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POST-CONVICTION ACCESS TO DNA TESTING: THE FEDERAL GOVERNMENT DOES NOT OFFER AN ADEQUATE SOLUTION, LEAVING THE STATES TO REMEDY THE SITUATION

David A. Schumacher⁺

“Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”¹ Judge Learned Hand wrote these words in an attempt to dispel concerns about the possibility of wrongful convictions.² In recent decades the availability of post-conviction DNA testing has revealed that wrongful convictions are indeed a very real problem in the American legal system.³ Since 1988, more than two hundred wrongfully convicted Americans have been exonerated by demonstrating their innocence through post-conviction DNA testing.⁴ This number is a testament to the fact that innocent

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

2. See Chet Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLIAMETTE L. REV. 373, 411 (2005).

3. See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 527 (2005) (“The number of DNA exonerations has increased across this period, from one or two a year in 1989 to 1991, to an average of six a year from 1992 through 1995, to an average of twenty a year since 2000.”); see also 150 CONG. REC. H8179, 8189 (daily ed. Oct. 6, 2004) (statement of Rep. Delahunt) (“[T]he criminal justice system is about the search for the truth, and like all human enterprises, it is fallible. Judges and jurors and police, eye witnesses, defense counsel and prosecutors are all human beings and all make mistakes. I served as a prosecutor for some 20 years. I made mistakes, and those mistakes are etched forever in my mind. But we have the means now at our disposal [*i.e.*, DNA testing] to minimize the possibility of error, and especially where lives are at stake, we have no choice, we have no option, we must take advantage of them.”).

4. See The Innocence Project, *Know the Cases*, <http://www.innocenceproject.org/know/> (last visited Aug. 18, 2008); see also Edward K. Cheng, *Reenvisioning Law Through the DNA Lens*, 60 N.Y.U. ANN. SURV. AM. L. 649, 649 (2005) (“In recent times, no development has transformed the practice of criminal justice as much as DNA evidence. In little over fifteen years, DNA profiling has produced nothing short of a paradigm shift.” (footnote omitted)); Jennifer Boemer, Student Article, *In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 WM. MITCHELL L. REV. 1971, 1976 (2001) (“When DNA testing was introduced to the criminal justice scene, prosecutors saw it as a powerful tool to assist in the conviction and incarceration of the guilty. Over the last few years, DNA analysis has become a powerful tool to the defense to exonerate those who have already been convicted. Using DNA testing at the post-conviction stage is a controversial issue that raises both procedural and substantive questions.”); Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 589–90 (2004) (“DNA testing,

people have been convicted in the past and may continue to be convicted today.⁵ Despite growing public awareness and recent federal legislation, many inmates continue to face an almost insurmountable uphill climb in their attempts to gain access to evidence for DNA testing.⁶ The problem is that the two primary means of challenging wrongful convictions are inadequate and do not allow inmates the access they need to physical evidence in order to prove their innocence.

Currently, federal law provides two options for inmates who seek to challenge their convictions with DNA evidence. The first option to gain access to evidence for use in DNA testing is for the inmate to establish a cause of action under § 1983.⁷ Section 1983 “gives a cause of action for anyone subjected ‘to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws’ by a person acting under color of state law.”⁸ The Supreme Court has yet to rule on whether post-conviction claims are cognizable under § 1983, and the federal circuit courts of appeals are split on

regardless of the form, yields one of three results: exclusion, meaning that the individual is not the source of the material tested; non-exclusion, meaning that the individual cannot be excluded as the source; or no result, meaning that the analysis cannot be completed. Exclusion is a definitive finding, but non-exclusion moves the inquiry into a statistical analysis to determine the probability that the individual is the source of the material. The power—that is, the degree of reliability and accuracy—of the statistical calculation varies depending on the type of DNA test performed. The most recent test, the polymerase chain reaction (PCR), requires much smaller quantities of source material, can use a wider variety of material, and tends to be more successful in analyzing materials from rape cases. In criminal proceedings, the plaintiff hopes to use retesting to find and develop exculpatory evidence, build a case for innocence, and, finally, secure release from custody.” (internal citations omitted); Courttv.com, *First for a Woman: DNA Frees Mother Convicted of Killing Daughter*, Nov. 29, 2007, <http://www.courtstv.com/news/2007/1129/dejac-ctv.html> (“A judge’s decision [on Nov. 28, 2007] to vacate the verdict and order a new trial made [Lynn DeJac] the first woman in the U.S. to have a murder conviction overturned on the basis of DNA evidence.”); Human Genome Project Information, DNA Forensics, http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last visited Aug. 18, 2008) (explaining in detail DNA testing and how it is done for those unfamiliar with the process).

5. See Gross, *supra* note 3, at 542 (“One way to think of false convictions is as a species of accidents. Like many accidents, they are caused by a mix of carelessness, misconduct, and bad luck.”); see also Hon. Stephen J. Fortunato, Jr., *Judges, Racism, and the Problem of Actual Innocence*, 57 ME. L. REV. 481, 517 (2005) (The article argues that United States courts currently face “a time in our legal history when there is no cause to be smug that the Anglo-Saxon criminal trial as we know it unerringly reaches the correct result. On the contrary, as the exoneration studies show, the outcome of the American criminal trial is often fatally wrong.”).

6. See Dylan Ruga, Comments, *Federal Court Adjudication of State Prisoner Claims for Post-Conviction DNA Testing: A Bifurcated Approach*, 2 PIERCE L. REV. 35, 35–36 (2004).

7. 42 U.S.C. § 1983 (2000).

8. *McKithen v. Brown*, 481 F.3d 89, 99 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1218 (2008).

the matter.⁹ The Fourth,¹⁰ Fifth,¹¹ and Sixth¹² Circuit Courts of Appeals have all held that an inmate seeking to challenge a conviction through DNA evidence does not have a cognizable claim because a § 1983 lawsuit amounts to a direct attack on the legitimacy of the conviction.¹³

Four other circuits have gone the opposite way.¹⁴ The Second,¹⁵ Seventh,¹⁶ Ninth,¹⁷ and Eleventh¹⁸ Circuit Courts of Appeals, as well as district courts residing in two circuits that have yet to speak on this issue,¹⁹ have held that while an inmate has a cognizable claim for access to DNA testing under § 1983, the process for release must still be found in a subsequent habeas corpus lawsuit.²⁰

The case of Johnnie Lee Savory II illustrates the shortcomings of § 1983.²¹ When James Robinson and Connie Cooper were killed in Peoria, Illinois, in 1977, Savory was charged with their murder.²² Though only fourteen at the time, Savory was convicted, but the conviction was overturned on appeal because of an involuntary confession introduced at trial.²³ The State of Illinois

9. See *Boyle v. Mayer*, 46 F. App'x 340, 340–41 (6th Cir. 2002); *Kutzner v. Montgomery County*, 303 F.3d 339, 341 (5th Cir. 2002); *Harvey v. Horan*, 278 F.3d 370, 375 (4th Cir. 2002). *But see McKithen*, 481 F.3d at 103; *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 2433 (2007); *Osborne v. Dist. Attorney's Office for the Third Judicial Dist.*, 423 F.3d 1050, 1054 (9th Cir. 2005), *remanded to* 445 F. Supp. 2d 1079 (D. Alaska 2006), *aff'd*, 521 F.3d 1118 (9th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3009 (U.S. Nov. 3, 2008) (No. 08-6); *Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002).

10. See *Harvey*, 278 F.3d at 375.

11. See *Kutzner*, 303 F.3d at 340.

12. See *Boyle*, 46 F. App'x at 340–41.

13. See *Harvey*, 278 F.3d at 378. The fact that Harvey, the inmate, was attempting to “use his [§ 1983] claim for access to evidence to set the stage for a future attack on his confinement” was unacceptable to that court. *Id.*

14. See *McKithen*, 481 F.3d at 103; *Savory*, 469 F.3d at 672; *Osborne*, 423 F.3d at 1054; *Bradley*, 305 F.3d at 1290.

15. See *McKithen*, 481 F.3d at 103.

16. See *Savory*, 469 F.3d at 672.

17. See *Osborne*, 423 F.3d at 1054.

18. See *Bradley*, 305 F.3d at 1290.

19. See *Wade v. Brady*, 460 F. Supp. 2d 226, 237–38 (D. Mass. 2006); *Derrickson v. Del. County Dist. Attorney's Office*, No. 04-1569, 2006 WL 2135854, at *7–8 (E.D. Pa. July 26, 2006).

20. See *Savory*, 469 F.3d at 672; see also 28 U.S.C. § 2254 (2000) (describing the requirements of a habeas corpus petition).

21. See *Savory*, 469 F.3d at 667.

22. *Id.* at 669.

23. *People v. Savory*, 403 N.E.2d 118, 124 (Ill. App. Ct. 1980); see also Margaret A. Berger, *The Impact of DNA Exonerations on the Criminal Justice System*, 34 J.L. MED. & ETHICS 320, 323 (2006) (“[W]e know that false confessions were made in quite a few of the [exoneration] cases, and we know that the police have many techniques for eliciting confessions. Indeed the Supreme Court in 2004 in *Missouri v. Seibert* noted various techniques the police had developed and disseminated in training manuals for evading the prophylactic effect *Miranda* warnings were

retried Savory in 1981 and he was again convicted.²⁴ During the second trial, the State offered physical evidence against Savory, including hair similar to his, a bloody knife found in his home, and pants Savory “may have worn bearing a bloodstain of the same type as the female victim’s blood.”²⁵ Following that conviction, Savory sought relief numerous times through state and federal courts, culminating in the filing of a § 1983 lawsuit in April 2005.²⁶ Despite the court’s decision that Savory’s suit was cognizable under § 1983,²⁷ he nevertheless lost his case because his claims were not timely filed.²⁸ Though § 1983 could have helped a potentially innocent man, it was inadequate in the *Savory* case.

The second option for post-conviction DNA testing is for an inmate to bring an action under the Justice for All Act of 2004 (JFAA).²⁹ The JFAA was intended to address some of the inadequacies of current methods of access to physical evidence.³⁰ Section 3600, known as the Innocence Protection Act (IPA), is the main element of the JFAA dealing with post-conviction DNA testing.³¹ Specifically, § 3600 permits an inmate to challenge a conviction through DNA evidence if the individual can satisfy the elements prescribed by the IPA.³² Senator Leahy, chairman of the Senate Judiciary Committee and one of the main proponents of the JFAA, explained that one of the central purposes of the IPA was to “reduce the risk that innocent persons may be executed” and “[e]nsure that convicted offenders are afforded an opportunity to prove their innocence through DNA testing”³³ While § 3600 was meant to address many of the difficulties created by the wrongful execution of

supposed to have on false confessions. And given the huge advantages that suspects may gain by pleading guilty, such as avoiding the death penalty, it is remarkably harsh to bar them from post-conviction DNA testing, particularly as many had probably never heard of DNA, or, if they had, did not comprehend at the time they pled that DNA evidence could prove innocence.” (footnotes omitted)).

24. *Savory*, 469 F.3d at 669.

