

## Book Note

### DNA's Dark Side

*Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted.* By Jim Dwyer,\* Peter Neufeld,\*\* & Barry Scheck.\*\*\*  
New York: Doubleday, 2000. Pp. ix, 298. \$24.95.

In 1932, Professor Edwin M. Borchard wrote in his classic study, *Convicting the Innocent*, “In an age when social justice has made such marked advances . . . it seems strange that so little attention has been given to one of the most flagrant of all publicly imposed wrongs—the plight of the innocent victim of unjust conviction in criminal cases.”<sup>1</sup> In the seven decades since Professor Borchard’s observation, the general cause of social justice has surely been advanced as the New Deal of the 1930s and the Great Society programs of the 1960s brought opportunity to previously neglected classes of Americans. Yet over the same period—at least until quite recently—the conviction of innocent individuals has remained a neglected topic among both policymakers and scholars.

In the 1990s, the use of advanced DNA testing has freed many wrongfully incarcerated persons.<sup>2</sup> As a result, scholars<sup>3</sup> and the media<sup>4</sup> have

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1. EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* 375 (1932).

2. See generally U.S. DEP’T OF JUSTICE, *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* (1996).

3. E.g., Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 *LAW & CONTEMP. PROBS.* 125 (1998); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 *J. CRIM. L. & CRIMINOLOGY* 429 (1998); Michael L. Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 *COOLEY L. REV.* 907 (1996); Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988*, 18 *N.Y.U. REV. L. & SOC. CHANGE* 807, 809 (1990-1991); Robert

increasingly focused on the conviction of the innocent. It was only a matter of time before the accumulated evidence of wrongful conviction precipitated the first intervention by a political leader: Illinois Governor George Ryan declared a moratorium on the death penalty in February 2000, which is to last until he can say “with moral certainty” that all those sentenced to death in Illinois were truly guilty.<sup>5</sup>

Aimed at a popular audience, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* is sure to raise consciousness regarding the problem of wrongful conviction. Authored by “dream team” and longtime Legal Aid lawyers Peter Neufeld and Barry Scheck, along with journalist Jim Dwyer, the book emerged from Neufeld’s and Scheck’s work on behalf of the Innocence Project of the Cardozo Law School at Brooklyn’s Yeshiva University, where Scheck teaches in the clinical program. Along with Cardozo law students, the two authors have worked to right unjust convictions using a combination of ultramodern science and old-fashioned lawyering.

The book is in part a selection of case studies of some of the sixty-seven people proven innocent by DNA as of August 1999 (p. xiv). I argue that there is a dark side to the authors’ focus on DNA, but I do not mean to detract from the force of the anecdotes they relate:<sup>6</sup> Ron Williamson and Dennis Fritz, imprisoned for twelve years and very nearly executed in Oklahoma for a murder they did not commit (pp. 144-56); Robert Miller, sentenced to death in Oklahoma for a rape and murder he did not commit (pp. 95-106); Marion Coakley, wrongfully imprisoned in New York for rape and robbery (pp. 11-34); Walter Snyder, wrongfully imprisoned for seven years for rape (pp. 37-77); Kirk Bloodsworth, sentenced to die for a rape and murder he did not commit (pp. 213-22); Kirk Grier, imprisoned for fifteen years after being wrongfully convicted of beating his wife and slaying his unborn child (pp. 239-44). These stories should be of significant interest to scholars, practitioners, and law students. They make the otherwise cold words of opinions and articles come to life.

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Rosenthal, *State of New Jersey v. Margaret Kelly Michaels: An Overview*, 1 PSYCHOL. PUB. POL’Y & L. 246 (1995).

4. E.g., Jeffrey Bils & Ken Armstrong, *Rockford Judge Gets Cruz Case, Former Prosecutor Surrenders*, CHI. TRIB., Dec. 19, 1996, at 1; Mark Hansen, *How a Vision Failed: Indictment Calls Prosecution a Conspiracy Against Suspect*, A.B.A. J., Feb. 1997, at 26; David Howard, *New Mission: Recording Police Interrogations*, N.Y. TIMES, May 25, 1997, at 7; Joseph P. Shapiro, *The Wrong Men on Death Row*, U.S. NEWS & WORLD REP., Nov. 9, 1988, at 22 (“For every 7 executions . . . 1 other prisoner on death row has been found innocent.”).

