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Assessing the Risk of Executing the Innocent: A Case for Allowing Access to Physical Evidence for Posthumous DNA Testing

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NOTES

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I. INTRODUCTION

On February 5, 1985, Helen Schartner was raped and murdered on her way home from a bar in Virginia Beach.¹ Joseph O'Dell was at the same bar that night, and fellow patrons claim he left the bar shortly after Schartner departed.² Several hours later, O'Dell was seen entering a convenience store with blood on his hands, face, and clothes.³ O'Dell's estranged girlfriend—who had previously falsely accused O'Dell of other murders—read about Schartner's murder and called the police to report that O'Dell had left some bloody clothes in her garage.⁴ The police arrested O'Dell and charged him with the rape and murder of Schartner.⁵ He was tried, found guilty, and sentenced to death.⁶

O'Dell's 1986 conviction rested primarily on the testimony of a state forensic expert who claimed that the blood on O'Dell's shirt and jacket was "consistent" with that of Schartner's.⁷ Because DNA

1. *Afraid of a Shadow of a Doubt*, WASH. POST, May 7, 2000, at B8; Roger Parloff, *Gone but Not Forgotten*, AM. LAW, Jan.-Feb. 1999, at 5.

2. John C. Tucker, *A Look at Executions; What's Wrong with Making Sure?*, WASH. POST, July 20, 1997, at C3 (noting that witnesses said that O'Dell and Shartner left within fifteen to thirty minutes of one another).

3. *Afraid of a Shadow of a Doubt*, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

testing was not widely available in the mid-eighties when O'Dell was tried,⁸ the expert relied solely upon a rudimentary blood analysis, which compared proteins and enzymes.⁹

O'Dell consistently maintained his innocence, claiming that on the night of the murder he had gotten into a fistfight after leaving the bar,¹⁰ and the blood on his clothing came from this fight, rather than from any assault upon Schartner.¹¹ DNA tests performed on O'Dell's shirt in 1990—four years after his conviction—proved that the blood on his shirt did not come from Schartner.¹² The tests were inconclusive with respect to the blood on O'Dell's jacket.¹³ While his case was on appeal, O'Dell gathered additional evidence of his innocence. At trial, the state had presented the testimony of Steven Watson, a jailhouse informant who claimed that O'Dell confessed to Schartner's rape and murder while the two shared a jail cell.¹⁴ In 1996, Watson gave a statement under oath in which he admitted that his trial testimony was false and that O'Dell had, in fact, never confessed to him.¹⁵

In 1997, O'Dell requested that additional DNA tests be performed on semen samples recovered from the victim.¹⁶ Earlier attempts to test this evidence had been unsuccessful; however, recent advances in DNA technology now made it possible to perform DNA testing on the small amount of genetic material in the sample.¹⁷

8. *Id.*

9. *Id.*

10. Tucker, *supra* note 2 (explaining that other witnesses confirmed O'Dell's story that he had gotten into a bar fight at another tavern that night).

11. *Id.*

12. *Id.* The test showed that the blood on O'Dell's shirt was neither the victim's blood nor his own. *Id.* "That proof both undermined a major part of the state's case and supported O'Dell's claim that the blood had come from an incident unconnected to the murder." *Id.*

13. See Petition for Appeal at 9 n.6, Roman Catholic Diocese v. Fruit (Va. 1999) (No. 99-1834) [hereinafter Petition for Appeal]. On the basis of the test results, both a defense expert and an expert for the Commonwealth concluded that DNA testing of the jacket sample was "inconclusive." *Id.* An additional expert for the Commonwealth testified, however, that "by analyzing [the private lab's] results under the Virginia state crime lab's 'match window'—which [is] 35% larger than the match window [of the private lab]"—he was able to conclude that the blood on the jacket was "consistent" with that of the victim. *Id.*

14. *Id.* at 3.

15. *Id.* Of all the wrongful convictions exposed through DNA testing by the Cardozo Law School's Innocence Project, jailhouse snitches played an integral role in twenty-one of these cases. BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 156 (2000). Of the cases that the Innocence Project investigated, none of the jailhouse snitches ever admitted to having fabricated their stories. See *id.*

16. See Petition for Appeal, *supra* note 13, at 3.

17. *Id.* At the time of the earlier unsuccessful tests, the lab was using a method of DNA testing called RFLP (restriction fragment length polymorphism), which requires a substantial

These additional DNA tests, O'Dell argued, would provide him with an opportunity to prove his innocence conclusively.¹⁸ The state attorney general, the governor, and the state and federal courts all refused to permit the testing.¹⁹ As a result, Joseph O'Dell was executed on July 23, 1997.²⁰

Convinced that O'Dell was wrongly executed, a team of lawyers, religious leaders, and death penalty opponents sought access to the body fluid evidence, so that DNA testing could finally be performed.²¹ It was too late to spare O'Dell's life, his advocates admitted,²² but not too late to expose the faulty system that had allowed his execution.²³ The Roman Catholic Diocese of Richmond and the Louisiana Crisis Assistance Center jointly filed suit in the Circuit Court of the City of Virginia Beach asking the court to donate the samples to them for testing.²⁴ The Diocese's claim relied on both the common law right of access to judicial records²⁵ and a Virginia statute that gives trial court judges discretion to donate evidence in criminal cases to charitable organizations upon completion of all proceedings.²⁶

The Commonwealth "vehemently opposed the petition" and asked the court instead for permission to destroy the evidence.²⁷ The Commonwealth warned that if the test results showed O'Dell's

amount of DNA. Record of Hearing Before Circuit Court Judge Edward Hanson, Jr. (June 15, 1998) at 44-45, Roman Catholic Diocese v. Fruit (Va. Cir. Ct. of Virginia Beach 1998) (No. CL 98-122) [hereinafter Record of *Fruit* Hearing]. An improved method of testing was subsequently invented—the PCR (polymerase chain reaction) test—which enables the testing of much smaller genetic samples. *Id.* at 45.

18. *Afraid of a Shadow of a Doubt*, *supra* note 1.

19. Petition for Appeal, *supra* note 13, at 3.

20. *Id.* at 1.

21. Petition for Donation of Certain Items Used as Evidence Against Joseph Roger O'Dell at Trial, and Motion for Temporary Injunction at 1-2, Roman Catholic Diocese v. Fruit (Va. Cir. Ct. of Virginia Beach 1998) (No. CL 98-122) [hereinafter Petition for Donation of Certain Items].

22. *See id.* at 4 (explaining that the plaintiffs do not "take issue with this Court's prior rulings" and conceding that "Mr. O'Dell has been executed").

23. *See id.* (noting the public's interest in knowing whether an innocent person has been executed).

24. *Id.* at 1-2.

25. *See* Petition for Appeal, *supra* note 13, at 4.

26. *Id.* The statute provides that "[u]pon petition of any organization which is exempt from taxation under § 501(c)(3) of the Internal Revenue Code, the court in its sound discretion may order the donation of an exhibit to such charitable organization." VA. CODE ANN. § 19.2-270.4(D) (Michie 2000). Such donation may be made after the exhaustion of all appellate remedies. *Id.* § 19.2-270.4(A). The petitioning charities also argued that the First Amendment and the common law right of access mandated public access to the evidence. *See* Petition for Appeal, *supra* note 13, at 4.

27. *See Afraid of a Shadow of a Doubt*, *supra* note 1; *see also* Petition for Appeal, *supra* note 13, at 1-2.

innocence "it . . . would be shouted from the rooftops that the Commonwealth of Virginia executed an innocent man."²⁸ The Commonwealth also questioned the integrity of the remaining physical evidence,²⁹ arguing that the authorities had not maintained a proper chain of custody over the evidence during its many years in storage.³⁰ In raising the possibility that someone might have tampered with or inadvertently contaminated the sample, the Commonwealth argued that any DNA testing would be unreliable.³¹

The petitioners responded to the Commonwealth's argument regarding the integrity of the evidence by explaining that the DNA tests themselves would reveal any contamination of the sample.³² The evidence consisted of vaginal swabs from the victim, which presumably contained the victim's DNA as well as that of her rapist.³³ If a third person's DNA were added to the swabs, the testing would simply reveal the presence of a third DNA signature in addition to the two DNA signatures—that of the victim and her rapist—originally in the sample.³⁴ Consequently, any attempt to tamper with the sample by introducing a third person's DNA would be unsuccessful for two reasons: (1) the rapist's DNA would remain a part of the sample and would be identified by the DNA test, and (2) the test would identify the presence of the third party's DNA, which would raise suspicion of tampering since earlier DNA tests had identified the presence of only two DNA signatures. On the other hand, if the samples had been switched, the swabs would lack the victim's DNA, which would also indicate tampering.³⁵ In either case, the petitioners argued, the sophisticated DNA testing would reveal any efforts to tamper with the sample.³⁶

The Circuit Court of the City of Virginia Beach, exercising its discretion under the statute governing disposal of evidence,³⁷ denied the petitioners' motion, asserting that "[t]here have been too many irregularities in the evidence, in the handling of the evidence."³⁸ On appeal, the Virginia Supreme Court affirmed.³⁹ Upon

28. Record of *Fruit* Hearing, *supra* note 17, at 82.

29. *Id.* at 82-83.

30. *Id.* at 80-83.

31. *Id.*

32. See Petition for Appeal, *supra* note 13, at 11 n.7.

33. *Id.*

34. *Id.*

35. *Id.*

36. See *id.*

37. VA. CODE ANN. § 19.2-270.4(D) (Michie 2001).

38. Record of *Fruit* Hearing, *supra* note 17, at 91.

receiving the approval of the state's highest court, the Commonwealth of Virginia incinerated the evidence, ensuring that DNA testing would never be performed to resolve the lingering doubts about the guilt or innocence of Joseph O'Dell.⁴⁰

The case of Joseph O'Dell is one of a handful of cases nationwide in which third parties have sought access to physical evidence after the death or execution of a convicted perpetrator in an effort to exonerate the deceased through DNA testing. In some cases, death penalty opponents have spearheaded the campaign, eager to demonstrate that America's capital punishment system makes fatal mistakes.⁴¹ In other cases, media organizations have sought access to the information in an effort to assess the reliability of questionable convictions.⁴² And finally, in still other cases, surviving family members of deceased perpetrators have sought to restore the name of their loved ones through posthumous exoneration.⁴³

Because there is no established legal avenue for gaining access to physical evidence in a closed criminal case, plaintiffs have relied on a variety of legal theories to compel a state to allow DNA testing of physical evidence in its custody. Plaintiffs have argued that the First Amendment and state freedom of information laws

39. Laurence Hammack, *Ministry Asks Judge to Block Evidence from Being Mailed; Group Says DNA Test Would Prove Executed Man Was Innocent*, ROANOKE TIMES & WORLD NEWS, Sept. 19, 2000, at B1 (noting that "the Virginia Supreme Court ruled the Roman Catholic Diocese of Richmond was not entitled to obtain [the sample] for its own DNA testing").

40. *Afraid of a Shadow of a Doubt*, *supra* note 1.

41. In the cases of Joseph O'Dell and Roger Coleman, nonprofit organizations working against the death penalty were among the parties that brought suit to gain access to the evidence. *See id.* (establishing that the Roman Catholic Diocese of Richmond petitioned for access to the DNA evidence in the O'Dell case); *see also* Frank Green, *Roger Keith Coleman Was Executed in 1992 for the Rape and Murder of His Sister-In-Law; With Improved DNA Technology, the Story and Questions About Coleman's Guilt Are Still Alive*, RICH. TIMES DISPATCH, Nov. 24, 2000, at A1 (noting that Centurion Ministries was one of the parties petitioning for access to the DNA evidence in Coleman's case).

42. In the cases of Roger Coleman and Wayne Felker, media organizations including the Boston Globe and the Atlanta Journal and Constitution were among the parties bringing suit to gain access to the evidence. *See* John Aloysius Farrell, *Scientist Vows to Safeguard DNA in Virginia Murder Case*, BOSTON GLOBE, Sept. 16, 2000, at A1; *see also* Rhonda Cook, *DNA Evidence Absent in 1981 Murder Case; Laboratory Analysis Fails to Prove Whether Felker Raped, Killed College Student*, ATLANTA J.-CONST., Oct. 25, 2000, at 1B (noting that the Atlanta Journal and Constitution and three other news organizations won a court order to have the evidence tested).

43. In the case of Richard Wayne Jones, Jones's two sons are seeking to gain access to physical evidence in order to exonerate their father, who was executed in August of 2000. Dan Malone, *DNA Test Clears Man After Death; Condemned Inmate's Case May Prompt More Reviews*, DALLAS MORNING NEWS, Dec. 16, 2000, at 1A.

mandate public access to evidence in closed criminal cases.⁴⁴ Plaintiffs have also relied on local statutes that allow trial judges to donate evidence to charity organizations after the completion of a criminal case.⁴⁵ In one case, plaintiffs sought to gain access to physical evidence by filing suit against the parties that they believed were actually responsible for the crime.⁴⁶

Despite these efforts, plaintiffs have experienced limited success in their pursuit of access to evidence for posthumous DNA testing. A review of the small group of cases in which access has been sought reveals that existing legal avenues have failed to provide reliable access.⁴⁷ Where access has been denied, as in the O'Dell case, the American public has lost a rare opportunity to discover whether its system of capital punishment makes fatal mistakes. Deprived of the critical information that could be obtained from posthumous DNA testing, both sides of the death penalty debate have continued to argue about whether the American legal system has in fact executed innocent people.⁴⁸ While death penalty proponents continue to insist that no innocent person has been executed since the current death penalty experiment began in 1976,⁴⁹

44. See Opinion Letter at 5, *In re* Globe Newspaper Co. ("The Boston Globe") Request for DNA Testing and Release of Results, Law No. 211-00; Centurion Ministries, Inc. Petition for Donation of Exhibits Pursuant to Va. Code § 19.2-240(4)(D), Law No. 212-00; Wash. Post, *Virginian-Pilot*, and Media Operations, Inc., d/b/a Richmond Times-Dispatch Request for DNA Testing and Release of Results, Law No. 239-00, at 9 (Va. Cir. Ct. May 31, 2001) [hereinafter Opinion Letter] (opinion letter of Judge Keary R. Williams, denying access to media plaintiffs and noting that the media plaintiffs had argued for access to the evidence under the Virginia Freedom of Information Act); Petition for Appeal, *supra* note 13, at 4-8. Freedom of information laws guarantee a public right of access to documents within the government's control. See, e.g., VA. CODE ANN. § 2.2-3704 (Michie 2001) (providing that "all public records shall be open to inspection and copying by any citizens of the Commonwealth").

