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A Prisoner's Right to Access DNA Evidence to Prove His Innocence: Post-Osborne Options

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NOTES & COMMENTS

A PRISONER'S RIGHT TO ACCESS DNA EVIDENCE TO PROVE HIS INNOCENCE: POST-*OSBORNE* OPTIONS

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I. INTRODUCTION

Despite advances in DNA technology and the ability, for the first time, to prove almost conclusively the guilt or innocence of a defendant, the Supreme Court recently held that access to DNA testing is constitutionally irrelevant.[1] In *District Attorney's Office v. Osborne*, the Supreme Court held that there is no independent Constitutional right to post-conviction DNA testing under the Fourteenth Amendment.[2] Instead, the Court held that it must be left up to the States to enact post-conviction relief statutes.[3] This Note posits that the Court must acknowledge the inevitable changes that modern DNA testing presents to the court system and lead the way in creating fitting policy that ensures all prisoners are able to access evidence to prove their innocence. It will argue that the protections afforded to individuals under the Constitution of the United States must be analyzed in light of modern society and its capabilities.[4] Nothing is more fundamental to the Constitution than the protection of individual liberty so our system of jurisprudence must be flexible enough to incorporate scientific advances that will allow the Court to better safeguard this important right.[5] Lastly, it will argue that for the following reasons, the most likely means of accomplishing the recognition of this right is through the substantive due process doctrine.

1. District Attorney's Office v. Osborne, 129 S.Ct. 2308, 2323 (2009).

2. *Id.* at 2322.

3. *Id.* at 2323.

4. Elizabeth A. Laughton, Note, *McKithen v. Brown: Due Process and Post-Conviction DNA Testing*, 2008 Duke L. & Tech. Rev. 0007.

5. Harvey v. Horan (Harvey II), 285 F.3d 298, 304–05 (4th Cir.) (2002) (Luttig, J., respecting the denial of rehearing en banc).

II. Historical Bases of the Court's Holding in *Osborne*

Historically, courts have distrusted exculpatory evidence discovered following a conviction.[6] Notions of finality and comity have dominated the system, in large part based on tradition.[7] Faith in the court system requires a dogmatic belief that the just result has been reached.[8] Moreover, finality is in the states' best interest given the expense and resources required by endless appeals.[9] Finally, there is a general distrust of witnesses who come forward years after the trial.[10] Their memories are likely to have faded and their motives become suspect.[11] As a result, the probative value of this evidence is deemed minimal. Over the years, the Supreme Court has adhered to these principles despite calls for change. In *Herrera v. Collins*, the Court held that there is no constitutional claim for actual innocence post-conviction.[12]

III. Developments in DNA Testing

More so than ever before, DNA testing today has the capability to provide concrete evidence of factual innocence.[13] DNA evidence was first introduced in criminal proceedings in the mid-80's and since then there have been rapid advances in its technology, demonstrating increasing reliability.[14] These advances have culminated in Short Tandem Repeat (STR) DNA, used predominantly in forensic identification science today.[15] STR DNA exponentially increases the reliability of forensic identification over earlier techniques.[16] The method uses an enzyme to make many copies of a small section of an individual's DNA.[17] This section is then cut into pieces by another enzyme, and separated.[18] The fragments are then examined under a silver stain where repeat units, or patterns of dark and light stripes emerge.[19] Because different unrelated people have different numbers

6. Brandon Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1630 (2008).
7. *Id.*; *See* Herrera v. Collins, 506 U.S. 390, 427–28 (1993) (Scalia, J., concurring).
8. *See Herrera*, 506 U.S. at 428 (Scalia, J., concurring).
9. *See id.* at 417.
10. Garrett, *supra* note 6, at 1630.
11. *Id.*
12. Herrera v. Collins, 506 U.S. 390, 417 (1993); House v. Bell, 547 U.S. 518 (2006).
13. *Harvey II*, 285 F.3d at 305 (Luttig, J., respecting the denial of rehearing en banc).
14. *Osborne*, 129 S.Ct. at 2316.
15. *Id.*
16. *Harvey II*, 285 F.3d at 305 (Luttig, J., respecting the denial of rehearing en banc).
17. Donald E. Riley, Ph.D., *DNA Testing: An Introduction For Non-Scientists: An Illustrated Explanation*, Scientific Testimony: An Online J. (2005), http://www.scientific.org/tutorials/articles/riley/riley.html
18. *Id.*
19. *Id.*

of repeat units, these regions of DNA can be used to discriminate between unrelated individuals.[20] Current techniques can often yield reliable results from a single cell.[21] Moreover, STR testing is capable of producing reliable results even when samples are severely disintegrated.[22] STR testing is unique because of its unparalleled statistical power of discrimination.[23] Under the analysis, the probability that two random individuals will have the same DNA is only one in three trillion.[24] For purposes of understanding the magnitude of these figures of probability, it is estimated that there are only six billion persons on the planet.[25] There is widespread agreement within the scientific community that this technology has the capability to distinguish between any two individuals, save identical twins, on the planet.[26] This means that for the first time, in certain cases scientific technology has the power to determine whether a defendant is guilty or innocent of a crime for which he has been convicted to a virtual certainty.[27]

IV. Legislative Reactions to Advances in DNA Technology

The advances in DNA testing and its implications have been recognized by both federal and state legislatures.

A. *Federal Legislature's Reaction*

The Innocence Protection Act of 2004 was the first piece of federal legislation to address the changes that the evolution of DNA testing posed to criminal proceedings in the post-conviction context.[28] It was housed in the Justice for All Act of 2004, which enhanced protections for victims of federal crime, increased federal resources available to state and local governments to combat crimes with DNA technology, and provided safeguards to prevent wrongful convictions and executions.[29] The Innocence Protection Act provides access to post-conviction DNA testing in federal cases, helps states improve the quality of

20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. DNA Notes: All About DNA, STR Analysis, http://dnanotes.blogspot.com/2010/11/str-analysis.html (last visited Feb. 21, 2011).
25. World Population Clock, http://math.berkeley.edu/~galen/popclk.html (last visited Feb. 20, 2011)
26. *Harvey II*, 285 F.3d at 305 (Luttig, J., respecting the denial of the rehearing en banc).
27. *Id.*
28. *See* Press Release, Sen. Patrick Leahy, Oversight of the Justice For All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs (Jan. 23, 2008), http://leahy.senate.gov/press/press_releases/release/?id=787763e4-73ce-4cb7-8a85-bda69fe39760.
29. Pub. L. No. 108-405, 118 Stat. 2260 (2004) (codified in scattered sections of 18, 28, and 42 U.S.C.).

legal representation in capital cases, and increases compensation in federal cases of wrongful conviction.[30] It also authorized $25 million over five years to defray the costs of post-conviction DNA testing.[31]

B. *State Legislatures' Reactions*

The majority of state legislatures have taken similar measures. Forty-seven states have enacted post-conviction DNA testing access statutes;[32] however, statutory innocence claims retain substantial limitations because many of these statutes implement procedural hurdles over which the person seeking relief must jump in order to obtain access to testing.[33] Many of these laws appear to have been arbitrarily constructed; they illustrate very little consistency from state to state. Therefore, although almost all states and the federal government have legislation in place aimed at providing post-conviction relief, they still do not safeguard a prisoner's right to access DNA testing.

