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Certainty vs. Finality

Constitutional Rights to Postconviction DNA Testing

Jay D. Aronson

It is better that ten guilty persons escape, than that one innocent suffer.

—William Blackstone (Blackstone 1765–1769, 352)

No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

—Justice John Marshall Harlan II (*Mackey v. United States* 1971, 691)

Introduction

At least in theory, the American criminal justice system is designed to ensure that innocent men and women are not wrongfully convicted for crimes that they did not commit. Constitutional and procedural safeguards abound. American citizens enjoy the right to a jury trial, the right to remain silent upon questioning by the state, the right to legal counsel, the right to examine all of the state's evidence before trial, the right to cross-examine opposing witnesses, as well as an overarching right to due process. Convicted prisoners also have the right to challenge a conviction if any constitutional rights were denied during trial, and also to seek clemency from the executive authority of the jurisdiction in which they were convicted.

Despite these safeguards, defense lawyers and civil liberties advocates have been arguing for years that the American legal system is in fact fundamentally unfair and unjust. Because of power and resource imbalances, federal and state prosecutors win convictions against individuals who did not commit the crimes for which they were on trial. As a result, thousands of actually innocent people may be languishing in prisons and death rows around the country (Bedau and Radelet 1987; Borchard 1932; Gross et al. 2005; Radelet, Bedau, and Putnam 1992; Radin 1964; Scheck, Neufeld, and Dwyer 2000).

In the past, such claims were difficult to prove, primarily because of the degradation of evidence, both physical and eyewitness, and the fundamental belief in the correctness of legal decision making (Bedau and Radelet 1987; Berger 2004). However, forensic DNA analysis is increasingly being used in postconviction litigation to prove that innocent people have been wrongfully incarcerated (Scheck, Neufeld, and Dwyer 2000). More than a decade and more than 250 exonerations later,¹ the Innocence Project at the Cardozo School of Law in New York City and its sister organizations have created a moment in which long-held assumptions about the fairness and efficacy of our criminal justice system are being called into question (Aronson and Cole 2009; Berger 2004).

Still, the decisions of our criminal courts are considered to be final unless a defendant's constitutional rights were violated at trial. In a landmark 1993 case, *Herrera v. Collins*, the Supreme Court ruled that even the "actual innocence" of a prisoner (i.e., the *fact* that the person did not commit the crime for which he was convicted) was not sufficient to necessitate the reversal of a conviction. Rather, it could only serve as the "gateway though which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits" (*Herrera* 1993, 404). In other words, the *Herrera* majority found that the weak but widely distributed right of all Americans to legal finality and repose (the notion expressed by Justice Harlan in *Mackey*) outweighs a defendant's narrowly

distributed, individual right to absolute certainty in legal decisions (the notion expressed above by Blackstone), as long as no constitutional violations led to the conviction.

Herrera raised significant legal challenges for defense lawyers hoping to use DNA test results to vacate the convictions of their clients. In many states, defense lawyers gained postconviction access to biological evidence through legislation, ad hoc agreements with prosecutors, and other legal processes. However, a major complaint made by the community seeking to overturn wrongful convictions is that there is no fail-safe right to DNA testing throughout the country. Though forty-eight states and the federal government have statutes mandating access to biological materials for postconviction DNA testing when conditions of varying stringency are met, as of July 2010 access in Oklahoma and Massachusetts still depended completely on the beneficence of government officials or the case-by-case decisions of individual judges.

According to the Innocence Project, although access to postconviction DNA testing has improved dramatically over the past decade, there are still numerous flaws and holes in coverage—even in those states that have passed statutes. Some statutes, for instance, set very high evidentiary hurdles before access is granted; others prohibit access for people who plead guilty to a crime (even though the problem of false confessions is well documented); several states

do not allow defendants to appeal denials of postconviction testing; and many states do not require courts to act quickly on a request for postconviction DNA testing once it has been filed (Innocence Project 2010). In other words, there is no ironclad guarantee that any convicted person in any prison in the country could gain access to postconviction DNA testing that could prove his or her innocence. Ensuring this unfettered access is the Innocence Project's ultimate goal.

Consequently, the Innocence Project and other organizations have called for the creation of a fundamental constitutional right to postconviction testing, thus overriding the balancing and utility tests that prosecutors and courts ordinarily use to deny access to biological evidence in the name of finality and social stability. This demand is based on the claim that DNA evidence has the power to provide "cast iron scientific proof," whereas our system convicts and sentences innocent people on a regular basis based on flawed forensic evidence and unreliable eyewitness testimony (Leahy 2001). As Barry Scheck, Peter Neufeld, and Paul Dwyer wrote in their book *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted*, "In what seems like a flash, DNA tests performed during the last decade of the [20th] century . . . have exposed a system of law that has been far too complacent about its fairness and accuracy" (2000, xv).

