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**GLOBE NEWSPAPER Co. v. COMMONWEALTH:  
AN EXAMINATION OF THE MEDIA'S "RIGHT" TO RETEST POSTCONVICTION DNA EVIDENCE**

By: EMILY S. MUNRO\*

I. INTRODUCTION

{1} In January of 2000, Governor George Ryan of Illinois issued a statewide moratorium on capital punishment, citing among his reasons the fact that more convicted killers had been exonerated than executed since Illinois reinstated the death penalty in 1977.<sup>1</sup> In 2001 Maryland's governor issued a temporary moratorium on capital punishment, pending the results of a University of Maryland death penalty study.<sup>2</sup> The North Carolina Senate recently approved a bill that would suspend all state executions for two years, after twenty-one North Carolina municipalities passed resolutions favoring a moratorium and two death-row inmates were awarded new trials.<sup>3</sup>

{2} The debate over the fairness of the death penalty has been invigorated by the increased use of DNA testing to determine with certainty if felons convicted by traditional evidence are in fact actually guilty of their alleged crimes. Because each person's DNA is a unique "genetic blueprint of life," it can be a powerful tool in determining guilt or innocence.<sup>4</sup> Debate continues as to whether and when a convicted felon can obtain and test DNA evidence; such controversy is beyond the scope of this Note.<sup>5</sup> But in addition to the questions posed concerning the accused's access to postconviction DNA testing, the potentially dispositive nature of such testing and the progressively more accurate results have piqued the interest of third parties to the original cases: the media. When the scene is set on death row, the stakes are especially high - not only for the accused, but for the judicial system itself.<sup>6</sup>

*A. Common Law Freedom of Access*

{3} Open trials and freedom of access to public records have their origins in English common law, which allowed parties with an individualized interest in the proceedings to petition the court for access.<sup>7</sup> The right of access in America is not so limited. The media may petition the court for access under the First Amendment, under various statutory acts ensuring Freedom of Information, and under the common law. The Supreme Court has noted that "the public's interest in keeping 'a watchful eye on the workings of public agencies' [is] . . . sufficient . . . to justify access."<sup>8</sup> In *Press-Enterprise Co. v. Superior Court of California* ("*Press-Enterprise I*"), the Supreme Court further described the importance of open trials, explaining that:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.<sup>9</sup>

{4} The common law right to access under the First Amendment is traditionally determined by applying a two-pronged test articulated by the Supreme Court in *Press-Enterprise Co. v. Superior Court of California* (“*Press-Enterprise II*”).<sup>10</sup> First, the court should consider “whether the place and process have historically been open to the press and general public.”<sup>11</sup> Second, the court should consider “whether public access plays a significant positive role in the functioning of the particular process in question.”<sup>12</sup> If the answer to both questions is affirmative, then the proceeding “passes these tests of experience and logic, [and] a qualified . . . right of public access attaches.”<sup>13</sup> This right is not, however, absolute, and may be defeated by an “overriding interest based on findings that closure is essential to preserve higher values and [the closure] is narrowly tailored to serve that interest.”<sup>14</sup> For example, access to evidence is usually granted where the requested material can be easily copied or examined (e.g., videotapes), but courts are understandably reluctant to grant access to evidence which could be compromised by the inspection (e.g., biological samples).<sup>15</sup>

#### *B. Virginia: The Right of Access Refined*

{5} In 2002, the Supreme Court of Virginia ruled in *Globe Newspaper Co. v. Commonwealth* that newspapers did not have the right to obtain and test DNA samples from past criminal trials. Furthermore, the court ruled that such evidence was not included in the “public record” to which newspapers are guaranteed access under the Virginia Freedom of Information Act.<sup>16</sup>

{6} The suit grew out of the case against Roger Keith Coleman, who was convicted of the rape and murder of his sister-in-law, Wanda McCoy, in 1982. The jury sentenced Coleman to life in prison for McCoy’s rape, and imposed the death penalty for McCoy’s murder. The biological material at issue, which included hair and body fluids, was collected from the victim and offered as evidence at Coleman’s trial. Since DNA testing was unavailable in 1982, the prosecution presented evidence from forensic serologist Elmer Gist, Jr. Gist testified that hair samples taken from Coleman were consistent with those found on the victim. Spermatozoa found in the victim’s vagina came from someone with Type B blood who was a secretor, meaning that his bodily fluids, such as semen or saliva, contained evidence of his blood type.<sup>17</sup> In a given population, 80% to 85% are secretors, but only 10% have Type B blood.<sup>18</sup> Coleman was a secretor with Type B blood. By 1990, more sophisticated tests had been developed, and Coleman successfully petitioned the court for a DNA test of the biological material found on Wanda McCoy’s body. “The test results did not exclude Coleman and 2% of the Caucasian population as the source of the biological material.”<sup>19</sup> This DNA test, when combined with the blood type testing, “narrow[ed] the percentage of the population with these characteristics to .20%.”<sup>20</sup> After the Supreme Court denied a final stay of execution, Coleman was executed in 1992.<sup>21</sup>

