the states in the union should be standardized so that all of those wrongfully convicted have a chance at proving their innocence. The denial of access to evidence is a violation of due process. Incarcerating or executing innocent inmates is cruel and unusual punishment, a violation of the Eighth Amendment. It is unconstitutional for those eight states to keep the innocent in prison, without giving them a chance to prove their innocence with DNA evidence.

I. Background

"There is growing evidence that the dramatic rise in the number of people being sent to prison has also resulted in an extraordinary increase in the number of wrongful convictions, illegal sentences, and unjust imprisonments."[15] There are many reasons why innocent people are sometimes convicted for crimes they did not commit. Mistaken identification was involved in eighty-one percent of the conviction cases that were later overturned by DNA testing.[16] Eyewitnesses can have poor memory or simply be mistaken in their recollection of events.[17] Additionally, a witness's perception can be affected or altered by any sort of suggestive instructions or arrangements.[18] Despite these common problems with eyewitness testimony, jurors still tend to believe them, regardless of the possibility that the testimony is not completely accurate.[19] Also, due to the low rates paid to defense attorneys representing indigent defendants, some attorneys are not able or willing to commit the necessary resources to their clients' cases.[20] As a result, the defendants sometimes do not receive adequate representation and are therefore convicted.[21] Sometimes people give false confessions because they were coerced, confused, or trying to protect others. Other reasons for wrongful convictions include serology inclusion, "misconduct by the prosecution,

15. Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 339 (2006).

16. SCOTT CHRISTIANSON, INNOCENT: INSIDE WRONGFUL CONVICTION CASES 27 (2004).

17. Michael E. Kleinert, Note, *Improving the Quality of Justice: The Innocence Protection Act of 2004 Ensures Post-Conviction DNA Testing, Better Legal Representation, and Increased Compensation for the Wrongfully Imprisoned*, 44 BRANDEIS L.J. 491, 497 (2006).

18. *Id.*

19. *Id.* at 497–98.

20. *Id.* at 498.

21. *Id.*

police misconduct, defective science," and microscopic hair comparison.[22] Because an individual could be wrongfully convicted for many reasons, it is necessary to have "checks on the criminal justice system."[23] Errors are bound to occur because the system is run by humans, and humans are bound to make mistakes from time to time. There are problems with the criminal justice system, and these problems sometimes result in false convictions. "Unless there are modifications to existing . . . state post-conviction procedures, many innocent prisoners will be denied desperately needed relief as a result of unjustifiable procedural defaults."[24]

In states where there are no laws giving convicted individuals a right to DNA evidence, availability of DNA access is left to the discretion of the state prosecutors, police officers, and court clerks.[25] This poses a problem, though, because many prosecutors are unwilling to challenge their own verdicts.[26] Thus, there is often resistance from prosecutors regarding access to post-conviction DNA testing.[27] Even though prosecutors are ethically bound to "seek the truth and ensure that justice is done,"[28] some prosecutors are reluctant to reopen cases of those prisoners they have already convicted. There are several reasons prosecutors use to justify their decision of not allowing access to post-conviction DNA testing. Some believe in finality.[29] "DNA is rarely used as a post-conviction tool, in part because prosecutors rarely pass up their right to vigorously oppose granting a second chance to the prisoners they helped to convict."[30] They think that since the inmate was already given a fair trial, he should not receive another one. "[S]ome prosecutors may believe that exonerations undermine the credibility of the system."[31] Exonerations can instill doubt that the criminal justice system actually works as it should. Some DNA exonerations disclose intentional misconduct by the police or prosecution in obtaining the wrongful convictions.[32] Many prosecutors may not want to

22. *Id.* at 497.

23. *Id.* at 499.

24. Stevenson, *supra* note 15, at 340.

25. Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 554 (2002).

26. *Id.* at 563.

27. *Id.* at 561–63.

28. *Id.* at 558.

29. *Id.* at 562.

30. Laura A. Bischoff & Tom Beyerlein, *Evidence Preservation a Key Piece to Exoneration Puzzle: Ohio's DNA Testing Law Also Closes Door to Many Potential Applicants*, DAYTON DAILY NEWS, Dec. 16, 2007, at A12.

31. Kreimer & Rudovsky, *supra* note 25, at 563.

32. *Id.*

expose the flaws in the criminal justice system to the public. Additionally, some are afraid that allowing access to DNA evidence will open the floodgates to the courts and create a "slippery-slope effect."[33] Therefore, when left to the prosecutors' discretion, those wrongfully convicted may never get a chance to prove their innocence.

