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ARTICLE: EVIDENCE DESTROYED, INNOCENCE LOST: THE PRESERVATION OF BIOLOGICAL EVIDENCE UNDER INNOCENCE PROTECTION STATUTES

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BIO:

* Professor Cynthia Ellen Jones is an Assistant Professor of Law at the American University, Washington College of Law. Professor Jones is a former staff attorney and the former Executive Director of the Public Defender Service for the District of Columbia. I would like to dedicate this article to the memory of my wonderful mother, Ernestine C. Jones, who continues to inspire me. Also, it "takes a village" to create a law review article, and I would like to thank all of my "village people": a very special thanks to my colleague, my mentor, and very dear friend, Professor Angela J. Davis, who continually motivated me in this creation; Professor Tamar Meekins, for her incredible friendship and support; my dedicated research assistants who gave me invaluable assistance on this journey: Addy Schmidt, Rolaine Bancroft, Joseph Caleb, Nana Amoako, Keir Bancroft, Holly Dae, Natalia Wilson and Michael Collins, Frank Pigott. I would also like to thank my many colleagues at the Washington College of Law for their on-going encouragement and support, especially Dean Claudio Grossman, Associate Dean Andy Pike, and Professors Ira Robbins, Bob Dinerstein, Jamin Raskin and Binny Miller.

LEXISNEXIS SUMMARY:

... At the time of Mr. Byrd's trial in 1985, DNA technology was not yet available for forensic analysis of biological evidence. ... Innocence protection statutes also authorize the court to order the government to make the still-existing biological evidence available for DNA testing if the prisoner meets the statutory qualifications. ... All innocence protection statutes fall into one of three categories with respect to preservation of biological evidence needed for DNA testing: no duty to preserve evidence, a "qualified" duty to preserve evidence, or a "blanket" duty to preserve evidence. ... While many state innocence protection statutes will likely meet the "reasonable process" requirement, jurisdictions that impose no duty to preserve biological evidence will not likely meet the preservation requirement. ... The requirement of a pre-existing court order is an unnecessary restriction because there would be no need for a court to issue an order mandating preservation of evidence if the innocence protection statute in the jurisdiction imposed a blanket duty to preserve evidence or if a petition for testing was filed and the government's qualified duty to preserve evidence was triggered. ... If there was no realistic probability that DNA analysis of biological evidence could prove actual innocence, the government's opposition to a duty to preserve biological evidence for post-conviction DNA testing

would have some legitimacy. ...

TEXT:

[*1239] In 1997, Texas governor George W. Bush issued a pardon to Kevin Byrd, a man convicted of sexually assaulting a pregnant woman while her two-year old daughter lay asleep beside her. n1 As part of the original criminal investigation, a medical examination was performed on the victim and bodily fluids from the rapist were collected for forensic analysis in a "rape kit." At the time of Mr. Byrd's trial in 1985, DNA technology was not yet available for forensic analysis of biological evidence. n2 In 1997, however, a comparison of Mr. Byrd's DNA with the bodily fluid in the rape kit established that Mr. Byrd was not the rapist. n3 After serving twelve years in prison, Mr. Byrd finally was exonerated because of the scientific advancements in DNA technology and the fact that, by "pure luck," the sample of biological material collected in the rape kit had been preserved at the Harris County Clerk's Office in Houston, Texas for over a decade. n4

After the DNA tests excluded Kevin Byrd as the perpetrator, the prosecution and the police were convinced that Mr. Byrd was innocent. n5 When Governor Bush issued the pardon, he predicted that Mr. Byrd's case would be the "first of many" in Texas to use the new DNA technology to re-examine old cases. n6 The same week of Mr. Byrd's pardon, however, the evidence custodians at the Harris County Clerk's [*1240] office began to systematically destroy old rape kits in its evidence storage facility. n7 In one fell swoop, fifty rape kits were discarded, n8 virtually guaranteeing that Kevin Byrd would not be the "first of many" in Harris County to benefit from DNA technology as was predicted by Governor Bush.

The sole reason given by Harris County for the destruction of this potentially exculpatory evidence was a simple lack of storage space. n9 While it seemed more than a little coincidental that evidence kept for a decade or longer was suddenly destroyed on the immediate heels of Mr. Byrd's exoneration, evidence custodians were quick to point out that destruction of the evidence was legal. n10 In fact, local law gave Harris County the complete discretion to either retain or destroy old evidence from closed cases, regardless of any potential value the evidence might have in establishing the actual innocence of a prisoner. n11

To date, 163 innocent people in nearly every jurisdiction in the country have been wrongly convicted and later exonerated, many as a result of DNA analysis performed on old evidence retained by the government. n12 A major impediment to the use of DNA evidence to exonerate the wrongly convicted has been -- and continues to be -- the destruction of evidence, such as rape kits, by the government. n13 Innocence Project attorneys and others working on behalf of the convicted describe the problem as a race to see how many people can be proven innocent before the evidence samples are lost or destroyed. n14 In fact, the Innocence Project [*1241] of the Benjamin Cardozo School of Law, the national leader in the use of DNA to exonerate wrongly convicted prisoners, reports that 75% of the cases it accepts cannot go forward because the evidence has been lost or destroyed. n15

While the practice of destroying old evidence in closed criminal cases was a routine and benign practice prior to the widespread forensic use of DNA, the current practice of destroying biological evidence, with full knowledge of its potential use to exonerate the wrongly convicted, is a cruel and callous injustice.

This article provides a critical analysis of the government's duty to preserve potentially exculpatory evidence under innocence protection statutes, newly enacted laws that allow prisoners to pursue DNA testing on biological evidence to establish their actual innocence. Part I examines the scope of the government's duty to preserve evidence under state law, the United States Constitution and innocence protection statutes. While innocence protection statutes have advanced the efforts of prisoners to utilize DNA testing to establish actual innocence, the vast majority of these statutes do not mandate that the government preserve the biological evidence needed for DNA analysis. Thus, the right to post-conviction DNA testing created by the overwhelming majority of innocence protection statutes is purely illusory. Moreover, even when innocence protection statutes impose a duty on the government to preserve evidence, the statutes do not include any remedy for convicted prisoners if all testable evidence is nonetheless destroyed and DNA testing is no longer possible. In order to truly protect the innocent -- the group of people for whom these remedial statutes were

enacted -- innocence protection statutes must recognize and remedy the harm suffered by prisoners who have been permanently deprived of the only avenue for establishing actual innocence.

Part II discusses the resistance of criminal justice officials to the duty to preserve evidence. The most frequently cited reasons for opposing prisoner requests for DNA testing -- cost, administrative burden and finality of judgments -- are largely unfounded and mask a more fundamental disagreement over the core values of our criminal justice system. Opponents of the duty to preserve evidence maintain that the slim margin of error resulting in the wrongful conviction of innocent people proves that the system, though imperfect, operates fairly and should not be further taxed with an evidence preservation burden. Advocates of a statutory duty to preserve evidence contend that our criminal justice system does not achieve justice or fairness if we ever convict an innocent person and then forever foreclose the only avenue to correct the error, even if correcting the error would be costly, difficult to manage and contrary to the interest in finality of judgments. The analysis concludes that the majority of innocence protection statutes are flawed [*1242] and fail to adequately protect the right of convicted prisoners to post-conviction DNA testing.

I. THE LAW OF EVIDENCE PRESERVATION

A. Traditional State Evidence Preservation Practices

Every jurisdiction has some form of evidence management policy or practice that establishes the procedures for storing physical evidence collected by the government in criminal cases, including various forms of biological evidence like rape kits, samples of hair, saliva, and semen. Commonly, evidence management policies designate an evidence custodian, set forth how long evidence must be preserved, and establish the procedures to be followed before destroying old evidence in closed criminal cases. n16 Evidence management policies are a vital tool in the justice system for ensuring that physical evidence can be retrieved and used at trial and will be available if there is a re-trial or other post-conviction litigation. As well, evidence management policies promote administrative efficiency by ridding overcrowded evidence storage facilities of old evidence from closed cases and in creating space for new evidence collected in open investigations and pending pretrial cases. n17

Prior to the 1990s when advancements in DNA technology first made it possible to extract and analyze biological material from old pieces of evidence, n18 rape kits and blood-stained clothing had minimal use after the defendant was convicted and the litigation was concluded in the case. n19 As a result, there was no compelling [*1243] reason to preserve physical evidence, and not much attention was paid to how and where evidence was kept in the criminal justice system. In the last decade, however, formerly useless physical evidence from closed criminal cases has become vitally important in proving, to a scientific certainty, that innocent people have been wrongly convicted. This has resulted in an increased focus on evidence management practices across the country by innocence projects and other advocates seeking to use the new DNA technology on old evidence to exonerate wrongly convicted prisoners. In searching evidence storage facilities across the country, prisoner advocates have found that the actual "management" of evidence is, at best, inefficient and, at worst, nonexistent. Over the last few years, there have been numerous reports from all across the country of lost or destroyed evidence in both pretrial, open criminal cases, n20 and in post-conviction, closed cases where the missing evidence might have been used to exonerate a wrongly convicted prisoner. n21

Because there are no uniform, national standards governing the retention of evidence, evidence management policies vary widely from state to state and from [*1244] courthouse to courthouse within each state. n22 Evidence management policies can be governed by state statutes, local court rules, police department operating procedures, and unwritten practices and customs. n23 In some jurisdictions, the evidence management practice mandates retention of old evidence at the court-house and designates court clerks or court reporters to serve as the custodians of the evidence until a judge signs an order authorizing destruction. n24 Other jurisdictions, like Harris County, Texas, require that the evidence be maintained by the police department or at the state forensics lab until the proscribed retention period has lapsed, after which time a prosecutor or a police official can make the discretionary choice to retain the evidence or authorize destruction. n25

[*1245] Even when a jurisdiction has an established evidence management policy in place, the retention of physical evidence is still largely a function of luck and happenstance. n26 Prisoner advocates have discovered that, contrary to the evidence management policy, some evidence within the same facility is kept for decades and other evidence is destroyed weeks after the case is closed. n27 Moreover, without an efficient system for cataloging and tracking evidence, it is often nearly impossible to locate evidence years after the case is closed. "Formerly lost" biological evidence subsequently used to exonerate innocent prisoners has been fortuitously discovered years later at various locations inside the courthouse, n28 in closed files at the state forensics lab, n29 in a storage closet in the prosecutor's office, n30 and even in a garbage dumpster. n31 In the case of Kirk Bloodsworth, the first death row inmate exonerated with DNA evidence, the biological evidence of the rape-murder that could have been legally destroyed after his conviction was affirmed had been saved by the judge in his chambers to prevent destruction. n32

In sum, although it is now well-established that old, formerly useless biological evidence is now essential in post-conviction DNA testing to establish actual innocence, the government is not required under most state laws to preserve [*1246] biological evidence collected in criminal cases. n33 Without an innocence protection statute mandating retention of evidence, critical biological evidence can be legally destroyed pursuant to the evidence management policies in the jurisdiction. n34

B. The Constitutional Duty to Preserve Evidence

While state laws traditionally have not mandated preservation of biological evidence, the Supreme Court has recognized that intentional destruction of evidence collected in criminal cases could potentially violate the constitutional right to due process. In a series of cases that fall under the umbrella of "constitutionally guaranteed access to evidence," n35 the United States Supreme Court has held that destruction or non-disclosure of evidence that the government knows to be exculpatory and material to the defense violates due process. n36 The Supreme Court has articulated a very different standard, however, when the defendant seeks the protection of the due process clause for "potentially exculpatory" evidence. In *Arizona v. Youngblood*, n37 the Court in 1989 recognized that "whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." n38 The Court stated that "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant" does not establish a due process violation unless the defendant can show bad faith on the part of the police in destroying the evidence. n39 The Court further held that a due process violation will only be found where the exculpatory value of the evidence was "apparent before the evidence was destroyed." n40

In the years since *Youngblood*, the requirement of demonstrating "bad faith" has proven to be an almost insurmountable burden in establishing a due process violation based on the destruction of evidence. n41 A few courts have found a due process violation when the government has destroyed the only evidence of the [*1247] defendant's guilt before trial and still proceeds with the prosecution. n42 Other courts have found that the government did not act in bad faith even when evidence is destroyed in violation of the local evidence management policy. n43 Courts have also refused to find bad faith where, notwithstanding the existence of independent exculpatory evidence, the government authorizes the destruction of all remaining biological evidence. n44 As a result, legal commentators have not been optimistic that the government's failure to preserve untested, "potentially exculpatory" biological evidence needed for post-conviction DNA analysis will constitute a violation of due process. n45

More recently, however, there has been a growing consensus and optimism among legal scholars that the widespread use of DNA evidence in criminal cases over the last decade will persuade courts to find due process violations when the government intentionally destroys evidence that could have been subjected to DNA analysis. n46 Other scholars have opined that the intentional destruction of biological evidence in direct violation of an evidence preservation law or an [*1248] innocence protection statute should be sufficient to establish bad faith. n47 To date, courts applying the *Youngblood* standard in post-conviction DNA testing cases have generally not adopted either approach. n48 Thus, post-*Youngblood* the government has no constitutional obligation to preserve biological evidence that could be subjected to post-conviction testing unless it is apparent prior to destruction that the evidence is

exculpatory.