{7} Eight years later, when a forensic lab in California revealed that new DNA testing of the evidence in its possession from the Coleman trial could definitively determine if he was the killer, the Boston Globe, among other newspapers, petitioned the Circuit Court of Buchanan County, Virginia to obtain and test the evidence.<sup>22</sup> The circuit court denied the request, and the ruling was affirmed by the state supreme court, which found no right of access under the First Amendment, the Virginia Freedom of Information Act, or the common law.

{8} The purpose of this Note is to examine the effect of *Globe Newspaper Co. v. Commonwealth* on future expansion of the definitional reach of “access.” Part II will address whether access

should include retesting of biological evidence by third parties. Part III will examine whether biological material such as DNA should be included in the public record. Finally, Part IV will focus on the implications of allowing independent parties to retest DNA materials after conviction and discuss the policy arguments for and against posthumous testing.

## II. THE RIGHT TO RETEST CRIMINAL EVIDENCE

{9} The plaintiffs in *Globe Newspaper v. Commonwealth* argued for access to obtain and retest biological evidence under the Virginia Freedom of Information Act (“VFOIA”), the First Amendment to the United States Constitution, and Article I, Section 12 of the Virginia Constitution. The VFOIA states: “The following records . . . may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law: (1) Complaints, memoranda, correspondence, case files or reports, witness statements, and evidence relating to a criminal investigation or prosecution . . . .”<sup>23</sup> The statute leaves the determination of access solely to the court’s discretion, which seems merely to echo the common law. In *Nixon v. Warner Communications*, the Supreme Court itself admitted the difficulty in “distill[ing] from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access” and left it to the particular courts to determine on a case-by-case basis.<sup>24</sup> The First Amendment freedom of the press argument parallels that of the Virginia Constitution, and the two were considered together in the case.<sup>25</sup>

### A. Access Under the Press-Enterprise II Standard

{10} Both parties agreed that access, as traditionally defined by the courts, had been granted; the newspapers were seeking instead to broaden the idea of access to include independent retesting of Coleman’s DNA. Based on the *Press-Enterprise II* standard, the Supreme Court of Virginia determined that the newspapers sought not to access the criminal record as allowed under VFOIA, but to “generate a new scientific report, thereby altering, manipulating, and/or destroying existing evidence in order to create new evidence.”<sup>26</sup> Such an act clearly failed to meet the first requirement, the historical precedent of openness. The process of testing biological evidence has never been one traditionally open to the press and public; only the results themselves have been historically available as part of the criminal record. One case in Georgia, in which the court considered the right to access evidence to be merely “‘hollow’ if it were limited to visual inspection,” while mentioned in the opinion, was held to be unpersuasive.<sup>27</sup> Rather, the court referred to the case as an “isolated decision” and discounted its precedential value.<sup>28</sup> Access in Virginia ultimately does not include the right of third parties to retest biological evidence.

{11} Assuming that the definition of access could be expanded, though, the second prong of the *Press-Enterprise II* standard provides a more substantial argument to allow postconviction testing by a third party. The court must evaluate whether allowing access and testing would play a “significant positive role” in how the death penalty is administered in Virginia.<sup>29</sup> The circuit court judge specifically addressed this question at the trial level in *Globe Newspaper* and found the answer to be “no.”

{12} By construing the issue narrowly, and looking only at the facts of the particular case, Judge Keary Williams found that retesting the DNA eight years after Coleman’s execution “‘would have no bearing on the fairness of the death penalty as it is now administered or on the public confidence . . . [in] the criminal justice system.’”<sup>30</sup> Judge Williams cited changes in the manner

in which the death penalty is administered, such as improved DNA identification capability and increased inmate access to exculpatory technology, as evidence that the dependability of capital punishment as administered in 1992 was no longer relevant in 2001.<sup>31</sup> Presumably Judge Williams believed that subsequent changes to the capital punishment system eliminated any chance of a wrongful conviction.