National groups, such as the Innocence Project, have recently been formed to help wrongfully convicted inmates obtain exoneration through DNA evidence.[34] This issue is a growing concern in the criminal law field. To date, 223 people have been exonerated through DNA evidence testing, and out of these 223, seventeen inmates were on death row.[35] On average, the convicted and then exonerated individuals served twelve years in prison.[36] Groups like the Innocence Project do not simply provide legal assistance to prisoners who wish to be exonerated, they aim to prevent future injustice and suggest reform of the criminal procedure.[37]

All of the states in the country, except the eight named above, have statutes allowing inmates to analyze DNA evidence—though with varying degrees of access.[38] The general trend appears to be going toward giving the mistakenly incarcerated a chance at freedom. This is likely because at the time of many inmates' trials, DNA technology was either not available or not dependable. Now, though, there has been vast improvement in DNA analysis methods.[39] Most states seem to have realized that those convicted by possibly faulty eyewitness testimony and circumstantial evidence should be allowed the opportunity to show that they are indeed not guilty of the crime. Many people openly support DNA exoneration. Even the Governor of Alabama, Bob Riley, supports post-conviction DNA testing, even though his state is one of the eight which does not allow it.[40] DNA evidence may shed light on the case and provide answers that were not

33. Dylan Ruga, Note, *Federal Court Adjudication of State Prisoner Claims for Post-Conviction DNA Testing: A Bifurcated Approach*, 2 PIERCE L. REV. 35, 50 (2004).

34. The Innocence Project Home Page, http://www.innocenceproject.org (last visited Nov, 16, 2008).

35. The Innocence Project News and Resources, http://www.innocenceproject.org/Content/351.php (last visited Nov. 16, 2008).

36. *Id.*

37. The Innocence Project Home Page, http://www.innocenceproject.org/ (last visited Nov. 16, 2008).

38. Moore, *supra* note 12.

39. The Innocence Project, *Understand the Causes: Unreliable and Limited Science*, http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php (last visited Nov. 10, 2008).

40. Rick Harmon, *Riley Won't Order DNA Testing*, THE MONTGOMERY ADVERTISER, Dec. 29, 2007.

available at the original time of trial.[41] These statutes give wrongfully convicted individuals a chance to redeem their name and rejoin society.

In addition, the federal government has also become involved in this area. The federal Innocence Protection Act in the Justice For All Act of 2004 authorizes post-conviction DNA testing to qualified federal inmates, providing rules and procedures for the process.[42] The Innocence Protection Act ("IPA") was introduced as a legislative response to more than one hundred cases in the nation where DNA evidence exonerated innocent prisoners, some of whom were on death row and were within days of their execution date.[43] The Senate IPA bill provides, "It shocks the conscience and offends social standards of fairness to deny inmates a right of access to evidence for tests that could produce persuasive evidence of their innocence."[44] The IPA attempts to prevent unconstitutional and unjust punishment by arguing that states should not deny prisoners access to DNA evidence "if the proposed DNA testing has the scientific potential to produce new, noncumulative evidence which is material to [the prisoner's claim] that the prisoner did not commit [the offense], and which raises a reasonable probability that the prisoner would not have been convicted."[45] Since our criminal system is imperfect, we must strive to make improvements upon it, and the enacted IPA is a much needed start to help protect innocent people.[46] Under the IPA, convicted individuals are given greater access to post-conviction DNA testing, and the federal government provides grants to cover costs of DNA analysis.[47] The court will order DNA testing only if the applicant meets certain requirements.[48] For instance, the applicant must swear under penalty of perjury that he or she is actually not guilty of the offense for which he or she was convicted.[49] Other requirements include the following: (1) the evidence must have been retained from the investigation, (2) the evidence must not have been already subjected to the type of DNA testing the applicant is suggesting, (3)

41. Matthew J. Mueller, Comment, *Handling Claims of Actual Innocence: Rejecting Federal Habeas Corpus as the Best Avenue for Addressing Claims of Innocence Based on DNA Evidence*, 56 CATH. U.L. REV. 227, 251 (2006).

42. Innocence Protection Act of 2004, P.L. No. 108-405, §§ 411-12, 118 Stat. 2260, 2278-85 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

43. Innocence Protection Act, S. 486, 107th Cong. § 103(a)(1)(E) (2002).

44. *Id.* § 103(a)(1)(K).

45. *Id.* § 103(b).

46. Kleinert, *supra* note 17, at 492.

47. Innocence Protection Act of 2004, P.L. No. 108-405, §§ 411-12, 118 Stat. 2260, 2278-85 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

48. *Id.* § 411(a).

49. *Id.* § 411(a)(1).

the evidence must have been properly stored so as not to be contaminated or altered, (4) applicant must assert a defense not inconsistent with one used at trial that would establish actual innocence, and (5) the applicant must aver that the testing would show a probability that the applicant did not commit the offense.[50] If it is later discovered that the applicant has lied, then he or she will be sentenced to an additional period of around three years.[51] By imposing all of these requirements, the IPA ensures that guilty people will not waste resources, while innocent people are given a chance to prove that their conviction was a mistake.[52] The enactment of the IPA demonstrates that the federal government believes that in order to ensure justice, convicted prisoners should be given the opportunity to access their DNA evidence, test it, and prove their innocence.[53] The IPA also strongly urges states to implement the same policy by providing federal incentives for states to allow permanent post-conviction DNA testing programs.[54] The eight states that do not allow inmates access to possibly exculpatory DNA evidence should take heed of the federal IPA. As we can see from the legislative notes, there certainly is merit for implementing such a policy. It also appears that most of the states in the country have followed suit to also provide access to post-conviction DNA testing. The eight states that have not should reconsider their policies and follow the examples set by other states and the federal government.