Such claims, as I will show, depend crucially on concurrent acts of construction and purification² of scientific techniques and the knowledge they produce. In order to be elevated to the status of a constitutional right, or as the clincher of a foolproof death penalty, DNA typing must also be elevated into the ultimate identification evidence, and all others must be simultaneously downgraded (Aronson 2007; Lynch et al. 2008). This work of constructing DNA's invincibility must then be rendered invisible, so that DNA evidence can speak with the disembodied power and authority of objective truth. Put differently, we see a two-pronged story unfolding: on the one hand, DNA evidence must be made foolproof and to speak for itself; on the other hand, the constitutional right to testing must be made to seem naturally flowing from the authority of DNA evidence. These two constructions are dependent upon and intimately linked to one another.

Although the U.S. Supreme Court narrowly declined to recognize the existence of this right in its 5–4 decision in *District Attorney's Office v. Osborne* (2009), the legal arguments surrounding the case raised fundamental questions about the reframing of rights through technological change. Ultimately, though further establishing DNA evidence as the “gold standard” of proof whose validity and accuracy are superior to all other forms of forensic evidence, DNA testing failed to dislodge process as the ultimate legitimator of finality in the courts.

Although some judges (including four Supreme Court justices) were eager to modify existing legal procedures based on the authority of DNA evidence, others sought to defend the sanctity of process in law from incursions by alternative, extralegal sources. At stake was the means by which our legal system can best balance the desire to provide justice to individual defendants and the need to maintain social order: through novel technological practices or well-entrenched legal ones.

Legal Background: Access to Evidence and Postconviction Relief

In order to understand the legal debate over postconviction DNA testing, a brief detour into criminal jurisprudence is necessary. The most important precedent was set in 1963 in *Brady v. Maryland*, when the Supreme Court ruled that a defendant in a criminal case is entitled to disclosure of any and all favorable and relevant evidence in the state's possession before trial. Before *Brady*, each side was free to withhold evidence from its opponent. *Brady* held that failure to disclose such evidence, irrespective of the motivations of the prosecutor, was a breach of due process.

Critical to the use of DNA testing in postconviction relief petitions is whether untested biological materials are subject to *Brady* guidelines. The current

leading case on this issue is *Arizona v. Youngblood* (1988) in which the Supreme Court ruled that due process is violated only when the state fails to preserve, or destroys, evidence in “bad faith” (i.e., when the evidence could potentially exculpate a convict but is destroyed anyway). Thus, based on current constitutional doctrine, it is legal for prosecutors and law enforcement agents to destroy materials of no known exculpatory value, as long as that act does not violate any existing state or federal statute. Consequently, *Brady* established no clear right of postconviction access to biological material for DNA testing.

That said, lawyers have had some success advancing *Brady* arguments around the country, most notably in *Dabbs v. Vergari*.³ In this 1990 New York case, an inmate sought DNA testing of physical evidence used to convict him of rape. The district attorney opposed this action, arguing that there was no statutory right to such a request. Finding in favor of the inmate, the court ruled that prosecutors should be held to the same standard to preserve and hand over exculpatory evidence to the defense both before and after trial. The court opined: “Due process is not a technical conception with a fixed content. . . . It is flexible and calls for such procedural protections as the particular situation demands. *Clearly, an advance in technology may constitute such a change in circumstance*” (*Dabbs* 1990, 768 [emphasis added]).

In a similar case in 2000, *Cherrix v. Braxton*, the court distinguished the inmate's claim from that in *Herrera* on the issue of evidence. Though the affidavits in *Herrera* "did not meet the standard of a truly persuasive showing of actual innocence," the court argued that "the circumstances in Cherrix's case are different. The evidence to be discovered in Cherrix's case constitutes DNA test results on seminal fluid seized from the body of the victim, which may be highly probative of the perpetrator's identity." The court then went on to state that the persuasiveness of DNA evidence on questions of guilt or innocence is "unquestionable" (*Cherrix* 2000, 767). Thus, at least a few state court judges have accepted the argument that DNA evidence is so powerful that it trumps not only the law's ordinary reliance on process as the guarantor of finality but also society's right to finality in criminal trials.

Postconviction Relief

Although a convicted prisoner can seek postconviction relief by several avenues, the most important is the writ of habeas corpus, which allows a prisoner to bring the authorities imprisoning him or her before a court of law to test the legality (constitutionality) of his conviction. In a series of cases over several decades, the U.S. Supreme Court established that the sole purpose of habeas corpus review is to test the constitutionality of a conviction, not to review its underlying factual

basis. In other words, no matter how much a prisoner may wish to prove his or her innocence, the prisoner has no absolute right to do so after being convicted. Two recent developments in habeas law are especially relevant to the use of DNA evidence in postconviction relief: the Supreme Court's decisions in *Herrera* and *Schlup v. Delo* (1995); and the passage of the federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).⁴

