POSTCONVICTION ACCESS TO DNA TESTING AND CLEMENCY AS A "FAIL-SAFE": THE IMPLICATIONS OF JUDICIAL FIDELITY TO THE LEGAL PROCESS VISION

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ABSTRACT

The power of DNA to engage in individualization with unrivaled levels of certainty has generated tension in the postconviction arena. This is because DNA technology undermines finality interests and the ability of rational procedures to produce legitimate (i.e., factually accurate) outcomes, which are fundamental ideals of the legal process vision. This Article explores the implications of judicial fidelity to the legal process vision when petitioners request access to DNA evidence and testing to, inter alia*, support an application for clemency. At present, the lower courts routinely reject such claims and demonstrate a largely unreserved loyalty to the legal process vision. They do this in two ways: (1) routinely applying the pro-finality precedent set out by the U.S. Supreme Court in* District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009), where the majority of justices rejected the existence of a freestanding postconviction right to DNA access and testing on the basis it would undermine "traditional notions of finality"; and (2) underpinning their decisions by deferring to the principle of institutional settlement. This pattern in judicial decisionmaking is problematic for three key reasons. First, it significantly undermines both the corrective justice function of clemency, as set out by the Supreme Court in* Herrera v. Collins*, 506 U.S. 390 (1993), and the value of substantive accuracy in the Era of Innocence. Second, it demonstrates an awkward approach to credible scientific evidence of individualization (i.e., DNA) in light of courts' more liberal approach to the less scientifically supported individualization evidence provided by the soft sciences. Third, it ignores the institutional competence of the courts to respond to scientific progress and engender an approach to access to DNA testing (which can subsequently be used to support a meaningful clemency application) that is sensitive to the legal process vision. This Article concludes that courts should take a more proactive approach to harnessing the power of DNA. Courts must rethink*

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their reliance on classic tenets of legal process theory to routinely reject the types of claims examined in this Article and ease the theory into the 21st Century, where it is known—for certain—that rational, pro-finality procedures can produce factually erroneous results.

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DNA technology has revolutionized the American criminal justice system since it was first developed by scientists in the 1980s.[1] The ability of DNA technology to prove both innocence and guilt with consistency and a high degree of scientific certainty has "shattered [a] perception of virtual infallibility" and exposed the reality that factual error in the criminal justice system is, as Findley puts it, "systemic, not just freakishly rare or merely episodic."[2] To date, 337 people have been exonerated by postconviction DNA testing in America.[3]

DNA technology has not settled into the postconviction stage of the criminal justice system with ease, however. This is because the ability of DNA technology to seriously challenge criminal convictions undermines ideals to which postconviction institutions are very loyal.[4] These ideals include key tenets of the legal process vision, namely, legitimacy of legal outcomes badged with procedural regularity, and the various interests that make up the doctrine of finality; all of which are allegedly furthered by restrictions on postconviction review.[5] Therein lies the inevitable tension: cases where petitioners possess DNA evidence that proves their factual innocence undoubtedly warrant review. Procedural regularity and finality must—eventually—be side-lined.

Before seeking review, however, petitioners first need to access and test the DNA evidence in their case.[6] But, in the 2009 case of *District Attorney's Office for the Third Judicial District v. Osborne*, the United States Supreme Court, by a 5–4 majority, rejected the argument that, as part of the right to due process, there is a constitutional right to access and test DNA

1. Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2921–22 (2010).

2. Keith A. Findley, *Innocence Found: The New Revolution in American Criminal Justice*, *in* CONTROVERSIES IN INNOCENCE CASES IN AMERICA 3, 4 (Sarah Lucy Cooper ed., 2014).

3. *The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=O&c4=Exonerated+by+DNA (last visited Jan. 12, 2016).

4. *See, e.g.*, Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1630–31 (2008) [hereinafter Garrett, *Claiming Innocence*]; Kristen McIntyre, *A Prisoner's Right to Access DNA Evidence to Prove His Innocence: Post-Osborne Options*, 17 TEX. WESLEYAN L. REV. 565, 567 (2011).

5. *See* Garrett, *Claiming Innocence*, *supra* note 4; McIntyre, *supra* note 4.

6. *See* Marjorie A. Shields, Annotation, *DNA Evidence as Newly Discovered Evidence Which Will Warrant Grant of New Trial or Other Postconviction Relief in Criminal Case*, 125 A.L.R. 5th 497, § 2 (2005).

evidence postconviction.[7] Due process is only triggered when a state arbitrarily denies a petitioner access to state DNA testing mechanisms.[8] As part of its analysis, the Court rejected Osborne's argument that a due process right to DNA testing derived from the liberty interest he had in clemency as the DNA evidence would support a future clemency application.[9] This argument was "readily disposed of"[10] with the Court bluntly applying precedent that "noncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is *entitled* as a matter of state law."[11] As such, Osborne could not challenge the constitutionality of any procedures available to vindicate an interest in state clemency.[12]

The Supreme Court acknowledged that DNA technology could "provide powerful new evidence unlike anything known before" and accepted that it had exposed the propensity of the criminal justice system to generate factual error.[13] By implication, the Court accepted that these capabilities make DNA very relevant to postconviction mechanisms such as clemency.[14] Despite this, the majority was restrained by the "dilemma" DNA presented to the "established system of criminal justice."[15] To that end, the majority decision was underpinned by concerns that the creation of a constitutional right to access DNA for testing would too severely undermine

7. *See generally* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 72–75 (2009).

8. *Id.* at 69–70, 72.

9. *Id.* at 67–68. For a more detailed discussion and definition of "clemency," see Sarah Lucy Cooper & Daniel Gough, *The Controversy of Clemency and Innocence in America*, 51 CAL W. L. REV. 55, 55–56 (2014) ("Justified under a mixture of retributive, redemptive, and utilitarian principles, 'clemency' covers 'a variety of mechanisms an executive can use to remit the consequences of a crime,' including pardons, commutations of sentence, reprieves, and the remission of fines and forfeitures. Through these mechanisms, executives and/or administrative bodies can accomplish such diverse goals as restore civil rights, acknowledge mitigating circumstances, correct egregious sentences, prevent deportations, and support political agendas. They can also correct the wrongful conviction of innocents." (footnotes omitted)).

10. *Id.* at 67.

11. *Id.* at 67–68 (citing Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)).

12. *Id.* at 68.

13. *Id.* at 62.

14. *See id.*

15. *Id.*

"traditional notions" of finality and process.[16]

Despite *Osborne*, petitioners continue to seek postconviction access to DNA testing through the courts and continue to argue that such testing is relevant to seeking clemency.[17] This is unsurprising. In *Herrera v. Collins*,[18] the Supreme Court stated clemency is the fail-safe[19] of the criminal justice system and the traditional remedy for miscarriages of justice.[20] Clemency, therefore, has a crucial corrective justice function,[21] with Austin Sarat labeling it the "court of last resort" for innocents.[22] Still, appellate courts actively apply *Osborne*, and its progeny to reject such claims, remaining loyal to notions of finality and procedural regularity.[23]

This Article explores the implications of judicial fidelity to the legal process vision when petitioners request access to DNA evidence and testing in order to, inter alia, support an application for clemency. Part I briefly sets out the development and capability of DNA technology from the 1980s to the present day. Part II further explores the influence of finality and the desire for procedural regularity on the Supreme Court's decisions in *Osborne*,[24] *Skinner v. Switzer*,[25] *Herrera*,[26] and *Ohio Adult Parole Authority v. Woodard*.[27] Part III confirms the influence of the *Osborne* decision on lower courts by presenting a cohort of cases where petitioners have argued for access to DNA evidence and testing in order to, inter alia, further a clemency application. Applying *Osborne*, the lower courts routinely reject such claims and demonstrate a largely unreserved loyalty to ideals of finality and procedural regularity. Part IV argues that this pattern in judicial decisionmaking is problematic, particularly in light of the corrective justice function afforded to clemency in *Herrera*. This current judicial trend

16. *Id.* at 72–73.

17. *See* discussion *infra* Part III.

18. *See generally* Herrera v. Collins, 506 U.S. 390 (1993).

19. *Id.* at 415.

20. *Id.* at 411–12.

21. Cooper & Gough, *supra* note 9, at 81 (citing Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 572 (2001)).

22. Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 LAW & SOC'Y REV. 183, 185 (2008).

23. See *infra* Part III.

24. *See generally* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009).

25. *See generally* Skinner v. Switzer, 562 U.S. 521 (2011).

26. *See generally* Herrera v. Collins, 506 U.S. 390 (1993).

27. *See generally* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998).

significantly undermines both clemency's corrective justice function and the value of substantive accuracy in the Era of Innocence. Moreover it demonstrates an awkward approach toward credible scientific evidence and ignores courts' own institutional competence for addressing scientific change. Part V concludes that the courts must rethink their routine reliance on legal process theory to reject these claims. The courts must assist clemency to fulfill its corrective justice function by ensuring petitioners have the tools necessary to present meaningful clemency applications. These tools should include access to, and testing of, DNA evidence. The lower courts must no longer apply *Osborne* as a default position but should instead recognize their own institutional competence to respond to the demands of the criminal justice system in the Era of Innocence and loosen the system's grip on regular process and finality when cases of factual error can be proven by the application of credible scientific testing.

I. THE DEVELOPMENT AND CAPABILITY OF DNA TECHNOLOGY IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

DNA is the molecular structure in all living organisms that contains genetic information.[28] An organism's complete DNA profile is called a genome.[29] Human cells that have a nucleus, such as skin cells, sperm cells, and saliva cells, contain a copy of a person's genome.[30] "Two unrelated human genomes share over 99.9 [percent] of genetic data; however, variations in the remaining portion . . . produce a genetic fingerprint unique to each individual, with the exception of identical twins."[31] DNA is very

28. Donald E. Shelton, *Twenty-First Century Forensic Science Challenges for Trial Judges in Criminal Cases: Where the "Polybutadiene" Meets the "Bitumen*," 18 WIDENER L.J. 309, 320 (2009) ("DNA is the molecular structure in all living things that contains genetic information. DNA evidence is very durable and can be extracted from the smallest of remains many years after a crime. Equally significant is its 'polymorphism,' meaning that, depending on the method used for its extraction, it is unique among humans and can identify the donor of the specimen with overwhelming accuracy. DNA testing can be extremely precise and can often demonstrate that only one person in billions could have been the source of the specimen evidence." (citations omitted)).

29. *Genome*, WEBSTER'S UNABRIDGED DICTIONARY 797 (Random House 2d ed. 2001) (defining genome as a full set of chromosomes).

30. *See DNA Analysis*, THE FORENSICS LIBRARY, http://aboutforensics.co.uk/dna-analysis/ (last visited Oct. 19, 2015).