5. Benjamin Soskis, *Alive and Kicking: Why the Death Penalty’s Not Going Away*, NEW REPUBLIC, Apr. 17, 2000, at 26.

6. Avoiding wrongful conviction is not just about these poor souls. It is also a law-and-order issue: When innocent people go to jail, the real killers or rapists are on the loose and free to break the law anew (pp. 244-45).

But the book sets out to do more than tell stories: Instead, it aims to figure out “what went wrong,” and “who did wrong,” and to take account of “the innocent person” (p. xvii). The heroes of this story are not the wrongfully convicted—many of whom led difficult, troubled lives<sup>7</sup>—nor even the author-lawyers themselves, whose “schmoozing, publicity and cajoling” (p. 148) on behalf of the wrongfully convicted are downplayed. If anything, the hero of this story is the DNA molecule.<sup>8</sup> The authors devote considerable space to describing the impact of DNA science on the art of freeing the wrongly convicted (pp. 35-40). By providing virtually unimpeachable evidence of innocence, “[t]he DNA era ha[s] shaken the foundations of the system” (p. 248). Along the way, readers learn the difference between RFLP (pp. 36, 40, 87), PCR (pp. 38, 40, 68, 87, 112), and STR (p. 151) approaches to DNA testing. Readers also encounter a number of prosecutors who resist the introduction of DNA evidence (pp. 93, 111, 206, 219), forcing the Innocence Project to fight “long, expensive, and maddening battles” (p. 219).

The authors direct the bulk of their effort to explaining the dimensions of the criminal justice system’s tendency to convict the innocent. Twenty-nine percent of the wrongful convictions studied by the Innocence Project involved “hair analysis” (p. 166), a type of junk science (pp. 158-71) used to convict the innocent, in spite of the fact that “[t]he weakness of the field is well established” (p. 162).<sup>9</sup> In addition to junk science, outright phony science played a role in a number of cases (pp. 109-25).<sup>10</sup> Eighty-four percent of the wrongful convictions studied rested at least in part on faulty witness identification (p. 73). Describing how mistaken eyewitness testimony favors wrongful conviction, the authors cull anecdotes ranging from a German professor’s experiment in his 1902 psychology class (p. 41) to an NBC broadcast from 1972 (p. 43). Misconduct by prosecutors and police officers (such as concealing exonerating evidence from defense

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7. In a particularly chilling chapter, the authors describe the intense difficulty the wrongfully convicted face in starting anew (p. 223). Faced with massive impediments to civil recovery, only 37% of the wrongfully convicted are ever compensated (p. 229). The authors tell the story of Marion Coakley, wrongfully imprisoned for rape and robbery, who won \$460,000 in civil court, but between his release and that victory, was poor and drunk and broke into a house, earning a sentence of twenty years (p. 231).

8. Just a decade ago, the acronym “DNA” would have required a lengthy explanation. The public has gained awareness of genetic science at a startling pace. See Paul B. Tyler, *Fundamental Misunderstandings About DNA Contamination: Does It Help or Hurt the Criminal Defendant?*, 31 BEVERLY HILLS B. ASS’N J. 15, 15 (1996) (“Thanks in whole to the immense media coverage of the O.J. Simpson case, the phrase ‘DNA evidence’ has become an all too familiar term. The Simpson case has elicited debate over DNA amongst the general public that heretofore had been limited to scientific circles, symposiums on scientific evidence, and the like.”).

9. The authors also describe a dog handler who claimed his German shepherd could pick up years-old scents and a forensic dentist who claimed to be able to see tooth marks and scratches, otherwise invisible, by using a blue laser light and yellow goggles (p. 163).

10. “Sham has passed for science in criminal cases all over the United States, at times to shocking effect” (p. 116).

counsel) (pp. 172-82) played a role in a whopping 63% of the wrongful convictions studied by the authors (p. 263). Incompetent or subpar legal representation played a role in 27% of the wrongful convictions studied (p. 187).<sup>11</sup> False confessions (pp. 78-108) played a role in 23% of the wrongful convictions studied (p. 92). Jailhouse snitches<sup>12</sup> played a role in 21% of the cases studied (p. 263). The authors also argue that race (pp. 193-210)<sup>13</sup> and the death penalty (p. 211)<sup>14</sup> played roles in wrongful conviction.