Many states impose outcome-based statutory limitations to DNA testing access.[34] In these states, the statute imposes a test whereby the court must determine the likely probative impact of the DNA evidence before access is granted. The standard which must be met differs among states. The vast majority of states require a threshold showing of "materiality" before testing is granted.[35] Materiality requires the petitioner to show that "a reasonable probability exists that the petitioner would not have been convicted if exculpatory results had been obtained through DNA testing."[36] This means that even if the court finds that evidence obtained through DNA testing could be probative of innocence, access will not be granted unless it meets the reasonable probability standard.[37] Kansas, Nebraska, and Wyoming set a low threshold by allowing access to DNA on a showing that there is a likelihood that the DNA will be probative of innocence.[38] Nonetheless, two states impose an even lower standard. Colorado and Texas require that it be "more probable than not" that the requested DNA evidence would prove innocence.[39] New Hampshire and Virginia require "clear and substantial evidence of" or "a substantial showing" that the DNA evidence would prove innocence before access will be granted.[40] Virginia requires a petitioner to show "clear and convincing evidence that the test results would prove materially

30. *Id.*
31. *Id.*
32. Garrett, *supra* note 7, at 1673.
33. *Id.* at 1675.
34. *Id.* at 1676.
35. *Id.*
36. *Id.*
37. *Id.*
38. Garrett, *supra* note 7, at 1676.
39. *Id.*
40. *Id.*

relevant, may prove innocence, and would not be cumulative or contradictory."[41] In doing so, the State ensures that it is virtually impossible for a convict to be exonerated through DNA evidence since without access to the evidence he is unable to prove those things necessary to allow him access.[42] These structures expose the states' hesitancy to provide DNA testing to prove actual innocence. Moreover, state courts have consistently interpreted these threshold showings strictly.[43]

Twenty-five states predicate access to DNA testing on conviction for certain crimes.[44] Kentucky and Nevada limit testing applicants on death row for capital crimes.[45] Similarly, twenty-one states require that the petitioner be incarcerated or in custody in order to obtain testing. Only seventeen states provide for testing when the petitioner seeks only a sentence reduction rather than relief from conviction.[46]

State statutes further incorporate a broad range of restrictions. Sixteen states, including Pennsylvania, require that an applicant seeking access to DNA testing must assert their actual innocence and present a prima facie case that the identity of the perpetrator of the crime was at issue in the proceedings that resulted in the applicant's conviction and sentencing.[47] These restrictions foreclose relief in cases where the petitioner pled guilty at trial.[48] In fact, they require that the defendant plead innocent at trial, which might have been strategically difficult to do without the support of DNA evidence.[49] Consequently, seven states permit testing if identity "should have" been raised at trial, even if it was not.[50] Twelve states require that the testing was technologically impossible at the time of trial; however, few states recognize the right to testing based solely on the constantly advancing technology.[51]

Several states have enacted time restrictions.[52] Five states require that the motions be brought within one to three years following conviction, although all of them but Delaware and Idaho include good-cause exceptions to this rule.[53] Lastly, only twenty-four states provide counsel to petitioners through this process. Four states have held that attorney error, including the failure to request DNA testing at trial or

41. *Id.* at 1676–77.
42. *Id.* at 1677.
43. *See id.* for an in-depth discussion on how various circuit courts have interpreted these threshold showing requirements.
44. Garrett, *supra* note 7, at 1680.
45. *Id.*
46. *Id.*
47. *Id.* at 1680–81.
48. *Id.* at 1680.
49. *Id.* at 1681.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*

to exercise due diligence does not warrant post-conviction DNA testing.[54]

Still three states do not have any DNA access statutes incorporated into their state law: Alaska, Massachusetts, and Oklahoma. Instead, Alaska has a general post-conviction relief statute under which a person who has been "convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief if the person claims . . . that there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice."[55] The problem is that newly discovered evidence cannot be presented unless access is first provided. The state of Alaska claims that discovery procedures provide this mechanism, however as of yet, it concedes that no litigant has obtained evidence for such testing under the statute.[56]

In light of the inconsistencies in state statutes and the limitations placed on access to post-conviction relief across the board, the only way to guarantee a prisoner's right to access DNA testing which is likely to determine the guilt or innocence of a convict following conviction is to recognize it as a constitutional right. Until recently it was still unclear whether prisoners had this right in addition to their statutory rights. However, on March 2, 2009, the Supreme Court finally addressed the issue in *Osborne*, holding that prisoners have no constitutional right to post-conviction DNA testing that might prove their innocence.[57]

V. THE CASE: *DISTRICT ATTORNEY'S OFFICE V. OSBORNE*

The issue arose out of an Alaska case, which resulted in a long string of litigation in state and federal courts. Sixteen years ago, two men were driving through Anchorage, Alaska when they solicited sex from a female prostitute, identified as "K.G."[58] After negotiating a price, she agreed to perform fellatio on both men and got in their car. When she demanded payment up front, the two men pulled out a gun and forcibly raped her, using a condom she had brought. The men then ordered her out of the car and told her to lay face down in the snow. When she refused, the men choked her and beat her with a gun. She made a final attempt to escape and one of the men beat her with an axe handle and then shot her in the head. They tried to cover her body and then left her on the side of the road. Amazingly, the bullet only grazed K.G.'s head and she survived. When she was sure the two

54. *Id.* at 1682.

55. Alaska Stat. § 12.72 (2008).

56. *Patterson v. State*, No. A-8814, 2006 WL 573797, *4 (Alaska App., Mar. 8, 2006).

57. *Osborne*, 129 S.Ct. at 2308.

58. *Id.* at 2312–13.

men had left, she got up and flagged down a passing car which took her to the hospital to receive medical care and speak with the police.[59]

The police found the axe handle, a spent shell casing, some of K.G.'s clothing stained with blood, and the blue condom. Six days later, Dexter Jackson was pulled over for flashing his headlights at another vehicle. In his car, they discovered a gun which matched the spent shell casing recovered at the scene. He also matched the description given by K.G.[60] Jackson admitted that he had been the driver during the rape and assault, and told the police that William Osborne had been his passenger.[61] Osborne was implicated by additional evidence as well. K.G. picked out his photograph and she identified him at the trial as her attacker. Other witnesses testified that Osborne was with Jackson on the evening in question, and an axe handle similar to the one at the scene of the crime was found in Osborne's room.[62]

The State also performed DNA testing on Osborne. The State performed DQ Alpha testing on the blue condom.[63] "DQ Alpha testing is a relatively inexact form of DNA testing that can clear some wrongly accused individuals, but generally cannot narrow the perpetrator down to less than 5% of the population."[64] The semen found on the condom had a genotype that matched a blood sample taken from Osborne.[65] Osborne is African-American and approximately 16% of African-Americans have the same genotype.[66] The genotype did not match Jackson's blood sample.[67] This means that the DQ Alpha testing ruled out Jackson, as well as 80% of other African-American individuals.[68]