Herrera, which involved the 1981 shooting deaths of two Texas highway patrolmen during a traffic stop, was decided just before postconviction DNA testing became an important part of the debate about the fairness and efficacy of the American criminal justice system. Leonel Herrera was arrested soon after the shootings based on a wide range of evidence, including eyewitness testimony, the fact that his girlfriend owned the car that had been stopped, serological data that matched blood on his pants to the one of the slain officers, as well as a handwritten note found in Herrera's pocket at the time of arrest strongly implying that he had committed the crime. In January 1982, Herrera was found guilty of murdering the second officer and was sentenced to death. Six months later, he pled guilty to the murder of the first officer, and unsuccessfully appealed the first conviction on the ground that some of the evidence was improperly admitted. He subsequently filed petitions for state and federal habeas corpus relief, both of which were denied.

More than eight years later, Herrera filed a second petition for state habeas corpus relief, and then for federal habeas relief, this time based on what he considered to be important new information not available at the first trial: two affidavits claiming that Herrera's now dead brother was the true perpetrator of the crimes. The District Court granted his request for a stay of execution so that this new evidence could be analyzed in court. On appeal, the U.S. Court of Appeals for the Fifth Circuit, vacated the stay, stating that the existence of newly discovered evidence relevant to the guilt of a state prisoner was not a ground for federal habeas corpus relief. Herrera appealed this judgment to the Supreme Court, which upheld the appellate decision.

In a 6–3 opinion, the Supreme Court held that a petitioner could launch a second petition for federal habeas corpus relief only if his constitutional claims were supplemented with a “colorable showing of factual innocence” (*Herrera* 1993, 400). No guidance was provided on exactly what such a showing might look like, but as a legal term “colorable” means plausible or believable. The Supreme Court also held that claims of actual innocence, in the absence of a constitutional claim, were not grounds for habeas corpus relief. Instead, they were merely “a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits” (404). In a vigorous dissent, however, Justices Blackmun, Stevens, and Souter denounced

this view, arguing that the execution of a person who has been validly convicted and sentenced, but who can prove his innocence with newly discovered evidence, was forbidden by the Eighth and Fourteenth Amendments (430–431).

At the heart of *Herrera* was a question of what to do with newly discovered evidence that could support or refute the validity of a guilty verdict. The *Herrera* majority held that for newly discovered evidence to lead to postconviction relief, it must reasonably have been unavailable at the initial trial, and it must also accompany a violation of constitutional rights. Thus, *Herrera* established that newly discovered evidence can matter only if it is linked to a constitutional violation. The main justifications for this conclusion were that “the passage of time only diminishes the reliability of criminal adjudications,” and therefore that evidence based on affidavits alone evidence would not be powerful enough to guarantee a more exact finding of guilt or innocence if Herrera were to receive a new trial.⁵ This view was codified by the passage of ADPEA in 1996, together with the requirement that habeas corpus relief must be applied for within one year after conviction in state court.

Schlup v. Delo

Two years after *Herrera*, the Supreme Court addressed the question of what should happen when a death row inmate who has exhausted all other avenues of

postconviction relief claims actual innocence based on both new evidence and a constitutional violation at his original trial. In *Schlup*, the court held that when the two claims are made simultaneously by a death row inmate, the petitioner need show only that the constitutional error *probably* resulted in his wrongful conviction. In other words, he must convince the habeas court that “in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt” (*Schlup* 1995, 200). Thus, the *Schlup* standard is slightly more lenient than that in *Herrera* (in that it is framed in the language of probabilities of innocence rather than certainty of innocence), but only because it seeks to prevent the most heinous miscarriage of justice—the execution of an innocent person.

Herrera and *Schlup* were both at play in *House v. Bell* (2006), in which the justices were asked to rule on what constitutes such a persuasive showing of actual innocence that it need not be accompanied by a constitutional claim to justify habeas relief. In this case, the Court directly addressed the issue of postconviction DNA testing for the first time. Tennessee death row inmate Paul House was seeking relief from his conviction and death sentence for the rape and murder of Carolyn Muncey, a woman who lived near him in a rural part of the state (Fisch 2006; Lane 2005).

During postconviction proceedings, House claimed that he had received ineffective counsel during his trial and presented three major pieces of new evidence that were not available when he was originally convicted. The first was the testimony of two women who claimed that Muncey's husband had confessed to killing his wife after they had been arguing. The second was evidence that the crime scene investigation was poorly handled and could have led to the spillage of Muncey's blood on House's clothing while the physical evidence was being transported from Tennessee to the FBI laboratory in Washington, D.C. Finally, new DNA tests showed that the semen on Muncey's clothing almost certainly belonged to her husband and not to House. If correct, this result meant that House most likely did not rape Muncey, taking away a crucial piece of evidence that linked him to the crime scene (Fisch 2006; Lane 2005).