{13} If, however, this issue were broadly construed, a clear argument can be made for the “significant positive role” of allowing the newspapers to retest the biological evidence.<sup>32</sup> Certainly, under the *Richmond Newspapers* test used by Judge Williams, a DNA test either confirming Coleman’s guilt or exonerating him would have a significant effect on the public’s perception of the death penalty in general, as well as in Coleman’s case in particular.<sup>33</sup> The fact that the system has been modified since 1992 hardly ensures that there are no death row inmates, convicted by more traditional evidence, whose factual innocence could not be proved with DNA testing. However, DNA evidence like the biological sample in the Coleman case, which was stored under ideal conditions in a research laboratory, may not be available in a majority of criminal prosecutions. The Coleman case was critical because the DNA was both available and uncompromised. If DNA testing could definitely prove that Roger Keith Coleman was, in fact, innocent of the crime for which he was executed, that would undoubtedly have a significant effect on the public’s confidence in the death penalty in Virginia. Cases for which no DNA evidence exists could be cast into doubt, with little hope of resolution. The Supreme Court has stated that “in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional.”<sup>34</sup> A demonstration that such an unconstitutional execution had taken place would significantly affect the public’s view of Virginia’s capital punishment system.

{14} Furthermore, there are some precedents for allowing public access based on the “significant positive role” of openness in the legal process.<sup>35</sup> Open access to both the jury selection process and to criminal pre-trial and trial proceedings is “essential,” as the watchful public presumably plays a significant positive role in keeping the proceedings honest.<sup>36</sup> The Court explains in *Press-Enterprise II* that “the ‘community therapeutic value’ of openness” may be frustrated by closure.<sup>37</sup> Surely this can be understood to include the therapeutic value of knowing that the state has executed a man who was in fact guilty. On the other hand, if the executed turns out to have been innocent, there is community therapeutic value in ensuring that such an event never happens again. If openness works to advance the “basic fairness” and “appearance of fairness so essential to public confidence” in our legal system, that openness could be extended to postconviction DNA testing as well.<sup>38</sup>

#### *B. Preserving “Higher Values”: Closure, Judicial Efficiency, and Policy*

{15} *Press-Enterprise I* allows that some proceedings may still be closed in good conscience if there is an “overriding interest based on findings that closure is essential to preserve higher values,” as long as the closure is “narrowly tailored to serve that interest.”<sup>39</sup> Even though the newspapers were seeking to re-open the record, rather than to be admitted to an ongoing legal proceeding, the Supreme Court of Virginia found that keeping the record closed was essential to preserve the higher values of finality and judicial efficiency. Additionally, the court held that it was impossible to narrowly tailor the allowable access to cases such as Coleman’s. Perhaps most importantly, the court found it necessary to deny access for policy reasons.<sup>40</sup>

{16} The court emphasized Coleman’s repeated chances for judicial review: on his initial appeal,

the Supreme Court of Virginia affirmed his conviction and sentence, and the U.S. Supreme Court denied certiorari. Coleman also sought habeas corpus review once in the state court and twice in the federal courts. The unsuccessful state habeas petition was denied certiorari by the Supreme Court in 1987. Four years later, the Supreme Court affirmed a federal district court's denial of Coleman's petition for federal habeas corpus relief.<sup>41</sup> After repeated hearings and recourse to available DNA testing, which did not exclude him, Coleman was executed in 1992. The court did not find the public interest compelling enough to overcome the finality of the case and allow access to retest the evidence.

{17} Postconviction testing also raises concern for the victims and their families. Of course, as Seth Kreimer and David Rudovsky point out in their article, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, retesting does not affect victims at all if the convicted's guilt is confirmed.<sup>42</sup> If not, then the victims surely have an interest in seeing the truly guilty party prosecuted. Although witness memory can dim with time, making a new trial more difficult, the scientific truth of DNA testing may be able to overcome weaker traditional evidence.

{18} Another potential concern is judicial efficiency. Prosecutors understandably do not want convicted felons using up limited judicial resources which might be more equitably used for defendants not yet convicted.<sup>43</sup> Having been proved guilty in a court of law puts convicted felons lower on the judicial priority list than those who remain innocent until proven guilty, and justifiably so. Still, the number of cases to which Coleman's facts could potentially apply is so limited as to make such concerns more theoretical than practical.

