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Op-Ed

## DNA and justice denied

**We are a long way from a system that grants fair access to DNA testing for convicted criminals.**

By Sheldon Krinsky and Tania Simoncelli

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We have seen repeatedly that DNA can shed light on wrongful convictions. To date, about 250 people who were wrongly convicted have been exonerated because of DNA evidence that was reexamined after they were pronounced guilty. But we are a long way from a system that grants fair access to DNA testing.

One primary constraint on the use of DNA in response to a claim of innocence is the availability of the relevant crime scene evidence. According to the Innocence Project in New York, 22% of the cases that its team investigated from 2004 to 2008 had to be terminated because the crime scene DNA evidence was no longer available. At least 24 states either lack laws requiring preservation of DNA evidence or have inadequate ones.

The recent movie "Conviction" was based on the true story of a falsely convicted man, Kenny Waters, who was ultimately freed only because his sister successfully pressed for crime scene DNA to be analyzed. In Waters' case, it was pure luck that the court hadn't discarded the evidence file containing the bloodstains that ultimately cleared him. Calvin Johnson, who was wrongfully convicted of rape in Georgia, was exonerated thanks to serendipity: An astute district attorney happened to notice boxes of evidence in a parking lot dumpster outside the courthouse and decided they should be saved. But there are almost certainly other innocent men and women sitting in prison because DNA evidence that could establish their innocence has been destroyed or discarded.

Even when crime scene evidence is available, some states severely restrict inmates' access to it. Though 48 states have enacted post-conviction DNA testing statutes, many of them have set up nearly insurmountable hurdles for those seeking access to testing. The U.S. Supreme Court recently heard arguments in the case of Henry Skinner, a Texas death row inmate who petitioned the court for the right to DNA testing of all evidence found at the crime scene where his girlfriend and her two sons were murdered. Skinner was within one hour of being executed in March when the Supreme Court issued a stay and decided to hear his case.

In a 2009 case involving a convicted rapist who had requested DNA testing, the Supreme Court held that the man had "no constitutional right to obtain post-conviction access to the state's evidence for DNA testing."

A third constraint in achieving exoneration by DNA is economic: Many prisoners lack the human resources and funds to investigate. Public defenders are typically overburdened and understaffed and rarely take on post-conviction claims of innocence. The lawyers and legal staff who do so depend on philanthropy and are unable to take on all the cases that come to their attention.

Even when evidence is available and testing is done that shows a defendant's DNA profile does not match that of the perpetrator, authorities are often reluctant to free those who were wrongly convicted. In the case of Darryl Hunt, who was convicted in 1984 for the rape and murder of a female reporter in North Carolina, DNA testing proved that Hunt's sperm did not match that found on the victim's body. Nonetheless, the North Carolina Supreme Court argued that the burden for a new trial based on post-conviction evidence — even DNA — requires a "truly persuasive demonstration of actual innocence." Hunt's legal team was forced to begin conducting surreptitious DNA tests in search of the real perpetrator. Eventually, through Hunt's legal team's findings and police cooperation, the real perpetrator was found, and he confessed to the crime. Hunt was released after spending 18 years in prison.

Forensic DNA profiling has certainly revolutionized criminal investigations. But the full potential of forensic DNA testing to uncover wrongful convictions will not be realized until barriers to providing convicted felons access to crime scene evidence are removed, until laws are widely implemented requiring the preservation of evidence, and until resources for post-conviction testing are made available to those with a claim of innocence.

*Sheldon Krinsky is a professor of urban and environmental policy and planning at Tufts University. Tania Simoncelli is former science advisor to the ACLU. They are the coauthors of the book " Genetic Justice: DNA Databanks, Criminal Investigation, and Civil Liberties."*

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