II. Not Allowing Post-Conviction DNA Exoneration Violates the Fourteenth Amendment's Due Process Clause

Not allowing post-conviction DNA exoneration is unconstitutional because it violates the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment states, in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[55] The Supreme Court has held that the Due Process Clause could be deemed "the area of constitutionally guaranteed access to evidence."[56] The Court has stated that a defendant in a criminal case is entitled to disclosure of all material evidence that could be favorable to the defendant's case.[57]

50. *Id.* § 411(a).

51. *Id.* § 411(f)(3).

52. Kleinert, *supra* note 17, at 502–03.

53. *Id.* at 492.

54. Innocence Protection Act of 2004 § 413.

55. U.S. CONST. amend. XIV, § 1.

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

57. Brady v. Maryland, 373 U.S. 83, 87 (1963).

In *Brady v. Maryland*, defendant Brady was convicted of murder in the first degree and was sentenced to death, even though he contended that another person committed the actual killing.[58] Only after sentencing did Brady discover that the other person's confession, which was in the prosecution's possession, was withheld from him.[59] Brady submitted a motion for a new trial based on the newly discovered evidence that had been kept from him by the prosecution.[60] The *Brady* Court held that "the 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, irrespective of the good faith or bad faith of the prosecution."[61] Similarly, keeping exculpatory DNA evidence away from those wrongfully convicted is a violation of due process. One may argue that there is a difference because the *Brady* case involved evidence withheld during the initial trial, whereas in the issue at hand the evidence comes up after conviction. However, it is not a big stretch of the imagination to extend the concept to post-conviction cases.

Although the *Brady* rule technically has not yet been applied to post-conviction evidence, it follows that it would also be unconstitutional to withhold evidence from one already convicted, just as it is unconstitutional to suppress evidence from one currently facing trial. The DNA analysis was not available to the prisoner at the time of his or her trial, so, in a way, that evidence was withheld from him or her. When an individual is innocent, it should not matter at what point in time the evidence becomes available. If exonerating evidence exists, the innocent party deserves the chance to view the evidence and prove his innocence. If a person is denied access to any favorable evidence, then that person is effectively denied full access to the courts.[62] It is unconstitutional to convict someone and uphold the conviction, without granting him access to exonerating evidence and thus the full court system. This surely amounts to depriving a person of liberty, and for those on death row, life, without due process of law.

The violation of due process also applies to the destruction of DNA evidence. "When identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process."[63] DNA evidence can play an integral role in identification. It can

58. *Id.* at 84.

59. *Id.*

60. *Id.*

61. *Id.* at 87.

62. Kreimer & Rudovsky, *supra* note 25, at 570.

63. State v. Escalante, 734 P.2d 597, 603 (Ariz. Ct. App. 1986).

either name the perpetrator or exonerate one wrongfully accused. Even though the prosecution has a duty to disclose evidence that is in the defendant's favor, the Supreme Court has previously held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[64]

However, there is a strong argument that the failure to preserve evidence should be considered a violation of due process. In *Arizona v. Youngblood*, defendant Youngblood was convicted of child molestation, sexual assault, and kidnapping a ten-year-old boy.[65] The evidence used to implicate Youngblood, who claimed he was innocent, was photographic identification from the victim.[66] Even though evidence from the rape had been collected, it was not properly refrigerated and was therefore lost for evidentiary purposes.[67] The Arizona Court of Appeals reversed the conviction on the basis that had the DNA samples been preserved, the jury could have reached another conclusion.[68] However, the Supreme Court reversed again, concluding that the defendant must show bad faith in order to prevail on a constitutional claim.[69] The dissent, on the other hand, urged that "[t]he Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial."[70] If one is denied an opportunity to present a full defense, then one is deprived the right of due process.[71] The dissent argued that the prosecution's ineptitude of properly storing and maintaining DNA evidence interfered with the defendant's ability to present a complete defense.[72] A defendant deserves to see all of the relevant evidence that could implicate or exonerate him or her.

Similarly, one who is already in prison should have the right to access to DNA evidence that could likely prove their innocence. Keeping a person away from the DNA evidence in his case is effectively like destroying the evidence. If no one is allowed access to it, the evidence might as well not exist. There is no utility in keeping evidence properly stored if it is never looked at or analyzed again. However, one could argue that it is even worse than having no evidence at all. The convicted inmates

64. Arizona v. Youngblood, 488 U.S. 51, 58 (1988).
65. *Id.* at 52.
66. *Id.* at 53.
67. *Id.* at 54.
68. *Id.*
69. *Id.* at 58.
70. *Id.* at 61 (Blackmun, J., dissenting).
71. *Id.*
72. *Id.* at 69–70.

have knowledge of the evidence and are instead taunted forever by the fact that they will never be able to access it and prove their innocence. It is true that at the time of the criminal trial, DNA analysis may not have been available or trustworthy, so no one would argue that the prosecution acted in bad faith. However, now that forensic testing is available, the inmates deserve a chance to utilize all of the evidence in its entirety. Knowingly preventing a prisoner from proving his or her innocence by denying access to possibly exculpatory evidence is tantamount to acting in bad faith during the original criminal proceeding because, in both circumstances, the government is actively preventing the accused from having a fair chance of proving his or her innocence. Denying access to DNA evidence violates due process and, therefore, is unconstitutional.