After the Tennessee Supreme Court declined to grant relief, a federal District Court determined that of the three new pieces of evidence, only the DNA evidence was reliable. The court ultimately agreed with the state that the premeditated nature of House's crime (which was a centerpiece of the prosecution's case against him) was significantly more important to his conviction and death sentence than the suggestion that he was motivated by rape. Thus, although the DNA evidence certainly changed the case, it did not affect the guilty verdict. Neither the federal District Court nor any of the federal appellate courts

that heard the case felt that this evidence was sufficient to establish his innocence, and none granted him a new trial.

House thereupon filed an appeal to the Supreme Court and the Court agreed to hear the case. During oral arguments on January 11, 2006, the justices focused heavily on how to weigh various forms of evidence. A key question was whether the new DNA evidence would have swayed the jury in the original trial either to declare House innocent or at least to not sentence him to death because of residual doubts about his guilt.⁶ This issue was especially important for Breyer, who at one point put himself in the shoes of the jury and suggested that the confession evidence and the DNA evidence might have swayed him to a not guilty vote (oral argument in *House 2006*, 46–47). Scalia interjected that Breyer could not undertake such a thought experiment because he had no way of determining the credibility of the confession evidence, but Souter immediately argued that such an argument does not hold for DNA evidence. Any juror who heard the results of the DNA tests on the semen on Muncey’s clothing, Souter observed, “would have to say that the only positive evidence that a rape was committed here would be evidence that pointed to the husband, not in fact to—to the defendant House” (49). Although there was some dispute among the lawyers and the justices about Souter’s conclusion, several of the justices stated that the DNA evidence in the case at least called the stated motive for the crime (rape)

into question (51–58). Thus, the debate among the justices was not about the absolute veracity of the DNA evidence, but only about its relevance to the total evidentiary picture of guilt and premeditation.

In a 5–3 ruling (Justice Alito was not yet a member when oral arguments were heard), the court determined that House’s petition for postconviction relief was viable and granted him a new trial. Despite the heavy media focus on the DNA evidence in the months leading up to the oral arguments, the majority opinion, written by Justice Kennedy, did not single out DNA evidence as the determining factor in justifying relief. Instead, the majority argued that the three pieces of new evidence, taken in totality, suggested that “it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt” about House’s guilt (*House* 2006, 545). For the dissenters, this was the wrong standard to apply. In their view, new evidence must not merely cast doubt on House’s conviction; it had to prove “that House was actually innocent, so that no reasonable juror would have convicted him in light of the new evidence” (548).

The Purification of DNA Profiling

The argument that a convicted felon has a constitutional right to DNA evidence even after he has exhausted all legal remedies rests squarely on the idea that DNA

testing serves as a “truth machine” that can definitively determine guilt or innocence beyond doubt. Both Peter Neufeld, a noted liberal, and former U.S. Attorney General John Ashcroft, a noted conservative, have characterized the technique in this way (Neufeld 2003, 33; Ashcroft 2002). Since its first introduction as a forensic technique, DNA evidence has been endowed with almost mythic infallibility both by prosecutors using it to put defendants behind bars and by defense attorneys using it to free the wrongfully convicted from prison (Aronson 2007; Lynch et al. 2008). Perhaps the strongest claim made by the defense community in this regard can be found in *Actual Innocence*: “DNA testing is to justice what the telescope is for the stars: not a lesson in biochemistry, not a display of wonders of magnifying optical glass, but a way to see things as they really are. It is a revelation machine. And the evidence says that most likely, thousands of innocent people are in prison” (Scheck, Neufeld, and Dwyer 2000, xv).

The comparison of DNA testing to the telescope is revealing. As the historian of science Simon Schaffer has shown, when the telescope was introduced into astronomy, the visual data it produced were often highly ambiguous, leading to multiple interpretations among scientists. Further, many lay people simply did not trust an implement like the telescope to provide them with an accurate portrait of stars as they “really” were. Viewers had to be trained both

to interpret the imperfect images created by the telescope and to believe that they actually represented reality (Schaffer 1983, 1989). In the same way, Scheck and Neufeld actively campaigned to convince judges, prosecutors, politicians, and the public that DNA was a revelation machine for exposing the faults of the criminal justice system that were not immediately obvious or apparent to most people (Scheck, Neufeld, and Dwyer 2000; Neufeld 2003).