31. Michael P. Luongo, Note, *Post-Conviction Due Process Right to Access DNA Evidence:* Dist. Attorney's Office v. Osborne, *129 S. Ct. 2308 (2009)*, 29 TEMP. J. SCI. TECH. & ENVTL. L. 127, 129 (2010); *see also* RON C. MICHAELIS, ROBERT G. FLANDERS JR. & PAULA H. WULFF, A LITIGATOR'S GUIDE TO DNA: FROM THE LABORATORY TO

durable and can be extracted from the smallest of remains many years after a crime.[32]

"DNA profiling was originally developed as a method of determining paternity [in the 1980s]," but its potential use in the criminal justice system was "quickly realized."[33] Because perpetrators of crimes leave behind traces of themselves—such as skin, blood, hairs, saliva, or semen—at crime scenes and on victims, investigators realized DNA could be harnessed to "catch" the guilty and vindicate the innocent.[34]

Over the last 30 years, three methods of DNA profiling have emerged and been applied in furtherance of criminal investigation.[35] The first—Restriction Fragment Length Polymorphism (RFLP)—was developed in 1985 and "became the dominant form of DNA profiling throughout the early 1990s."[36] "The RFLP test produced a high degree of certainty of a positive match, and could conclusively exclude a person as the source of a sample if there was no match."[37] Still, the method was limited largely because "it required . . . large amount[s] of genetic material to obtain clear results" and was "not suitable for use on the degraded DNA samples often found in crime scenes."[38]

The second method of DNA profiling, Short Tandem Repeat (STR), was propelled from the development of a technique called Polymerase Chain Reaction (PCR) in the late 1980s.[39] This technique copies short strands of

THE COURTROOM 11 (2008).

32. *See* HOWARD COLEMAN & ERIC SWENSON, DNA IN THE COURTROOM: A TRIAL WATCHER'S GUIDE 25–27 (1994); Edward J. Imwinkelried, *The Relative Priority Which Should Be Assigned to Trial Stage DNA Issues*, *in* DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE 91, 92 (David Laze ed., 2004); Shelton, *supra* note 28.

33. Luongo, *supra* note 31, at 131.

34. *See id.* The notion that criminals leave behind traces of themselves at crime scenes and on victims can be traced back to the origins of forensic science, long before the development of DNA profiling. Edmond Locard, who opened the world's first criminal investigation laboratory in 1910, developed the Locard Exchange Principle, which simply states, "Every contact leaves a trace." VAL MCDERMID, FORENSICS: THE ANATOMY OF CRIME 5 (2014) ("[Locard] wrote: 'It is impossible for a criminal to act, especially considering the intensity of a crime, without leaving traces of his presence.'").

35. *See* Luongo, *supra* note 31, at 30–31.

36. *Id.* at 130 (citations omitted).

37. *Id.*

38. *Id.* (citations omitted).

39. *Id.* at 130–31.

DNA from a small number of initial strands.[40] As such, PCR-based DNA profiling can produce results from smaller or degraded samples of DNA, e.g., those more likely to be found at crime scenes.[41] STR-generated DNA profiles "are both highly sensitive and highly discriminating."[42]

A third method of DNA profiling—mitochondrial DNA typing—emerged in the mid-1990s.[43] This method utilizes DNA drawn "from the mitochondria of the cell rather than the nucleus."[44] "Mitochondria are small intracellular bodies, or organelles, located outside of the nucleus that contain their own small DNA genomes."[45] As "[m]itochondrial DNA typing can be applied to biological material such as hair shafts or bones that do not have a nucleus," it has the ability—unlike RFLP and STR-testing methods—to yield results from samples not containing nuclear DNA.[46] This method of profiling "lacks the precision to conclusively match a person to a sample," but is "valuable because a non-match can conclusively exclude a person as the source of a test sample, and for certain biological materials, it is the only test that can be performed."[47]

Over the last three decades, developments in DNA technology have increased both the specificity and sensitivity of testing techniques.[48] DNA analysts can now obtain a profile from cellular material left at crime scenes that is invisible to the naked eye and still establish the probability of finding the particular combination of DNA in another randomly selected person as less than one in several billion.[49]

40. *Id.*

41. *Id.*

42. *Id.*

43. *See A Brief History of DNA Testing*, NEW ENGLAND INNOCENCE PROJECT, http://www.newenglandinnocence.org/knowledge-center/resources/dna/ (last visited Oct. 22, 2015).

44. Luongo, *supra* note 31, at 131 (citations omitted).

45. *Id.* (citations omitted).

46. *Id.*

47. *Id.* (citations omitted).

48. *See id.* at 130–31.

49. *See* Jason Felch & Maura Dolan, *FBI Resists Scrutiny of 'Matches*,*'* L.A. TIMES (July 20, 2008), http://articles.latimes.com/2008/jul/20/local/me-dna20 ("The FBI estimated the odds of unrelated people sharing those genetic markers to be as remote as 1 in 113 billion."); *see also* MICHAELIS ET AL., *supra* note 31, at 105–06 (estimating the average random match probability for a positive match of an individual to a sample associated with a criminal investigation using the FBI's CODIS system is 1 in 1 trillion).

DNA profiling is not infallible, of course. Infallibility is a myth, and would remove the "science" of DNA from its social context.[50] DNA profiling involves social actors and therefore is subject to human error.[51] False positive results, mistakes, contamination, and falsification (among other things) are always a possibility.[52] Still, the proven capabilities of DNA profiling (absent error) have led to it being labeled the gold-standard of forensic techniques.[53] Unlike other popular forensic techniques such as friction-ridge analysis and tool-mark analysis, exhaustive testing has led to the progressive development of DNA profiling such that the technique has a quantifiable and miniscule error rate.[54] Thus, the discovery and development of DNA profiling have raised the bar as to what is scientifically acceptable for identifying a source "to the exclusion of all others."[55] The National Academy of Sciences (NAS)—one of the world's premier sources of independent, expert advice on scientific issues—acknowledged this in 2009.[56] In its landmark report, *Strengthening Forensic Science in the United States: A Path Forward* (the NAS Report), the NAS concluded: "With the exception of nuclear DNA analysis, . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."[57]

50. *See* Shelton, *supra* note 28, at 323–34 ("Although DNA profiling is clearly scientifically superior to other forensic identification evidence, it is not—contrary to earlier pronouncements—infallible. DNA evidence and its underlying methodology are, of course, subject to human error. False positive DNA results have occurred and will undoubtedly continue to be part of the DNA testing landscape. Proffered evidence may still, as with other forensic science evidence, be the result of mistakes or contamination in its collection, testing, or interpretation. As the technology and methodology of DNA testing has progressed, it is the human errors that may present the biggest evidentiary challenges for trial judges." (citations omitted)).

51. *Id.*

52. *Id.*

53. *See* COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 7 (2009) [hereinafter NAS REPORT].

54. *See id.*

55. Sarah Lucy Cooper, *The Collision of Law and Science: American Court Responses to Developments in Forensic Science*, 33 PACE L. REV. 234, 235 (2013) (quoting Mickael J. Saks, *Merlin and Solomon: Lessons from the Law's Encounters with Forensic Identification Science*, 49 HASTINGS L.J. 1069, 1082, 1119 (1998)).

56. *See* NAS REPORT, *supra* note 53.

57. *Id.*

The power of DNA led to a criminal justice revolution in the form of the American Innocent Movement; a Movement considered to be as significant as Chief Justice Warren's "Due Process Revolution" of the 1960s.[58] As Brandon Garrett explains:

> Traditional postconviction law emphasized leaving final convictions undisturbed because, over time, courts could not reliably revisit facts, as witnesses' memories faded and physical evidence degraded. DNA testing made it possible to reopen cold cases decades after a trial and obtain remarkably accurate scientific evidence concerning identity. As DNA technology steadily improved during the 1990s, law enforcement created vast DNA databanks, tens of thousands of crimes were solved using DNA testing, and many thousands of suspects were excluded using DNA testing. As innocence projects secured the release of mounting numbers of innocent prisoners, legislators recognized the importance of DNA testing postconviction, and almost all states enacted statutes providing access to DNA and postconviction relief.[59]

These changes saw "innocence consciousness" replace perceptions that the criminal justice system was virtually infallible.[60] Now, with over 330 postconviction DNA testing exonerations secured across America;[61] studies revealing jurors have an increased thirst for scientific evidence;[62] innocence commissions researching the wrongful convictions DNA has exposed;[63]

58. Findley, *supra* note 2, at 3.

59. Garrett, *DNA and Due Process*, *supra* note 1, at 2921–22 (citations omitted).

60. *See* Keith Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1172–77 (2011).

61. *The Cases*, *supra* note 3.

62. *See, e.g.*, Donald E. Shelton, Young S. Kim & Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 333 (2006).

63. *See generally* Sarah Lucy Cooper, *Innocence Commissions in America: Ten Years After*, *in* CONTROVERSIES IN INNOCENCE CASES IN AMERICA 197–207 (Sarah Lucy Cooper ed., 2014) [hereinafter Cooper, *Innocence Commissions*]. Notably, in October, 2015 Iowa Governor, Terry Branstad, announced the creation of a Wrongful Conviction Division at the Office of the State Public Defender in Des Moines, Iowa. Office of the Gov. of Iowa, *Governor Branstad Announces Creation of the Wrongful Conviction Division*, IOWA.GOV (Oct. 26, 2015), https://governor.iowa.gov/2015/10/governor-branstad-announces-creation-of-the-wrongful-conviction-division. The Division will "systematically review and identify potential cases involving wrongful convictions and pursue available legal remedies." *Id.* The creation of the division is seemingly propelled by a desire to strengthen confidence in the Iowa criminal justice system, by providing an integrated self-correction mechanism. Given the integration of the division into Public Defender's Office, the Author would now categorize the division as a "back-end"

error-correction commissions investigating and litigating cases with exculpatory DNA;[64] and clemency being granted to petitioners in possession of exculpatory DNA test results,[65] the impact of DNA technology is unquestionable.

The Supreme Court, however, has been more cautious, preferring to remain loyal to procedural regularity and finality rather than embrace the accuracy that DNA testing has the potential to produce. The Supreme Court's conservative approach towards DNA testing, clemency, and due process is outlined in Part II.

II. LEGAL PROCESS THEORY AND ITS INFLUENCE IN THE U.S. SUPREME COURT IN THE CONTEXT OF ACCESS TO DNA TESTING AND CLEMENCY

The Supreme Court has "lingered on the sidelines" as the DNA revolution has churned the American criminal justice system.[66] The Court's position has been underpinned by its loyalty to the legal process vision. This approach is evident in four key cases in the context of clemency and DNA evidence: *Herrera*, *Woodard*, *Osborne*, and *Skinner*. This Part briefly sets out the legal process vision before moving on to outline its influence on the Supreme Court in these cases.

A. *The Legal Process Vision: Promoting Finality and Procedural Regularity Postconviction*

Legal Process Theory was conceived by Professor Henry M. Hart Jr. and Professor M. Albert Sacks in the 1960s.[67] At the center of that vision is the principle of institutional settlement, which expresses the view that when decisions are made by an institution that has been granted competence to make relevant decisions (such as a trial court), and that decision is "duly arrived at as a result of duly established procedures,"[68] it "ought to be

integrity program. *See* Cooper, *supra*, at 199–200, for examples of front-end integrity programs.