{19} The court expressed special concern on a policy level as to how a ruling in favor of the newspapers could be narrowly tailored to include death penalty cases like Coleman's but not open the door to independent testing of any forensic evidence from any criminal proceeding. The court questioned how such testing should be supervised if the evidence itself is "limited in quantity or subject to destruction when tested."<sup>44</sup> If the integrity of the evidence is compromised or destroyed by the test, and/or if several parties petition to test it, is there a principled way to assess the validity and importance of each party's claim without getting stuck in a judicial quagmire? The Supreme Court of Virginia thought not and sought to avoid the entire issue.

{20} In the view of the court, the overriding interest in finality and the integrity of the judicial system overcame the public's right to know in a closed case like Roger Keith Coleman's. Under existing Virginia law, there is no precedent for extending the idea of "access" to include retesting and allowing third parties to retest criminal evidence in a case settled years before. But even without the historical precedent, the right could have been extended under the second prong of the *Press-Enterprise II* test. Perhaps the overriding interest should not have been finality, but concern for the truth.

### C. Balancing Closure with the Right to Know

{21} In *In re Knight Publishing Co.*, the Fourth Circuit summarized the Supreme Court's suggestions from *Nixon v. Warner Communications* concerning the factors to consider in balancing the state interest (in closure) with the public's right to know.

[T]he factors to be weighed in the balancing test include whether the records are sought for improper purposes, such as promoting public scandals or unfairly

gaining a business advantage; whether release would enhance the public's understanding of an important historical event; and whether the public has already had access to the information contained in the records.<sup>45</sup>

Several of these factors are relevant to *Globe Newspaper*. The information was sought not for "improper purposes," but out of a legitimate interest guaranteed by the First Amendment and by the spirit, if not the letter, of the VFOIA. And while the execution of Roger Keith Coleman might not be termed an "important historical event," certainly concern over the unfair administration of the death penalty is part of our nation's history. Since *Furman v. Georgia* declared the administration of the death penalty in Georgia unconstitutional, state legislatures and the Supreme Court continually have been re-evaluating state capital punishment sentencing guidelines.<sup>46</sup> Whatever the test results, the information sought in *Globe Newspaper* could certainly add to the public's understanding of this controversial issue. Finally, while the state might argue that the public already has had access to the information in the record, such a narrow construction of the guideline is not in keeping with the continual evolution of technology and its role in criminal proceedings. If the technology is available to enable the courts to discover the truth, perhaps that should be the overriding factor in determining whether access should be granted.

### III. THE PUBLIC RECORD

#### A. Defined

{22} The Virginia Freedom of Information Act defines the public record as:

[A]ll writings and recordings that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recoding or other form of data compilation . . . prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.<sup>47</sup>

Based on this definition, the biological material at issue in *Globe Newspaper* clearly does not fall within the "public record." The Supreme Court of Virginia had some precedential support for its position. A New York decision refused to extend the definition of "public record" as stated in New York's freedom of information statute to include "articles of clothing and alleged weapons."<sup>48</sup> In *United States v. McDougal*, an Arkansas federal district court denied the media access to a videotape of President Clinton's deposition which was played at the trial and for which transcripts were available.<sup>49</sup> The Eighth Circuit affirmed the order, mentioning the district court's conclusion that "substantial access to the information provided by the videotape had already been afforded."<sup>50</sup> The transcripts were part of the public record; the videotape of the deposition was not.

{23} But other courts have found non-traditional evidence to be part of the public record. In 1998, the Ninth Circuit intimated that the public and the press have a limited right of access to view executions.<sup>51</sup> Based on First Amendment freedom of the press cases like *Richmond Newspapers v. Virginia* and *Press-Enterprise I and II*,<sup>52</sup> the district court had extended the right of the press to view executions.<sup>53</sup> On appeal, the Ninth Circuit upheld a California regulation, aimed at protecting prison staff, which restricted witnesses from viewing the execution until the

intravenous tubes which conduct the lethal injection were inserted and the execution team had left the room.<sup>54</sup> But the Ninth Circuit did concede that the First Amendment protects the right of the press to “gather news and information . . . because ‘without some protection for seeking out the news, freedom of the press could be eviscerated.’”<sup>55</sup> This reasoning can be applied to the public record question at issue in *Globe Newspaper*. If the First Amendment protects the right of the press to gather news and information, and if the news and information about criminal trials are not specifically limited to the written record, perhaps the public record does include the right to access non-traditional evidence like the biological sample from the Coleman trial.