25. *Id.*

26. *Id.*

27. *Id.* at 672.

28. *Id.* at 675. Cf. David DeFoore, Comment, *Postconviction DNA Testing: A Cry for Justice From the Wrongly Convicted*, 33 TEX. TECH L. REV. 491, 503 (2002) (“Although there have been many recent changes in the law regarding postconviction DNA testing and admissibility, it has normally been difficult, under both federal and state law, to obtain postconviction DNA testing because of time limits on motions for a new trial based upon newly discovered evidence.”).

29. Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended in scattered section of 10, 18, 28, and 42 U.S.C.).

30. *Id.*

31. 18 U.S.C. § 3600 (Supp. IV 2006).

32. *Id.*

33. Sen. Leahy, Major Issues – Innocence Protection Act, <http://leahy.senate.gov/issues/ipa/index.html> (last visited Aug. 18, 2008).

innocent people,³⁴ § 3600 itself is both confusing in the way it is written³⁵ and unwieldy in practice.³⁶

Since its passage, the IPA has often failed to provide inmates the opportunity to prove their innocence, as witnessed in the case of Danny Boose.³⁷ Boose was accused of kidnapping and raping a woman on July 4, 1995.³⁸ Prior to trial, DNA taken from pants found in Boose's house was compared to a DNA sample taken from Boose.³⁹ The FBI concluded that the samples contained Boose's DNA and that it was Boose's semen found on the pants.⁴⁰ The test results bolstered the claims of an eyewitness and ten others who testified that they either saw Boose commit one of the acts or heard him talk about the crimes afterward.⁴¹ Though Boose continuously professed his innocence, he was not able to obtain relief through re-testing under the too-numerous requirements of § 3600.⁴²

This Comment argues that neither § 1983 nor the IPA provide inmates an adequate opportunity to obtain post-conviction DNA testing. In Part I, this Comment explores the basis for the current circuit split over § 1983 lawsuits. Part II then examines the inadequacies of the IPA, in which Congress attempted to address the post-conviction conundrum. Part III next analyzes why three of the circuits have erred in denying § 1983 actions in light of Supreme Court precedent and points out how the Court must correct those circuits in the future. This Part also analyzes the deeper problems § 1983 cannot solve, as demonstrated by the case of Johnnie Lee Savory II. This Comment will then argue that the IPA's overly strict nature causes it to fall short of the potential hoped for by innocence proponents and lawmakers. Finally, Part IV proposes that model legislation is necessary to prevent wrongful executions and the prolonged imprisonment of the innocent by allowing them to DNA-test their evidence.

34. *See id.* (The Senator stated that one of the most important features of the legislation was “[e]nsur[ing] that convicted offenders are afforded an opportunity to prove their innocence through DNA testing . . .”).

35. *See, e.g.*, 18 U.S.C. § 3600(a). Subpart (a) of § 3600 contains no less than ten requirements an inmate must meet in order to access his physical evidence for testing. *Id.*

36. *See, e.g.*, *United States v. Boose*, 498 F. Supp. 2d 887, 890–92 (N.D. Miss. 2007) (denying plaintiff's § 3600 claim because he failed to satisfy four of the ten requirements of § 3600 (a)).

37. *See id.*

38. *Id.* at 888.

39. *Id.*

40. *Id.* at 888–89.

41. *Id.* at 889.

42. *Id.* at 890–92.

I. FROM *PREISER* TO *DERRICKSON*: DEVELOPING THE FAIR USE OF § 1983

A. What § 1983 Requires of a Litigant and its Early Limitations

Any person who alleges a deprivation of civil rights under color of state law may file a § 1983 lawsuit.⁴³ A complainant must make two specific allegations in order to establish a valid § 1983 lawsuit.⁴⁴ First, the plaintiff must allege that the defendant deprived him of a federal constitutional right.⁴⁵ Second, the plaintiff must allege that the defendant acted under color of state law.⁴⁶ The Supreme Court has commented that § 1983 should be interpreted broadly to further its purpose as remedial legislation.⁴⁷

Initially, courts struggled to decide how § 1983 should be handled in relation to habeas corpus lawsuits. In 1973, the Supreme Court issued a landmark decision, *Preiser v. Rodriguez*, concluding that § 1983 cannot be used to question confinement.⁴⁸ In *Preiser*, state prison inmates filed § 1983 claims to obtain the restoration of time they had accrued for good behavior (good-time credit).⁴⁹ The Court held that state prisoners could not challenge the fact or duration of their confinement under § 1983 because only habeas corpus could be used for that purpose.⁵⁰ *Preiser* reached this conclusion based on the Court's view that Congress established habeas corpus as the "appropriate remedy" in such situations.⁵¹ Furthermore, the Court noted that § 1983 cannot be used as an end-run around the habeas corpus exhaustion requirements because Congress specifically passed habeas legislation mandating exhaustion.⁵²

43. 42 U.S.C. § 1983 (2000) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.").

44. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

45. *Id.*

46. *Id.*

47. *Id.* at 639.

48. *See Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973).

49. *Id.* at 481.

50. *Id.* at 490.

51. *Id.* ("In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.").

52. *Id.* at 489.

The Supreme Court expanded upon *Preiser* and the use of § 1983 in *Heck v. Humphrey*, decided in 1994.⁵³ In that case, the plaintiff sought compensatory and punitive damages for a conviction he claimed was obtained illegally.⁵⁴ The Court held that a state prisoner cannot bring a § 1983 claim that “would necessarily imply the invalidity of [the plaintiff’s] conviction or sentence” even if the plaintiff was not seeking release from prison.⁵⁵ The Court emphasized that the only way a prisoner could challenge the fact or duration of his confinement, directly or indirectly, was through habeas corpus.⁵⁶

B. How Three Circuit Courts of Appeals Used Preiser and Heck to Deny § 1983 Lawsuits Seeking Post-Conviction DNA Testing

In the wake of the Supreme Court decisions in *Preiser* and *Heck*, the Fourth, Fifth, and Sixth Circuits have each ruled that inmates may not bring § 1983 lawsuits in order to compel DNA testing.⁵⁷ The earliest of these decisions was *Harvey v. Horan*, in which the Fourth Circuit decided to bar the use of § 1983 if the inmate’s true desire in the lawsuit was a future attack on his incarceration.⁵⁸ Two other circuits soon fell in line.

In *Kutzner v. Montgomery County*, the Fifth Circuit reviewed an inmate’s claim that prosecutors had refused to release physical evidence for DNA testing that might have led to his exculpation.⁵⁹ *Kutzner*, like *Harvey*, held that

53. *Heck v. Humphrey*, 512 U.S. 477, 481–82 (1994); see also Eric J. Savoy, *Heck v. Humphrey: What Should State Prisoners Use When Seeking Damages From State Officials . . . Section 1983 or Federal Habeas Corpus?*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 109, 138 (1996) (“[T]he anticipated Supreme Court case [i.e., *Heck*] has made a complex area of the law even more complicated.”). Instead of simply applying the holding from *Preiser*, the Court offered an alternative rationale. *Id.*

54. *Heck*, 512 U.S. at 479 (“The complaint alleged that respondents, acting under color of state law, had engaged in an ‘unlawful, unreasonable, and arbitrary investigation’ leading to petitioner’s arrest; ‘knowingly destroyed’ evidence ‘which was exculpatory in nature and could have proved [petitioner’s] innocence’; and caused ‘an illegal and unlawful voice identification procedure’ to be used at petitioner’s trial. App. 5–6. The complaint sought, among other things, compensatory and punitive monetary damages. It did not ask for injunctive relief, and petitioner has not sought release from custody in this action.” (alteration in original)).

55. *Id.* at 487.

56. *Id.* at 481; see also *Preiser*, 411 U.S. at 490.

57. See *Boyle v. Mayer*, 46 F. App’x 340, 340–41 (6th Cir. 2002); *Kutzner v. Montgomery County*, 303 F.3d 339, 340 (5th Cir. 2002); *Harvey v. Horan*, 278 F.3d 370, 378 (4th Cir. 2002).

58. *Harvey*, 278 F.3d at 378. According to the court, *Harvey* wanted to “use his [§ 1983] claim for access to evidence to set the stage for a future attack on his confinement. Therefore, his claim is effectively a petition for a writ of habeas corpus.” *Id.* The court would not allow *Harvey* to do any such thing. *Id.*

59. *Kutzner*, 303 F.3d at 340. It is not uncommon for exonerated prisoners to accuse prosecutors of having acted poorly. In one recent case, however, the prosecutor struck back by suing a freed inmate who wrote a book about his experience for libel. See *TheKansasCityChannel.com, KC Man Wrongly Imprisoned Sued By Prosecutor*, Oct. 3, 2007, <http://www.kmbc.com/news/14258640/detail.html?taf=kcl>. But see Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of*

the inmate was precluded from bringing a § 1983 claim to compel DNA testing under precedent set by *Heck*.⁶⁰ The court concluded that the plaintiff's claim was really a habeas corpus petition and, therefore, he could not succeed by disguising his case as something else under § 1983.⁶¹

Finally, the Sixth Circuit agreed with the Fourth and Fifth Circuits in *Boyle v. Mayer*.⁶² There, the court dismissed Boyle's claim that the prosecutor would not assist him in DNA testing and declared his § 1983 claim invalid under *Preiser* and *Heck*.⁶³ When *Boyle* is viewed in combination with *Kutzner* and *Harvey*, it is evident that these circuits view § 1983 lawsuits seeking post-conviction DNA testing as habeas petitions in disguise, and reject them accordingly.⁶⁴

C. Another Circuit Court of Appeals Went the Opposite Way and Allowed § 1983 in the Post-Conviction Setting

At the same time that the Fourth, Fifth, and Sixth Circuits were rejecting post-conviction § 1983 lawsuits, the Eleventh Circuit took the bold step of allowing them in *Bradley v. Pryor*.⁶⁵ In *Bradley*, an inmate who was convicted and sentenced to death filed a § 1983 claim seeking to obtain DNA evidence from the government.⁶⁶ His § 1983 motion was dismissed by the lower court, which described the motion as the "'functional equivalent' of a second habeas petition" that had not been filed according to proper habeas procedures.⁶⁷ Seen as a habeas corpus petition, *Bradley*'s case would have been dismissed under the Fourth, Fifth, and Sixth Circuit's approach; however, the Eleventh Circuit determined that DNA testing may yield evidence that is either exculpatory or

Innocence, 38 CAL. W. L. REV. 389, 410–12 (2002) (arguing for statutory standards whereby prosecutors "seek the fullest possible accounting of the truth," give full disclosure in completed cases, and "utilize the most accurate scientific methods" to ensure those convicted were properly convicted).

60. *Kutzner*, 303 F.3d at 340 (noting that the court "agree[s] with the analysis of the Fourth Circuit" in *Harvey*).

61. *Id.* at 340–41.

62. *Boyle*, 46 F. App'x at 340.

63. *Id.* at 340 ("Boyle plainly challenged the validity of his criminal convictions and the fact or duration of his continued confinement. Thus, the district court properly found that the exclusive federal remedy for his claims was a writ of habeas corpus.").