Although Scheck and Neufeld's support was crucial in establishing the status of DNA profiling as the gold standard of forensic science, these two passionate advocates did not always have such a rosy view of the technique. Indeed, Scheck and Neufeld were responsible for generating significant controversy about the validity and reliability of DNA testing in the first few years after its introduction into the American legal system (Aronson 2007). Notable examples include *People v. Castro* (1989), in which they highlighted significant flaws in the laboratory procedure of one of the two private companies offering the technique; *United States v. Yee* (1991), in which they challenged the methods used by the FBI to calculate the probability of a false match between biological samples; and *People v. Orenthal James Simpson* (1994), in which they argued that although most of the technical problems associated with forensic DNA testing had been resolved, DNA evidence still could not automatically be trusted because of the fallibility and corruptibility of the human beings performing it (Scheck 2003;

Thompson 1996). It should be noted that their strategy in the Simpson case was a marked departure from previous cases in which they sought to open up the “black box” of forensic DNA analysis to highlight its potential faults. By contrast, in the Simpson case, Scheck and Neufeld treated the laboratory technique almost as a black box and argued that the limiting factor was the skill, honesty, and integrity of the people responsible for managing the evidence. Indeed, summing up his attack on the evidence at the Simpson trial, Scheck declared, “garbage in, garbage out”—in other words, don’t blame the technology when your inputs are fatally flawed (Lee and Tirnady 2003, 257–258). By switching the focus of attack to law enforcement officials—in this case, the discredited Los Angeles Police Department—Scheck offered in effect a preview of the strategic gear shift that led to the Innocence Project (Thompson 1996).

The Innocence Project

Following the Simpson trial, Scheck and Neufeld’s mission became much bigger than protecting their legal clients from unreliable evidence. In 1992 they founded the Innocence Project, a nonprofit legal clinic at New York’s Cardozo School of Law, where Scheck was a professor. The clinic was set up in order to free a few of what they believed were thousands of wrongfully convicted people languishing in American prisons. To succeed, however, they needed a form of proof that was

so credible and convincing that prosecutors and law enforcement agents would be unable to disagree with them. They found this truth teller in DNA. Gone now were their one-time concerns about the integrity of forensic samples; gone (at least for a while) were their fears of lab error; and gone was their original skepticism toward scientific claims of infallibility. Scheck, Neufeld, and Dwyer's 2000 book, *Actual Innocence*, does not even mention their earlier experiences with DNA evidence. It is sanitized history, with DNA as the triumphant hero.

To be fair, Scheck and Neufeld had long argued that although DNA evidence was problematic when used for incrimination, it could be reliably used for exculpatory purposes, because no population genetics data were needed. A nonmatch requires no statistical interpretation. This view, however, ignored the ever present problems of contamination, degradation of forensic DNA samples, chain of custody issues, and lab misconduct. By carefully reviewing the circumstances of each case before accepting it, however, the Innocence Project rarely has to discuss these potential problems with DNA evidence publicly. The Innocence Project makes no secret of the fact that it accepts only those cases in which DNA evidence can yield conclusive proof of actual innocence.⁷ In doing so, Innocence Project lawyers manage the image of DNA in the postconviction context so that there can be no question of its truth-telling power. The Innocence

Project owes its success to this continuous purification of DNA profiling from its problematic social matrix.

A Fundamental Right to DNA Testing?

For many in the defense community, DNA profiling is so much stronger than other forms of evidence that it overrides traditional arguments about the sanctity of procedural finality in our legal system. If a DNA test can definitively adjudicate guilt or innocence, then it would be a constitutional violation, so the defense argument runs, to deny prisoners access to postconviction DNA testing. In a 2005 *Scientific American* article, Neufeld and Innocence Project policy analyst Sarah Tofte made exactly this case, arguing that “the dozens of DNA exonerations demonstrate that, a decade or more after conviction, DNA results are more reliable than eyewitnesses, confessions, and questionable forensic science introduced at the original trial . . . DNA, in limited situations, offers the criminal adjudicatory process a doctrine of certainty to replace the doctrine of finality” (Neufeld and Tofte 2005, 188–189).

However, because *Herrera* effectively blocked a prisoner’s ability to obtain postconviction DNA testing to prove actual innocence, defense attorneys have had to pursue other legal avenues to gain access to biological materials for analysis (Neufeld and Tofte 2005, 189). In several cases,⁸ the Innocence Project

and affiliated attorneys made use of the 42 USC §1983 civil suit, which is a civil court action that allows a citizen to petition the federal government for relief or remedy when a state agent does not protect his or her constitutionally guaranteed rights (Vetter 2004). This legal mechanism was initially developed in 1871 in response to the failure of southern states to protect blacks from the Ku Klux Klan, but its use was expanded in the 1961 Supreme Court case *Monroe v. Pape* to provide federal remedies for state laws that were inadequate in theory or practice. In the criminal context, this may mean seeking compensation for unconstitutional treatment or demanding access to services or protections not provided by the state.

In *Harvey v. Horan* (2002a), James Harvey, a Virginia prisoner convicted of rape, sought a constitutional right of access to DNA evidence under §1983. This kind of challenge differs from a petition for habeas corpus in that a successful outcome neither secures the release nor proves the actual innocence of a convicted prisoner. At best, it can provide access to evidence that might establish actual innocence. Two central aspects of a §1983 suit are that the evidence is never automatically exculpatory, as test results could show that the DNA sample from the crime scene matches the plaintiff, and even if the evidence is exculpatory, the plaintiff must still file for habeas corpus or ask for a pardon in order to be released from prison. In other words, a §1983 suit must not seek to

overturn a conviction, and it cannot be seen as bypassing state courts—it can only ask for evidence that the state is unwilling to hand over to the defendant for testing due to some legal or procedural defect.