Significantly, these dimensions of the problem do not operate in isolation, but rather reinforce one another so as to multiply the likelihood of wrongful conviction for the most disadvantaged: “[C]riminal investigations can become echo chambers, where answers are shaped by what people believe ought to be true rather than what they know to be the facts” (p. 114). For example, when confronted with junk science, a witness might suddenly “remember” previously “forgotten” facts. A minority defendant might also be more likely than a majority defendant to be poorly represented.

The authors also canvass the literature on wrongful convictions (and their own experiences in the field) to develop a comprehensive list of policy proposals. These range from forming an administrative screening committee to determine whether a jailhouse snitch should be allowed to testify (pp. 256-57), to requiring prompt DNA testing for suspects (p. 255), to mandating videotaping of all police interrogations (p. 256), to forming a

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11. The authors describe this problem under the chapter heading, “Sleeping Lawyers” (pp. 183-92).

12. The authors imply that such snitches, motivated by bald self-interest, fabricate or otherwise distort the truth.

13. This section of the book is a bit underdeveloped. The authors present statistics showing how the criminal justice system differentially punishes minority men (pp. 203-04). That does not prove that minority men are any more likely to be convicted while innocent. The authors’ point is supported by anecdotal evidence describing how black alibi witnesses are rejected in favor of white identification witnesses (p. 209). If juries are racist, they might be blind to exculpatory facts presented by black alibi witnesses. One should also not underestimate the role judges play, through various jury-control mechanisms, in influencing jury perception of facts on racial grounds. Cf. John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 819 (2000) (demonstrating how judges can be just as susceptible to racial bias as juries).

14. Gruesome murders (those most likely to be capital crimes) receive the most public attention, and as a result, “the barrier[s] to conviction drop . . . considerably” (p. 213). Jurors vote for guilt “as a way to speak for [a victim’s] life” (p. 213), and the weaknesses of a case are “ignored in the backwash of emotion that follows a terrible killing” (p. 221). The authors hint at, but do not explicitly mention, a second way the death penalty could lead to wrongful imprisonment: by scaring some innocent suspects into confessing so as to avoid even a small chance of capital punishment. For example, they tell the story of David Vasquez, a borderline mentally retarded suspect who pled guilty to a crime he did not commit so as to avoid the death penalty (p. 244). Recent empirical scholarship on the economics of crime has explored the link between the death penalty and plea bargaining. See generally Ilyana M. Kuziemko, *Does the Death Penalty Lead to More Guilty Pleas in Murder Cases?* (2000) (unpublished A.B. thesis, Harvard University) (on file with the Harvard University Library).

network of well-funded Innocence Projects at the nation's law schools (p. 260).

While the authors do gather a wide array of policy prescriptions,<sup>15</sup> in the end they concentrate on DNA evidence.<sup>16</sup> None of the other proposals the authors make provide as clear-cut evidence of an individual's wrongful conviction as exculpatory DNA evidence. But there may be a dark side to the authors' attempt to lead America to the altar of genetic acid.<sup>17</sup> This dark side has two principal aspects. First, the overemphasis on DNA evidence might lead the public to assume that once DNA testing is provided, the other policy proposals the authors offer are unneeded. Second, overemphasizing DNA could, if taken to its logical extreme, be used to undermine traditional constitutional liberties.

The first problem with emphasizing DNA evidence as a means of averting wrongful conviction arises from the possibility that the public will assume that DNA can cure all the procedural defects of America's criminal justice system. Only a limited number of crimes, however, are likely to involve DNA evidence. As Edward Lazarus writes, "The universe of cases where DNA testing can provide such magic-bullet results is very small: basically, only rape or rape-murder cases, in which the exchange of genetic material necessarily occurs."<sup>18</sup> Lazarus neglects to consider that DNA technology could advance to the point where a stray hair or a flake of dead skin could provide sufficient material for an identification. Still, the fact remains that DNA evidence, at the present time, is available for only a small number of those who might be wrongly convicted.

