

RE-EXAMINING CUSTODY AND INCARCERATION
REQUIREMENTS IN POSTCONVICTION DNA TESTING
STATUTES

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INTRODUCTION

On September 18, 1988, a seventeen-year-old New Jersey girl was raped on her walk home from work at the local McDonald’s.¹ Three days later, the victim saw twenty-two-year-old Dion Harrell at the same McDonald’s and was confident that she had spotted her attacker.² She promptly called the police, who arrested Mr. Harrell and charged him with sexual assault based largely on the girl’s identification.³

¹ Alan Feuer, *Wrongfully Convicted of Rape, a New Jersey Man Finds More Punishment After Prison*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/nyregion/wrongfully-convicted-of-rape-a-new-jersey-man-finds-more-punishment-after-prison.html> [<https://perma.cc/D2H6-FGU7>]; Kathleen Hopkins, *Long Branch Man Cleared of ’88 Rape by DNA Test He Fought For*, DAILY J. (Aug. 4, 2016), News, at A4.

² See Press Release, Innocence Staff, DNA Evidence Exonerates New Jersey Man of 1988 Rape, INNOCENCE PROJECT (Aug. 2, 2016), <https://www.innocenceproject.org/dna-evidence-exonerates-new-jersey-man-1988-rape> [<https://perma.cc/GNN5-8E8C>]; Feuer, *supra* note 1; see also Christie Thompson, *Out of Prison, Out of Luck*, MARSHALL PROJECT (May 27, 2015, 12:25 PM), <https://www.themarshallproject.org/2015/05/27/out-of-prison-out-of-luck> [<https://perma.cc/PU2X-YRZU>].

³ Thompson, *supra* note 2.

Over the next three-and-a-half years, Mr. Harrell adamantly maintained his innocence and repeatedly rejected plea deals.⁴ At his 1992 trial, he testified that on the evening of the assault he played basketball with friends—one of whom was a police detective—and rode his bicycle to a friend’s house with his three-year-old nephew.⁵ A number of these friends, including the detective, testified on Mr. Harrell’s behalf at trial.⁶ However, prosecutors put forth a forensic serologist⁷ expert witness who incorrectly testified that Mr. Harrell was a part of a mere two percent of the population who could have contributed the sperm found in the victim’s rape kit.⁸ In fact, any man on earth could have contributed it.⁹

Mr. Harrell was convicted of second-degree sexual assault.¹⁰ He served four years of an eight-year prison sentence,¹¹ during which he wrote to the Innocence Project requesting assistance in securing DNA testing to prove his innocence.¹² However, the Innocence Project’s waiting list prevented it from taking the case immediately.¹³ Despite Mr. Harrell only serving half of his original prison sentence,¹⁴ his nightmare

⁴ Hopkins, *supra* note 1; Andrew Schmertz, *A Wrongful Conviction ‘Destroyed’ This Man’s Life*, NJTV NEWS (Aug. 11, 2016, 5:00 PM), <https://www.njtvonline.org/news/video/wrongful-conviction-destroyed-mans-life> [<https://perma.cc/63TN-QM5D>].

⁵ *DNA Evidence Exonerates New Jersey Man of 1988 Rape*, *supra* note 2.

⁶ *Id.*

⁷ Forensic serology is the identification, analysis, and individualization of bodily fluid evidence, including blood, saliva, and semen. See R.E. Gaensslen, *Development of Forensic Serology—From Genetic-Marker Systems to DNA Typing*, in 3 FORENSIC SCI. § 29.01 (Cyril H. Wecht ed., 2017).

⁸ Vanessa Meterko, *Strengths and Limitations of Forensic Science: What DNA Exonerations Have Taught Us and Where to Go from Here*, 119 W. VA. L. REV. 639, 641 & n.19 (2016).

⁹ *Id.* at 641 n.19. The serologist in this case provided expert testimony “in hundreds of cases in all 21 counties in New Jersey, and[,] as a supervisor[,] . . . oversaw the work of other examiners.” *DNA Evidence Exonerates New Jersey Man of 1988 Rape*, *supra* note 2 (quoting Vanessa Potkin, Director of Post-Conviction Litigation for the Innocence Project, which is affiliated with Benjamin N. Cardozo School of Law).

¹⁰ *DNA Evidence Exonerates New Jersey Man of 1988 Rape*, *supra* note 2.

¹¹ Feuer, *supra* note 1; *DNA Evidence Exonerates New Jersey Man of 1988 Rape*, *supra* note 2.

¹² Feuer, *supra* note 1.

¹³ *Id.*

¹⁴ See sources cited *supra* note 11 and accompanying text. Mr. Harrell’s maximum sentence comports with the 2006 average. See SEAN ROSENMERKEL ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL

was just beginning. Upon his release from incarceration, Mr. Harrell was required to register as a sex offender for the rest of his life.¹⁵

Dion Harrell was subjected to New Jersey's sex offender registration act ("SORA") from the time he was released from prison in 1997 until August 2016.¹⁶ The law barred him from living near children, which interrupted his re-entry plan of living with his sister and nephews.¹⁷ It also required the publication of his name, face, and address, details about his crime of conviction, and other identifying information on New Jersey's publicly accessible online sex offender database.¹⁸ Because Mr. Harrell maintained his innocence and refused to register as a sex offender, he was convicted and incarcerated two more times.¹⁹ When he eventually complied with the law and registered, his status on the sex offender registry made it difficult to find work and housing and subjected him to shame and ridicule from old friends and acquaintances.²⁰

In late 2013, the Innocence Project accepted Mr. Harrell as a client.²¹ Within a year, the Monmouth County Prosecutor's Office found slides from the rape kit that could be tested for DNA to prove conclusively whether Mr. Harrell was actually the perpetrator.²² However, Mr. Harrell's attorneys soon hit a roadblock: New Jersey's postconviction ("PC") DNA testing statute limited such testing to those

TABLES 9 tbl.1.6, <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf> [<https://perma.cc/MMP4-FTJZ>] (last updated Nov. 11, 2010) (the mean maximum sentence length in state court for sexual assault in 2006 was 106 months, or 8.833 years).

¹⁵ N.J. STAT. ANN. § 2C:7-2 (West 2018); Hopkins, *supra* note 1; *New Jersey Sex Offender Internet Registry: Frequently Asked Questions*, N.J. ST. POLICE, <https://www.njsp.org/sex-offender-registry/faqs.shtml> [<https://perma.cc/S64R-CRVE>] (last visited Feb. 6, 2019) ("All sex offenders subject to Megan's Law must register for the remainder of their lives.").

¹⁶ Feuer, *supra* note 1.

¹⁷ *Id.* While Mr. Harrell was, immediately upon his release from prison, subject to the geographic restrictions often associated with sex offender registries, a New Jersey court subsequently invalidated that restriction. *Id.*; G.H. v. Twp. of Galloway, 951 A.2d 221 (N.J. Super. Ct. App. Div. 2008).

¹⁸ Feuer, *supra* note 1; *see* N.J. STAT. ANN. § 2C:7-13(g) (West 2018).

¹⁹ Hopkins, *supra* note 1.

²⁰ *See* Feuer, *supra* note 1; *see also* Hopkins, *supra* note 1; Thompson, *supra* note 2.

²¹ Maurice Possley, *Dion Harrell*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4959> [<https://perma.cc/G7KK-T65F>] (last updated Sept. 12, 2018).

²² *Id.*

currently in prison, even though its general PC review scheme did not.²³ Prosecutors relied on the statute and opposed Mr. Harrell's request for DNA testing, declaring: "The State believes the conviction is entitled to finality."²⁴

The Innocence Project continued to seek testing for Mr. Harrell. Over the next few years, they received varying degrees of support from prosecutors despite the incarceration requirement.²⁵ His case led to a policy campaign that resulted in the amendment of the New Jersey statute to remove the incarceration requirement.²⁶ Despite being released at the age of twenty-eight, it was not until New Jersey changed its law—by which point Mr. Harrell had turned fifty—that he was granted DNA testing, excluded as the donor of the sperm from the rape kit, and ultimately exonerated.²⁷

To provide paths to PC DNA testing and control the scope of that testing, all fifty states, the District of Columbia, and the federal government have enacted PC DNA testing statutes.²⁸ Each jurisdiction has a different set of requirements that petitioners must meet.²⁹ This Note focuses on the custody requirement and its restrictive progeny, the incarceration requirement.

Part I describes the history of custody and incarceration requirements in PC DNA testing statutes, as well as the interaction

²³ 2001 N.J. Laws 377, amended by 2015 N.J. Laws 127 (codified at N.J. STAT. ANN. § 2A:84A-32a (West 2019)) (removing "who was convicted of a crime and is currently serving a term of imprisonment"). Cf. *State v. Roper*, 827 A.2d 1099, 1103 (N.J. Super. Ct. App. Div. 2003) ("Not only do [New Jersey's general PC review] rules not require that a [New Jersey state PC review] petitioner be in custody, but we have been unable to find a single case since adoption of the rules that interprets the remedy to include such a condition. As a general matter, we conclude that no such requirement exists.").

²⁴ Thompson, *supra* note 2.

²⁵ Possley, *supra* note 21. For the purposes of this Note, I refer to requirements in state PC DNA testing statutes that petitioners must be incarcerated or imprisoned to qualify for testing as the incarceration requirement. I refer to the broader category of requirements that petitioners must at least be on parole or probation, or subject to some other form of government-imposed restraint, as the custody requirement.

²⁶ *Id.*

²⁷ *Id.*; Meterko, *supra* note 8, at 641 n.19.

²⁸ See sources cited *infra* note 36.

²⁹ See generally Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 DRAKE L. REV. 799 (2011).

between those requirements and state sex offender registration acts. Part II analyzes a number of custody and incarceration requirements across various states. Part III proposes the elimination of custody requirements from PC DNA testing statutes and rebuts concerns about removing these requirements. Ultimately, this Note argues that custody and incarceration requirements specifically harm those who have been wrongly convicted of sex offenses, and the requirements' fundamental incongruity with the goals of PC DNA testing support their complete elimination from PC DNA testing regimes.

I. BACKGROUND

A. *Postconviction DNA Testing Statutes: Form and Function*

The first United States exoneration based on DNA³⁰ testing occurred in 1989.³¹ Since then, a total of 362 innocent individuals have been exonerated by DNA testing.³² In 158 of those instances, DNA testing has also identified the actual perpetrators.³³ In 2009, the United States Supreme Court proclaimed, "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the

³⁰ See Mark W. Perlin, *Introduction to DNA Evidence*, in 4 FORENSIC SCIENCES § 37C.01 (Cyril H. Wecht ed., 2017) ("Deoxyribonucleic acid (DNA) is the elixir of life, the forensic gold standard, and the holy grail of identification evidence.")

³¹ Jonah Horwitz & Rob Warden, *David Vasquez*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3705> [https://perma.cc/4UM8-LG2C] (last updated Mar. 11, 2014). While most accounts refer to Gary Dotson's August 14, 1989 in-court exoneration as the first DNA exoneration, David Vasquez was pardoned on January 4, 1989, based on DNA testing in three cases that were "virtually identical" to the case for which he was convicted. See *id.* Cf. *First DNA Exoneration: Gary Dotson*, NW. PRITZKER SCH. L.: CTR. ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html> [https://perma.cc/D6YM-4VEL] (last visited Feb. 6, 2019); Channon Hodge, *The Shifting Science of DNA in the Courtroom*, CNN (June 9, 2017, 11:30 AM), <https://www.cnn.com/2017/06/09/health/dna-technology-forensic-evidence/index.html> [https://perma.cc/3YSH-MPG7].

³² See *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states> [https://perma.cc/M4FX-4J63] (last visited Feb. 6, 2019). Given the continuing regularity of DNA exonerations, this number is bound to increase prior to this Note's publication.

³³ *Id.*

guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices.”³⁴

PC DNA exoneration claims were initially brought under the common law. New York passed the first PC DNA testing statute in 1994.³⁵ In the decades since, the other forty-nine states, the District of Columbia, and the federal government have all passed PC DNA testing statutes.³⁶ These statutes grant convicted defendants who have met certain conditions the right to test pertinent physical evidence from their underlying case in order to develop DNA evidence that may prove innocence to an unparalleled degree of accuracy.³⁷

³⁴ Dist. Att’y’s Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 55 (2009).

³⁵ *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1573 (1995).