Harvey originated in 1996, when the Innocence Project asked the Virginia Division of Forensic Science to hand over biological evidence for retesting. They asked again in 1998 and 1999, but their requests were denied. Harvey subsequently argued that the state’s failure to test biological evidence using the latest Short Tandem Repeat (STR)-based DNA profiling technology violated his due process rights.⁹ The federal district court hearing the case acknowledged such a right based on *Brady*, and also accepted that his claim was not for a writ of habeas corpus because he was not seeking immediate release from prison. Commonwealth Attorney Horan appealed this ruling.

The Court of Appeals for the Fourth Circuit reversed the district court decision, arguing in part that Harvey had not followed the proper procedure in making his claim for postconviction relief. The court stated that a prisoner could bring a §1983 claim only *after* the conviction or sentence is “reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus” (*Harvey* 2002a, 374). As the Supreme Court had ruled in *Heck v. Humphrey* (1994), such civil suits could not be used to challenge a still valid criminal conviction (because there

was no confirmation that any constitutional rights had been violated). The threat to finality loomed large in the Fourth Circuit court's thinking:

Harvey would have this court fashion a substantive right to postconviction DNA testing out of whole cloth or the vague contours of the Due Process Clause. We are asked to declare a general constitutional right for every inmate to continually challenge a valid conviction based on whatever technological advances may have occurred since his conviction became final. The Supreme Court has made clear that the finality of convictions cannot be brought into question by every change in the law. . . . Similarly, we believe that finality cannot be sacrificed to every change in technology. The possibility of postconviction developments, whether in law or science, is simply too great to justify judicially sanctioned constitutional attacks upon final criminal judgments. (*Harvey 2002a*, 375)

In other words, the court acknowledged that although finality is not a value that trumps all others, it can be overridden only in cases in which radically new evidence is discovered after trial.

In *Harvey*, the Fourth Circuit staked out a very conservative position with regard to the law's obligation to keep up with developing science and technology. As far as this court was concerned, the legal system has a valid, well-established

mechanism for discovering the facts of a case that is not intrinsically inferior to scientific methods of truth making. In the interest of justice, already settled cases should not be reopened simply because some new scientific technique could potentially provide additional information not originally available at trial. In a society of seemingly continuous scientific change, doing so would mean that all judicial decisions would become provisional—never finished, always open to relitigation (*Harvey* 2002a, 375–376).

This argument implicitly denies the theory of the law lag—the idea that the legal system takes a long time to take notice of, understand, and come to grips with rapidly evolving science—and that it has an obligation to do better.¹⁰ According to Fourth Circuit, the legal system has no duty to continually readjudicate old cases by the newest science; it must simply seek to ensure that the best available contemporary science is used at the time that the case is initially litigated. It is law, not science, that authorizes the final determination of guilt or innocence (*Harvey* 2002a, 376).

Obviously unhappy with the decision, the defense petitioned for rehearing and rehearing *en banc* in March 2002. Both petitions were denied. Chief Judge Harvey Wilkinson filed an opinion supporting the denial, and Judge J. Michael Luttig filed an opinion against the decision (*Harvey*, denial of *en banc* motion). Luttig thereby became one of the few judges in the country to support a

constitutional right to postconviction DNA testing—an unusual position for one of the most conservative jurists in the country. Until the appointment of Supreme Court Justices John Roberts and Samuel Alito, Luttig was on the Bush administration’s short list of nominees, along with Wilkinson (Kirkpatrick 2005).

Wilkinson was clearly concerned that constitutionalizing a right to postconviction access to DNA would foreclose broader democratic deliberation about the impact of science on society. In his view, it is not the court’s prerogative to adapt established procedures to new scientific advances unless explicitly told to do so by Congress (*Harvey* 2002b, denial of *en banc* hearing, 301). Fairness and justice, he held, are guaranteed by already enshrined constitutional norms and the “orderly” processes set up to implement them. For Wilkinson, Harvey’s §1983 suit was a blatant attempt to bypass Virginia’s system of criminal justice and proceed directly into federal court. “Such disregard of process,” he wrote, “is an anomaly in an area where criminal defendants, above all, rely on proper process to protect their rights. . . . Shorn of process, neither the innocent nor the public upon whom offenders prey will have any assurance of justice” (299).