45. See generally Petition of Centurion Ministries, Inc. for Donation of Exhibits Pursuant to Va. Code § 19.2-270.4D, *In re* Petition of Centurion Ministries, Inc. for Donation of Exhibits Pursuant to Va. Code § 19.2-270.4D (Va. Cir. Ct. Virginia Beach 2000) (No. 212-00) [hereinafter Petition of Centurion Ministries, Inc. for Donation of Exhibits]; Petition for Appeal, *supra* note 13, at 12.

46. See Malone, *supra* note 43 (explaining that, in the Jones case, the sons of the executed man were "trying to determine whether the evidence might implicate other suspects who [the sons] could in turn sue for damages").

47. See Opinion Letter, *supra* note 44, at 9; see also Record of Fruit Hearing, *supra* note 17, at 91 (denying access to petitioning charities).

48. See, e.g., Rebert V. Pambianco, . . . *Oh Yeah? Name One*, WASH. POST, June 20, 2000, at A23; see also Death Penalty Information Center, *Executed Despite Doubts About Guilt*, at <http://www.deathpenaltyinfo.org/innocothers.html#executed> (last visited Feb. 6, 2002) (summarizing cases in which individuals have been executed despite doubts of their guilt).

49. See, e.g., Edward Cohn, *Paul Cassell and the Goblet of Fire: A Conservative Professor's Adventure in the Liberal Legal System*, AM. PROSPECT, Aug. 28, 2000, at 33, available at <http://www.prospect.org/print/v11/19/cohn-e.html> (last visited Feb. 6, 2002). In 1972, the U.S. Supreme Court found that existing death penalty statutes led to arbitrary sentencing and struck

death penalty abolitionists point to fortuitous death row exonerations and argue that innocent people have certainly been executed in recent history.⁵⁰ Meanwhile, the legacy of Joseph O'Dell—and others executed amidst lingering doubts of their guilt—remains uncertain.

This Note advocates the passage of statutes that specifically provide for public access to physical evidence for DNA testing in closed criminal cases. The proposed statutes will satisfy the public's interest in assessing the reliability of convictions and death sentences and will also accommodate the state's interest in ensuring the continued integrity and accuracy in the testing of physical evidence.

Part II of this Note will explore the legal theories upon which plaintiffs have thus far relied in seeking post-execution access to DNA evidence in a state's custody. Specifically, this Part will review claims made under state freedom of information acts, the common law right of access, the First Amendment, and statutes that provide for the donation of evidence to charitable organizations. This Part will demonstrate that these existing avenues have failed to provide reliable post-execution access to DNA evidence. Part III will then discuss the policy concerns that justify mandating public access to physical evidence for the purpose of conducting post-execution DNA testing. Specifically, this Part will argue that proof of a wrongful execution would foster a more honest and complete public dialogue about the death penalty and would draw attention to needed reforms in the criminal justice system. Finally, Part IV will suggest that legislation be passed to facilitate posthumous exoneration through DNA testing, and it will offer concrete suggestions regarding the content of such legislation.

down these statutes as unconstitutional under the Eighth Amendment. See Death Penalty Information Center, *History of the Death Penalty, Part I*, at <http://www.deathpenaltyinfo.org/history2.html> (last visited Feb. 22, 2002). Then, in 1976, the Court approved recrafted death penalty statutes, which were designed to avoid the problems of arbitrariness. *Id.* The modern death penalty "experiment" thus began in 1976 with the passage of these new statutes.

50. See, e.g., Richard C. Dieter, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent*, at <http://www.deathpenaltyinfo.org/inn.html> (last visited Feb. 6, 2002) (noting the increasing risk of executing the innocent and explaining that many cases of innocence have been discovered "not because of the normal appeals process, but rather as a result of new scientific techniques, investigations by journalists, and the dedicated work of expert attorneys, not available to the typical death row inmate").

II. THE CURRENT LANDSCAPE: THE INADEQUACY OF EXISTING LEGAL THEORIES

To date, there are only a handful of cases in which third parties have sought access to physical evidence in closed criminal cases for the purpose of conducting DNA testing.⁵¹ Overall, existing civil avenues for obtaining access have proven to be inadequate. In some cases, plaintiffs have relied on legal theories that afford judges enormous discretion in determining whether to grant access to evidence in the state's custody.⁵² In other cases, plaintiffs have crafted creative legal arguments that simply do not adequately accommodate the unique situation raised by attempts at posthumous DNA exoneration.⁵³

A. *The Common Law Right of Access and State Open Records Statutes*

In several cases, third-party plaintiffs have relied upon state freedom of information acts and/or the common law right of access in seeking access to physical evidence in a closed criminal case.⁵⁴ The results in these cases demonstrate that the open records doc-

51. See *In re* Request for Inspection and Testing of Evidence in Connection with Criminal Action No. 12405, No. 2000 V 67049, slip op. (Ga. Sup. Ct. Houston County July 28, 2000) (unpublished opinion of Judge L.A. McConnell, Jr.) (seeking evidence from Felker Case); Petition for Equitable Bill of Discovery and Depositions Before Suit to Investigate Potential Claim or Suit and Request for Injunctive Relief, *In re* Richard Wayne Jones, Jr. & Keith Donavan Jones (Tex. Dist. Ct. Tarrant County 2000) (No. 048184376-00) [hereinafter Petition for Equitable Bill of Discovery]; Request for DNA Testing and Release of Results, *In re* Globe Newspaper Co. ("The Boston Globe") (Va. Cir. Ct. Buchanan County 2000) (No. 211-00) (seeking evidence from Coleman case); Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45 (seeking evidence from Coleman case); Petition for Donation of Certain Items, *supra* note 21.

52. For example, in the Coleman case, the media plaintiffs sought access to the physical evidence under Virginia's Freedom of Information Act, which gives the court unlimited discretion over whether or not to grant access. See Opinion Letter, *supra* note 44, at 9. The circuit court exercised this discretion to deny access. *Id.*

53. The First Amendment, for example, has not provided a sufficient legal basis for access. See *infra* notes 170-82 and accompanying text.

54. In both the O'Dell and Coleman cases, the plaintiffs relied on the common law right of access and/or on Virginia's open records statute. See Request for DNA Testing and Release of Results, *supra* note 51, at 3; Petition for Appeal, *supra* note 13, at 4-8. In the Felker case, the plaintiff news organizations relied on Georgia's Open Records Act. Memorandum in Support of The Atlanta Journal Constitution's Motion to Intervene at 2, *In re* Request for Inspection and Testing of Evidence in Connection with Criminal Action No. 12405 (Ga. Super. Ct. Houston County 2000) (No. 2000 V 67049) [hereinafter AJC Motion to Intervene].

trine⁵⁵ does not offer third-party plaintiffs any meaningful guarantee of gaining access to physical evidence in a state's custody.

1. Background

The common law right of access to court proceedings and records predates the Constitution.⁵⁶ In England, access was generally conditioned upon the petitioning party demonstrating a personal interest in the records.⁵⁷ In the United States, access is generally not conditioned upon a demonstration of either proprietary interest in the document or a need for access to the document as evidence in a lawsuit.⁵⁸ Instead, the public's interest in keeping "a watchful eye on the workings of public agencies" has been deemed a sufficient interest to justify access.⁵⁹

In *Nixon v. Warner Communications, Inc.*, the Supreme Court clarified that the common law right to inspect and copy judicial records is not absolute.⁶⁰ Explaining that every court has supervisory power over its own records and files, the Court concluded, "[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."⁶¹ The Court noted the scarcity of case law identifying legitimate factors that a trial court should consider when it exercises its discretion, but it declined "to delineate precisely the contours of the common-law right"⁶²

Lower courts have considered petitions to gain access to a variety of court documents and pieces of evidence.⁶³ Under the

55. The term "open records doctrine," as used here, refers to both the common law right of access and state statutory provisions—freedom of information acts—that mandate public access to government records.

56. Diane Apa, *Common Law Right of Public Access—The Third Circuit Limits Its Expansive Approach to the Common Law Right of Public Access to Judicial Records*, 39 VILL. L. REV. 981, 981-82 (1994).

57. Benjamin L. Sells, Note, *The Right of Access to Judicial Records: When May the Electronic Media Copy Audio and Videotape Evidence?*, 60 CHI.-KENT L. REV. 755, 757-58 (1984); see also *Ferry v. Williams*, 41 N.J.L. 332, 334-39 (N.J. 1879).

58. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

59. *Id.* at 598. The Supreme Court also noted in *Nixon* that "a newspaper publisher's intention to publish information concerning the operation of government" is an interest sufficient to compel access. *Id.*

60. *Id.*

61. *Id.* at 599.

62. *Id.* at 598-99.

63. See, e.g., *San Jose Mercury News v. United States Dist. Court*, 187 F.3d 1096, 1101-02 (9th Cir. 1999) (holding that the public has prejudgment right of access to judicial records in civil cases); *United States v. Gonzales*, 150 F.3d 1246, 1263 (10th Cir. 1998) (explaining that there is

common law right of access, the media have been successful in obtaining access to documents, audiotapes, and videotapes that have been admitted into evidence.⁶⁴ A review of existing case law, however, reveals that court-ordered access has generally occurred only in cases where the material could be copied or easily inspected.⁶⁵ As the Second Circuit explained in *In re NBC* (“*Meyers*”), only the “most compelling circumstances” could justify restricting the public right to access “[w]hen physical evidence is in a form that permits inspection and copying without any significant risk of impairing the integrity of the evidence or interfering with the orderly conduct of the trial.”⁶⁶ Under this standard, a court could easily exercise its discretion to deny access to a biological sample of evidence, concluding that access would pose a significant risk to the continued integrity of such evidence.

In many states, the common law right of access to judicial records has been recognized or modified by statute.⁶⁷ The Virginia Code, for example, provides, “The records and papers of every circuit court shall be open to inspection by any person and the clerk shall, when required, furnish copies thereof, except in cases in which it is otherwise specifically provided.”⁶⁸ In construing this statute, the Virginia Supreme Court concluded that the state legislature intended to recognize the common law right of access while also declaring its own power to make statutory exceptions to the rule.⁶⁹

There are few cases that have considered whether items of physical evidence in criminal cases fall under the purview of freedom of information statutes. In *Sideri v. Office of the District Attorney*, the New York Supreme Court concluded that evidence consisting of “articles of clothing and alleged weapons” did not fall within the statutory definition of a “record” under New York’s freedom of

no common law right of access to administrative documents); *In re NBC*, 635 F.2d 945, 952 (2d Cir. 1980) (recognizing a common law right of the public and the press to copy ABSCAM video and audiotapes admitted into evidence).

64. See, e.g., *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981) (recognizing common law presumption of a right to inspect and copy videotapes admitted into evidence); *NBC*, 635 F.2d at 952 (recognizing a common law presumption of a right of the public and press to copy ABSCAM video and audio tapes admitted into evidence).

65. See DAN PAUL ET AL., COMMUNICATIONS LAW 2000, at 212-15 (2000) (providing catalog of case law granting access to documentary material, audiotapes, and videotapes—all materials that can be easily copied or inspected).

66. 635 F.2d at 952 (2d Cir. 1980).

67. See *Nixon*, 435 U.S. at 597 n.7; 37A AM. JUR. 2D *Freedom of Information Acts* § 2, at 29 (1994).

68. VA. CODE ANN. § 17.1-208 (Michie 1999).

69. *Shenandoah Puhl'g House, Inc. v. Fanning*, 368 S.E.2d 253, 255 (Va. 1988).

information law.⁷⁰ Some state statutes specifically address the question of public access to physical evidence in criminal proceedings. In Georgia, for example, a state statute provides that a trial judge may exercise his or her discretion in deciding whether to allow public inspection of exhibits of evidence in criminal and civil trials; however, where such direct access is denied, the custodian must provide either a photograph, photocopy, facsimile, or other reproduction.⁷¹ Similarly, Virginia's Freedom of Information Act provides that criminal evidence is excluded from the general mandate requiring access to public records.⁷² Instead, when one makes a request for access to criminal evidence, such evidence "may be disclosed by the custodian, in his discretion."⁷³

2. A Virginia Case: Roger Keith Coleman

In a case similar to the O'Dell suit, several newspapers and a charitable organization, citing Virginia's Freedom of Information Act, sought access to physical evidence in the case of Roger Coleman.⁷⁴ Despite significant differences in the Coleman and O'Dell petitions,⁷⁵ in both cases, the trial courts exercised their discretion under the state statute and denied access to the physical evidence.⁷⁶

Virginia's 1992 execution of Roger Keith Coleman generated significant controversy.⁷⁷ Coleman was sentenced to death in 1981 for the rape and murder of his sister-in-law, Wanda McCoy.⁷⁸ While Coleman was on death row, Centurion Ministries, a nonprofit organization dedicated to exposing cases of wrongful convictions, investigated Coleman's case and became convinced that he was inno-

70. 663 N.Y.S.2d 206, 207 (N.Y. App. Div. 1997).

71. See GA. CODE ANN. § 50-18-71.1 (1998) ("[A]n exhibit tendered to the court as evidence in a criminal or civil trial shall not be open to public inspection without approval of the judge assigned to the case . . .").

72. VA. CODE ANN. § 2.2-3706 (Michie 2001).

73. *Id.*

74. See Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45, at 3-4; Request for DNA Testing and Release of Results, *supra* note 51, at 3.

75. See Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45, at 8-9.

76. See *Virginia v. Coleman*, Nos. 106-81 & 108-81, slip op. at 1 (Va. Cir. Ct. Buchanan County Sept. 7, 2000) (unpublished court order); Record of *Fruit* Hearing, *supra* note 17, at 91.