It is likely that the acquittal stories the authors describe do not portend a burgeoning trend.<sup>19</sup> Rather, this historical moment is exceptional: In this decade, for the first time, testing of DNA evidence is possible. For those for whom DNA testing could make a difference, it probably already has.<sup>20</sup> In

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15. These include new commissions, tests, blue-ribbon committees, screening committees, new levels of federal involvement in state prosecutions, performance standards for defense lawyers, observers of interrogations, taping methods, inspectors general, and regulatory oversight (pp. 255-60).

16. The authors' emphasis on DNA can be seen both in how they relate their narratives (*passim*), and how they present their policy proposals (listing DNA first) (p. 255).

17. The authors are certainly not the only commentators to put their faith in DNA. One court claimed that DNA evidence might become "the single greatest advance in the 'search for truth' . . . since the advent of cross-examination." *People v. Wesley*, 533 N.Y.S.2d 643, 644 (Albany County Ct. 1988).

18. Edward Lazarus, *The Limits of DNA Justice*, WASH. POST, June 16, 2000, at A29.

19. The authors recognize this (p. 251). However, they do not admit that from a policy perspective, as I argue, framing narratives of wrongful conviction around DNA testing might draw attention from more meaningful reforms. More significantly, they fail to recognize that DNA may be relevant in only a small percentage of future criminal trials.

20. There are no doubt some incarcerated persons who have not received DNA testing. For most inmates for whom additional, nongenetic evidence casts doubt on their guilt, however, projects like the one led by the authors have probably already provided DNA testing.

the future, DNA testing may help avoid wrongful convictions, but it is not likely to help free the wrongfully convicted.

Telling these stories and concentrating on the role of DNA in freeing the wrongly convicted draws attention to DNA, but possibly at the cost of distracting policymakers from other necessary reforms of the justice system. The media furor over acquittals of death row convicts generated a number of DNA-testing-related bills in Congress this year.<sup>21</sup> No similar bills were generated concerning jailhouse snitches or junk science. As Edward Lazarus concluded, “It would be a tragic irony if DNA testing, having shown that innocent people do get convicted, becomes a ploy by which politicians feign concern while ignoring the vast majority of persons with evidence of innocence—those for whom DNA testing is no help at all.”<sup>22</sup> This is of course not the aim of the authors of *Actual Innocence*. But their approach—emphasizing above all the power of DNA testing—may contribute to such political ploys.

A more dangerous consequence of focusing the public’s attention on DNA evidence relates directly to the authors’ concern for averting wrongful convictions. Drawn from the public, juries may come to overvalue DNA evidence to convict defendants not indicted by other evidence. After all, in most cases all DNA evidence can show is that a defendant had contact with a victim. Works that, like *Actual Innocence*, praise the power of DNA may inadvertently encourage juries to neglect other sources of exonerating evidence when DNA evidence favors conviction. Moreover, when juries place excessive faith in DNA, they make it more likely that planted evidence, corrupt DNA labs, and lab error could lead to unjust conviction. This “reverse-O.J.”<sup>23</sup> problem cautions against singing DNA’s praises too loudly.

The second danger of overemphasizing the role of DNA in freeing the unjustly convicted, from a civil libertarian perspective, is that DNA testing could actually provide the basis for reducing procedural protections for criminal suspects. A growing movement is afoot in the legal academy to end or at least “flexify”<sup>24</sup> the Fourth Amendment’s requirement that police

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21. Helen Dewar, *Support Grows for Execution Safeguards: Exonerations Spur Bills in Congress*, WASH. POST, June 16, 2000, at A1.

22. Lazarus, *supra* note 18.

23. As most readers no doubt know, in the O.J. Simpson case, the jurors’ doubts about DNA labs and belief that evidence had been planted led to the defendant’s acquittal. *See generally* JEFFREY TOOBIN, *THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON* (1996). In the scenario I describe, jurors’ excessive faith in DNA makes it *more* likely that a defendant will be convicted on the basis of planted evidence and flawed labs.