C. Evidence Preservation under Innocence Protection Statutes

1. Overview of Innocence Protection Statutes

Against the backdrop of lawful evidence destruction pursuant to evidence management policies and the lack of any meaningful constitutional duty to preserve evidence, legal reform was urgently needed to better protect the rights of [*1249] prisoners seeking post-conviction exoneration through the use of DNA testing. Innocence protection statutes emerged from a national reform effort. To date, innocence protection statutes have been enacted in thirty-eight states and the District of Columbia. n49 In late 2004, the much-anticipated Federal Innocence Protection statute was enacted. n50 While New York and Illinois were the first jurisdictions to have post-conviction DNA testing statutes in the 1990s, the overwhelming majority of innocence protection statutes have been enacted since 2000. n51

In addition to pervasive problems of evidence destruction, prior to the passage of innocence protection statutes, wrongly convicted prisoners seeking post-conviction DNA testing faced the dual problems of gaining access to the evidence for DNA testing and access to the courts to obtain judicial relief from a wrongful conviction. n52 Even if biological evidence was still in existence many years after the original conviction and had been properly preserved by the government, gaining access to the evidence was often extremely difficult because the evidence was in the exclusive possession of the government. Advocates on behalf of the convicted were forced to seek the permission of the prosecutor's office to perform DNA analysis on the old evidence. Frequently, prosecutors recognized that inmates had no legal right to have access to the evidence and refused to make the evidence available for DNA testing. n53 In most cases, however, recalcitrant prosecutors were eventually persuaded (or pressured) to authorize the release of the [*1250] evidence. n54

Even when prisoners were able to access the evidence and secure definitive, exculpatory DNA test results, the second problem they encountered without an innocence protection statute was legal barriers that prevented them from presenting the DNA evidence in court to obtain relief from the wrongful conviction. n55 Every jurisdiction has court rules and statutes that set strict limitations on the time allowed for post-conviction litigation. n56 Since most post-conviction litigation based on DNA testing is initiated many years after the original conviction (usually because DNA technology was not available at the time of trial), all appeals and post-conviction challenges have been fully litigated or are barred under the local procedural rules long before the biological evidence is analyzed and can be presented to the court. n57 As a result, courts have no authority to grant any relief. The only avenue then available to secure the release of a wrongly convicted prisoner is executive clemency. n58 While many exonerees, like Kevin Byrd, successfully obtained relief from their wrongful convictions by receiving a pardon [*1251] from the governor, n59 pardons are discretionary n60 and a wrongly convicted prisoner could remain in prison for several additional years before receiving a pardon, especially if the government opposes the clemency petition. n61

Many of the access to the evidence and access to the courts barriers that plagued post-conviction DNA litigation have been addressed by most innocence protection statutes that create a statutory right to DNA testing for prisoners, give courts the power to make existing biological evidence available and grant relief if test results are exculpatory. Although the forty innocence protection statutes that have been enacted differ substantially, n62 all of the statutes have some common provisions. Generally, innocence protection statutes permit a convicted prisoner to petition the court for DNA testing of biological evidence in the possession of the government, notwithstanding the expiration of the normal time period for post-conviction litigation under applicable court rules and local statutes. n63 Innocence protection statutes also authorize the court to order the government to make the still-existing biological evidence available for DNA testing if the prisoner meets the statutory qualifications. n64 To qualify for DNA testing under most innocence protection [*1252] statutes, the prisoner's petition for testing must aver that the identity of the perpetrator was a disputed issue at trial, n65 and the petition must include a declaration that there still exists biological evidence that was collected by the government in the original investigation n66 which has been maintained by the government with a proper chain of custody. n67 Finally, the petition for testing must state that DNA analysis of the evidence would

demonstrate that the prisoner is actually innocent or would not have been convicted. n68 The recently-enacted Federal Innocence Protection statute has similar provisions. n69

2. The Duty to Preserve Evidence

Although innocence protection statutes address some barriers to post-conviction DNA testing, the overwhelming majority of these statutes have two fundamental flaws with respect to the preservation of biological evidence. n70 First, the majority of these statutes do not impose an effective duty on the government to preserve all biological evidence that could be subjected to post-conviction DNA testing. Second, among the statutes that impose a duty to preserve evidence, n71 only a few have adequate statutory provisions to enforce the duty if evidence is intentionally destroyed. This combination of deficiencies, discussed in turn below, is fatal to the effective implementation of the remedial goals of innocence protection statutes.

All innocence protection statutes fall into one of three categories with respect to [*1253] preservation of biological evidence needed for DNA testing: no duty to preserve evidence, a "qualified" duty to preserve evidence, or a "blanket" duty to preserve evidence. n72

a. No-Duty Statutes

The innocence protection statutes enacted in eight states n73 are conspicuously silent with respect to the duty to preserve biological evidence for post-conviction DNA analysis. These "no-duty" statutes purport to establish a right to DNA testing for prisoners, but fail to mandate preservation of the biological evidence needed to give that right any real meaning. Moreover, with no legal obligation to retain evidence, the government could effectively nullify the entire innocence protection statute by systematically destroying all biological evidence in every closed criminal case pursuant to the local evidence management policy. n74 Thus, in [*1254] no-duty jurisdictions the actual right to post conviction DNA testing is left to the whim of evidence custodians and the fortuity of their inefficiency.

b. "Qualified" Duty Statutes

In eleven jurisdictions, n75 the innocence protection statute imposes a "qualified" duty to preserve evidence. The duty is qualified because it is not triggered until a petition for DNA testing is filed. The Kansas Innocence Protection statute, for example, provides: "upon receiving notice of a petition [for post-conviction DNA testing] . . . , the prosecuting attorney shall take such steps as are necessary to ensure that any remaining biological material that was secured in connection with the case is preserved pending the completion of proceedings under this section." n76 While these qualified-duty statutes provide some measure of protection against intentional evidence destruction during the post-conviction litigation, a qualified duty to preserve evidence does not shield biological evidence from destruction during the time when the evidence is most likely to be destroyed -- after the defendant has been convicted and before the petition for testing is filed. When biological evidence is destroyed before the qualified duty is triggered, courts have summarily denied the prisoner's petition for testing on the grounds that the biological evidence needed for the DNA analysis no longer exists. n77 Evidence custodians in qualified-duty jurisdictions can, therefore, continue to destroy old biological evidence up until the date a petition for DNA testing is filed. n78 In fact, the decision of the Harris County Clerk's Office to destroy the fifty rape kits immediately after Kevin Byrd's exoneration would be in full compliance with a qualified-duty statute if there were no petitions for DNA testing pending in the other cases.

Moreover, there is an even greater potential for abuse by the government when the innocence protection statute imposes only a qualified duty to preserve evidence. As discussed above, in order to meet the statutory qualifications for post-conviction DNA testing, a petition must assert that testable, biological evidence still exists and a proper chain of custody has been maintained by the [*1255] government. n79 To establish a factual basis for this allegation, the petitioner must inquire of the government, giving the government ample notice that a petition for DNA testing is forthcoming and, unfortunately, ample time to destroy the evidence legally before the petition is filed. n80 Thus, innocence protection statutes that impose only a qualified duty to preserve evidence fail to guarantee the right to DNA

testing promised by the statute because these statutes do not provide adequate protection against the lawful destruction of biological evidence.

c. "Blanket" Duty Statutes

The innocence protection statutes in the remaining nineteen states, n81 as well as the federal and District of Columbia statutes, n82 impose a "blanket" duty to preserve evidence. This duty is the most comprehensive and effective evidence preservation requirement because the government has an obligation to preserve all biological evidence that was collected during the initial criminal investigation and properly [*1256] retain that evidence until the prisoner is released from confinement. n83 Unlike the qualified duty, the blanket duty to preserve evidence is triggered automatically when there is a conviction and is not contingent upon the filing of a petition for DNA testing. Blanket-duty statutes also insulate biological evidence from the haphazard evidence management policies that have resulted in the discretionary disposal of valuable evidence solely to create additional storage space. Further, unlike the extremely narrow constitutional duty to preserve evidence, the blanket statutory duty mandates preservation regardless of good or bad faith and notwithstanding whether the evidence has an apparent exculpatory value. Thus, innocence protection statutes that impose a blanket duty to preserve evidence effectively close the gap between lawful evidence destruction pursuant to evidence management policies and the extremely limited constitutional duty to preserve evidence.

Although only half of all innocence protection statutes are blanket-duty statutes, Congress sought to create a uniform, national standard of blanket preservation of biological evidence with passage of the Federal Innocence Protection statute. n84 To this end, Congress passed companion legislation creating over \$ 12 million in DNA-related incentive grants for jurisdictions that have innocence protection laws with certain minimum provisions. n85 To qualify for the federal funds, the thirty-eight states (and the District of Columbia) that already have innocence protection statutes must demonstrate that their state law "ensures a reasonable process for resolving claims of actual innocence" and mandates preservation of biological evidence "in a manner that ensures that reasonable measures are taken by all jurisdictions within the State to preserve such evidence." n86 While many state innocence protection statutes will likely meet the "reasonable process" requirement, jurisdictions that impose no duty to preserve biological evidence will not likely meet the preservation requirement. Likewise, jurisdictions with qualified-duty statutes may be unable to demonstrate that "reasonable measures are taken by all jurisdictions in the state" to preserve evidence when, in fact, state law imposes no legal obligation to preserve biological evidence until a petition for DNA testing is filed. Therefore, many jurisdictions may not qualify for federal funds under [*1257] existing innocence protection statutes. n87

With respect to the states that had not enacted innocence protection legislation by the effective date of the federal statute, October 30, 2004, in order to qualify for the federal funds, the state is required to enact an innocence protection statute with an evidence preservation provision that is "comparable" to the Federal Innocence Protection statute. n88 While the federal statute does not require states to adopt an identical preservation provision, it is not likely that a state will qualify for the federal funds if there is no comprehensive, state-wide duty to preserve biological evidence, as required in the Federal Innocence Protection Act.

As discussed more fully below, criminal justice officials across the country have generally opposed the imposition of a statutory duty to preserve evidence. n89 While the potential for substantial federal funds could induce some states to amend their laws or enact comparable preservation of evidence statutes, it remains to be seen whether there will soon be a uniform, national standard of blanket preservation of biological evidence.

In sum, in the twenty-one jurisdictions in which there is either no duty or only a qualified duty to preserve evidence, innocence protection statutes merely create an illusory right to post-conviction DNA testing. Blanket-duty preservation statutes provide the best protection for vital evidence needed for post-conviction DNA testing. Blanket-duty statutes also ensure that biological evidence can be used to help the criminal justice system correct the injustice caused by the conviction and incarceration of innocent people.

3. *Statutory Enforcement of the Duty to Preserve Evidence*

The second deficiency in innocence protection statutes is that, among the thirty-two statutes that impose either a qualified or blanket duty to preserve evidence, the overwhelming majority fail to impose an effective legal remedy for prisoners if the government intentionally destroys evidence in violation of the statute. n90 These "right-without-a-remedy" statutes have created a gap in the law that allows the government to violate evidence preservation requirements with [*1258] impunity. Courts have very narrowly interpreted these deficient innocence protection statutes as mere procedural rules that entitle prisoners to no legal remedy when the destruction of evidence by the government has completely eliminated the possibility of DNA testing. n91 By contrast, the innocence protection statutes in eleven jurisdictions create criminal penalties if evidence is intentionally destroyed in violation of the statute or allow courts to impose "appropriate sanctions" to remedy the statutory violation.

a. Criminal Penalties

The Federal Innocence Protection statute and the innocence protection statutes enacted in four jurisdictions make the intentional destruction of biological evidence a criminal act. n92 While some legal commentators have suggested that the threat of criminal penalties might deter government actors from intentionally destroying evidence in violation of the statute, n93 the use of criminal penalties is both inadequate and impractical as the sole remedy for the intentional destruction [*1259] of evidence.

First, under the law in nearly every jurisdiction in the country, intentional destruction of evidence required to be preserved for future litigation already constitutes the crime of tampering with evidence. The language in most tampering with evidence statutes provides that: "a person commits the crime of tampering with physical evidence if, believing that an official proceeding is pending or may be instituted . . . he makes physical evidence unavailable." n94 This language is broad enough to encompass the pretrial destruction of evidence that could be used to establish guilt at trial, as well as the post-conviction use of the same evidence to establish actual innocence. Yet evidence custodians, completely undeterred by the prospect of criminal charges for tampering with evidence, continue to destroy evidence with full knowledge that this evidence must be "available" for post-conviction litigation. Thus, the criminal penalty provisions in innocence protection statutes merely create a new, duplicative crime and do not significantly reform the law in a way that will likely halt the destruction of biological evidence pursuant to existing evidence management policies.

Also, criminal penalty provisions create an inherent conflict for the government. When a prisoner files a petition for DNA testing, innocence protection statutes give the local prosecuting authority the right to oppose the petition and ask the court to deny DNA testing of biological evidence. n95 In addition, if an evidence custodian destroys the very biological evidence that the government did not want tested, the same prosecutor's office would be responsible for deciding whether to file criminal charges against the custodian under the innocence protection statute. The decision to initiate criminal charges is a largely unreviewable, discretionary decision vested with the prosecution, not the court. n96 A district attorney's office has the right to decide for any reason, or for no reason at all, not to prosecute an evidence custodian for intentionally destroying evidence in violation of the statute. This gives the government the power to nullify criminal penalty provisions in [*1260] innocence protection statutes in any case where the government opposed DNA testing.