### *B. Extending Access*

{24} As the court mentioned in *Globe Newspaper*, to have a significant impact, any such extension would have to include the right not only to inspect the evidence, as the VFOIA currently allows, but to test it as well.<sup>56</sup> By specifically listing what is included, the language of the Virginia statute excludes by implication what it does not list. The Georgia statute at issue in the case of *Ellis Wayne Foster*, on the other hand, leaves open the definition of the public record: “an exhibit tendered to the court as evidence in a criminal or civil trial shall not be open to public inspection without approval of the judge assigned to the case.”<sup>57</sup> Here, the same court which issued *Foster*’s death warrant nearly four years earlier granted access to several newspapers to retest biological evidence from his criminal trial.<sup>58</sup> As previously mentioned, the Supreme Court of Virginia summarily dismissed this case when deciding *Globe Newspaper*.<sup>59</sup>

{25} The VFOIA should be changed to be more inclusive in its definition of the public record, in keeping with the general purpose of the Act. The statute itself stipulates that its provisions

[S]hall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government . . . [t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.<sup>60</sup>

Such broad, sweeping policy language seems incongruous with the provision excluding biological evidence from the public record. Furthermore, as its stated purpose is to promote public awareness of government activities, allowing access and retesting of the materials as a check on Virginia’s death penalty system seems to be perfectly congruent with allowing freedom of information. To be meaningful information, the evidence has to be retested. The policy of the statute will support the extension.

## IV. FORECAST AND RECOMMENDATION

{26} The use of DNA in criminal trials and as an avenue of appeal for convicted felons has become a widespread and accepted practice.<sup>61</sup> The decision in *Globe Newspaper* excluding DNA from the public record as considered in the VFOIA will not stem the tide. It may, however, affect the storage and retention of biological materials after conviction. Certainly the Georgia case reveals the necessity of adopting and following adequate labeling and storage procedures in the state crime labs:<sup>62</sup> the Coleman evidence was preserved for testing because it had been stored under ideal conditions in a private research laboratory in California.<sup>63</sup> Prosecutors and defense attorneys alike, knowing the potentially exculpatory nature of the evidence and recognizing that



DNA technology is constantly improving, should provide for samples to be preserved whenever possible.

{27} A more compelling debate is that over the implications of allowing independent parties the right to test DNA materials. One factor to consider is the damage to the public's trust in the judicial system in general and the administration of the death penalty in particular. The petitioners seeking access to the DNA from Coleman's criminal trial argued their case before the very court which had affirmed Coleman's death sentence and denied his habeas appeal.<sup>64</sup> To allow the newspapers access to evidence which could potentially exonerate him would open Pandora's box. Allowing access could "directly condemn [the] competence" of the Supreme Court of Virginia by horrifically proving that an innocent man was put to death for a crime he did not commit. Exonerating results would also demonstrate the fallibility of Virginia's capital punishment system and call into question, at least in the court of public opinion, the sentence of every other inmate on death row.<sup>65</sup> In a similar Virginia case from 1998, that of convicted murderer Joseph O'Dell, the Supreme Court of Virginia likewise denied a post-execution petition from a third party seeking access to biological evidence from O'Dell's trial.<sup>66</sup> The Commonwealth not only opposed the petitioner's access to the evidence, but asked permission of the court to incinerate it, arguing that "if the test results showed O'Dell's innocence 'it would be shouted from the rooftops that the Commonwealth of Virginia executed an innocent man.'"<sup>67</sup>

{28} This assumes, however, that the test would have exonerated O'Dell. Half the time, the opposite occurs, and the DNA test confirms the guilt of the accused.<sup>68</sup> Additionally, the current technological sophistication of DNA testing, which was not yet available at either O'Dell or Coleman's original trial, has no bearing on the competence of the courts. In Coleman's case, the biological evidence was introduced, but the testing was not sophisticated enough to prove conclusively that Coleman was or was not the perpetrator.

{29} But even if the particular judges who affirmed Coleman's death sentence did not fear public condemnation of their own competence,<sup>69</sup> there is no doubt that test results confirming the execution of an innocent man would diminish the public's belief that traditional evidence can be trusted to reveal the truth.<sup>70</sup> Death penalty opponents argue that it should do just that, and that cases such as Coleman's are extremely relevant to the evaluation of Virginia's death penalty system. Still, in the face of fears about an avalanche of postconviction testing petitions, it is important to remember that DNA evidence is available and has the potential to exonerate in a relatively small number of cases.