Osborne and Jackson were convicted by an Alaska jury for kidnapping, assault and sexual assault.[69] Given the brutality of the crime, Osborne was sentenced to twenty-six years in prison, with five years suspended.[70] Osborne then sought post-conviction relief in Alaska state court on three separate claims. First, he argued that his attorney was constitutionally ineffective because she failed to comply with his request for a more precise form of DNA testing during trial.[71] Osborne's attorney testified that after investigation, she had determined that a more advanced DNA test would harm her client rather than

59. *Id.* at 2313
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 2314.
70. *Id.* at 2314.
71. *Id.*

help him. Her defense was mistaken identity and she feared that the "DNA test would have served to prove that Osborne committed the alleged crimes."[72] The Alaska court concluded that her decision had been strategic and rejected his claims.[73]

Second, he sought relief based on Alaska's post-conviction statute, § 12.72;[74] however, § 12.72 does not apply to DNA testing that was available at trial. Finally, Osborne argued that he had a claim under both the Federal and State Constitutions.[75] The state court found no basis for recognizing a federal constitutional right to DNA testing. He was precluded from bringing a state constitutional claim because, according to the court, the testing was not likely to be conclusive of his guilt since there was additional evidence negating innocence.[76] The court relied heavily on the fact that Osborne had confessed some of his crimes in a 2004 application for parole.

At the same time, Osborne was also suing in federal court under 42 U.S.C. § 1983.[77] He claimed that the Due Process Clause gave him a constitutional right to access STR DNA testing.[78] The United States District Court for the District of Alaska dismissed the claim but the Court of Appeals held that he had a due process right to post-conviction DNA access. The Supreme Court granted certiorari to decide whether Osborne had a viable constitutional right to post-conviction DNA testing.[79]

VI. Federal Vehicles Available to Make a Constitutional Claim

Before examining the constitutional claims posed by Osborne, it is necessary to understand the federal vehicles available to prisoners seeking to remedy an alleged violation of their constitutional rights.

A. *Habeas Relief v. § 1983 Civil Rights Claim*

Prisoners have two potential avenues available to them when appealing for federal relief from an alleged constitutional violation.[80] They can file a civil suit under 42 U.S.C. § 1983 or apply for a writ of habeas corpus under 28 USC § 2254.[81] Both statutes create remedies for violations of constitutional rights, but they differ in scope.[82] Section 1983 establishes a civil action for deprivation of constitutional

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 2315.
78. *Id.*
79. *Id.* at 2316.
80. Heck v. Humphrey, 512 U.S. 477, 480 (1994).
81. *Id.*
82. *Id.*

rights.[83] It creates a federal remedy to address situations where "the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the fourteenth amendment might be denied by the state agencies."[84] The federal remedy is auxiliary to the state remedy.[85] This means that the petitioner does not need to exhaust state remedies before it can be invoked.

The federal habeas statute authorizes state prisoners held in violation of federal law to apply for a writ of habeas corpus in federal court.[86] The purpose of the writ was to give a person in custody an avenue to challenge the legality of that custody, and to obtain release from illegal custody.[87] The writ requires a litigant to pursue and exhaust all state remedies.[88] Federal habeas courts can hear state defaulted claims only in rare circumstances. Therefore, the greatest practical distinction between the two remedies is procedural. Whereas, a civil rights claim can be brought directly to federal court, generally a habeas claim must first be exhausted in state courts.

1. The Blurring of the Distinction Between Habeas Relief and a § 1983 Claim

Over time, an increase in state post-conviction remedies coupled with the writ's state exhaustion requirements meant a delay in federal habeas relief.[89] Thus, prisoners began to view § 1983 as an attractive alternative to habeas relief because it bypassed the exhaustion requirements and provided immediate relief.[90] Increasingly, the demarcation between the two statutes became blurred as prisoners sought to use them interchangeably.[91] In *Preiser v. Rodriguez*, the Supreme Court addressed the issue. It held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment," habeas is the exclusive remedy, subject to its procedural exhaustion requirements.[92] In *Heck v. Humphrey*, the Court further decreased the scope of § 1983 by specifying that a prisoner cannot use § 1983 in any suit where success would "necessarily imply" the unlawfulness of a conviction or sentence.[93]

83. 42 U.S.C. § 1983.
84. Benjamin Vetter, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 593 (2004).
85. *Id.*; *Heck*, 512 U.S. at 480.
86. Vetter, *supra* note 84, at 590.
87. *Id.* at 594.
88. *Id.*
89. *Id.* at 595.
90. *Id.*
91. *Id.*
92. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).
93. *Heck*, 512 U.S. at 487.

2. The Proper Vehicle Under Which to Bring a Federal Claim to Access DNA Testing

These holdings led Circuit Courts to reach different conclusions regarding a prisoner's ability to use § 1983 as a vehicle for seeking access to DNA evidence. However, in 2004, the Supreme Court ruled on a § 1983 claim which raised many of the same substantive issues as *Osborne*. In *Wilkinson v. Dotson*, the court held that prisoners could challenge the constitutionality of state parole procedures under § 1983.[94] Habeas is the exclusive remedy only where the action seeks invalidation of the judgment.[95] The fact that the action, if successful, may cause the State to seek a new judgment is not relevant.[96] This holding seems to suggest that a prisoner may bring a § 1983 claim even if success in the action might later be used as a basis for release, so long as it does not *necessarily* result in release.

In *Osborne*, the majority assumes without deciding that *Heck* does not bar Osborne's § 1983 claim.[97] In doing so, the court failed to recognize the precedential nature of *Wilkinson*, and thus missed an opportunity to decisively rule on an increasingly relevant issue. Like the petitioners in *Wilkinson*, Osborne "hoped"[98] his suit would "help bring about earlier release"; however the § 1983 suit could not accomplish that without further proceedings.[99] Whether DNA is exculpatory cannot be determined until after the testing and the basis for the claim is to get the opportunity to perform the testing. The extra step that is required before the evidence can be used to challenge the validity of the conviction forms the basis of the distinction between a § 1983 claim and a habeas claim.[100] Thus, under court precedent, a § 1983 claim is the correct vehicle under which to bring a claim for post-conviction access to DNA testing.[101]

VII. Potential Due Process Grounds for Recognition of a Constitutional Right to Access DNA Testing Post-Conviction

Both a § 1983 claim and a habeas claim must be brought to assert an underlying constitutional right. This means that in order to succeed in a § 1983 claim, the court must recognize a constitutional right to access DNA testing. Leading up to *Osborne*, scholars promulgated

94. Wilkinson v. Dotson, 544 U.S. 74, 76 (2005).
95. *Id.* at 81.
96. *Id.*
97. *Osborne*, 129 S.Ct. at 2319.
98. *Id.* (quoting *Wilkinson*, 544 U.S. at 78).
99. *Id.* (quoting *Wilkinson*, 544 U.S. at 82).
100. Howard Wasserman, Osborne *and Due Process*, PrawfsBlawg (June 30, 2009, 6:54 AM), http://prawfsblawg.blogs.com/prawfsblawg/2009/06/osborne-and-due-process.html.
101. *Id.*

a variety of due process grounds, both procedural and substantive, to support a constitutional claim for post-conviction access to DNA testing.