Moreover, even if the prosecutor's office decides to exercise its discretion and file criminal charges, it would be very difficult in most cases to determine who should be prosecuted. As discussed above, evidence management practices generally require evidence custodians to obtain some form of authorization before evidence is destroyed. n97 If the custodian follows proper procedures and secures authorization, it may be very hard to convince a fact finder that the custodian "willfully" or "intentionally" violated the statutory preservation law. Moreover, attempting to prosecute the government agent that authorized the destruction presents other political and practical considerations regarding whether a district attorney will prosecute a judge who signs an evidence destruction order, or whether a prosecutor's office will initiate criminal proceedings against one of its own attorneys for authorizing the destruction of the evidence. As a result, in most cases where biological evidence is intentionally destroyed the potential defendants that could be

prosecuted under the criminal penalty provisions of an innocence protection statute may be sufficiently insulated from the reach of the law.

Perhaps the most significant problem with the use of criminal penalties as the only remedy for the intentional destruction of evidence is the failure to address the harm caused to the wrongly convicted. n98 Although innocence protection statutes were specifically enacted to give prisoners access to DNA testing to correct the injustice of a wrongful conviction, n99 these remedial statutes ignore the fact that destruction of biological evidence in most cases permanently prevents prisoners from pursuing the only remaining avenue for exoneration. Thus, the use of criminal penalties to address evidence destruction is, at best, an inadequate and incomplete remedy because an innocent person may remain in prison or on death row even if an evidence custodian is prosecuted and convicted. An effective remedy for the violation of a statute designed to protect the rights of the wrongly convicted must address the harm suffered by the wrongly convicted when the statute is violated.

b. "Appropriate Sanctions"

The second type of enforcement provision in innocence protection statutes provide for "appropriate sanctions" imposed by a court. The Maine Innocence [*1261] Protection statute states: ". . . if the evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions." n100 The innocence protection statutes in five jurisdictions have "appropriate sanctions" provisions to enforce the duty to preserve evidence. n101 While these broad statutory provisions have yet to be interpreted by any court, the plain language gives a judge discretion to fashion a remedy to redress intentional evidence destruction based on the facts of each case. Accordingly, a court could conclude that the destruction of evidence warrants criminal contempt charges against persons responsible for the evidence destruction. n102 The court could also decide that an additional sanction is "appropriate" to address the harm suffered by the prisoner, e.g., dismissal of the indictment (vacating the conviction), n103 a sentence reduction, or the grant of a new trial. Appropriate sanctions provisions have the potential to remedy the destruction of evidence which prevents the DNA testing envisioned by the statute and leaves the wrongly convicted with no avenue for exoneration.

In some jurisdictions, however, the court cannot impose appropriate sanctions unless evidence is intentionally destroyed *after* the court has issued an order to preserve the evidence. n104 As a result, if an evidence custodian intentionally destroys evidence in violation of an innocence protection statute, the court could not impose appropriate sanctions unless there was a court order mandating preservation of the evidence before the evidence was destroyed. The requirement of a pre-existing court order is an unnecessary restriction because there would be [*1262] no need for a court to issue an order mandating preservation of evidence if the innocence protection statute in the jurisdiction imposed a blanket duty to preserve evidence or if a petition for testing was filed and the government's qualified duty to preserve evidence was triggered. Thus, to effectively remedy all acts of intentional evidence destruction, the court should have the authority to impose appropriate sanctions if evidence has been destroyed in violation of a court order, and/or in violation of a statutory duty to preserve evidence.

In sum, nearly every innocence protection statute that has been enacted has evidence preservation deficiencies that undermine the effectiveness of these statutes in protecting the innocent from wrongful convictions. The innocence protection statutes in only three states -- New Mexico, Maine, and Nebraska -- have blanket preservation of evidence provisions and "appropriate sanctions" enforcement provisions. The remaining thirty-seven innocence protection statutes leave innocent people in desperate need of protection from reckless and haphazard evidence management practices.

II. PRESERVATION OF BIOLOGICAL EVIDENCE AS SOUND PUBLIC POLICY

It is now well-established that DNA evidence can be used to prove the identity of the perpetrator of a crime without the unreliability and human error that can taint confessions and eyewitness identifications and lead to wrongful convictions. n105 Notwithstanding the undisputed power and validity of DNA evidence, criminal justice officials have

mounted fierce resistance to a statutory duty to preserve biological evidence, citing the fiscal and administrative burden that preservation would impose. More generally, criminal justice officials argue that the use of DNA testing in closed cases upsets the government's strong interest in finality of judgments. These concerns are largely unfounded, and do not outweigh the paramount interest in the integrity of the criminal justice system advanced by the preservation of biological evidence.

A. Fiscal and Administrative Burden

Officials in the criminal justice system have steadfastly maintained that the government should not be saddled with the obligation to preserve biological evidence after there has been a conviction because it would be too expensive to [*1263] preserve every piece of biological evidence collected in every criminal case. n106 Critics also maintain that there is simply no space in overcrowded police property rooms and evidence storage facilities to accommodate the sheer volume of evidence -- particularly cars, furniture and other bulky items -- that would have to be retained under a blanket duty to preserve evidence. n107 Further, criminal justice officials contend that the exorbitant cost of properly preserving all biological evidence in temperature-controlled or refrigerated facilities would be prohibitively expensive in most jurisdictions. n108 Finally, opponents of the duty to preserve biological evidence argue that, as a matter of policy, the overall administrative burden occasioned by cataloging, tracking and storing all biological evidence collected in closed criminal cases is a needless diversion of the government's scarce resources that could be better utilized in open cases. n109

Contrary to the assertions of criminal justice officials, imposing a blanket duty to preserve evidence would not result in a great fiscal burden, nor would it cause administrative disarray in evidence retention. First, there is no biological evidence recovered in the overwhelming majority of criminal cases. n110 Biological evidence is recovered primarily in cases involving rape and sexual assault. n111 In fact, the majority of the DNA-based exonerations to date have involved underlying charges [*1264] of rape or sexual assault. n112 Moreover, national statistics show that more than 75% of all crimes reported in the United States are property offenses, n113 crimes that generally do not involve the recovery of biological evidence. By contrast, rape and sexual assault cases, where biological evidence is most likely to be recovered, account for less than 1% of all reported crimes. n114 Thus, even though police departments and prosecutors must handle hundreds of thousands of cases each year, the duty to preserve biological evidence will only exist in a very small percentage of cases.

Second, in order to fulfill its duty to preserve evidence, the government would not be required to keep and store thousands (or even hundreds) of bulky, oversized pieces of physical evidence. When biological material is found on large pieces of evidence, the government would only be required to extract a sample of the biological material in a sufficient quantity to allow DNA testing. n115 Thereafter, in accordance with evidence disposal procedures in many innocence protection statutes, the bulky and oversized physical evidence can be discarded or returned to the rightful owner. n116

Nor would the government incur exorbitant expenses to preserve biological evidence in costly refrigerated facilities. Under the current state of technology, DNA analysis can be successfully performed on biological material as long as the evidence is stored in a dry, dark, air-conditioned room. n117 No costly refrigeration is required. In fact, the biological evidence successfully analyzed in many DNA exonerations had previously been stored for many years in un-refrigerated evidence storage rooms. n118

Finally, the duty to preserve biological evidence would require the continued preservation only of evidence the government has maintained since the initial investigation of the case. n119 The government would not be required to collect any new evidence or assume additional responsibilities to preserve the evidence [*1265] beyond steps previously taken to preserve the evidence for its own investigative use. In fact, if the case remained open and unsolved, law enforcement officials would have continued to preserve the biological evidence until the perpetrator was identified and prosecuted. Fiscal and administrative concerns do not dictate whether the criminal justice system preserves biological evidence needed to prosecute the guilty and should not dictate whether evidence is preserved to exonerate the

innocent.

B. Finality of Judgments

In addition to opposing the duty to preserve evidence based on fiscal and administrative impracticality, criminal justice officials have argued that allowing belated actual innocence challenges grossly undermines the government's well-established interests in finality of judgments n120 and providing victim closure. n121 These concerns are well-supported by the precedents of the United States Supreme Court. n122 The Court has stated that "neither innocence nor just punishment can be vindicated until the final judgment is known . . . without finality, the criminal law is deprived of much of its deterrent effect." n123 The Court has also stated that

"only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. . . . To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty." n124

Thus, when confronted with requests for federal habeas corpus review of a state court conviction, the Court has held that "in the absence of a strong showing of actual innocence' . . . the state's interest in actual finality outweigh the prisoner's interest in obtaining yet another opportunity for [post-conviction] review." n125 Applying the interest in finality of judgments to post-conviction DNA testing, [*1266] criminal justice officials argue that finality must trump the very human desire of the convicted to perpetually seek their freedom through every available avenue, including subjecting old evidence to DNA testing and other technologies that might become available. n126

While the government's interest in finality of judgments is strong enough to block some post-conviction petitions for review, n127 that interest should be significantly weaker when asserted in the context of petitions for post-conviction DNA testing. n128 The principle of finality of judgments is based, in part, on two closely-related assumptions. The first assumption is that the original trial was an accurate fact-finding process that resulted in a fair and reliable guilty verdict. n129 The second assumption is that, given the full panoply of constitutional rights given the accused, the chance of an erroneous conviction is so remote that additional post-conviction litigation will not likely yield any different result. n130 With 163 exonerations to date, however, it is now beyond dispute that innocent people are in fact convicted at trial, and post-conviction DNA analysis can and does expose these miscarriages of justice many years after the judgment of conviction is declared to be final by the justice system. The dispositive nature of DNA analysis thoroughly uproots the foundation of finality as a basis for the government's staunch opposition to the duty to preserve biological evidence. Where biological evidence can be used to definitively identify the true perpetrator, DNA technology redefines the point at which the justice system should fairly declare that a judgment is final.

[*1267] Further, the Court has recognized that the government's interest in finality is not absolute and must yield if there is a "truly persuasive demonstration of actual innocence." n131 Few would dispute that DNA analysis that excludes a prisoner as the possible perpetrator is a "truly persuasive demonstration of actual innocence" in most cases. The failure to impose a legal duty to preserve biological evidence has stopped and will continue to stop the wrongly convicted from making a truly persuasive demonstration of actual innocence. The government's strong interest in finality of judgments simply does not vest the government with the power to destroy critical evidence which could be used to discredit the verdict reached at trial and then simultaneously declare that the judgment is final and the litigation is over.

In addition to the interest of courts in punishing the guilty, finality of judgments protects the government's interest in providing closure to crime victims. While convicting innocent people of crimes significantly undermines the goal of providing victim closure, preservation of biological evidence is consistent with the interests of victims because it ensures that victims are not given a false sense of closure. Crime victims and their families cannot and do not receive real closure if an innocent person is convicted and the actual perpetrator is free in the community to re-offend. If the DNA testing confirms the guilt of the prisoner, the case is usually closed without the need for further court proceedings

or involvement of victims. Indeed, in nearly half of all the DNA-based post-conviction challenges, the DNA test confirms the prisoner as the perpetrator and the case is closed. n132 Alternatively, if DNA testing excludes the prisoner as the source of the biological evidence, the same biological material can be used to correctly identify the actual perpetrator and provide victims with the real closure they deserve. In fact, following many DNA-based exonerations, the government has been able to finally identify the actual perpetrator. n133

[*1268] Moreover, the government's interests in finality of judgments and providing victim closure must be balanced against the greater societal interest in the integrity of the criminal justice system. Without question, the integrity of the criminal justice system has been tarnished by the number of exonerations in recent years. n134 According to recent Department of Justice data, less than half of Americans have solid confidence in the criminal justice system. n135 Also, the number of Americans that oppose the death penalty today because of the potential of a wrongful conviction has more than doubled. n136 The retention of biological evidence for post-conviction DNA testing is a necessary step towards restoring public confidence in the criminal justice system. The duty to preserve evidence provides some assurance to a doubtful public that while innocent people may be convicted, the criminal justice system will not perpetuate the injustice by permitting the destruction of potentially exculpatory evidence and allowing an innocent person to languish in prison or face execution.

The clash between evidence destruction and actual innocence will not end when the remaining biological evidence in all closed criminal cases has been subjected to DNA testing. Some legal scholars have opined that issues surrounding the preservation of biological evidence will eventually disappear as the government will have all biological evidence subjected to DNA analysis during the pretrial phase of a case. n137 This view of the criminal justice system is probably overly optimistic. While it is true that there are a finite number of old, "pre-DNA" cases with biological evidence still remaining, there are simply too many flaws in our [*1269] justice system to assume that, henceforth, DNA testing will be utilized in every case where there is biological evidence.