64. See *Boyle*, 46 F. App'x at 340 (The court held that the defendant's "exclusive federal remedy . . . was a writ of habeas corpus."); *Kutzner*, 303 F.3d at 341 (concluding that the defendant's § 1983 claims "were only cognizable in habeas corpus"); *Harvey v. Horan*, 278 F.3d 370, 374 (4th Cir. 2002) ("While we agree with *Harvey* that the question of guilt or innocence lies at the heart of the criminal justice system, we also believe that the proper process for raising violations of constitutional rights in criminal proceedings cannot be abandoned. Because the substance of a claim cannot be severed from the proper manner of presenting it, we find *Harvey*'s § 1983 action to be deficient.").

65. *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002).

66. *Id.* at 1288.

67. *Id.* at 1289.

inculpatory.⁶⁸ Consequently, the DNA testing would not amount to a direct, or even an indirect, attack on Bradley's conviction or duration of sentence.⁶⁹ Rather, the testing would only be an initial step in a long legal battle.⁷⁰ Based on this reasoning, the Eleventh Circuit reversed and remanded the decision of the district court.⁷¹

*D. The Supreme Court Bolstered the Eleventh Circuit with a Focus on
"Necessarily"*

In 2005, the Supreme Court addressed a portion of the circuit split between the Fourth, Fifth, and Sixth Circuits and the Eleventh Circuit in favor of the Eleventh Circuit in *Wilkinson v. Dotson*.⁷² In *Dotson*, two state prisoners, William Dotson and Rogerico Johnson, brought a § 1983 lawsuit to complain, primarily, about what they saw as ex post facto parole denials.⁷³ The lower court denied relief, stating that the men should have filed under habeas corpus, rather than § 1983.⁷⁴ The Sixth Circuit reversed the lower court, and Ohio parole officials appealed.⁷⁵ The Supreme Court held that the inmate's claims were cognizable under § 1983 and affirmed the decision of the Sixth Circuit.⁷⁶

Although *Dotson* addressed parole and not post-conviction access to evidence for DNA testing, the Court's discussion of *Preiser* and *Heck* offered some important clarification about how the principles set forth in those cases

68. *Id.* at 1291; see also 150 CONG. REC. S11609, 11610 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy) ("Post-conviction DNA testing does not merely exonerate the innocent; it can also solve crimes and lead to the incarceration of very dangerous criminals. In case after case, DNA testing that exculpates a wrongfully convicted individual also inculpates the real criminal. Just this year, for example, the exoneration of Arthur Lee Whitfield in Virginia led to the identification of another inmate, already serving a life sentence, as the true perpetrator of two rapes for which Whitfield had served 22 years in prison. Last year, DNA evidence in the case of Kirk Bloodsworth was matched to another man, a convicted sex offender who has now pleaded guilty to the horrendous rape-murder that sent Mr. Bloodsworth to Maryland's death row.").

69. *Bradley*, 305 F.3d at 1291 ("The results of any DNA tests that are eventually performed may be inconclusive, they may be insufficiently exculpatory, or they may even be inculpatory. That these scientific possibilities exist, in and of itself, suffices to establish that the asserted right of mere access is not a direct, or for that matter even an indirect, attack on one's conviction or sentence." (quoting *Harvey v. Horan*, 285 F.3d 298, 308 (4th Cir. 2002) (Luttig, J., respecting the denial of reh'g en banc))).

70. *Id.* ("[T]he petitioner would have to initiate an entirely separate action at some future date, in which he would have to argue for his release upon the basis of a separate constitutional violation altogether.").

71. *Id.* at 1292 (noting that Bradley merely sought the production of evidence in the form of DNA testing).

72. *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

73. *Id.* at 76–77 (noting that both defendants claimed that the state retroactively applied harsher parole standards).

74. *Id.* at 77.

75. *Id.*

76. *Id.* at 85.

might apply to post-conviction testing.⁷⁷ First, the Court defined the clear limits of *Preiser*, which it stated prevents an inmate from filing a § 1983 lawsuit to challenge the “fact or duration of his confinement” and prevents him from seeking either release or the shortening of his sentence.⁷⁸ Second, the Court explained that its decision in *Wolff v. McDonnell* meant that § 1983 could not be used to restore good-time credit, but could be used to get a statement demonstrating that the procedures used to deny those credits were invalid.⁷⁹ The Court then proceeded to its main point: that from *Preiser* onward the Court had demanded habeas petitions when inmates wanted to invalidate the duration of their incarceration.⁸⁰ Focusing on the term “necessarily,”⁸¹ the Court concluded that an inmate’s § 1983 lawsuit would not be barred if the result of that suit would *not necessarily* result in his release.⁸² Since Dotson and Johnson’s lawsuit did not necessitate their release, it was allowed to go forward.⁸³

E. Other Circuits Keyed on “Necessarily” and Followed the Eleventh Circuit’s Model

Other circuit courts in the United States have since applied the reasoning of *Dotson* and *Bradley* by allowing § 1983 lawsuits in post-conviction DNA cases. The first such instance occurred only a few months after the *Dotson* decision in the Ninth Circuit case of *Osborne v. District Attorney’s Office for the Third Judicial District*.⁸⁴ There, Osborne filed a § 1983 lawsuit to compel DNA testing while his state appeal for relief was still pending.⁸⁵ The district court relied on *Heck* and dismissed the § 1983 claim, stating that, by filing the

77. *Id.* at 78–84 (explaining the history of the Court’s jurisprudence regarding § 1983 challenges to an inmate’s confinement).

78. *Id.* at 79.

79. *Id.* at 79–80 (citing *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)).

80. *Id.* at 81 (“[T]he Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State’s custody.”).

81. *Id.* at 81–82.

82. *Id.* (“These cases, taken together, indicate that a state prisoner’s § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner’s suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.”); see also *Edwards v. Balisok*, 520 U.S. 641, 645 (1997) (focusing on whether the § 1983 claim “necessarily” implies the conviction was invalid in a good-time credit case).

83. *Dotson*, 544 U.S. at 82 (concluding that both respondents had valid § 1983 suits).

84. 423 F.3d 1050 (9th Cir. 2005), *remanded to* 445 F. Supp. 2d 1079 (D. Alaska 2006), *aff’d*, 521 F.3d 1118 (9th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3009 (U.S. Nov. 3, 2008) (No. 08-6).

85. *Id.* at 1052.

claim, Osborne was “set[ting] the stage’ for an attack on his underlying conviction,” and therefore his only remedy was a habeas petition.⁸⁶ The Ninth Circuit disagreed;⁸⁷ it concluded that “§ 1983 and habeas are not always mutually exclusive.”⁸⁸ The court indicated that Osborne’s lawsuit did not necessarily challenge his conviction because it would provide him access to evidence that could actually prove, rather than disprove, his guilt.⁸⁹ Even if the evidence exonerated him, another action based on a completely separate constitutional violation would be needed to overturn his conviction.⁹⁰

The Ninth Circuit’s lead was subsequently followed by the Seventh Circuit in its decision of *Savory v. Lyons*.⁹¹ As discussed above, Savory was a convicted murderer who sought DNA testing to prove his innocence.⁹² The Seventh Circuit analyzed whether Savory’s claim was cognizable under § 1983 and, like the *Dotson* court, focused on whether the § 1983 claim “necessarily” invalidated the confinement or the duration of the confinement.⁹³ The court analyzed the approaches taken by the Fourth, Fifth, and Sixth Circuits, but rejected them.⁹⁴ Instead, the court adopted the approach taken by the Eleventh and Ninth Circuits, finding it “more consistent with *Preiser* and its progeny,” including *Dotson*.⁹⁵ The court noted that, while the exception for § 1983 is narrow, courts must be mindful of the form and function of a plaintiff’s complaint when reviewing whether the claim fits the narrow exception.⁹⁶ In Savory’s case, access to evidence “would not imply the invalidity of his conviction” and would perhaps allow him to use the test results in another, future lawsuit.⁹⁷ Therefore, his lawsuit was cognizable under § 1983.⁹⁸

86. *Id.*

87. *Id.* at 1056.

88. *Id.* at 1055.

89. *Id.* at 1045.

90. *See id.* at 1054–55. The Ninth Circuit stated: “[a]ny remaining doubt as to the propriety of this approach is removed, we believe, by the Court’s recent opinion in *Dotson*, which reads ‘necessarily’ to mean ‘inevitably’ and rejects the notion that a claim which *can* be brought in habeas *must* be brought in habeas.” *Id.* at 1055.

91. 469 F.3d 667 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 2433 (2007).

92. *Id.* at 669–70.

93. *See id.* at 671 (“*Preiser* and its progeny [such as *Dotson*] have clearly and consistently emphasized that only those claims that, if successful, would ‘necessarily’ invalidate the fact or duration of the prisoner’s confinement are restricted to habeas.”).

94. *See id.* at 671–72.

95. *Id.* at 672.

96. *See id.* (“Special attention, however, must be given to the manner in which the plaintiff frames his complaint, and the consequences that would follow from a favorable disposition.”).

97. *Id.*

98. *Id.* ([S]uccess in Savory’s action will *not* demonstrate the invalidity of any outstanding criminal judgment against [the plaintiff]” (citing *Heck v. Humphrey*, 512 U.S. 477, 487 (1994))).

The Second Circuit applied essentially the same analysis in *McKithen v. Brown*, siding with the Seventh, Ninth, and Eleventh Circuits.⁹⁹ McKithen was convicted of the attempted murder of his estranged wife with a kitchen knife.¹⁰⁰ The knife was never DNA tested (or even fingerprinted), and McKithen eventually filed a § 1983 lawsuit in 2002 to gain access to that knife.¹⁰¹ Contrary to the lower court's ruling, the Second Circuit determined that the "necessarily" language allowed for McKithen to bring a § 1983 suit.¹⁰² The court also addressed an issue that had not been dealt with explicitly in the other circuits, the motive of the plaintiff.¹⁰³ The court explained that the plaintiff's motive in filing his suit should not matter in the consideration of his case.¹⁰⁴ After determining that this suit would not necessarily lead to McKithen's release and that motive was irrelevant, the court remanded his case for further proceedings.¹⁰⁵

In *McKithen*, the Second Circuit also noted district court cases from the First and Third Circuits, which have yet to speak on this circuit split.¹⁰⁶ In *Wade v. Brady*, a district court in Massachusetts addressed an inmate's suit against local prosecutors in an attempt to gain access to physical evidence.¹⁰⁷ The plaintiff, a man with borderline retardation, was denied relief at the state level and then sought to use § 1983 to gain access to his evidence.¹⁰⁸ Relying on the same reasoning of courts allowing similar § 1983 lawsuits,¹⁰⁹ the district court denied the defendant's motion to dismiss.¹¹⁰ While the court was careful to

99. *McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1218 (2008).

100. *Id.* at 93–94.