64. *See generally id.*

65. *See, e.g.*, The Cases: DNA Exoneree Profiles, *Clark McMillan*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/clark-mcmillan?searchterm=clark+mcm (last visited Oct. 22, 2015).

66. *See* Garrett, *DNA and Due Process*, *supra* note 1, at 2922.

67. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 4th ed. 1994).

68. *Id.*

accepted as binding upon the whole society unless and until they [(the procedures)] are duly changed."[69] In other words, the principle theorizes that it is procedural regularity in the decisionmaking process of a competent institution that legitimizes the institution's decisions, not whether its decisions are substantively accurate.[70] Procedure is "critically important"[71] because it provides an effective way of obtaining "good" decisions, facilitates the collaboration of institutions in an interconnected institutional system (like the criminal justice system), and enhances the legitimacy of the law by generating consistency.[72]

The legal process vision is acutely linked to finality. The doctrine of finality developed out of a taxonomy detailed by Professor Paul M. Bator in 1963.[73] Bator argued that the finality of criminal judgments serves important interests that are harmed by expansions of postconviction rights[74] and proposed "that because we can never know [with] 100 [percent] certainty that no error of law or fact was made during trial or appellate proceedings, we must impose an end to litigation at some point or else the case could conceivably go on *ad infinitum*."[75] Fifty years later, it is widely accepted that finality interests include:

> ensuring respect for criminal judgments, conserving state resources, furthering the efficiency and deterrent and educational functions of the criminal law, satisfying the human need for closure, incentivizing defense counsel to "get it right first time" and preventing a flood of non-controversial claims from masking the fewer, credible ones.[76]

The legal process is the focal point of Bator's taxonomy.[77] According

69. *Id.*

70. *See id.*

71. William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 721 (1991).

72. *Id.* at 721–22.

73. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 446–53 (1963).

74. *See id.*; Sigmund G. Popko, *Putting Finality in Perspective: Collateral Review of Criminal Judgments in the DNA Era*, 1 L.J. SOC. JUST. 75, 76–77 (2011).

75. *See* Popko, *supra* note 74, at 76 (citing Bator, *supra* note 73, at 446–53).

76. Sarah Lucy Cooper, *Judicial Responses to Challenges to Firearms-Identification Evidence: A Need for New Judicial Perspectives on Finality*, 31 T.M. COOLEY L. REV. 457, 459–60 (2014) [hereinafter Cooper, *Firearms-Identification*] (citations omitted).

77. So much so it has been referred to as "Bator's Process View." *See, e.g.*, Gabriel A. Carrera, Note, *Section 1983 & the Age of Innocence: The Supreme Court Carves a*

to Bator, the efficacy of outcomes produced by the criminal justice system (such as jury verdicts and trial court decisions) require the application of a procedural model that provides "a reasoned and acceptable probability that justice will be done."[78] When faced with postconviction challenges, legal-process thinkers ask if the measures and processes of the trial court gave the petitioners a full and fair opportunity to challenge the case against them and present their own case.[79] If so, the legal process vision dictates that the relevant outcomes are legitimate—whether they are substantively accurate or not.[80] Consequently, the process model simultaneously protects finality interests by restricting the means to usurp a rationally processed conviction.[81] This approach underpins postconviction frameworks across America,[82] and pervades the rationales of appellate judges considering challenges to evidence postconviction and executives with decisionmaking powers in clemency procedures.[83]

The DNA-inspired criminal justice revolution has disturbed (or at least should have disturbed) this process-sensitive status quo. As Starger sets out: "[T]he current postconviction DNA access debate concerns how proof intersects with legal process. DNA's extraordinary forensic power to determine guilt or innocence has challenged traditional notions of finality for criminal convictions where proof was adduced 'beyond a reasonable doubt.'"[84]

DNA technology has proven that the application of rational procedures can lead to factually incorrect outcomes. DNA "can cast legitimate doubt on the verdict of the trial, quite apart from any procedural defect."[85] DNA technology is a development that the legal process vision

Procedural Loophole for Post-Conviction DNA Testing in Skinner v. Switzer, 61 AM. U. L. REV. 431, 440 (2011).

78. Bator, *supra* note 73, at 448.

79. Carrera, *supra* note 77.

80. *Id.*

81. *See id.*

82. *See* Cooper, *Firearms-Identification*, *supra* note 76, at 462–64; Sarah Lucy Cooper, *Judicial Responses to Shifting Scientific Opinion in Forensic Identification Evidence and Newly Discovered Evidence Claims in the United States: The Influence of Finality and Legal Process Theory*, BRIT. J. AM. LEGAL STUD. 649, 678–79 (2015) [hereinafter Cooper, *Shifting Scientific Opinion*].

83. Cooper & Gough, *supra* note 21, at 87.

84. Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos*, 99 J. CRIM. L. & CRIMINOLOGY 1045, 1047 (2009).

85. David Wolitz, *Innocence Commissions and the Future of Post-Conviction*

failed to forecast and has yet to resolve.[86] While procedural regularity may provide levels of consistency and certainty, "it also raises the possibility that the importance people attach to procedural justice may distract them from the failure of the legal system to provide substantively fair outcomes."[87]

Petitioners armed (actually or potentially) with exculpatory DNA evidence have tried to disturb this status quo. They have filed claims in appellate courts for access, testing, and review of DNA evidence and have filed clemency applications premised on that actual and prospective access and testing.[88] How the U.S. Supreme Court has sculpted the common law with regards to these avenues, therefore, is crucial. The following subsections consider four key cases decided by the Court in this domain and demonstrate how the legal process vision has influenced the Court's decisionmaking.

B. Herrera v. Collins *and* Ohio Adult Parole Authority v. Woodard*: The Legal Process Vision Collides with Clemency, Innocence, and Due Process*

In *Herrera v. Collins*,[89] the Court held that Herrera's claim of actual innocence (absent some other procedural violation in his case) was not a ground for federal habeas relief.[90] In so holding, the Court reasoned that (1) clemency was the fail-safe of the criminal justice system;[91] (2) state clemency processes are the proper mechanism for assessing innocence claims;[92] and (3) clemency has always been the historic remedy for preventing miscarriages of justice where the judicial process had been exhausted.[93] Consequently, "the creation of a judicial remedy [bespoke for actual innocence claims] was not necessary for the constitutionally convicted yet actually innocent prisoner because clemency is the appropriate forum for adjudicating actual innocence claims."[94]

Review, 52 ARIZ. L. REV. 1027, 1060 (2010).

86. *Id.*

87. Jenny S. Martinez, *Process and Substance in the "War on Terror*,*"* 108 COLUM. L. REV. 1013, 1027 (2008) (citing E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 86 (1988)).

88. *See infra* Part III.

89. *See generally* Herrera v. Collins, 506 U.S. 390 (1993).

90. *Id.* at 400, 404.

91. *Id.* at 415.

92. *Id.* at 416.

93. *Id.* at 411–12.

94. Ryan Dietrich, *A Unilateral Hope: Reliance on the Clemency Process as a Trigger for a Right of Access to State-Held DNA Evidence*, 62 MD. L. REV. 1028, 1034

Concerns about finality played a significant role in the Court's decision. Writing for the majority, Chief Justice Rehnquist reasoned that allowing actual innocence to stand solely as a ground for federal habeas relief would have a "very disruptive effect . . . on the need for finality"[95] and was mindful of the "enormous burden that having to retry cases based on often stale evidence would place on the States."[96] As Justice O'Connor stated in a concurrence joined by Justice Kennedy, "At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation."[97] The majority opinion further remarked that, if a petitioner was to have a freestanding right to make an actual innocence claim, the threshold for relief would "necessarily be extraordinarily high."[98] This rationale drew upon a fundamental "interest" of finality, namely the prevention of frivolous claims flooding the appellate system and masking the fewer, credible claims.[99] Justice O'Connor concluded, "If the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved for the truly extraordinary case; they ought not be forced to sort through the insubstantial and the incredible as well."[100]

In 1998, the Supreme Court considered whether clemency was an "integral" part of Ohio's system for adjudicating guilt or innocence in the case of *Ohio Adult Parole Authority v. Woodard*.[101] In contradiction of its decision in *Herrera*, the Court determined "clemency proceedings are not part of the trial or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process."[102] In so holding, the Court affirmed that clemency decisions are not the "business of the courts."[103]

Five justices agreed that minimal due process protections attached to clemency proceedings.[104] Justice O'Connor, joined by Justices Breyer,

(2003) (citing *Herrera*, 506 U.S. at 412).

95. *Herrera*, 506 U.S. at 417.

96. *Id.*

97. *Id.* at 426 (O'Connor, J., concurring).

98. *Id.* at 417.

99. *See id.*; *see also supra* note 76 and accompanying text.

100. *Herrera*, 506 U.S. at 426–27 (O'Connor, J., concurring).

101. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 285 (1997).

102. *Compare Woodard*, 523 U.S. at 284, *with Herrera*, 506 U.S. at 411–12.

103. *Woodard*, 523 U.S. at 284 (quoting Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)).

104. *Id.* at 288–89 (O'Connor, J., concurring in part and concurring in judgment).

Ginsburg, and Souter, concluded that "some *minimal* procedural safeguards apply to clemency proceedings,"[105] even if the power to grant clemency is solely entrusted to the executive.[106] Justice O'Connor reasoned that judicial intervention might be "warranted in the face of a scheme whereby the state official flipped a coin to determine whether to grant clemency or in a case where the state arbitrarily denied a prisoner any access to its clemency process."[107] Justice Stevens separately concurred, arguing it would be wrong for clemency processes "infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence" to be constitutionally acceptable.[108]

Concerns about safeguarding finality interests were not obvious in *Woodard*. There was only a fleeting reference when the Court described clemency as a mere "unilateral hope," somewhere a defendant can appeal to "as a matter of grace" after he has accepted "the finality of the . . . sentence for the purposes of adjudication."[109] However, the Supreme Court's decision in *Woodard* to (1) (somewhat reluctantly) attach only minimal due process protections to clemency proceedings and set a very high threshold for review, i.e., require petitioners to show the extremity of a coin toss or its functional equivalent[110] in the course of their clemency proceedings in order to trigger judicial intervention; and (2) affirm that courts should not interfere in state clemency proceedings save extraordinary circumstances,[111] have conspired to encourage lower courts to routinely reject challenges to alleged unconstitutional state clemency proceedings, and thus preserve finality interests.[112]

105. *Id.* at 289.

106. *Id.*

107. *Id.*

108. *Id.* at 290–91. (Stevens, J., concurring in part and dissenting in part).

109. *Id.* at 281–82 (plurality opinion) (emphasis in original).

110. *See id.* at 288–89 (O'Connor, J., concurring in part and concurring in judgment). This sort of language appears throughout judicial decisions to reject claims that state clemency processes violate Woodard's minimal due process standard. Some courts refer to the extremity of a coin toss or "flip of a coin." *See, e.g.*, Aruanno v. Corzine, No. 07-5270 (AET), 2007 WL 4591378, at *5 (D.N.J. Dec. 28, 2007). Whereas others employ phrases such as the "roll of a dice." *See, e.g.*, Link v. Nixon, No. 2:11-cv-4040NKL, 2011 WL 529577, at *3 (W.D. Mo. Feb. 7, 2011).