A. *History and Function of the Due Process Clause*

The Fifth Amendment was adopted in 1791. It prohibits the federal government from depriving any person of life, liberty, or property without due process of law.[102] The Fourteenth Amendment was added to the Bill of Rights in 1868. It provides that "no State shall. . .deprive any person of life, liberty, or property without due process of law."[103] It protects individuals from abridgement of rights from state governments as well as the federal government. Otherwise, the two clauses have been interpreted identically. As a limitation on Congress, the Supreme Court has held that the Due Process Clause provides two functions: (1) a remedial function when other constitutional rights have been violated; and (2) to impose restrictions on both legal procedures as well as on legal substance.[104] In this way, it acts as a limitation on the state's right to restrict certain substantive rights of its citizens, and as a limitation on congressional power. It does not affect the state's rights to legislate the issues affecting the substantive right at issue; it simply bars the state's denial of the right. In *Osborne*, the court addressed a petitioner's claim to access DNA post-conviction as both a procedural due process right and a substantive due process right.

B. *Procedural Due Process Right*

There are three main constitutional grounds rooted in a prisoner's procedural due process right that proponents argued could support Osborne's claim for DNA testing: (1) actual innocence, (2) a residual liberty interest, and (3) an extension of the *Brady* doctrine.

1. Claims of Actual Innocence

Claims of actual innocence are based on the "factual innocence" of the petitioner. They are often brought when additional evidence tending to show the petitioner is actually innocent is discovered following conviction. They must be brought in habeas because success in the action would mean that the petitioner was in fact, innocent of the underlying crime; and therefore "necessarily imply" the invalidity of the conviction.[105] The Court's jurisprudence has divided claims of actual

102. Veronica C. Abreu, Note, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the "Deeply Rooted" Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment's Due Process Clause*, 44 B.C. L. REV. 177, 181 (2002) (citing U.S. Const. amend. V).
103. U.S. CONST. AMEND. XIV.
104. *Id.* at 181–82.
105. *Heck*, 512 U.S. 477.

innocence into two categories: (1) substantive innocence claims and (2) procedural innocence claims.[106]

a. Substantive Innocence Claims

In *Herrera v. Collins*, the Supreme Court made it clear that claims of actual innocence are not themselves constitutional claims justifying federal habeas relief when the petitioner was afforded an "entirely fair and error free" trial.[107] Nonetheless, the Court did acknowledge that a "truly persuasive" post-trial demonstration of actual innocence may render a defendant's *execution* unconstitutional and give him a freestanding innocence claim in federal habeas court.[108] The Court suggested that such a claim would only be available in capital cases, and only if the state does not provide an effective avenue for relief. The Court declined to define what threshold showing would have to be made in order to trigger relief other than to say that it would necessarily be "extraordinarily high."[109] This was for two reasons: (1) the disruptive effect that allowing such claims would have on the state's interest in finality, and (2) the notion that once a defendant has been afforded a fair trial and convicted, the presumption of innocence disappears.[110] This presupposes that only the *execution* of an innocent person is so "constitutionally intolerable" as to overcome the Court's interest in finality and comity.

b. Procedural Innocence Claims

In *Schlup v. Delo*, the court carved out an exception, whereby a constitutional claim based on procedural error during the underlying criminal proceedings may be heard on the merits if it is accompanied by a threshold showing of actual innocence.[111] *Herrera* claims are constitutional claims in and of themselves. *Schlup* claims of actual innocence are not themselves constitutional claims, but rather a "gateway through which a petitioner must pass to have his otherwise barred constitutional claim considered."[112]

The exception is grounded in the principle that redress is available to ensure that individuals are not imprisoned in violation of the Constitution, rather than to address errors of fact.[113] A *Schlup* claim must be accompanied by a claim of constitutional error at trial.[114] Absent a

106. *See also* Schlup v. Delo, 513 U.S. 298, 314 (1995) (contrasting petitioner Schulp's procedural claim of innocence with Herrera's substantive claim of innocence in *Herrera v. Collins*).
107. *Herrera*, 506 U.S. at 400.
108. *Id.* at 417.
109. *Id.*
110. *Id.* at 399, 417.
111. *Schlup*, 513 U.S. 298.
112. *Id.* at 315.
113. *Herrera*, 506 U.S. at 400.
114. *Schlup*, 513 U.S. at 316.

showing that the petitioner received an unfair trial, the exception is not available. The Court wanted to ensure that the exception would only be available in "extraordinary cases," so it also tied the exception to the petitioner's innocence.[115] It reasoned that reliable evidence capable of showing actual innocence, such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence unavailable at trial," would be unavailable in the majority of cases.[116] Obviously, the reliability of modern DNA evidence has altered this analysis.

In 2006, the Supreme Court agreed to hear a petitioner's post conviction appeal based on DNA testing for the first time. In *House v. Bell*, a petitioner presented post-conviction DNA evidence that established that the semen found on the victim's nightgown came from her husband, and not from the petitioner. This directly contradicted evidence presented at trial. He obtained access to testing through Tennessee's relevant statute. The Court held that the petitioner met the threshold of a *Schlup* "procedural innocence" claim by casting sufficient doubt on his guilt.[117] Again, the Court cursorily acknowledged the hypothetical freestanding innocence claim set forth in *Herrera* but "[declined] to resolve the issue," only acknowledging that "whatever burden" a freestanding innocence claim would require, "this petitioner has not satisfied it."[118]

c. Due Process Claim for Access to DNA Grounded in Actual Innocence

It is important that a distinction be made between claims of actual innocence and claims for *access* to the DNA used to bring an actual innocence claim. Claims of actual innocence are only relevant to the extent that a prisoner is provided meaningful access to the means necessary to prove his innocence. Osborne was seeking access to DNA testing; he did not yet know if the evidence sought could be used to support an actual innocence claim or not. Even assuming that DNA testing conclusively proving innocence would meet the "extraordinarily high" threshold set forth for freestanding actual innocence claims under *Herrera*, Osborne must first obtain the right to access the test. Absent access, Osborne does not have a viable actual innocence claim.

This concept has led to the argument that due process demands a prisoner be guaranteed access to DNA evidence:[119] "a right of access to DNA evidence may be the procedure that is necessary for a peti-

115. *Id.* at 324.
116. *Id.* at 324.
117. House v. Bell, 547 U.S. 518, 555 (2006).
118. *Id.*
119. *Townsend v. Sain*, 372 U.S. 293, 317 (1963).

tioner to establish a well supported claim of actual innocence."[120] The problem arises when state post-conviction statutes are inadequate to provide access to DNA testing. In that case, the only way to ensure access is through the recognition of a constitutionally protected procedural due process right to obtain the evidence; however, this would mean the Court must acknowledge that state procedures are inadequate.