³⁶ Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended at 18 U.S.C. § 3600 (2018)); ALA. CODE § 15-18-200 (2018); ALASKA STAT. ANN. § 12.73.010 (West 2018); ARIZ. REV. STAT. ANN. § 13-4240 (2019); ARK. CODE ANN. § 16-112-202 (West 2018); CAL. PENAL CODE § 1405 (West 2018); COLO. REV. STAT. ANN. §§ 18-1-410–18-1-417 (West 2018); CONN. GEN. STAT. § 54-102kk (2019); DEL. CODE ANN. tit. 11, § 4504 (West 2019); D.C. CODE §§ 22-4133, 22-4135 (2019); FLA. STAT. §§ 925.11–12, 943.3251 (2017); GA. CODE ANN. § 5-5-41 (West 2018); HAW. REV. STAT. ANN. §§ 844D-121–844D-133. (West 2018); IDAHO CODE ANN. § 19-4902 (West 2018); 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2018); IND. CODE ANN. §§ 35-38-7-1–35-38-7-19 (West 2018); IOWA CODE ANN. § 81.10 (West 2018); KAN. STAT. ANN. § 21-2512 (West 2018); KY. REV. STAT. ANN. § 422.285 (West 2018); LA. CODE CRIM. PROC. ANN. art. 926.1 (2018); ME. STAT. tit. 15, §§ 2136–38 (2017); MD. CODE ANN., CRIM. PROC. § 8-201 (West 2018); MASS. GEN. LAWS ANN. ch. 278A, §§ 1–18 (West 2018); MICH. COMP. LAWS ANN. § 770.16 (West 2018); MINN. STAT. ANN. §§ 590.01–590.06 (West 2018); MISS. CODE ANN. §§ 99-39-1–99-39-29 (West 2019); MO. ANN. STAT. § 547.035, 547.037 (West 2018); MONT. CODE ANN. § 46-21-110 (West 2017); NEB. REV. STAT. ANN. §§ 29-2101, 29-4116–29-4125 (West 2018); NEV. REV. STAT. ANN. §§ 176.0918, 176.09183, 176.09187, 176.0919 (West 2017); N.H. REV. STAT. ANN. § 651-D:1–651-D:5 (2018); N.J. STAT. ANN. §§ 2A:84A-32a–2A:84A-32d (West 2019); N.M. STAT. ANN. § 31-1A-2 (West 2019); N.Y. CRIM. PROC. LAW §§ 440.10–440.40 (McKinney 2019); N.C. GEN. STAT. ANN. §§ 15A-269–15A-270.1 (West 2018); N.D. CENT. CODE ANN. § 29-32.1-15 (West 2018); OHIO REV. CODE ANN. §§ 2953.21–2953.23, 2953.71–2953.84 (West 2019); OKLA. STAT. ANN. tit. 22, § 1373 (West 2018); OR. REV. STAT. ANN. §§ 138.690–138.698 (West 2018); 42 PA. CONS. STAT. § 9543.1 (2017); 10 R.I. GEN. LAWS ANN. §§ 10-9.1-10–10-9.1-12 (West 2018); S.C. CODE ANN. § 17-28-10 (2018); S.D. CODIFIED LAWS § 23-5B-1 (2018); TENN. CODE ANN. §§ 40-30-301–40-30-313 (West 2018); TEX. CODE CRIM. PROC. ANN. art. 64.01–64.05 (West 2017); UTAH CODE ANN. §§ 78-35a-301–78-35a-304 (West 2018); VT. STAT. ANN. tit 13, § 5561 (West 2018); VA. CODE ANN. § 19.2-327.1 (West 2018); WASH. REV. CODE ANN. § 10.73.170 (West 2018); W. VA. CODE ANN. § 15-2B-14 (West 2018); WIS. STAT. ANN. §§ 974.02, 974.06, 974.07 (West 2018); WYO. STAT. ANN. § 7-12-302 to -315 (West 2018).

³⁷ See sources cited *supra* note 36.

1. Limiting Conditions

State PC DNA testing statutes have conditions that restrict testing to subsets of convicted defendants by specific criteria.³⁸ Some of these criteria are related to the substance of the claim³⁹—that the petitioner was wrongfully convicted and can prove so via DNA testing—while other criteria are procedural bars that address state concerns about the finality of convictions and the costs of continued litigation.⁴⁰ Each statute has some mixture of criteria chosen from the set of commonly employed provisions, with each criterion adjusted to be more or less restrictive.⁴¹

There are two general categories of substantive requirements for PC DNA testing: the petitioner must show that (1) the perpetrator's identity is at issue,⁴² and (2) results from DNA testing may have changed the outcome at trial.⁴³ States impose different legal standards for both of these requirements. As to the first, states require identity to have been at issue at different points in the case.⁴⁴ As to the second, states require different levels of certainty that the outcome would have been different, as well as how much more favorable the outcome would likely have been.⁴⁵

In contrast, because they are not acutely related to the merits of innocence or guilt, procedural limits on PC DNA testing vary

³⁸ See, e.g., Brooks & Simpson, *supra* note 29 (analyzing the various limiting conditions in various state PC DNA testing statutes as of 2011).

³⁹ See, e.g., *id.* at 811–24 (examining both the various “materiality” standards for evidence in PC DNA testing statutes and the common requirement in state PC DNA testing statutes that identity was at issue in the underlying criminal investigation or conviction).

⁴⁰ See, e.g., sources cited *infra* notes 47–52 (discussing “crime of conviction” limitations in state PC DNA testing statutes).

⁴¹ See, e.g., sources cited *infra* notes 47–52 and accompanying text (discussing the range of “crime of conviction” limitations in state PC DNA testing statutes); see sources cited *supra* note 36.

⁴² See, e.g., Brooks & Simpson, *supra* note 29, at 820–24; Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1680–81 (2008).

⁴³ See, e.g., Brooks & Simpson, *supra* note 29, at 811–20; Garrett, *supra* note 42, at 1676–79.

⁴⁴ See, e.g., Brooks & Simpson, *supra* note 29, at 820–24; Garrett, *supra* note 42, at 1680–81.

⁴⁵ See, e.g., sources cited *supra* note 43.

significantly from state to state.⁴⁶ For instance, many states restrict the types of convictions that one may challenge by PC DNA testing.⁴⁷ These “conviction restrictions” range from “[a]n individual convicted of a capital offense” in Alabama,⁴⁸ to a person convicted of one of twenty-four listed offenses in South Carolina,⁴⁹ to “[a] person convicted of a felony” in West Virginia,⁵⁰ to absolutely no restriction in New York.⁵¹ The rest of the states (as well as the District of Columbia and the federal government) fall somewhere on this spectrum, with more states closer to New York than Alabama.⁵²

Similar to the “crime of conviction” condition, other conditions imposed on applicants for PC DNA testing can be more or less restrictive, depending on how a state chooses its narrowing criteria. Some of these other conditions include: (1) the defendant was convicted at trial (rather than via guilty plea);⁵³ (2) the defendant moved for DNA

⁴⁶ See, e.g., Brooks & Simpson, *supra* note 29, at 806–11, 840–46, 860–64; see also sources cited *infra* notes 47–55.

⁴⁷ See Brooks & Simpson, *supra* note 29, at 806–11 (surveying “crime of conviction” limitations on PC DNA testing and noting that “[n]o reason exists, other than cost, for limiting the number or type of crime for which postconviction DNA testing can be utilized”).

⁴⁸ ALA. CODE § 15-18-200 (2018).

⁴⁹ S.C. CODE ANN. § 17-28-30 (2018).

⁵⁰ W. VA. CODE ANN. § 15-2B-14 (West 2018).

⁵¹ N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2019).

⁵² See Brooks & Simpson, *supra* note 29, at 806–11 (“The majority of [jurisdictions] impose minimal to no conditions on individuals with respect to the underlying conviction.”). Cf. CAL. PENAL CODE § 1405 (West 2018) (felony); D.C. CODE § 22-4133(a) (2019) (crime of violence); MICH. COMP. LAWS ANN. § 770.16 (West 2018) (felony). While the Kansas PC DNA testing statute limits claims to those petitioners “in state custody, at any time after conviction for murder in the first degree . . . or for rape,” the Supreme Court of Kansas has twice found that these narrow, crime-specific conditions violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. See KAN. STAT. ANN. § 21-2512 (West 2018); *State v. Cheeks*, 310 P.3d 346, 356 (Kan. 2013) (extending § 21-2512 to include “individuals convicted of second-degree murder and sentenced before the effective date of the KSGA [Kansas Sentencing Guidelines Act] to the maximum penalty of 15 years to life imprisonment”); *State v. Denney*, 101 P.3d 1257 (Kan. 2004) (extending § 21-2512 to include individuals convicted of aggravated criminal sodomy).

⁵³ See, e.g., OHIO REV. CODE ANN. § 2953.72(C)(2) (West 2018). Cf. 162 CONG. REC. S996–01 (daily ed. Feb. 24, 2016) (statement of Sen. Leahy) (“This bill expands access to post-conviction DNA testing so that more innocent people will have a chance at the redemption they deserve. For example, [it] will permit individuals to access DNA testing even if they previously waived their right to testing as part of a guilty plea. This change is critical because we know that people sometimes pled guilty or confess to crimes they did not commit. In fact, of the 337

testing within a certain period of time, either from their arrest, conviction, or incarceration, or from the passage of the statute itself;⁵⁴ and (3) the defendant is incarcerated or subject to some form of custody.⁵⁵

2. Policy Justifications for Procedural Limits

States justify procedural limits to collateral attacks on criminal convictions by invoking the finality interests typically implicated by those convictions.⁵⁶ First, states are concerned about the potential

people who have been freed based on DNA evidence, 88 falsely confessed or pled guilty. That is almost 30 percent of DNA exonerations. Had it not been for DNA testing, they would likely still be behind bars, or worse.”)

⁵⁴ See, e.g., ALA. CODE § 15-18-200(f)(1)(c); ALA. R. CRIM. P. 32.2(c).

⁵⁵ See, e.g., COLO. REV. STAT. ANN. § 18-1-412 (West 2018) (“[a]n incarcerated person may . . .”); CONN. GEN. STAT. ANN. § 54-102kk(a) (West 2019) (“any person who was convicted of a crime and sentenced to incarceration may, at any time during the term of such incarceration . . .”); N.H. REV. STAT. ANN. § 651-D:2(I) (2018) ([a] person in custody pursuant to the judgment of the court . . .”). Some states have more idiosyncratic limiting conditions. See, e.g., IOWA CODE ANN. § 81.10(1) (West 2018) (limiting testing to “defendant[s] who ha[ve] been convicted of felony or aggravated misdemeanor and who ha[ve] not been required to submit a DNA sample for DNA profiling,” presumably because Iowa’s PC DNA testing statute is part of its DNA profiling statutory scheme) (emphasis added); see also sources cited *infra* notes 176–88 and accompanying text (describing the peculiar incarceration requirements of Mississippi, Utah, and Michigan’s respective PC DNA testing statutes).

⁵⁶ See Lee Kovarsky, *Preclusion and Criminal Judgment*, 92 NOTRE DAME L. REV. 637, 646 (2016) (“In the context of a criminal judgment, some traditional finality interests are diminished. . . . Criminal judgments, however, trigger other types of finality interests: government litigants and winning defendants need repose, victims want closure, and courts must reallocate scarce judicial resources.”) (internal citations omitted). Modern arguments for finality in criminal judgments typically draw from Professor Paul M. Bator’s influential 1963 article that promoted the importance of finality in order to argue for more limited federal habeas review of state convictions. See generally Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). Professor Bator contended that the finality of criminal convictions is integral to some of the fundamental substantive aims of the criminal justice system, including deterrence, education, punishment, rehabilitation, and societal repose. *Id.* at 451–53. In this Note, I analyze fiscal and finality interests separately, so as to view their respective applicability to incarceration requirements in PC DNA testing statutes. However, all potential state fiscal costs of relitigating “final” criminal judgments can be viewed as an element of the state’s multifaceted interest in the finality of convictions. See *id.* at 451 (arguing that the question of whether to allow relitigation on the merits must be answered “in terms of conservation of resources . . . not only simple economic

financial burden of increased PC litigation.⁵⁷ Second, states often cite victims', communities', courts', and prosecutors' interests in "finality," which are disrupted by allowing convicted individuals to challenge their convictions beyond direct appeal.⁵⁸

State concerns about costs can further be divided into two categories. First, states fear that if they expand access to PC DNA testing, everyone who was ever convicted of a crime will move for testing.⁵⁹ This "opening of the floodgates" will ostensibly clog up the courts at considerable taxpayer expense.⁶⁰ Second, state legislators likely fear that as expanded access to PC DNA testing leads to more exonerations, it will also bring about the compensation of more exonerees—at considerable cost to their constituents.⁶¹

resources, but all of the intellectual, moral, and political resources involved in the legal system").

⁵⁷ These concerns can be divided into two categories: judicial costs and exoneree compensation. While the former is often cited as the primary reason for limiting access to PC DNA testing, the outsized costs of the latter—as well as its clear ethical justification—are likely the actual foremost concern for democratically elected state legislators.

⁵⁸ See, e.g., sources cited *supra* note 56 and accompanying text; see also Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26 (1996) (codified at various sections of 21, 28 U.S.C.) [hereinafter AEDPA]; Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."). Cf. *Dist. Att'y's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009) (noting that advancements in DNA testing technology challenge "our traditional notions of finality," but mostly leaving the process of working out that challenge to the states).

⁵⁹ See, e.g., H. LEGISLATIVE ANALYSIS SECTION, POST-CONVICTION USE OF DNA EVIDENCE TO PROVE INNOCENCE, 2000 MI S.B. 1395 (Dec. 6, 2000), <http://www.legislature.mi.gov/documents/1999-2000/billanalysis/House/pdf/1999-HLA-1395-A.pdf> [<https://perma.cc/AMZ2-NSDD>] ("The bill's five-year deadline could lead to the filing of numerous unwarranted petitions. . . . Instead of the careful and deliberate screening process that is planned, a flood of petitions could be filed simply to meet the bill's timetable."); see also NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 18 (1999), <https://www.ncjrs.gov/pdffiles1/nij/177626.pdf> [<https://perma.cc/MNL2-YJ23>] ("[C]oncern that the 'floodgates' would be opened, and the public treasury depleted, by demands for postconviction DNA testing has been cited informally and formally as a factor in judicial and prosecutorial rejection of requests for postconviction DNA testing").

⁶⁰ See sources cited *supra* note 59.

⁶¹ See *infra* Section III.B.