101. *Id.* at 94. The knife was admitted into evidence after being identified by McKithen's wife as the assault weapon. *Id.*

102. *Id.* at 102 ("We conclude that the governing standard for application of the *Preiser-Heck* exception, then, is whether a prisoner's victory in a § 1983 suit would *necessarily demonstrate* the invalidity of his conviction or sentence; that a prisoner's success might be merely helpful or *potentially* demonstrative of illegal confinement is, under this standard, irrelevant.").

103. *See id.* (The court noted that the test for a § 1983 suit is "not whether a plaintiff *intends* to bring subsequent challenges" In fact, the court stated that "a prisoner's motives for bringing a § 1983 suit are . . . also plainly beside the point." (citing *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005))). In *Dotson*, the court criticized the state's argument: "[t]he problem with Ohio's argument lies in its jump from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief)." *Dotson*, 544 U.S. at 78.

104. *McKithen*, 481 F.3d at 103 ("[E]ven if a plaintiff's ultimate motive is to challenge his conviction—a post-conviction claim for access to evidence is cognizable under § 1983.").

105. *See id.* at 102–03, 108.

106. *Id.* at 99.

107. *Wade v. Brady*, 460 F. Supp. 2d 226, 229 (D. Mass. 2006).

108. *Id.* at 229–30. It should be noted that one of the major problems Wade faced at trial in regard to DNA testing was that testing "had only been ruled admissible in Massachusetts courts one week before [his] trial began." *Id.* at 229 n.3.

109. *See id.* at 236–39 (discussing the application of *Heck* and *Dotson* to the current case).

110. *Id.* at 251.

note that its decision did not actually grant Wade access to the evidence at issue, it was also mindful to demonstrate that ideas of fairness required the denial of the motion to dismiss.¹¹¹

The Second Circuit also cited the Eastern District of Pennsylvania's decision in *Derrickson v. Delaware County District Attorney's Office*, which permitted access to evidence through the use of § 1983.¹¹² Derrickson was convicted of murder and numerous other charges in 1995.¹¹³ He made many unsuccessful filings in the ensuing years, including a habeas corpus petition, culminating in his filing a § 1983 lawsuit.¹¹⁴ The prosecutors argued, as in other cases, that *Heck* barred Derrickson's suit.¹¹⁵ The court disagreed, finding that a claim such as Derrickson's was cognizable under § 1983 because the requested evidence did not necessarily challenge his conviction.¹¹⁶ The court ultimately determined, however, that Derrickson's specific claims did not amount to a denial of due process and therefore granted the defendant's motion for summary judgment.¹¹⁷

II. CONGRESS'S ATTEMPT TO HELP IN THE POST-CONVICTION TESTING ARENA: THE INNOCENCE PROTECTION ACT OF 2004

A. Shortcomings that Congress Attempted to Address

While inmates who proclaim their innocence have long faced a doubting public and judiciary,¹¹⁸ over the past few decades many state legislatures have

111. *Id.* at 231 (“DNA testing is different [from other post-conviction challenges]. Because DNA testing can exonerate the defendant, the government may only legitimately deny access to testing if it has a compelling reason to do so. To hold otherwise would subordinate the pursuit of justice to an arid obsession with procedure. Where DNA evidence can prove that a miscarriage of justice was perpetrated by an earlier verdict, our interest in fundamental fairness and the integrity of the criminal justice system require that DNA testing be allowed. Because I find that a Due Process right to DNA testing does exist, I hereby deny defendant's motion to dismiss.”).

112. *McKithen v. Brown*, 481 F.3d 89, 99 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1218 (2008) (citing *Derrickson v. Del. County Dist. Attorney's Office*, No. 04-1569, 2006 WL 2135854, at *8 (E.D. Pa. July 26, 2006)).

113. *Derrickson*, 2006 WL 2135854, at *1.

114. *Id.* at *2–5.

115. *See id.* at *7.

116. *Id.* at *8 (“Although Derrickson hopes that testing the clothing evidence will produce exculpatory evidence that will ultimately lead to overturning his conviction, the evidence does not necessarily imply the invalidity of his conviction. The clothing evidence may just as easily prove inculpatory as exculpatory. Because of the uncertain material effect of the clothing evidence, granting access to the evidence for further testing does not necessarily imply the invalidation of Derrickson's conviction.”).

117. *Id.* at *11.

118. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 398-99 (1993). In that case, Chief Justice William Rehnquist referred to safeguards, especially in capital cases, that “have the effect of ensuring against the risk of convicting an innocent person.” *Id.* One such safeguard is supposedly clemency, but clemency is an inadequate protection. *See* Alyson Dinsmore, Comment, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L.

decided to enact reforms.¹¹⁹ For example, New York passed the first DNA-access statute in 1994.¹²⁰ Illinois followed New York's lead in 1998,¹²¹ and today forty-two states have some sort of post-conviction DNA statute.¹²² Unfortunately, while the fact that so many states have these statutes is promising, the statutes often contain important shortcomings.¹²³

REV. 1825, 1827 (2002) (“[Clemency’s] ability to thwart such possible miscarriages of justice is in fact questionable.”).

119. See, e.g., Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 266–68 (noting that many states permit defendants access to DNA evidence). Rosen discussed that DNA statutes have come into existence in response to exonerations, but noted that “[d]espite the strong impetus provided by the DNA exonerations, it is too early to conclude that the American criminal justice system has made the fundamental changes that would appreciably diminish the incidence of wrongful convictions.” *Id.* at 269.

120. See N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005). *But see* 150 CONG. REC. S11609, 11612 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy) (“Ten years after New York passed the nation’s first post-conviction DNA testing statute, many States have yet to establish a right to post-conviction DNA testing, and others have erected unjustifiably high procedural hurdles to testing. For example, some States provide for post-conviction DNA testing only if the inmate is under sentence of death, and some rely on arbitrary and unnecessary time limits. To quote New York Attorney General Eliot Spitzer, who testified in support of the Innocence Protection Act in June 2000, ‘DNA testing is too important to allow some States to offer no remedy to those incarcerated who may be innocent of the crimes for which they were convicted.’”).

121. See 725 ILL. COMP. STAT. ANN. 5/116-3(c)(1) (West. Supp. 2008) (permitting testing only if “the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant’s assertion of *actual innocence* even though the results may not completely exonerate the defendant.” (emphasis added)); see also Karen Christian, Note, “*And the DNA Shall Set You Free*”: *Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195, 1203–05 (2001) (discussing the limitations of the New York and Illinois statutes in relation to two specific cases).

122. See The Innocence Project, News and Information: Fact Sheets, <http://www.innocenceproject.org/Content/304.php> [hereinafter Innocence Project Fact Sheet] (last visited Aug. 18, 2008). The eight states that do not have testing statutes are Alabama, Alaska, Massachusetts, Mississippi, Oklahoma, South Carolina, South Dakota, and Wyoming. *Id.*; see also Solomon Moore, *DNA Exoneration Leads to Change in Legal System*, N.Y. TIMES, Oct. 1, 2007, at A1.

123. See Innocence Project Fact Sheet, *supra* note 122 (The fact sheet lists some shortcomings of state statutes, such as: 1) “Some laws present insurmountable hurdles to the individual seeking access, putting the burden on the defense to effectively solve the crime and prove that the DNA evidence promises to implicate another individual.” 2) “Despite the fact that ten of the first 207 individuals proven innocent through DNA testing initially plea-bargained, certain laws still do not permit access to DNA when the defendant originally pled guilty.” 3) “Many laws fail to include adequate safeguards for the preservation of DNA evidence.” 4) “Several laws do not allow individuals to appeal denied petitions for testing.” 5) “A number of states fail to require full, fair and prompt proceedings once a DNA testing petition has been filed, allowing the potentially innocent to languish interminably in prison.”); see also Press Release, Sen. Leahy on Gov. George Ryan’s Moratorium on Executions in Illinois (Jan. 31, 2000) available at <http://leahy.senate.gov/press/200001/000131.html> (When discussing the moratorium on the death penalty in Illinois, Senator Leahy stated at the time: “This will also be a catalyst for a similar review in Washington. Regardless of whether people are for or against the death penalty, it is undeniable that shocking numbers of innocent people are falsely convicted and sentenced to

James S. Liebman of Columbia University Law School published a 2002 study of more than 5000 capital punishment cases, which revealed another problem unaddressed by many states.¹²⁴ Liebman's study found that "[a]ll but one of the 10 states with the highest death-sentencing rates had overall reversal rates that exceeded 68%—the national average."¹²⁵ While the study did not attempt to go so far as to claim that any specific innocent person had been executed, it did tend to support the doubts of one former Supreme Court Justice that the death penalty system works fairly.¹²⁶

B. Congress's Response to the Shortcomings of the States

Congress began seriously debating a solution to the problem of wrongful convictions in 2000 when Senator Leahy first introduced the IPA.¹²⁷ The primary purpose of the IPA was to reduce wrongful convictions by allowing DNA testing.¹²⁸ Senator Leahy's statements at the introduction of the IPA recognized that DNA should be used to prove both guilt and innocence.¹²⁹ The Senator also emphasized that while the IPA addressed "grave and urgent problems with moderate, fine-tuned practical solutions," it also did not attempt

death. The criminal justice system is often unable to admit mistakes, even when they involve the death penalty. We should have zero tolerance for executing the innocent. It is time to make sensible reforms that can dramatically reduce these errors, like ensuring competent counsel and prompt access to new crime-fighting tools such as DNA typing.").

124. See Henry Weinstein, *Death Penalty Study Suggests Errors*, L.A. TIMES, Feb. 11, 2002, at A13.

125. *Id.*; see also CNN.com, *DNA Wins Freedom for Man After 26 Years*, Jan. 3, 2008, <http://www.cnn.com/2008/US/01/03/dna.exoneration.ap/> (noting that Texas, a leader in executions, has "released at least 30 wrongfully convicted inmates since 2001.").

126. See Weinstein, *supra* note 124. The paper reported that "[i]n a speech last summer, [Supreme Court Justice Sandra Day] O'Connor said, 'If statistics are any indication, the system may well be allowing some innocent defendants to be executed.'" *Id.*; see also CBSNews.com, *Lawyers' Group: Halt Executions*, Oct. 29, 2007, <http://www.cbsnews.com/stories/2007/10/29/national/main3422627.html> (reporting that the ABA has called for a stay of all executions in the United States because of "[s]potty collection and preservation of DNA evidence . . . misidentification by eyewitnesses, false confessions from defendants, and persistent racial disparities that make death sentences more likely when victims are white").

127. See, e.g., 149 CONG. REC. S89, 142 (daily ed. Jan. 9, 2003) (statement of Sen. Leahy) ("We know that the nightmare of innocent people on death row is not just a dream, but a frequently recurring reality. Since the early 1970s, more than 100 people who were sentenced to death have been released—not because of technicalities, but because they were innocent. Goodness only knows how many were not so lucky."); Larry Yackle, *Congressional Power to Require DNA Testing*, 29 HOFSTRA L. REV. 1173, 1173 (2001) (arguing that the IPA was "constitutionally feasible" in the face of early constitutional criticism).