{30} Lastly, the postconviction testing debate again implicates the issue of finality. Finality is an essential element of the criminal justice system, particularly with regard to victims and victims' families.<sup>71</sup> If a conviction is not final after a person has been investigated, charged, and convicted under due process of law, sentenced to death and denied all appeals, and finally executed, when might it be final? Still, some advocates argue that simply testing the evidence has "no impact on victims, witnesses, or complainants unless it actually exonerates an innocent individual."<sup>72</sup>

{31} In her Note, *Assessing the Risk of Executing the Innocent: A Case for Allowing Access to Physical Evidence for Posthumous DNA Testing*, Anne-Marie Moyes argues that a third party suit does not implicate principles of finality at all, as such suits are brought in the public's interest, not the convicted man's.<sup>73</sup> Assuming the third party can meet the qualifications for standing, the original grounds for denial of the *Globe Newspaper* petition at the trial level, this is an interesting

answer to the problem of finality. At any rate, it is certainly true that “an obsession with finality to the exclusion of justice is at odds with the legitimate administration of punishment.”<sup>74</sup>

## V. CONCLUSION

{32} An inscription on the walls of the U.S. Department of Justice reads, “The United States wins its point whenever justice is done its citizens in the courts.”<sup>75</sup> *Globe Newspaper v. Commonwealth* reveals the complexity of that mission. Whose interests should be considered paramount - the family of Wanda McCoy, raped and murdered at age nineteen, the convicted killer who quite possibly could be exonerated, or the media, seeking for reasons high and low to know the truth about Roger Keith Coleman? On a larger level, is the government’s interest better served by maintaining the status quo rather than opening the door to the truth? Public trust and confidence in the system, once lost, may be impossible to regain. But the Commonwealth does itself a disservice by refusing to examine the possibility that the death penalty, as administered in Virginia, is deeply flawed.

{33} As forensic technology continues to improve and be utilized in criminal investigations and proceedings, more questions will arise as to how best to adapt existing statutory and common law to accommodate it. DNA, with its ability to determine guilt or innocence with a precision unavailable in traditional evidence, is a powerful tool in this evolving process. As better and better DNA tests are developed and used in criminal investigations and trials, there will be fewer chances like that of *Globe Newspaper* to determine after the fact if justice was done.<sup>76</sup> Attention must be given to the underlying issues of the posthumous DNA testing debate before another case like *Globe Newspaper* develops. Ideally, of course, DNA tests will reveal the truth before a death sentence is carried out. But for the few unfortunate cases in which technology comes too late, the decision of whether to allow independent testing to confirm or deny the outcome remains a source of passionate debate.

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<sup>1</sup> Ryan is quoted as saying, “We have now freed more people than we have put to death under our system – 13 people have been exonerated and 12 have been put to death.” CNN, *Illinois Suspends Death Penalty* (Jan. 31, 2000), at <http://cnn.com/2000/US/01/31/illinois.executions.02/>.

<sup>2</sup> CBS, *Maryland Death Penalty Moratorium* (May 9, 2002), at <http://www.cbsnews.com/stories/2002/05/09/politics/main508491.shtml>. The Maryland ban lasted only about eight months. The death penalty was reinstated by Governor Glendening’s successor, who had promised to do so in his campaign. Nat’l Ass’n of Criminal Def. Lawyers, *Maryland Death Penalty Moratorium Evaporates to Bolster Political Position of New Governor* (Jan. 22, 2003), at <http://www.criminaljustice.org/public.nsf/newsreleases/2003mn004?opendocument>.

<sup>3</sup> *Death-Penalty Moratorium Gains in N.C.*, RICH. TIMES-DISPATCH, May 27, 2003, at A9. The new trials were awarded for prosecutorial misconduct.

<sup>4</sup> Holly Schaffter, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 699 (2002) (quoting Peter Donnelly & Richard D. Friedman, *DNA Database Searches and the Legal Consumption of Scientific Evidence*, 97 MICH. L. REV. 931, 934 (1999)). Identical twins will have the same DNA. Otherwise, Schaffter reports that scientists estimate the likelihood that an innocent person will be a genetic match to DNA from a crime

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scene is between “one in millions [and] one in many billions.” *Id.* at 700.

<sup>5</sup> For an interesting discussion of recent state and federal legislative activity in the area of postconviction testing, see Anna M. Franceschelli, Comment, *Motions for Postconviction DNA Testing: Determining the Standard of Proof Necessary in Granting Requests*, 31 CAP. U. L. REV. 243 (2003).