111. *See Woodard*, 523 U.S. at 284–85 (noting the process of clemency is not within the normal operation of the judiciary).

112. This practice has allowed even the most suspect clemency proceedings to pass constitutional muster. *See* Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U.L. REV. 219, 235–36 (2003) ("Thus far, virtually every challenge to state

Herrera and *Woodard* have led to the judiciary and clemency having an uneasy relationship: "On the one hand, the U.S. Supreme Court has made clear its view that our criminal justice system relies on a functioning clemency doctrine. On the other hand, the Court notes that clemency decisions do not readily lend themselves to judicial supervision or review."[113]

The development of DNA profiling has exacerbated this tension. The increasing use of postconviction DNA testing has strengthened a petitioner's ability to present a case of actual innocence to clemency authorities.[114] The Supreme Court, however, has yet to facilitate this avenue of relief and to side-line process-thinking accordingly. This is demonstrated by the Court's decisions in *Osborne* and *Skinner*.

C. District Attorney's Office for the Third Judicial District v. Osborne *and* Skinner v. Switzer*: The Legal Process Vision Collides with DNA, Due Process, and Innocence*

In *Osborne*, the Supreme Court refused to "constitutionalize the issue" of access to DNA testing.[115] The majority found there was no freestanding due process right to DNA testing, fashioning instead "a qualified, derivative"[116] procedural due process right to DNA testing based on "a liberty interest in demonstrating . . . innocence with new evidence under state law."[117] However, the fact that Alaska provided an adequate statute for obtaining postconviction access to DNA evidence, which Osborne had neglected to utilize, meant he could not challenge the process as applied to him.[118]

Fidelity to the legal process vision drove the *Osborne* majority's decision. The majority analyzed Osborne's claim as an issue of institutional settlement. As one scholar explained:

clemency procedures based on *Woodard* has been summarily rejected by lower courts, despite allegations of serious irregularities.").

113. Michael Heise, The Death of Death Row Clemency and the Evolving Politics of Unequal Grace, 66 ALA. L. REV. 949, 965–66 (2015) (citing Herrera v. Collins, 506 U.S. 390, 411–12, 415 (1993); Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)).

114. *Id.* at 951, 965.

115. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 56 (2009).

116. Garrett, *supra* note 1, at 2921 (citing *Osborne*, 557 U.S. at 68).

117. *Osborne*, 557 U.S. at 68.

118. *Id.* at 69–71.

> The existence of Alaska procedures to obtain postconviction DNA testing formed the opinion's "starting point in analyzing Osborne's constitutional claims." After finding "nothing inadequate" about Alaska's procedures, the Court deliberately echoed Wilkinson in declining to "short-circuit" state legislative activity. In the end, the majority did not find DNA's accuracy relevant to a debate it sees as fundamentally about the morality of federal courts overriding state processes.[119]

The *Osborne* majority believed there was a "dilemma [about] how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice,"[120] which was underpinned with "traditional notions of finality."[121] Concerns about undermining the legal process vision are reflected in the Court's desire to maintain the trial as the "'main event' in which the issue of guilt or innocence can be fairly resolved."[122] By couching the issue in these terms "the Court implied that DNA's truth-telling power must somehow be constrained to fit into our existing system as opposed to allowing the system to change in response to the unique power of DNA evidence."[123] In other words, a constitutional right to DNA testing does not fit the legal process vision because it undermines the efficacy of the criminal justice system, despite its thousands of procedures and measures.[124] Moreover, the Supreme Court observed the institutional competence of the political branches of state governments to work out how the law should address new technological developments: "The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords."[125] The Supreme Court worried that to constitutionalize this area suddenly would short-circuit "a prompt and considered legislative response," i.e., shirk the legal process vision.[126]

119. Starger, *supra* note 84, at 1099–100 (citations omitted).

120. *Osborne*, 557 U.S at 62.

121. *Id.* at 72.

122. Murray v. Carrier, 477 U.S. 478, 506 (1986) (Stevens, J., concurring).

123. Jason Kreag, *Letting Innocence Suffer: The Need for Defense Access to the Law Enforcement DNA Database*, 36 CARDOZO L. REV. 805, 846 (2015) (citing *Osborne*, 557 U.S. at 62).

124. *See id.*

125. *Osborne*, 557 U.S at 72–73.

126. *Id.* at 73.

The Court confronted the issue again *Skinner v Switzer*.[127] Skinner, a death row inmate, sought postconviction DNA testing pursuant to Texas law.[128] State courts refused his request, so he filed a federal claim alleging that Texas violated his right to due process in refusing him access to the evidence to perform DNA testing.[129]

The Court allowed Skinner's claim, but remained true to the legal process vision. First, the majority explained that the DNA evidence, in Skinner's case, "would not 'necessarily imply' the invalidity of his conviction" because, while it may prove exculpatory, it may just as likely prove inconclusive or inculpatory.[130] In other words, the Supreme Court's decision to allow *access* to the DNA evidence did not—of itself—undermine the validity of Skinner's conviction and, thus, the process that it had been obtained by.[131] *Switzer* did not, therefore, create a precedent that would be at odds with the legal process vision.[132] Second, the Supreme Court was swayed by the fact that Skinner, unlike Osborne, had not attempted to circumvent state procedures and therefore had not chipped away at the principle of institutional competence.[133] Third, the Court "delineated several safeguards" against the argument that its holding would significantly disrupt finality interests, especially the interest of not having the federal courts

127. Skinner v. Switzer, 562 U.S. 521, 524 (2011).

128. *Id.* at 528.

129. *Id.* at 528–29.

130. *Id.* at 534.

131. *See id.* Unsurprisingly, the dissent was concerned about how access would disrupt legal process values. *See id.* at 540–41 (Scalia, J., dissenting). The dissenters found that if Skinner's Section 1983 claim were cognizable at all, it would sound in a habeas petition. *Id.* at 540. They were of the view that, because there is no federal remedy for reviewing state trial procedures, which are part of the "process of law under which [a prisoner] is held in custody by the State," Section 1983 should not be extended to review post-trial proceedings. *Id.* (quoting Frank v. Manqum, 237 U.S. 309, 327 (1915) (alteration in original)). "Similarly, although a state is not required to provide procedures for postconviction review, it seems clear that when state collateral review procedures are provided for, they too are part of the 'process of law under which [a prisoner] is held in custody by the State.'" *Id.* (quoting *Manqum*, 237 U.S. at 327) (alteration in original). In other words, the dissent was concerned with the principle of institutional settlement. *See* Jennifer F. McLaughlin, Comment, *Just DNA: Expansion of Federal § 1983 Jurisdiction Under* Skinner v. Switzer *Should be Limited to Actions Seeking DNA Evidence*, 23 GEO. MASON U. CIV. RTS. L.J. 201, 217 (2013).

132. *See Skinner*, 526 U.S. at 534.

133. *See id.* at 530–31.

submerged in a wave of claims seeking access to evidence.[134] These safeguards included: (1) affirming the *Osborne* ruling that there is no substantive due process right to DNA testing;[135] (2) acknowledging that there was no evidence showing "any litigation flood or even rainfall" in the federal circuit courts of appeal that have allowed claims for postconviction access to DNA;[136] and (3) relying on the several constraints on federal claims contained in the Prison Litigation Reform Act of 1995.[137]

The legal process vision underpinned the decisions in *Herrera*, *Woodard*, *Osborne*, and *Switzer*, albeit in varying forms. The approach of the Supreme Court to favor process over substantive accuracy has heavily influenced the lower courts. Part III confirms this by presenting a cohort of cases where petitioners have argued for access to DNA evidence and testing to, inter alia, further a clemency application pre- and post-*Osborne*. Following *Osborne*, the lower courts have solidified an approach that routinely rejects such claims and demonstrates an unreserved loyalty to ideals of finality and procedural regularity.

III. ACCESS TO DNA EVIDENCE TO, INTER ALIA, SUPPORT A CLEMENCY APPLICATION: RECENT APPROACHES TO JUDICIAL DECISIONMAKING IN THE LOWER COURTS

Prior to the decision in *Osborne*, a number of courts addressed claims on access to evidence for DNA testing and the relation of that evidence to a petitioner's clemency application.

In the 2001 case of *Cherrix v. Braxton*,[138] a federal district court acknowledged the pertinence of DNA evidence to a petitioner wishing to pursue an innocence claim via clemency, stating, "Without the DNA testing, it would be futile for Cherrix to seek clemency because he has no new evidence upon which to make a truly persuasive claim for Clemency."[139] The

134. McLaughlin, *supra* note 131, at 216.

135. *Skinner*, 526 U.S. at 525.

136. *Id.* at 535.

137. *Id.* at 535–36 (citing Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626 (2006)).

138. *See generally* Cherrix v. Braxton, 131 F. Supp. 2d 756 (E.D. Va. 2001).

139. *Id.* at 768. ("It is unlikely that a viable petition for clemency is available to Cherrix without the persuasive conclusions of the DNA tests. The Governor of Virginia is not required to review or accept for submission any clemency petition, even if the applicant presents compelling evidence of actual innocence. Moreover, 'most of the Virginia proceedings than culminated in executive clemency began in court with

court ordered testing on the basis that, inter alia, clemency had a corrective justice function under *Herrera*; the court, however, remained loyal to the legal process vision.[140] First, the court reasoned that the testing would assist in proving the efficacy of the criminal justice system: "Such a result would remove the nagging questions surrounding this case that might otherwise undermine confidence in the criminal justice system."[141] Second, the court underscored that its decision made no pronouncement on the petitioner's innocence and therefore did not imply the jury's verdict was wrong.[142] Third, the court grounded its decision in concerns about procedure (as opposed to accuracy), reasoning that the provision of funds for DNA testing and preservation of the evidence was appropriate because there were "disturbing questions regarding the constitutionality of Cherrix's trial proceedings."[143]

The loyalty of the courts to process thinking continued in subsequent cases, but with more conservative results. In *Alley v. Key*, for example, the Sixth Circuit Court of Appeals rejected a death row inmate's request for access to DNA evidence on the basis that there was no substantive due process right to clemency, and thus the state's denial of access did not "shock the conscience."[144] The court rationalized its judgment via deference to the principle of institutional settlement.[145] As access could only be granted in accordance with state law, it was "neither arbitrary nor capricious for [the state] to defend legally what has to date been viewed as valid state practice in the handling of extremely belated requests for examination of alleged DNA evidence."[146]

In *Arthur v. King*, the petitioner argued that the denial of access to DNA evidence rendered his clemency process arbitrary.[147] Given the executive-based nature of clemency—and slim protection provided by minimal due process—the court rejected his claim.[148] Given no testing results

successful requests for access to court exhibits containing critical biological evidence that was ultimately subjected to DNA testing.'" (citations omitted)).

140. *See id.* at 767–69.

141. *Id.* at 787.

142. *Id.* at 786.