128. 149 CONG. REC. S89, 142. A secondary purpose of the IPA, the Senator stated, was to provide competent counsel. *Id.* The discussion of the competency of counsel is beyond the scope of this Comment.

129. *Id.*

“to make the system perfect, but simply to reduce what is currently an unacceptably high risk of error.”¹³⁰

After several years of debate, the IPA was finally passed and signed into law in 2004 as part of the broader JFAA.¹³¹ The IPA provides that, upon written motion by an inmate, “the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that *all* of the following [ten subsections] apply.”¹³² One notable shortcoming is that DNA testing may only be ordered in cases involving federal offenses, effectively precluding many state inmates from seeking evidentiary access.¹³³ The general section contains ten subsections, all of which must be met by the inmate,¹³⁴ including requirements such as: the inmate can only pursue DNA testing under “penalty of perjury” and must claim he is “actually innocent;”¹³⁵ the evidence is in the possession of the government and has been kept under a proper chain of custody over the years;¹³⁶ and “the identity of the perpetrator was at issue in the trial” if the applicant was convicted following a trial.¹³⁷ The IPA contains additional prerequisites such as notice,¹³⁸ testing procedures,¹³⁹ and post-testing procedures.¹⁴⁰

130. *Id.*

131. *See* 18 U.S.C. § 3600 (Supp. IV 2006); Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended in scattered sections of 10, 18, 28 and 42 U.S.C.). Senator Leahy, a prime sponsor of the bill, felt that the Bush administration was often an obstacle to its passage. *See* 150 CONG. REC. S10910, 10916 (daily ed. Oct. 9, 2004) (statement of Sen. Leahy) (“Today, at long last, the Senate is poised to pass the Justice For All Act and to send this important legislation to the President. I hope he will sign it, despite his Justice Department’s continued efforts to kill this bill.”). Regarding the bill’s passage, Senator Leahy summarized:

The reforms it enacts will create a fairer system of justice, where the problems that have sent innocent people to death row are less likely to occur, where the American people can be more certain that violent criminals are caught and convicted instead of the innocent people who have been wrongly put behind bars for their crimes, and where victims and their families can be more certain of the accuracy, and finality, of the results.

Id.

132. 18 U.S.C. § 3600(a) (emphasis added).

133. *See id.* (stating that courts can order DNA testing for state offenses only if those crimes are accompanied by federal convictions).

134. *Id.* § 3600(a)(1)-(10).

135. *Id.* § 3600(a)(1).

136. *Id.* § 3600(a)(4).

137. *Id.* § 3600(a)(7).

138. *Id.* § 3600(b).

139. *Id.* § 3600(c).

140. *Id.* § 3600(f).

C. The IPA in Action Results in Failure

The case of Danny Boose of Mississippi illustrates that the IPA has not eliminated all the barriers for inmates who seek DNA testing.¹⁴¹ Boose was convicted of kidnapping and raping a woman in 1996.¹⁴² DNA testing concluded that the semen samples from the victim's clothes contained Boose's blood.¹⁴³ Boose, however, maintained his innocence and filed for relief under the IPA, claiming that better testing had developed and that the original lab results may have been unreliable.¹⁴⁴

Before examining Boose's claims, the court took the time to note that the IPA "provides a method to order DNA testing in cases if the defendant can meet ten factors (with some factors having multiple requirements)."¹⁴⁵ The court then highlighted subsections three, four, six, and eight of the IPA as particularly relevant to Boose's case.¹⁴⁶ The *Boose* court determined that the plaintiff failed to meet the requirements of those four subsections and, therefore, could not file a valid claim under the IPA.¹⁴⁷ For example, physical evidence in this case was destroyed on or about September 2, 1997 in accordance with FBI policy.¹⁴⁸ Therefore, the plaintiff could not show that the government possessed the evidence subject to a chain of custody as required by 18 U.S.C. § 3600 (a)(4).¹⁴⁹ As a result, the IPA provided no relief to Boose and his motion for testing was denied.¹⁵⁰

141. *United States v. Boose*, 498 F. Supp. 2d 887 (N.D. Miss. 2007).

142. *Id.* at 888.

143. *Id.*

144. *Id.* at 889–91.

145. *Id.* at 889.

146. *Id.* ("Among other factors, the court must find that: (1) the case did not involve previous DNA testing or that there is newer, more effective DNA testing available (18 U.S.C. § 3600(a)(3)); (2) that 'the specific evidence to be tested is in the possession of the Government and has been subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing' (18 U.S.C. § 3600(a)(4)); (3) that the defendant shows that the evidence would establish a theory of defense that is not inconsistent with an affirmative defense and would establish actual innocence of the defendant (18 U.S.C. § 3600(a)(6)); and, (4) that the DNA testing would raise a reasonable possibility that the defendant is actually innocent of the crime (18 U.S.C. § 3600(a)(8)).").

147. *Id.* at 890–92.

148. *Id.* at 891.

149. *See id.*

150. *Id.* at 892.

III. WHERE DO §§ 1983 & 3600 GO WRONG?

A. While the Supreme Court Must Resolve the Split, § 1983 Could Never Provide Appropriate Relief

1. The Outdated Circuit Courts Must Rule in Line with Bradley

The first major problem with § 1983's application is that three circuit courts are denying suits based on an outdated interpretation of § 1983.¹⁵¹ The Fourth, Fifth, and Sixth Circuits' decisions to bar § 1983 actions for post-conviction access appeared reasonable at the time they were issued because these circuits followed existing Supreme Court precedent in holding as they did.¹⁵² Specifically, in *Preiser*, the Supreme Court had established that challenges to the fact or duration of imprisonment were not cognizable under § 1983.¹⁵³ Furthermore, the *Preiser* Court made it clear that it considered federal-state comity to be key in its decision, because habeas corpus petitions require exhaustion of all state options, whereas § 1983 does not.¹⁵⁴ *Heck* supported *Preiser* by clarifying that the only way an inmate can challenge the fact or duration of confinement, either directly or indirectly, is through habeas.¹⁵⁵ Therefore, through early 2002, it was reasonable for the Fourth Circuit to rule as it did and for the Fifth and Sixth Circuits to follow.¹⁵⁶

The Eleventh Circuit took an opposing, but equally reasonable, view of *Preiser* and *Heck* later in 2002, arguing that the Fourth Circuit rule was wrong and causing a major problem.¹⁵⁷ By emphasizing that DNA testing could be

151. See *Boyle v. Mayer*, 46 F. App'x 340, 340 (6th Cir. 2002); *Kutzner v. Montgomery County*, 303 F.3d 339, 340–41 (5th Cir. 2002); *Harvey v. Horan*, 278 F.3d 370, 372 (4th Cir. 2002).

152. See, e.g., *Heck v. Humphrey*, 512 U.S. 477, 481 (1994); *Preiser v. Rodriguez*, 411 U.S. 475, 489–90 (1973).

153. *Preiser*, 411 U.S. at 489–90.

154. *Id.* at 491–92 (“It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.”); see also *id.* at 505 (Brennan, J., dissenting) (asserting that the majority's decision left untouched the rule that § 1983 does not require exhaustion of state remedies). But see *Rosen*, *supra* note 119, at 285–86 (“A claim of innocence is not based on a technicality—it is a claim that the legal system made the most fundamental of errors, that the imposition of punishment was unjust from the inception. Notions of comity, retroactivity, finality, procedural default—all of the means we use to keep the system from being overwhelmed by guilty defendants trying to escape their punishment—have no place when the claim is that the trial ended in a miscarriage of justice.”).

155. *Heck*, 512 U.S. at 481.

156. See *Harvey*, 278 F.3d at 375 (“While *Heck* dealt with a § 1983 claim for damages, the Court did not limit its holding to such claims. And we see no reason why its rationale would not apply in a situation where a criminal defendant seeks injunctive relief that necessarily implies the invalidity of his conviction.”).

157. *Bradley v. Pryor*, 305 F.3d 1287, 1290–91 (11th Cir. 2002) (indicating that Judges King and Luttig's concurring opinions in *Harvey* correctly identified the Fourth Circuit majority's error).

either exculpatory or inculpatory and that any positive DNA results would only lead to a separate lawsuit for actual relief,¹⁵⁸ the *Bradley* court demonstrated a deeper understanding of the true intent behind *Preiser* and *Heck* and properly picked up on the use of the word “necessarily.”¹⁵⁹ Then the Eleventh Circuit approach was bolstered by a later Supreme Court case on point, *Dotson*, which also emphasized application of the word “necessarily.”¹⁶⁰ The Court stressed that it had made it “clear that § 1983 remains available for procedural challenges where success in the action *would not necessarily* spell immediate or speedier release for the prisoner.”¹⁶¹

Other federal courts facing similar § 1983 actions have since followed the Eleventh Circuit approach while also adding new layers to the analysis.¹⁶² First, the Ninth Circuit in *Osborne* drew out the distinction that § 1983 and habeas corpus are not the same under the *Preiser* exception.¹⁶³ Second, the Second Circuit in *McKithen* determined that the motive of an inmate in filing his suit should not be a factor considered by the courts.¹⁶⁴ Third, the district court in *Wade* suggested that, although DNA testing itself may not be used to attack the finality of a conviction, permitting such testing is procedurally fair where doubt exists about the original conviction.¹⁶⁵ Finally, in *Derrickson*, another district court highlighted the discouraging fact that the long road of § 1983 might be an inmate’s last hope, but often leads to no positive result.¹⁶⁶

158. *Id.* at 1290–91.

159. *See id.* at 1290 (“Bradley seeks access, for the purpose of DNA testing, to evidence that he believes is in the State’s possession. He prevails in this lawsuit once he has access to that evidence or an accounting for its absence. Nothing in that result *necessarily* demonstrates or even implies that his conviction is invalid.” (emphasis added)).

160. *See Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005).

161. *Id.*

162. *See McKithen v. Brown*, 481 F.3d 89, 102 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1218 (2008); *Osborne v. Dist. Attorney’s Office for the Third Judicial Dist.*, 423 F.3d 1050, 1054 (9th Cir. 2005), *remanded to* 445 F. Supp. 2d 1079 (D. Alaska 2006), *aff’d*, 521 F.3d 1118 (9th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3009 (U.S. Nov. 3, 2008) (No. 08-6); *Wade v. Brady*, 460 F. Supp. 2d 226, 244 (D. Mass. 2006); *Derrickson v. Del. County Dist. Attorney’s Office*, No. 04-1569, 2006 WL 2135854, at *7 (E.D. Pa. July 26, 2006).

163. *See Osborne*, 423 F.3d at 1055 (“*Preiser’s* implied exception to § 1983 coverage exists ‘where the claim seeks—not where it simply “relates to”—“core” habeas corpus relief, *i.e.*, where a state prisoner requests present or future release.’” (quoting *Dotson*, 544 U.S. at 81)).

164. *McKithen*, 481 F.3d at 103 n.15 (“It is now beyond dispute that a § 1983 plaintiff’s unspoken motives—as contrasted with the relief the plaintiff has in fact sought—are merely red herrings.”).