Unstated concerns about runaway compensation costs⁶² raise more significant questions than the oft-stated concerns about the allocation of scarce judicial resources.⁶³ Legislatively enacted compensation standards among jurisdictions vary wildly,⁶⁴ from as high as \$80,000 per year of incarceration and a monthly annuity in Texas,⁶⁵ to as low as \$50 per day of PC confinement in Missouri,⁶⁶ or a maximum aggregate of \$20,000 in New Hampshire.⁶⁷

Exonerees may also seek compensation via federal civil rights or common law tort suits.⁶⁸ However, high bars to recovery are sometimes built into state compensation schemes to protect states from steep jury verdicts.⁶⁹ Municipalities that remain concerned about large verdicts⁷⁰

⁶² *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <https://www.innocenceproject.org/compensating-wrongly-convicted> [<https://perma.cc/5YYZ-92EE>] (last visited Feb. 6, 2019) (“The federal government, the District of Columbia, and 33 states have compensation statutes of some form. The following 17 states do not: Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Kentucky, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming.”). Compensation statutes range broadly in terms of what they require of wrongfully convicted and incarcerated individuals before they will compensate them, how much they are then willing to compensate them per year, and what caps, if any, they have on overall compensation. Compensation laws raise complex and important concerns that merit their own thorough analysis. See generally Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369 (2017).

⁶³ See *infra* Section III.B.

⁶⁴ See generally Meghan J. Ryan, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 296, 310 (2012) (listing compensation statutes as of publishing); Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 142–44 (2010).

⁶⁵ TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West 2017).

⁶⁶ MO. ANN. STAT. § 650.058 (West 2018).

⁶⁷ N.H. REV. STAT. ANN. § 541-B:14 (2018).

⁶⁸ See, e.g., Esther Castillejo, *Wrongful Conviction Leads to Record \$20 Million Settlement*, CHI. SUN-TIMES (June 24, 2016, 11:07 AM), <https://chicago.suntimes.com/politics/wrongful-conviction-leads-to-record-20-million-settlement> [<https://perma.cc/L6CV-8HT7>]; Sean Gardiner, *‘Central Park Five’ Settlement Eyed in Similar Cases*, WALL ST. J. (July 7, 2014, 10:08 PM), <https://www.wsj.com/articles/central-park-five-settlement-with-new-york-city-eyed-by-wrongful-conviction-lawyers-1404785297> [<https://perma.cc/S36X-M2C9>]; see also Saskia de Melker, *Four Wrongfully Convicted Men, Four Very Different Outcomes*, PBS NEWS HOUR (Nov. 9, 2014, 1:53 PM), <https://www.pbs.org/newshour/nation/life-exoneration> [<https://perma.cc/8KRZ-ZT7S>].

⁶⁹ See Gutman, *supra* note 62, at 373 (“Tort-based full compensation in [wrongful conviction] cases can be enormous. Fear of episodic, unplanned, and potentially large payouts in wrongful conviction cases leads to tough prerequisites to recovery and ungenerous

and the negative publicity attendant with stories of official misconduct⁷¹ often settle wrongful conviction suits for millions, if not tens of millions, of dollars.⁷²

3. Custody and Incarceration Requirements' Origins in Habeas Corpus

In addition to limiting PC DNA testing to certain kinds of cases, a number of states also have limited it to defendants who are still “in custody.”⁷³ This is likely because PC DNA testing is a form of PC review,⁷⁴ which generally derives from or mirrors the writ of habeas corpus.⁷⁵ While PC review varies significantly from state to state,⁷⁶ state PC review statutes often borrow features of federal habeas.⁷⁷ In

prescribed awards and caps.”); Associated Press, *Man Receives \$13 Million in Lawsuit Over Wrongful Conviction*, DAILY HERALD, <https://www.dailyherald.com/article/20170412/news/304129780> [<https://perma.cc/7RGP-6367>] (last updated Apr. 12, 2017).

⁷⁰ See Dan Hinkel & Steve Mills, *Man Freed After 20 Years in Prison for Waukegan Murder Gets \$20 Million*, CHI. TRIB. (Mar. 20, 2015, 8:35 PM), <https://www.chicagotribune.com/suburbs/lake-county-news-sun/crime/ct-rivera-lawsuit-settlement-met-20150320-story.html>.

⁷¹ See, e.g., Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 720–23 (discussing how the exposure of Detective Louis Scarcella as having deliberately framed suspects brought significant negative publicity to the New York Police Department and Brooklyn District Attorney’s Office).

⁷² See Hinkel & Mills, *supra* note 70; Stephanie Clifford, *New York City Settles Wrongful Conviction Case in Brooklyn for \$6.25 Million*, N.Y. TIMES (June 23, 2015), <https://www.nytimes.com/2015/06/24/nyregion/brooklyn-wrongful-conviction-case-settled.html>.

⁷³ See, e.g., *infra* Part II.

⁷⁴ The first PC DNA exoneration was in 1989. See sources cited *supra* note 31 and accompanying text. New York passed the first PC DNA testing statute in the U.S. in 1994. See sources cited *supra* note 35 and accompanying text.

⁷⁵ Habeas corpus is “[a] writ employed to bring a person before a court, most frequently to ensure that the person’s imprisonment or detention is not illegal.” *Habeas Corpus*, BLACK’S LAW DICTIONARY (10th ed. 2014). The right to the “Great Writ,” as it is often called, is derived from English common law and referenced in the Constitution. See *id.*; U.S. CONST. art. I, § 9. Congress has codified this right and granted federal subject matter jurisdiction over habeas corpus claims for people convicted of crimes by both federal and state courts. See 28 U.S.C. §§ 2241, 2254, 2255 (2018).

⁷⁶ See generally BRIAN R. MEANS, POSTCONVICTION REMEDIES (2017); DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS (5th ed. 2009).

⁷⁷ See, e.g., sources cited *infra* notes 159–62 and accompanying text; 39 AM. JUR. 2d HABEAS CORPUS § 9 (2017). State PC review is even often called state habeas. Brandon L. Garrett & Lee

particular, the “in custody” requirement that originated in federal habeas doctrine⁷⁸ has been incorporated into about half of the states’ PC relief statutory schemes⁷⁹ and into many of the states’ PC DNA testing statutes.⁸⁰

Courts historically read the federal writ’s custody requirement strictly.⁸¹ However, beginning in the early 1960s, the Warren Court⁸² relaxed the meaning of “custody” in the habeas context.⁸³ The Court has read the requirement leniently ever since.⁸⁴ Today, the habeas custody

Kovarsky, *State Habeas at Center Stage*, AM. CONST. SOC’Y: BLOG (Mar. 28, 2012), <https://www.acslaw.org/acsblog/state-habeas-at-center-stage> [<https://perma.cc/6BFF-TBJH>].

⁷⁸ See §§ 2254(a), 2255(a) (2018). Being “in custody” is a jurisdictional prerequisite for federal habeas. § 2254(a); *Maleng v. Cook*, 490 U.S. 488, 490 (1989) (per curiam). This is particularly important in cases when state prisoners challenge their state convictions via federal habeas. See § 2254(a); Kovarsky, *supra* note 56, at 650–51 n.98.

⁷⁹ Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel*, 98 KY. L.J. 301, 303 n.21 (2010) (As of 2010, twenty-four states limited postconviction relief to defendants imprisoned, on probation, or on parole.). *But see* Kathy Swedlow, *Don’t Believe Everything You Read: A Review of Modern “Post-Conviction” DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 360 (2002) (“[S]ome form of ‘custody’ is normally a jurisdictional prerequisite in traditional postconviction litigation.”) (citing JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 359–401 (4th ed. 2001)).

⁸⁰ See *infra* Part II.

⁸¹ See *Parker v. Ellis*, 362 U.S. 574 (1960) (Petitioner’s release after filing habeas petition but before its ultimate adjudication did not fulfill the custody requirement.); *Weber v. Squier*, 315 U.S. 810 (1942) (Parole did not fulfill the custody requirement.); *Stallings v. Splain*, 253 U.S. 339 (1920) (Bail did not fulfill the custody requirement.); *Wales v. Whitney*, 114 U.S. 564 (1885) (A mandate to stay within Washington, D.C., did not fulfill the custody requirement.).

⁸² See Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 931 n.34 (2006).

⁸³ See *Lefkowitz v. Newsome*, 420 U.S. 283 (1975) (bail pending appeal fulfills the custody requirement), *abrogating Stallings*, 253 U.S. 339; *Carafas v. LaVallee*, 391 U.S. 234 (1968) (filing a habeas petition while in prison fulfills the custody requirement, even if the petitioner is released prior to the petition’s ultimate adjudication), *overruling Parker*, 362 U.S. 547; *Jones v. Cunningham*, 371 U.S. 236 (1963) (parole fulfills the custody requirement), *abrogating Weber*, 315 U.S. 810.

⁸⁴ While the Court has since generally trended towards stricter habeas requirements, it has exempted the custody requirement from this stricter reading. See *Garlotte v. Fordice*, 515 U.S. 39 (1995) (a state sentence that is currently being consecutively served after an expired state sentence fulfills the custody requirement for petitioner to challenge the expired sentence under habeas); *Maleng v. Cook*, 490 U.S. 488 (1989) (per curiam) (a state sentence that is to be consecutively served immediately after petitioner completes the federal sentence he is currently serving, and that was enhanced by a prior state conviction, fulfills the custody requirement);

requirement entails only that a person files their habeas corpus petition in federal court while⁸⁵ under government-imposed restraints not shared by the general public.⁸⁶

Despite this broad construction, until recently no federal court of appeals had found that a SORA satisfied the federal habeas custody requirement.⁸⁷ That changed in *Piasecki v. Court of Common Pleas*,⁸⁸ in

Lefkowitz, 420 U.S. 283; *Hensley v. Municipal Court*, 411 U.S. 345 (1973) (release on one's own recognizance fulfills the custody requirement); *see also* Neil D. McFeeley, *A Change of Direction: Habeas Corpus from Warren to Burger*, 32 W. POL. Q. 174, 184 (1979) (noting that the Burger Court didn't tighten the custody requirement). *Cf.* Kovarsky, *supra* note 56, at 663 (describing how finality and comity concerns influenced the Burger and Rehnquist Courts' limiting the writ, led to AEDPA's passage, and retain momentum in the Roberts Court).

⁸⁵ *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 8.2 (7th ed. 2016) ("As long as the habeas corpus petition was filed in federal court at a time when the petitioner was in custody, an action challenging that custody is not necessarily mooted by the petitioner's release from custody prior to final trial and appellate adjudication of the petition.") (internal citations omitted).

⁸⁶ *Hensley*, 411 U.S. at 351 (quoting *Jones*, 371 U.S. at 240). In a federal habeas action, the "in custody" requirement only applies to the time when someone files her habeas petition. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). However, a petitioner must maintain a concrete and continuing injury throughout the life of her suit in order to avoid mootness. *Nowakowski v. New York*, 835 F.3d 210, 217–18 (2d Cir. 2016). This injury typically takes the form of collateral consequences of a conviction. *Id.*; *see also* *Fowler v. Sheriff's Dep't*, 421 F.3d 1027, 1033 n.5 (9th Cir. 2005) (being on probation when filing a habeas petition and, despite having completed probation by the time the court heard the case, remaining subject to California's SORA, respectively fulfilled the habeas custody requirement and avoided mootness).

⁸⁷ *See* *Hautzenroeder v. DeWine*, 887 F.3d 737, 739, 741 (6th Cir. 2018) (Ohio's post-2007 SORA, which requires lifetime, in-person registration and updates unless a court rules otherwise, did not fulfill the habeas custody requirement.); *Calhoun v. Att'y Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014) (collecting cases); *Virsnieks v. Smith*, 521 F.3d 707 (7th Cir. 2008), *cert. denied*, 555 U.S. 868 (2008) (Wisconsin's SORA, which allows registrants to update their information with the state by mail or phone, "does not impose any significant restriction on a registrant's freedom of movement" sufficient to fulfill the habeas custody requirement.); *Leslie v. Randle*, 296 F.3d 518, 521–23 (6th Cir. 2002) (Ohio's pre-2008 SORA, which required lifetime, in-person registration and updates unless a court rules otherwise, did not fulfill the habeas custody requirement.); *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (*per curiam*) (Oregon's SORA, which mirrored Ohio's SORA as in *Leslie*, 296 F.3d at 521–23, did not fulfill the habeas custody requirement.); *Henry v. Lungren*, 164 F.3d 1240 (9th Cir. 1999), *cert. denied*, 528 U.S. 963 (1999) (California's SORA, which mirrored Ohio's SORA as in *Leslie*, 296 F.3d at 521–23, did not fulfill the habeas custody requirement.); *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999) (Washington's SORA, which allowed registrants to register and update their information with the state by mail, did not fulfill the habeas custody requirement.); *see also generally* Wendy Calaway, *Sex Offenders, Custody and*

which the Third Circuit found Pennsylvania's SORA registration and reporting requirements "sufficiently restrictive to constitute custody."⁸⁹ The Ninth Circuit had previously noted that a SORA with strict enough limits on a registrant's ability to move about freely could be severe enough to satisfy the requirement.⁹⁰ While *Piasecki* was decided on the restrictiveness of registration and reporting requirements,⁹¹ SORA geographic restrictions—which typically restrict where registrants may live, work, and "loiter"—also bear a striking resemblance to state-imposed restraints on liberty not shared by the general public.⁹²

B. *The Interaction Between Postconviction DNA Testing Statutes' Custody Requirements and Sex Offender Registration Acts*

As unnerving and confusing as it may be for people to contemplate the reopening of sex offender cases, the fact remains that sexual offenses are paradigmatic cases for DNA testing because perpetrators are prone to leave behind a variety of biological evidence.⁹³ Ninety-one percent of

Habeas, 92 ST. JOHN'S L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3234043.

⁸⁸ 917 F.3d 161 (3d Cir. 2019).

⁸⁹ *Id.* at 170.

⁹⁰ See *Williamson*, 151 F.3d at 1181, 1183–84 (a state SORA's "substantial disincentive to movement might be so severe as to create 'custody' for habeas purposes, even in the absence of some outright prohibition on movement.").