As Professor Givelber aptly observed, if the prosecutor believes that the government can prove its case on the strength of the testimony of the victim and other witnesses, the government would be under no obligation to submit biological evidence for DNA testing simply because such evidence exists. n138 In fact, in an effort to preclude post-conviction DNA testing requests, a prosecutor's office recently began trying to require defendants to waive the preservation of biological evidence as a prerequisite of getting a favorable plea offer. n139 Also, the defense will not seek pretrial DNA testing in every case in which biological evidence exists. While DNA testing is now available pretrial, it is still out of reach for many indigent defendants who are represented by grossly under-funded public defender offices and court-appointed counsel. n140 Moreover, in many jurisdictions, the trial court has the power to refuse defense requests for DNA testing and related expert services. n141 If the court denies the request, the indigent defendant will be forced to proceed to trial without the potential benefit of dispositive DNA test results. n142

CONCLUSION

If there was no realistic probability that DNA analysis of biological evidence could prove actual innocence, the government's opposition to a duty to preserve biological evidence for post-conviction DNA testing would have some legitimacy. After 163 exonerations, however, our criminal justice system has revealed itself to be as fallible as the human beings who occupy the bench, populate the jury box, take the witness stand, and sit at the counsel table. Innocence protection statutes are nothing more than an empty promise and do little to actually protect innocence unless these statutes impose a blanket duty to preserve evidence and empower the court to impose sanctions that meaningfully address the harm suffered by the wrongly convicted when evidence is intentionally destroyed. While the blanket duty to preserve evidence will require some additional government resources, the [*1270] actual cost is negligible when measured against the tax dollars wasted to incarcerate an innocent person for a decade or longer, and the additional tax dollars that will be justly used to compensate exonerated prisoners. The most important function of the criminal justice system has always been to reliably convict the guilty and never convict the innocent. We must have zero tolerance for even honest mistakes that result in the conviction of the innocent, especially when we can identify the mistakes and correct them. Whatever our sense of justice and fairness is, we can achieve neither if we lock up innocent people and

then, quite literally, throw away the key to their freedom.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Postconviction Proceedings DNA Testing Evidence Procedural Considerations Exclusion & Preservation by Prosecutor Evidence Scientific Evidence DNA

FOOTNOTES:

n1 Claudia Kolker, *DNA Tests Can Free Wrongly Convicted if Evidence Survives; Sample That Helped Kevin Byrd Almost Thrown Out of Warehouse*, HOUS. CHRON., Oct. 13, 1997, at 25A.

n2 See Lauren Kern, *Innocence Lost? Despite its Increasing Importance, DNA Evidence Routinely Gets Destroyed Here*, HOUST. PRESS, Nov. 30, 2000 (noting that the widespread use of DNA evidence in rape and murder cases began in 1996); see also *infra* note 18.

n3 *Proof Clearing Man Almost Tossed Out*, AUSTIN AM.-STATESMAN, Oct. 14, 1997, at B3 [hereinafter *Proof Almost Tossed Out*].

n4 Kolker, *supra* note 1, at 25A.

n5 Jim Dwyer, *W. Soft on Napping Lawyers, DNA*, DAILY NEWS (New York), Mar. 5, 2000, at 8.

n6 *Id.*

n7 Kolker, *supra* note 1, at 25A.

n8 See *id.*; see also Dwyer, *supra* note 5, at 8.

n9 Kolker, *supra* note 1, at 25A.

n10 See *id.*; see also *Proof Almost Tossed Out*, *supra* note 3, at B3; see also Kern, *supra* note 2 (discussing the then-existing state law that mandated retention of evidence for only two years after final convictions in non-capital felony cases with sentences of five years or more).

n11 See Kolker, *supra* note 1, at 33A; see also *Proof Almost Tossed Out*, *supra* note 3, at B3 (quoting a court official stating that evidence collected in non-capital felony cases is required to be retained for only two years after the case closed; then, pursuant to local practices, the prosecutor has the discretion to "sign off" on destruction or authorize retention).

n12 Innocence Project, Benjamin Cardozo School of Law, <http://www.innocenceproject.org> (last visited

Oct. 11, 2005). According to the Center on Wrongful Convictions at Northwestern University School of Law, there have been wrongly convicted persons exonerated in forty-three states, as well as the District of Columbia and the federal court system. Center on Wrongful Convictions, <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/States.htm> (last visited Sept. 24, 2005). The only states where there have been no reported exonerations to date are Delaware, Hawaii, New Hampshire, North Dakota, South Dakota, Rhode Island and Wyoming. *See generally* Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 555-60 (2005) (listing DNA and non-DNA-based exonerations by state in all jurisdictions from 1989 through 2003).

n13 *See, e.g.*, Ted S. Reed, *Freeing the Innocent: A Proposed Forensic Evidence Retention Statute to Optimize Utah's Post-Conviction DNA Testing Act for Claims of Actual Innocence*, 2004 UTAH L. REV. 877, 882-84 (discussing the pervasive problems of evidence destruction encountered in Utah by the Rocky Mountain Innocence Center); *see also* cases discussed *infra* note 22.

n14 *Morning Edition: DNA Testing in Crime Cases Causing Distrust in the Criminal Justice System* (NPR radio broadcast Aug. 29, 2000) (quoting Peter Neufeld, Co-Founder, Innocence Project, Cardozo Law School: "we are in a race right now against all these police departments who are destroying the evidence.") [hereinafter NPR, *DNA Testing in Crime Cases*].

n15 EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 19 U.S. DEPT OF JUSTICE (1996) [hereinafter *Convicted by Juries*], available at <http://www.ncjrs.org/pdffiles/dnaevid.pdf>; *see also* Sharon Cohen, *Sheer Luck Saves Some Whose DNA Evidence Was Almost Destroyed*, GRAND FORKS HERALD, Oct. 8, 2000, at back page.

n16 *See infra* notes 24-25 and accompanying text.

n17 *See infra* note 107 and accompanying text.

n18 DNA (deoxyribonucleic acid) is the unique genetic code found in almost all biological material in humans. *See Automated DNA Typing: Method of the Future?* NATIONAL INSTITUTE OF JUSTICE RESEARCH PREVIEW (Nat'l Inst. of Justice, Wash. D.C.) Feb. 1997. In 1989, the forensic use of DNA evidence to establish identity began to gain widespread acceptance in the criminal justice system. *See BARRY SCHECK & PETER NEUFELD, WRONGLY CONVICTED, PERSPECTIVES ON FAILED JUSTICE* 241 (Saundra D. Westervelt & John A. Humphrey eds., Rutgers University Press 2001). At that time, the state-of-the-art DNA analysis was a method called restriction fragment length polymorphism (RFLP). *Id.* at 242. The RFLP analysis was of limited utility in criminal investigations, however, because it required a large amount of pure and properly preserved biological material, a relatively uncommon occurrence at most crime scenes. *Id.* Later, the polymerase chain reaction (PCR) method was developed which could extract DNA from a very small amount of biological material and produce results from old and degraded samples. *Id.* By 1996, the third generation of DNA testing, short tandem repeats (STR), was developed. *Id.* at 243. This methodology, a form of PCR, has much greater accuracy and allows scientists, for the first time, to input the DNA profile (genetic markers) in a databank and determine whether the DNA profile matches anyone else in the databank. *Id.* Similarly, the third generation of DNA technology has made it possible to test small amounts of previously untestable biological material contained in old rape kits to determine whether the prisoner is actually innocent. *Id.*; *see generally* Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, 75 WIS. LAW. 20, 57

(May 2002) (discussing the evolution of DNA technology from RFLP to PCR/STR and mitochondrial DNA testing).

n19 See NPR, *DNA Testing in Crime Cases*, *supra* note 14. (quoting Chris Asplen, National Commission on the Future of DNA Evidence: "[In the 1980s] there was no reason to keep this [old] evidence around any longer because we didn't know about DNA. We didn't know that you could retest a biological sample from a crime scene 10, 15, 20 years later to determine whether or not someone was actually innocent. So that's part of what went into those destruction policies.").

n20 E.g., Walt Philbin, *N.O. Police Want Lee's DNA to Investigate Local Killings*, TIMES-PICAYUNE, May 29, 2003, at 1 (during a recent cleaning of the New Orleans Police Department evidence room, evidence destroyed in as many as 100 cases); Tasgola Karla Bruner, *Detective Accused of Destroying Rape Evidence*, THE ATLANTA JOURNAL CONSTITUTION, Apr. 5, 2003, at 3H; Michael Perlstein, *Evidence Missing at NOPD Storage; Items Lost, Destroyed in Cleaning of Room*, TIMES-PICAYUNE, Feb. 4, 2003 (during a "routine purge of evidence" in a police property room, thousands of items of evidence destroyed, including rape kits in still-open cases); Steve Berry, *Disposal of DNA Leads to Review Policy: Rape Survivors and Police Rethink Limit for Keeping Evidence*, LOS ANGELES TIMES, Aug. 18, 2002, at B1 (noting police department destroyed over 1,000 rape kits); Steve Berry, *Biological Crime Evidence May Be Missing*, LOS ANGELES TIMES, Apr. 3, 2002 at 5; Jim DiPalma, *Boynton Police Missing Drug Evidence*, SUN SENTINEL, Apr. 24, 1996 at 3B; Jim Stingl, *Evidence in Rape Case is Destroyed*, MILWAUKEE JOURNAL, Apr. 7, 1992, at B5.

n21 See Gregory D. Kesich, *Inmate's Fight for Freedom: Supporters of Convicted Murderer Dennis Dechaine hope to use DNA evidence as basis of requesting a new trial*, PORTLAND PRESS HERALD (MAINE), Apr. 6, 2003, at 1A (advocating on behalf of the convicted prisoner discovered that most of the biological evidence collected in the case had been thrown away four years after the conviction); See also Phillip Pina, *Missing Evidence Leads to New Storage Policies*, ST. PAUL PIONEER PRESS, Nov. 14, 2002, at 14A (stating that "biological evidence was likely destroyed during routine disposal of old evidence from the court's evidence vault and police property room" before defendant could obtain DNA testing) [hereinafter *Missing Evidence*]; Associated Press, *Destruction of Evidence Thwarts DNA Appeal*, DESERET NEWS, Feb. 10, 2002, at B4 (finding that three years after the defendant's trial, biological evidence was destroyed according to "normal procedures" before defendant could secure DNA analysis); Mitchel Maddux, *Old DNA Evidence Often Destroyed by State New Testing Policy is Immaterial for Some*, THE RECORD (BERGEN COUNTY, NJ), Jun. 19, 2001, at A03 (according to a New Jersey prosecutor most inmates seeking post-conviction DNA testing will find that the old evidence has long since been destroyed); Andrew Smith, *DA's Crusade on DNA/Catterson Seeks Review to Aid Wrongly Convicted*, NEWSDAY, Dec. 20, 2000, at A04 (New York prosecutor-initiated review of old convictions identified two cases where biological evidence existed at the time of the original trial, but DNA testing thwarted because evidence had since been destroyed); NPR, *DNA Testing in Crime Cases*, *supra* note 14, at 1 ("Police and courts across the country are destroying the biological evidence that could determine whether a person has been wrongly convicted").

n22 See Reed, *supra* note 13, at 880 (finding that there are no statewide evidence retention laws in Utah and retention practices vary widely throughout the state); Kreimer & Rudovsky, *"Double Helix, Double Bind, Factual Innocence and Post Conviction DNA Testing," 151 U. PA. L. REV. 547, 554 (2002)* (stating that the disposition of physical evidence after trial is left to prosecutors, police officers in evidence rooms and court clerks); *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1567 (1995) (noting that many jurisdictions follow some form of preservation practice, though not uniform nor generally regulated by state or federal laws). See also Laura Maggi, *DNA Tests for inmates elusive despite law, La. Fund lacks cash*;

evidence hard to find, TIMES-PICAYUNE (New Orleans), Dec. 16, 2002 at I (stating that biological evidence in Louisiana is hard to find because it could be located with the court clerk, the crime lab, the sheriff's office or the police department); Dianne Molvig, *Freeing the Innocent*, 74 APR WISC. LAWYER 14, 57 (2001) (according to Barry Scheck, around the country there are a hodgepodge of evidence management policies and, in some places, there is no policy at all); *Missing Evidence*, *supra* note 21, at 14A (stating that in Ramsey County, Minnesota, some evidence is retained at the courthouse, other evidence is sent back to the police department in a "completely random" fashion); Mark Hansen, *DNA Bill of Rights: Activists call for standards in inmate testing, evidence preservation*, 86 A.B.A.J. 30 (2000) (stating that there are no uniform standards as to how long biological evidence should be kept, additionally different places have different policies and practices).

n23 *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 2.21(f) (Vernon 2003) (stating a court clerk has the authority to dispose of exhibits after trial); WIS. STAT. ANN. § 165.81 (West 1998) (regulating the retention and disposal of physical and biological evidence by the state Department of Justice); *Vardas v. City of Dallas*, No. 3-02-CV-0504-D, 2002 WL 911776 (N.D. Tex. Apr. 29, 2002) (finding evidence destroyed by the Dallas Police department pursuant to a city ordinance); *People v. Walker*, 628 N.E.2d 971, 973 (Ill. App. Ct 1993) (noting that the Chicago police officers who destroyed the evidence were not acting in accord with police department general orders).

n24 *See, e.g.*, *Lovitt v. Commonwealth*, 537 S.E.2d 866 (2000), 585 S.E.2d 801 (2003); *Lovitt v. True*, 330 F. Supp. 2d 603, 610, 629 (2004), *aff'd*, 403 F.3d 171 (2005) (stating that a court clerk destroyed evidence to make storage space after a judge signed an order authorizing the destruction), discussed *supra* note 48; *State v. Brown*, 613 S.E.2d 284, 285 (N.C. App. 2005) (finding that the same day defendant was convicted of rape, judge signed "order for Disposition of Physical Evidence" directing police to dispose of all evidence, including victim's clothing which could have contained biological material).

n25 *See, e.g.*, *Cherrix v. Braxton*, 131 F. Supp.2d 756, 761 (E.D.Va.), *aff'd*, *Cherrix v. Braxton*, 258 F.3d 250, 254 (4th Cir. 2001) (discussing the medical examiner's regular office policy of destroying biological evidence at the direction of the state prosecutor's office); FRONTLINE: *What Jennifer Saw* (PBS television broadcast Feb. 25, 1997), available at www.frontline.orgwww.frontline.orgpbs.org/wgbh/pages/frontline/shows/dna/etc/script.html (stating that the rape kit collected in the case of Ronald Cotton was not destroyed during the eleven years he was wrongly convicted solely because the detective assigned to the case unilaterally decided to keep it); *Kolker, DNA tests*, *supra* note I (stating that the prosecutor presented with a list of closed cases slated for evidence destruction unilaterally decided to preserve the rape kit that was later used to exonerate Kevin Byrd); *People v. Cress*, 645 N.W.2d 669 (Mich. Ct. App. 2002) (stating the prosecutor signed a "routine" evidence destruction order authorizing the police department evidence custodians to dispose of the evidence, including all of the biological evidence) (discussed *infra* at n. 44); *Berry*, *supra* note 20, at 5 (finding destruction of evidence authorized by the Los Angeles detectives investigating the case).