77. See John Aloysius Farrell, *Judge Asked to Save DNA in Capital Case*, BOSTON GLOBE, Sept. 14, 2000, at A5 ("The Coleman case is cited by the American Civil Liberties Union and other foes of capital punishment as a wrongful execution. He appeared on the cover of *Time* magazine before he died, and a book, 'May God Have Mercy,' has been written about the case.").

78. *Id.*

cent.⁷⁹ In the months before Coleman's execution, the case received national media attention, including a *Time* magazine cover story that questioned Coleman's guilt.⁸⁰

Coleman's supporters gathered significant evidence that indicated his innocence;⁸¹ however, unsophisticated DNA tests performed in 1990 failed to provide conclusive results regarding Coleman's guilt.⁸² Despite a vigorous campaign to spare his life, then-Governor Douglas Wilder rejected Coleman's plea for clemency, and Coleman was executed on May 20, 1992.⁸³

In 2000, eight years after Coleman's execution, *The Boston Globe* and Centurion Ministries sought access to the remaining physical evidence in the Coleman case, in order to perform more sophisticated DNA tests to determine whether or not Coleman was

79. JOHN C. TUCKER, *MAY GOD HAVE MERCY: A TRUE STORY OF CRIME AND PUNISHMENT* 119-38 (1997) (describing the investigation by Centurion Ministries).

80. See Jill Smolowe, *Must This Man Die?*, *TIME*, May 18, 1992, at 40.

81. Coleman's lawyers were able to undermine the testimony of the jailhouse informant who had testified at trial that Coleman had confessed to his involvement in the crime while the two were in the county jail. TUCKER, *supra* note 79, at 185-87. Specifically, Coleman's investigators established that this informant obtained leniency in exchange for his testimony against Coleman and that he had admitted to others that his testimony was false. *Id.* Additionally, the investigators uncovered evidence that the victim's next-door neighbor, a man with a history of sexually assaulting women, admitted to several people that he was the real killer. *Id.* at 247-48. The investigators also demonstrated that at least two persons were involved in the crime, while the undisputed testimony of various trial witnesses had established that Coleman was alone for the entire evening. *Id.* at 247. The investigators also attacked the State's timeline and assembled evidence that Coleman did not have time to commit the crime. *Id.*

82. The lab that conducted the tests concluded that the sperm taken from the victim's body matched the DNA of Coleman and approximately two percent of the population. *Id.* at 179. The tests also indicated that there were two sperm donors. *Id.* at 179-180. Coleman's lawyers insisted that this evidence of a second perpetrator constituted additional evidence of Coleman's innocence. *Id.* at 180. The lawyers explained that according to the Commonwealth's own timeline, Coleman was alone at every stage of the evening and would not have had time to meet up with an accomplice before committing the crime. *Id.* Moreover, Coleman's lawyers argued that the reliability of the lab's inclusion of Coleman within the two percent of the population who could have committed the crime was questionable. *Id.* at 180-81. With two sperm donors, it can be technologically difficult to separate out the two strains of DNA, which can lead to inaccurate results. *Id.* at 181. Although the Commonwealth could have argued that the victim's husband must have been the second sperm donor, this was a problematic theory because the husband had insisted that he and his wife had not had intercourse in the several days preceding her murder. *Id.* at 180.

83. The day before the scheduled execution, then-Governor Wilder indicated that if Coleman took a lie detector test, he might reconsider his decision not to grant clemency. *Id.* at 280-81, 295-97. While Coleman's supporters did not believe that he could pass a lie detector test while experiencing the incredible stress of being within hours of his scheduled execution, they nonetheless agreed to the test, knowing that nothing else could possibly save Coleman's life. *Id.* at 306-307. On the morning of Coleman's scheduled execution, the lie detector test was administered, and the Commonwealth's examiner concluded that Coleman failed the test. *Id.* at 312.

actually guilty.⁸⁴ The remaining physical evidence was in the custody of the private California laboratory that had conducted the DNA tests in 1990.⁸⁵ When the Commonwealth of Virginia learned of the efforts to have this remaining evidence tested, the Commonwealth's attorney general petitioned the Circuit Court of Buchanan County in order to compel the California lab to return the Coleman evidence to the state.⁸⁶

In opposition to the Commonwealth's petition, lawyers for *The Boston Globe* and Centurion Ministries argued that the common law right of access and Virginia's Freedom of Information Act mandated that the public be allowed to test the remaining evidence.⁸⁷ While recognizing that the Virginia Supreme Court had denied a similar petition in the O'Dell case, Centurion Ministries emphasized distinct factors in Coleman that weighed in favor of dismissing the Commonwealth's petition.⁸⁸ In O'Dell, the trial court had refused to grant access to the evidence based on the questionable integrity of the remaining physical sample.⁸⁹ The plaintiffs in Coleman distinguished the O'Dell case, explaining that there was no concern regarding the integrity of the remaining portion of the Coleman rape kit.⁹⁰ The kit had been in Virginia's exclusive custody until it was sent to a reputable private laboratory in California for DNA testing in 1990,⁹¹ and since that date, the sample had been properly stored in a freezer at the California lab.⁹² Additionally, unlike in the O'Dell case, there were no allegations that Coleman's advocates had previously withheld unfavorable DNA results from the Commonwealth.⁹³

Despite these factors, which rendered the Coleman petition starkly distinguishable from the one in O'Dell, Circuit Court Judge Keary Williams ordered the California lab to relinquish the remain-

84. Farrell, *supra* note 77; see also Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45, at 5.

85. Farrell, *supra* note 77.

86. *Id.*

87. *Id.*; Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45, at 2-4.

88. See Petitioner's Request for Reconsideration and for Hearing at 3, *In re* Petition of Centurion Ministries, Inc. for Donation of Exhibits Pursuant to Va. Code § 19.2-270.4.D (Va. Cir. Ct. Buchanan County 2000) (No. 212-00) [hereinafter Petitioner's Request for Reconsideration and for Hearing].

89. *Id.*

90. *Id.*

91. *Id.* at 2 (explaining that, at the time of the petition in September 2000, the DNA evidence had been in the custody of Dr. Edward T. Blake "for a decade").

92. *Id.*

93. See Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45, at 9; Petition for Appeal, *supra* note 13, at 8-9.

ing evidence to the Commonwealth of Virginia.⁹⁴ The plaintiffs subsequently petitioned for a rehearing.⁹⁵

In May 2001, Judge Williams reaffirmed his decision mandating the return of the evidence to the Commonwealth of Virginia, but stayed the order pending appeal.⁹⁶ Judge Williams looked to the language of Virginia's Freedom of Information Act,⁹⁷ which provides: "[c]omplaints, memoranda, correspondence and evidence relating to a criminal investigation or prosecution" are excluded from the Act's mandatory access provisions.⁹⁸ Although the court is not required to grant access to criminal evidence under the act, the statute does permit judges, in their discretion, to disclose such evidence.⁹⁹ Exercising this discretion, Judge Williams found that there was not a sufficient public interest to justify granting access to the evidence.¹⁰⁰ As Judge Williams explained, additional DNA tests in the Coleman case "would have no bearing on the fairness of the death penalty as it is now administered or on the public confidence of the criminal justice system."¹⁰¹ Pointing to changes in Virginia's capital punishment system since Coleman's 1992 execution, including advances in DNA technology and the recognition of defendants' rights to use DNA in challenging convictions, Judge Williams asserted that the risk of error in Coleman's 1992 execution had little relevance to the reliability of the current system.¹⁰²

94. *Virginia v. Coleman*, Nos. 106-81 & 108-81, slip op. at 1 (Va. Cir. Ct. Buchanan County Sept. 7, 2000) (unpublished court order).

95. Petitioner's Request for Reconsideration and for Hearing, *supra* note 88, at 1-4. In response to Judge Williams's order, the director of the California lab, Edward Blake, insisted, "I'm not sending [the sample] anywhere. It's my work product." Farrell, *supra* note 42.

96. Opinion Letter, *supra* note 44, at 9; Laurence Hammack, *No DNA Test for Executed Prisoner; Genetic Tests Unavailable When Coleman Convicted*, ROANOKE TIMES & WORLD NEWS, June 2, 2001, at A1.

97. Opinion Letter, *supra* note 44, at 9.

98. VA. CODE ANN. § 2.2-3706(F)(1) (Michie 2001).

99. *Id.* § 2.2-3706(F). Specifically, the Virginia Freedom of Information Act provides that criminal evidence "may be disclosed by the custodian, in his discretion." *Id.* In effect, this language gives the court, as custodian of the evidence, the discretion to allow or disallow access. *See, e.g.*, Opinion Letter, *supra* note 44, at 9 (noting that "the VFOIA is not a mandate on the Court to allow access to criminal evidence, but gives the Court, as custodian of the evidence, the discretion to do so").

100. Opinion Letter, *supra* note 44, at 7-8.

101. *Id.* at 8 (emphasis added).

102. *Id.* Williams explained, "How can investigation of the death penalty as it was implemented in 1992 be beneficial in scrutinizing the death penalty as it is carried out in 2001 when the processes are so different?" *Id.*

3. A Georgia Case: Ellis Wayne Felker

A similar case in Georgia yielded very different results. In July 2000, several media organizations filed motions in the Superior Court of Houston County, requesting that they be allowed to test physical evidence in the case of Ellis Wayne Felker.¹⁰³ Felker was executed in Georgia's electric chair in 1996 for the rape and murder of Evelyn Joy Ludlam, a nineteen-year-old college student.¹⁰⁴

Felker's conviction was based on circumstantial evidence, and, throughout the case, he steadfastly professed his innocence.¹⁰⁵ Felker met the victim, Ludlam, at a bar where they discussed her potential employment at his leather shop.¹⁰⁶ The following day—the day of Ludlam's disappearance—the victim came by Felker's house twice and his leather shop once.¹⁰⁷ Two weeks after her disappearance, Ludlam's body was found in a creek.¹⁰⁸ She had been beaten, raped, and strangled.¹⁰⁹ In 1983, Felker was convicted of the rape and murder.¹¹⁰ Prosecutors convinced a jury to find Felker guilty based on evidence that: (1) Felker was the last person seen with the victim; (2) hairs found on the victim's clothes were similar to Felker's; (3) fibers on the victim's coat and from a blanket showed that she had been in Felker's house; and (4) the attack was similar to a sexual assault for which Felker had been convicted in 1976.¹¹¹

103. See AJC Motion to Intervene, *supra* note 54, at 1; Motion of CBS Broadcasting, Inc. to Intervene for the Purpose of Testing Evidence at 3, *In re* Request for Inspection and Testing of Evidence in Connection with Criminal Action No. 12405 (Ga. Super. Ct. Houston County July 17, 2000) (No. 2000-V-67049); Request for Inspection and Testing of Evidence in Connection with Criminal Action No. 12405 at 1, *In re* Request for Inspection and Testing of Evidence in Connection with Criminal Action No. 12405 (Ga. Super. Ct. Houston County July 13, 2000) (No. 2000-V-67049) [hereinafter Request for Inspection] (concerning the Boston Globe's request for access to the physical evidence in the Felker case).

104. Rhonda Cook, *DNA Testing Ordered in Felker Case; Suspect Executed for Murder Four Years Ago*, ATLANTA J.-CONST., July 26, 2000, at 1A; David E. Rovella, *In Search of a Death Penalty Martyr*, NAT'L L.J., Sept. 4, 2000, at A1.

105. Rhonda Cook, *DNA Testing Ordered in Case of Man Already Executed*, ATLANTA J.-CONST., July 27, 2000, at 1B (explaining that prosecutors admitted that their case against Felker was circumstantial); Rovella, *supra* note 104 ("[Felker] had steadfastly professed his innocence until the end, telling his executioners that they were killing an innocent man.").

106. Cook, *supra* note 104.

107. *Id.*

108. Rovella, *supra* note 104.

109. *Id.*

110. Cook, *supra* note 104 (noting that Felker was tried "17 years ago"); Rovella, *supra* note 104 (noting that Felker was convicted and sentenced to death for the rape and murder of Ludlam).

111. Cook, *supra* note 104.

Felker admitted to having contact with Ludlum shortly before her disappearance.¹¹² He insisted, however, that he was not responsible for her death and that the last time he saw her was when she left his shop.¹¹³ Felker remained on death row for thirteen years.¹¹⁴ In the final months before his execution, his attorneys sought the courts' permission to conduct DNA testing on the physical evidence, including the multiple hairs found on the victim's body.¹¹⁵ The courts refused to allow the testing.¹¹⁶

Almost four years after the execution, *The Boston Globe*, CBS News, *The Atlanta Journal and Constitution*, and several other media outlets initiated an effort to obtain access to the physical evidence in the case in an attempt to conduct DNA testing that could possibly exonerate Felker.¹¹⁷ The newspapers and television network petitioned the Circuit Court of Houston County, arguing before the same judge that had signed Felker's death warrant several years earlier.¹¹⁸ The petition relied on Georgia's open records act,¹¹⁹ which gives trial courts discretion to allow public inspection of evidence in criminal trials.¹²⁰

In making its determination, the court looked first to the language of the statute: "[A]n exhibit tendered to the court as evidence in a criminal or civil trial shall not be open to public inspection without approval of the judge assigned to the case."¹²¹ Exercising the discretion provided under the statute, the court determined that access should be granted unless there was a compelling privacy right that outweighed the public's "right to know."¹²² Upon engaging in this balancing, the court concluded that any factors that weighed

112. *Id.*

113. *Id.*

114. *See id.*

115. *Id.*

116. *Id.* ("The courts refused, saying the request should have been made sooner. The courts allow for such last-minute requests only when there is a new law that has not been reviewed by the federal courts or new evidence that had not been available sooner."). Courts often find that DNA does not constitute "newly discovered evidence" that would justify a deviation from the procedural limitations in the capital appeals process. *See Penny J. White, Newly Available, Not Newly Discovered*, 2 J. APP. PRAC. & PROCESS 7, 11-13 (2000). Such courts reason that the physical evidence was available at trial, and therefore, is not "new," even though the method of scientifically testing the underlying evidence was not available at the time of trial. *Id.*

117. Request for Inspection, *supra* note 103, at 1.

118. Rovella, *supra* note 104.

119. Request for Inspection, *supra* note 103, at 1.

120. GA. CODE ANN. § 50-18-71.1 (1998).

121. *In re* Request for Inspection and Testing of Evidence in Connection with Criminal Action 12405, slip op. at 1 (Ga. Super. Ct. Houston County July 28, 2000) (No. 2000 V. 67049) (unpublished opinion of Judge L.A. McConnell, Jr.) (quoting GA. CODE ANN. § 50-18-71.1).