143. *Id.*

144. Alley v. Key, No. 06-5552, 2006 WL 1313364, at *1–2 (6th Cir. May 14, 2006).

145. *See id.* at *2.

146. *Id.*

147. Arthur v. King, No. 2:07-CV-319-WKW, 2007 WL 2381992, at *10 (M.D. Ala. Aug. 17, 2007).

148. *Id.*

had been withheld from the governor (because no testing had been conducted), the petitioner's argument—that the state was violating state law by not providing the governor with all pertinent information to his clemency application—was meritless.[149] Again, focusing on the principle of institutional settlement, the key point was that the petitioner had been provided access to the state's clemency process.[150] The revelations that might result from testing of the DNA evidence were irrelevant.[151]

There was seemingly a single, yet assertive, shift by one court in favor of accuracy in 2008. In *McKithen v. Brown*, McKithen had been convicted of the attempted murder of his wife, and he petitioned the court for access to DNA testing on a knife that could exonerate him.[152] One question the court considered was whether McKithen's liberty interest—meaningful access to existing executive clemency mechanisms—encompassed access to perform DNA testing on the knife.[153] Judge John Gleeson of the U.S. District Court for the Eastern District of New York, referring to *Herrera's* labeling of clemency as a "fail-safe," held there was

> strong support for my conclusion that the right of meaningful access to existing clemency mechanisms entails the right to certain evidence of innocence. Though clemency proceedings are not exclusively or even primarily "error-correction" proceedings, and often turn not on a revisitation of the facts underlying a conviction, but on an analysis of a defendant's contrition and personality, they nevertheless have one significant, even if discretionary, error-correcting function: they are the last resort for the wrongfully convicted.[154]

In allowing McKithen's claims, Judge Gleeson tackled the state's finality interest head-on:

> The government does have an interest in finality, but that interest is not substantially burdened by a prisoner performing DNA testing on physical evidence used to convict him. . . . States have uniformly found the value of clemency mechanisms to outweigh whatever impacts on finality they may have. Having set up clemency mechanisms specifically

149. *Id.*
150. *See id.*
151. *See id.*
152. McKithen v. Brown, 565 F. Supp. 2d 440, 445–46 (E.D.N.Y. 2008), *rev'd*, 626 F.3d 143 (2d Cir. 2010).
153. *Id.* at 457–58.
154. *Id.* at 471 (citing Halbert v. Michigan, 545 U.S. 605, 620 (2005)).

> for the purpose of overriding the finality of judgments, and having reserved entirely to itself the discretion to do so, the state cannot argue that finality concerns weigh heavily against providing prisoners a meaningful opportunity to access those mechanisms.[155]

He concluded that the criminal justice system continues to "grapple with the questions of which avenues of relief remain open to those advancing claims that they are wrongfully convicted."[156] He noted that "[i]n some states, . . . there are statutory mechanisms to set aside a conviction based on newly discovered evidence," but it was "unclear whether there was a constitutional right to do so."[157] He reasoned, therefore,

> The remaining resort for the innocent convicted is to avail themselves of the opportunity to petition for clemency in whatever form the state has authorized. States may debate the value of expanding or contracting any of these avenues; in light of the tremendous probative power of DNA evidence, it may be wise to strike a different balance between accuracy and finality in cases where it is available.[158]

Months later, the Supreme Court handed down its decision in *Osborne*, compelling the Second Circuit Court of Appeals to overrule *McKithen*.[159] Since then, the courts have routinely rejected claims that access to evidence for DNA testing is required to, inter alia, support a petitioner's clemency application. In so holding, the courts have entrenched an even stauncher fidelity to the legal process vision. The following cases demonstrate this.

In 2010, the Eleventh Circuit Court of Appeals had delayed its decision in the case of *Cunningham v. District Attorney for Escambia County* in order

155. *Id.* at 484 (citations omitted).

156. *Id.* at 495.

157. *Id.*

158. *Id.*

159. *See* McKithen v. Brown, 626 F.3d 143, 145 (2d Cir. 2010). The Second Circuit Court of Appeals relied largely on the Supreme Court's decision in *Osborne*, which was delivered after the district court considered *McKithen*. *Id.* In *Osborne*, the Supreme Court held that Osborne (who raised similar issues to McKithen) was not entitled to DNA evidence in postconviction proceedings as a matter of either substantive or procedural due process. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 72–73 (2009). The Second Circuit essentially applied that decision in reversing the district court's ruling that McKithen was entitled to conduct postconviction DNA testing as a matter of procedural due process. *McKithen*, 626 F.3d at 145, 150. The Second Circuit read *Osborne* as foreclosing a claim that a prisoner has a liberty interest in meaningful access to state clemency mechanisms. *Id.* at 151.

to consider the Supreme Court's decision in *Osborne*.[160] Originally, Cunningham argued that he had a constitutional right to postconviction access to biological evidence for purposes of DNA testing.[161] Without access and testing, Cunningham argued, he was unable to, inter alia, pursue an application for state clemency or pardon.[162] However, post-*Osborne*, Cunningham filed supplementary material conceding that his clemency claim did not survive *Osborne*.[163] The Eleventh Circuit readily agreed, "Because there is no constitutional right to state clemency proceedings, that cannot be a basis for an access to courts claim either."[164]

A federal district court was equally quick to dispose of a comparable claim in *Alvarez v. McCollum*.[165] Alvarez sought to compel the release of evidence for DNA testing, arguing, inter alia, that the state was depriving him of his "right . . . to apply for executive clemency and the function that executive clemency serves in preventing the violation of constitutional rights that would arise from continued incarceration [of an actually innocent petitioner]."[166] The court found that *Osborne* easily disposed of this claim: "The *Osborne* Court rejected the clemency-based claim before it, noting that it had previously 'held that noncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is *entitled* as a matter of state law.'"[167] The Supreme Court "squarely held that 'Osborne therefore cannot challenge the constitutionality of any procedures available to vindicate an interest in state clemency.'"[168] Following this reasoning, Alvarez had failed to state a valid cause of action.[169]

The Eleventh Circuit rejected a similar claim in the 2011 case of *Van Poyck v. McCollum*.[170] In that case, the court, applying *Osborne*, declined to

160. Cunningham v. Dist. Attorney for Escambia Cty., 592 F.3d 1237, 1255 (11th Cir. 2010).

161. *Id.* at 1254.

162. *Id.* at 1254–55.

163. *Id.* at 1255.

164. *Id.* at 1272 (citing *Osborne*, 557 U.S. at 67–68).

165. Alvarez v. McCollum, No. 6:08-cv-1024-Or1-28DAB, 2011 WL 130169, at *6 (M.D. Fla. Jan. 14, 2011).

166. *Id.*

167. *Id.* (quoting *Osborne*, 557 U.S. at 67–68).

168. *Id.* (quoting *Osborne*, 557 U.S. at 68).

169. *Id.*

170. Van Poyck v. McCollum, 646 F.3d 865, 868–69 (11th Cir. 2011).

find that Van Poyck had a "liberty interest, as a capital defendant, in pursuing DNA evidence testing . . . for the purpose of meaningful access to a full and fair clemency proceeding."[171] The court recognized that *Osborne* had left open "slim room" for the possibility that a capital defendant might have a liberty interest in state clemency that procedural due process might protect, but because Van Poyck had not couched his claim in terms that argued Florida's procedures were inadequate, the court did not opine on the matter.[172]

A federal district court in Ohio addressed the "slim room" left by *Osborne* in *Hartman v. Walsh*.[173] Hartman claimed "that the state trial court denied him access to Ohio's postconviction DNA testing process in violation of his procedural due process rights."[174] The court determined that Hartman's claim did not fall into the "slim room" left by *Osborne*, rooting its decision—like *Osborne* and *Skinner*—in the principle of institutional settlement.[175] Because Hartman had never pursued the relief that Ohio law provided him (i.e., specific state procedures for DNA testing), the court relied on *Osborne's* institutional settlement lens to reject his claim, quoting:

> [Plaintiff's] attempt to sidestep state process through a new federal lawsuit puts [plaintiff] in a very awkward position. If he simply seeks the DNA through the State's discovery procedures, he might well get it. If he does not, it may be for a perfectly adequate reason, just as the federal statute and all state statutes impose conditions and limits on access to DNA evidence. It is difficult to criticize the State's procedures when [plaintiff] has not invoked them. This is not to say that [plaintiff] must exhaust state-law remedies. But it is [plaintiff's] burden to demonstrate the inadequacy of the state-law procedures available to him in state post-conviction relief. These procedures are adequate on their face, and without trying them, [plaintiff] can hardly complain that they do not work in practice.[176]

Again, Hartman had not challenged the nature of Ohio's postconviction

171. *Id.* at 868.

172. *Id.* at 869.

173. Hartman v. Walsh, No. 5:11-CV-01401, 2011 WL 5362123, at *3 (N.D. Ohio Nov. 2, 2011).

174. *Id.*

175. *Id.*

176. *Id.* at *4 (emphasis omitted) (quoting Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 71 (2009)) (alteration in original).

DNA testing regime.[177] Thus, he had no cause of action.[178]

The Supreme Court's fidelity to institutional settlement also dictated a federal district court's decision in *Vaughn v. Office of the Judge for the Third Circuit Court*.[179] In that case the petitioner made a variety of due process claims, including that that he had been prevented from proving his actual innocence and furthering a clemency application by being denied access to DNA evidence.[180] The court determined, however, that his clemency claim was barred by way of *Heck v. Humphrey*.[181] In *Heck*, the Supreme Court determined

> that a state prisoner cannot make a cognizable claim under § 1983 for an alleged unconstitutional conviction or for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid" unless the prisoner first shows that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination or called into question by a federal court's issuance of a writ of habeas corpus . . . ."[182]

All that remained for Vaughn was the possibility of an attack on the fairness or application of the state's DNA testing statute, which he had failed to make.[183] The court found "that pleading failure cannot be cured because the Michigan statute reasonably balances the competing interests of the convicted person's right to pursue DNA evidence and testing with the state's right to maintain an orderly criminal justice system."[184] In other words, even without close examination, the state regime preserved the traditional notions of justice at the center of the majority's concern in *Osborne*.[185]

A number of petitioners have argued post-*Osborne* that a lack of access to DNA testing has the impact of making clemency proceedings violative of

177. *Id.*

178. *Id.*

179. *See* Vaughn v. Office of the Judge for the Third Circuit Court, No. 14-CV-10458, 2015 WL 404254, at *6–7 (E.D. Mich. Jan. 29, 2015).

180. *Id.* at *1.

181. *Id.* at *6.

182. *Id.* (quoting Heck v. Humphrey, 512 U.S. 477, 486–87 (1994)).

183. *Id.* at *9.

184. *Id.* (citing Franklin v. Cty. of Kalamazoo, No. 1:11-CV-36, 2011 WL 1042321, at *5 (W.D. Mich. Mar. 18, 2011)).