24. Professor Christopher Slobogin argues that “probable cause to search should not be conceptualized as a fixed quantity of certainty but rather, as is already the case with suspicion requirements associated with seizures, should be varied according to the level of intrusion involved.” Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1038, 1057 (1996) [hereinafter Slobogin, *Testilying*]; *see also* Christopher

obtain search warrants backed up by probable cause before searching the property of suspects.<sup>25</sup> Under the so-called exclusionary rule established by the Supreme Court, evidence seized in violation of the Fourth Amendment is inadmissible.<sup>26</sup> While the Supreme Court has called for a commonsense view of the probable cause requirement,<sup>27</sup> other courts have resisted modification of the exclusionary rule.<sup>28</sup>

The anti-Fourth Amendment camp could make an argument that wrongful conviction can be avoided by reducing procedural protections against search and seizure so as to maximize the chances that police promptly gather all available genetic evidence.<sup>29</sup> Such an argument would begin something like this: Procedure means delay. After targeting a particular suspect, police officers have to set out to acquire enough probable cause to sustain a search warrant.

In the post-DNA world of criminal justice, it could be said, time matters. With time, DNA, like blood-marker proteins (p. 30), breaks down.<sup>30</sup> DNA gathered at a crime scene may be insufficient for identification purposes, which is why searching a suspect's property and possessions matters: "[I]n the messy reality of crime scenes, DNA is a scarce commodity" (p. 36). In the Marion Coakley case described by the

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Slobogin, *The World Without the Fourth Amendment*, 39 UCLA L. REV. 1, 68-75 (1996) (arguing at greater length that Fourth Amendment standards should be more flexible).

25. U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . .").

26. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

27. *E.g.*, *United States v. Cortez*, 449 U.S. 411, 418 (1981) (stating that probable cause "does not deal with hard certainties, but with probabilities . . . [and] common-sense conclusions about human behavior").

28. *See, e.g.*, *People v. Quintero*, 657 P.2d 948 (Colo. 1983) (ruling that observation of a stranger in a neighborhood trying to hitch a ride with his shirt draped over a TV and wool gloves in his back pocket, an hour after he was seen peering into two houses, was not probable cause).

29. Slobogin, the dean of the anti-Fourth Amendment school, has already argued that the Fourth Amendment increases the likelihood of wrongful conviction by creating a culture of lying among police officers. Slobogin, *Testilying*, *supra* note 24, at 1057. Slobogin argues that the probable-cause requirement exerts ex post pressure on police to lie in support of questionable searches, stating, "Lying intended to convict the guilty—in particular, lying to evade the consequences of the exclusionary rule—is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: 'testilying.'" *Id.* at 1040. Once lying to convict the clearly guilty becomes acceptable, Slobogin argues, lying to convict the probably guilty could easily become commonplace. In a culture where police are permitted if not encouraged to lie, some more zealous officers may even be led to frame suspects who are not clearly guilty. One scholar has argued that Slobogin's proposal is already the reality in American courtrooms—that is, that the Fourth Amendment means nothing in serious crimes. Steven Duke, *Making Leon Worse*, 95 YALE L.J. 1405, 1408 n.33 (1986) (arguing that the exclusionary rule simply does not apply in serious crimes).

30. Technically, heat, not time, causes DNA molecules to denature. Time increases the likelihood, however, that DNA molecules will be exposed to heat and ultraviolet light and thus begin to break down. *See* L. McNally et al., *Evaluation of Deoxyribonucleic Acid (DNA) Isolated from Human Bloodstains Exposed to Ultraviolet Light, Heat, Humidity, and Soil Contamination*, 34 J. FORENSIC SCI. 1059 (1989) (reporting that studies show heat, ultraviolet light, humidity, and soil contamination can work to degrade a DNA sample).

authors, DNA evidence was destroyed by initial lab tests (p. 24). The Fourth Amendment causes delay, which means that DNA evidence in a suspect's possession that could exonerate him might never be recovered.<sup>31</sup> However, one could counter that a Fourth Amendment-induced delay (of, say, twenty-four hours) would not lead to the destruction of evidence that would not have been destroyed in the first few hours. Thus, the Fourth Amendment might not bring about any marginal loss in DNA evidence.