Thus, withholding evidence is unconstitutional. When there is a possibility that DNA analysis could prove a person's innocence, that DNA evidence is material to a person's case, regardless of whether that person has already been convicted. Denying prisoners, who claim they are innocent, access to DNA evidence constitutes taking away their liberty without giving them a proper chance at possible exoneration. Not allowing access to DNA evidence violates the Due Process Clause of the Fourteenth Amendment, and it is a denial of the full justice system. The policies of the eight states that do not allow post-conviction DNA exoneration are unconstitutional.

III. Recent Federalization of State Criminal Law

The United States is a federalist government. Each individual state, through reserved power, has the right to enact its own laws and act as sovereign over its own citizens.[73] Traditionally, criminal laws for state crimes have been left to the states to decide.[74] States have the general police power, while the federal government is more limited. However, the states are not completely free to do whatever they please. The states must also abide by the United States Constitution.[75] Congress has legislative power when the matter is within Congress's authority under Section 5 of the Fourteenth Amendment.[76] Additionally, the Supreme Court has held

73. Timothy Zick, *Active Sovereignty*, 21 ST. JOHN'S J.L COMM. 541, 542 (2007).

74. Jerold Israel, *Federal Influence in State Cases: Sentencing, Prosecution, and Procedure: Federal Criminal Procedure as a Model for the States*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 131 (1996).

75. *Id.*

76. *Id.* at 132.

that state criminal procedure laws are all subject to the Bill of Rights, due to incorporation by the Fourteenth Amendment's Due Process Clause.[77]

State criminal law has become more regulated by the judicial branch over the last four decades, and the courts will continue insisting on maintaining constitutional rights.[78] The Supreme Court has enforced federally guaranteed minimum procedural rights in state criminal cases.[79] There is a line of recent cases that indicate that the Supreme Court is concerned with the constitutionality of state criminal laws.[80] In *City of Chicago v. Morales*, the Court struck down a Chicago loitering ordinance, using the constitutional "void-for-vagueness" principle.[81] Another example includes *Atkins v. Virginia*, where the Court invalidated a statute that authorized the execution of mentally retarded individuals.[82] Most recently, in *Lawrence v. Texas*, the Court struck down Texas's statute that criminalized sodomy.[83] The Court has defined constitutionally protected conduct by placing protective limitations on state criminal power.[84] "The Constitution contemplates that the federal government will have a limited (although important) sphere of interest to protect."[85] Even though each state is entitled to implement its own criminal laws, which may differ greatly from jurisdiction to jurisdiction, those laws still must comply with constitutional rights. We have seen a progression of federal intervention in state criminal jurisprudence. Therefore, suggesting that the eight states forego a bit of their state sovereignty by adopting post-conviction DNA exoneration laws in order to uphold constitutional rights is not shocking or novel. These states would simply be doing exactly what many states have already been doing for the past fifty years.

State sovereignty is an important element of our government, but it should not be upheld at the price of the rights of the citizens of the United States. "[W]here defendants merely seek access to potentially determinative exculpatory evidence that rests in the exclusive possession of the State[,] . . . arbitrary denial of access to DNA evidence that could

77. *Id.*

78. James A. Strazzella, *The Influence of Federal Law on the Dual Criminal Justice System: The Recent Past and the Emerging Future*, 10 DIGEST 29, 30 (2002).

79. *Id.* at 31.

80. Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 512 (2004).

81. City of Chicago v. Morales, 527 U.S. 41, 64 (1999).

82. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

83. Lawrence v. Texas, 539 U.S. 588, 579 (2003).

84. Strazzella, *supra* note 78, at 37.

85. *Id.* at 39.

demonstrate innocence falls outside the sphere of local autonomy."[86] Although states generally have the power to enact their own laws, they should not be able to when the result is unconstitutional.

IV. The Rights of Prisoners

In his article *Toward a Constitutional Law of Crime and Punishment*, Markus Dirk Dubber claims that the principle behind constitutional criminal law is dignity of the person.[87] Human dignity is a property shared by all persons.[88] It is a naturally occurring condition, not bestowed upon us by society or government, and therefore it cannot be taken away, unlike social dignity.[89] "Constitutional law marks the realm of principles of justice,"[90] so personal dignity is the backbone of constitutional criminal law.[91] The purpose of state implementation of criminal law is protection of its citizens' lives, liberties, and property and the guarantee of personal rights.[92] However, "[i]n protecting one person's right, it must not disregard the right of another. To put it differently, not only the victim has rights as a person, so does the offender."[93] Even though an offender loses respect from others in society, he preserves his human dignity, no matter how much social dignity he has lost.[94] In application of this principle to the topic of this Note, those people who are convicted and placed behind bars may be deprived of rights by the government, but they can never be denied their basic human rights. As alleged offenders, they should be treated with dignity, as humans. They should have the opportunity to proclaim their innocence, and if exculpatory evidence exists, then that evidence should be available to them as proof. The mere fact that they are already locked up for a crime does not make them any less deserving of human rights and dignity.