2. Due Process Protection of a Prisoner's Residual Post-Conviction Liberty Interest

A constitutional post-conviction right of access to DNA may also stem from a prisoner's residual post-conviction liberty interest.[121] Supreme Court precedent makes it clear that a lawful conviction "does not entirely eliminate the liberty interests of convicted persons."[122] Although the exact contours of this liberty interest are unclear, it is likely that some portion of "a prisoner's interest in freedom from bodily restraint" survives criminal conviction and incarceration.[123] For example, even if a prisoner is barred from pursuing his claim any further because of procedural hurdles, he still has a right to pursue his freedom through clemency;[124] however, in order to pursue clemency, a prisoner must be able to access the evidence needed to present it to the executive.[125] This suggests that access to DNA testing may be the due process necessary to safeguard a convict's interest in clemency or some other liberty interests.

3. An Extension of *Brady* Access to Exculpatory Evidence

Some people have argued that a prisoner's residual liberty interest is such that due process necessitates an extension of the pre-trial constitutional right of access to exculpatory evidence.[126] The Supreme Court first recognized a defendant's right of access to exculpatory evidence held by the prosecution as a matter of fairness in *Brady v. Maryland*.[127] The Court held that the suppression of evidence favorable to the accused violates due process.[128] In *Pennsylvania v. Ritchie*, Brady was extended to potentially exculpatory evidence as well so

120. Elizabeth A. Laughton, *McKithen v. Brown: Due Process and Post-Conviction DNA Testing*, 2008 DUKE L. & TECH. REV. 7, 14 (2008).

121. *Id.* at 19.

122. *Osborne*, 129 S.Ct. at 2334 (Stevens, J., dissenting).

123. *Harvey II*, 285 F.3d at 312 (Luttig, J., respecting the denial of the rehearing en banc).

124. *Herrera*, 506 U.S. at 410–11.

125. Laughton, *supra* note 4, at 11.

126. *Id.*, at 10.

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

128. *Id.* at 87.

that the court could review it and determine its import;[129] however, *Brady* was still only recognized as a pre-trial right.[130]

Leading up to *Osborne*, arguments were made that *Brady* should be extended to encompass post-conviction access to exculpatory evidence, particularly DNA testing.[131] The argument was that the same underlying notion of basic fairness that governs pre-trial production of all potentially exculpatory evidence governs post-trial production of evidence held by the government since testing could prove beyond any doubt that the defendant did not commit the crime for which he was convicted.[132]

4. *Osborne* invalidated each of the foregoing procedural due process grounds for bringing a claim for access to DNA testing.

The Supreme Court analyzed each of the above grounds for recognizing a constitutional right to access DNA testing. For various reasons, the Court held that the right was not supported by any of these bases. The Court combined its analysis of Osborne's arguments that access to DNA testing is the due process necessary to protect both his right to bring an actual innocence claim and his residual liberty interest. It found that a constitutional due process claim is not necessary to safeguard either interest so long as the State provides adequate procedure.[133] According to the Court, the "question is whether consideration of Osborne's claim within the framework of the State's procedures for post-conviction relief" offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[134] *Osborne* recognized that Osborne did have some part of a residual liberty interest to prove his innocence.[135] Under state law, he had a "liberty interest in demonstrating his innocence with new evidence." The court recognized Alaska's post-conviction statute as the mechanism to safeguard this interest.[136] The Court claimed that there is "nothing inadequate about the procedures Alaska has provided to vindicate its state right to post-conviction relief in general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence."[137] It based its determination on Alaska's providing a "right to be released on a sufficiently compelling showing of new evidence that establishes

129. Pennsylvania v. Ritchie, 480 U.S. 39 (1987).
130. *See id.* at 52–53 (holding that the Confrontation Clause protects a defendant's trial rights but does not compel pretrial disclosure of information which may help the defense prepare the case); Laughton, *supra* note 4, at 9.
131. *Id.* at 10.
132. *Harvey II*, 285 F.3d at 317.
133. *Osborne*, 129 S.Ct. at 2320.
134. *Id.*
135. *Osborne*, 129 S.Ct. at 2319.
136. *Id.*
137. *Id.* at 2320.

innocence" and the state's declaration that the statute's discovery procedures are applicable to convicts seeking access to post-conviction DNA testing.[138] The court acknowledged that there are limitations on what is discoverable under the statute: "The evidence must be newly available . . . , must have been diligently pursued, and must also be sufficiently material;" however, it maintained that Alaska's statute is not inconsistent with the "traditions and conscience of our people."[139]

Osborne definitively holds that *Brady* does not extend to the post-conviction context. Because Osborne was convicted in a fair trial, his "right to due process is not parallel to a trial right [and] he has only a limited interest in post-conviction relief."[140] In some circumstances, a state-created right can beget other rights essential to their realization; however, the Court held that it would go too far to conclude that due process requires *Brady* be extended to Osborne's post-conviction liberty interest.[141]

In his concurrence, Justice Alito disagrees with the majority that *Brady* should not be extended to the post-conviction context. He frames the right to access DNA testing post-conviction as a classic *Brady* claim, which must therefore be brought in habeas;[142] however, Alito confused the doctrine's application. Typical *Brady* material is evidence that exculpates on its face, such as the *results* of DNA testing suggesting the prisoner did not commit the crime.[143] By definition, the failure to turn over exculpatory evidence necessarily implies the invalidity of the conviction and must be brought in habeas. Osborne did not know if the evidence he was seeking was exculpatory or not; that depended on the outcome of the testing which he was seeking to perform. For this reason, the majority was correct that a constitutional right of access to DNA testing sued for under § 1983 cannot be couched as an extension of a *Brady* claim.

VIII. POST-*OSBORNE*: WHAT IS LEFT FOR PRISONERS SEEKING TO ACCESS DNA EVIDENCE TO PROVE THEIR INNOCENCE POST-CONVICTION

The *Osborne* opinion was couched as a states-right opinion. The Court concluded that Osborne did not have a constitutional claim to post-conviction access to DNA testing because he had not exhausted the remedies provided to him by the State of Alaska. The Court held that Osborne was afforded adequate due process by the state; however, the fact remains that he was denied access to evidence that could conclusively prove his guilt or innocence. Thus, the state court's ap-

138. *Id.*
139. *Id.* at 2320–21.
140. *Osborne*, 129 S.Ct. at 2320.
141. *Id.* at 2319–20.
142. *Osborne*, 129 S.Ct. at 2325 (Alito, J., concurring).
143. *See* Brady v. Maryland, 373 U.S. 83, 87–89 (1963).

plication of the statute begs serious questions about "whether the State's proceedings are fundamentally unfair in their operation."[144] Even if Osborne had pursued his claims through state court, it is unlikely that he would have received relief because Alaska's statute does not apply to DNA testing that was available at the time of trial and STR DNA testing was available at that time—it was not utilized based on trial strategy.[145] Furthermore, the state concedes that no litigant has ever obtained access to DNA testing under the Statute.[146] By holding that Alaska's application of its post-conviction relief statute did not violate Osborne's due process, the Court averred that it is not willing to interfere with the state's right to legislate in this area: "to suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response."[147]

Osborne demonstrates that not all state statutes provide relief. The only way to ensure that all citizens are able to utilize DNA technology to determine guilt or innocence is by the recognition of a constitutional right. Since the *Osborne* Court invalidates all procedural due process grounds for bringing a claim, courts must recognize a substantive due process right.