165. *See Wade*, 460 F. Supp. 2d at 248–49 (“DNA testing does not itself attack the finality of a judgment. Attacks on a conviction can only occur if a DNA test yields exculpatory results. In these cases, the State should have grave concerns about the fairness and accuracy of the original verdict. When the State loses faith in a trial verdict, it no longer has valid reason to detain an individual. Retribution and deterrence are not served by continued incarceration, and judging is not improved by further detention.”).

166. *See Derrickson*, 2006 WL 2135854, at *11 (noting that *Derrickson* failed to establish that DNA evidence had a “reasonable probability of affecting the outcome of his criminal trial”).

Differences among habeas petitions, motives of the claimant, fairness of the proceedings, and the lack of alternatives are all factors to consider when analyzing § 1983, and all lend credence to the approach originally outlined by *Bradley*.¹⁶⁷

Despite *Bradley*'s widespread acceptance, the Supreme Court's failure to clarify whether the Eleventh Circuit was correct and whether the outdated approach utilized by the Fourth, Fifth, and Sixth Circuits should be rejected has left the federal courts without clear guidance as to the propriety of § 1983 lawsuits seeking DNA testing.¹⁶⁸ The language used by the Court in *Dotson*, with the emphasis on the word "necessarily," strongly suggests that the use of § 1983 suits to obtain DNA testing is proper because such suits do not necessarily lead to any direct attack on imprisonment.¹⁶⁹ As the Ninth Circuit stated in 2005 in *Osborne*, "*Dotson* thus erases any doubt that *Heck* applies both to actions for money damages and to those, like this one, for injunctive relief, and clarifies that *Heck* provides the relevant test to determine whether § 1983 is a permissible avenue of relief for *Osborne*."¹⁷⁰ Because all doubt has been erased in the minds of four circuit courts and two district courts, the Supreme Court should clearly state that those circuits are correct and that the Fourth, Fifth, and Sixth Circuits must fall in line.

2. Clarifying § 1983 Would Be a Good Step, But § 1983 Falls Short of Solving the Problem on Its Own

While the Supreme Court's support of *Bradley* would clarify the problem of initial access to § 1983, it would fail to address the second, deeper set of problems which § 1983 cannot adequately solve.¹⁷¹ First, as demonstrated by the Eleventh Circuit itself, § 1983 does not get an inmate very far in obtaining any real relief because an inmate still must bring a later suit to challenge the actual conviction.¹⁷² That an inmate does not necessarily achieve success with § 1983 is a convenient legal fact that has allowed the Eleventh Circuit and

The court summarized Derrickson's unsuccessful plight: "[t]o date, Derrickson's conviction has not been overturned on appeal, expunged by executive order, declared invalid by a state court, or called into question by a federal court via writ of habeas corpus." *Id.* at *3.

167. See *Bradley v. Pryor*, 305 F.3d 1287, 1292 (11th Cir. 2002).

168. See *Wade*, 460 F. Supp. 2d at 244 ("Neither the Supreme Court nor the First Circuit has ruled on the constitutional significance of DNA testing.").

169. See *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005).

170. *Osborne v. Dist. Attorney's Office for the Third Judicial Dist.*, 423 F.3d 1050, 1053 (9th Cir. 2005), *remanded to* 445 F. Supp. 2d 1079 (D. Alaska 2006), *aff'd*, 521 F.3d 1118 (9th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3009 (U.S. Nov. 3, 2008) (No. 08-6).

171. See, e.g., *Derrickson*, 2006 WL 2135854, at *8-11 (concluding that although testing would not necessarily result in plaintiff's release from jail, the particular circumstances of his case did not add up to a due process violation in the mind of the court; therefore, the DNA testing was denied).

172. *Bradley*, 305 F.3d at 1290-91.

others to recognize that these suits are cognizable.¹⁷³ The recognition of a § 1983 claim, however, provides little support to inmates who were perhaps wrongly incarcerated for decades.¹⁷⁴ The long road inmates face after winning under § 1983 is too long.

The second underlying problem with § 1983 as a mechanism for relief is that it fails to directly address inherent flaws in the system, all of which are present in the case of Johnnie Lee Savory II.¹⁷⁵ The first flaw is that “[i]n more than 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty.”¹⁷⁶ In Savory’s case, his initial confession, given as a fourteen year-old, was obtained after almost two days of police questioning.¹⁷⁷

The second systemic flaw is that “[e]yewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing.”¹⁷⁸ After Savory’s

173. See *id.* at 1292 (noting that a successful § 1983 claim merely grants access to evidence).

174. See, e.g., *Savory v. Lyons*, 469 F.3d 667, 675 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 2433 (2007) (declining to rule on prisoner’s § 1983 claim that sought DNA evidence because the claim was barred by the statute of limitations); see also Ted Gregory, *Parolee Joyful After 30 Years In Prison*, CHI. TRIB., Dec. 20, 2006, at C3 (reporting that Savory was finally released on parole, after 30 years in prison).

175. See *infra* notes 176–84 and accompanying text.

176. The Innocence Project, *Understand the Causes: False Confessions*, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Aug. 18, 2008); see also Rosen, *supra* note 119, at 246–47 (2006) (“Whatever slight protection against false confessions the Miranda rule could be said to offer in 1967, the Supreme Court made clear over the following decades that it would not interpret Miranda in a way that would seriously interfere with secret police interrogations. In the years since Miranda, the Court has restricted its deterrent effect by allowing statements taken in violation of a valid recitation or waiver of Miranda rights to be used in numerous circumstances. In fact, the Court’s efforts to neutralize Miranda’s impact were so successful that police officers had little incentive to give the warnings, or even to honor a suspect’s request that they honor his rights.” (internal citations omitted)). Many local and state governments have taken steps to prevent false confessions. See Moore, *supra* note 122 (“More than 500 local and state jurisdictions, including Alaska, Illinois, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, Wisconsin and the District of Columbia have adopted policies that require the recording of interrogations to help prevent false confessions . . .”).

177. See Gregory, *supra* note 174.

178. The Innocence Project, *Understand the Causes: Eyewitness Misidentification*, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Aug. 18, 2008); see also Rosen, *supra* note 119, at 247 (“[M]isidentifications are the single largest factor in producing wrongful convictions”); Moore, *supra* note 122 (“Legislatures considered 25 witness identification bills in 17 states this year, the National Association of Criminal Defense Lawyers reported. Five states approved bills, while five states defeated them. Bills are pending in seven states. ‘It’s become clear that eyewitnesses are fallible,’ said Lt. Kenneth A. Patenaude, a police commander in Northampton, Mass., who is an expert on witness identification techniques.”). But see Ramsey County Attorney, *The DNA Project*, <http://www.co.ramsey.mn.us/attorney/SPDNA.asp> (last visited Aug. 18, 2008) (The county attorney argued that DNA testing is unwarranted in most cases because “[i]n many [old cases], the defendant’s identity was not in question so DNA testing would serve no purpose.”).

confession was excluded on appeal,¹⁷⁹ he was re-tried and convicted, largely due to the testimony of three new witnesses who claimed Savory shared self-incriminating details of the crime.¹⁸⁰ Two of the three witnesses later recanted.¹⁸¹

The third and final systemic flaw, as numerous cases have shown over the last decade, is that courts continue to accept less-reliable forms of evidence, despite the fact that DNA testing is uniquely capable of “show[ing] whether someone is actually guilty or innocent.”¹⁸² In other words, the power of DNA testing is thoroughly underutilized.¹⁸³ For example, Savory professed his innocence throughout his almost thirty years in prison and pushed for DNA testing of fingernail scrapings and hair, but was repeatedly denied judicial relief.¹⁸⁴

While these flaws hindered Savory’s attempts to exonerate himself, he was ultimately unable to bring his § 1983 lawsuit because he failed to file a timely claim.¹⁸⁵ Savory also failed to find an audience with the Supreme Court when his petition for certiorari was denied on May 21, 2007.¹⁸⁶ Fortunately for Savory, he had already been paroled on December 19, 2006.¹⁸⁷ Nineteen

179. See *Savory*, 469 F.3d at 669 (noting that the confession was involuntarily provided in violation of Savory’s *Miranda* rights).

180. See Gregory, *supra* note 174.

181. See *id.*

182. The Innocence Project, Understand the Causes: Unreliable/Limited Science, <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php> (last visited Aug. 18, 2008) [hereinafter Innocence Project, Limited Science]; see also Rosen, *supra* note 119, at 256 (“The scientific certainty of DNA evidence has made it hard for skeptics to question the exonerations of the last decade, and to bury the accompanying powerful narratives under counternarratives of crime victims’ suffering. Perhaps inevitably, the heart-wrenching stories of wrongfully convicted defendants has [sic] sparked at least the beginnings of a new wave of reforms.”).

183. See 150 CONG. REC. H8175, 8176 (daily ed. Oct. 6, 2004) (statement of Rep. Myrick) (“Unfortunately, the current Federal and State DNA collection and analysis system suffers from a variety of problems. In many cases public crime laboratories are overwhelmed by backlogs of unanalyzed DNA samples, samples that could be used to solve violent crimes if the States had the funds to eliminate this backlog. In my home State of North Carolina, the number of unprocessed DNA samples is 7,000 and the number of unprocessed DNA rape kits is estimated to be 6,000. North Carolina authorities say that the processing and entering of the DNA backlog could solve hundreds of crimes.”); see also *id.* at 8191 (statement of Rep. Weiner) (“With DNA we can find out who did a crime, and as other speakers have spoken to here, we can also find out who did not do it. But the prism I look at this issue through was formed early in my congressional career. The prism I look at DNA through is a series of cardboard boxes all stacked in a refrigerated warehouse in Long Island City. That is where I found rape kits that were evidence for crime scenes, completely anonymous except for the numbers written on the side of these cardboard boxes, 16,000 of them in early 1999 when I was first elected, all collected at crime scenes in New York City, all that had not been analyzed, all that had not been processed, all representing a victim that was awaiting justice.”).

184. See *Savory*, 469 F.3d at 669–70; Gregory, *supra* note 174.

185. See *supra* note 28 and accompanying text.

186. *Savory v. Lyons*, 127 S. Ct. 2433 (2007).

187. See Gregory, *supra* note 174.

requests for parole over thirty years finally paid off for Johnnie Lee Savory,¹⁸⁸ but the fact remains that § 1983 essentially did him no good in his bid to prove his innocence.