122. *Id.*

against granting access, including possible objections by the family of the victim or the offender, simply did not outweigh the public's "right to know."¹²³ In defining the scope of the inspection granted under the statute, the court explained that the public's right to access the evidence would be rendered "hollow" if it were limited to a visual inspection.¹²⁴ "In order for the inspection to be meaningful," the court explained, "the public should have a right to know what, if anything, is contained in the subject evidence."¹²⁵ The court then ordered that the hair samples and other physical evidence be made available for DNA testing by a laboratory acceptable to the district attorney.¹²⁶

Although the physical samples were sent to an independent laboratory for testing, at present, the lab has been unable to reach any conclusions regarding Felker's culpability.¹²⁷ Because the Georgia state crime lab had not properly labeled the hair samples, the independent laboratory has been unable to achieve its goal of determining whether the hair samples found on the victim were in fact Felker's.¹²⁸ Testing of the rape kit and fingernail scrapings have been similarly unsuccessful.¹²⁹

4. A Viable Theory for Obtaining Access to Physical Evidence?

The right of access, as embodied in either the common law or state statutory provisions, fails to provide sufficient access to physical evidence for those attempting to achieve posthumous exoneration. The primary shortcoming of this theory is the large amount of discretion that is granted to trial judges. A review of the three cases examined—O'Dell, Coleman, and Felker—reveals that the extensive discretion afforded to trial judges serves as a barrier to third parties who have a legitimate interest in gaining access.

The Virginia Freedom of Information Act specifically excludes criminal evidence from the Act's mandatory disclosure provisions.¹³⁰ Instead, the act merely provides that such evidence "may

123. *Id.* at 1-2.

124. *Id.* at 2.

125. *Id.*

126. *Id.*

127. Rhonda Cook, *Crime Lab Blasted in Felker Case*, ATLANTA J.-CONST., Sept. 27, 2000, at 1B.

128. *Id.*

129. See Cook, *supra* note 41 (explaining that the DNA could not be found in biological evidence collected from the victim and that the lab did not expect to find DNA material under victim's fingernails).

130. VA. CODE ANN. § 2.2-3706(F)(1) (Michie 2001).

be disclosed by the custodian, in his discretion,” and declines to offer specific constraints on the custodian’s exercise of this discretion.¹³¹

The Georgia statute governing the inspection of public records is similarly limited.¹³² The Georgia statute provides: “[A]n exhibit tendered to the court as evidence in a criminal or civil trial shall not be open to public inspection without approval of the judge assigned”¹³³ If inspection is not approved, the custodian of the exhibit must provide a photograph, photocopy, facsimile, or other reproduction of the exhibit.¹³⁴ Like the Virginia act, this Georgia statute affords enormous discretion to the judge in deciding whether or not to allow inspection of the exhibit.¹³⁵ The requirement that some reproduction of the exhibit be supplied if inspection is denied does not seem to contemplate a request to subject the exhibit to independent scientific testing.¹³⁶ Although this Georgia statute was interpreted to support access to the physical evidence in the Felker case, the court’s action in granting access to allow DNA testing was premised on a very liberal construction of the statute.¹³⁷ Specifically, Judge McConnell found that the “inspection” allowed under the statute entailed more than mere visual inspection of the evidence, but required his approval of DNA testing.¹³⁸

The position taken by state officials in possession of the evidence likely plays an influential role in the court’s exercise of its discretion. In the Coleman and O’Dell cases, the Commonwealth of Virginia vehemently opposed granting access.¹³⁹ In contrast, the Georgia officials in the Felker case agreed to provide access, seeking only to control the terms under which the DNA testing would be performed.¹⁴⁰ Thus, in instances in which state officials are opposed

131. *Id.* § 2.2-3706(F).

132. *See* GA. CODE ANN. § 50-18-71.1 (1998).

133. *Id.* § 50-18-71.1(a).

134. *Id.* § 50-18-71.1(b).

135. *See id.* § 50-18-71.1(a).

136. The types of reproductions that the act specifically suggests are very nonintrusive and do not seem to suggest the possibility of permanently parting with a portion of the evidence. *See id.* § 50-18-71.1(b).

137. *See In re Request for Inspection and Testing of Evidence in Connection with Criminal Action 12405*, slip op. at 2 (Ga. Super. Ct. Houston County July 28, 2000) (No. 2000 V. 67049) (unpublished opinion of Judge L.A. McConnell, Jr.).

138. *See id.*

139. *See Afraid of a Shadow of a Doubt*, *supra* note 1 (explaining that the Commonwealth of Virginia vehemently opposed access to the DNA evidence in the O’Dell case); Farrell, *supra* note 77 (explaining that the Virginia Attorney General’s office moved to block the testing and regain control of the DNA samples in the Coleman case).

140. Telephone Interview with Charles W. Byrd, Attorney for Boston Globe (Oct. 2000) [hereinafter Interview with Byrd].

to granting access to physical evidence, it appears that the courts are more likely to deny access.

The potential damage to public confidence in the judiciary is another factor that likely plays a part in how the courts exercise their discretion. In the O'Dell, Coleman, and Felker cases, the petitions for access were argued before the same courts, and in some instances the same judges, who had conducted the executed man's original trial and heard his subsequent appeals.¹⁴¹ Allowing for the testing of evidence that could ultimately prove that an innocent man was executed under the watch of these courts would therefore directly condemn their competence.

Arguably, the more the judiciary's reputation is at risk, the more likely it is that a court will exercise its discretion to deny access to evidence. For example, in the Felker case, the risk of severely discrediting the judiciary was minimal because the DNA tests were unlikely to exonerate Felker conclusively.¹⁴² In contrast, DNA testing of the evidence in both the O'Dell and Coleman cases had the potential of completely exonerating these defendants, and consequently, of proving that the Commonwealth of Virginia had executed innocent men.¹⁴³ As a result, DNA testing of the Coleman and O'Dell evidence could be extremely inflammatory and could dramatically undermine public confidence in the state's court system. It is not surprising, therefore, that the O'Dell and Coleman courts, unlike the Felker court, denied access to the physical evidence. The judges in these two Virginia cases issued rulings that directly protect the reputation of the judiciary, of which they are sitting members. In O'Dell, the lawyers for the Commonwealth clearly exploited this vulnerability by reminding the court that if the DNA evidence exonerated O'Dell, it "would be shouted from the

141. See Rovella, *supra* note 104 (explaining that The Boston Globe's petition was filed before Judge McConnell, the same judge that had signed Felker's death warrant); see also Record of Fruit Hearing, *supra* note 17, at 62-63 (noting that the Roman Catholic Diocese petitioned for posthumous access to the DNA evidence before the Circuit Court of Virginia Beach, the same jurisdiction where O'Dell was tried and sentenced to death).

142. The primary evidence being tested in the Felker case consisted of hair samples and fingernail scrapings. Rovella, *supra* note 104. Although a rape kit was taken from the victim, the state crime lab had already concluded that no sperm was present in the samples taken. Cook, *supra* note 129. While exclusion of Felker as the contributor of the hair sample evidence would be highly suggestive of innocence, it would not conclusively establish his innocence. Rovella, *supra* note 104 (noting that both Felker's former lawyers and the state prosecutor did not believe that Felker would be posthumously vindicated).

143. In both the O'Dell and Coleman cases, rape kits were available for testing. Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45, at 2; Petition for Appeal, *supra* note 13, at 3. Clearly, ruling out either man as the contributor of the semen in the rape kit would conclusively establish his innocence.

rooftops that the Commonwealth of Virginia executed an innocent man."¹⁴⁴

B. The First Amendment: Freedom of the Press

In addition to claiming a common law right or statutory public right of access to evidence, the media plaintiff in the Coleman suit also argued for access under the First Amendment to the U.S. Constitution.¹⁴⁵ The Virginia circuit court refused to recognize a media right to access physical evidence in closed criminal cases under the First Amendment.¹⁴⁶ The Coleman case illustrates that plaintiffs seeking post-execution access to DNA evidence will have a difficult time satisfying the current test for determining access under the First Amendment.

1. Background

The First Amendment protects not only freedom of speech, but also freedom of the press.¹⁴⁷ In struggling to define the meaning of "freedom of the press," the Supreme Court has considered whether the First Amendment guarantees a right merely to publish the news, or also to gather the news.¹⁴⁸ More specifically, the Court, on numerous occasions, has considered whether the press enjoys a constitutional right of access to places or information within the government's control.¹⁴⁹

Claims of a special press right of access under the First Amendment have generally not fared well.¹⁵⁰ When the public itself does not have access to certain places or information within the government's control, the press enjoys no special right of access.¹⁵¹ Specifically, the Supreme Court has articulated a two-part test in considering whether the press should be afforded access to govern-

144. Record of *Fruit* Hearing, *supra* note 17, at 82.

145. Opinion Letter, *supra* note 44, at 5.

146. *See id.* at 5-8.

147. U.S. CONST. amend. I.

148. *See* GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 461-76 (1999).

149. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 419-431 (1999) (outlining cases in which the Supreme Court has considered whether the press has a constitutional right of access to jails and judicial proceedings).

150. *See id.* at 419.

151. *See, e.g.,* *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (explaining that the government has no affirmative duty to provide journalists with sources of information not available to the general public).

ment-controlled places or information.¹⁵² Under this test, the press will be granted access only if it can demonstrate that: (1) the public has historically enjoyed access to the place or information at issue, and (2) allowing public and media access serves a significant positive role in the functioning of the particular process in question.¹⁵³

a. Press Access to Government Institutions—Jails and Prisons

In several cases, the U.S. Supreme Court has considered whether the press has a right of access to government institutions such as jails and prisons. In two landmark cases, the Court denied any right of press access to prison inmates.¹⁵⁴ In *Pell v. Procunier*, the Court considered the constitutionality of a California Department of Corrections policy that prohibited media interviews with individual prisoners.¹⁵⁵ Similarly, in *Saxbe v. Washington Post Co.*, the Court considered a Federal Bureau of Prisons ban on press interviews with individual federal prisoners.¹⁵⁶ In both cases, the Court rejected the media's claim that they had a constitutional right of access to prisons.¹⁵⁷ Central to the Court's opinions was its position that the First Amendment bars the government from *interfering* with the free press, but does not "require government to accord the press special access to information not shared by members of the public generally."¹⁵⁸ In *Pell*, Justice Stewart, writing for the majority, explained,

It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, and that government cannot restrain the publication of news emanating from such sources. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.¹⁵⁹

152. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-12 (1986) (noting the previous adoption of this test with respect to access to criminal proceedings and then applying the test to question whether the press has constitutional right of access to court transcript of preliminary hearing).

153. *Id.* at 8.

154. See *Saxbe*, 417 U.S. at 850; *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974).

155. 417 U.S. at 819.

156. 417 U.S. at 844-45.

157. *Id.* at 850 (rejecting claim of press access to prisons or inmates); *Pell*, 417 U.S. at 834-35 (explaining that the Constitution does not "require government to accord the press special access to information not shared by members of the public generally").

158. SULLIVAN & GUNTHER, *supra* note 149, at 420-21.

159. 417 U.S. at 834 (citations omitted).

b. Press Access to Judicial Proceedings

In considering whether the media has a constitutional right of access to judicial proceedings, the Supreme Court again conditioned the media's access upon the degree of public access.¹⁶⁰ In *Richmond Newspapers, Inc. v. Virginia*, the Court concluded that the media has a constitutional right to attend criminal trials since: (1) trials have historically been open to the public,¹⁶¹ and (2) public access to criminal trials serves an important societal function.¹⁶² Chief Justice Burger, writing for the majority, explained that the First Amendment was adopted "against the backdrop of the long history of trials being presumptively open," and that the guarantees of freedom of speech and freedom of the press "prohibit the government from summarily closing courtroom doors which had long been open to the public at the time [the First Amendment] was adopted"¹⁶³

c. Press Access to Court Documents

Although the Supreme Court itself has not ruled on the question of whether the press has a constitutional right of access to court documents under the First Amendment, some lower courts have recognized such a right.¹⁶⁴ Recognition of a constitutionally based right of access to judicial documents has been predicated upon satisfaction of the two conditions outlined in *Richmond Newspapers*: (1) the public has historically had access to such documents, and (2) public access serves an important societal interest.¹⁶⁵

With the advent of new technologies, courts have had to consider what limits to place on press access to emerging evidentiary materials. In *Nixon v. Warner Communications, Inc.*, the U.S. Supreme Court considered whether the press had a First Amendment right of access to the Watergate tapes that had been admitted into evidence.¹⁶⁶ The Court emphasized that the public itself had never

160. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577-78 (1980).

161. *Id.* at 577.

162. See *id.* at 578 (explaining that the openness of criminal trials "has been thought to enhance the integrity and quality of what takes place").

163. *Id.* at 576.

164. See, e.g., *United States v. El-Sayegh*, 131 F.3d 158, 160-61 (D.C. Cir. 1997) ("The First Amendment guarantees the press and the public access to aspects of court proceedings, including documents").

165. See, e.g., *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989); *Globe Newspaper Co. v. Pokaski*, 684 F. Supp. 1132, 1135 (D. Mass. 1988).