The *Osborne* Court did address whether a substantive due process right existed and held that it did not; however, the Court's substantive due process jurisprudence belies a willingness to revisit the right based on public opinions and moral consensus. Furthermore, the recognition of a substantive due process right is consistent with the Court's efforts to retain state rights because the recognition of a substantive due process right would not prohibit the states from legislating the particular details of post-conviction access to DNA testing; rather, it would simply bar the state's denial of that right.

A. *The History of the Substantive Due Process Doctrine*

Due process rights are not limited to the specific guarantees enumerated in the Constitution.[148] Substantive due process made its first appearance in the Court's jurisprudence in *Lochner v. New York* where it invoked the Due Process Clause to strike down a New York statute limiting the number of hours bakers could work a week.[149] The Court reasoned that the statute interfered with an individual's right and liberty to contract.[150] The Court held that the freedom to contract was implicit in the Due Process Clause of the Fourteenth Amendment. Thus, it significantly expanded the scope of the Due

144. *Osborne*, 129 S. Ct. at 2332 (Stevens, J., dissenting).
145. *Id.* at 2333.
146. *Osborne*, 129 S.Ct at 2333 (Stevens, J., dissenting).
147. *Id.* at 2322.
148. Abreu, *supra* note 102, at 181
149. Lochner v. New York, 198 U.S. 45 (1905).
150. *Id.* at 61.

Process Clause to protect substantive rights.[151] For several decades following, the Court frequently used the doctrine to strike down laws that it found incompatible with a particular social or economic philosophy.[152]

For example, in *Pierce v. Society of Sisters*, the Court used substantive due process to strike down a state law requiring school children to attend public schools because the right to educate a child in the school of the parent's choice—public or private—is protected by the Due Process Clause.[153] Similarly, in *Meyer v. State of Nebraska*, the Court held that a law making it illegal to teach school children foreign languages before high school was unconstitutional.[154]

The Ninth Amendment of the Constitution lent additional support to the substantive due process doctrine.[155] The Ninth Amendment ensures that "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[156] The amendment was introduced to quiet expressed fears that a bill of specifically enumerated rights could not be broad enough to cover all essential rights.[157] The Ninth Amendment also illustrates the framers' intent for the Constitution to retain flexibility.[158] The framers intentionally left the concept of liberty open to gather meaning from experience: "[The] constitution [was] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[159]

B. *Criticism of Substantive Due Process and Its Demise*

The *Lochner* era, characterized by the Court's readiness to recognize rights not specifically enumerated in the Constitution, was widely criticized.[160] The central criticism was that "unelected judges were unduly substituting their own values for those of popularly elected legislatures."[161] Critics also worried that judges were overstepping their boundaries by reading a substantive component into the Due Process Clause in addition to its procedural restrictions.[162] Because the sub-

151. *Id.* at 53.
152. John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, N.Y.U. J. L. & LIB., 172, 176 (2009).
153. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925).
154. Meyer v. Neb., 262 U.S. 390, 403 (1923).
155. *See* Griswold v. Conn., 381 U.S. 479, 488–89 (1965) (Goldberg, J., concurring).
156. U.S. CONST. amend. IX
157. *Griswold*, 381 U.S. at 488–89 (Goldberg, J., concurring).
158. *See id.;* Abreu, *supra* note 102, at 193.
159. McCulloch v. Maryland, 17 U.S. 316, 415 (1819).
160. Toro, *supra* note 152, at 175.
161. *Id.* (citing ERWIN CHEMERISNSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 616 (3d ed. 2006)).
162. *See id.* at 174 ("Justice Black argued that protecting substantive rights under the Due Process Clause encroaches on the legislative province because it 'require[s]

stantive element is not explicitly addressed in the Constitution, critics argued that substantive due process was nothing more than judicial interpretation.[163]

As a result, the Court made attempts to move away from previous opinions which held laws unconstitutional for a violation of freedom of contract.[164] Instead, it averred that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[165] The Court made it clear that it would be more deferential to legislative judgment in the future.[166] In 1963, the Court gave assurances that it had moved away from the judicial activism that dominated the *Lochner* era and that it would not exceed its proper role as a neutral interpreter of the law again: although "there was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy," that doctrine "has long since been discarded."[167]

C. *The Re-Emergence of Substantive Due Process*

Substantive due process was not invoked again until 1965 when the Court decided *Griswold v. Connecticut*.[168] There, the Court struck down a Connecticut state statute banning contraceptives on the ground that it violated the right to marital privacy—a right not enumerated in the Constitution.[169] The majority opinion was careful not to frame its decision as one based on the Due Process Clause. It attempted to distance itself from the Lochner era; it spoke of "penumbras," formed by emanations from specific guarantees in the Bill of Rights "that help give [those guarantees] life and substance." The Court continued to expand the list of substantive rights protected by the Constitution although it couched them as rights emanating from the Bill of Rights rather than the Due Process Clause.[170] *Griswold* also marked the beginning of the modern substantive due process era, in which the Court applies the doctrine predominantly to social issues as opposed to the economic liberties of the *Lochner* era.[171]

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judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary'").

163. *See id.*

164. *See id.* at 175 (reporting that the Court upheld a minimum wage requirement in *West Coast Hotel Co. v. Parish* and thereby overruled previous opinions which held similar statutes unconstitutional under the Due Process Clause).

165. *Id.*

166. *Id.*

167. *Id.* at 175–76.

168. *See id.* at 176; *Griswold v. Conn.*, 381 U.S. 479, 485 (1965).

169. *Id.*

170. *See id.*

171. *See Griswold*, 381 U.S. 479; Toro, *supra* note 152, at 177.