⁹¹ *Id.* at 166–73.

⁹² See, e.g., *Nowakowski v. New York*, 835 F.3d 210, 216–17 (2d Cir. 2016) (conditional discharge and one day of community service fulfills the "in custody" requirement); *Dow v. Circuit Court*, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam) (a court-imposed requirement that petitioner attend fourteen hours of alcohol treatment is a greater restraint on liberty than release on one's own recognizance, "significantly restrains appellant's liberty to do those things which free persons in the United States are entitled to do[,] and therefore must be characterized, for jurisdictional purposes, as custody"); see also *supra* notes 101–02 and accompanying text.

⁹³ Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989–2014: Review of Data and Findings from the First 25 Years*, 79 ALB. L. REV. 717, 718 (2016) ("[S]exual assaults and murders . . . are the types of cases that are most likely to have biological evidence left behind by the perpetrators that can be subjected to DNA testing . . ."). Prolonged physical contact, as well as the likelihood of depositing saliva and semen, accounts for the abundant biological evidence in many sexual assault cases. See DNA INITIATIVE, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *DNA FOR THE DEFENSE BAR 8* (2012).

the 325 DNA exonerations that had taken place in the United States by the end of 2014 were for crimes containing a sexual assault element, while 34% were for homicides.⁹⁴ Additionally, far more people are convicted of sexual assault than non-negligent homicide each year.⁹⁵ Moreover, sexual assault convictions typically result in much shorter prison sentences than those for non-negligent homicide.⁹⁶ Thus, in states with PC DNA testing incarceration requirements, a significant slice of the population for whom PC DNA testing may prove innocence are ineligible to petition for potentially exonerative testing for reasons unrelated to the merits of their claims of innocence—namely, because they have already been released from prison.⁹⁷

Modern sex offender registries were statutorily enacted at the federal and state levels beginning in the early 1990s. Since then, they have generally become more onerous.⁹⁸ In 2006, the federal Sex Offender Registration and Notification Act⁹⁹ (SORNA) predicated some federal funding on states' bringing their sex offender registries into compliance with baseline requirements.¹⁰⁰ Still, state SORAs vary from state to state,¹⁰¹ and most states are not in substantial compliance with

⁹⁴ West & Meterko, *supra* note 93, at 725.

⁹⁵ ROSENMERKEL ET AL., *supra* note 14 (in 2006, 33,566 people were convicted of sexual assault in both state and federal courts, while only 8,816 were convicted of murder or non-negligent manslaughter).

⁹⁶ *Id.* While the mean maximum federal sentence for sexual assault is longer than that for non-negligent homicide, less than 2% of the total convictions for either set of crimes were federal. *Id.*

⁹⁷ See sources cited *supra* notes 93–97 and accompanying text.

⁹⁸ See Samantha R. Millar, Note, *Doe v. O'Donnell and New York's Sex Offender Registration Act: The Problem of Continued Registration Under SORA After Leaving the State*, 38 CARDOZO L. REV. 337, 340–44 (briefly discussing the history of sex offender registries in the United States).

⁹⁹ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. I, 120 Stat. 587, 590 (codified as amended at 34 U.S.C. §§ 20901–62 (2018)).

¹⁰⁰ 34 U.S.C. § 20927 (2018); see also CHARLES DOYLE, CONG. RESEARCH SERV., R42692, SORNA: A LEGAL ANALYSIS OF 18 U.S.C. § 2250 (FAILURE TO REGISTER AS A SEX OFFENDER) 22 (2017); *Legislative History of Federal Sex Offender Registration and Notification*, U.S. DEP'T JUST.: OFF. JUST. PROGRAMS, <https://www.smart.gov/legislation.htm> [<https://perma.cc/5VJ5-Y4EQ>] (last visited Feb. 6, 2019) (providing a detailed history of federal sex offender legislation from the 1994 Wetterling Act through the 2016 International Megan's Law).

¹⁰¹ See Millar, *supra* note 98, at 358–59.

SORNA.¹⁰² Nonetheless, some states have implemented restrictions on convicted sex offenders that not only go above and beyond those proscribed by SORNA, but also have gone so far as to have been held unconstitutional.¹⁰³

A good example is Michigan's SORA, which was recently held to be an unconstitutional *ex post facto* punishment.¹⁰⁴ This finding, and likely the Supreme Court's subsequent denial of certiorari, was primarily due to aspects of Michigan's SORA that go above and beyond the SORNA requirements.¹⁰⁵ For instance, Michigan's SORA's three-tier system

¹⁰² See DOYLE, *supra* note 100, at 22 (noting "most states do not feel compelled to bring their systems into full [federal] SORNA compliance") (citing *Jurisdictions that Have Substantially Implemented SORNA*, U.S. DEP'T JUST.: OFF. JUST. PROGRAMS, https://ojp.gov/smart/newsroom_jurisdictions_sorna.htm [<https://perma.cc/YD7V-BC9E>] (last visited Feb. 6, 2019) (as of March 2019, seventeen states have substantially implemented SORNA's requirements)).

¹⁰³ See *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1232 (D. Colo. 2017) (collecting cases), *appeal docketed*, No. 17-1333 (10th Cir. Sept. 21, 2017); *Commonwealth v. Muniz*, 164 A.3d 1189, 1223 (Pa. 2017) (holding that Pennsylvania's Sex Offender Registration and Notification Act violates the *ex post facto* clauses of both the United States and Pennsylvania constitutions), *petition for cert. denied*, 138 S. Ct. 925 (Mem.); Brief for the United States as Amicus Curiae at 9, *Snyder v. Does*, 138 S. Ct. 55 (2017) (Mem.) (No. 16-768), 2017 WL 2929534, at *9 ("Michigan's sex-offender-registration scheme contains a variety of features that go beyond the baseline requirements set forth in federal law and differ from those of most other states."); *Sex Offender Enactments Database*, NAT'L CONF. ST. LEGISLATURES (Jan. 1, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-enactments-database.aspx> [<https://perma.cc/BR7G-P74Z>] (providing a searchable database of key state sex offender legislation enacted from 2008 through mid-2016). The constitutionality of various mixtures of SORA provisions is a topic worthy of its own dedicated scholarship. See, e.g., Brief for the United States as Amicus Curiae, *Snyder v. Does*, 138 S. Ct. 55 (2017) (Mem.) (No. 16-768), 2017 WL 2929534.

¹⁰⁴ *Does v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016) (holding that Michigan's Sex Offender Registration Act violates the *Ex Post Facto* Clause of the U.S. Constitution), *cert. denied*, 138 S. Ct. 55 (2017) (Mem.).

¹⁰⁵ Prior to denying review of the Sixth Circuit's decision, the Supreme Court asked the Solicitor General whether the Court should grant certiorari. See *Snyder v. Does*, 137 S. Ct. 1395 (2017); Brief for the United States as Amicus Curiae, *Snyder v. Does*, 138 S. Ct. 55 (2017) (Mem.) (No. 16-768). The Solicitor General responded that the Court should not grant a writ of certiorari because there is no actual circuit split or conflict with SORNA requirements. *Id.* at 17 ("No conflict exists between the decision in *Smith*, which considered the aggregate effects of a law containing a different combination of features, and the decision below."); *id.* at 19 ("[T]he state's inability to enforce retroactively the school-safety zones, the publication of offenders' tier classification, and the in-person reporting requirement for changes to vehicle ownership, temporary residence, e-mail address, and other online designations would have no effect on its SORNA compliance.").

imposes an unappealable and publicly-accessible tier determination on registrants that is supposed to relate to “the state’s estimation of present dangerousness.”¹⁰⁶ However, this “estimation” does not actually correlate to “present dangerousness;” rather, it is based only on the offense for which the individual is required to register.¹⁰⁷ Thus, no matter how long a Michigan defendant convicted of a Tier III offense maintains a clean record post-incarceration, they will forever remain subject to state supervision solely due to the crime for which they were convicted.¹⁰⁸ As noted in *Does v. Snyder*, this rigid tier system resembles shaming and is functionally punitive.¹⁰⁹

Further, Michigan and many other states’ SORAs contain restrictions on where registrants may live and work.¹¹⁰ These restrictions often result in near-complete societal exclusion, particularly in densely populated cities and suburbs.¹¹¹ Under such regimes, registrants must structure their lives around state-imposed geographic restrictions and are limited to few jobs and residences.¹¹² These restraints on liberty are similar to incarceration, where inmates are

¹⁰⁶ *Does*, 834 F.3d at 702. The three-tier system of categorizing individuals on sex offender registries comes from the federal SORNA. See The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030–31, 38035, 041–43, 052–54, 059, 064, 067–68 (July 2, 2008) (discussing SORNA’s three-tier classification system).

¹⁰⁷ MICH. COMP. LAWS § 28.722(v), (w) (2015); see also *Does*, 834 F.3d at 702 (noting that Michigan does no “individualized assessment” when determining a registrant’s “present dangerousness”), *cert. denied*, 138 S. Ct. 55 (2017).

¹⁰⁸ See sources cited *supra* note 105.

¹⁰⁹ *Does*, 834 F.3d at 702–04.

¹¹⁰ *Id.* at 702; *Sexual Offender Residence Restrictions*, ASS’N FOR TREATMENT SEXUAL ABUSERS (Aug. 2, 2014), <http://www.atsa.com/pdfs/Policy/2014SOResidenceRestrictions.pdf> [<https://perma.cc/U2YM-YCL8>]. Some state courts have struck down local geographic restriction ordinances. See, e.g., *G.H. v. Twp. of Galloway*, 951 A.2d 221 (N.J. Super. Ct. App. Div. 2008); see also Mary Fuchs, *N.J. Supreme Court Invalidates Restrictions on Where Sex Offenders Can Live*, NJ.COM, https://www.nj.com/news/2009/05/nj_supreme_court_strikes_down.html [<https://perma.cc/2S6Y-ZSKF>] (last updated May 8, 2009, 1:04 PM).

¹¹¹ *Does*, 834 F.3d at 701; see also *Sexual Offender Residence Restrictions*, *supra* note 110, at 3 (noting that “the higher the population density, the more likely neighborhoods include schools, parks, etc.”).

¹¹² *Does*, 834 F.3d at 702; see also *Sexual Offender Residence Restrictions*, *supra* note 110, at 3 (“The unintended consequences of residence restrictions include transience, homelessness, instability, and other obstacles to community reentry In fact, unemployment, unstable housing, and lack of support are associated with increased criminal recidivism.”).

assigned living quarters and work duties by the government.¹¹³ They are also similar in that both prison sentences and sex offender registration are direct consequences of convictions.¹¹⁴ And just as perceived insubordination in prison often results in further punishment,¹¹⁵ failing to comply with a SORA is often a felony that may result in reincarceration.¹¹⁶

Dion Harrell's tale of living in limbo while being subject to sex offender registration requirements for almost two decades is not an isolated incident.¹¹⁷ Eddie James Lowery was wrongfully convicted of a rape in 1982 and released on parole in 1991.¹¹⁸ However, in order to receive parole, he falsely confessed to the crime.¹¹⁹ Further, he enrolled in a sex offender treatment program as a mandatory condition of his release.¹²⁰ "It was almost like I was still in a prison on the outside," said Mr. Lowery.¹²¹ "Even though I was out, I wasn't free."¹²² He eventually became frustrated with registering as a sex offender annually—a requirement of SORA—and was able to pay for DNA testing on the biological evidence from his case.¹²³ Twenty-one years after his arrest, Eddie James Lowery was vindicated by DNA testing that proved he could not have committed the rape for which he was convicted.¹²⁴

¹¹³ See, e.g., 28 C.F.R. 545.23 (2019) (discussing inmate work assignments in federal prisons); FED. BUREAU OF PRISONS, UNIT MANAGEMENT MANUAL 4 (Aug. 10, 2017), <https://www.bop.gov/policy/progstat/5321.08.pdf> [<https://perma.cc/NCZ3-E2YX>] (noting that unit rules in federal prisons must include rules regarding room or cell assignments).

¹¹⁴ See, e.g., N.Y. PENAL LAW § 70.00 (McKinney 2019); N.Y. CORRECT. LAW § 168-a (McKinney 2019); N.Y. CORRECT. LAW § 168-f (McKinney 2019).

¹¹⁵ See, e.g., N.Y. CORRECT. LAW § 803 (McKinney 2019).

¹¹⁶ See, e.g., N.Y. CORRECT. LAW § 168-t (McKinney 2019).

¹¹⁷ See Feuer, *supra* note 1 ("It is hard to know precisely how many cases like Mr. Harrell's exist across the country.").

¹¹⁸ Matt Moline, *DNA Exoneration: Riley County Judge Overturns Conviction*, TOPEKA CAPITAL-J., Apr. 4, 2003, at C1.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Feuer, *supra* note 1.

¹²³ Eddie Lowery, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3394> [<https://perma.cc/9UEA-LH28>] (last updated Mar. 14, 2019).