Dubber maintains that the state is authorized to use the criminal law for no other purpose than to protect its citizens.[95] The Constitution places limits on those punishments a state may inflict upon a person who is

86. Kreimer & Rudovsky, *supra* note 25, at 612.
87. Dubber, *supra* note 80, at 515.
88. *Id.*
89. *Id.*
90. *Id.* at 532.
91. *Id.* at 516.
92. *Id.* at 537.
93. *Id.* at 538.
94. *Id.* at 547.
95. *Id.* at 555.

convicted of a crime.[96] The Eighth Amendment states that cruel and unusual punishments cannot be inflicted.[97] Keeping an innocent person in prison can be construed as cruel and unusual punishment. Imprisonment and serving out a sentence for a crime one did not commit is indeed cruel and unusual—wasting time in a prison cell, day after day, all the time knowing that it should not be. It is cruel to have to live with that sort of injustice for years, or even for the rest of one's life. It is unusual because most people are punished for crimes they *did* commit, not for crimes of which they are innocent. Furthermore, many prisoners who maintain their innocence are also sentenced to death. To be executed for a crime that one did not commit is certainly cruel and unusual. The Supreme Court has held that "punishment is excessive and unconstitutional if it is nothing more than the purposeless and needless imposition of pain and suffering"[98] or if it is "grossly out of proportion to the severity of the crime."[99]

In addition, the Court has held that the cruel and unusual punishment protections of the Eighth Amendment do not desist once a person has been validly convicted and sentenced.[100] Just because someone is already imprisoned does not mean that the Eighth Amendment provisions do not apply. Keeping an innocent person in prison has no purpose other than punishing that person for a crime that he or she did not commit. This punishment constitutes unnecessary pain and suffering. There is no reason why an innocent person should have to serve time and pay for a crime he or she is not guilty of. If a person is innocent, the punishment is excessive and unconstitutional. Denying prisoners access to DNA evidence that could set them free simply prolongs the punishment, when the punishment was not even theirs to bear in the first place. Keeping possibly exculpatory evidence from inmates ensures that their pain and suffering will continue, with no regard to whether it is actually necessary. If the evidence can show that they were wrongfully convicted, then there is no need for those prisoners to remain incarcerated. Denying post-conviction DNA exoneration prolongs cruel and unusual punishment and is therefore unconstitutional.

96. *Id.* at 558.

97. U.S. CONST. amend. VIII.

98. Coker v. Georgia, 433 U.S. 584, 593 (1977).

99. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

100. Johnston v. Mississippi, 486 U.S. 578, 585–86 (1988).

V. Prohibition of Post-Conviction DNA Exoneration is Contrary to the Goals of Criminal Justice

This phenomenon works against the ultimate goal of our criminal justice system. "After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent."[101] Refusing to allow wrongfully convicted prisoners access to DNA evidence that may prove their innocence does not benefit society. The innocent party is forced to remain in jail, while the actual culprit runs free, paying no consequences for his illicit actions. At an Oklahoma[102] Bar Association meeting, Policy Director Stephen Saloom stated, "The only person who benefits from a wrongful conviction is the real perpetrator."[103]

Keeping the innocent behind bars not only affects the wrongfully convicted, but also family and friends. For instance, contemplate the story of Kirk Bloodsworth, who was the first man to be exonerated through the use of DNA technology. In 1984, Bloodsworth was arrested for the brutal rape and murder of a nine-year-old girl.[104] Maintaining his innocence and feeling he had nothing to hide, Bloodsworth defiantly showed his face while walking through a throng of cameras and reporters.[105] Therefore, everyone in the community saw that Bloodsworth had been arrested for such a horrendous crime, including his friends. Bloodsworth was convicted based on eyewitness identification, despite having an alibi supported by several witnesses and the prosecution's lack of corroborating physical evidence.[106] He received a sentence of death, it appears, because he looked like the real culprit.[107] In 1992, eight years later, Bloodsworth's lawyer successfully convinced the prosecution to allow forensic testing of DNA evidence, using methods that had previously been unavailable.[108] The DNA testing proved that Bloodsworth was innocent.[109] Unfortunately Bloodsworth's mother died before he was exculpated, but his father was

101. Herrera v. Collins, 506 U.S. 390, 398 (1993) (citing United States v. Nobles, 422 U.S. 225, 230 (1975)).

102. Oklahoma remains one of the eight states that do not allow prisoners access to DNA evidence.

103. Marie Price, *Oklahoma Bar Association Urged to Tackle Wrongful Convictions*, J. RECORD, Nov. 9, 2007.

104. John T. Rago, *"Truth or Consequences" and Post-Conviction DNA Testing: Have You Reached Your Verdict?*, 107 DICK. L. REV. 845, 859, 862 (2003).

105. *Id.* at 862.

106. *Id.* at 863–64.

107. *Id.* at 864.

108. *Id.* at 866–67.

109. *Id.* at 867.

finally able to see him walk out of jail free.[110] After his release, Bloodsworth wrote, "I can never get back what was taken from me. My mother and my uncle died while I was wrongfully imprisoned. They always knew I was innocent, but they never saw me walk out of prison a vindicated man."[111] One can only imagine if Bloodsworth had not been allowed to test the DNA evidence. He would have remained in prison for the rest of his life. The public, including his friends, would have forever labeled him a rapist and murderer. Neither of his parents would have ever seen their son exonerated. They would have spent their life savings on lawyers for their son, with no success. Who knows? Over time, Bloodsworth's parents might have even given up, believed he was guilty, and rejected their son for a crime he did not commit. Keeping innocent people in prison affects more than just the convicted individual. It can destroy relationships, businesses, and families. An innocent person's reputation is destroyed, while the person truly responsible for the crime remains free to live in society without consequence, or even worse, to strike again.