D. *The Court Uses the "Deeply Rooted" Test to Find Substantive Rights*

Despite attempts in *Griswold* to avoid the perception that the Court was interpreting the Due Process Clause to protect substantive rights, it candidly acknowledged in *Loving v. Virginia* that the freedom to marry is derived from the Due Process Clause of the Fourteenth Amendment.[172] Again, in *Roe v. Wade*, the Court recognized that the right to privacy is founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action;[173] however, the concern that judges were reading their own values into the Due Process clause by enacting policy in place of the state legislatures remained.[174] Four years later, Justice White voiced his concern "that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable."[175]

The Court has dealt with this apprehension by only protecting substantive rights under the Due Process clause that are deemed fundamental.[176] To determine what rights are fundamental, the Court has adopted two tests: (1) the "deeply rooted" test which protects un-enumerated rights only if they are "objectively, deeply rooted in this Nation's history and tradition;"[177] and (2) the "ordered liberty" test which would strike down laws that infringe on rights that are "implicit in the concept of ordered liberty."[178] The Court has expressed a preference for the "deeply rooted" test in accomplishing the stated purpose of preventing judges from inserting their personal partialities into the Constitution:[179] this "approach tends to rein in the subjective elements that are necessarily present in due process judicial review."[180] For that reason, most courts have adopted the "deeply rooted" test; however, this Note argues that the adherence to the "deeply rooted" test as set forth in *Washington* has continued in name only. The test is so easily manipulated that Courts are able to contour the test to achieve their desired results.

172. Loving v. Va., 388 U.S. 1,12 (1967); *See* Abreu, *supra* note 102, at 187.
173. Roe v. Wade, 410 U.S. 113 (1973)
174. *See* Toro, *supra* note 152, at 179.
175. *Id.*; Moore v. City of E. Cleveland, 431 U.S. 494, 543 (White, J., dissenting).
176. Abreu, *supra* note 102, at 181.
177. Bowers v. Hardwick, 478 U.S. 186, 194 (1986) *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (overruled on other grounds); *see also* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citing *Moore*, 431 U.S. at 503 (plurality opinion)).
178. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
179. *Washington*, 521 U.S. at 721.
180. *Id.* at 722.

E. *The Court's Analysis of Osborne's Claim Under the "Deeply Rooted" Test*

In addition to various procedural due process claims, Osborne brought a substantive due process claim for access to DNA testing.[181] The *Osborne* court used the "deeply rooted" test to strike it down.[182] At first glance, this test seems instantly and fundamentally to bar Osborne's claim since DNA testing is a new technology which by definition, cannot be deeply rooted in the Nation's history and tradition.[183] The Court avers that Osborne does not have a right to access state evidence to apply DNA testing technology based solely on the reasoning that there is no history of a right to DNA testing: "the mere novelty of such a claim is reason enough to doubt that substantive due process sustains it."[184]

In his dissent, Justice Souter addresses the obvious flaws in the majority's cursory analysis: "There is no denying that the Court is correct when it notes that a claim of right to DNA testing, post-trial at that, is a novel one, but that only reflects the relative novelty of testing DNA, . . . and is not a sufficient reason alone to reject the right."[185] The rest of his opinion is framed as an argument that recognition of a substantive due process right to access DNA should be analyzed under the "ordered liberty" test rather than the "deeply rooted" test.[186] According to Souter, the substantive due process doctrine is an expression of the notion that the liberty it protects is free from arbitrary governmental action.[187] However, he recognizes that technological advances can alter societal views on the reasonableness of certain governmental actions. What would have at one time seemed a proper governmental restriction may in time, be deemed overly restrictive of one's liberty.[188]

Souter emphasizes that this change often happens slowly and the Court cannot be blamed for refusing to endorse a new moral claim immediately.[189] Instead, just as individual experience affects the capacity of that individual to see the potential legitimacy of a moral position, the broader society needs the chance to take part in the "political back and forth" about a new liberty claim before the Court can legitimately declare state or national laws arbitrary to the point of being unconstitutional.[190] Therefore, under Souter's analysis it is not only possible, but likely that the Court will revisit this claim; and

181. *Osborne*, 129 S.Ct. at 2322.
182. *Id.* at 2320.
183. *Id.* at 2322.
184. *Id.*
185. *Id.* at 2340 (Souter, J., dissenting).
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 2341.

based on changes in societal perceptions on the liberty implications of denying prisoners' access to DNA testing to prove their innocence, recognize it as a fundamental right.

F. *Why the Claim to Post-Conviction Access to DNA Will Be Revisited*

Osborne's declaration that this right does not pass the "deeply rooted" test will not bar the Court from reconsidering the claim. The Court has frequently revisited substantive due process claims and declared rights fundamental which it previously refused to recognize under "deeply rooted" test. Because there is no objective yardstick by which to determine how a tradition should be described, the Court retains a vast degree of discretion in deciding how narrowly or broadly to define the tradition at issue in a particular case.[191] If the Court aims to find a particular right fundamental, it analyzes the history of a broader, more generalized right in applying the test.[192] The Court does this when the right at issue would not be deeply rooted in our history and traditions, if it was defined narrowly.[193] By defining the right broadly, it can hinge its analysis on the broader right's deep roots and hold the narrower right, which is actually at issue, to be fundamental.[194] Therefore, by defining the right in a broader, more generalized manner, the Court is able to fit a more expansive set of rights into the "deeply rooted" test, and therefore afford them fundamental status.[195]

Most often, the Court alters its definition of the right at issue in order to remain consistent with the moral progress of the public and to pull along straggling states. Thus, the doctrine has been used by the Court as a reaction to public opinion and to set a moral bar under which states are not allowed to drop. Yet, it has often taken the Court time to recognize the relevant rights, as it waits for public opinion to cement.[196] By altering its definition of the right at hand, the Court is able to reach an outcome consistent with changes in society's moral perception of an individual's liberty interest in the corresponding right.[197]

Whether a right is defined narrowly or broadly often has a profound impact on the outcome of the case.[198] For example, in the 1965 deci-

191. Toro, *supra* note 152, at 186.

192. *See id.* at 187 (arguing that judges can more readily strike down statutes they deem contrary to a broad definition of tradition).

193. Abreu, *supra* note 102, at 199–200.

194. *Id.*

195. *Id.*

196. *See* Toro, *supra* note 152, at 186.

197. *See id.* (arguing that the Court can selectively emphasize supportive history or temper unsupportive history to alter which unenumerated rights are constitutionally protected).

198. *Id.*

sion *Griswold v. Connecticut*, the Court struck down a Connecticut statute that imposed a fine or imprisonment on anyone who used contraceptive drugs or devices to prevent conception.[199] It based its holding on a broad right to privacy in one's personal relationships, particularly marriage rather than on the narrow right to use contraception.[200] Because the Court defined the right to privacy within marital relations as fundamental, it was also able to define the narrower right to use contraception within those relationships as fundamental and deeply rooted in our society.

It is incontrovertible that the Court's holding was at least, in part, based on society's changing moral perception of contraceptive use. The birth control pill was made publicly available in the United States only five years prior, in 1960; and the sexual revolution beginning in the 1960s signaled a shift in how society viewed sexuality.[201] Sexual liberalization brought with it a more general societal acceptance of contraceptive use.[202] The Supreme Court's decision aligned with the moral consensus of the country.