¹²⁴ *Id.*

Individuals who are wrongfully convicted of sex offenses and subsequently released from prison, pre-exoneration,¹²⁵ into states with incarceration requirements in their PC DNA testing statutes face bleak prospects for exoneration.¹²⁶ While they may be out of prison, they are often still subject to state and federal SORAs.¹²⁷ These laws regulate the behavior of convicted sex offenders in a variety of ways.¹²⁸ Violation of these regulations put convicted sex offenders at risk of further convictions and re-incarceration, creating a sense of constantly being in custody.¹²⁹ Despite the significant degree of control these laws exert over convicted individuals' lives,¹³⁰ remaining subject to them post-release often does *not* fulfill PC DNA testing statutes' custody incarceration requirements,¹³¹ just as federal courts have mostly found them insufficiently restrictive to satisfy the habeas custody requirement.¹³²

¹²⁵ This means being released as most prisoners are, at the completion of their prison sentence, and without having their conviction vacated, their indictment dismissed, or been pardoned, acquitted upon retrial, or granted PC DNA testing while still serving that sentence. *See, e.g., West & Meterko, supra* note 93, at 718 (defining a “post-conviction DNA exoneration” as “a case where DNA testing results were dispositive of actual innocence and central to vacating the conviction and/or dismissing the indictment. The indictment must have been dismissed, the defendant pardoned on the grounds of innocence or acquitted at a retrial.”).

¹²⁶ *See* sources cited *supra* notes 15–24 and accompanying text.

¹²⁷ As of May 2017, there were 861,837 registered sex offenders in the United States and its territories. *Map of Registered Sex Offenders in the United States and its Territories per 100,000 Population*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD. (May 24, 2017), https://api.missingkids.org/en_US/documents/Sex_Offenders_Map.pdf [<https://perma.cc/2CAQ-7PKY>]. This number is up from 747,708 in early 2012. Jacob Sullum, *Out of 747,408 Registered Sex Offenders, How Many Are Actually Dangerous?*, REASON: HIT & RUN BLOG (Jan. 23, 2012, 3:31 PM), <http://reason.com/blog/2012/01/23/out-of-747408-registered-sex-offenders-h> [<https://perma.cc/D9UR-AGAF>].

¹²⁸ *See, e.g., Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017) (describing how Michigan's SORA is punitive in effect).

¹²⁹ *Id.*

¹³⁰ *See, e.g., Sexual Offender Residence Restrictions, supra* note 110, at 2 (“At least 30 states and hundreds of cities have implemented some form of residence restrictions. In some jurisdictions, court challenges to the constitutionality of residence restrictions have resulted in these laws being overturned.”); *see also* text accompanying *supra* note 86; sources cited *supra* note 126.

¹³¹ *See, e.g., COLO. REV. STAT. ANN. § 18-1-411(4)* (West 2019) (“‘Incarcerated’ means physically housed in a department of corrections facility, a private correctional facility under contract with the department of corrections, or a county jail following a felony conviction, or in a juvenile facility following adjudication for an offense that would have been a felony if committed by an adult, or under parole supervision.”). *Cf. S.C. CODE. ANN. § 17-28-20(7)*

II. ANALYSIS: CUSTODY AND INCARCERATION REQUIREMENTS IN STATE POSTCONVICTION DNA TESTING STATUTES

Unlike the federal habeas statutes¹³³ and about half of the states' generalized PC relief statutes,¹³⁴ most states' PC DNA testing statutes do not have a custody incarceration requirement.¹³⁵ The rationale behind this distinction is simple: because DNA testing has proven itself as a uniquely useful tool for discovering truths previously unknowable in our criminal justice system,¹³⁶ the availability of PC DNA testing should depend on the potential for exoneration rather than on conditions unrelated to actual innocence.¹³⁷ However, a number of states have maintained custody or incarceration requirements in their PC DNA testing statutes.¹³⁸ These states' statutes can be divided into three rough

(2018) (“Incarceration’ means serving a term of confinement in the custody of the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice and does not include a person on probation, parole, or under a community supervision program.”).

¹³² See sources cited *supra* notes 87–90 and accompanying text.

¹³³ See 28 U.S.C. § 2254(a) (2018) (“in custody”); § 2255(a) (“in custody”). The federal habeas custody requirement has been read in a manner more favorable to petitioners over the past half century. See sources cited *supra* notes 79–84 and accompanying text.

¹³⁴ See sources cited *supra* note 77 and accompanying text.

¹³⁵ See Brooks & Simpson, *supra* note 29, at 862–64 (“The statutes of five states [explicitly] permit individuals who are not incarcerated to bring a motion for post-conviction DNA testing. . . . The statutes of twenty-one states are silent on the issue.”) (internal citations omitted). Since 2011, at least four jurisdictions have amended their statutes to remove incarceration requirements. See sources cited *infra* notes 224–27 and accompanying text. Further, Kentucky amended their statute by replacing the strict incarceration requirement with a very broad custody requirement, and Massachusetts passed a PC DNA testing statute with a very broad custody requirement. See *infra* sources cited notes 164–71 and accompanying text.

¹³⁶ See Dist. Att’y’s Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 55 (2009) (“DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.”); see also Swedlow, *supra* note 79, at 360 (“While some form of ‘custody’ is normally a jurisdictional prerequisite in traditional postconviction litigation, a good argument can be made that [PC DNA] testing statutes should not be similarly restricted, insofar as many of these statutes were enacted to correct systemic problems within the criminal justice system.”) (internal citation omitted); Barry Scheck & Peter Neufeld, *DNA and Innocence Scholarship*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 241, 248–49 (Saundra D. Westervelt & John A. Humphrey eds., 2002) (“The results of [DNA] testing have invariably been found to have scientific certainty that easily outweighs the eyewitness identification testimony or other direct or circumstantial proof that led to the original conviction.”).

¹³⁷ See, e.g., sources cited *supra* notes 39–40 and accompanying text.

¹³⁸ See, e.g., sources cited *infra* notes 139–42.

categories: (1) those that strictly require that the petitioner is incarcerated¹³⁹ or “serving a term of imprisonment,”¹⁴⁰ (2) those that afford judges discretion to determine whether a person is in custody,¹⁴¹ and (3) those that either include or exclude parole and probation as sufficient to fulfill an incarceration requirement.¹⁴² While the aforementioned categorization imparts a basic understanding of how different states’ incarceration and custody requirements work, it glosses over the policy problems that belie the inclusion of these requirements in PC DNA testing statutes,¹⁴³ as well as the considerable distinctions between the specifics of various states’ custody and incarceration requirements.¹⁴⁴

PC DNA testing statutes vary quite considerably in how they articulate custody or incarceration requirements.¹⁴⁵ While some custody or incarceration requirements expressly define their scope within their states’ respective PC DNA testing (or general PC relief) statutory schemes,¹⁴⁶ others borrow language directly from one of the federal habeas statutes,¹⁴⁷ despite the distinction between the policies underlying federal habeas and state or local PC DNA testing.¹⁴⁸ Some

¹³⁹ See, e.g., CONN. GEN. STAT. § 54-102kk(a) (2019).

¹⁴⁰ See, e.g., ALA. CODE 1975 § 15-18-200 (2018); W. VA. CODE § 15-2B-14 (2018).

¹⁴¹ See D.C. CODE § 22-4133(a) (2019) (“A person in custody pursuant to the judgment of the Superior Court of the District of Columbia”) (emphasis added); N.H. REV. STAT. ANN. § 651-D:2(I) (2018) (A person in custody pursuant to the judgment of the court”) (emphasis added).

¹⁴² See, e.g., COLO. REV. STAT. ANN. § 18-1-411(4) (West 2019) (“‘Incarcerated’ means physically housed in a department of corrections facility, a private correctional facility under contract with the department of corrections, or a county jail following a felony conviction, or in a juvenile facility following adjudication for an offense that would have been a felony if committed by an adult, or under parole supervision.”). Cf. S.C. CODE ANN. § 17-28-20(7) (2018) (“‘Incarceration’ means serving a term of confinement in the custody of the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice and does not include a person on probation, parole, or under a community supervision program.”). This distinction evinces the tension between various states’ PC DNA testing statutes’ incarceration requirements and the need for uniformity in PC DNA testing.

¹⁴³ See sources cited *infra* 196–215 and accompanying text.

¹⁴⁴ See *supra* Section I.A.

¹⁴⁵ *Id.*

¹⁴⁶ See sources cited *supra* note 142.

¹⁴⁷ See sources cited *infra* notes 159–63.

¹⁴⁸ While federal habeas is a “process review” of the constitutional and procedural soundness of one’s original trial and direct appeals, PC DNA testing is meant as a review of the

state PC DNA testing statutes simply express their custody requirement with one of three words—imprisonment, incarceration, or custody—without any explanation or definition of these terms.¹⁴⁹

A. *Washington: The Ambiguity of “Imprisonment”*

In *State v. Slattum*,¹⁵⁰ the Washington Court of Appeals grappled with the ambiguity of an undefined term in the Washington PC DNA testing statute’s incarceration requirement.¹⁵¹ The court found that the word “imprisonment” in Washington’s PC DNA testing statute¹⁵² was ambiguous because, among other reasons, it was not defined in the relevant statutory scheme,¹⁵³ dictionary definitions were not helpful,¹⁵⁴ and the parties offered competing authority, legislative history, and plain meaning arguments.¹⁵⁵ It consequently applied the rule of lenity¹⁵⁶

facts underlying that original conviction. See Lee Kovarsky, *Custodial and Collateral Process: A Response to Professor Garrett*, 98 CORNELL L. REV. ONLINE 1, 17 n.69 (2013); David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1055–60 (2010).

¹⁴⁹ See, e.g., CAL. PENAL CODE § 1405 (West 2019) (“imprisonment”); WASH. REV. CODE § 10.73.170(1) (2019) (“imprisonment”). A number of these also include “or awaiting execution of a sentence of death,” presumably to ensure that those who have been sentenced to death are not left out of a statutory scheme meant to help those who have been wrongfully convicted and sentenced to harsh punishment. See ALA. CODE 1975 § 15-18-200 (2018); see also 42 PA. CONS. STAT. § 9543.1(a)(1) (2017) (“serving a term of imprisonment or awaiting execution because of a sentence of death”). Cf. §9543(a)(1)(i) (“currently serving a sentence of imprisonment, probation or parole for the crime”).

¹⁵⁰ 295 P.3d 788 (Wash. Ct. App. 2013), cert. denied, 308 P.3d 643 (Table) (2013).

¹⁵¹ *Slattum*, 295 P.3d 788.

¹⁵² WASH. REV. CODE § 10.73.170(1) (2019).

¹⁵³ *Slattum*, 295 P.3d at 793.

¹⁵⁴ *Id.* at 793–94.

¹⁵⁵ *Id.* at 797. Some insight as to this ambiguity can be gained by looking at Supreme Court jurisprudence regarding the “in custody” jurisdictional requirement for habeas litigation. See, e.g., sources cited *supra* notes 81–86 and accompanying text. Black’s Law Dictionary defines “imprisonment” as “[t]he act of confining a person, esp. in a prison . . . [a]lso termed incarceration[,] . . . the quality, state, or condition of being confined[,] . . . [or t]he period during which a person is not at liberty.” *Imprisonment*, BLACK’S LAW DICTIONARY 875 (10th ed. 2014). It defines “incarceration” as “[t]he act or process of confining someone” and provides “imprisonment” as a synonym. *Incarceration*, BLACK’S LAW DICTIONARY 878 (10th ed. 2014). It defines “custody” as “[t]he care and control of a thing or person for inspection, preservation, or security,” and also provides a definition of “constructive custody” within that definition, which

and construed the phrase “term of imprisonment” in the statute favorably for the petitioner, as including the community custody portion of the defendant’s sentence.¹⁵⁷ The court also emphasized that the procedural purpose of the “imprisonment” requirement was dwarfed by the “onerous” substantive criteria the statute requires one to meet in order to receive relief.¹⁵⁸

B. D.C. and New Hampshire: Echoes of Habeas

Both the District of Columbia and New Hampshire’s PC DNA testing statutes require petitioners for testing to be “in custody pursuant to the judgment of” a court.¹⁵⁹ However, neither of these states’ courts have ruled on exactly what this phrase means.¹⁶⁰ The phrase itself comes from the federal habeas statute for individuals convicted of crimes by state courts,¹⁶¹ and echoes that statute’s “in custody” requirement.¹⁶² To that end, it would be prudent to presume that these two custody requirements should be read similarly to the federal custody

is “[c]ustody of a person (such as a parolee or probationer) whose freedom is controlled by legal authority but who is not under direct physical control.” *Custody*, BLACK’S LAW DICTIONARY 467 (10th ed. 2014). “The period during which a person is not at liberty,” from the definition of “imprisonment,” sounds suspiciously like *Hensley*’s definition of the habeas custody requirement: being subject to a “restraint [on liberty] ‘not shared by the public generally,’” *Hensley v. Municipal Ct.*, 411 U.S. 345, 351 (1973) (quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963)); *Imprisonment*, BLACK’S LAW DICTIONARY 875 (10th ed. 2014).

¹⁵⁶ *Slattum*, 295 P.3d at 797–99.

¹⁵⁷ *Id.* at 790.

¹⁵⁸ *See id.* at 799 (“We note also that underpinning the State’s position on this issue is its prediction that allowing persons on community custody to petition for DNA testing would cause unreasonable expenditure of public funds. But the State ignores the statute’s strict substantive requirements. . . . ‘In contrast to the state’s lenient procedural requirements, its substantive standard is onerous.’”) (citing *State v. Riofta*, 209 P.3d 467, 472 (Wash. 2009)).

¹⁵⁹ *See* D.C. CODE § 22-4133(a) (2019) (“A person in custody pursuant to the judgment of the Superior Court of the District of Columbia”) (emphasis added); N.H. REV. STAT. ANN. § 651-D:2(I) (2018) (“A person in custody pursuant to the judgment of the court”) (emphasis added).

¹⁶⁰ *See* sources cited *infra* note 161 and accompanying text; *see also* sources cited *infra* note 163 and accompanying text.

¹⁶¹ 28 U.S.C. § 2254 (2018) (“[A] person in custody pursuant to the judgment of a State court”).