Luttig found this reasoning faulty in light of the power of DNA-based technology to establish truth. He believed that the advances that led to DNA testing were “no ordinary developments, even for science.” As a result, they could

not be treated as “ordinary developments for law.” Instead, they “must be recognized for the singularly significant developments that they are—in the class of cases for which they actually can prove factual innocence, the evidentiary equivalent of ‘watershed’ rules of constitutional law” (*Harvey* 2002b, 305–306).¹¹ After pointing out that the right to DNA testing must be tightly managed so as not to overwhelm the criminal justice system with spurious claims of innocence, Luttig stated that “it would be a high credit to our system of justice that it recognizes the need for, and imperative of, a safety valve in those rare instances where objective proof that the convicted actually did not commit the offense later becomes available through the progress of science” (306).¹² For Luttig, then, the law has an overriding duty to incorporate objective truth, and hence to defer to the exceptional truth-telling capability of DNA profiling.

These issues resurfaced in *Osborne v. District Attorney’s Office* (2008), a §1983 case in the Court of Appeals for the Ninth Circuit.¹³ William Osborne, a prisoner in Alaska, had been convicted of sexual assault and kidnapping, along with an accomplice. In 2002, he sought to compel the District Attorney’s Office in Anchorage to allow him to test the biological evidence used to convict him in 1994 (a used condom and two hairs) with sophisticated DNA profiling techniques unavailable at the time of his original trial. Osborne argued, following the logic of *Dabbs* and subsequent cases, that the state’s *Brady* obligations extend beyond

well beyond the pretrial phase all the way through to the postconviction period, and further, that *Heck* is no barrier to a §1983 civil suit, because even if he gained access to evidence for further testing, it would not automatically invalidate his conviction. Following *Heck*, such determinations would have to be made in a separate criminal court proceeding (*Osborne 2005a*, 1056; *Osborne 2008*, 1122).

At the time, Alaska was one of three states that had no statute mandating postconviction access to biological evidence, so the state Court of Appeals heard such cases (a postconviction DNA testing statute was ultimately passed in May 2010). In Osborne's case, the court was "reluctant to hold that Alaska law offers no remedy to defendants who could provide their factual innocence," and therefore devised a three-part test for access to biological evidence based on policies deemed to exist in other states (*Osborne 2005b*, 995). In order to gain access to biological evidence, Osborne's request had to satisfy the following criteria: (1) the original conviction had to rest primarily on eyewitness identification, (2) there had to be doubt in the identification of Osborne by the witness, and (3) any evidence produced had to be conclusively exculpatory. Osborne did not pass this test because numerous other forms of evidence were presented at trial, including a gun found in Osborne's car that matched shell casings recovered by police at the crime scene. He was therefore denied relief.

After several rounds of litigation, Osborne’s legal team persuaded the Anchorage Police Department to hand over evidence for testing. Although the district attorney opposed this action, the district court in Anchorage and the Ninth Circuit Court of Appeals decided in favor of Osborne, finding (on the basis of Luttig’s reasoning) that he had a “very limited constitutional right to the testing sought” based on the novelty and revelatory potential of the evidence and the fact that it would not be directly used to invalidate his conviction (*Osborne* 2006, 1080–1081). Unsatisfied with this result, the district attorney asked the U.S. Supreme Court to review the decision of the Ninth Circuit, setting up a definitive test of the existence of a constitutional right to postconviction DNA testing.

The Supreme Court reversed the Ninth Circuit, denying that any due process violation occurred. Alaska, the court noted, had a legitimate framework for postconviction relief that, however imperfect, did not “offend” fundamental principles of justice or fairness (*District Attorney’s Office v. Osborne* 2009, 16). This, in the majority’s view, would be the only basis for upsetting a state’s postconviction relief procedures. More to the point, the Supreme Court also rejected Osborne’s plea to recognize a freestanding right to DNA testing in the absence of some constitutional error at trial, because they felt this was a matter for legislatures to deal with (1–2). In the majority’s view, articulated by Chief Justice Roberts, “there is no reason to constitutionalize the issue in this way” (2). Relying

on Wilkinson's reasoning in *Harvey*, Roberts argued that "the availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice" (8).

Although the four dissenting justices argued that the benefits of absolute certainty provided by this revolutionary new technique outweighed the risks associated with violating the established legal order, the majority countered that "there is no long history of such a right and the mere novelty of such a claim is reason enough to doubt that substantive due process sustains it" (19).

The majority also took aim at the very notion that served as the foundation for calls to constitutionalize a right to postconviction DNA testing—that modern STR analysis can provide conclusive proof of guilt or innocence in an efficient, low-cost manner. Taking a page from Scheck and Neufeld's old playbook, the majority adopted a skeptical view of the certainty accorded to DNA profiling. Contesting the dissenting judges' claim that "the DNA test Osborne seeks is a simple one, its costs modest, and its results uniquely precise" (*District Attorney's Office v. Osborne* [2009], Stevens, J. dissent, 1), the majority quoted at length from law professor Erin Murphy's *Emory Law Journal* article on "the subjectivity inherent in forensic DNA typing" (Murphy 2008). There, Murphy reopened the

black box that Scheck and Neufeld had fought to close, highlighting such issues as contamination, degradation of DNA, and the ambiguity of forensic samples containing biological material from multiple people. Persuaded by her deconstruction, the court also went along with her caution against overconfidence in the results of DNA testing.