185. *See id.*

due process,[186] i.e., below the "minimal due process standard" set out in *Woodard*.[187] This, petitioners argue, means they fall within *Osborne's* "slim room" to challenge the constitutionality of access to evidence for DNA testing.[188] The courts have largely rejected such challenges, and, in doing so, demonstrated a clear favoring of procedural regularity over substance. For example, in *Wilson v. Kentucky*, a petitioner challenged the constitutionality of Kentucky's clemency procedures under the Due Process Clause when he had been denied access to DNA testing that could support his clemency application.[189] The Supreme Court of Kentucky denied his claim, reasoning that the law demanded no more than Wilson be provided access to the clemency process, and that the Governor file a statement of reasons for his decision.[190] The clemency proceedings did not have to be meaningful in any other way.[191]

Similarly, in *Williams v. McCulloch*, the petitioner sought a stay of execution pending testing of DNA evidence.[192] Williams argued the state's refusal to release the evidence violated his right to due process in clemency proceedings.[193] The U.S. District Court for the Eastern District of Missouri disagreed, labeling the claim frivolous because Williams had two lawyers seeking clemency on his behalf, and Missouri's clemency process did not guarantee discovery of evidence used at trial.[194] Again, access was more important than substance.[195] In a case that did not concern access to DNA, *Tamayo v. Perry*, the petitioner argued that *Osborne* had shifted the doctrine away from "minimal due process" (in context of clemency proceedings) and required clemency proceedings to have heightened due process protection.[196] The petitioner's basis for this argument was not clear, however the court rejected it outright, labeling Tamayo's use of *Osborne*

186. *See, e.g.*, Wilson v. Kentucky, 381 S.W.3d 180, 193 (Ky. 2012).

187. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1997).

188. *See, e.g.*, Van Poyck v. McCollum, 646 F.3d 865, 869 (11th Cir. 2011) (noting the "slim room" argument for challenges to access to DNA testing); Hartman v. Walsh, No. 5:11-cv-01401, 2011 WL 5362123, at *3 (N.D. Ohio Nov. 2, 2011).

189. *Wilson*, 381 S.W.3d at 193.

190. *Id.* at 194.

191. *See id.*

192. Williams v. McCulloch, No. 4:15CV00070 RWS, 2015 WL 222170, at *1 (E.D. Mo. Jan. 14, 2015).

193. *Id.* at *2.

194. *Id.* at *3.

195. *See id.*

196. Tamayo v. Perry, 553 F. App'x 395, 401 (5th Cir. 2014).

"inapposite."[197] *Osborne*, the court pointed out, involved a due process challenge concerning DNA testing in the context of postconviction relief, which was different from an inmate challenging the executive's clemency proceedings.[198] Each of these cases demonstrate the courts' fidelity to procedure over substance—an approach that has been documented in the context of clemency proceedings.[199]

The courts have even remained loyal to the process vision when finding DNA testing is relevant to a clemency application. For example, in *Gary v. Humphrey*, Gary motioned for DNA testing after being denied clemency by the state parole board.[200] The motion was granted for certain evidence (with the court concluding that such testing may be relevant to a state clemency application), and compensation for Gary's counsel and for a DNA expert was approved.[201] Based upon the DNA test results, Gary pursued a second state clemency hearing simultaneously with an extraordinary motion for new trial in state court.[202] Gary's counsel submitted vouchers for services related to the second clemency proceeding and new trial motion.[203] The court approved compensation for services connected with the clemency proceeding but denied compensation for services related solely to the new trial.[204] Gary appealed that decision to a federal district court, which denied his appeal.[205] Although the district court's decision does, by implication, agree that a clemency hearing (particularly one including potential exculpatory DNA evidence) is sufficiently important to warrant state-funded counsel, it also continues the cautious, process-sensitive trend demonstrated by the other courts.[206] This is because the court made a point in its judgment to narrow the decision under a specially labeled "Future Guidance" section.[207] In that section, the court first stated it was not convinced that providing counsel to pursue DNA testing subsequent to the

197. *Id.*

198. *Id.*

199. *See* Cooper & Gough, *supra* note 21, at 105; *see also* Cooper, *Innocence Commissions*, *supra* note 63, at 207–08.

200. Gary v. Humphrey, No. 4:97-CV-181(CDL), 2011 WL 205772, at *1 (M.D. Ga. Jan. 21, 2011).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at *1, *7.

206. *See id.* at *7.

207. *Id.* at *7–8.

final dismissal of a federal habeas petition, even if it is to be used in support of clemency relief, was mandatory under federal law.[208] Second, it underscored that its decision to fund counsel did "not include a legal right to DNA testing to be used to support a clemency petition."[209] In other words, it was not at odds with the *Osborne* decision.[210] Third, the court was careful to acknowledge the principle of institutional settlement.[211] It affirmed the right to DNA testing was a "limited right under Georgia law."[212] And by underscoring that its decision did not undermine that regime:

> While the results [of the DNA testing] may also be used in a second clemency hearing, there is no statutory right to obtain those results for use in a clemency hearing, nor is there any statutory right to use them once they are obtained. The fact that they may be available for such future use in the clemency hearing is completely fortuitous.[213]

These cases confirm that lower courts are taking a cautious approach to claims that access to DNA evidence for testing is constitutionally required to, inter alia, support a clemency application. This has largely been the case before and after *Osborne*. As a matter of routine, the courts have been quick to (1) deny the existence of a constitutional right to DNA testing;[214] (2) restrict the "slim room" for due process challenges left open by *Osborne*;[215] and (3) further the doctrine that there is no substantive procedural right to state clemency proceedings.[216] In so holding, the courts favor procedure over substance when it comes to the constitutionality of state clemency procedures (preserving *Woodard's* finality-enforcing high threshold for relief), barely acknowledge the corrective justice function of clemency under *Herrera*, and remain loyal to the legal process vision, particularly by deferring to the principle of institutional settlement, and even underscoring

208. *Id.*

209. *Id.*

210. *Compare id.*, *with* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 67–68 (2009).

211. *See Humphrey*, 2011 WL 205772, at *7.

212. *Id.*

213. *Id.*

214. *See, e.g.*, Cunningham v. Dist. Attorney for Escambia Cnty., 592 F.3d 1237, 1272 (11th Cir. 2010).

215. *See, e.g.*, Hartman v. Walsh, No. 5:11-cv-01401, 2011 WL 5362123, at *3 (N.D. Ohio Nov. 2, 2011).

216. *See, e.g.*, Alley v. Key, No. 06-5552, 2006 WL 1313364, at *1–2 (6th Cir. May 14, 2006).

that any pro-access decisions do not usurp traditional notions of justice. This approach, however, is problematic. Part IV outlines the reasons why this is the case.

IV. REASONS WHY THE CURRENT JUDICIAL DECISIONMAKING APPROACH IS PROBLEMATIC

The approach to the judicial decisionmaking identified in Part III is problematic. First, it undermines the corrective justice function of clemency and the value of substantive accuracy (as opposed to procedural accuracy) in the Era of Innocence.[217] In addition, it demonstrates an awkward approach to credible scientific evidence that supports individualization (i.e., DNA) in light of courts' more liberal approach to the less-scientifically supported individualization evidence provided by the soft sciences.[218] Finally, it largely ignores the institutional competence of the courts to respond to scientific progress and engender an approach to DNA access and testing that is sensitive to the legal process vision.[219]

A. *Current Judicial Decisionmaking Undermines the Corrective Justice Function of Clemency and the Value of Substantive Accuracy in the Era of Innocence*

The current approach to judicial decisionmaking undermines the corrective justice function of clemency. By labeling clemency the fail-safe of the criminal justice system in *Herrera*, the Supreme Court placed extreme confidence in the clemency function to remedy wrongful convictions, catapulting it into the role of a last chance saloon for innocents.[220] Professor Austin Sarat now considers gubernatorial clemency to be "the court of last resort" as a result of the various procedural and substantive limits on federal habeas review.[221]

The Supreme Court has "placed great weight and faith in the clemency process" to remedy innocence claims.[222] It has "consistently affirmed the importance of the clemency process in ensuring the integrity of the criminal

217. *See infra* Part IV.A.
218. *See infra* Part IV.B.
219. *See infra* Part IV.C.
220. *See* Herrera v. Collins, 506 U.S. 390, 415 (1993).
221. Sarat, *supra* note 22, at 185.
222. Dietrich, *supra* note 94, at 1044.

justice system."[223] Moreover, numerous courts have rationalized their decisions not to grant "actual innocence" claims on the basis that a clemency process existed in the relevant jurisdictions.[224] As a consequence of this *Herrera*-inspired doctrine, a right to a meaningful clemency process should be recognized, and part of this substance should be the opportunity to present exculpatory DNA evidence, if it exists.[225] As one scholar comments,

> In relying on the clemency process to fulfill an articulated and unique position in the criminal justice system, it is imperative that the Court uphold and maintain the integrity of the process. Therefore, the Court must ensure that prisoners have the tools necessary to present a meaningful petition to the clemency authority. Part of this meaningful ability to access the clemency process should be the ability to access state-held evidence for the purposes of modern DNA testing.[226]

Moreover, such provision would encourage executives with decisionmaking powers to be both more accurate and more confident in making pro-clemency decisions.[227] A shift towards tough-on-crime politics has effectively blinded the system to innocence claims by fueling antipathetic executive attitudes towards clemency and encouraging narrow interpretations of what can be done using the clemency power.[228] At the state level, governors continue to find their use of clemency being used against them in election campaigns[229] and tend to employ conservative clemency policies as a result.[230] For example, although New York Governor Andrew Cuomo had been an outspoken proponent of clemency prior to election, it took him over three years to grant his first, and to date only, pardon.[231] Notably, President Barack Obama boasts a similar conservative attitude

223. *Id.* Note that in *The Controversy of Clemency and Innocence in America*, Daniel Gough and the Author challenged the Supreme Court's historical account of clemency as playing a key role in correcting wrongful convictions in *Herrera*, concluding to the contrary that "political expediency appears to be the historical, primary function of clemency." Cooper & Gough, *supra* note 21, at 72.

224. Dietrich, *supra* note 94, at 1044, 1044 n.143 (compiling cases).

225. *See id.* at 1044.

226. *Id.* at 1045 (citations omitted).

227. *See id.* at 1045–46.

228. *See* Sarat, *supra* note 22, at 187.

229. *Id.*

230. *See id.*

231. Editorial, *Governor Cuomo's Stingy Pardon*, N.Y. TIMES (Jan. 3, 2014), http://www.nytimes.com/2014/01/04/opinion/governor-cuomos-stingy-pardons.html.

with regards to his use of the presidential pardon.[232] This current state of affairs has led commentators to describe the current clemency system as in a "state of collapse."[233] Unfortunately, this collapse has not only coincided with clemency having to handle the responsibility of being the final remedy for innocence claims, but also comes at a time when the concept of innocence is solidifying its presence in the criminal justice system.[234] These antipathetic attitudes are also embedded in the fabric of state clemency systems. For instance, numerous states underscore that a grant of clemency (especially one that is grounded on innocence) is a rarity or, at least, are unwelcoming of applications. For example, Georgia states that a grant of clemency based on "complete innocence" is "most rare,"[235] and highlights that only two such pardons have been granted since 1943.[236] In Virginia, it is emphasized that an "Absolute Pardon," which is based on the belief that a petitioner was unjustly convicted and is innocent, is "rarely granted."[237] Point three of Wisconsin's general information package about clemency reads: "Executive clemency is an extraordinary measure and is rarely granted."[238] The point is emboldened and double underlined by the state.[239]

Thus, if a petitioner can access and test DNA evidence, and the results of such testing are exculpatory in some credible way, designing the constitutional framework to ensure that such evidence is presented to the executive is imperative.[240] In other words, the constitutional framework should mandate state procedures that require, when available, that DNA

232. *See* Arthur Delaney, *Obama Presidential Pardons: The Elusiveness of Executive Clemency*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/06/03/obama-presidential-pardons_n_870431.html (updated Aug. 3, 2011).