n26 Molvig, *supra* note 22 (stating that according to Barry Scheck some evidence custodians simply forget to throw away evidence).

n27 Cohen, *supra* note 15 (stating that an innocence advocate seeking biological evidence on behalf of an inmate learned that evidence kept for twenty-seven years had been discarded to save storage space just two months prior to the request for DNA testing); NPR, *DNA Testing in Crime Cases*, *supra* note 14 (stating Kerry Kotler was exonerated after seventeen years in prison because a court clerk "neglected" to destroy one box of evidence after Kotler's post-conviction appeals were exhausted).

n28 TARYN SIMON, *THE INNOCENTS* 70, 94 (Lesley A. Martin ed., Umbrage Editions 2003) (stating that in the case of Larry Mayes, "for years" the biological evidence was reported lost, but eventually discovered by a court clerk. In Kenneth Waters' case, his sister located the formerly lost biological evidence in the courthouse); Connie Schultz, *Knowledge is Power: Michael Gets an Education in Prison as His Stepdad Seeks Evidence to Free Him*, *THE PLAIN DEALER* (CLEV.), Oct. 14, 2002, at C1 (stating that after an exhaustive search for biological evidence with court, prosecutor, and lab, evidence located in a box in the basement of the courthouse).

n29 *E.g.*, Simon, *supra* note 28, at 88 (stating that after many years of trying to locate missing biological evidence, Marvin Anderson was finally exonerated when it was discovered that the lab technician who analyzed the biological evidence in his case just happened to keep a portion of the biological material in her archived files); Tim McGlone, *State Scientist's habit of Saving Evidence Led to DNA Testing*, *THE VIRGINIAN-PILOT*, Feb. 13, 2003 at A4 (stating that Julius Earl Ruffin was exonerated because the forensic scientist from the state lab, in direct violation of lab protocols, preserved a portion of the biological material collected in his case). Tom Bailey, Jr., *Offices Work on Keeping DNA-Laden Evidence; Agencies Strive for Ways to Maintain Chain of Custody on Rape Kits*, *THE COMMERCIAL APPEAL* (MEMPHIS), June 9, 2002 at B2 (stating that Clark McMillan exonerated after twenty-two years in prison because of lab policy to preserve all forensic evidence).

n30 Paul J. Passanante, *Innocence Project Unfairly Assails Joyce; Circuit Attorney Never Opposed DNA Testing in This Case and Did Nothing to Delay it*, *ST. LOUIS POST-DISPATCH*, Aug. 6, 2002, at B7 (stating that after evidence reported lost, a pipe burst in the prosecutor's office and evidence collected in Larry Johnson's case was found in a closet during the clean up).

n31 Cohen, *supra* note 15 (stating Calvin Johnson freed because prosecutors took rape kit out of garbage can where it had been discarded by a judge's clerk who was cleaning out the judge's office).

n32 TIM JUNKIN, *BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA* 245 (Algonquin Books 2004) (stating that the judge had been uncomfortable with the outcome of the case and decided to keep some of the trial exhibits to prevent destruction).

n33 Reed, *supra* note 13, at 879-80, 884-85.

n34 *See, e.g., Murphy v. State*, 111 S.W.3d 846, 849 (Tex. App. 2003) (holding that the law provides no relief when biological evidence is destroyed prior to the enactment of an innocence protection statute); *Accord, Watson v. State*, 96 S.W.3d 497, 499-500 (Tex. App. 2002).

n35 *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

n36 *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

n37 *Youngblood*, 488 U.S. 51 (1988).

n38 *Id.* at 57-58 (quoting *California v. Trombetta*, 467 U.S. 479, 486 (1984)).

n39 *Youngblood*, 488 U.S. at 57.

n40 *Id.* at 56-57 (quoting *California v. Trombetta*, 467 U.S. 479, 489 (1984)).

n41 *See, e.g., Monzo v. Edwards*, 281 F.3d 568, 580 (6th Cir. 2002) (finding no due process violation because evidence not destroyed in bad faith); *DiBenedetto v. Hall*, 272 F.3d 1, 12 (1st Cir. 2001) (same); *Lolly v. State*, 611 A.2d 956, 960 (Del. 1992) (stating that "short of an admission by the police, it is unlikely that a defendant would ever be able to make the necessary showing to establish the required elements for proving bad faith.").

n42 *See, e.g., U.S. v. Belcher*, 762 F. Supp. 666, 668 (W.D. Va. 1991) (finding constitutional violation where all drugs destroyed by government in drug possession case); *accord U.S. v. Bohl*, 25 F.3d 904, 906 (10th Cir. 1994) (finding physical evidence destroyed by government resulted in constitutional violation); *State v. Blackwell*, 537 S.E.2d 457, 458 (Ga.App. 2000) (finding destruction of urine sample in DUI case violated due process); *People v. Walker*, 628 N.E.2d 971 (1993) (holding that destruction of certain items of clothing constituted a denial of due process, because clothing material to the robbery defendant's defense of misidentification).

n43 *Guzman v. State*, 868 So.2d 498, 509 (Fla. 2003) (finding no bad faith when evidence destroyed without written authorization as mandated by police department evidence management procedures).

n44 This point is aptly made by the case of Thomas Cress. *See Cress*, 645 N.W. 2d 669. Cress was convicted of the brutal rape and murder of Patricia Rosansky. There were no eyewitnesses and no physical evidence linking Mr. Cress to the murder, but the government presented the testimony of several witnesses who claimed to have heard Mr. Cress confess to the murder. *See id.* There was biological evidence, including hairs and semen stains on the victim's clothing. Although DNA testing was not available at the time of trial in 1987, a forensic expert testified that the hair did not belong to the victim or Mr. Cress. Years later, the defendant filed a motion for a new trial based on the fact that several of the prosecution witnesses had recanted their trial testimony and admitted they "conspired to lie and set up" Mr. Cress to collect reward money and the fact that another man, Michael Ronning, a confessed serial killer, admitted to killing Patricia Rosansky. *Id.* at 674. After the trial court granted the motion for a new trial, the defense learned that several years earlier, the prosecutor signed an order authorizing the state police to destroy all physical evidence collected in the case, including the biological evidence. *Id.* at 675. The defense alleged that the destruction was in bad faith because the prosecutor knew of Ronning's confession to the Rosansky murder five months before signing the destruction order and even after the order was signed continued to have numerous discussions about entering into negotiations with Ronning to plead guilty to the Rosansky murder. *Id.* Although the appellate court found the circumstances surrounding the prosecutor's authorization of the evidence destruction "deeply disturbing," *id.* at 694, on remand, the lower court ruled that the prosecutor had not acted in bad faith and, therefore, there was no due process violation under *Youngblood*, 488 U.S. at 51. The Michigan Supreme Court let this ruling stand. *People v. Cress*, 664 N.W.2d 174, 181 (Mich. 2003).

n45 As one commentator noted, "evidence that has not been examined or tested by government agents provides a prime example of evidence that does not have apparent exculpatory value." Elizabeth A. Bawden, *Here Today, Gone Tomorrow -- Three Common Mistakes Courts Make When Police Lose or Destroy Evidence with Apparent Exculpatory Value*, 48 CLEV. ST. L. REV. 335, 344 (2000).

n46 Kreimer & Rudovsky, *supra* note 22, at 587 ("In an era of universal use of DNA evidence to both implicate and exonerate criminal suspects, it would be disingenuous for the prosecutor to claim that anything short of a truly accidental loss was not strong evidence of bad faith."); *accord* Symposium, *Developments in the Law -- Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV 1481, 1567 (1994-1995).

n47 Findley, *supra* note 18, at 57 (stating that innocence protection acts "reflect a legislative judgment that biological evidence has potential exculpatory value, and willful destruction of the evidence in violation of the statute might go a long way toward establishing bad faith"); *see also* Lucy S. McGough, *Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims*, 65 LAW & CONTEMP. PROBS. 179, 198-99 (2002).

n48 The case of Robin Lovitt provides a very poignant example of the court's reluctance to find "bad faith" even when the government has destroyed biological evidence that was required to be preserved under a post-conviction DNA testing statute. *See Lovitt v. Commonwealth*, 537 S.E.2d 866 (Va. 2000); *Lovitt v. Warden* 585 S.E.2d 801 (2003), *aff'd*, *Lovitt v. True*, 330 F. Supp. 2d 603 (Va. 2004), *aff'd*, 403 F.3d 171 (4th Cir. 2005). Robin Lovitt was convicted of first degree murder and sentenced to death in the state of Virginia. *See Commonwealth*, 260 Va. at 501-02., 537 S.E.2d at 870. The physical evidence collected in Lovitt's case, including evidence containing biological material, was in the custody of the clerks of the Circuit Court where Lovitt was tried. *See Warden*, 266 Va. at 229, 585 S.E.2d at 808. After the death sentence was imposed, Lovitt unsuccessfully appealed his conviction through the state appellate courts and then filed a petition for certiorari before the United States Supreme Court. *See True*, 403 F.3d at 176. After Lovitt's conviction was affirmed by the Virginia Supreme Court, but while his petition for certiorari was still pending, one of the deputy court clerks decided that the physical evidence in Lovitt's case, including biological evidence, should be destroyed in order to create more space in the evidence storage facility. *See id.* at 177, 186. Despite pleas from fellow clerks, the deputy clerk drafted an evidence destruction order and submitted the order to a judge. *See Warden*, 585 S.E.2d at 809. The judge signed the order, and all of the evidence that could have been subjected to DNA testing was destroyed. *See id.* at 809. At the time the evidence was destroyed, a recently-enacted post-conviction evidence preservation statute was in effect which mandated that, in death penalty cases, "the court that entered the judgment shall, in all cases, order any human biological evidence or representative samples to be transferred . . . to the Division of Forensic Science [which shall] store, preserve, and retain such evidence until the judgment is executed." *See id.* at 809. After the evidence was destroyed, Lovitt filed a writ of habeas corpus and maintained that destruction of the evidence in violation of the state statute constituted "bad faith" and amounted to a denial of due process. *See True*, 330 F. Supp. 2d at 611. Following a hearing, the Virginia Supreme Court found that although the physical evidence containing biological material was required to be maintained under the Virginia statute, destruction of the evidence by the deputy clerk did not entitle Lovitt to any form of relief because the clerk was not aware of the statute at the time of destruction and, therefore, his actions were not in bad faith. *See Warden*, 585 S.E.2d at 808-10. This ruling, among others, was appealed to the United States Supreme Court and, on July 11, 2005, less than five hours before his scheduled execution, the Court granted a stay of execution pending a determination of whether the Court will review the Virginia Supreme Court's rulings. *See Lovitt v. True*, No. 05-5044 (U.S. July 11, 2005) (granting stay of execution pending grant of certiorari); *see also* Donna St. George, *Va. Man Granted Stay of Execution: High Court Agrees to Consider Case*, WASH. POST, July 12, 2005, at A1. Less than three months later certiorari was denied by the Court. *Lovitt v. True*, No. 05-5044 (U.S. Oct. 3, 2005).

n49 ARIZ. REV. STAT. § 13-4240 (2004); ARK. CODE ANN. § 16-112-201 (2005); CAL. PENAL CODE § 1405 (2005); COLO. REV. STAT. §§ 18-1-411-415 (2004); CONN. GEN. STAT. §§ 54-102jj-pp (2005); DEL. CODE ANN. tit. 11, § 4504 (2004); D.C. CODE §§ 22-4131-4135 (2005); FLA. STAT. § 925.11 (2005); GA. CODE ANN. § 5-5-41(c) (2005); IDAHO CODE Ann. § 19-4902(b) (2004); 725 ILL. COMP. STAT. 5/116-5

(2005); IND. CODE § 35-38-7 (2004); KAN. STAT. ANN. § 21-2512 (2004); KY. REV. STAT. ANN. §§ 422.285-7 (2004); LA. CODE CRIM. PROC. ANN. § 926.1 (2005); ME. REV. STAT. ANN. tit. 15, §§ 2136-8 (2004); MD CODE ANN., CRIM. PROC. § 8-201 (West 2004); MICH. COMP. LAWS § 770.16 (2005); MINN. STAT. §§ 590.01-.06 (2005); MO. REV. STAT. § 547.035 (2004); MONT. CODE ANN. § 46-21-110 (2003); NEB. REV. STAT. §§ 29-4116-4125 (2004); NEV. REV. STAT. § 176.0918 (2003); N.H. STAT. § 651-D:1-4 (2004); N.J. STAT. ANN. § 2A:84A-32a (2005); N.M. STAT. ANN. § 31-1a-2 (LexisNexis 2003); N.Y. CRIM. PROC. LAW § 440.30 (1-a)(a) (McKinney 2005); N.C. GEN. STAT. § 15A-269 (2003); OHIO REV. CODE ANN. §§ 2953.71 -- 2953.81 (West 2005); OKLA. STAT. ANN. tit. 22 §§ 1371-1372 (West 2005); 42 PA. CONS. STAT. ANN. § 9543.1 (West 2005); R.I. GEN. LAWS § 10-9.1-11 (2004); TENN. CODE ANN. §§ 40-30-304 -- 413 (2003); TEX. CODE CRIM. PROC. ANN. arts. 64.01-.05 (Vernon 2005); UTAH CODE ANN. §§ 78-35A-301-304 (2005); VA. CODE ANN. § 19.2-327.1 (2005); WASH. REV. CODE § 10.73.170(2005); W.VA. CODE § 15-2B-14 (2004); WIS. STAT. ANN. § 974.07 (West 2004).