166. 435 U.S. 589, 591 (1978).

had *physical* access to the tapes and that the press was not entitled to any access superior to that of the public.¹⁶⁷ The Court explained,

Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public.¹⁶⁸

Despite this Supreme Court holding, some lower federal courts have recognized a First Amendment right of access to videotapes or audiotapes that have been admitted into evidence.¹⁶⁹

2. The Coleman Case: Press Access to Physical Evidence Under the First Amendment

In the Coleman case, the media plaintiffs argued that they had a First Amendment right to inspect the remaining biological evidence.¹⁷⁰ The Virginia circuit court rejected this claim, refusing to extend the constitutional right of access to judicial proceedings and/or court documents to include a right to independent testing of crime scene evidence.¹⁷¹

In considering whether the media plaintiffs had a constitutional right to test the biological evidence, Virginia circuit court Judge Keary Williams looked to the two-part test articulated by the Supreme Court in *Richmond Newspapers*.¹⁷² Tailoring the test to the facts of the Coleman case, Judge Williams asked: (1) "[W]hether retesting the Coleman DNA after conviction and execution of judgment is a process historically open to the public," and (2) whether the testing "would aid in ensuring the fairness of, and contributing to the public confidence in, the death penalty as implemented in Virginia."¹⁷³

Turning to the first prong of the test, Judge Williams concluded that "[t]he request in this case does not involve a process that is part of the criminal justice system, much less a process that

167. *Id.* at 609.

168. *Id.* (citing *Estes v. Texas*, 381 U.S. 532, 589 (1965)).

169. In *United States v. Carpentier*, for example, a federal district court in New York denied the government's motion to place audiotapes admitted into evidence under seal. 526 F. Supp. 292, 294-95 (E.D.N.Y. 1981). The court explained that "the public has a strong First Amendment claim to access to evidence admitted in a public sentencing hearing," and therefore, the "tapes should be disclosed." *Id.*

170. Request for DNA Testing and Release of Results, *supra* note 51, at 3.

171. Opinion Letter, *supra* note 44, at 5-8.

172. *Id.* at 5-6.

173. *Id.* at 6.

has been historically open to the public.”¹⁷⁴ The circuit court noted the absence of any precedent to support a constitutional right to independent testing of evidence in a criminal case.¹⁷⁵ Judge Williams explained that the cases that the plaintiffs had cited merely recognized a public right of access to criminal proceedings and documents filed in connection with such proceedings.¹⁷⁶ Interpreting this precedent to mandate independent testing of evidence in a closed criminal case would constitute “quite a leap,” and Judge Williams refused to make this leap.¹⁷⁷

The court next looked to the second prong of the test, considering whether a larger societal interest would be served by granting access.¹⁷⁸ Judge Williams held that the results of any DNA testing of the remaining semen evidence in the Coleman rape kit “would have no bearing on the fairness of the death penalty as it is now administered or on the public confidence in the criminal justice system.”¹⁷⁹ The judge explained that Virginia law had been modified since Coleman’s execution and that the sophisticated DNA tests unavailable to Coleman prior to his execution were now available to prisoners facing the death penalty.¹⁸⁰ Because of such changes in the capital punishment system in the nine years since Coleman’s execution, testing the biological evidence simply would not help to assess the reliability of the current system.¹⁸¹ As Judge Williams explained, “How can investigation of the death penalty as it was implemented in 1992 be beneficial in scrutinizing the death penalty as it is carried out in 2001 when the processes are so different?”¹⁸²

3. An Implausible Basis for Media Access

The Coleman case provides a stark illustration of the barriers to maintaining a press claim of access under the First Amendment.¹⁸³ Most critically, media plaintiffs face the problem of having to demonstrate that the public has historically enjoyed the type of

174. *Id.* at 7.

175. *Id.* at 6-7.

176. *Id.* at 6.

177. *Id.* at 6-7.

178. *Id.* at 8. Judge Williams interpreted this second prong to require that the granting of access play “an important role in ensuring fairness of the process and contributing to public confidence in our criminal justice system as it operates today.” *Id.*

179. *Id.* at 8.

180. *Id.*

181. *Id.*

182. *Id.*

183. See *supra* notes 170-83 and accompanying text.

access being sought.¹⁸⁴ Arguably, a court *could* find that the historical public right of access to court *documents* is sufficiently analogous to public access to physical evidence to support a constitutional claim for independent testing of such evidence. In other words, a court could interpret historical access at a high level of generality, holding, for example, that the historical right of access to court documents is more accurately described as a historical right of access to all exhibits introduced into evidence—whether paper documents or biological evidence.¹⁸⁵ As discussed earlier in this Note, however, it seems more likely that a court would exercise its discretion—including the discretion inherent in characterizing historical public access—to block access to biological evidence.¹⁸⁶ Since granting access risks exposing the fallibility of the appellate review system in death penalty cases, a court that is part of this system of review has a very real interest in denying access, and thus, protecting its own reputation.¹⁸⁷

Even if a court were to find a historical basis for public access to biological evidence, it could nonetheless deny a First Amendment claim on the ground that such access does not serve a larger societal interest.¹⁸⁸ As demonstrated by the Coleman case, the question of societal interest is a very subjective inquiry, offering considerable discretion to the court.¹⁸⁹ In Coleman, the court found that the testing of the DNA evidence would not have an impact on

184. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (“First, because, a ‘tradition of accessibility implies the favorable judgment of experiences’ we have considered whether the place and process have historically been open to the press and general public.” (citations omitted)); Opinion Letter, *supra* note 44, at 5-6.

185. An example of a court’s use of this level of generality can be found in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). In that case, the Supreme Court considered the constitutionality of a Massachusetts law that barred the press from the courtroom during the testimony of sexual assault victims under the age of eighteen. *Id.* at 598. The Court concluded that access to a criminal trial did not depend on the historical openness of a certain *type* of criminal trial. *Id.* at 604 n.13. Rather, there is a presumption of openness of all criminal trials, and this openness cannot be defeated on the grounds that a particular type of trial had not historically been open to the public. *Id.*

186. See *supra* Part II.A.4.

187. See *supra* notes 139-44 and accompanying text.

188. See Opinion Letter, *supra* note 44, at 8; see also *Press-Enterprise Co.*, 478 U.S. at 8 (articulating the two-prong test for granting press access).

189. Judge Williams concluded that DNA testing of the evidence in the Coleman case would have no impact on public confidence in the current death penalty system. See Opinion Letter, *supra* note 44, at 8. Yet a compelling argument can be made that Coleman’s exoneration would have a dramatic impact on public confidence in Virginia’s capital punishment system. See Editorial, *Test Coleman’s Execution*, ROANOKE TIMES & WORLD NEWS, June 5, 2001, at A12 (arguing that proof of a wrongful execution “surely would have great bearing on public confidence” and that “so tragic an error would demonstrate in a most dramatic way the fallibility of human judgment, and provide a powerful argument against the abomination that is the death penalty”).

public confidence in the death penalty system since the current system recognizes the right of condemned prisoners to have sophisticated DNA tests performed on any physical evidence.¹⁹⁰ Judge Williams conveniently declined to mention, however, that there is no DNA evidence in the vast majority of criminal cases.¹⁹¹ Thus, many capital defendants today are in the same position as Roger Coleman was when he was convicted and sentenced to death in 1981, before DNA testing existed.¹⁹² An exoneration of Coleman would reveal the fallibility of traditional forms of evidence—from jailhouse informants to visual hair comparison,¹⁹³ and would expose the inability of the appellate system to identify every wrongful conviction. Because many capital convictions continue to rest exclusively on traditional forms of evidence,¹⁹⁴ exposing the fallibility of these types of evidence must have relevance in evaluating the health of our current capital punishment system.¹⁹⁵ Additionally, if the public realized that the appellate system was an imperfect mechanism for identifying error, public support for the death penalty could be greatly undermined.¹⁹⁶ Thus, it seems disingenuous for Judge Williams to conclude that testing the evidence in the Coleman case “would have no bearing on the fairness of the death penalty as it is now administered or on the public confidence in the criminal justice system.”¹⁹⁷

C. Unique State Claims

Plaintiffs have advanced creative legal theories in an effort to gain post-execution access to physical evidence. Recognizing that most avenues to access are extinguished upon the death of the offender, plaintiffs in civil suits have carefully searched state codes for provisions that might afford access to other interested parties. In several cases, seldom-used statutes have been resurrected or ret-

190. See Opinion Letter, *supra* note 44, at 8.

191. See John C. Tucker, *Earley's Opposition to DNA Test Showed Poor Judgment*, VIRGINIAN-PILOT, June 18, 2001, at B11 (noting that “in the vast majority of criminal cases, including murder cases, there is no DNA evidence to test”).

192. See *id.*

193. See Smolowe, *supra* note 80 (explaining that Coleman was convicted on the basis of three pieces of evidence—the testimony of a jailhouse informant, visual hair comparison evidence, and blood type evidence).

194. *Id.*

195. See *id.*

196. See John Aloysius Farrell, *Cry of “Innocent!” Trumps Moral Claim*, BOSTON GLOBE, Aug. 27, 2000, at F1 (attributing the dramatic decline in support for the death penalty to public concern over the risk of executing the innocent).

197. See Opinion Letter, *supra* note 44, at 8.

rofitted to serve a purpose that the original drafters never anticipated.

1. Virginia: A Trial Court's Discretion to Donate Evidence to a Charity

Nonprofit organizations petitioned for post-execution access to physical evidence in both the O'Dell and Coleman cases.¹⁹⁸ In O'Dell, two nonprofit organizations—the Roman Catholic Diocese of Richmond and the Louisiana Crisis Assistance Center—jointly filed suit.¹⁹⁹ In Coleman, a single charitable organization—Centurion Ministries—joined several media plaintiffs in a combined effort to gain access to the physical evidence.²⁰⁰ In both the O'Dell and Coleman suits, the charitable organizations' claims to access relied primarily on a Virginia statute that grants trial judges the discretion to donate evidence in closed criminal cases to charitable organizations.²⁰¹ The statute provides: “[U]nless objection with sufficient cause is made, the trial court in any criminal case may order the donation or destruction of any or all exhibits received in evidence during the course of the trial . . . at any time after exhaustion of all appellate remedies.”²⁰² The statute further provides that “[u]pon petition of any organization which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code, the court in its sound discretion *may* order donation of an exhibit to such charitable organization.”²⁰³

In both the Coleman and O'Dell cases, the petitioning charities argued that the conclusive determination of guilt or innocence through post-execution DNA testing would assist them in their missions of educating the public about capital punishment.²⁰⁴ In the O'Dell petition, the plaintiffs explained that “[w]hether the individuals executed by the state are in fact guilty of their crimes is of utmost importance and the Evidence is the best evidence available as to whether the death penalty system functioned properly in the

198. Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45, at 10; Petition for Appeal, *supra* note 13, at 14.

199. Petition for Donation of Certain Items, *supra* note 21, at 1-2.

200. Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45, at 1; Petition for Appeal, *supra* note 13, at 14.

201. VA. CODE ANN. § 19.2-270.4 (Michie 2000); Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45, at 1; Petition for Appeal, *supra* note 13, at 1.

202. § 19.2-270.4(A).

203. *Id.* § 19.2-270.4(D) (emphasis added).

204. Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45, at 4-8; Petition for Appeal, *supra* note 13, at 4-5.

case of Joseph O'Dell."²⁰⁵ Similarly, in petitioning for access to the evidence in Coleman, Centurion Ministries explained that gaining access to the evidence would further its charitable mission of vindicating "individuals wrongly convicted of crimes" and educating "the public with regard to the risk of wrongful convictions."²⁰⁶

Attempts to gain access to DNA evidence pursuant to this Virginia statute have thus far been unsuccessful.²⁰⁷ In both Coleman and O'Dell, the courts exercised their discretion and refused to donate the evidence to the petitioning charities.²⁰⁸ In O'Dell, the Virginia circuit court concluded that the evidence had not been sufficiently protected from tampering or contamination during its years in storage and that donation of the sample would therefore be inappropriate.²⁰⁹ In Coleman, Judge Keary Williams of the Virginia Circuit Court held that the statute only allowed for donation of evidence that had been actually introduced at trial.²¹⁰ Since the biological evidence in Coleman had not, in fact, been introduced at Coleman's original 1981 trial,²¹¹ the court did not have the authority under the statute to donate the evidence to a charitable organization.²¹²

The Coleman and O'Dell cases together illustrate the difficulty of gaining access to physical evidence under the Virginia statute. Under Judge Williams's ruling in Coleman, a petitioner must first demonstrate that the evidence sought was actually introduced at trial.²¹³ Of the group of cases in which DNA technology could posthumously exonerate an executed offender, the biological evidence may not have been introduced at trial in a significant number of such cases. Without the ability to identify the source of the biological evidence through DNA testing, the prosecution may have simply found that the evidence had insufficient probative value and was not worthy of introduction at trial.

205. Petition for Appeal, *supra* note 13, at 13.

206. Petition of Centurion Ministries, Inc. for Donation of Exhibits, *supra* note 45, at 4.

207. See *Virginia v. Coleman*, Nos. 106-81 & 108-81, slip op. at 1 (Va. Cir. Ct. Buchanan County Sept. 7, 2000) (unpublished court order); Opinion Letter, *supra* note 44, at 3-5; Record of *Fruit* Hearing, *supra* note 17, at 82.

208. *Coleman*, Nos. 106-82 & 108-81, slip op. at 2; Opinion Letter, *supra* note 44, at 3-5; Record of *Fruit* Hearing, *supra* note 17, at 82.

209. Record of *Fruit* Hearing, *supra* note 17, at 91 (holding that donating the evidence to the petitioning charities would be inappropriate given the "many irregularities . . . in the handling of the evidence").

210. See Opinion Letter, *supra* note 44, at 5.

211. *Id.* at 2 (noting that "DNA evidence was collected during the investigation of the murder, but never introduced into evidence at trial").

212. *Id.* at 5.

213. *Id.*

Even if the plaintiff demonstrates that the disputed evidence was introduced at trial and is therefore eligible for donation, the statute still grants the trial court broad discretion over whether to donate the evidence to the petitioning charity.²¹⁴ Rather than providing the court with specific factors to consider in exercising this discretion, the statute simply states, "[T]he court in its sound discretion may order donation of an exhibit to such charitable organization."²¹⁵ Exercising this broad discretion, the O'Dell court denied access because of the questionable integrity of the evidence.²¹⁶ Although the evidence was continuously in the state's custody and the DNA tests themselves would have exposed any contamination or attempts to tamper with the sample,²¹⁷ the court nevertheless found that donation of the sample was inappropriate.²¹⁸ As long as courts enjoy such broad discretion in considering donation, it is unrealistic to expect that plaintiffs will prevail under the statute. As mentioned previously in this Note, proof of a wrongful execution would undermine the credibility of the entire death penalty appellate process.²¹⁹ When given broad discretion, courts can be expected to deny access so as to protect their own reputations.