Alternatively, DNA that could conclusively prove the guilt of one of several suspects might be lost, and the police could thus end up pursuing the wrong suspect. Broader sweeps early in an investigation could recover DNA evidence from individuals not yet targeted by the police, but the Fourth Amendment makes such broad sweeps difficult or impossible. Moreover, the requirement of probable cause for arrests and searches necessitates that police officers focus on witness identification and informants—which the authors rightly portray as prone to facilitate injustice—rather than on gathering reliable DNA evidence, since to get a warrant in the first place police need evidence along the lines of witness testimony or a tip from a “confidential informant,” in the parlance of the business. Paraphrasing the Supreme Court's 1967 decision in *United States v. Wade*,<sup>32</sup> the authors note that “[o]nce a sympathetic witness identifies a suspect, . . . investigation ends for nearly all intents and purposes” (p. 74). The anti-Fourth Amendment camp could argue that reducing the requirement of probable cause would reduce the need on the part of law enforcers for such unreliable sources, enabling them to concentrate their efforts on obtaining the most accurate evidence, DNA.

“Flexification” could take several forms. First, because DNA evidence is so powerful, Fourth Amendment protections could be relaxed for all citizens, facilitating maximum accumulation of genetic evidence. The problem with this approach is that there is no way to know *ex ante* who has DNA evidence and who does not, so everyone would be susceptible to all searches. The danger is that a search for DNA might produce non-DNA evidence of other crimes, and thus eviscerate the Fourth Amendment's privacy protection. There is really no difference, then, between this DNA-driven attack on the Fourth Amendment and one based on any other type of

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31. Consider the following scenario: A witness sees a man running from the scene of a crime with a bloody shirt. The Fourth Amendment warrant process delays a search of the suspect's home, and in that time the blood evidence is gone, but the eyewitness is still able to testify about the fact that the suspect was covered with blood. DNA testing would have demonstrated definitively that the blood the witness saw was not the victim's. A more obvious case would be one in which DNA evidence was not destroyed but simply obscured to the point where only an inexact DNA test was possible. As a result, DNA which would not have matched could be identified as being a possible match.

32. 388 U.S. 218 (1967).

evidence. There are costs and benefits to the Fourth Amendment, and DNA does not substantially affect the balance.

A more modest approach would be to relax Fourth Amendment protections only for suspects. Such suspects might otherwise be convicted despite being innocent without the discovery of exonerating DNA evidence (which is arguably imperiled by procedural delays). This approach, too, is problematic. Again, there is no way of knowing which suspects have exonerating DNA evidence, so the Fourth Amendment rights of all suspects would have to be breached. This could be a backdoor approach to eliminating the Constitution's privacy guarantee. The universe of scenarios in which this would help a suspect is also quite restricted.<sup>33</sup> Crime scene evidence, after all, is not protected by the Fourth Amendment, and a suspect's own DNA is not at risk of disappearing. On balance, the social costs of reducing privacy rights probably do not outweigh the gains resulting from a minute diminution in the rate of wrongful conviction.

On the other hand, one could assert that the moral implications of even a single wrongful conviction are more troubling than wholesale deprivations of privacy rights. Assuming that the value consequences of wrongful conviction trump those of privacy deprivation, the anti-Fourth Amendment argument based on DNA suddenly becomes plausible.

Political scientists<sup>34</sup> and science-fiction filmmakers<sup>35</sup> have envisioned a world where genetic and other forms of technology favor (and are favored by) anti-liberty regimes. The Supreme Court might never be tempted to flexify further the Fourth Amendment out of a concern for stare decisis.<sup>36</sup> Or the Court might appreciate that the examples discussed above<sup>37</sup> are not frequent enough to justify an across-the-board breach of the Fourth Amendment rights of all suspects, much less all citizens. Still, whenever a line of argument has the potential to restrict constitutional liberties, it should be considered carefully.

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33. For a few plausible examples, see *supra* note 31.

34. Political scientists have speculated that dictatorships could thrive if technology reduced their tendency to punish arbitrarily (that is, for reasons unrelated to the truth of guilt or innocence). Cf. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 294 (1991) (speculating that a "technocratic electronic dictatorship" could thrive in the future).

35. For example, in the film *Gattaca*, society accepts utterly invasive criminal investigation, confident that advanced genetic testing will help ascertain the guilt or innocence of suspected criminals. *GATTACA* (Sony 1997).

36. Witness the Court's recent refusal to abandon *Miranda v. Arizona*, 384 U.S. 436 (1966), largely on stare decisis grounds. *Dickerson v. United States*, 120 S. Ct. 2326 (2000).

37. *Supra* note 31.