n50 Innocence Protection Act, 18 U.S.C.A. § 3600 (2004).

n51 The states that have not yet enacted an innocence protection statute are: Alabama, Alaska, Iowa, North Dakota, South Dakota, Vermont and Wyoming. Innocence protection legislation is pending in Hawaii, Massachusetts, Mississippi, Oregon, and South Carolina.

n52 See WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 244-45 (Saundra Davis Westervelt & John A. Humphrey Rutgers University Press 2001); S. REP. No. 107-315, at 16 (2002) (discussing the impediments that exist in gaining effective access to post-conviction DNA testing).

n53 JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED, at xvi (Doubleday 2000) (finding in approximately half of the exoneration cases described, the prosecutor refused to make the biological evidence available until litigation was threatened or filed); see generally Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 125-30 (2004) (discussing prosecutorial practices that thwart post-conviction innocence claims).

n54 *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002) (stating prisoner filed civil right suit seeking to force the prosecutor to grant access to the existing biological evidence for DNA testing); see also SIMON, *supra* note 28, at 44 (noting in Eduardo Velazquez' case the prosecutor resisted making the evidence available and had to be ordered by an appellate court to do so); Schultz, *supra* note 28, at C5 (finding it took two years of legal maneuvering to get prosecutor to release the biological evidence that was used to exonerate Michael Green who had already served 11 years in prison for rape); but see Jodi Wilgoren, *Prosecutors Use DNA Test to Clear Man In 85 Rape*, N.Y. TIMES, Nov. 14, 2002, at A22 (stating David Sutherlin exonerated when prosecutors in St. Paul, Minnesota initiated a review of old cases and used DNA testing on old evidence to exonerate him); Smith, *supra* note 21, at A04 (discussing Suffolk County, New York prosecutor decision to review criminal convictions to determine if biological evidence exists that could be used to exonerate); Molvig, *supra* note 22, at 16, 56 (describing the San Diego District Attorney's Office efforts to review old cases for biological evidence and offer of free post conviction DNA tests, and describing Austin, Texas prosecutor's cooperation in making evidence available and paying for testing).

n55 See generally Heidi Schmitt, *Post-Conviction Remedies Involving The Use of DNA Evidence To Exonerate Wrongfully Convicted Prisoners: Various Approaches Under Federal and State Law*, 70 UMKC L.

REV. 1001, 1007-09 (2002) (discussing the procedural obstacles faced by prisoners seeking post-conviction exoneration through the judicial process).

n56 See *Diamen v. United States*, 725 A.2d 501 (D.C. 1999) (finding post-conviction claim of actual innocence was time-barred under court's 2-year statute of limitations); *Herrera v. Collins*, 506 U.S. 390, 410-11 (1993) (discussing the procedural limitations on post-conviction claims in each state); see also George C. Thomas III et al., *Is it Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 277-81 (2003).

n57 See *Death Penalty Overhaul: Hearing before the S. Judiciary Comm., 107th Cong. (2002)* (stating, according to Barry Scheck, co-founder, The Innocence Project, it takes three to five years to screen, evaluate, investigate and collect the myriad of information needed to file a non-frivolous petition for DNA testing, especially when inmates are indigent and the evidence is hard to locate); cf. Gross et al., *supra* note 12, at 524 (among the exonerations examined by the authors, more than 50% had served ten or more years in prison prior to being exonerated, and 80% were incarcerated for at least five years before exoneration and release from confinement).

n58 *Herrera*, 506 U.S. at 413-17 (rejecting habeas petitions based solely on actual innocence and describing the clemency process as the "fail safe" for those asserting their actual innocence when the judicial process has been exhausted); see generally Ryan Dietrich, *A Unilateral Hope: Reliance on the Clemency Process As A Right of Access To State-Held DNA Evidence*, 62 MD. L. REV. 1028 (2003) (discussing the clemency process in the context of post-conviction actual innocence claims based on DNA testing).

n59 See, e.g., *Convicted By Juries*, *supra* note 15, at 35-37, 57-59, 73-74 (stating that because of Virginia's twenty-one day time limitation on filing post-conviction claims, the only option available for Edward Honaker, Walter Snyder, and David Vasquez upon receiving exculpatory DNA results was to request a pardon from the governor).

n60 See *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 768 (E.D. Va. 2000) (stating that under the Virginia constitution, the governor is not required to grant clemency petitions even if the petition presents "compelling evidence of actual innocence").

n61 See e.g., *Molvig*, *supra* note 22, at 57 (stating that in the case of Earl Washington, even after DNA evidence established his actual innocence procedural rules barred him from going back to court to seek relief from his conviction and it took seven years to win a pardon from the governor); see generally, MARGARET EDDS, *AN EXPENDABLE MAN: THE NEAR EXECUTION OF EARL WASHINGTON, JR.* (New York University Press 2003) (describing in detail Earl Washington's case, from his arrest on May 21, 1983, to his release from prison on February 12, 2001).

n62 See Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 358-360 (2002) (discussing the wide array of limitations and restrictions in different state innocence protection statutes).

n63 See e.g., *CONN. GEN. STAT. §§ 54-102kk(a)* (2004) ("Notwithstanding any other provision of law governing post-conviction relief, any person who was convicted of a crime and sentenced to incarceration may,

at any time during the term of incarceration, file a petition with the sentencing court requesting the DNA testing of any evidence that is in the possession or control of the Division of Criminal Justice. . . .").

n64 The Innocence Protection Act in Maine typifies the prerequisites for post-conviction DNA testing under most innocence protection statutes: "The court shall order DNA analysis if [a convicted prisoner] presents prima facie evidence that: (A) The evidence sought to be analyzed is material to the issue of the person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction; (B) A sample of the evidence is available for DNA analysis; (C) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced or altered in any material way; (D) The evidence was not previously subjected to DNA analysis or, if previously analyzed, will be subject to DNA analysis technology that was not available when the person was convicted; and (E) The identity of the person as the perpetrator of the crime that resulted in conviction was at issue during the person's trial." *ME. REV. STAT. ANN. tit. 15, § 2138(4)(A)-(E)* (2004).

n65 *See, e.g., Id.* § 2138(4)(E).

n66 *See, e.g., Id.* § 2138(4)(B); *see also Commonwealth v. Robinson*, 682 A.2d 831, 837 (*Pa. Super. Ct.* 1996) (holding that in order to establish a prima facie case for DNA testing under state Post Conviction Relief Act, petition must allege that specimens collected in rape kit are still in existence).

n67 *See, e.g., ME. REV. STAT. ANN. tit. 15, § 2138(4)(C).*

n68 *See, e.g., MINN. STAT. § 590.01(1a)(c)* (2004) ("The court shall order that the testing be performed if . . . the testing has the scientific potential to produce new, non-cumulative evidence materially relevant to the defendant's assertion of actual innocence. . . .").

n69 Under the Federal Innocence Protection Act, 18 U.S.C.A. § 3600 (2004), prisoners under sentence for a federal crime can petition for DNA testing if the prisoner files a petition which certifies that the petitioner is actually innocent of the federal crime that has resulted in their conviction and consents to provide a DNA sample for comparison analysis. § 3600(a)(1), (a)(9). Second, the petition must allege that the identity of the perpetrator was a disputed issue at petitioner's trial. § 3600(a)(7). Further, the petitioner cannot put forth a theory of defense which would fail to establish actual innocence, or a defense which is inconsistent with the defense presented at trial. § 3600(a)(6). The petition must also assert that the requested forensic analysis will produce "new material evidence" that would support the proffered defense theory and raise a "reasonable probability" that the applicant did not commit the offense. § 3600(a)(8). With respect to the biological evidence, the petition for testing must aver that the evidence was collected as part of the original criminal investigation, has been properly preserved, and subject to a continuous chain of custody by the government. § 3600 (a)(2), (a)(4).

n70 S. REP. No. 107-315 at 19 (2002) (noting that many state innocence protection statutes do not impose a duty to preserve evidence).

n71 In some states, the preservation of biological evidence is incorporated in the innocence protection statute. *See, e.g., FLA. STAT. § 925.11(4)(a)* (2004). In some other jurisdictions the post-conviction preservation of evidence provision is codified in a separate statute. *See, e.g., Mo. STAT. § 650.056* (2004). As discussed herein, *infra* Part 2, with regard to the problems of preservation of biological evidence, the criticisms are

applicable irrespective of whether there is a separate provision, or whether the provision occurs within the body of a more encompassing innocence protection statute.

n72 See Swedlow, *supra* note 62, at 377-80 (describing the various statutory approaches to the preservation of evidence).

n73 11 DEL. CODE ANN. tit. 11, § 4504 (2005); IDAHO CODE § 19-4902(b) (2004); MINN. STAT. § 590.01-06 (2004); N.J. STAT. ANN. § 2A:84A-32a (2005); N.Y. CRIM. PROC. LAW § 440.30 (1-a)(a) (McKinney 2005), OHIO REV. CODE ANN. §§ 2953.71 -- 2953.81 (West 2005); W.VA. CODE § 15-2B-14 (2005). The Colorado statute, COLO. REV. STAT. §§ 18-1-414, expressly states:

(2) A court granting a motion for hearing [on a petition for post-conviction DNA testing] shall order the appropriate law enforcement agency to preserve existing biological evidence for DNA testing.

(3) Notwithstanding the provisions of subsection (2) of this section, this section does not create a duty to preserve biological evidence nor does it create a liability on the part of a law enforcement agency for failing to preserve biological evidence.

n74 The problems with innocence protection laws that do not impose a clear duty to preserve evidence is aptly illustrated by *People v. Trama*, 636 N.Y.S.2d 982 (N.Y. Co. Ct. 1995). In *Trama*, the defendant was convicted of rape in New York in 1987 but continued to appeal his conviction through the state appellate courts until April 1991. In July 1992, under the New York post-conviction DNA testing statute, the defendant moved for DNA testing of some of the biological evidence collected in the case that was located at a forensics lab. By October 1992, the motion was served on the government and granted by the court. In October 1993, the government notified defense counsel that the State Police had destroyed the rape kit and the victim's panties on September 20, 1990, and the remaining physical evidence was destroyed on December 1, 1992. Notably, when the rape kit was destroyed, *Trama* was still actively involved in appellate litigation of this conviction and his case was not yet closed. Also, when the other evidence was destroyed in December 1992, the court had already granted the defense motion for DNA testing of some of the physical evidence in the case two months earlier, and the litigation was still on-going.

The court ruled that the government only had a legal duty under New York law to preserve the physical evidence for thirty days after the defendant's appeal. The court stated that "judicial recognition of a right to post-conviction [DNA testing] . . . does not, in and of itself, extend or enlarge the People's duty to preserve evidence." The court held that the "even assuming the People's obligation to preserve evidence extended until the time that the last appellate court determination was reached on April 3, 1991, I find that no legal consequence flows from the September 20, 1990, destruction of the rape kit, jeans and panties." The court reasoned that "even where evidence is destroyed during the period in which the People are obligated to preserve it," no relief will be given to the defendant unless there is a showing that the defendant made a demand for the evidence or "there existed reason to believe that defendant was seeking discovery of the subject evidence." The court noted that, despite the filing of the motion for DNA testing, no specific request was made by counsel that any additional physical evidence in the government's possession be located or preserved. It is unclear from the court's opinion why the filing of the motion for testing of some of the physical evidence collected in the case would not have been sufficient notice to the government that all remaining physical evidence collected in the case should be preserved at least until the pending litigation was resolved.

n75 See ARIZ. REV. STAT. § 13-4240(H) (2004) ("If a petition is filed . . . the court shall order the state to preserve . . . all evidence in the state's possession that could be subjected to [DNA] testing."). *Accord GA.*

CODE ANN. § 5-5-41(c)(10) (2004); IND. CODE § 35-38-7-14(1) (2004); KAN. STAT. ANN. § 21-2512(b)(2) (2003); LA. CODE CRIM. PROC. ANN. § 926.1(F) and (H)(3) (West 2004); NEV. REV. STAT. 176.0918(3) (2004); 42 PA. CONS. STAT. ANN. § 9543.1(b)(2) (West 2004); TENN. CODE ANN. § 40-30-304 (2004); UTAH CODE ANN. § 78-35a-301(5) (2005); VA. CODE ANN. § 19.2-270.4:1 (A) (2004); WIS. STAT. ANN. § 974.07(5) (West 2003).

n76 KAN. STAT. ANN. § 21-2512(b)(2) (2004).

n77 E.g., *Johnston v. State*, 99 S.W.3d 698 (Tex. App. 2003), discussed *infra* note 91.

n78 See Swedlow, *supra* note 62, at 379 (2002).

n79 See *supra* note 66, *Robinson*, 682 A.2d at 837.