233. Editorial, *Mercy in the Justice System*, N.Y. TIMES (Feb. 10, 2014), http://www.nytimes.com/2014/02/10/opinion/mercy-in-the-justice-system.html?_r=0.

234. For an in-depth discussion of the issues associated with innocence and the American criminal justice system, see CONTROVERSIES IN INNOCENCE CASES IN AMERICA (Sarah Lucy Cooper ed., 2014).

235. GEORGIA STATE BD. OF PARDONS AND PAROLES 31 (2006), http://pap.georgia.gov/sites/pap.georgia.gov/files/Annual_Reports/06Annual_Report.pdf.

236. *Id.*

237. Office of the Secretary of the Commonwealth of Virginia, *Absolute Pardons and Writ of Actual Innocence*, VIRGINIA.GOV, https://commonwealth.virginia.gov/judicial-system/pardons/absolute-pardons/ (last visited Oct. 22, 2015).

238. *Application for Executive Clemency*, STATE OF WISCONSIN OFFICER OF THE GOVERNOR http://www.recordgone.com/public/templates/default/pdf/Wisconsin-Pardon-Application.pdf (last visited Oct. 22, 2015).

239. *Id.*

240. *See* Dietrich, *supra* note 94, at 1052–53.

evidence be presented in clemency proceedings.[241] The executive can then underpin his or her decision by way of this evidence, which is, at present, the most reliable individualization evidence science can offer.[242] A decision to grant clemency in such circumstances is not "soft" on crime, but simply a decision rooted in what is scientifically most accurate.[243] As the dissent in *Osborne* pointed out, DNA is "uniquely precise"[244] and unrivaled in its ability to ascertain the "truth."[245] Decisions underpinned by scientific evidence would serve to strengthen the efficacy of the criminal justice system, not undermine it, as decisions that are likely more accurate are naturally more legitimate in the context of criminal process. Moreover, they would be the product of a rationalized procedure designed at the state level, thereby satisfying the principle of institutional settlement. As one scholar explained, "The Supreme Court has recognized that unless a state provides an additional remedy, clemency is the sole remedy for the constitutionally convicted yet innocent prisoner. Therefore, certain safeguards must exist to ensure that an actually innocent prisoner has the ability to properly communicate his innocence to the appropriate authority."[246]

This development is all the more necessary considering this is now widely considered to be the Era of Innocence. The American Innocence Movement began to emerge in the 1990s, after the power of DNA technology to exonerate the innocent was discovered.[247] In 1992, Barry C. Scheck and Peter J. Neufeld formed The Innocence Project to assist prisoners who could be proven innocent through DNA testing.[248] By the end of 1993, 135 people had been exonerated,[249] including 14 whose innocence had been conclusively proven by postconviction DNA evidence. As of October 2015, 330 people had been exonerated by postconviction DNA

241. *See id.*

242. *See* NAS REPORT, *supra* note 53, at 47.

243. *See id.*

244. Dist. Attorney's Office for the Third Judicial Dist. V. Osborne, 557 U.S. 52, 87–88 (2009) (Stevens, J., dissenting).

245. *Id.* at 88.

246. Dietrich, *supra* note 94, at 1052 (citing Herrera v. Collins, 506 U.S. 390, 412–13 (1993)).

247. Findley, *supra* note 2, at 3, 5–6.

248. *Id.* at 5.

249. THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Oct. 22, 2015) (filter "Exonerated" column by year).

testing in America,[250] and "innocence" has come to be a growing feature of legal, social, and political discourse.[251] The Innocence Movement is now described as "the most dramatic development in the criminal justice world since the Warren Court's Due Process Revolution of the 1960s."[252]

The effect of the Innocence Movement has been (or at least should be) to make the system more sensitive to substantive accuracy. The courts have acknowledged this in a very limited way, however. In fact, the majority in *Osborne* "omitted any mention of the importance of accuracy to due process jurisprudence."[253] It is therefore unsurprising that the lower courts have followed suit. However, "[f]ailing to mention accuracy as a core due process value was anomalous in a case seeking access to DNA testing, which, after all, has an 'unparalleled ability' to quickly and inexpensively get at the truth."[254] The courts must begin to remedy this anomaly and error. One way to do this is to sculpt a legal framework that provides for meaningful clemency proceedings, supported by DNA evidence where possible.

B. *Current Judicial Decisionmaking Demonstrates an Awkward Approach to Credible Scientific Individualization Evidence in Contrast to the Judicial Treatment of Individualization Evidence by the Soft Sciences*

The majority decision in *Osborne* has propelled a conservative approach to the provision of access to and testing of DNA evidence.[255] The unrivaled accuracy of DNA to engage in individualization[256] has created tension because it has disturbed the status quo.[257] The *Osborne* majority believed there was a "dilemma [about] how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system

250. *See The Cases*, *supra* note 3.

251. *See generally* CONTROVERSIES IN INNOCENCE CASES IN AMERICA (Sarah Lucy Cooper ed., 2014).

252. Findley, *supra* note 2, at 3.

253. Garrett, *DNA and Due Process*, *supra* note 1, at 2924.

254. *Id.* (quoting Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 55 (2009)).

255. *See supra* Part III.

256. The term "individualization" refers to the ability of a forensic discipline to identify and apply its methods in order to identify the perpetrator of a crime to the exclusion of all others. *See* Norah Rudin & Keith Inman, AN INTRODUCTION TO FORENSIC DNA ANALYSIS 5 (2d ed. 2002). For example, matching a tool mark on ammunition to a suspect weapon, or matching a suspect's teeth to a bite mark present on a victim. *See id.*

257. *See Osborne*, 557 U.S. at 62.

of criminal justice."[258] The dissent, however, emphasized that the level of certainty provided by DNA warranted that tradition be side-lined, contending that finality concerns must give way when "objective proof that the convicted actually did not commit the offense later becomes available through the progress of science."[259] In his dissent, Justice Stevens conceded that to allow access and testing would harm finality, but such interests must take a backseat in light of the power of DNA evidence to prove innocence.[260]

At the time Osborne was decided, the capabilities of DNA were making waves throughout the criminal justice system, not only with regard to access and testing of DNA evidence, but with regard to how it exposed the frailties of other forensic methods widely employed in the criminal justice system. In February 2009 (three months before the Osborne decision), the National Academy of Sciences (NAS)—one of the world's premier sources of independent, expert advice on scientific issues—published a report (commissioned by Congress) on the past, present, and future use of forensic science in America (the NAS Report).[261] The report was billed as a "blockbuster" that would overhaul the legal landscape relating to forensic evidence.[262]

The report made some important observations and impacts. First and foremost, the report reached the unprecedented conclusion that DNA was the only forensic method that had "been rigorously shown to have the capacity to consistently, and with a high degree of certainty," engage in individualization.[263] Consequently, the report cast a new and officially stamped, critical light onto the soft sciences, such as fingerprint, tool-mark, bite-mark, and microscopic hair analysis.[264] The bottom line was simple: "In a number of forensic science disciplines, forensic science professionals have yet to establish either the validity of their approach or the accuracy of their

258. *Id.*

259. *Id.* at 98 (Stevens, J., dissenting) (quoting Harvey v. Horan, 285 F.3d 298, 306 (4th Cir. 2002)).

260. *Id.* at 99.

261. *See generally* NAS REPORT, *supra* note 53. The report addressed a wide range of relevant topics including an overview of the forensic community and need for integrated governance, the methods and veracity of various forensic disciplines, the admission and interpretation of scientific data, methods for improvement, and education and training. *Id.* at 3–4.

262. Jacqueline McMurtrie, *Swirls and Whorls: Litigating Post-Conviction Claims of Fingerprint Misidentification after the NAS Report*, 2010 UTAH L. REV. 267, 267 (2010).

263. NAS REPORT, *supra* note 53.

264. *Id.* at 7–8.

conclusions, and the courts have been utterly ineffective in addressing this problem."[265]

However, generally, the NAS Report—and other catalogued criticism of forensic identification evidence—has had limited impact. In particular, it has failed to turn the heads of the judiciary when it comes to the admissibility of forensic identification evidence.[266] Despite the NAS Report's findings, trial judges continue to admit, often unreservedly, forensic identification evidence that engages with individualization.[267] Moreover, appellate judges continue to defer to such trial court decisions or find the admission of such forensic identification evidence was a "harmless error" or lawful due to the fact defense counsel had the opportunity to challenge it (whether or not they did so effectively).[268] Furthermore, the report's findings and other such criticism has, on the whole, failed to persuade appellate judges that there has been a shift in scientific opinion or generation of controversy, within relevant forensic identification disciplines, which qualifies as "newly discovered evidence."[269] Interestingly, the judiciary's approach across these claims is underpinned by its fidelity to the legal process vision.[270] For example, concerns about unpicking trial verdicts and disturbing the adversarial model underscore review of admissibility decisions,[271] and a strong desire to follow precedent and sign-off procedural regularity that underpin decisions concerning newly discovered evidence.[272]

This general approach of the judiciary highlights an interesting paradox. On the one hand, the judiciary continues to favor individualization evidence from a variety of forensic disciplines—despite such practices being significantly criticized for lacking, at present, adequate scientific underpinning.[273] On the other hand, as demonstrated by Parts II and III of this article, the judiciary are comfortable in taking a comparably conservative approach to questions concerning access to, and testing of, DNA evidence.

265. *Id.* at 53.
266. *See* Cooper, *The Collision*, *supra* note 55, at 301.
267. *Id.*
268. *See* Cooper, *Firearms-Identification*, *supra* note 76, at 471–72.
269. Cooper, *Shifting Scientific Opinion*, *supra* note 82, at 679–80.
270. *See* Cooper, *Firearms-Identification*, *supra* note 76, at 459.
271. *See id.* at 460.
272. Cooper, *Shifting Scientific Opinion*, *supra* note 82, at 678–79.
273. *See* Cooper, *Firearms-Identification*, *supra* note 76, at 468–70.