<sup>6</sup> The stakes are high in the political arena as well. Governor Mark Warner of Virginia is currently considering a petition from Centurion Ministries, a New Jersey based charity, requesting a gubernatorial order to Virginia’s DNA laboratory to retest the Coleman DNA. Larry Sabato, a political analyst from the University of Virginia, stated that if Warner allows the retesting and Coleman is in fact proven to be innocent, “Virginia’s death row will become the poster boy for the anti-death-penalty movement in the United States and throughout the world,” warning that “if [Warner] creates the spark that leads to the abolition of the death penalty or even energizes the movement for the abolition of the death penalty, it will damage him in a very pro-death-penalty state.” *Warner Still Reviewing Bid for DNA Test*, RICH. TIMES-DISPATCH, Sept. 10, 2003, at B3.

<sup>7</sup> Anne-Marie Moyes, Note, *Assessing the Risk of Executing the Innocent: A Case for Allowing Access to Physical Evidence for Posthumous DNA Testing*, 55 VAND. L. REV. 953, 962 (2002).

<sup>8</sup> *Id.* (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978)).

<sup>9</sup> *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 508 (1984).

<sup>10</sup> *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 8-9 (1986).

<sup>11</sup> *Id.* at 8 (giving jury selection as an example of a historically open proceeding).

<sup>12</sup> *Id.* at 8-9 (explaining that some government proceedings, such as the grand jury system, require secrecy to function appropriately).

<sup>13</sup> *Press-Enterprise II*, 478 U.S. at 9.

<sup>14</sup> *Press-Enterprise I*, 464 U.S. at 510.

<sup>15</sup> Moyes, *supra* note 7, at 963. See also *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981) (granting access to videotapes); *In re NBC*, 635 F.2d 945, 952 (2d Cir. 1980) (granting access to videotapes).

<sup>16</sup> *Globe Newspaper Co. v. Commonwealth*, 570 S.E.2d 809 (Va. 2002).

<sup>17</sup> *Id.* at 810.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Coleman v. Thompson*, 798 F. Supp. 1209, 1213-14 (W.D. Va. 1992).

<sup>21</sup> *Coleman v. Thompson*, 504 U.S. 188 (1992).

<sup>22</sup> The plaintiffs in the case, *Globe Newspapers, Inc.* and *Media General Operations*, include *The Boston Globe*, *The Washington Post*, *The Virginia-Pilot*, and *The Richmond Times-Dispatch*. *Globe Newspaper*, 570 S.E.2d at 811.

<sup>23</sup> VA. CODE ANN. § 2.2-3706(F)(1) (Cum. Supp. 2003).

<sup>24</sup> *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978).

<sup>25</sup> Compare U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .”) with VA. CONST. art. I, § 12 (“[T]he General Assembly shall not pass any law abridging the freedom of speech or of the press . . . .”).

<sup>26</sup> *Globe Newspaper*, 570 S.E.2d at 812.

<sup>27</sup> *Moyes*, *supra* note 7, at 970.

<sup>28</sup> *Globe Newspaper*, 570 S.E.2d at 813.

<sup>29</sup> *Press-Enterprise II*, 478 U.S. at 8.

<sup>30</sup> *Moyes*, *supra* note 7, at 967 (quoting an Opinion Letter of Judge Keary Williams). Judge Williams applied a two-part test from *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), similar to the *Press-Enterprise II* standard used by the Supreme Court of Virginia, in asking “[w]hether retesting the Coleman DNA after conviction and execution of judgment is a process historically open to the public and . . . would aid in ensuring the fairness of, and contributing to the public confidence in, the death penalty as implemented in Virginia.” *Moyes*, *supra* note 7, at 976.

<sup>31</sup> *Moyes*, *supra* note 7, at 977.

<sup>32</sup> *Press-Enterprise II*, 478 U.S. at 8.

<sup>33</sup> See generally *Moyes*, *supra* note 7; *supra* text accompanying note 30.

<sup>34</sup> *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

<sup>35</sup> *Press-Enterprise II*, 478 U.S. at 8.

<sup>36</sup> *Press-Enterprise II*, 478 U.S. at 8, 12.

<sup>37</sup> *Id.* at 13 (quoting *Richmond Newspapers*, 448 U.S. at 572).

<sup>38</sup> *Press-Enterprise I*, 464 U.S. at 508.

<sup>39</sup> *Id.* at 510.

<sup>40</sup> *Globe Newspaper*, 264 Va. 622, 630 (2002).

<sup>41</sup> See *Coleman v. Bass*, 484 U.S. 918 (1987) (denying certiorari to the Supreme Court of Virginia’s denial of Coleman’s state habeas corpus petition); *Coleman v. Thompson*, 895 F.2d 139 (4th Cir. 1990) (affirming district court denial of a writ of habeas corpus), *aff’d* 501 U.S. 722 (1991); *Coleman v. Thompson*, 798 F. Supp. 1209 (W.D. Va. 1992), (denying a second petition for a federal writ of habeas corpus), *aff’d* No. 92-4005, 1992 U.S. App. LEXIS 11440 (4th Cir. May 18, 1992) (per curiam).