n80 This level of vindictiveness to thwart post-conviction DNA testing is not, unfortunately, farfetched. In the case of Michael Elliot, the defendant was convicted of murder in 1997 and sentenced to life without the possibility of parole. In 2002, while investigating Elliot's wrongful conviction claim, the Kentucky Innocence Project discovered a bloodstain that they believed came from the assailant. The Project hoped that this piece of potentially valuable evidence, preserved among other physical evidence in the state police department evidence room, could be subjected to DNA analysis and produce results that would exonerate Elliot. The Project immediately moved to have the stain preserved. The prosecutor's office not only opposed the motion to preserve the stain, but filed a motion with the court to have the evidence destroyed before any DNA testing could be conducted. Incredibly, the trial court granted the government's motion, authorizing the immediate destruction of this untested and potentially exculpatory evidence. The decision was quickly appealed, and the Kentucky Court of Appeals granted a stay of the trial court's destruction order. Elliot's defense team then "sped" to the state police evidence facility to serve the appellate court's order before the evidence was destroyed. See, e.g., Katya Cengel, *Kentucky Law Students are Transforming American Justice*, COURIER-JOURNAL (Louisville, KY), June 29, 2003 at 1H; Former FBI Director, William Sessions also noted the egregiousness of the actions taken in the Elliot case, William S. Sessions, *DNA Tests Can Free the Innocent. How Can We Ignore That?*, WASH. POST, Sept. 21, 2003 at B2; Testimony of Barry Scheck before the United States Senate Committee on the Judiciary (June 18, 2002) available at <http://a257.g.akamaitech.net/7/257/2422/15may20031230/www.access.gpo.gov/congress/senate/pdf/107hrg/86617.pdf>.

n81 CAL. PENAL CODE § 1417.9(a) (2005) ("Notwithstanding any other provision of law . . . the appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case."); Accord ARK. CODE ANN. § 12-12-104(a)-(b)(1) (2005); CONN. GEN. STAT. § 54-102jj(b) (2004); FLA. STAT. ch. 925.11(4)(a) (2004); 725 ILL. COMP. STAT. 5/116-4(a) (2004); KY. REV. STAT. ANN. § 524.140(3) (2004); MD CODE ANN., CRIM. PROC. § 8-201(i)(1) (2004); ME. REV. STAT. ANN. tit. 15, § 2138(14) (West 2004); MICH. COMP. LAWS § 770.16(11) (2005); MO. STAT. § 650.056 (2004); MONT. CODE ANN. § 46-21-111 (2003); NEB. REV. STAT. § 29-4120 (3) (2004); N.H. STAT. § 651-D (2004); N.M. STAT. ANN. § 31-1A-2(L) (2005); OKLA. STAT. ANN. tit. 22 § 1372(A) (West 2000); N.C. GEN. STAT. § 15A-268 (2004); R.I. GEN. LAWS § 10-9.1-11(a) (2004); TEX. CRIM. PRO. art. 38.39(a) (Vernon 2004); WASH. REV. CODE § 10.73.170(4) (West 2004).

n82 § 3600A (a) ("Notwithstanding any other provision of law, the Government shall preserve biological

evidence that was secured in the investigation or prosecution of a Federal offense, if a defendant is under a sentence of imprisonment for such offense."). *See also* D.C. CODE ANN. § 22-4134(a) (2004).

n83 If the government seeks to dispose of the evidence at any time before the prisoner's discharge from custody, the government must provide notice to the prisoner and seek leave of the court, *See, e.g.,* ARK. CODE ANN. § 12-12-104(c) (2005) ("After a conviction is entered, the prosecuting attorney or law enforcement agency having custody of the evidence may petition the court with notice to the defendant for entry of an order allowing disposition of the evidence. . . ."). *See also* *infra* note 115 (discussing statutory procedures for disposal of oversized pieces of evidence containing biological material).

n84 S. Rep. No. 107-315 at 19 (2002) (explaining that the Federal Innocence Protection law is needed to "ensure appropriate preservation of biological evidence throughout the country." The Committee also noted that requiring states to adopt "reasonable preservation procedures consistent with the new Federal law" would safeguard the rights of inmates to produce proof of their innocence through DNA testing and "help law enforcement retest old cases to catch the actual perpetrators.").

n85 42 U.S.C. § 14136.

n86 *See id.* at §§ 14136 (2)(A)(i)-(B)(i).

n87 *See generally* Reed, *supra* note 13, at 886-88.

n88 42 U.S.C. §§ 14136 (2)(A)(ii)-(B)(ii). *See also* S. Rep. No. 107-315 at 17-18 (stating that procedures adopted by a State must, at a minimum, incorporate the core elements of the federal procedure. Specifically, the Committee noted that a state innocence protection statute which only applied to death row inmates, set unreasonable time restrictions, or "which would systematically deny testing to whole categories of prisoners" who would be entitled to testing under the Federal Innocence Protection statute as examples of state statutes which would not meet the "comparable" requirement).

n89 *See* *infra* notes 107-110 and accompanying text.

n90 In fact, the innocence protection statutes in Louisiana, Virginia and Colorado expressly limit the legal action against the government if the evidence is destroyed in violation of the statute. LA. CODE CRIM. PROC. ANN. § 926.1 (H)(6) (2004) ("Except in the case of willful or wanton misconduct or gross negligence, no clerk or law enforcement agent responsible for preservation shall be held criminally or civilly liable for unavailability or deterioration if testing cannot be performed"); VA. CODE ANN. § 19.2-270.4:1 (E) (2004) ("Nothing in this section shall create any cause of action for damages against the Commonwealth, or any of its political subdivisions or officers, employees or agents of the Commonwealth or its political subdivisions."). *See also* COLO. REV. STAT. §§ 18-1-414(3), *supra* note 73.

n91 Several recent cases illustrate the gap in the law created by post-conviction preservation provisions that have no enforcement provision when the duty to preserve evidence is breached. In *Johnston v. State*, 99 S.W.3d 698 (Tex. App. 2003), the defendant was convicted of sexual assault and thereafter filed a petition for DNA testing under the Texas Innocence Protection statute which imposes a blanket duty to preserve evidence, *see*

TEX. CRIM. PRO. Ann. art. 38.39(a) (Vernon 2004). The government acknowledged that there was evidence containing biological material collected in the case, but stated that the evidence was destroyed in the normal course of business by the police. The appellate court ruled that the blanket preservation statute applied to the evidence destroyed by the government, *id. at 702*, but held that, even if the statute was violated, the court could not grant any relief to Johnston because the statute "does not provide a remedy when the State destroys evidence without following the procedure outlined in the statute." *Id. at 702*. The court reasoned that "laws that do not amend substantive law by defining criminal acts or providing penalties are procedural in nature." *Id. at 701*. The court concluded that it had no jurisdiction to grant any legal remedy for the government's violation of a mere procedural rule regarding evidence preservation. *See also State v. Brown*, 613 S.E.2d 284 (N.C. App. 2005); *Chavez v. State*, 132 S.W.3d 509, 510 (Tex. App. 2004); *Watson v. State*, 96 S.W.3d 497, 499 (Tex. App. 2002).

n92 *See ARK. CODE ANN. § 12-12-104 (e)* (2005) ("It is unlawful for any person to purposely fail to comply with the provisions of this section. . . . A person who violates this section is guilty of a Class A misdemeanor"); *D.C. CODE ANN. § 22-4134(d)* (2004) ("Whoever willfully destroys or tampers with evidence that is required to be preserved under this section with the intent to "impair integrity", "prevent testing" or "prevent production" shall be subject to a fine of \$ 100,000 or imprisoned for up to 5 years or both."); *720 ILL. COMP. STAT. 5/33-5(b)* (2004) ("A person who [fails to preserve evidence] is guilty of a Class 4 felony"); *W. VA. CODE § 15-2B-13 (a-b)* (2005) ("Any person who neglects [to preserve or destroys evidence] is guilty of a misdemeanor. . . . Further, such neglect constitutes misfeasance in office and may subject that person to removal from office"). The Kentucky Innocence Protection statute is a hybrid, imposing criminal penalties in non-capital cases, *KY. REV. STAT. ANN. § 524.140(6)* (2004) (Class D felony), but allowing the court to impose "appropriate sanctions" in capital cases, *KY. REV. STAT. ANN. § 422.285* (2004).

n93 *See Reed*, *supra* note 13, at 898-99 (arguing that civil penalties and criminal sanctions may provide some measure of deterrence against intentional evidence destruction by evidence custodians); Diana L. Kanon, *Will The Truth Set Them Free? No, But The Lab Might: Statutory Responses To Advancements In DNA Technology*, 44 *ARIZ. L. REV.* 467, 492 (2002) (stating criminal penalties may deter destruction of evidence). *But see Swedlow*, *supra* note 62, at 379 (questioning the effectiveness of criminal penalties as a deterrent for evidence custodians "inclined" to destroy evidence).

n94 *ALA. CODE § 13A-10-129* (2004). *Accord ALASKA STAT. § 11.56.610* (2004); *ARIZ. REV. STAT. § 13-2809* (2004); *ARK. CODE ANN. § 5-53-111(b)* (2004); *COLO. REV. STAT. § 18-8-610* (2004); *CONN. GEN. STAT. § 53a-155* (2004); *D.C. CODE ANN. § 22-723(b)* (2005); *FLA. STAT. ANN. § 918.13(2)* (West 2004); *GA. CODE ANN. § 16-10-94* (2004); *HAW. REV. STAT. § 710-1076(3)* (2004); *KY. REV. STAT. ANN. § 17.170(4)* (2004); *ME. REV. STAT. ANN. tit. 17, § 455(2)* (West 2004); *MO. REV. STAT. § 575.100(2)* (2004); *MONT. CODE ANN. § 45-7-207(2)* (2004); *NEB. REV. STAT. § 28-922(3)* (2004); *NEV. REV. STAT. § 199.220* (2004); *N.H. REV. STAT. ANN. § 641:6* (2004); *N.J. STAT. ANN. § 2C:28-6* (West 2005); *OHIO REV. CODE ANN. § 2921.12(B)* (West 2004); *OR. REV. STAT. § 162.295* (2003); *18 PA. CONS. STAT. § 4910* (2004); *TENN. CODE ANN. § 39-16-503(b)* (2004); *TEX. PENAL CODE ANN. § 37.09* (Vernon 2004); *UTAH CODE ANN. § 76-8-510.5* (2004).

n95 *See, e.g., GA. CODE ANN. § 5-5-41(c)(5)*(2004) ("The motion [for post-conviction DNA testing] shall be served upon the district attorney and the Attorney General. The state shall file its response, if any, within 60 days. . . . The state shall be given notice and an opportunity to respond at any hearing conducted pursuant to this subsection.").

n96 *See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.2(a)* (4th ed. 2004) ("The notion

that the prosecuting attorney is vested with a broad range of discretion in deciding when to prosecute and when not to is firmly entrenched in American law.").

n97 *See supra* notes 25-26 and accompanying text.

n98 Several legal scholars have noted this deficiency of criminal penalty provisions. *See* Nathan T. Kipp, *Preserving Due Process: Violations Of The Wisconsin DNA Evidence Preservation Statutes As Per Se Violations Of The Fourteenth Amendment*, 2004 WIS. L. REV. 1245, 1255-58 (2004) (explaining that none of the innocence protection statutes that provide criminal sanctions as a remedy for evidence destruction specify what remedy will be available to the prisoner upon violation of the statute); Kanon, *supra* note 93, at 492-93 (stating criminal sanctions are of no use to the convicted defendant).

n99 *See, e.g.,* NEB. REV. STAT. § 29-4117 (2004) (stating "it is the intent of the Legislature that wrongfully convicted persons have an opportunity to establish their innocence through deoxyribonucleic acid, DNA, testing.").

n100 ME. REV. STAT. ANN. tit. 15 § 2138(2) (2004).

n101 ARIZ. REV. STAT. § 13-4240(H) (2004) (stating that "if evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions, including criminal contempt, for a knowing violation"); IND. CODE § 35-38-7-14(3) (2004) (stating "if evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions"); NEB. REV. STAT. § 29-4120(4) (2004) (stating that "if evidence is intentionally destroyed after notice of a motion filed pursuant to this section, the court shall impose appropriate sanctions, including criminal contempt"); N.M. STAT. ANN. § 31-1A-2(F) (2005) (stating "the district court may impose appropriate sanctions, including dismissal of the petitioner's conviction or criminal contempt, if the court determines that evidence was intentionally destroyed after issuance of the court's order to secure evidence"); TENN. CODE ANN. § 40-30-409 (2004) (stating "the intentional destruction of the evidence after the court order may result in appropriate sanctions, including criminal contempt for a knowing violation"). *See also* KY. REV. STAT. ANN. § 422.285 (2004) (stating that if evidence is intentionally destroyed [in capital cases] after the court orders preservation, the court may impose appropriate sanctions, including criminal contempt"); The Model Statute for Obtaining Post Conviction DNA Testing proposed by the Innocence Project at Cardozo Law School ("Notwithstanding any other provision of law, all appropriate governmental entities shall retain all items of physical evidence which contain biological material that is secured in connection with a criminal case. . . . This requirement shall apply with or without the filing of a petition for post-conviction DNA testing, as well as during the pendency of proceedings under this Act. . . . If evidence is intentionally destroyed after the filing of a petition under this Act, the Court may impose appropriate sanctions on the responsible parties."), *available at* http://www.innocenceproject.org/docs/Model_Statute_Postconviction_DNA.pdf.

n102 *See, e.g.,* N.M. STAT. ANN. § 31-1A-2(F) (2005) (stating "the district court may impose appropriate sanctions, including dismissal of the petitioner's conviction or criminal contempt, if the court determines that evidence was intentionally destroyed after issuance of the court's order to secure evidence").

n103 *Id.*

n104 See *Herrera*, 506 U.S. at 398-400.