Conclusion

The Supreme Court in *District Attorney's Office v. Osborne* (2009) seemed to recognize, and capitalize upon, the central point of the coproduction framework: that the construction of a constitutional right to DNA testing is intimately linked to the construction of DNA testing itself as a foolproof and fail-safe technology. The technique's status was achieved as much through social action as through scientific advance, and the legal system ought not to treat it as an intrinsically infallible "revelation machine" (Aronson 2007; Jasanoff 2006; Lynch et al. 2008). Further, crafting a constitutional right to access to DNA evidence would not have greatly advanced the cause of justice in the long term. With each passing year, the subset of cases in which previously untested genetic evidence exists grows smaller and smaller. In fact, within a relatively short time, the era of DNA-based exonerations may well be over. Even during this transitional era, in the vast

majority of postconviction cases, there is simply no biological evidence available for testing when a prisoner claims innocence.

Yet the failure to construct a constitutional right to postconviction DNA testing does not mean that Luttig's call for a "safety valve" for the wrongfully convicted was unfounded. Indeed, the justification for postconviction access to strong evidence of innocence is so abundantly clear (thanks, in large part, to the excellent but not infallible technology of DNA profiling) that it need not depend on any exaggerated belief in the infallibility of science. The way forward is to argue for a constitutional right to any evidence that meets the *Schlup* standard, regardless of whether the case involves a capital crime. Thus, any new evidence making it "more likely than not" that a reasonable juror, presented with that evidence, could not have convicted the defendant would potentially trigger a reexamination of the conviction. Under such a rule, convicted felons could gain access not only to DNA evidence in cases where it might have a major impact on the outcome, but also to any other form of evidence that might profoundly affect a jury's decision. It would, of course, be left to the courts to determine, state by state, what kinds of evidence would pass this test in individual cases, but state courts already play this gate-keeping role in criminal trials.

We may give Luttig the last word with respect to the ideal relationship between legal procedure and scientific techniques—or between social finality and

epistemic certainty—in meting out justice. In his criticism of the decision not to rehear Harvey’s postconviction case, Luttig wrote that if “it is agreed that, in a given class of cases, it would be possible to establish to a certainty through such further analysis that one did not in fact commit the crime for which he was convicted and sentenced, then grave harm would come to the Constitution were it to be dismissively interpreted as foreclosing access to such evidence under any and all circumstances and for any and all purposes (judicial or even executive). The Constitution is not so static” (*Harvey 2002b*, 306).

In the end, we can conclude that both finality (just process) and certainty (DNA typing) are important social achievements. In addition to safeguarding the rights of the defendants and preserving social order, the legal must system should endeavor to ensure that neither value gets elevated to the status of a false god.

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Notes

1. See the Innocence Project’s website for the latest total:

<<http://www.innocenceproject.org>>.

2. “Purification” here refers to the process by which the social dimensions of science are hidden in order to ensure that results are seen by outsiders to be

unmediated representations of nature as it really is. Purification thus renders contingency, human intervention, and other sources of error invisible to the untrained eye (Latour 1993).

3. See also *State v. Thomas* (1990) and *Sewell v. State* (1992).

4. Habeas corpus was first codified in England in a 1641 act that specifically allowed the courts of the King's Bench or common pleas to examine the legality of a detention (see Capra and Saltzburg 2007).

5. See also: *Ford v. Wainright* (1986) and *Johnson v. Mississippi* (1988).

6. This action is consistent with the empiricist behavior of judges described by Sheila Jasanoff (Jasanoff 1998, 2002).

7. See Innocence Project, "FAQ: How do you choose your cases? How many letters do you receive?" (July 6, 2010) at <http://www.innocenceproject.org/Content/103.php>.

8. *Harvey v. Horan* (2002a); *Godschalk v. Montgomery County District Attorney's Office and Bruce Castor* (2001); *Bradley v. Pryor* (2002); *McKithen v. Brown* (2007); *Breest v. N.H. Attorney General* (2008); and *Osborne v. District Attorney's Office* (2006).

9. In oral arguments, the defense conceded that Harvey received due process under both law and science when he was convicted in 1990.
10. See Jasanoff, chapter 1, this volume.
11. See *Teague v. Lane* (1989).
12. Based on Luttig's logic, several courts have granted access to postconviction DNA evidence, but none of these cases led to a substantial shift in the legal landscape. See *Bradley v. Pryor* (2002), *Breest v. N.H. Attorney General* (2008), and *McKithen v. Brown* (2007).
13. There are several related cases in this matter with the same or similar names. See the Cases Cited section for details.

{Notes_end}

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