Similarly, in 1967, the Court held in *Loving v. Virginia* that a Virginia anti-miscegenation statute violated an individual's due process interest in the freedom to marry the person of their choosing.[203] Again, the holding was based on the broad notion that "marriage is one of the basic civil rights of man, fundamental to our very existence and survival."[204] Thus, the Court was able to strike down the statute by framing it in the larger context of the fundamental right to marry despite the fact that the particular non-traditional form of marriage at issue was not "deeply rooted" in the nation's history. By 1967, Virginia was one of only sixteen states that still prohibited interracial marriages; and in the fifteen years prior, fourteen states had repealed laws outlawing interracial marriages.[205] This suggests that the Court was willing to protect the right to marry interracially only after the majority of the country demonstrated a moral acceptance of interracial marriages.

The Court's readiness to manipulate the "deeply rooted" test to effectuate an outcome consistent with the moral consensus of the country is perhaps best illustrated through its jurisprudence on homosexual sodomy. As recently as 1986, in *Bowers v. Hardwick*, the Court held that a Georgia statute proscribing homosexual sodomy did not violate

199. Griswold v. Conn., 381 U.S. 479, 485 (1965).

200. *Id.* at 484–85.

201. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. Pol. Econ 730, 730-34 (2002), http://www.economics.harvard.edu/faculty/katz/ files/goldin_katz_pill.pdf.

202. *Id.* at 732.

203. *Loving v. Va.*, 388 U.S. 1, 12 (1967).

204. *Id.* at 12.

205. *Id.* at 6 & n.5.

the fundamental rights of homosexuals.[206] It framed its analysis narrowly by focusing on the nation's specific tradition against homosexual sodomy: "proscriptions against that conduct have ancient roots."[207] In his concurrence, Justice Burger wrote that "condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."[208] The Court emphasized the fact that twenty-four states and the District of Columbia continue to provide criminal penalties for sodomy.[209] In refusing to define a new fundamental right, it reiterated its familiar argument that the Court should not overstep its boundaries by second-guessing the legislature.[210]

Not surprisingly, this argument was absent in 2003 when the Court declared a similar Texas statute unconstitutional as violating an individual's fundamental right to "engage in certain intimate conduct."[211] In *Lawrence v. Texas*, the Court found it necessary to revisit *Bowers* in light of a broader commitment to individual privacy and personal autonomy: "Adults may choose to enter upon this relationship in the confines of. . .their own private lives and still retain their dignity as free persons."[212] The Court chose to frame the right in broad terms by speaking of a commitment to freedom and equality, rather than narrowly focusing on the specific right at issue: homosexual sodomy.[213] Thus, it was able to invalidate the law under the "deeply rooted" test.

Again, this illustrates the Court's propensity to constitutionalize due process protections only after similar sub-constitutional protections have been widely established. In the time between *Bowers* and *Lawrence* were decided, states with laws prohibiting the relevant conduct were reduced to thirteen, of which only four enforce their laws against homosexual conduct.[214] Moreover, the moral perception of homosexuality changed drastically in those years. By 2003, homosexuality was far more widely accepted in mainstream America.

206. *Bowers*, 478 U.S. 186.
207. *Id.* at 192.
208. *Id.* at 196 (Burger, J., concurring).
209. *Id.* at 193.
210. *See id.*
211. Lawrence v. Texas, 539 U.S. 558, 567 (2003).
212. *Id.*
213. *See id.*
214. *Id.* at 573.

IX. CONCLUSION: THE NATION'S READINESS TO EMBRACE POST-CONVICTION ACCESS TO DNA AS A FUNDAMENTAL RIGHT MAKES SUBSTANTIVE DUE PROCESS THE MOST LIKELY MEANS OF RECOGNIZING A CONSTITUTIONAL RIGHT AND BRINGING THE STATES IN LINE

The Court's history of revisiting issues and retroactively recognizing a substantive due process right makes it the most likely means of ultimately recognizing a constitutional right to access DNA testing post-conviction. Furthermore, its inclination towards applying the "deeply rooted" test flexibly according to the specific rights at stake will allow it to revisit the concept of constitutionalizing post-conviction access to DNA and ultimately reach a different conclusion. In *Osborne*, the Court defines the right to post-conviction access to DNA narrowly, and therefore finds no basis in history or tradition for the right.[215] This is only because of the relative newness of this technology: "of course courts have not historically granted convicted persons access to physical evidence for STR testing."[216] By framing the right broadly as a right to physical liberty and freedom from arbitrary government action, rather than as a narrow right to DNA testing, the right to post-conviction access to DNA will be compatible with the "deeply rooted" test. Under Supreme Court precedent, the "most elemental" of the liberties protected by the Due Process Clause is the "interest in being free from physical detention by one's own government.[217] Thus, when one considers an innocent prisoner, petitioning for the right to access DNA evidence to prove his innocence, it unquestionably becomes a violation of his fundamental rights to deny him such access. It is necessary to frame the analysis in this way since it is ultimately the innocent prisoner which the system is trying to vindicate.

Today, there is evidence of national recognition that the court system does not always produce the right result and an ensuing interest in prisoners' post-conviction rights. Forty-seven states provide some form of post-conviction access to DNA testing.[218] The impact of groups, such as the National Innocence Project, which campaigns for prisoner rights,[219] is felt nationwide. It has helped to exonerate 254 inmates across the country.[220] The Innocence Network is a group of law schools, journalism schools and public defender offices across the

215. See *Osborne*, 129 S.Ct. at 2320-23.

216. *Id.* at 2338 (Stevens, J., dissenting).

217. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

218. *Access to Post-Conviction DNA Testing*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/304.php (last visited Feb 13, 2011).

219. *About the Innocence Project*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/about (last visited Feb 13, 2011).

220. *Innocence Project Case Profiles*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/know (last visited Feb 13, 2011).

country that assists inmates in accessing DNA testing to prove their innocence.[221]

The Court has consistently recognized fundamental rights in accordance with the evolving societal conscience. They do this to pull retrograde states along and impose some national floor of rights where it is clear that protection of the right is generally consistent with society's moral conscience. As awareness grows and more convicts are exonerated with DNA evidence, the moral pulse of the country will continue to shift towards the view that prisoners should be given the opportunity to access DNA testing in cases where it is likely to prove their guilt or innocence. The Court will respond by using substantive due process as a tool to implement a base level of rights to which all prisoners should be entitled based on the broad concepts of liberty and justice. States like Alaska, which do not have a post-conviction access statute, or which make it procedurally difficult for prisoners to obtain actual access will be forced to provide at least a base level of rights.

Despite the Court's dismissal of a substantive due process claim in *Osborne*, the Court's substantive due process jurisprudence suggests that the Court will likely revisit the issue in the future and ultimately recognize the right to post-conviction DNA testing. There is an increasing moral consensus in the country that prisoners should be given access to potentially exculpatory evidence. Because state statutory remedies are inconsistent and incomplete, the Court must lead the way in dictating proper policy regarding access to DNA testing by recognizing a substantive due process right. Doing so would not affect the state's rights to legislate the issues affecting that right, as the Court suggests; rather, it would simply bar the state's denial of the right.

221. *About the Innocence Project*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/about (last visited Feb 13, 2011).