n105 See Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542-46 (2005) (discussing the number of wrongful convictions based on eyewitness error and false confessions); DWYER, *supra* note 53 (stating that in a study of sixty-two wrongful convictions false confessions accounted for 24% of wrongful convictions and mistaken eyewitness identifications resulted in 84% of wrongful convictions). See also Steven Wisotsky, *Miscarriages of Justice: Their Causes and Cures*, 9 ST. THOMAS L. REV. 547, 552-53 (1996-97) (discussing eyewitness error); James McClosky, *Convicting the Innocent*, 8 CRIM. JUSTICE ETHICS 2 (1989) (detailing vivid examples of wrongful convictions based on perjured testimony secured by police coercion).

n106 See, e.g., *Florida Moves to Close Window For DNA Appeals*, (NPR radio broadcast Aug. 8, 2005) (recounting statement by Florida prosecutor that preservation of evidence requirement is too broad and "open-ended"); *Waivering Rights: Are Prosecutors Circumventing the New Law Designed to Preserve DNA Evidence?*, Houston Press, July 12, 2001, at 16 (quoting a Texas judge that saving biological evidence in every case is a "gross waste of resources"; state prosecutor, Bert Graham, reacting to Texas evidence preservation statute stating, "we almost have to keep everything unless the defense agrees to let us get rid of it. And that could lead to costly and cumbersome storage problems for the police.") [hereinafter *Waivering Rights*]; see also *Preserve or Destroy Evidence? Prosecutors, Defense at Odds*, THE SALT LAKE TRIBUNE, Jul. 18, 1993, at A16 (according to an Oakland, California prosecutor "destroying evidence may trouble some people, but the legal system certainly doesn't have a perpetual obligation to keep things").

n107 See, e.g., S. REP. NO. 107-315 at 20; John Cheves, *Bills Call For Felons' DNA Samples Another Requires Keeping Evidence*, Lexington Herald-Leader, Feb. 12, 2001, at A1 (quoting Kentucky prosecutor that it is a necessity that evidence in criminal cases be destroyed after the appeals process over because "the county doesn't have enough storage space to hold evidence forever" and noting that in one murder case the government could have large pieces of evidence like a "couch with blood on it."); NPR, *DNA Testing in Crime Cases*, *supra* note 14 (quoting evidence custodian stating that his office handles 90,000 cases per year and "it's just overwhelming when you have that much evidence. They'd need warehouse after warehouse to keep all of it.").

n108 See Cheves, *supra* note 107, at A7 (discussing prosecutors' concerns over cost of preserving biological evidence in a climate-controlled storage facility); S. REP. NO. 107-315, *supra* note 52, at 20.

n109 Kreimer & Rudovsky, *supra* note 22, at 561 n.49 (citing prosecutorial concerns over the diversion of the state's limited DNA testing resources to convicted felons).

n110 *Convicted By Juries*, *supra* note 15, at xxiii (stating it is unlikely that the perpetrator of a crime will leave biological material at the crime scene in cases other than sexual assault); John T. Rago, "Truth or Consequences" and Post-Conviction DNA Testing: *Have You Reached Your Verdict?*, 107 DICK. L. REV. 845, 851-52 (2002-2003) (estimating that in approximately 80% of serious felony cases there is no biological evidence); see also Findley, *supra* note 18, at 22 (stating in most cases the perpetrator does not leave biological evidence).

n111 See Gross et al., *supra* note 12, at 529 (examining 144 DNA-based exonerations and finding 105 wrongful convictions in rape cases, thirty-nine in rape-murder cases, and no wrongful convictions in cases involving drug offenses, property crimes or other violent crimes).

n112 See *Convicted By Juries*, *supra* note 15, at xxiii (twenty-six of twenty-eight wrongful convictions profiled in the landmark Department of Justice study involved analysis of sperm in semen from sexual assault cases).

n113 CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2003 STATISTICAL TABLES, tbl.1 available at <http://www.ojp.usdoj.gov/bjs/abstract/cv04.htm> (reporting that there were approximately 24 million crimes reported nationally in 2004, and approximately 18 million of all reported crimes were property crimes (theft, burglary, motor vehicle theft) and approximately 209,000 cases of rape and sexual assault-related charges were reported).

n114 *Id.*

n115 *E.g.*, D.C. CODE § 22-4134(c) (2001) ("The District of Columbia shall not be required to preserve evidence that must be returned to its rightful owner, or is of such a size, bulk, or physical character as to render retention impracticable. If practicable, the District of Columbia shall remove and preserve portions of this material evidence sufficient to permit future DNA testing before returning or disposing of it."); *Accord* Innocence Protection Act of 2004, 18 U.S.C. § 3600A (c)(4)(A)-(B) (Supp. 2005); ARK. CODE ANN. § 12-12-104 (c)-(d) (2003); 725 ILL. COMP. STAT. 5/116-4(c)(1)-(2) (Supp. 2005); MD CODE ANN., CRIM. PROC. § 8-201 (j)(4)(ii) (Supp. 2004); N.M. STAT. ANN. § 31-1a-2 (M)(3)-(4) (Supp. 2003); VA. CODE ANN. § 19.2-270.4:1 (D) (2004).

n116 *E.g.*, D.C. CODE § 22-4134(c) (2001).

n117 S. REP. NO. 107-315 at 20.

n118 See *supra* notes 29-32 and accompanying text.

n119 See Kreimer & Rudovsky, *supra* note 22, at 610.

n120 Adam Liptak, *Prosecutor's See Limits to Doubt in Capital Cases*, N.Y. TIMES, Feb. 24, 2003, at A1 (quoting Missouri Attorney General, Jeremiah W. Dixon: "is the state required to prove every day that someone committed an offense beyond a reasonable doubt?" Also, Jamie Orenstein, former Department of Justice official stated: "society has a real and legitimate need for finality in answering the question of whether someone is guilty of a crime." Josh Marquis, Oregon Prosecutor, argued that "there are circumstances where enough is enough . . . at some point there has to be finality.").

n121 See also Louis Romano, *When DNA Meets Death Row, It's the System That's Tested*, WASH. POST, Dec. 12, 2003 at A1 (stating prosecutors oppose DNA testing because of concern for the victims' relatives, who have waited years -- sometimes decades -- for closure); Liptak, *supra* note 120, at A16 (quoting Joshua Marquis of the National District Attorneys Association, "conversations with victims' families about these [DNA] motions are not easy for prosecutors . . . every Prosecutor dreads making a phone call to a victim after the victim thinks the case is over. . . . you're reopening the wound.").

n122 *Calderon v. Thompson*, 523 U.S. 538, 554-556 (1998), and cases cited therein.

n123 *Id.* at 555 (citing *Teague v. Lane*, 489 U.S. 288 (1989)); see also, *Herrera*, 506 US at 403-05.

n124 *Calderon*, 523 U.S. at 556 (citing *Herrera*, 506 U.S. at 421, O'Connor, J. concurring).

n125 *Calderon*, 523 U.S. at 557 (citing *Murray v. Carrier*, 477 U.S. 478 (1986)).

n126 See *Romano*, *supra* note 121, at A14 (arguing against post-conviction testing, one Virginia prosecutor states: "What do we do about it in 10 years -- when more sophisticated technology comes up? Do we test it again? When does this Pandora's box stop opening?"); see also *Thomas et al.*, *supra* note 56, at 293-94 (arguing that finality is needed because "prisoners would endlessly search for scraps of new evidence and bombard the courts with petitions to reopen their cases").

n127 See generally *Calderon*, 523 U.S. at 538 (recognizing that the state's interest in finality of judgment limits the courts' discretion in granting *habeas corpus* petitions); *Herrera* 506 U.S. at 390 (1993) (holding that a claim of actual innocence based on new evidence is not grounds for a *habeas corpus* petition in the absence of a constitutional claim).

n128 The United States Supreme Court has recognized that the state's interest in finality of judgments "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135 (1982). See also *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (stating that an "extraordinary case" where an innocent person has been convicted, the court will consider granting *habeas* relief to correct a fundamental miscarriage of justice).

n129 See *Herrera*, 506 U.S. at 398-400 (stating that once the accused has been accorded all constitutional rights and convicted at a trial the presumption of innocence disappears and the post-conviction petitioner is presumed guilty).

n130 *Id.* at 403-04 ("There is no guarantee that the guilt or innocence determination would be any more exact [in a subsequent trial with additional evidence]. To the contrary, the passage of time only diminishes the reliability of criminal adjudications."). See also *id.* at 420 (O'Connor, J., concurring) ("Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent"). See also Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1332-34 (1997) (asserting that critics of post-conviction litigation do not believe that the innocent would be initially convicted).

n131 *Herrera*, 506 U.S. at 417 (internal quotation marks omitted).

n132 Peter J. McQuillan, DNA News, INNOCENCE PROJECT, available at InnocenceProject.org/dnanews/index (last visited Sept. 9, 2005) (stating that half of the post-conviction DNA tests implicate the convicted prisoner). See also Richard Willing, *Justice Department: DNA Tests for Guilty Jam System: Authorities Don't Want Petitions to Be Made Easier*, USA TODAY, May 13, 2004, at 18A (stating Ricky McGinn was granted DNA testing by Governor Bush and DNA tests confirmed his guilt. In addition, Benjamin LaGuer was convicted in Massachusetts, attracted popular support, and his guilt was confirmed after supporters raised \$ 30,000 to pay for DNA testing.).

n133 See SIMON, *The Innocents*, *supra* note 28 (stating that the biological evidence used to exonerate the wrongly convicted was also used to locate the actual perpetrator of the crime in many cases, including Kirk Bloodsworth, Anthony Robinson, Darryl Hunt, Larry Youngblood, Ronald Cotton, Kevin Green, Jeffrey Pierce, Rona Williamson, Dennis Fritz, and Marvin Anderson). See also Associated Press, "Man Sues Over Wrongful Convictions," Oct. 1, 2002 (when DNA testing completed in Earl Washington's case, "a DNA cold hit' linked a man already serving time for rape" to the murder that Washington had been convicted of); Louis Romano, *When DNA Meets Death Row, It's the System That's Tested*, WASH. POST, Dec. 12, 2003 at A14 (showing that Frank Lee Smith died of cancer on Florida's death row before the DNA test result exonerated him, but eleven months later, the DNA evidence was used to identify a convicted rapist and murderer as the actual perpetrator of the crime); Editorial, *States Dawdle While Jailed Innocents Languish*, USA TODAY, June 26, 2001, at 12A (noting Jerry Frank Townsend was convicted on several murder charges in Florida and was later exonerated when DNA testing on biological evidence pointed to an institutionalized mental patient).

n134 *Morning Edition: DNA Testing in Crime Cases Causing Distrust in the Criminal Justice System* (NPR radio broadcast Aug. 29, 2000) (reporting that, according to local attorney, headlines about DNA exonerations were making potential Texas jurors consider the fallibility of the criminal justice system). See Romano, *supra* note 133, at A14 ("Prosecutors and defense lawyers agree that the spate of well-publicized wrongful convictions uncovered by DNA testing has taken its toll on the [criminal justice] system.").

n135 BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-2002 116, tbl.2.12 (Kathleen Maguire & Ann L. Pastore eds., 2003). The data showed that 29% of people had a "great deal" or "quite a lot" of confidence in the criminal justice system; the remaining 71% of people stated that they had only "some," "very little," or "[no]" confidence in the criminal justice system.

n136 In 1991, only 11% of people listed the possibility of wrongful conviction as their reason for opposing the death penalty. By 2003, 25% of people opposed the death penalty because of the possibility of wrongful conviction. *Id.* at 148, tbl. 2.54. Conversely, Americans overwhelmingly support re-opening old cases to allow prisoners to obtain DNA testing on old biological evidence. See Mark Gillespie, *Americans Favor DNA "Second Chance" Testing for Convicts*, Gallup News Service, March 30, 2000 (reporting that a survey in 2000 showed that 92% of Americans -- of all demographic and political ideologies -- believe that prisoners should be allowed to get DNA tests if such tests might prove their innocence).

n137 Kreimer & Rudovsky, *supra* note 22, at 611 ("As time goes by the universe of cases where blood or semen samples were not initially tested will diminish."); Liptak, *supra* note 120, at A15 ("The impact of [DNA evidence] may be a limited and passing phenomenon. DNA testing at the outset of a prosecution is now routine, so that more recent convictions will not be subject to the challenges on this basis."); Mark Hansen, *DNA Bill of Rights*, A.B.A. J., March 2000, at 30, 31 (quoting Professor James Starrs that the Innocence Projects "will eventually put themselves out of business" because there will be no more old evidence to test).

n138 Givelber, *supra* note 130, at 1376 ("The weaker the prosecution's case, the more likely that the prosecutor will seek additional evidence from DNA testing. The corollary is that the stronger the prosecution's case, the less likely the prosecutor will use DNA testing.").

n139 Lauren Kern, *Waivering Rights: Are Prosecutors Circumventing the New Law Designed to Preserve DNA Evidence?*, HOUSTON PRESS, July 12, 2001, at 16.

n140 AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> (discussing the current abysmal state of funding and resources available for indigent defense representation throughout the country).

n141 AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, A COMPREHENSIVE OVERVIEW OF INDIGENT DEFENSE IN VIRGINIA 60 (2004), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf> (reporting on the high standard set in Virginia courts for indigent defendants to receive expert assistance); Givelber, *supra* note 130, at 1376 (asserting that a defendant's ability to secure DNA testing is subject to the court's willingness to order testing).

n142 Givelber, *supra* note 130, at 1376.

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