¹⁶² *Id.*; *see also* sources cited *supra* notes 75–79 and accompanying text.

requirement. There is, however, little precedent supporting or contradicting this proposition.¹⁶³

C. *Massachusetts and Kentucky: Contrasting Broad Custody Requirements*

Among the states that still have incarceration requirements, Massachusetts and Kentucky stand out in their broadening of the requirement to anything remotely resembling “custody,” even more so than the modern reading of the custody requirement in the federal habeas statutes.¹⁶⁴ Despite its arguably progressive reputation, Massachusetts was the second-to-last state to enact a PC DNA testing statute.¹⁶⁵ This allowed Massachusetts to survey the landscape and tailor its statute more carefully. To this end, Massachusetts’s PC DNA testing statute requires that a petitioner “is incarcerated in a state prison, house of correction, is on parole or probation or [has had their] liberty . . . otherwise restrained as the result of a conviction.”¹⁶⁶ While

¹⁶³ In one case, the United States District Court for the District of Columbia held that D.C. Code § 22-4133(a), which specifically requires that a petitioner be “in custody pursuant to the judgment of the *Superior Court of the District of Columbia*” in order to receive PC DNA testing, does not apply to individuals in custody pursuant to a judgment of a *federal* court. *United States v. Clipper*, 179 F. Supp. 3d 110, 118 n.5 (D.D.C. 2016) (emphasis added).

¹⁶⁴ See MASS. GEN. LAWS ANN. ch. 278A, § 2 (West 2018); KY. REV. STAT. ANN. § 422.285(5)(f) (West 2018). Cf. sources cited *supra* notes 83–84 and accompanying text (discussing the relaxation of the custody requirement in federal habeas proceedings over the past half century).

¹⁶⁵ See *DNA Testing Access Law, Prisoners in Massachusetts*, BRANDEIS U.: SCHUSTER INST. FOR INVESTIGATIVE JOURNALISM, <https://www.brandeis.edu/investigate/criminal-justice/dna-access-law-ma.html> [<https://perma.cc/2GZP-G9UB>] (last updated Feb. 10, 2012). This delay may have been partially due to Massachusetts courts’ amenability to granting DNA testing via the state’s general post-conviction relief pathway. See Theodore Tibbitts, Note, *Post-Conviction Access to DNA Testing: Why Massachusetts’s 278A Statute Should Be the Model for the Future*, 36 B.C. J.L. & SOC. JUST. 355, 384 (2016) (citing Rachel Steinback, Comment, *The Fight for Post-Conviction DNA Testing Is Not Yet Over: An Analysis of the Eight Remaining “Holdout States” and Suggestions for Strategies to Bring Vital Relief to the Wrongfully Convicted*, 98 J. CRIM. L. & CRIMINOLOGY 329, 345 (2008)).

¹⁶⁶ MASS. GEN. LAWS ANN. ch. 278A, § 2 (West 2018).

this is not a complete rebuke of the custody requirement, it seems to broaden it short of abandonment.¹⁶⁷

In 2013, Kentucky amended its PC DNA testing statute to similarly broaden its custody requirement.¹⁶⁸ While this amendment also rid the statute of its previous “death sentences only” requirement, it was replaced with a “crime of conviction” requirement, which still restricts testing to individuals convicted of violent crimes.¹⁶⁹ Thus, despite similarly broad custody requirements in Massachusetts and Kentucky’s respective PC DNA testing statutes, there is a stark distinction between the degree of access to justice that the statutes each provide.¹⁷⁰ This distinction illustrates that while incarceration requirement reform is a crucial element of reforming state PC DNA statutes, it is not a panacea.

¹⁶⁷ See *Commonwealth v. Clark*, 34 N.E.3d 1, 15 (Mass. 2015) (“Given [the Massachusetts Legislature’s] compelling interest in remedying wrongful convictions of factually innocent persons, . . . it is entirely appropriate that we construe the language of [Massachusetts’s PC DNA testing statutes] in a manner that is generous to the moving party.”) (internal citations omitted); Tibbitts, *supra* note 165, at 386 (“278A is open to any who have had their freedom constrained by the criminal justice system, be it through probation, parole, or sex offender registration laws.”). Another signal that the Massachusetts Legislature wanted its incarceration requirement to be broadly construed is its use of the past tense in its final clause, as opposed to the focus on petitioners’ current circumstances and use of the present tense in many other states’ incarceration requirements. See MASS. GEN. LAWS ANN. ch. 278A, § 2 (West 2018) (“or whose liberty *has been* otherwise restrained as the result of a conviction”) (emphasis added). Cf. KY. REV. STAT. ANN. § 422.285(5)(f) (West 2018) (“*is still* incarcerated or on probation, parole, or other form of correctional supervision, monitoring, or registration”) (emphasis added); CAL. PENAL CODE § 1405(a) (West 2019) (“*is currently* serving a term of imprisonment”) (emphasis added); S.C. CODE. ANN. § 17-28-30(A) (West 2018) (“*is currently* incarcerated”) (emphasis added).

¹⁶⁸ 2013 Ky. Acts 411–12 (codified at KY. REV. STAT. ANN. § 422.285(1)(a) (West 2019)) (“a person who was convicted of a capital offense, a Class A felony, a Class B felony, or any offense designated a violent offense under KRS 439.3401”); KY. REV. STAT. ANN. § 422.285(5)(f) (requiring that “[t]he petitioner is still incarcerated or on probation, parole, or other form of correctional supervision, monitoring, or registration for the offense to which the DNA relates”), amending 2007 Ky. Acts 488–90 (removing the “sentenced to death for a capital offense” requirement and replacing it with a broader scope of applicable crimes of conviction and a requirement that “petitioner is still incarcerated or on probation, parole, or other form of correctional supervision, monitoring, or registration”) (emphasis added).

¹⁶⁹ See 2013 Ky. Acts 411–12 (replacing KY. REV. STAT. ANN. § 422.285(1)(a)’s “convicted of and sentenced to death for a capital offense” requirement with “convicted of a capital offense, a Class A felony, a Class B felony, or any offense designated a violent offense under KRS 439.3401”).

¹⁷⁰ See MASS. GEN. LAWS ANN. ch. 278A, § 2 (West 2018); KY. REV. STAT. ANN. § 422.285(1)(a), (5)(f) (West 2018).

Each PC DNA statute must be viewed as a whole in order to determine its ultimate effect on access to justice in the Innocence Era.¹⁷¹

D. *Mississippi, Utah, and Michigan: Idiosyncratic Incarceration and Custody Requirements*

Some states have intertwined incarceration requirements with other limitations on PC DNA testing.¹⁷² Each of these permutations attempt to balance competing concerns in the PC DNA testing arena, namely cost, finality, and justice.¹⁷³ Thus, they offer insight into the common aims behind the various procedural limitations states place on PC DNA testing.¹⁷⁴

Mississippi's PC relief statute provides the state's only avenue for PC DNA testing.¹⁷⁵ While the Mississippi statute grants individuals who are out on parole or probation, or registered as sex offenders a right to file a motion for DNA testing, that right expires, or "sunset," for those who remain subject to sex offender registration after five years.¹⁷⁶ This

¹⁷¹ See Barry Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 709 (2017) (noting that we are "twenty-seven years into an 'innocence era' triggered by the advent of post-conviction DNA testing").

¹⁷² See, e.g., MICH. COMP. LAWS ANN. § 770.16(1) (West 2018) (differentiating requirements for testing based on whether one was convicted before Jan. 1, 2001, or on or after that date); MISS. CODE ANN. § 99-39-5(1) (West 2019) (requiring that those "subject to sex offender registration" file within "the period of the registration or [within] the first five (5) years of registration, whichever is the shorter period"); UTAH CODE ANN. § 78B-9-301(8) (West 2018) (requiring both indigence and "imprisonment" for the state to pay for testing).

¹⁷³ See generally Steinback, *supra* note 165, at 350.

¹⁷⁴ See, e.g., sources cited *infra* notes 184–215 and accompanying text.

¹⁷⁵ MISS. CODE ANN. § 99-39-3 (West 2019).

¹⁷⁶ MISS. CODE ANN. § 99-39-5(1) ("Any person sentenced by a court of record of the State of Mississippi, including a person currently incarcerated, civilly committed, on parole or probation or subject to sex offender registration for the period of the registration or for the first five (5) years of the registration, whichever is the shorter period, may file . . . a motion to request forensic DNA testing of biological evidence . . .") Also, the lack of a comma between "on parole or probation" and "or subject to sex offender registration" creates an ambiguity as to whether "for the period of the registration or for the first five (5) years of the registration" refers only to sex offender registration, or also refers to parole or probation registration, in which case the five year sunset period would apply not only to individuals subject to sex offender registration for more than five years, but also to those subject to parole or probation for more than five years. *Id.*

sunset provision bars people from receiving DNA testing solely because they did not file for testing quickly enough.¹⁷⁷ A significant part of the problem stems from Mississippi's decision to codify its state-granted right to PC DNA testing in the same set of statutes that grant general PC relief.¹⁷⁸ If the state had codified the right to PC DNA testing separately from the general right to PC relief, it could have more easily created a broader right to the former than the latter.¹⁷⁹ However, by not doing so, it has limited the ability of Mississippians wrongly subjected to sex offender registration to attack their convictions with the full force of DNA testing, highlighting the problems with both incarceration requirements and sunset provisions.¹⁸⁰

While Utah does not require a person to be incarcerated to petition for PC DNA testing, it does require that they are both indigent and "imprison[ed]" for the state to pay for testing.¹⁸¹ While this unique hybrid restriction may not seem particularly onerous at first, it may harm wrongly convicted individuals who have been released from prison, are subject to sex offender registration, and have been unable to have their case accepted by an innocence organization.¹⁸² This is because registrants are likely to be unable to pay for testing on their own, as they often have difficulty finding work and supporting themselves given the many restrictions imposed on them by registration laws.¹⁸³

¹⁷⁷ There are many potential reasons why one subject to sex offender registration might not pursue PC DNA testing relief within five years: lengthy backlogs at the various innocence organizations around the country, emotional or mental distress, financial insolvency, sheer ignorance of the right, or any combination of those reasons that could add up to five years. It is no coincidence that all of these possibilities are either functions of, or exacerbated by, long stretches of incarceration.

¹⁷⁸ See *generally*, MISS. CODE ANN. § 99-39-1 to -29.

¹⁷⁹ See *generally* MASS. GEN. LAWS ANN. ch. 278A (2016 & Supp. 2017).

¹⁸⁰ See MISS. CODE ANN. § 99-39-5(1).

¹⁸¹ See UTAH CODE ANN. § 78B-9-301(7)(a)(iii), (8) (West 2018).

¹⁸² States often rely on innocence organizations to provide valuable screening and cost-sharing functions, easing judicial administration costs. ALIZA KAPLAN ET AL., HOUSE BILL 3206: ASSOCIATED COSTS & RESOURCES, OR. INNOCENCE PROJECT, <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/55878> [<https://perma.cc/U4M2-QV97>] (last visited Feb. 6, 2019).

¹⁸³ See Feuer, *supra* note 1.

Michigan's PC DNA testing statute had both a filing deadline and a conviction deadline until its most recent amendment.¹⁸⁴ While this amendment removed the statute's filing deadline, it had no effect on the statute's conviction deadline of January 8, 2001.¹⁸⁵ The conviction deadline¹⁸⁶ complicates the statute's applicability by differentiating eligibility requirements for those convicted before the date of Michigan's first PC DNA testing statute's enactment and those convicted on or after that date.¹⁸⁷ It does this by conditioning testing for those convicted prior to the law's initial enactment date on an incarceration requirement, while simultaneously restricting testing for individuals convicted on or after that date to those individuals who have already had inconclusive DNA testing and for whom "testing with current DNA technology is likely to result in conclusive results."¹⁸⁸ If that seems confusing, don't worry—it is.

¹⁸⁴ See 2011 Mich. Pub. Acts 212, *amended by* 2015 Mich. Pub. Acts 229 (compiled at MICH. COMP. LAWS § 770.16 (2018)) (removing the Jan. 1, 2016, filing deadline for all petitions).

¹⁸⁵ *Id.* This is the date Michigan's first PC DNA testing statute went into effect. 2000 Mich. Pub. Acts 402.

¹⁸⁶ Michigan's conviction deadline has been in effect since the PC DNA testing statute was first enacted. See 2000 Mich. Pub. Acts 402, § 16 ("a defendant convicted of a felony at trial *before the effective date of the amendatory act that added this section*") (emphasis added). It has become more pronounced each time the statute has been amended to extend its filing deadline. See 2015 Mich. Pub. Acts 229 (having no filing deadline but differentiating between the availability of testing for those convicted before January 8, 2001, and those convicted on or after January 8, 2001), *amending* 2011 Mich. Pub. Acts 212 ("A petition under this section shall be filed not later than January 1, 2016."), *amending* 2008 Mich. Pub. Acts 410 ("The petition shall be filed not later than January 1, 2012."), *amending* 2005 Mich. Pub. Acts 4 ("The petition shall be filed not later than January 1, 2009."), *amending* 2000 Mich. Pub. Acts 402 ("The petition shall be filed not later than January 1, 2006."). However, the conviction deadline became particularly distinct in 2008, when Michigan began allowing defendants convicted on or after January 8, 2001, to petition for testing, *whether or not* they were still incarcerated, but only if they'd already had inconclusive DNA testing and current DNA testing was likely to be conclusive. 2008 Mich. Pub. Acts 410.

¹⁸⁷ See MICH. COMP. LAWS § 770.16(1).