2. Texas: Access Premised on Potential Suit Against the Actual Perpetrator(s)

The case of Richard Wayne Jones provides another example of the creative use of a state statute to gain access to physical evidence.²²⁰ The State of Texas executed Jones in August of 2000.²²¹ He had been convicted thirteen years earlier for the murder of Tammy Livingston.²²² Although Jones originally confessed to the crime, he

214. See VA. CODE ANN. § 19.2-270.4 (Michie 2000) (providing that the trial court "in its sound discretion may order donation of an exhibit" to a charitable organization).

215. *Id.* (emphasis added).

216. See Record of *Fruit* Hearing, *supra* note 17, at 91.

217. See *id.* at 86 (providing explanation by plaintiff's attorney, Paul Enzinna, that "[t]his evidence has been in custody of the state for the past fifteen years"); Petition for Appeal, *supra* note 13, at 10, 11 n.7 (referring to affidavit of DNA expert Barry Scheck, which explained that "contamination cannot be detected until DNA testing is performed," and explaining that the DNA tests themselves would reveal any tampering).

218. See Record of *Fruit* Hearing, *supra* note 17, at 91.

219. See Farrell, *supra* note 196.

220. See Petition for Equitable Bill of Discovery, *supra* note 51, at 1-2.

221. Malone, *supra* note 43.

222. Jones was convicted in July of 1987. See Application for Reprieve from Execution, Commutation of Sentence, and Conditional Pardon at 10, *In re Richard Wayne Jones* (Proceeding before the Hon. George W. Bush, Governor of the State of Texas and the Texas Board of Pardons and Parole).

later retracted the admission, explaining that he signed a confession only after being subjected to a grueling interrogation and threats by detectives.²²³

According to Jones, his sister, Brenda Jones Ashmore, pleaded for his assistance after she and her boyfriend, Walter Sellers, had killed the victim.²²⁴ Jones eventually admitted to helping Ashmore and Sellers dispose of the victim's body, but denied any involvement in the murder itself.²²⁵ Considerable evidence supported Jones's account.²²⁶ Several people gave statements, or testified before the grand jury, that Sellers had attempted to sell them the victim's checks, credit cards, and car.²²⁷ At least one witness claimed that Sellers even confessed to them that he was the murderer.²²⁸ Also, while Sellers was seen with considerable blood on his clothing near the time of the murder, Jones's clothes only contained small specks of blood, which is consistent with his story of having merely disposed of the body.²²⁹

After the execution, Jones's two sons sought access to the physical evidence in the case in order to perform DNA testing.²³⁰ Convinced of their father's innocence, the sons believed that the DNA tests would demonstrate that their father's sister, Ashmore, and her boyfriend, Sellers, were the actual perpetrators.²³¹ In re-

223. According to Jones, he was initially subjected to twelve hours of continuous interrogation, from 7:00 p.m. to 7:00 a.m., during which time he was denied food and sleep. *Id.* at 15. Officers threatened him with physical harm and allegedly convinced Jones that both he and his pregnant girlfriend would be sentenced to death, and the child born on death row, if he failed to cooperate. *Id.* at 14-18. Jones took the stand at his trial and denied his involvement in the murder, explaining to jurors that his confession was the product of police coercion and threats. *Id.* at 31.

224. *Id.* at 21.

225. *Id.* at 20. Jones did not admit to helping dispose of the body at trial, *id.* at 31, and failed to tell his own lawyers about his involvement in disposing of the body, *id.* at 26. Jones claimed that he originally elected not to tell the entire story because he was trying to protect his sister. *Id.* at 26.

226. *See id.* at 22-25.

227. *Id.* at 24.

228. *Id.* (mentioning that Douglas Daffern testified before the grand jury that Sellers claimed to have killed two women). Additionally, another individual, Michael Barton, contacted Jones's attorney before trial and confessed that he and Sellers had murdered Livingston together. *Id.* at 29.

229. James King testified that Sellers had blood on his clothing when he tried to sell him checks, identification, and a car. *Id.* at 24. Similarly, Scott Christian gave a statement that shortly after the murder, Sellers came to his house to try to sell him the checks and identification of a woman fitting the description of the victim. *Id.* According to Christian, Sellers seemed nervous and upset, and his clothes appeared to be spattered with blood. *Id.* In contrast, Jones himself only had two small specks of blood on his lower pants leg. *See id.* at 37.

230. *See* Petition for Equitable Bill of Discovery, *supra* note 51, at 1; Malone, *supra* note 43.

231. *See* Malone, *supra* note 43 (explaining that if DNA tests show that Ashmore and/or Sellers were in the victim's car, this would go a long way in corroborating Jones's claim of innocence).

sponse to the sons' efforts to implicate them, Ashmore and Sellers allegedly threatened to kill the boys' mother.²³²

In seeking access to the physical evidence in the case, Jones's sons relied on Rule 202 of the Texas Rules of Civil Procedure.²³³ Under Rule 202, a person can petition the court for an order that authorizes discovery to investigate a *potential* claim or suit.²³⁴ The Texas district court judge barred the sons from arguing that Jones was innocent of Livingston's murder.²³⁵ Therefore, the sons based their Rule 202 petition on a potential suit against Ashmore and Sellers for intentional infliction of emotional distress, fraud, and misrepresentation.²³⁶ In their petition, the sons requested the court's permission to test the physical evidence and depose Ashmore and Sellers.²³⁷ The court has yet to rule on this request; however, the sons' attorney, Gerald Staton, indicated that he expects the judge to grant their request.²³⁸

Although the Rule 202 petition in this case may prove successful in gaining access to the physical evidence, it is unlikely that this approach will be easily duplicated in other cases. The viability of the sons' Rule 202 petition turns on features unique to the case: the history of threats from Ashmore and Sellers, and significant evidence that points to Ashmore's and Seller's involvement in the crime. Only when a plaintiff can convince a judge that there is a viable potential civil suit against the actual perpetrators will such a claim hold real promise of success. Clearly, other plaintiffs, with legitimate claims, will be unable to mount such an argument to seek access.

D. Negotiations with the State

Direct negotiations with state officials constitute an additional avenue to obtaining access to physical evidence in a state's custody.²³⁹ If a state simply agrees to access, then the interested third party need not pursue a civil suit to obtain court-ordered ac-

232. Telephone Interview with Gerald Staton, Partner, Staton & Taylor (Feb. 14, 2001) [hereinafter Interview with Staton].

233. Petition for Equitable Bill of Discovery, *supra* note 51, at 1.

234. TEX. R. CIV. P. 202.

235. Interview with Staton, *supra* note 232; *see also* Malone, *supra* note 43.

236. Interview with Staton, *supra* note 232.

237. Petition for Equitable Bill of Discovery, *supra* note 51, at 1.

238. Interview with Staton, *supra* note 232.

239. *See* Sydney Freedberg, *DNA Clears Inmate Too Late*, ST. PETERSBURG TIMES, Dec. 15, 2000, at 1A (explaining that deceased inmate's lawyers gained access to DNA evidence through the process of negotiating with state officials).

cess. In the cases considered thus far in this Note, a civil suit proved necessary either because the state categorically opposed access,²⁴⁰ or because the parties sought court mediation regarding the terms of access.²⁴¹

Negotiation with state officials produced a favorable result in the case of Frank Lee Smith.²⁴² In 1985, Smith was arrested and charged with the rape and murder of an eight-year-old child.²⁴³ Smith was on parole at the time of the murder, and his two previous homicide convictions made him a likely suspect.²⁴⁴ Although no physical evidence linked him to the crime,²⁴⁵ Smith was convicted and sentenced to death in 1986 based on the testimony of two eyewitnesses who identified him as the man they saw leaving the victim's home on the night of the murder.²⁴⁶

Years after Smith's conviction, a key prosecution witness recanted her testimony, insisting that she had wrongly identified Smith after police pressured her and warned her that Smith was dangerous.²⁴⁷ Smith's lawyers, convinced of his innocence, requested the courts' permission to have DNA testing performed on semen evidence.²⁴⁸ The State of Florida strongly opposed the testing and accused Smith's lawyers of merely trying to delay justice.²⁴⁹ While his lawyers continued to plead for access to the evidence, Smith was diagnosed with cancer, and died in 1999 in a prison hospital.²⁵⁰

After Smith's death, his lawyers continued to fight to have the DNA evidence tested and sought an order to keep the State

240. For a discussion of the O'Dell case, see *supra* note 26 and accompanying text. For a discussion of the Coleman case, see *supra* note 82 and accompanying text.

241. The Felker case is an example of an instance in which the state did not oppose access, but wanted the court to condition access on certain terms being met. See Interview with Byrd, *supra* note 140.

242. See Freedberg, *supra* note 239.

243. See Charles Savage et al., *Smith's Lawyers Say Officials Knew a Decade Ago He Might Be Innocent*, MIAMI HERALD, Dec. 16, 2000 (explaining that Smith was arrested soon after the 1985 crime when neighbors indicated that Smith resembled a composite sketch of the perpetrator).

244. Freedberg, *supra* note 239.

245. *Id.*

246. Malone, *supra* note 43.

247. Freedberg, *supra* note 239.

248. *Id.*

249. *Id.*

250. *Id.* After Smith's death, his lawyers accused prosecutors of ignoring evidence of his innocence for years and blocking DNA testing while Smith was alive: "We knew he was innocent in December of 1989. . . . We told the courts, and we told them who was the real killer, but no one cared, and they kept Frank Lee Smith on death row for another 10 years until he died." *Id.*

from destroying the evidence.²⁵¹ Initially, prosecutors maintained their opposition to the testing.²⁵² But, through the process of negotiations, the parties were able to reach an agreement,²⁵³ under which the evidence was sent to an FBI lab for testing.²⁵⁴ In December 2000, the FBI announced that the DNA tests exonerated Smith.²⁵⁵

The Smith case represents the first time that a death row prisoner has been posthumously exonerated through DNA testing.²⁵⁶ The case prompted Florida Governor Jeb Bush to suggest that DNA testing should be made available to other condemned inmates, and has revitalized the campaign for a moratorium on executions in Florida.²⁵⁷ Also, the outcome in this case demonstrates that negotiation with state officials offers a possible avenue of access to DNA evidence after the death of the prisoner. Unfortunately, this avenue is unlikely to be successful in cases in which the perpetrator was actually executed. As the O'Dell and Coleman cases demonstrate, states are strongly opposed to granting access to evidence and go to the greatest lengths to prevent testing in those instances in which the state has the most to lose in terms of its own credibility.²⁵⁸

III. POLICY ARGUMENTS IN FAVOR OF ALLOWING POSTHUMOUS DNA TESTING

A. The Spirit of Open Government Records: An Informed Electorate Means a More Effective Democracy

In determining the proper scope of public access to government records and institutions, courts and legislatures have acknowledged that the openness of government records serves an important role in a well-functioning democracy. In several cases, for example, the Supreme Court has justified recognition of the common law right of access to government documents on the basis that

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *See Malone, supra* note 43.

257. Freedberg, *supra* note 239 ("A spokeswoman for Gov[ernor] Jeb Bush said . . . that the governor wants to offer DNA testing to other condemned inmates."); *see also Malone, supra* note 43 ("Death penalty opponents said they believe the *Smith* case could lead to a moratorium on executions in Florida.").

258. *See supra* notes 139-41 and accompanying text.

such access: (1) fosters healthy democratic institutions,²⁵⁹ and (2) provides a check on corrupt practices by exposing the judicial process to public scrutiny.²⁶⁰ Similarly, the Court's finding that the First Amendment guarantees press access is predicated on the idea that an electorate that is well informed by the media enhances democracy.²⁶¹ Legislatures have also recognized the importance of allowing public access to government records.²⁶² Congress and most state legislatures have opted to codify or expand the common law right of access to government information.²⁶³ Again, these statutory provisions are premised on the notion that a well-informed electorate is the cornerstone of a well-functioning democracy.²⁶⁴

A state's use of its ultimate power—the power to take life—calls for the highest level of public scrutiny. If the public is to assess properly the reliability of its capital punishment system, and any potential corruption within that system, it must have access to information in the government's control. The government should not be permitted to conceal information in an effort to preserve public confidence in the infallibility of the death penalty. If the electorate is to have an informed debate about the appropriateness of the death penalty, it must have full access to information, and this access should include the ability to posthumously test DNA evidence in the state's custody.

B. The Relevance of Posthumous DNA Testing to an Informed Policy Debate About the Death Penalty

Posthumous DNA testing in death penalty cases, if allowed, could provide highly relevant information in a national death penalty debate, which is increasingly focused on the risk of executing the innocent.²⁶⁵ The striking number of exonerations that have occurred *prior* to execution—absent proof that an innocent person has been executed—have dramatically transformed the death penalty

259. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-73 (1980) (explaining that public access to the courts promotes free discussion of governmental affairs).

260. See *id.* at 570; *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559-60 (1976) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

261. Underlying the First Amendment right of access is the understanding that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

262. See, e.g., GA. CODE ANN. § 50-18-71.1 (1998); VA. CODE ANN. § 2.2-3704 (Michie 2001).

263. 37A AM. JUR. 2D *Freedom of Information Act* §§ 2, 5 (2001).

264. *Id.* § 1 ("The basic purpose of the [Freedom of Information Act] is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.").

265. See Farrell, *supra* note 196.

debate.²⁶⁶ In February of 2000, Illinois Governor George Ryan declared a moratorium on executions in Illinois following that state's thirteenth death row exoneration.²⁶⁷ In the wake of numerous exonerations nationwide, support for the death penalty has fallen from over eighty percent a decade ago to a recent estimate of only sixty-six percent.²⁶⁸

Proponents of capital punishment have themselves suggested the importance of proving that an innocent person has been executed.²⁶⁹ Despite clear evidence that nearly one hundred innocent people have been freed from death row since 1973, many death penalty proponents continue to defend the infallibility of America's capital punishment system.²⁷⁰ Proponents explain that these exonerations provide convincing evidence that the appeals process works—that every miscarriage of justice is uncovered during the multiple layers of appeals.²⁷¹ In defending the current system, many proponents insist that not one innocent person has been executed in recent history.²⁷² Conservative legal scholar Paul Cassell contends that there is no documented case of a wrongful execution in the United States in the past fifty years.²⁷³ Cassell explains, “[T]he abolitionists are well-funded. The reason they haven't been

266. *Id.* (noting that the question of the risk of executing the innocent has transformed the death penalty debate).