B. Similar to § 1983, § 3600 Could Never Provide Appropriate Relief

The United States faced serious problems at the beginning of the new millennium in the arena of DNA testing statutes.¹⁸⁹ Not all states had a testing statute, and many of the existing statutes were insufficient.¹⁹⁰ In addition, a national study suggested that states with the highest-death sentences rates also led the nation in reversal rates.¹⁹¹

The passage of the IPA “strongly suggests a congressional belief that miscarriages do occur and that existing procedures are not wholly adequate to rectify them.”¹⁹² Congress knew that problems existed and created the IPA to improve access to DNA testing.¹⁹³

188. *See id.* Of course, not everyone was happy with Savory’s parole, especially the named defendant in Savory’s case, Peoria County State’s Attorney Kevin Lyons. Less than a month after Savory’s release, the appointment of a parole board member who had opposed Savory’s release was not renewed. Press Release, Kevin W. Lyons, Peoria County (Ill.) State’s Att’y, (Jan. 9, 2007) available at <http://www.peoriacountystatesattorney.org/press%20release-stenson%20release%20from%20ILPRB.htm>. In a press release in support of the departing board member and in condemnation of Savory, Lyons stated the following:

And so we now have the newly reconstituted Illinois Prisoner Review Board, the Will Rogers of parole boards, for they never met a murderer they didn’t like. On behalf of the law abiding People of Peoria County and central Illinois, I register my disgust with the parole board’s cavalier coddling of criminals and the state senate’s ugly poisoning of the parole board membership by surreptitiously shutting the door to law and order members while opening the door to Johnnie Lee Savory and his ilk, all coming soon to a neighborhood near you.

Id.

189. *See supra* notes 118–23 and accompanying text.

190. *See Innocence Project Fact Sheet, supra* note 122; *see also* Kathy Swedlow, *Don’t Believe Everything You Read: A Review of Modern “Post-Conviction” DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 387 (2002) (noting that the “lack of perfection in the extant testing statutes is largely attributable to their inability to address the complexities of state and federal post-conviction law.”).

191. *See supra* notes 124–26 and accompanying text.

192. *State v. Jimenez*, 880 A.2d 468, 494 n.8 (N.J. Super. Ct. App. Div. 2005), *rev’d*, 908 A.2d 181 (N.J. 2006), *clarified by* 924 A.2d 513 (N.J. 2007). While the use of § 3600 was not at issue in this case, the statute was briefly discussed by the court as “an additional device for discerning miscarriages.” *Id.*; *see also* *United States v. Boose*, 498 F. Supp. 2d 887, 889 (N.D. Miss. 2007) (“Indeed, the entire purpose of the statute is to permit collateral review of convictions through DNA testing—no matter how much time has transpired—or what other deadlines have passed. What the statute seeks—with its narrow tailoring—is justice itself.”).

193. *See* 150 CONG. REC. H8175, 8176 (daily ed. Oct. 6, 2004) (statement of Rep. Myrick); *see also* The Innocence Project, *Understand the Causes: Forensic Science Misconduct*, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Aug. 18, 2008) [hereinafter Innocence Project, *Forensic Science Misconduct*] (“DNA exonerations have exposed official misconduct at every level and stage of a criminal investigation. This misconduct

But a close analysis of § 3600, seen through the light of an example case such as *Boose*, demonstrates the unfortunate shortcomings of § 3600.¹⁹⁴ The first major problem with § 3600 is that it is of limited use to state inmates because it only permits relief to defendants convicted of federal offenses.¹⁹⁵ At best, the IPA encourages states to adopt DNA testing legislation for state offenses.¹⁹⁶

The second major problem is that the requirements of § 3600 are too strict.¹⁹⁷ For example, one could look at § 3600(a)(3), “which requires that the evidence must not have been previously subjected to DNA testing—or was previously subjected to DNA testing, but a new method or technology is substantially more probative than the prior DNA testing.”¹⁹⁸ Many courts, such as the one in *Boose*’s case, might reject the argument that new modes of DNA testing should allow an inmate to re-test his evidence because of the

has included: deliberate suggestiveness in identification procedures[;] the withholding of evidence from defense[;] the deliberate mishandling, mistreatment or destruction of evidence[;] the coercion of false confessions[;] the use of unreliable government informants or snitches[.]”). As the Innocence Project website points out, many of the problems Congress sought to address are actually created by government itself. *Id.*

194. *See* *United States v. Boose*, 498 F. Supp. 2d 887, 890–92 (N.D. Miss. 2007) (noting that the defendant could not satisfy four of the ten requirements). The court also discussed an unfortunate side-effect of the statute: that an inmate’s test results are entered into the National DNA Index System (“NDIS”). *Id.* at 890. Once an inmate is in NDIS, he could be connected to unsolved crimes and bring further charges upon himself:

The Government shall submit any test results relating to the DNA of the applicant to the National DNA Index System If the . . . comparison of the DNA sample of the applicant results in a match between the DNA sample of the applicant and another offenses, the Attorney General shall notify the appropriate agency

18 U.S.C. § 3600 (e)(2)–(e)(3)(B).

The *Boose* court commented on the dilemma posed to defendants:

[D]efendants who know they have committed crimes for which they have not been charged-and for which DNA evidence could shed some light-may think twice before availing themselves of this statute. New DNA testing could well confirm the guilt of such a defendant already serving time-yet lead to his prosecution for *other* crimes in the NDIS database.

Boose, 498 F. Supp. 2d at 890.

195. *See* 18 U.S.C. § 3600(a); *see also* 150 CONG. REC. S11609, 11612 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy) (“The provisions [of the Innocence Protection Act] . . . will have direct application to Federal cases and Federal defendants only. Earlier versions of the IPA recognized a constitutional right of State prisoners to access biological evidence held by the State for the purpose of DNA testing; as enacted, however, the IPA contains no such provision. This is regrettable.”). Senator Leahy indicated, but did not explicitly endorse, the proposition that access to DNA testing may well be “constitutionally required as a matter of basic fairness.” 150 CONG. REC. S11612 (daily ed. Nov. 19, 2004) (internal quotation marks omitted).

196. 150 CONG. REC. S11609 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy) (“[The Innocence Protection Act] does encourage States that have not already done so to enact provisions similar to section[] 3600.”).

197. *See, e.g., Boose*, 498 F. Supp. 2d at 890–92 (describing the various ways plaintiff failed to meet the requirements of § 3600).

198. *Id.* at 890 (citing 18 U.S.C. § 3600 (a)(3)).

court's understanding of the term "substantially more probative" as used in § 3600.¹⁹⁹ A rule such as § 3600(a)(3) may work well for an inmate who never had the benefit of testing, but it will not work as worded for most inmates who obtained primitive DNA tests.²⁰⁰

There are at least three other examples of how § 3600 is too strict. First, § 3600(a)(4) requires that the government possess the evidence, that the chain of custody is unbroken, and that there are no problems such as contamination with the evidence.²⁰¹ In practice, however, this standard is difficult to satisfy because the FBI sometimes destroys physical evidence after a certain period of time, making testing impossible.²⁰² Second, § 3600(a)(6) requires the inmate to have a "theory of defense" that is not inconsistent with the defense used at trial and that "would establish . . . actual innocence."²⁰³ Unsophisticated inmates often do not possess a "theory of defense" beyond a claim of actual innocence, but such claims will not suffice with a court.²⁰⁴ For example, in Boose's case, the court would not accept Boose's *claim of actual innocence* because his conviction was based in part on multiple eyewitnesses who

199. *Id.* at 890–91 (finding newer testing techniques to be inapplicable to the testing sought by the defendant); see also Rosen, *supra* note 119, at 276 ("On the other side, just as the DNA exonerations have enhanced the need for maximizing the use of science in criminal cases, they have also revealed the misuse of science. Many of the DNA exonerations have come in cases where 'science' was used to produce the initial wrongful conviction. As a result, a hard examination of much of what passes for science in the courts is necessary." (citations omitted)).

200. See, e.g., Boose, 498 F. Supp. 2d at 890–91; see also Innocence Project, Limited Science, *supra* note 182 (discussing the fact that traditional serology tests and earlier forms of DNA testing are far less accurate than modern DNA testing); Innocence Project, Forensic Science Misconduct, *supra* note 193 ("The risk of misconduct starts at the crime scene, where evidence can be planted, destroyed or mishandled. Then the evidence is sent by police to a state forensic lab or independent contractor, where it can be contaminated, poorly tested, consumed unnecessarily or mislabeled. The next step is a report, in which technicians and their superiors sometimes misrepresent results. DNA exonerations have revealed numerous instances of 'drylabbing' evidence—reporting results when no test was actually performed. It's cheaper and faster—but fraudulent.").

201. 18 U.S.C. § 3600(a)(4) (Supp. IV 2006).

202. See Boose, 498 F. Supp. 2d at 891 (holding that Boose could not satisfy § 3600(a)(4) because the FBI destroyed the evidence).

203. 18 U.S.C. § 3600(a)(6).

204. See, e.g., Boose, 498 F. Supp. 2d at 891–92; see also Rosen, *supra* note 119, at 285 ("Another potential solution is to create procedures that would treat postconviction claims of innocence separately from other claims. Much of the indifference or hostility to postconviction innocence claims undoubtedly occurs because these claims get lost amid the myriad legal claims of defendants who are undoubtedly guilty. The common assumption is that defendants seeking relief after appeal are trying to get released on a 'technicality.' Leaving aside the fact that a constitutional deficiency is in no way a 'technicality,' finding a way to separate claims of innocence from other claims is worth considering.").

identified Boose.²⁰⁵ The court did not consider that the unreliability of eyewitnesses is well documented,²⁰⁶ and moved on.

A final example of how § 3600 can be too strict is § 3600(a)(8), which requires that the testing produce evidence that would support a claim from § 3600(a)(6) and “raise a reasonable probability that the applicant did not commit the offense.”²⁰⁷ This requirement is also problematic because an inmate whose only claim is actual innocence will not get by § 3600(a)(6) and will therefore fail under § 3600(a)(8) as well.²⁰⁸

This analysis suggests that the vast majority of inmates will be unable to obtain relief under § 3600. The IPA is made up of an overly elaborate ten-part test.²⁰⁹ All of the parts of the test must be met for any applicant to move closer to actual DNA testing.²¹⁰ Even an inmate who satisfies several of the IPA’s requirements can be denied relief if he is unable to meet all ten parts.²¹¹ At least one court has found that an inmate’s basic claim of innocence failed to satisfy § 3600’s pleading requirements.²¹² As the judge in *Boose* stated, “I didn’t do it” is “[s]uch a bare allegation [that it] hardly meets the rigorous standard[s] of the Innocence Protection Act.”²¹³ Thus, under this interpretation of the IPA, an inmate who relies on a continual insistence of actual innocence

205. *Boose*, 498 F. Supp. 2d at 892 (“Indeed, the overwhelming eyewitness testimony alone would have been sufficient to sustain Danny Boose’s conviction in this case.”).

206. *See id.* (holding that defendant’s base claim of innocence “hardly meets the rigorous standard of the Innocence Protection Act”); *see also* Thom Patterson, *Innocent Man Shares His 20-Year Struggle Behind Bars*, CNN, Oct. 26, 2007, <http://www.cnn.com/2007/US/law/10/25/innocence.project/index.html> (discussing the case where Willie “Pete” Williams spent nearly twenty-two years in prison for rape, kidnapping, and aggravated sodomy he did not commit because “the key evidence that sealed Williams’ fate was the testimony of three eyewitnesses who mistakenly said they recognized him”); *supra* note 178 and accompanying text.