¹⁸⁸ *Id.*

E. *Pennsylvania: A Recipe for Reform*

Pennsylvania’s PC DNA testing statute is embedded in its overall statutory PC relief scheme.¹⁸⁹ While that scheme generally allows those “currently serving a sentence of imprisonment, probation or parole for the crime” to petition the court for relief,¹⁹⁰ the PC DNA testing statute had—until recently—a narrower incarceration requirement, under which only those “serving a term of imprisonment or awaiting execution because of a sentence of death” may petition the court for testing.¹⁹¹

At the end of 2018, however, Pennsylvania passed a series of criminal justice reform bills, one of which vastly expanded access to PC DNA testing.¹⁹² Among other changes, Act 147 of 2018 completely removed the Pennsylvania PC DNA testing statute’s custody requirement.¹⁹³ These reforms brought Pennsylvania in line with most other states by ratcheting down the procedural restrictions placed on people seeking to use uniquely powerful DNA evidence to prove their innocence.¹⁹⁴

III. PROPOSAL: REMOVE CUSTODY AND INCARCERATION REQUIREMENTS FROM POSTCONVICTION DNA TESTING STATUTES

Because the role of custody and incarceration requirements is directly at odds with the aim of PC DNA testing, those requirements should be completely removed from all PC DNA testing statutes. While the limited, process-based aim of federal habeas may be best served by

¹⁸⁹ See generally 42 PA. CONS. STAT. §§ 9543.1, 9541–46 (2017).

¹⁹⁰ See 42 PA. CONS. STAT. § 9543(a)(1)(i).

¹⁹¹ See 2002 Pa. Laws 109, amended by 2018 Pa. Laws 147.

¹⁹² Pres Release, Commonwealth of Pa., Governor Wolf Signs Bipartisan Criminal Justice Reform Bills into Law (Oct. 24, 2018), <https://www.governor.pa.gov/governor-wolf-signs-bipartisan-criminal-justice-reform-bills-law> [<https://perma.cc/7P2P-2DEF>].

¹⁹³ *Id.* (“The new law also allows those who plead guilty to access testing, requires the commonwealth to identify all physical evidence in a case, allows testing when new DNA testing technology becomes available, and matches DNA profiles in CODIS, the FBI’s DNA database.”); see also 42 PA. CONS. STAT. § 9543.1(a)(1) (2019).

¹⁹⁴ See sources cited *supra* notes 135, 184; sources cited *infra* notes 224–27 and accompanying text.

procedural bars like the jurisdictional “in custody” requirement,¹⁹⁵ the factual error-correction aim of PC DNA testing should not be limited by procedural bars unrelated to the merits of innocence. In fact, the significant substantive requirements one must fulfill in order to be granted PC DNA testing already serve those purposes.¹⁹⁶ In order to best fulfill the criminal justice reform goals underlying the compensation of the wrongfully convicted, we must identify more wrongfully convicted people to compensate. We can only do this by removing procedural bars to PC DNA testing that are unrelated to the merits of innocence—like all custody requirements—and subsequently exonerating more wrongfully convicted people.

The custody requirements in PC DNA testing statutes are often justified with the same reasons as all procedural limits on access to PC DNA testing.¹⁹⁷ These can be boiled down to cost and finality, and primarily derive from the debate over state prisoners’ access to federal habeas.¹⁹⁸ Comparing the aims of state PC DNA testing statutes with federal habeas provides a framework to both discern whether the same concerns are actually implicated in both contexts and, if they are, whether the incarceration requirement addresses those concerns.¹⁹⁹

¹⁹⁵ This role is due to DNA testing’s “unparalleled ability.” See *Dist. Att’y’s Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55 (2009).

¹⁹⁶ *State v. Riofta*, 209 P.3d 467, 473 n.4 (Wash. 2009) (en banc) (noting the legislature’s “intent to restrict the availability of postconviction DNA testing to a limited class of extraordinary cases where the results could exonerate a person who was wrongfully convicted of a crime,” rather than “ensuring a defendant had a fair trial,” and that the statute’s “purpose is to provide a remedy for those who were wrongfully convicted *despite* receiving a fair trial”); Paul G. Cassell, *Can We Protect the Innocent Without Freeing the Guilty? Thoughts on Innocence Reforms that Avoid Harmful Tradeoffs*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* 264, 264 (Daniel Medwed ed., 2017) (“The truly innocent will benefit in a system that values substance over procedure.”); Garrett, *supra* note 42, at 1709 (“[M]ost criminal cases do not often both have identity as a disputed issue and also involve relevant biological evidence. Currently, a narrow category of prisoners can be exonerated pursuant to a [PC DNA-based] innocence claim.”).

¹⁹⁷ Procedural limits on access to PC DNA testing are limits that do not go to the merits of whether the testing can prove innocence. See sources cited *supra* notes 46–55 and accompanying text.

¹⁹⁸ See sources cited *supra* notes 56–58 and accompanying text.

¹⁹⁹ This is because incarceration requirements in PC DNA testing statutes directly descend from the “in custody” jurisdictional requirement of federal habeas. See sources cited *supra* notes 78–80 and accompanying text.

A. *The Incongruity of Custody and Incarceration Requirements in PC DNA Testing Statutes: Process Versus Proof*

The non-fiscal aims of finality of criminal judgments include reinforcing criminal law's deterrent and educational functions, granting victims closure, incentivizing defense attorneys to put on the best defenses possible at trial, and ensuring that credible PC petitioners' claims are not drowned out by a flood of relatively frivolous claims.²⁰⁰ These reasons for finality all stem from the notion that once a criminal defendant has had a trial court decide the questions of fact and law surrounding her alleged conduct, and then had the opportunity to appeal those findings all the way up to the United States Supreme Court, she has exhausted all of the direct remedies that our judicial system typically affords.²⁰¹

The emphasis on the finality of criminal convictions developed alongside the process-based approach to post-trial jurisprudence, and the two "acutely linked" doctrines have been primary influences on the narrowing of access to federal habeas relief from the 1970s through today.²⁰² After states adopted the process approach,²⁰³ the PC DNA testing revolution occurred, leading to the widespread passage of DNA testing statutes.²⁰⁴ However, these DNA testing statutes often maintained many of the process-based features of the federal habeas-inspired general state PC review statutes that preceded them, including the "in custody" requirement, which was codified by many states as an incarceration requirement.²⁰⁵

²⁰⁰ Sarah Lucy Cooper, *Postconviction Access to DNA Testing and Clemency as a "Fail-Safe": The Implications of Judicial Fidelity to the Legal Process Vision*, 64 DRAKE L. REV. 1, 12 (2016).

²⁰¹ This is often referred to as "a full and fair opportunity." See *id.* at 13 (citing Gabriel A. Carrera, Note, *Section 1983 & the Age of Innocence: The Supreme Court Carves a Procedural Loophole for Post-Conviction DNA Testing in Skinner v. Switzer*, 61 AM. U. L. REV. 431, 440 (2011)); Nancy J. King, *The Judicial System: Appeals and Postconviction Proceedings*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 217, 221–22 (Redlich et al. eds., 2014).

²⁰² Cooper, *supra* note 200, at 11–12; King, *supra* note 201, at 222; Kovarsky, *supra* note 56, at 663.

²⁰³ King, *supra* note 201, at 222.

²⁰⁴ See sources cited *supra* note 36 and accompanying text.

²⁰⁵ See *supra* Section I.A.2; King, *supra* note 201, at 222; Place, *supra* note 79, at 303 n.21.

Dion Harrell's case embodies the problem with maintaining process-related bars on review in PC DNA testing statutes designed to spot and remedy wrongful convictions.²⁰⁶ While discussing Mr. Harrell's case in the context of amending the incarceration requirement out of New Jersey's PC DNA testing statute, New Jersey State Assemblyman Declan O'Scanlon decried the law as "an awful contradiction," the amendment of which "would increase the certainty of our justice system—freeing the innocent and increasing the likelihood that the truly guilty will be prosecuted."²⁰⁷

Despite this distinction, some proponents of limiting PC DNA testing statutes with procedural bars unrelated to innocence still cite traditional finality concerns.²⁰⁸ However, in the context of using DNA testing to review the factual accuracy of convictions, many of these concerns are inapplicable.²⁰⁹ For instance, the deterrence, rehabilitation, and education functions of the criminal justice system, as well as true closure for victims, require the conviction of *actual* perpetrators.²¹⁰ Thus, putting stock in the finality of criminal judgments where DNA testing could completely exonerate the convicted defendant undermines these aims by allowing actual perpetrators to run free and possibly commit more crimes while innocent people remain behind bars.²¹¹

²⁰⁶ See *supra* Introduction.

²⁰⁷ Kathleen Hopkins, O'Scanlon Pushes DNA Testing for Freed Inmates, ASBURY PARK PRESS NJ (Jan. 14, 2015, 8:46 PM), <https://www.app.com/story/news/local/monmouth-county/2015/01/14/oscanlon-pushes-dna-testing-freed-inmates/21775231> [<https://perma.cc/T6AX-BVK6>].

²⁰⁸ See Steinback, *supra* note 165, at 350. This argument was put forth in support of the limitations in Michigan's 2000 PC DNA testing statute. See S. Fiscal Agency, Bill Analysis, 2000 MI S.B. 1395 (S-2), at 4 (Nov. 27, 2000) ("The bill would protect the interests of crime victims . . . [T]he bill's time limit would allow closure for victims, who should not be subjected to the endless possibility that an inmate could be [sic] someday seek DNA testing and be released."). But see *id.* ("Under existing court rules, there is no deadline on motions for PC relief when a defendant discovers new evidence. Genetic material, which can be far more reliable than other types of evidence, should not be treated differently.").

²⁰⁹ See sources cited *infra* notes 210–11 and accompanying text.

²¹⁰ See James R. Acker, *Taking Stock of Innocence: Movements, Mountains, and Wrongful Convictions*, 33 J. CONTEMP. CRIM. JUST. 8, 17 (2016); Garrett, *supra* note 42, at 1704 ("[D]eterrence itself is undermined when the innocent continue to be punished while the guilty go free.").

²¹¹ The most powerful support for this point comes from the numbers behind the exonerations themselves. See sources cited *supra* notes 32–33 and accompanying text.

States that have maintained procedural bars to PC DNA testing, such as custody requirements, have not taken these arguments into account.²¹² Thus, a counterintuitive hesitance to broaden the scope of PC DNA testing is likely one explanation as to why, despite Michigan's recent abandonment of the filing deadline in its PC DNA testing statute, there has never been a successful challenge to the law's conviction deadline and incarceration requirements.²¹³ The 2015 Michigan Senate Fiscal Analysis of the most recent amendment to the state's PC DNA testing law explicitly notes the state's primary goals in removing the filing deadline: providing the wrongfully convicted "meaningful access to DNA testing" and identifying and prosecuting actual perpetrators.²¹⁴ However, the Analysis does not address the conviction deadline and

Academics, legislators, the wrongly convicted, and crime victims are in agreement about the import of this point. See Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 607 (2002) ("Testing itself has no impact whatsoever on victims, witnesses, or complainants, unless it actually exonerates an innocent individual. The request does not implicate any of their interests in repose or privacy since the question of the relevance of the evidence to the claim of innocence can be decided without reference to testimony or the submission of any further evidence from victims or other witnesses. And if the testing demonstrates innocence, neither the State's nor the victim's interests in retribution, deterrence, or incapacitation are served by continued incarceration."); Steinback, *supra* note 165, at 353 ("[V]ictims would want to know that the true perpetrators of these heinous crimes are in prison and not sitting safely at home, planning to act again."); Garrett, *supra* note 42, at 1708 ("One must also consider the great social cost arising from cases in which the actual perpetrator continues to commit additional serial crimes, as many did in the cases for which individuals were exonerated by post-conviction DNA testing."); see also S. Fiscal Agency, Bill Analysis, 2000 MI S.B. 1395, at 4 (S-2) (Nov. 27, 2000) ("The one-year time limit [in the 2000 bill] would not serve the cause of justice or the interests of anyone, including victims, particularly if it meant that the actual perpetrator was on the streets while an innocent person was behind bars."). See generally JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TORNEO, *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* (2009) (Ronald Cotton was wrongly convicted of raping Jennifer Thompson-Cannino, partly on the basis of her eyewitness identification testimony. Since his exoneration, the two have travelled the country together talking about their experiences and wrote this book as a result of those experiences and conversations.).

²¹² See, e.g., *supra* Part II.

²¹³ See 2000 Mich. Pub. Acts 402; 2005 Mich. Pub. Acts 4; 2008 Mich. Pub. Acts 410; 2011 Mich. Pub. Acts 212; 2015 Mich. Pub. Acts 229. One possible justification for limiting relief to re-testing for petitioners convicted on or after January 1, 2001 could be the belief that individuals convicted on or after that date had the opportunity to do DNA testing in their initial investigation and period of trial defense, and those who chose not to take advantage of that opportunity forfeited their right to PC DNA testing.

²¹⁴ S. Fiscal Agency, Bill Analysis, 2015 MI S.B. 151, at 2 (Dec. 11, 2015).

accompanying incarceration requirement. Those two limitations bar claims that may otherwise be meritorious on the substantive question of whether DNA testing could prove innocence, contradicting the underlying values that were explicitly stated as the motivation for removing the filing requirement.²¹⁵

B. *The Fiscal Costs of Removing Incarceration Requirements: Critical to Criminal Justice Reform and Likely Less than Expected*

PC DNA testing statutes are enacted to spur criminal justice reform.²¹⁶ While legislators typically express concern about the administrative, judicial, and prosecutorial costs associated with expanding access to PC DNA testing, those costs are vastly overstated. Where there are increased costs—be they associated with administering PC DNA testing statutes or compensating more exonerees—those costs incentivize criminal justice reform among all the relevant actors in the system: police, prosecutors, courts, and even potential criminals.²¹⁷ This, in turn, saves the municipality money by preventing more, future wrongful convictions and subsequent payouts. Finally, by providing for the exoneration of individuals who have been released from incarceration but remain on sex offender registries, municipalities will decrease the cost of maintaining their sex offender registration and notification systems.²¹⁸

The most common cost-related concern about expanding access to PC DNA testing is that administrative, prosecutorial, and judicial costs will rise due to a flood of litigation.²¹⁹ This argument is belied by decades of experience.²²⁰ State fiscal analyses demonstrate that the

²¹⁵ See *id.*

²¹⁶ See Deborah F. Buckman, Annotation, *Validity, Construction, and Application of State Statutes and Rules Governing Requests for Postconviction DNA Testing*, 72 A.L.R.6th 227, at *2 (2012).