267. Ken Armstrong & Steve Mills, *Ryan: "Until I Can Be Sure"; Illinois Is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1. In his public statement, Governor Ryan “decried the state’s ‘shameful record of convicting innocent people and putting them on Death Row’” *Id.*

268. Farrell, *supra* note 196.

269. Death penalty proponent Paul Cassell has dismissed studies showing widespread error in capital cases, reasoning that the researchers of such studies have been “unable to find a single case in which an innocent person was executed” and “[t]hus, the most important error rate—the rate of mistaken executions—was zero.” See Cohn, *supra* note 49, at 33. Similarly, death penalty supporter Robert Pambianco argues that “[t]he best opponents [of the death penalty] can do is point to cases of individuals who were sentenced to die but who, for one reason or another, were later exonerated or had their sentences reduced. But these folks are alive. They are anything but evidence that innocent people are being executed.” Pambianco, *supra* note 48.

270. Alan Berlow, *The Wrong Man*, ATLANTIC MONTHLY, Nov. 1999, at 66, 68; see also Cohn, *supra* note 49, at 33 (“Death-penalty supporters in this country have invested considerable energy in reassuring the public that the execution of an innocent person is virtually impossible.”).

271. *E.g.*, Cynthia Tucker, *Some Case Will Sway Supporter of Death Penalty*, ATLANTA J. & CONST., June 25, 2000, at 5B (explaining that “death penalty proponents cite death row releases as evidence that the system is self-correcting”).

272. See Cohn, *supra* note 49, at 33 (calling the idea that an innocent person has been put to death “urban legend”); Jeff Jacoby, *Supporters of Capital Punishment Can Cheer Governor Ryan’s Decision*, BOSTON GLOBE, Feb. 28, 2000, at A15; Pambianco, *supra* note 48.

273. Cohn, *supra* note 49, at 33.

able to find someone [wrongfully executed] isn't the lack of energy and funding; it's because there isn't anyone out there to find."²⁷⁴

Similarly, elected public officials have continued to express absolute confidence in the capital punishment system, despite the alarming number of proven wrongful convictions,²⁷⁵ and the fortuity of many of these exonerations.²⁷⁶ In 1998, for example, a spokesman for then-Virginia Attorney General Mark L. Earley boasted, "Virginians can rest assured that if someone is executed in the Commonwealth they're guilty . . . Virginia's criminal justice system is a model for the nation and as fail-safe as it gets."²⁷⁷ Likewise, when then-presidential candidate George W. Bush was questioned about the risk of executing the innocent, he assured the public that every person executed in the State of Texas had been guilty of the crime.²⁷⁸

Posthumous access to DNA evidence is of particular importance as the public debate over the risk of executing the innocent remains fixated on the ability to prove that an innocent person has in fact been executed. Death penalty opponents agree with proponents that absolute proof of a wrongful execution could transform the death penalty debate.²⁷⁹ Richard Dieter, director of the Death Penalty Information Center in Washington D.C., an anti-death penalty educational organization, is among those who believe that evidence of a wrongful execution could have a profound effect on the national death penalty debate.²⁸⁰ "It could be very important," Dieter explains, because "[o]ne concern about the death penalty is that it is an irrevocable act."²⁸¹

274. *Id.*

275. Nearly 100 innocent people have been released from death row since 1973. See Death Penalty Information Center, *Innocence and the Death Penalty*, at <http://www.deathpenaltyinfo.org/innoc.html> (last visited Feb. 6, 2002).

276. Dieter, *supra* note 50 (explaining that many cases of innocence "were discovered not because of the normal appeals process, but rather as the result of new scientific techniques, investigation by journalists, and the dedicated work of expert attorneys, not available to the typical death row inmate").

277. Frank Green, *Freed Inmates Tell Their Stories; Death Row Residents Wrongfully Convicted*, RICH. TIMES DISPATCH, Nov. 15, 1998, at A1.

278. Peter Grier, *Death Penalty Under Siege*, CHRISTIAN SCI. MONITOR, June 14, 2000, at 1 (reporting statement of then-Governor George W. Bush expressing confidence that every person executed in Texas during his term in office has been "guilty of the crime charged.").

279. See, e.g., Tucker, *supra* note 271 (suggesting that proof of a wrongful execution would undermine remaining support for the death penalty); see also Berlow, *supra* note 270, at 68 (noting that "[o]pponents of the death penalty believe that the execution of an innocent person would have a profound effect on public support for capital punishment").

280. David G. Savage, *'92 Execution Haunts Death Penalty Foes; Activists Fight for DNA Test in Hopes of Bolstering Doubts on Capital Punishment*, L.A. TIMES, July 22, 2001, at A1.

281. *Id.*

Supreme Court Justice Sandra Day O'Connor, a consistent supporter of the death penalty during her twenty years on the bench, has recently commented on the risk of executing the innocent.²⁸² In July of 2001, Justice O'Connor publicly stated that the number of recently freed death row inmates suggests that "the system may well be allowing some innocent defendants to be executed."²⁸³ Proof of a single wrongful execution would certainly provoke additional high-level dialogue regarding the soundness of the death penalty as public policy.

C. Forcing a More Honest Dialogue About Criminal Justice Reform

1. The Unique Opportunity Afforded By DNA

The availability of DNA technology as a means of proving innocence has resulted in an increase in the rate of death penalty exonerations.²⁸⁴ The power of DNA evidence has been twofold: (1) the technology has spared lives that might otherwise have been lost to execution or years in prison, and (2) it has exposed law enforcement corruption and the fallibility of forms of evidence commonly believed to be highly reliable.²⁸⁵ For example, DNA evidence has exonerated condemned prisoners in cases in which the conviction rested on multiple eyewitness identifications,²⁸⁶ and in instances where a suspect initially confessed to the crime.²⁸⁷ DNA testing has

282. *Id.*

283. *Id.*

284. *Id.*

285. See Patrick Leahy, *Serenity Now or Insanity Later?: The Impact of Post-Conviction DNA Testing on the Criminal Justice System, Introduction*, 35 NEW ENG. L. REV. 605, 605 (2001) (explaining that post-conviction DNA testing provides a unique opportunity to identify broad patterns of error and abuse in the criminal justice system, including inadequate counsel, mistaken identification, and prosecutorial misconduct); see also Michael J. Saks et al., *Toward a Model Act for the Prevention and Remedy of Erroneous Convictions*, 35 NEW ENG. L. REV. 669, 669 (2001) (noting that DNA technology has "return[ed] innocent people to freedom" and has "opened an exceptionally valuable window through which to view the criminal justice system").

286. For example, Kirk Bloodsworth was convicted and sentenced to death in the State of Maryland based on the testimony of three eyewitnesses who all claimed to have seen him with the nine-year-old victim immediately before her disappearance. SCHECK ET AL., *supra* note 15, at 213-220. Nine years after his original conviction, Bloodsworth was completely exonerated by DNA evidence. *Id.* at 220.

287. In Virginia, Earl Washington was convicted and sentenced to death for a 1982 rape and murder. Francis X. Clines, *Furor Anew with Release of Man Who Was Innocent*, N.Y. TIMES, Feb. 11, 2001, at A23. Washington, who was mentally retarded, confessed to the crime. *Id.* In 1994, DNA tests were performed that excluded Washington as the perpetrator, and then-Governor Douglas Wilder commuted his sentence to life without the possibility of parole. *Id.* Washington was finally pardoned and released in 2001 after more sophisticated DNA tests further exoner-

highlighted the problems of police abuse in obtaining confessions²⁸⁸ and has drawn attention to the deadly impact of withholding exculpatory evidence.²⁸⁹ The technology has also exposed the risks of using jailhouse snitches and untested scientific techniques to obtain convictions.²⁹⁰

The era of post-conviction DNA exonerations, however, will be short-lived.²⁹¹ Law enforcement officials currently use DNA testing early in the investigative process to determine whether to eliminate someone as a suspect or proceed with a prosecution.²⁹² Thus, the age of post-conviction application of DNA testing provides a unique opportunity to assess the reliability of traditional forms of evidence and investigative techniques.²⁹³ Rather than squandering this opportunity, courts should maximize the insight available through DNA technology by granting third-party requests for post-execution access to DNA evidence. In other words, the use of DNA to assess the accuracy of convictions should not be limited to active

ated him. *Id.* In a similar case, Ronald Jones was convicted in Illinois of the 1985 rape and murder of Debra Smith. SCHECK ET AL., *supra* note 15, at 220. Jones signed a confession after ten hours in police custody, but claimed that he admitted to the crime only after police beat him and took him to the abandoned building where the murder took place. *Id.* Ten years after his conviction, Jones was exonerated through DNA testing. *Id.*

288. In the case of Earl Washington, police interrogated the highly suggestible Washington over a period of two days and were able to elicit confessions for several unsolved crimes. Brooke A. Masters, *Missteps on Road to Injustice; In Virginia, Innocent Man Was Nearly Executed*, WASH. POST, Dec. 1, 2000, at A1; *see also supra* note 287 (discussing the Washington case). The police did not seem to be troubled by the numerous inconsistencies in Washington's confessions. *Id.* As one police sergeant explained, "It was almost like a big party. 'Come on down, this guy is confessing to everything.'" *Id.* When Washington failed to give the police the specific response they sought, the officers simply asked the question again, and the mentally retarded Washington changed his answer to satisfy the officers. *Id.* When, for example, police asked Washington whether the victim was white or black, Washington first responded that she was black. *Id.* When detectives asked Washington the same question again, this time Washington gave the "right" answer, telling officers that the victim was white. *Id.* In an Illinois case, DNA evidence exonerated four young men who had been convicted of the rape and murder of a medical student. Ken Armstrong et al., *Coercive and Illegal Tactics Torpedo Scores of Cook County Murder Cases*, CHI. TRIB., Dec. 16, 2001, at 1. One of the young men, who was fourteen years old at the time of his arrest, explained why he falsely confessed to police: "They threatened to do things and got me thinking they could do them. . . . One said he would smack me in the mouth if I didn't cooperate. . . . Then they told me I would go home if I gave them what they wanted." *Id.*

289. SCHECK ET AL., *supra* note 15, at 149-57.

290. *Id.* at 158-71 (explaining the unreliability of some forms of scientific evidence, like visual hair comparison, and suggesting reforms to prevent the use of junk science in criminal cases); *id.* at 156-57 (noting that the testimony of jailhouse snitches was used to convict twenty-one percent of the individuals cleared by DNA testing through the Innocence Project).

291. *See Saks et al.*, *supra* note 285, at 670 (explaining that "in cases where DNA typing can be performed it will routinely be performed, and the post-conviction DNA exoneration cases that today are almost commonplace will disappear").

292. *Id.*

293. *Id.* at 669-70.

criminal cases, which are in the process of being appealed. Instead, the search for error should be extended to post-execution review in an effort to gather as much information as possible about the functioning of our criminal justice system.

2. Overcoming Resistance to Reform

In response to the frequency of wrongful convictions and the fortuity of their discovery, many have advocated abolishing the death penalty or suspending its use.²⁹⁴ Others have identified common patterns of faulty evidence and official misconduct in known cases of wrongful convictions and have proposed reforms to reduce the risk of convicting and executing the innocent.²⁹⁵ For example, Barry Scheck and Peter Neufeld of Cardozo Law School's Innocence Project have identified a pattern of common errors in the sixty-five wrongful convictions that the Innocence Project has identified. They have suggested the following reforms: (1) changing the way line-ups and other identification processes are conducted in order to reduce the risk of mistaken identification; (2) videotaping all interrogations; (3) employing a presumption that the testimony of jailhouse snitches/informants is unreliable and admitting such testimony only when certain criteria are satisfied;²⁹⁶ (4) establishing independent crime laboratories; (5) increasing funding for public defenders and appointed defense counsel; and (6) creating performance standards to deal exclusively with misconduct by criminal defense attorneys and prosecutors.²⁹⁷

Despite the alarm bell sounded by increasing numbers of DNA exonerations, courts and legislatures in the 1990s aggres-

294. Andrew H. Malcolm, *Tainted Verdicts Resurrect Specter of Executing the Innocent*, N.Y. TIMES, May 3, 1989, at A18 ("Opponents of the death penalty say [the mere possibility of executing the innocent] should be sufficient to outlaw executions."). In 1997, the American Bar Association "called for a moratorium on executions until the death penalty could be administered fairly and with less risk to the innocent." Editorial, *Innocents on Death Row*, N.Y. TIMES, May 23, 1999, at A16.

295. See, e.g., SCHECK ET AL., *supra* note 15, at 255-60 (outlining "A Short List of Reforms to Protect the Innocent"); Saks et al., *supra* note 285, at 672-83 (proposing a model act to reduce the risk of wrongful convictions).

296. Scheck and Neufeld provide several examples of factors that should be considered in deciding whether to allow the testimony of a jailhouse informant. See SCHECK ET AL., *supra* note 15, at 256-57. These factors include: (1) whether the statement can be confirmed by extrinsic evidence; (2) whether the statement "contain[s] details or leads to the discovery of evidence known only to the perpetrator"; (3) the general character of the snitch; and (4) whether the snitch is a "recidivist snitch/informer." *Id.*

297. *Id.* at 255-60.

sively sought to expand the use of the death penalty.²⁹⁸ Rather than implementing reforms to reduce the risk of wrongful executions, courts and legislatures took steps to curtail the capital appeals process and to decrease funding for attorneys representing death row inmates.²⁹⁹ In 1996, for example, Congress passed the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"),³⁰⁰ which makes it nearly impossible to succeed on a successive habeas corpus petition.³⁰¹ Also in 1996, Congress voted to withdraw funding from capital case resource centers nationwide.³⁰² These centers have provided quality representation to many prisoners on death row and have kept track of which inmates are in need of representation.³⁰³ Critics claimed, however, that the centers were "little more than taxpayer-funded think tanks for the anti-death penalty movement."³⁰⁴ Measures like the AEDPA and the elimination of funds to resource centers arguably make it *more* difficult to expose wrongful convictions because these changes undermine effective legal representation and limit access to the courts.³⁰⁵

298. Berlow, *supra* note 270, at 84 ("The Supreme Court, Congress, and many states have moved during the past decade to expedite executions by making it more difficult for defendants to have their appeals heard.").