207. *See* 18 U.S.C. § 3600(a)(8). Sponsors of the IPA believed the “reasonable probability” standard was an appropriate threshold. 150 CONG. REC. S11609, 11610-11 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy) (“Th[e] reasonable probability] standard was the subject of intense negotiations, as members recognized that setting the standard too low could invite frivolous applications, while setting it too high could defeat the purpose of the legislation and result in grave injustice. I argued that in balancing these concerns, Congress should be guided by the principle that the criminal justice system should err on the side of permitting testing, in light of the low cost of DNA testing and the high cost of keeping the wrong person locked up. I am pleased that this view ultimately prevailed.”).

208. *See Boose*, 498 F. Supp. 2d at 892 (noting that Boose failed both § 3600(a)(6) and § 3600(a)(8)).

209. *See* 18 U.S.C. § 3600(a)(1)–(10).

210. *Id.* § 3600(a) (requiring the court to order DNA testing if “all of the following [ten requirements] apply”).

211. *See, e.g., Boose*, 498 F. Supp. 2d at 889–92 (finding at least three flaws in Boose’s suit under § 3600).

212. *See id.* at 891–92.

213. *Id.* at 892.

will find no relief. In a legal system where more than 200 Americans proved they were innocent by DNA testing,²¹⁴ relief must be more readily available.²¹⁵

IV. A BETTER SOLUTION IS AVAILABLE AND MUST BE IMPLEMENTED

Because §§ 1983 and 3600 are inadequate to handle the need for post-conviction DNA testing and the state remedies also fall short,²¹⁶ a more comprehensive solution is needed. The Innocence Project has drafted model legislation, called “An Act Concerning Access to Post-Conviction DNA Testing,”²¹⁷ that should be adopted with only minor changes by every state and, eventually, the federal government.²¹⁸

Model legislation in this area must contain several key components that are markedly different from the current, short-sighted solutions. First, recognizing that DNA testing is highly reliable and relatively inexpensive,²¹⁹ the legislation should expand access to DNA testing. The model act accomplishes this goal by allowing testing for any convict “who asserts he did not commit th[e] crime”²²⁰ This would address the problem discussed above, that the ten-part test of § 3600 and the technical requirements of reviewing an inmate’s claim are

214. See Innocence Project, Know the Cases, *supra* note 4.

215. But see Gwendolyn Carroll, Comment, *Proven Guilty: An Examination of the Penalty-Free World of Post-Conviction DNA Testing*, 97 J. CRIM. L. & CRIMINOLOGY 665, 665 (2007) (arguing that DNA testing requested by inmates is costly and time-consuming, and that sanctions should be imposed on petitioners whose guilt is confirmed through testing as a deterrent against frivolous requests).

216. See *supra* Parts II.A, III.

217. See AN ACT CONCERNING ACCESS TO POST-CONVICTION DNA TESTING (The Innocence Project Model Legislation 2006) [hereinafter INNOCENCE PROJECT MODEL LEGISLATION], available at http://www.innocenceproject.org/docs/Model_Statute_Postconviction_DNA.pdf.

218. See Matthew J. Mueller, Comment, *Handling Claims of Actual Innocence: Rejecting Federal Habeas Corpus as the Best Avenue for Addressing Claims of Innocence Based on DNA Evidence*, 56 CATH. U. L. REV. 227, 260 (2006) (arguing that states are best equipped to handle innocence claims related to DNA evidence, but that it would be appropriate for the federal courts to review state claims if the inmate makes a “truly persuasive” showing of actual innocence”). Muller argues that “[t]his outcome would also support Congress’s attempts to prevent the flood of habeas corpus claims from overwhelming the federal courts. Such a prisoner would already have had one shot at direct federal review of his or her state conviction.” *Id.*

219. See Tonja Jacobi & Gwendolyn Carroll, *Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*, 102 NW. U. L. REV. 263, 281 (2008) (noting that DNA testing is becoming more accurate and less costly).

220. See INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 217, § 2 (“[A] person convicted of a crime and who asserts he did not commit that crime may at any time file a petition requesting forensic DNA testing of any biological evidence secured in relation to the investigation or prosecution attendant to the conviction. Persons eligible for testing shall include any and all of the following: A. Persons currently incarcerated, serving a sentence of probation or who have already been released on parole; B. Persons convicted on a plea of not guilty, guilty or *nolo contendere*; and/or C. Persons who have finished serving their sentences.”).

too complicated and strict.²²¹ Second, the process should be speedy. The petitioner should be able to file a motion and receive a response from the state within 30 days; a court should hear the motion within 60 days of its filing.²²² These rules would allow cases to be brought more easily and disposed of more quickly, helping to address the problem that § 1983 lawsuits take a very long time and often yield few positive results.²²³

The legislation should also contain a detailed section on what a court must find before ordering DNA testing. First, there must be a “reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence” if there were favorable test results “at the time of the original prosecution.”²²⁴ Such a standard is preferable to the theory of defense required by § 3600 because an unsophisticated inmate claiming innocence would satisfy this standard.²²⁵ Second, the model act requires that at least one of the pieces of evidence sought to be tested must still exist.²²⁶ Again, this is a better standard than the chain of custody requirements of § 3600, which punishes the petitioner for both the government’s negligent handling of evidence and for its use of strict destruction policies.²²⁷ Third, the evidence must have come from the offense that resulted in conviction and must not have been tested before or, even if it was, “can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results.”²²⁸ This requirement will provide a greater number of inmates with a more useful way of accessing the advances in DNA testing than § 3600 can because even those who had prior testing can avail themselves of further testing.²²⁹

Fourth, the chain of custody must be strong enough to exclude tampering, or, if it is not, the testing itself must have “the potential to establish the integrity of the evidence.”²³⁰ Such language makes more sense than the limiting language seen in § 3600(a)(4), which requires that there can be no testing without an

221. See *supra* notes 197–208 and accompanying text.

222. See INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 217, § 3 (indicating that a response should take no more than ninety days).

223. See *supra* notes 172–74 and accompanying text.

224. INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 217, § 4.

225. See *supra* notes 203–04 and accompanying text.

226. See INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 217, § 4.

227. See, e.g., *United States v. Boose*, 498 F. Supp. 2d 887, 891 (N.D. Miss. 2007) (indicating that Boose could not obtain relief under § 3600 because the FBI had destroyed the initial DNA evidence).

228. INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 217, § 4.

229. See *supra* notes 203–04 and accompanying text.

230. See INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 217, § 4 (“For purposes of this Act, evidence that has been in the custody of law enforcement, other government officials or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement of this subsection, absent specific evidence of material tampering, replacement or alteration.”).

unbroken chain of custody.²³¹ Finally, the motion for DNA testing must be made “to demonstrate innocence or the appropriateness of a lesser sentence and not solely to unreasonably delay the execution of sentence or the administration of justice.”²³² Such a requirement would weed out frivolous suits brought only to frustrate the courts, but would still allow the unsophisticated inmate to simply plead innocence.²³³

This legislation would also go a long way toward solving three additional problems evident in §§ 1983 and 3600. First, the legislation would directly help those incarcerated as a result of their own incriminating statements or inaccurate eyewitness identifications²³⁴ because it would promote DNA testing over the less reliable traditional forms of evidence.²³⁵ Second, the legislation’s emphasis on access to DNA testing would signal the importance of testing and would therefore help address the problem that DNA testing is underutilized.²³⁶ And finally, adoption of the statute by all states, and eventually the federal government, would address the serious problems caused by § 3600’s limited accessibility and its excessively strict requirements.²³⁷

V. CONCLUSION

The criminal justice system must strive for a more effective and fair solution for post-conviction DNA testing. Solutions adopted by the states fall short,

231. See *supra* notes 201–02 and accompanying text.

232. See INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 217, § 4.

233. See *supra* notes 205–07 and accompanying text; see also Rosen, *supra* note 119, at 286 (“Allowing guilt or innocence to be litigated on appeal is one possible approach. In some judicial systems, appellate courts can hear new evidence, reverse convictions, order new trials, or even find the defendant innocent if they find that the decision at the trial stage was wrong or against the weight of the evidence. Even in England, where the trial by jury most closely resembles ours, the appellate courts can hear ‘fresh evidence’ and throw out convictions if they find that the conviction was ‘unsafe’ or that the jury would not have necessarily returned the guilty verdict if they had known of the fresh evidence. Similarly, allowing innocence to be litigated as a separate claim at the post-appeal stage is preferable to litigating it in the guise of a Brady, ineffective assistance, or newly discovered evidence claim (each of which has its own technical obstacles to overcome).” (internal citations omitted)).

234. See *supra* notes 176–81 and accompanying text.

235. See 150 CONG. REC. H8179, 8192 (daily ed. Oct. 6, 2004) (statement of Rep. Maloney) (“DNA is accurate, it never forgets, it cannot be intimidated by a prosecutor; and we have to put this technology to use in convicting criminals and freeing the innocent.”).

236. See *supra* notes 182–83 and accompanying text. See also 150 CONG. REC. S10674, 10676 (daily ed. Oct. 7, 2004) (statement of Sen. Leahy) (“Crime labs across the country are suffering the consequences of years of increased demand and decreased funding. One consequence is sloppy lab work. Another consequence is massive backlogs. In December 2003, the Department of Justice estimated that there were more than 500,000 criminal cases with biological evidence awaiting DNA testing. This estimate included 52,000 homicide cases and 169,000 rape cases. Ten months later, the situation has only gotten worse. While the Senate has been idle on this bill, rape kits and other crime scene evidence has been sitting on shelves, untested for lack of funding.”).

237. See *supra* notes 195–208 and accompanying text.

and §§ 1983 and 3600 are too cumbersome, unwieldy, and ineffective to provide adequate relief. Therefore, states should adopt the model legislation advocated by this Comment, which does not provide inmates with a get-out-of-jail-free card, but focuses on reasonable measures to ensure that justice was done properly the first time around. Only by ensuring that those convicted of crimes were *properly* put in prison can we ensure the ghost of the innocent man does not haunt us all.²³⁸

238. See Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 367 (2006) (“Indifference to the plight of wrongly condemned and convicted prisoners in America ultimately breeds contempt for the rule of law. We have invested billions into ‘Corrections’ while simultaneously embracing a bewildering resistance to correcting fundamental violations of clearly established constitutional rights. As a result, too many innocent and wrongly convicted men and women are now locked down in jails and prisons where they should not be. Restoring fairness in collateral appeals and remediating these wrongful convictions is the only corrective measure that can bring justice to thousands of prisoners. A generation of policymakers, legislators, lawyers, law students, and advocates will need to emerge and seriously challenge a legal and political landscape that has become an impediment to providing fair and just treatment for this country’s most vulnerable and disempowered people. It is a challenge well worth undertaking if equal justice is going to be anything more than an idea about which we hear, but never see.”); see also Holly Schaffter, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 737–38 (2002) (noting that wrongful convictions should get the same attention from states that “airplane crashes, defective automotive parts, medical malpractice, fraud, or bad prescription drugs” currently do).