Not allowing inmates the opportunity to prove their innocence contradicts a fundamental value of the American criminal justice system—that it is better to let a guilty defendant go free than to convict an innocent person.[112] In the words of Judge Learned Hand, "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream."[113] This principle is why the criminal justice system works on a presumption of innocence and proof beyond a reasonable doubt. Reasonable doubt is "that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."[114] In order to conclude that someone is guilty of a crime, there can be no reasonable doubt that he or she may actually be innocent. Reasonable doubt is introduced when those convicted maintain that, if analyzed, DNA evidence could prove their innocence. Therefore, we are not following the foundational criminal principle of certainty of guilt beyond a reasonable doubt when we deny inmates access to the evidence that could establish their innocence.

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110. *Id.* at 868.

111. Kirk Bloodsworth, *My 20-Year Journey*, THE TULSA WORLD, Sept. 21, 2003, at G3, *available at* http://www.tulsaworld.com/opinion/article.aspx?articleID=030921_Op_g3_my20y.

112. Rago, *supra* note 104, at 848 (citing *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

113. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

114. Commonwealth v. Webster, 59 Mass. (1 Cush.) 295, 320 (1850).

Of course, the jury and judge are only human and are bound to make mistakes from time to time. However, an understanding of the inevitable flaws of the criminal justice system is not the same as tolerating the conviction of people who are actually innocent.[115] We know that mistakes happen, but instead of merely accepting those mistakes, we should attempt to fix them. Pretending that the mistakes never occurred and that no injustice exists does not solve anything. Edwin M. Borchard states,

> I have long urged that the State or community assume the risks of official wrongdoing and error instead of permitting the losses resulting from such fault or mistake to be born by the injured individual alone. Among the most shocking of such injuries are erroneous criminal convictions of innocent people.[116]

Instead of denying wrongfully convicted inmates access to DNA evidence that may exonerate them, the states should act to right a wrong. Our criminal justice system demands that we ensure that we only punish those who are indeed guilty. It does not support a policy of keeping innocent people in prison, without even a chance to show that they could be in prison for something they did not do. Therefore, prisoners should not be denied access to DNA evidence, if that evidence could prove their innocence.

Many believe that we should not create doubt in the criminal justice system by exonerating those already convicted. Finality is an essential part of the system,[117] because victims need to obtain closure, and the aims of criminal law are retribution and deterrence.[118] However, although finality is important, it does not overshadow protection of the innocent. "The protection of innocence has been the touchstone of due process in the criminal justice system."[119] Finality should not bar review when an inmate has a "colorable claim of innocence."[120] Therefore, the interest of finality does not outweigh the more important goal of ensuring that the innocent are not wrongfully imprisoned.

Others reject DNA exoneration because of the perceived increase in administrative costs and burdens. Authorities claim that prisoners are

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115. *See* Rago, *supra* note 104, at 853.

116. EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE, at vii–viii (1932).

117. *See* Murray v. Carrier, 477 U.S. 478, 487 (1986).

118. Kreimer & Rudovsky, *supra* note 25, at 606.

119. *Id.* at 588.

120. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970).

simply trying to delay the inevitable conviction, so access to evidence should be restricted.[121] Skeptics believe that guilty inmates will abuse the system if they are allowed to reopen their cases for analysis of DNA evidence. For those who believe the costs will be massive, the burden is not as great as one might imagine. Depending on the type of analysis, the cost of DNA tests range from one hundred dollars to fifteen hundred dollars.[122] True, there would be a large number of convicted individuals wanting access to their DNA evidence now. However, as time goes by, the number of requests for testing will decrease drastically. There will be many prisoners interested in testing now because this newly developed technology was otherwise unavailable at the time of many of their original trials. But, DNA evidence is so prevalent now that DNA found at the scene of a crime is automatically gathered and tested when the police are attempting to find the perpetrator. There will be little need to test DNA evidence post-conviction in the future, because the DNA will have already been tested prior to conviction. The number of cases requiring post-conviction DNA analysis will decrease over time; therefore, the administrative burdens will also decrease. It is true that allowing prisoners access to DNA evidence may increase the workload in the short term, but it will hardly run out of control. Instead, the additional administrative burdens will eventually taper off to minimal amounts.

In addition, those prisoners who know they are guilty but choose to test DNA from the crime anyway will not necessarily be wasting the government's resources. Law enforcement officials may use the newly discovered information to connect the prisoners to other crimes that had, until then, been unsolved.[123] In addition, with the release of innocent inmates, the administrative costs and burdens of maintaining prisoners during incarceration will be greatly diminished. Providing the means for post-conviction DNA exoneration not only fulfills the aims of criminal justice, but also results in an economic benefit, which could then be reinvested into the criminal justice system. Prohibition of access to DNA evidence only hinders criminal justice.