299. See Naftali Bendavid, *The Hangman Cometh: Twenty Years After the Supreme Court Restored the Death Penalty, Congress Made Two Big Moves Intended to Speed Up Executions*, LEGAL TIMES, Dec. 23, 1996, at 20, 20 (noting that in 1996 Congress defunded capital resource centers nationwide and reformed habeas corpus so as to curtail the appeals process).

300. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (Supp. V 1999)).

301. See Bendavid, *supra* note 299, at 20 (explaining that the new law "allows only one appeal in federal court, except under extraordinary circumstances, and the appeal must be filed within one year" of the exhaustion of state remedies).

302. *Id.*

303. *Id.* at 21.

304. *Id.*

305. Dieter, *supra* note 50 ("The current emphasis on faster executions, less resources for the defense, and an expansion in the number of death cases means that the execution of innocent people is inevitable. The increasing number of innocent defendants being found on death row is a clear sign that our process for sentencing people to death is fraught with fundamental errors—errors which cannot be remedied once an execution occurs."). Critics of the AEDPA point to cases in which death row prisoners were able to establish their innocence on successive habeas petitions. See Bendavid, *supra* note 299, at 20. Under the new AEDPA regime, these cases very well could have resulted in execution of the innocent. *Id.* Critics often point to the case of Lloyd Schlup, a Missouri death row prisoner who was sentenced to death in 1984 for killing a fellow inmate while serving time for another crime. *Id.* Years after Schlup's conviction, his appellate attorney found several eyewitnesses and a prison videotape, all of which corroborated Schlup's claim of innocence. *Id.* This new evidence proving Schlup's innocence was raised on a successive habeas petition, and Schlup was subsequently spared from execution. *Id.* Lawyers familiar with Schlup's case insist that his subsequent appeal would not have been allowed under the AEDPA and that he would have been executed. *Id.*

Admittedly, in the past couple of years, some moderate steps have been taken to protect innocent defendants.³⁰⁶ A number of states, for example, have enacted legislation that provides prisoners with post-conviction access to DNA evidence.³⁰⁷ Additionally, some state legislatures have recently increased funding for indigent defense.³⁰⁸ What has not yet emerged, however, is the criminal justice revolution that the lessons of DNA exonerations demands.³⁰⁹ Proof of an innocent person's execution may be the only thing that is capable of capturing the nation's attention and of prompting a serious dialogue about the full extent of needed reforms. Perhaps only the shock of our collective complicity in a wrongful execution will be enough to trigger this honest dialogue.

D. Addressing Policy Arguments Against Allowing Posthumous DNA Testing

Those opposing post-execution access to DNA evidence may argue that the need for finality in criminal proceedings counsels against allowing access to biological evidence after a death sentence has already been carried out. The perceived need for finality in death penalty cases has been a recurring concern of Congress and the federal courts.³¹⁰ When Congress passed the AEDPA in 1996, it significantly limited the number of appeals available to death row prisoners and set strict time limits on when appeals must be brought.³¹¹ Prior to the passage of the AEDPA, the Supreme Court

306. Richard C. Dieter, *The Death Penalty in 2001: Year End Report*, at <http://www.deathpenaltyinfo.org>, (under What's New/DPIC's 2001 Year End Report (last visited Feb. 27, 2002) (outlining reform legislation passed in 2001).

307. *Id.* at 4 (explaining that seventeen states have enacted legislation in 2001 "to provide inmates with greater opportunity for DNA testing").

308. *Id.* (noting that, in 2001, some states "made changes in their systems of indigent defense in an attempt to provide better representation").

309. Berlow, *supra* note 270, at 78 ("Although the Justice Department and a handful of state legislatures have examined pieces of the wrongful conviction puzzle, no government agency, federal or state, has conducted a comprehensive analysis of why such miscarriages occur—not even in Florida, where at least 18 innocent men have been discovered on death row since 1977.").

310. *See infra* note 312 and accompanying text. Senator Orrin Hatch, commenting on the passage of AEDPA, explained that the AEDPA "accomplished a decade-long effort to ensure that a . . . capital sentence by a state court could be carried out without awaiting the disruptive, dilatory tactics of counsel for condemned prisoners." Deborah L. Stahlkopf, Note, *A Dark Day for Habeas Corpus: Successive Petitions Under the Antiterrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1115 (1998) (citing *A Constitutional Amendment for Crime Victims, 1997: Hearing on S.J. Res. 6 Before the Senate Judiciary Committee*, 105th Cong. (1997), available at 1997 WL 241160).

311. *See* 28 U.S.C. § 2244(b), (d) (Supp. V 1999).

itself took repeated steps to curtail the capital appeals process.³¹² In addition to the specific concern of limiting death penalty appeals, courts normally refuse to consider *any* criminal appeal that is brought after the defendant has died, or after the defendant's sentence has already been completed.³¹³ Under such circumstances, the defendant's appeal is generally considered moot.³¹⁴

Pointing to these examples of legislative and judicial commitment to finality in criminal proceedings, opponents of post-execution access to DNA evidence may argue that courts should not facilitate continued scrutiny of a capital case years after the sentence has already been carried out. Arguing against allowing DNA testing of biological evidence in the O'Dell case, the Virginia Attorney General's office expressed such a concern for finality, explaining that "Mr. O'Dell had every reasonable opportunity to litigate and re-litigate and re-re-litigate the question of his innocence At some point in all of these proceedings, Mr. O'Dell has said and done everything he could have and should have and so have his attorneys."³¹⁵

The doctrines of finality and mootness may well be relevant in considering whether the family of the executed, representing the interests of the executed in clearing his name, should be granted post-execution access to physical evidence in the state's custody. When bringing a civil suit for access, the family of the executed in effect brings suit in the name of their loved one, continuing the executed's legal challenge to his conviction. Because the suit is arguably brought in the interests of the criminal defendant himself, the principles of finality and mootness, which restrict the defendant's own right to challenge his conviction, may similarly restrict his loved ones' right to challenge the validity of the execution.

In contrast, when third parties, like the media or a public interest group, seek access to the evidence—not in the name of the executed, but in the name of the public generally—the principles of finality are not implicated. Such third-party suits are brought to further the public's right to assess the functioning of government

312. See Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 486 (1995) ("Almost two decades ago the Supreme Court set out to reform habeas corpus. Flying banners of federalism and finality, the Court signaled its intention to impose strict limitations upon the availability of the writ.").

313. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5, at 1271-72 (3d ed. 2000).

314. *Id.*

315. See, e.g., Record of *Fruit* Hearing, *supra* note 17, at 84-85.

institutions.³¹⁶ They are not merely a disguised effort to continue the executed's individual quest for justice.³¹⁷ Consequently, notions of finality should not defeat the legitimate access claims of third parties who truly represent the public interest in monitoring government activity.

IV. THE NEED FOR LEGISLATION MANDATING ACCESS TO DNA EVIDENCE

As discussed in Part II of this Note, parties who have sought access to DNA evidence through existing legal avenues have met with limited success.³¹⁸ In those cases in which DNA testing has had the potential to exonerate the executed conclusively, the state has aggressively opposed access, and the courts have sided with the state.³¹⁹ These cases demonstrate that the legal avenues currently available to those seeking post-execution access to DNA evidence are insufficient.

Existing legal bases for access are unreliable for two reasons. First, some legal bases simply do not provide a solid legal foundation upon which to grant access. Under the First Amendment, for example, press access to information in the government's control is conditioned upon a historical public right of access to such information.³²⁰ Since the public has not historically enjoyed access to criminal evidence in a state's custody,³²¹ it is difficult to craft a winning argument for access under the First Amendment. A claim under the First Amendment will prevail only if a court is willing to entertain a creative argument that the public's historical access to court documents encompasses a right to inspect criminal evidence.³²² Second, other legal bases for access afford trial judges enormous discretion in deciding whether to allow access at all.³²³ Virginia's Freedom of Information Act, for example, provides that the trial judge

316. See *supra* notes 204-06 and accompanying text; see also AJC Motion to Intervene, *supra* note 54, at 1 (explaining that "The Journal-Constitution . . . has a right and responsibility to inspect court records and evidence in order to inform the public about the operation of the criminal justice system").

317. See *id.*

318. See *supra* Part II.

319. See Opinion Letter, *supra* note 44, at 9; Record of Fruit Hearing, *supra* note 17, at 91.

320. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-12 (1986).

321. See Opinion Letter, *supra* note 44, at 7.

322. See *supra* notes 184-85 and accompanying text.

323. See *supra* notes 130-35 and 214-15 and accompanying text.

may, in his or her discretion, grant access to evidence.³²⁴ Since those requesting access to the evidence seek to expose the fallibility of the court system, it is unlikely that this discretion will often be exercised to allow access.³²⁵

Compelling policy arguments support the right of public and press access to DNA evidence to assess the reliability of executions. As discussed in Part III of this Note, permitting access is consistent with the principles that underlie the freedom of information acts, the common law right of access, and the First Amendment. These principles assert that public and press access to information within the government's control promotes democracy and protects against government corruption.³²⁶ Proof of a wrongful execution would further both of these principles by: (1) fostering a more complete dialogue about the appropriateness of retaining capital punishment, and (2) drawing attention to the patterns of corruption and incompetence in the criminal justice system that lead to wrongful convictions and executions.

This Note advocates that legislation be passed to ensure post-execution access to DNA evidence in a state's custody. Specifically, a provision that mandates post-execution access to DNA evidence should be added to states' freedom of information acts. The aim of these provisions would be to provide the media and the general public with the means to assess the reliability of questionable executions.

The legislation requiring post-execution access to DNA evidence should afford little discretion to trial judges. As discussed earlier in this Note, exposing a wrongful execution would severely undermine public confidence in the entire criminal justice system, including the court system.³²⁷ With its own reputation in the balance, a court given broad discretion over petitions for access simply cannot be expected to grant access liberally. The statute should therefore be worded to mandate access in any case in which DNA testing has the potential to yield exculpatory evidence. The statute should not require that DNA testing be capable of conclusively exonerating the executed prisoner. In other words, a mere demonstration that DNA testing *could* provide *any* evidence of innocence should be sufficient to achieve access. By requiring only this very

324. VA. CODE ANN. § 2.2-3706 (Michie 2001) (excluding criminal evidence from the mandatory disclosure provisions of the freedom of information act and providing that such evidence "may be disclosed by the custodian, in his discretion").

325. See *supra* notes 141-44 and accompanying text.

326. See *supra* notes 259-60 and accompanying text.

327. See *supra* note 279 and accompanying text.

minimal threshold showing, the statute will provide access in cases like Coleman and O'Dell—where DNA testing of the rape kits could conclusively exonerate those executed³²⁸—and in Felker and Jones—where favorable DNA test results could, at best, suggest the deceased's innocence.³²⁹

While affording the trial court little discretion over whether to grant access, the legislation should provide courts with the discretion to shape the terms of access. By dictating the terms of access, courts will thus be able to protect the state's interest both in maintaining the integrity of the evidence and in ensuring reliability of the testing. In exercising its discretion, a court could, for example, require that a neutral, reputable lab conduct the testing, or that the state retain a portion of the sample. A court should not, however, be able to categorically deny a request to test evidence that is in the state's custody, unless the state can demonstrate that such testing would have no probative value regarding the guilt or innocence of the deceased.

V. CONCLUSION

The execution of an innocent defendant led to the abolishment of the death penalty in England in 1965.³³⁰ More than thirty years later, Illinois Governor George Ryan imposed a moratorium on executions after his state came within forty-eight hours of executing an innocent man.³³¹ In both cases, the stark illustration of the risk of executing the innocent transformed the public policy debate over the use of the death penalty.

In the case of Joseph O'Dell, the Virginia Attorney General's office warned that if DNA tests exonerated O'Dell, it "would be

328. See *supra* note 143 and accompanying text.

329. See *supra* note 142 and accompanying text; see also Malone, *supra* note 43 (explaining that DNA tests in the Jones case might implicate other suspects and corroborate Jones's claim of innocence).

330. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 471 (1996) (explaining that "executions of innocent defendants, or of defendants widely believed to be innocent, have played major parts in successful movements to abolish the death penalty, from Michigan in 1846 to England in 1965").

331. Governor Ryan explained, "I cannot support a system which, in its administration, has proven so fraught with error, and has come so close to the ultimate nightmare, the state's taking of innocent life." Stuart Taylor, Jr., *The Death Penalty: To Err Is Human*, NAT'L J., Feb. 12, 2000, at 450. In his announcement of the moratorium, Governor Ryan specifically referred to the case of Anthony Porter, an innocent man who spent sixteen years on death row and came within forty-eight hours of being executed. Alan Berlow, *Lethal Injustice*, AM. PROSPECT, Mar. 27-Apr. 10, 2000, at 54, available at <http://www.prospect.org/print/V11/10/berlow-a.html> (last visited Mar. 11, 2002).

shouted from the rooftops that the Commonwealth of Virginia executed an innocent man.”³³² This certainly is true. If the Virginia courts had allowed the third-party plaintiffs to test the evidence, and the tests had exonerated O’Dell, the media would have widely broadcast the news that the Commonwealth of Virginia, in the name of all of its citizens, had executed an innocent man.

But, rather than fearing the potential exposure of the system’s fallibility, we should welcome the opportunity to examine any shortcomings of the capital punishment system. If, in fact, innocent people have been executed in recent history, the public benefits from discovering such occurrences and implementing the reforms necessary to prevent future tragedies.

*Anne-Marie Moyes**

332. Record of *Fruit* Hearing, *supra* note 17, at 82.

* This Note is dedicated to Erskine Johnson and the hundreds of other innocent people in U.S. prisons for whom DNA offers no hope of liberation. For such individuals, whose cases lack any biological evidence, the road to exoneration is long and exceptionally difficult.

* * *