<sup>42</sup> Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 607 (2002).

<sup>43</sup> Kreimer & Rudovsky, *supra* note 42, at 561.

<sup>44</sup> *Globe Newspaper*, 570 S.E.2d at 813.

<sup>45</sup> *In re Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984) (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-608 (1978)).

<sup>46</sup> *Furman v. Georgia*, 408 U.S. 238 (1972); see also *Smith v. Commonwealth*, 248 S.E.2d 146 (Va. 1978) (summarizing the early post-Furman death penalty decisions).

<sup>47</sup> VA. CODE ANN. § 2.2-3701 (Michie 2001).

<sup>48</sup> *Sideri v. Office of the Dist. Atty.*, 243 A.D.2d 423, 423 (N.Y.A.D. 1997).

<sup>49</sup> *United States v. McDougal*, 940 F. Supp. 224, 226, 228 (E.D. Ark. 1996).

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<sup>50</sup> United States v. McDougal, 103 F.3d 651, 654 (8th Cir. 1996).

<sup>51</sup> See Cal. First Amendment Coalition v. Calderon, 150 F.3d 976, 982 (9th Cir. 1998) (noting the limited nature of this right).

<sup>52</sup> Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (guaranteeing the right of public and press access to criminal trials); Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501 (1984) (allowing access to the jury selection process); Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1 (1986) (allowing access to preliminary hearings).

<sup>53</sup> Calderon, 150 F.3d at 980-81.

<sup>54</sup> *Id.* at 983. The Ninth Circuit upheld the regulation based on Supreme Court rulings in Pell v. Procunier, 417 U.S. 817 (1974) (holding that limiting media access to prisoners did not violate First Amendment free press interests) and Houchins v. KQED, Inc., 438 U.S. 1 (1978) (holding that the press has no special First Amendment right of access to prisons). If a policy does not “deny the press access to sources of information available to members of the general public,” no First Amendment violation has occurred. Pell, 417 U.S. at 835.

<sup>55</sup> Calderon, 150 F.3d. at 981 (quoting Branzburg v. Hayes, 408 US 665, 681 (1972)).

<sup>56</sup> Globe Newspaper, 570 S.E.2d at 813.

<sup>57</sup> GA. CODE ANN. § 50-18-71.1 (Lexis 2002).

<sup>58</sup> Moyes, *supra* note 7, at 969. Because the state crime lab had mislabeled the evidence, the DNA tests were inconclusive. *Id.* at 970.

<sup>59</sup> Globe Newspaper, 570 S.E.2d at 813.

<sup>60</sup> VA. CODE ANN. § 2.2-3700(B) (Michie 2001).

<sup>61</sup> Kreimer & Rudovsky, *supra* note 42, at 595.

<sup>62</sup> See *supra* text accompanying note 54.

<sup>63</sup> Moyes, *supra* note 7, at 966.

<sup>64</sup> Moyes, *supra* note 7, at 972.

<sup>65</sup> *Id.*

<sup>66</sup> Moyes, *supra* note 7, at 957.

<sup>67</sup> Moyes, *supra* note 7, at 956-57.

<sup>68</sup> Kreimer & Rudovsky, *supra* note 42, at n.254 (quoting Brooke A. Masters, *DNA Testing Confirms Man’s Guilt in Va. Rape*, WASH. POST, May 16, 2002, at B1 (“About half of all conclusive postconviction tests inculpate the inmate, rather than prove his innocence.”)).

<sup>69</sup> Moyes argues that the decision to bar third-party testing was suspiciously self-serving: “The judges in these two Virginia cases issued rulings that directly protect the reputation of the judiciary, of which they are sitting members.” Moyes, *supra* note 7, at 973.

<sup>70</sup> Two examples of fallible traditional evidence are false confessions and incorrect eyewitness identifications. Kreimer & Rudovsky, *supra* note 42, at 563-64.

<sup>71</sup> *Id.* at 606.

<sup>72</sup> *Id.* at 607.

<sup>73</sup> Moyes, *supra* note 7, at 995.

<sup>74</sup> Kreimer & Rudovsky, *supra* note 42, at 588.

<sup>75</sup> *Id.*

<sup>76</sup> Moyes, *supra* note 7, at 991.