VI. Problems with Other Methods of Exoneration

Some people may argue that it is not necessary for states to provide access to post-conviction DNA testing to prisoners because there are other

121. Stevenson, *supra* note 15, at 339.

122. Kimberly Powell, DNA Family Trees, About.com, http://genealogy.about.com/cs/geneticgenealogy/a/dna_tests.htm.; Frontline, What Jennifer Saw, Frequently Asked Questions by The Innocence Project, http://www.pbs.org/wgbh/pages/frontline/shows/dna/etc/faqs.html.

123. Kreimer & Rudovsky, *supra* note 25, at 611.

avenues through which they can pursue exoneration, such as habeas corpus and state clemency.

A. Habeas Corpus

Habeas corpus allows a prisoner to obtain habeas review in federal court, claiming that his or her incarceration violates the United States Constitution.[124] The purpose of habeas corpus is to protect innocent defendants and deter official constitutional misconduct or errors.[125] A writ of habeas corpus is available when a petitioner shows a violation of his or her constitutional rights and a reasonable probability of innocence.[126] The writ was extended to state criminal cases by the Habeas Corpus Act of 1867, providing that a federal court could determine that even though a state prisoner might have been convicted on a facially valid state law, the confinement is nevertheless in violation of the federal constitution.[127] The Act states, "[T]he several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution."[128] However, history shows that the Supreme Court was somewhat reluctant to apply habeas review to state criminal cases.[129] In *Frank v. Mangum*, defendant Frank appealed his state conviction, alleging that the trial had been influenced by disorder and violent sentiments.[130] The Supreme Court denied habeas for Frank, but also stated that if the state failed to provide corrective process, then habeas could be available.[131] In dictum, the Court stated, "[I]f the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."[132]

Later, in *Moore v. Dempsey*, the Court granted a state criminal defendant habeas review of his detention.[133] However, even though habeas

124. Joseph L. Hoffman & Lauren K. Robel, *Federal Influence in State Cases: Sentencing, Prosecution, and Procedure: Federal Court Supervision of State Criminal Justice Administration*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 154, 156 (1996).

125. *Id.* at 163.

126. *Id.*

127. *Id.* at 156.

128. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

129. *See* Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1139 (1995).

130. Frank v. Mangum, 237 U.S. 309, 316 (1915).

131. *Id.* at 335.

132. *Id.*

133. Moore v. Dempsey, 261 U.S. 86, 92 (1923).

corpus has been extended to state criminal cases, the Court has also held "that the judgment of state courts in criminal cases will not be reviewed on habeas corpus merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted."[134] In other words, the federal courts will not review just any state criminal defendant who claims that he or she does not belong in prison. The Supreme Court has limited the application of habeas corpus to state convicts with procedural constitutional claims. The function of habeas review is to ensure that people are not detained in a constitutionally violating manner.[135] However, in *Herrera v. Collins*, the Supreme Court decided that claims of actual innocence are not constitutional claims.[136] In *Herrera*, defendant Herrera was convicted of murder and sentenced to death.[137] Herrera sought habeas review, alleging that he was actually innocent and his deceased brother was the real culprit.[138] He offered his brother's confession as evidence.[139] With no additional constitutional claims, this allegation was a freestanding assertion of actual innocence.[140] The *Herrera* Court rejected the habeas petition because there was no constitutional claim.[141]

Herrera demonstrates that "federal habeas review only protects criminal defendants from trial error that deprived the petitioner of procedural due process of law guaranteed by the United States Constitution."[142] Habeas corpus cannot be used by those who simply proclaim that they are factually innocent. Like Herrera, wrongfully convicted people who could be exonerated by DNA evidence are not likely to obtain habeas review. DNA tests proving a prisoner's innocence are similar to the confession letter written by Herrera's brother. However, inmates in the named eight states who have made claims of actual innocence, rather than procedural constitutional claims, will most likely be unable to obtain habeas review and, therefore, not be exonerated through this channel.

134. Knewel v. Egan, 268 U.S. 442, 447 (1925).

135. Eli Paul Mazur, *"I'm Innocent": Addressing Freestanding Claims of Actual Innocence in State and Federal Courts*, 25 N.C. CENT. L.J. 197, 223 (2003).

136. Herrera v. Collins, 506 U.S. 390, 404 (1993).

137. *Id.* at 393.

138. *Id.*

139. *Id.* at 396.

140. *Id.* at 401.

141. *Id.* at 416.

142. Mazur, *supra* note 135, at 238.

B. State Clemency

Other people arguing against DNA exoneration might contend that wrongfully convicted prisoners can always be pardoned via state clemency. Michael Heise notes in his study that clemency is an extrajudicial avenue that exists to correct legal errors and ensure justice.[143] The idea behind clemency is that "the public interest would be better served by sparing the life of the condemned than by taking it."[144] Clemency requires that the decision maker obtain all accurate information about the crime, the prisoner, and societal needs in order to choose whether to exonerate the condemned individual.[145] Therefore, the clemency process is by nature a political creature.[146] Clemency policies vary greatly from state to state. Some states give their governors sole clemency power, others assign clemency authority to administrative boards, and the rest use a hybrid system with both governor and agency having clemency authority.[147] Executive authorities responsible for clemency exercise their discretionary power with almost no checks from the courts.[148] The clemency power is not a judicial procedure, nor is it subject to judicial review.[149] Faced with the exact same case and facts, one governor may decide one way while another governor may decide the opposite.[150]

The clemency procedure seems to be solely discretionary and with no guidelines or reassurances. The U.S. Attorney General's manual aptly states, "[Clemency] authority has never been crystallized into rigid rules. Rather, its function has been to break rules."[151] In addition, political factors often influence clemency decisions.[152] Heise's study further illustrates that many other variables affect clemency determinations.[153] For instance, political and structural variables, defendants' backgrounds, and a bias in favor of women all play a role in clemency decision making.[154] It is

143. Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 252 (2003).