This is a sharp (and troubling) contrast because DNA is undoubtedly more scientifically qualified to engage in individualization than other forensic methods. DNA analysis has been "subject . . . to rigorous evaluation standards from the beginning, because scientific groundwork for DNA analysis had been laid outside the context of law enforcement."[274] Numerous institutions "funded and conducted extensive basic research, followed by applied research," and "[s]erious studies on DNA analysis preceded the establishment and implementation of 'individualization' criteria and parameters for assessing the probative value of claims of individualization."[275] As the NAS explained,

> This history stands in sharp contrast to the history of research involving most other forensic science disciplines, which have not benefitted from extensive basic research, clinical applications, federal oversight, vast financial support from the private sector for applied research, and national standards for quality assurance and quality control. The goal is not to hold other disciplines to DNA's high standards in all respects; after all, it is unlikely that most other current forensic methods will ever produce evidence as discriminating as DNA. However . . . the least that the courts should insist upon from any forensic discipline is certainty that practitioners in the field adhere to enforceable standards, ensuring that any and all scientific testimony or evidence admitted is not only relevant, but reliable.[276]

This contrast is troublesome and should be acknowledged by the judiciary. At present, the judiciary is supporting the use of what we know to be less reliable individualization evidence[277] and hampering the use of the most credible individualization evidence.[278] Ironically, both approaches are underpinned by their fidelity to the legal process vision.

274. NAS REPORT, *supra* note 53, at 100–01 (citations omitted).

275. *Id.*

276. *Id.*

277. *See* Cooper, *Firearms-Identification*, *supra* note 76, at 468–70.

278. *See* Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 62 (2009).

C. *Current Judicial Decisionmaking Ignores the Institutional Competence of the Courts to Respond Appropriately to Scientific Progress and Engender an Approach to Access to DNA Testing that is Sensitive to the Legal Process Vision*

The courts have acknowledged the dilemma that DNA evidence presents for traditional notions of criminal justice.[279] However, as demonstrated above, the courts have responded to claims concerning access to and testing of DNA evidence conservatively.[280] The courts have not been eager to change tradition in the face of scientific development.[281] One other reason underpinning this approach, which also reflects fidelity to the legal process vision, is that "most courts recognize the legislative process as the proper forum for creating such a right [to access DNA and perform testing]."[282] In other words, the courts are of the view that the legislature has the institutional competence to, should they wish to, legally mandate postconviction DNA access and testing, and prescribe what frameworks, such as clemency proceedings, should facilitate its presentation postconviction.[283]

This view is not altogether surprising. The legislature has long been the forum to respond to scientific progress in this context.[284] However, this view also ignores numerous important factors. First, federal and state legislatures have been slow to respond in this domain. As one scholar puts it, "Congress and state legislatures have yet to fully heed the call to provide prisoners with a statutory mechanism to access evidence for DNA testing."[285] The courts thus need to remedy this inactivity. Second, this view is premised on the belief that judicial intervention would wrongly supersede the legislature.[286] "However, for the judiciary to recognize a right of postconviction access to DNA testing neither disturbs nor supersedes the ability of the legislature to determine a prisoner's ability to utilize the judiciary to attack the validity of

279. *Id.*

280. *See* discussion *supra* Part II & III.

281. *See id.*

282. Dietrich, *supra* note 94, at 1041.

283. *See id.*; *Osborne*, 557 U.S. at 72–73.

284. *Osborne*, 557 U.S. at 62 (citing Washington v. Glucksberg, 521 U.S. 702, 719 (1997)) (noting the dilemma of how to harness the power of DNA to prove innocence "without unnecessarily overthrowing the established system of criminal justice," has been a task which has belonged to the legislature).

285. Dietrich, *supra* note 94, at 1041.

286. *Id.* at 1048–49.

a conviction."[287] The ability to pass judgment on the innocence or guilt of a properly convicted individual remains firmly independent from the judiciary.[288] Therefore, "affording a prisoner a constitutional right to access and test old evidence does not 'improperly short-circuit legislative activity.'"[289]

Third, this view overlooks courts', and in particular appellate courts', institutional competence to respond to scientific developments.[290] Although the courts suffer from a number of institutional deficiencies when it comes to engaging with science, namely their discomfort with fact-based assessments and non-binary questions, the shortcomings of the adversarial system, and judges' lack of scientific expertise, these limitations can be overcome to a significant extent.[291] Ultimately, it is courts' constitutional role to review the law.[292] Moreover, addressing change associated with scientific progress is a crucial part of the appellate judiciary's day job.[293] The courts, therefore, have the institutional power to develop and engage in appropriate decisionmaking procedures to suit the task at hand: they have the strength to evolve towards decisionmaking that is more sensitive to notions of accuracy.

Moreover, the courts can do this and remain true to the legal process vision. As per the legal process vision, a "distinctive comparative advantage of the judiciary"[294] is its ability to use "the defining tools of legal craft—to render decisions according to principle rather than discretion or subjective policy judgment."[295] The judiciary can, as part of their craft, strive for decisionmaking that accords with principles of accuracy.[296] Moreover, the courts can do this and be loyal to notions of procedural regularity. This procedure not only defines the relative roles and duties of the different institutions, but also "provides mechanisms for systemic self-correction, an

287. *Id.* at 1049.

288. *See id.*

289. *Id.* (quoting Harvey v. Horan, 278 F.3d 370, 376 (4th Cir. 2002)).

290. Cooper, *Shifting Scientific Opinion*, *supra* note 82, at 679–85.

291. *Id.*

292. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

293. *See* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 940 (2003).

294. *Id.* at 920.

295. *Id.* (citations omitted).

296. *See id.*

important virtue under the relativist theory of democracy."[297] In other words, institutional procedure has a built-in corrective function.[298] To bolster this strength, the courts can utilize a variety of preexisting institutional mechanisms. For example, judges can use procedures to narrow the disputed scientific issues; conduct hearings where the court can examine potential experts; and appoint independent experts, special masters, and specially trained law clerks.[299] Courts also have a convening power, namely "the ability to bring together the various actors needed to craft effective solutions to multi-dimensional problems,"[300] like, for example, scientific uncertainty.

In the specific context of creating a postconviction right to DNA access and testing, and fashioning a due process doctrine that mandates meaningful clemency proceedings that can make use of exculpatory results, the courts can be proactive, and still entrench legal process thinking. First, the provision of a constitutional right to access alone does not disrupt finality.[301] Merely granting a request to access to evidence for DNA does not automatically result in a conviction being undermined.[302] Testing can lead to results that indicate guilt as well as innocence.[303] They can also be inconclusive; the decision in *Skinner* supports this notion.[304] Second, the creation of a postconviction right to DNA access and testing, and the sculpting of meaningful clemency proceedings that make use of exculpatory results only serve to engender efficacy in the criminal justice system.[305] In addition to the points made in Part IV.A, there is significant recognition "that the grip of finality should be relaxed in the face of the ability to establish innocence,"[306] and states have demonstrated their acceptance of this in numerous ways. For example, they have provided statutory rights to postconviction DNA testing and created postconviction frameworks based around "actual innocence" and newly discovered evidence, which provide an opportunity for petitioners to seek to vacate their conviction based on

297. Eskridge, Jr. & Peller, *supra* note 71 (citations omitted).

298. *See id.*

299. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 149–50 (1997); *see also* Cooper, *The Collision*, *supra* note 55, at 243.

300. *See* Dorf, *supra* note 293, at 945 (citation omitted).

301. Skinner v. Switzer, 526 U.S. 521, 523 (2011).

302. *Id.*

303. *Id.*

304. *Id.*

305. *See* Dietrich, *supra* note 94, at 1052–53.

306. Kreag, *supra* note 123, at 849 (citation omitted).

evidence that undermines their conviction.[307]

In summary, the courts have institutional competence to address the scientific progress demonstrated by DNA evidence and harness it in a way that is sensitive to both substantive accuracy (as we see it in the Era of Innocence) and the legal process vision.

V. CONCLUSION

DNA technology has revolutionized the American criminal justice system.[308] However, its unrivaled ability to engage in individualization, and thus disturb trial court findings has created great tension in the postconviction arena. This is because DNA technology challenges traditional notions of justice, which are underpinned by legal process theory and, in particular, the need for finality and reliance upon procedural regularity to generate legitimate outcomes.

This article has explored the implications of judicial fidelity to the legal process vision when petitioners request access to DNA evidence and testing in order to, inter alia, support an application for clemency. At present, the lower courts routinely reject such claims, following the Supreme Court's decision in *Osborne* to reject the existence of a postconviction right to DNA access and testing.[309] In doing so, the courts demonstrate a largely unreserved loyalty to the legal process vision.

This pattern in judicial decisionmaking is problematic for three key reasons. First, it significantly undermines the corrective justice function of clemency, as set out by the Supreme Court in *Herrera*.[310] The courts are overlooking the fact that for clemency to be an effective fail-safe, it requires adequate constitutional protection. The courts should recognize a constitutional right to a meaningful clemency process, and part of this substance should encompass the opportunity to present exculpatory DNA evidence, if it exists. This vacuum in judicial decisionmaking, in turn, undermines the value of substantive accuracy in the Era of Innocence. The effect of the Innocence Movement, which has witnessed over 330 postconviction DNA exonerations to date, has been (or at least should be) to make the system more sensitive to substantive accuracy. The courts have

307. *See*, *e.g.*, N.C. GEN. STAT. ANN. § 15A-269 (West 2015); TEX. CODE CRIM. PROC. ANN. art. 64.01 (West 2015); WASH. REV. CODE ANN. § 10.73.170 (West 2015).

308. *See* discussion *supra* Part I.

309. *See* discussion *supra* Part III.

310. *See* discussion *supra* Part IV.A.

largely failed to acknowledge this, however. With an ever-increasing tally of exonerations, this attitude must change. Second, the current judicial approach demonstrates an awkward approach to credible scientific evidence of individualization (i.e., DNA) in light of courts' more liberal approach to the less-scientifically supported individualization evidence provided by the soft sciences.[311] At present it appears that the judiciary is supporting the use of what we know to be less reliable individualization evidence provided by the soft sciences, and hampering the use of the most credible individualization evidence available, namely DNA. Third, the current approach ignores the institutional competence of the courts to respond to scientific progress and engender an approach to DNA access and testing (which can subsequently be used to support a meaningful clemency application) that is sensitive to the legal process vision.[312]

In sum, the courts should take a more proactive approach to harnessing the power of DNA which, at present, provides a unique level of certainty. The courts must rethink their reliance on legal process theory to routinely reject the types of claims examined in this article. The courts must assist clemency to fulfill its corrective justice function by ensuring petitioners have the tools necessary to present meaningful clemency applications. These tools should include access to DNA evidence and testing. The lower courts must no longer, as a default position, apply *Osborne*, but instead recognize their own institutional competence to respond to the demands of the criminal justice system in the Era of Innocence and loosen the system's grip on regular process and finality when cases of factual error can be proven by the application of credible scientific testing. Developing a legal framework that is more sensitive to substantive accuracy (as opposed to finality and procedural regularity), in appropriate cases, will only serve to improve the efficacy of the criminal justice system. The quest for factual accuracy supported by scientific developments should not dismantle the legal process vision, but simply ease it into the 21st Century, where it is known—for certain—that rational, pro-finality procedures can produce factually erroneous results.

311. *See* discussion *supra* Part IV.B.
312. *See* discussion *supra* Part IV.C.