²¹⁷ See sources cited *infra* note 235 and accompanying text.

²¹⁸ See sources cited *infra* note 239 and accompanying text.

²¹⁹ See sources cited *supra* note 59; see also Garrett, *supra* note 42, at 1704 (“[A]nother concern could be the cost of relitigating judgments.”).

²²⁰ See Garrett, *supra* note 42, at 1708–09 (“Not only are the costs of litigating claims of innocence far less than the great sums we already expend on far more time-consuming and resource-intensive claims, but there is also little danger of the floodgates opening such that

floodgates have not opened as states have enacted PC DNA testing statutes.²²¹ For example, the Michigan Senate Fiscal Agency’s own 2015 legislative analysis of the most recent amendments to their PC DNA testing statute acknowledges that, after nearly fifteen years of providing statutory access to PC DNA testing, “the program of petitioning the court for PC DNA testing has proven not to be a burden on Michigan’s court system.”²²² Further, not one of the first thirty-seven states without an incarceration requirement has reported a flood of DNA testing litigation.²²³ In the past few years, at least four more jurisdictions—Montana,²²⁴ New Jersey,²²⁵ Oregon,²²⁶ and Rhode Island²²⁷—have

courts would be inundated with innocence claims. . . . [M]ost criminal cases do not often both have identity as a disputed issue and also involve relevant biological evidence.”)

²²¹ Compare H. Fiscal Agency, Legislative Analysis, 2000 MI S.B. 1395 (Dec. 6, 2000) (“The bill’s five-year deadline could lead to the filing of numerous unwarranted petitions. . . . Instead of the careful and deliberate screening process that is planned, a flood of petitions could be filed simply to meet the bill’s timetable.”), with S. Fiscal Agency, Bill Analysis, 2015 MI S.B. 151, at 2 (Dec. 11, 2015) (“[T]he program of petitioning the court for postconviction DNA testing has proven not to be a burden on Michigan’s court system. . . . [T]he [Cooley] Innocence Project had screened more than 5,000 cases since 2001, but had filed only 27 petitions for DNA testing as of March 2015.” The Analysis continues, “While some prisoners had filed petitions on their own, the majority of postconviction DNA testing cases have been carefully screened and vetted by the Cooley Innocence Project and there is no evidence that petitions for DNA testing have burdened the courts.”). See also Steinback, *supra* note 165, at 336 n.37 (“The concerns that post-conviction DNA testing statutes are overbroad and will ‘open[] the floodgates’ have thus far failed to materialize. While all currently available evidence is anecdotal, no state has reported a floodgate crisis. In fact, the willingness of states to extend or eliminate sunset provisions implies quite the contrary: that the system can withstand the cases it is receiving.”). Interestingly, in the Michigan Senate Fiscal Agency’s 2000 Bill Analysis of the state’s first PC DNA testing statute, the floodgates argument is raised in support for both broader and narrower access to DNA testing. See S. Fiscal Agency, Bill Analysis, 2000 MI S.B. 1395 (S-2) (Nov. 27, 2000), at 4 (provisions ensuring that DNA testing decisions “were not handled arbitrarily or inconsistently” would also make sure “that the courts were not flooded with meritless petitions”). Cf. *id.* at 5 (“The bill’s 365 day deadline could lead to the filing of numerous unwanted petitions. . . . Instead of the careful and deliberate screening process that is planned, a flood of petitions could be filed simply to meet the bill’s timetable.”).

²²² S. Fiscal Agency, Bill Analysis, 2015 MI S.B. 151, at 2 (Dec. 11, 2015).

²²³ ALIZA KAPLAN ET AL., *supra* note 182.

²²⁴ Thompson, *supra* note 2; see also 2015 Mont. Laws 313 (codified at MONT. CODE ANN. § 46-21-110 (2019)), amending 2003 Mont. Laws 79 (removing the phrase “who is serving a term of incarceration” from various subsections, among other relevant modifications).

²²⁵ Feuer, *supra* note 1 (“[T]he [New Jersey] law [requiring incarceration for PC DNA testing] has since been amended.”); see also 2015 N.J. Laws 127 (codified at N.J. STAT. ANN. § 2A:84A-32a (West 2019)), amending 2001 N.J. Laws 377 (substituting “eligible person” for

amended their PC DNA testing laws to allow testing for those already released from prison. As of Dion Harrell's exoneration in summer 2016, only twenty-four people had been exonerated by post-release DNA testing nationwide, indicating a narrow subset of people for whom post-release testing would be a substantively viable option.²²⁸

By removing procedural bars to PC DNA testing and exonerating more wrongfully convicted individuals, states may actually limit judicial costs by reducing the number of petitioners who will turn to repeat time-consuming non-DNA PC review claims, such as state PC review and federal habeas.²²⁹ Additionally, DNA testing is becoming less expensive as time goes on,²³⁰ and local innocence organizations typically screen for potentially meritorious claims and pay for their clients' testing.²³¹ Thus, legislators should not fear a flood of costly or frivolous PC DNA testing petitions to result from removing custody requirements.²³²

“who was convicted of a crime and is currently serving a term of imprisonment,” among other relevant modifications).

²²⁶ 2015 Or. Laws 564 (codified at OR. REV. STAT. § 138.690 (2019)), *amending* 2007 Or. Laws 800 (removing the custody requirement subsection entirely, among other modifications); *see also* Kate Davidson, *New Oregon DNA Testing Law Explained*, OR. PUB. BROADCASTING, <https://www.opb.org/news/article/oregon-dna-testing-law> [<https://perma.cc/6MXW-7FDE>] (last updated July 3, 2015, 6:51 PM) (explaining, among other things, that the bill passed unanimously).

²²⁷ 2015 R.I. Pub. Laws 119 & 153 (codified at 10 R.I. GEN. LAWS § 10-9.1-11 (2018)), *amending* 2001 R.I. Pub. Laws 386 (removing incarceration requirement).

²²⁸ Thompson, *supra* note 2 (nothing that “across the country, only 23 people have been exonerated by DNA testing after their release”). The exoneration of Mr. Harrell brought that number to 24. That small of a number may, however, be a function of any number of factors or a combination thereof: the difficulty of obtaining post-release DNA testing, the desire of most non-exonerated wrongfully convicted individuals to move on with their lives once they have served their sentence and are released from prison, society's greater interest in seeing people freed from jail than seeing free people's names cleared, or the narrowing of the eligible population over time due to the continuing rise in the use and utility of pre-conviction DNA testing. *Id.*

²²⁹ *See, e.g.,* King, *supra* note 201, at 221–22; Garrett, *supra* note 42, at 1704 (“[F]ederal courts already conduct a range of time-consuming factual review focusing on questions of guilt and innocence, which includes review of newly discovered evidence of innocence.”).

²³⁰ Garrett, *supra* note 42, at 1704 (“DNA testing itself is increasingly inexpensive.”).

²³¹ *See* source cited *supra* note 182 and accompanying text.

²³² *See* sources cited, *supra* notes 219–29 and accompanying text.

Beyond the oft-stated concern about a flood of petitioners lies the unstated concern about the cost of compensating a broader swath of wrongfully convicted individuals.²³³ While compensation is often costly,²³⁴ it helps deter wrongful convictions—a critical criminal justice reform effort—by incentivizing thorough, impartial, and accurate policing, prosecuting, and adjudication.²³⁵ Further, when exonerees are compensated more than \$500,000, they are less likely to commit crimes upon release,²³⁶ fulfilling the traditional deterrence aim of the criminal justice system.²³⁷

The primary comparative disadvantage of allowing PC DNA testing for individuals who are no longer incarcerated is that, unlike allowing testing for individuals who are still incarcerated, it does not provide an obvious financial incentive in the form of decreased incarceration costs.²³⁸ However, exonerating those who are wrongfully subject to sex offender registries will, by removing these individuals from the registries, save states and municipalities significant staffing costs associated with the administration of sex offender registration and notification.²³⁹ Individuals convicted of crimes with sexual elements

²³³ See sources cited *supra* notes 62–72 and accompanying text.

²³⁴ See, e.g., sources cited *supra* note 72.

²³⁵ See Evan J. Mandery et al., *Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553, 564 (2013) (“Placing liability on the government would create an incentive—which currently does not exist—for prosecutors to avoid wrongful convictions.”). *But see* Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT. L. REV. 127 (2010).

²³⁶ Mandery et al., *supra* note 235, at 556 (noting that while “[c]ompensated exonerees offend at roughly the same rate as” non-compensated exonerees, “[e]xonerees who are compensated above a threshold amount of \$500,000 commit offenses at a significantly lower rate than those who are either not compensated or compensated beneath the threshold level”).

²³⁷ See Bator, *supra* note 56, at 442; Kovarsky, *supra* note 56, at 646 n.72; Garrett, *supra* note 42, at 1704 (“[D]eterrence itself is undermined when the innocent continue to be punished while the guilty go free.”).

²³⁸ See, e.g., Garrett, *supra* note 42, at 1708 (“The minimal cost of DNA testing is also overwhelmed by the cost of keeping an innocent person behind bars, even putting to one side the social cost of such a wrongful conviction.”).

²³⁹ A 2006 survey of twenty-one New Jersey counties, to which fifteen counties responded, showed that the 2006 aggregate ongoing cost of administering the state sex offender registration and notification act in those fifteen counties was just shy of \$4 million, with \$3.6 million of that attributable to staffing costs. KRISTEN ZGOBA ET AL., NEW JERSEY DEPARTMENT OF CORRECTIONS, MEGAN’S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 35 (Dec. 2008). Further, multiple studies have found that the home values immediately surrounding

continue to make up the vast majority of DNA exonerees²⁴⁰ and tend to serve shorter sentences than those convicted of non-negligent homicide.²⁴¹ Thus, a significant percentage of the wrongfully convicted individuals who both have been released from prison and could viably be exonerated by DNA testing either are or have been on sex offender registries.²⁴² A reduction in this population would significantly diminish states' SORA-related staffing costs.²⁴³

While it is unclear whether these savings will be greater than the administrative, judicial, and prosecutorial costs of screening the cases that come in and the compensation costs of meritorious cases, the same can be said for the oft-cited savings from freeing wrongfully incarcerated prisoners.²⁴⁴ This is partly because compensation varies wildly from state to state and case to case.²⁴⁵ Further, there is no clear way to quantify the administrative, judicial, and prosecutorial costs of dealing with petitions for PC DNA testing—particularly when those petitions are often filed in lieu of successive federal habeas or general state PC petitions.²⁴⁶

CONCLUSION

Removing incarceration requirements from PC DNA statutes would increase access to justice while likely implicating none of the rationales often espoused for limiting the availability of PC DNA testing: state repose, victim closure, and judicial or prosecutorial

publicly-listed, registered sex offenders decrease about 2–4%, indicating the negative fiscal impact of sex offender registries on community members (via home values) and local and state governments (via property taxes). See generally Leigh Linden & Jonah E. Rockoff, *Estimates of the Impact of Crime Risk on Property Values from Megan's Laws*, 98 AM. ECON. REV. 1103 (2008); Jaren C. Pope, *Fear of Crime and Housing Prices: Household Reactions to Sex Offender Registries*, 64 J. URB. ECON. 601, 602 (2008).

²⁴⁰ See sources cited *supra* note 94 and accompanying text.

²⁴¹ See sources cited *supra* notes 95–96 and accompanying text.

²⁴² See sources cited *supra* notes 240–41 and accompanying text.

²⁴³ See sources cited *supra* notes 239–41 and accompanying text.

²⁴⁴ See, e.g., sources cited *supra* notes 62–72 and accompanying text.

²⁴⁵ See, e.g., sources cited *supra* notes 62–72 and accompanying text.

²⁴⁶ See, e.g., sources cited *supra* note 229 and accompanying text.

costs.²⁴⁷ In fact, it may actually save jurisdictions money to remove exonerees from state sex offender registries, especially if the actual culprits are already in the registries for other sexual offenses.²⁴⁸ While expanding access to PC DNA testing to convicted individuals who have been released from prison may implicate the unspoken potential for runaway compensation costs, these concerns are outweighed by the societal imperative to compensate those who have suffered the burdens of wrongful conviction. Further, bearing these costs will advance the goals of both the criminal justice system as a whole and PC DNA testing regimes in particular.²⁴⁹ Finally, removing the incarceration requirement would best serve the interests of justice, as wrongfully convicted individuals should not be burdened by the collateral consequences of wrongful convictions, especially when those consequences are arguably punitive restraints on liberty.²⁵⁰ In order to provide access to justice for more wrongly convicted individuals, states should abolish custody and incarceration requirements from their PC DNA testing statutes.

²⁴⁷ See generally Part III.

²⁴⁸ See sources cited *supra* notes 238–39 and accompanying text.

²⁴⁹ See sources cited *supra* notes 233–37 and accompanying text.

²⁵⁰ See sources cited *supra* notes 87–90 and accompanying text.