144. Deborah Leavy, Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L. J. 889, 893 (1981).

145. *Id.* at 892.

146. *Id.* at 893.

147. Heise, *supra* note 143, at 255.

148. Leavy, *supra* note 144, at 891.

149. Mazur, *supra* note 135, at 216.

150. *Id.* at 217.

151. Heise, *supra* note 143, at 254 (citing 3 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 295 (1939)).

152. Mazur, *supra* note 135, at 216–17.

153. Heise, *supra* note 143, at 307.

154. *Id.*

difficult to assess the correctness or quality of clemency decision making.[155] The clemency process does not allow the prisoner to have an attorney, be aware of the information adverse to his case, appear personally before the decision maker to plead his case, have notice, or be present at a hearing.[156] The person affected by the determination has no chance to correct or rebut any of the information the decision is based upon.[157] The prisoner is basically at the mercy of the clemency decision maker, with no power to help his own case.

The inconsistency and seemingly arbitrary decision making involved in state clemency does not make it a reassuring method for possible exoneration. Of course, a prisoner does have a slight chance at obtaining exoneration, but clemency is quite rare, and the prisoner is unable to provide any input. In addition, without DNA evidence proving their innocence, the inmates have a low probability of prevailing in a clemency plea. Unless the state offers the DNA evidence for testing during the clemency process, the convicted individuals will have nothing more than the facts from the case—facts that convicted them in the first place. The wrongfully convicted deserve an opportunity to prove their innocence, and it does not seem that state clemency can provide them with a fair chance. Therefore, convicted prisoners should be allowed access to their DNA evidence, because other methods of exoneration are not likely to lead to successful results. If denied the opportunity to analyze DNA from their case, a wrongfully convicted prisoner will have slim chances of exoneration.

Conclusion

Should people just move to a state they know has post-conviction DNA laws, and hope that they are never falsely implicated in a crime in one of the other eight states? What happens if one is so unfortunate as to be falsely convicted of a crime one did not commit? Something this important should not be left up to luck or chance. Our country ought to have a more unified policy, one where it does not matter if you live in Kentucky or Oklahoma. If a person is innocent, he or she deserves the opportunity to prove that he or she did not commit the crime. If the use of DNA analysis may confirm innocence, then access should be allowed. Anything less would be unjust.

"[T]he local democratic process can be an effective means by which the citizens of a state can determine for themselves when a claim of

155. Leavy, *supra* note 144, at 899.

156. *Id.* at 901.

157. *Id.*

innocence based on new evidence warrants the protection of post-conviction safeguards."[158] However, individual state statutes may not provide enough protection for the innocent. State policies regarding post-conviction DNA evidence vary immensely on degrees of access. The practice among the states is divergent.[159] But, every citizen of the United States deserves the same opportunity to prove his or her innocence. One's chance for redemption and freedom should not depend on which state he or she is convicted in. If a convict is innocent, he or she should be allowed the chance to prove it, no matter where incarcerated, throughout every state in the country. It is ludicrous to think that one's fate can rest solely on geography. All of the states in the nation should provide prisoners access to exonerating DNA evidence. The states ought to provide a fair and just system, not one that can be likened to a lucky (or unlucky) roll of the dice.

The Supreme Court has not yet recognized a right to counsel for those who believe they have been wrongfully convicted.[160] However, one cannot deny that those who are innocent deserve a chance to prove their innocence. Disclosure of DNA evidence does not ensure that people in jail will be freed, but at least it gives them the chance to show that they are innocent. Without the opportunity to access the DNA evidence, wrongfully convicted prisoners will be eternally stuck in jail, without any hope.

This Note does not contend that there should be uniform state statutes for all aspects of law. However, in this very specific area of post-conviction DNA exoneration, the importance of protecting the innocent outweighs the states' rights to create their own laws denying prisoners access to exculpatory DNA evidence. State sovereignty is an extremely important aspect of our government. Nevertheless, one must remember that a government is not comprised solely of statutes and regulations. Our government consists of, and is sustained by, its people. A state's right to enact whatever laws it wishes is still limited by the fundamental constitutional rights of its citizens. Denying post-conviction DNA exoneration constitutes a violation of the fundamental rights to life and liberty. The innocent should not be left to rot in prison for crimes they did not commit. The innocent must be protected.

158. Mueller, *supra* note 41, at 259.

159. Herrera v. Collins, 506 U.S. 390, 410 (1993).

160. Stevenson, *supra* note 15, at 353.