



UNC  
SCHOOL OF LAW

University of North Carolina School of Law  
Carolina Law Scholarship  
Repository

---

Faculty Publications

Faculty Scholarship

---

2010

## Why Defense Attorneys Cannot, But Do, Care About Innocence

Robert P. Mosteller

*University of North Carolina School of Law*, [rmostell@email.unc.edu](mailto:rmostell@email.unc.edu)

Follow this and additional works at: [http://scholarship.law.unc.edu/faculty\\_publications](http://scholarship.law.unc.edu/faculty_publications)



Part of the [Law Commons](#)

Publication: *Santa Clara Law Review*

---

This Article is brought to you for free and open access by the Faculty Scholarship at Carolina Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

# WHY DEFENSE ATTORNEYS CANNOT, BUT DO, CARE ABOUT INNOCENCE

Robert P. Mosteller\*

## INTRODUCTION

At a time when special attention is being paid by the public to innocence and the prosecution is being asked to undertake new responsibility regarding erroneous convictions,<sup>1</sup> this article reexamines the apparent irrelevance of the question of the client's guilt or innocence to the defendant's trial counsel. To date, concern for innocence has been an "enabler" for procedural reforms that broadly benefit those accused of crime,<sup>2</sup> but that effect is not a given if

---

\*J. Dickson Phillips Distinguished Professor of Law, University of North Carolina School of Law. I would like to thank Susan Bandes, Ken Broun, Mike Corrado, Margareth Etienne, Jeff Powell, Rich Rosen, Larry Rosenthal, Fred Zachiaras, and participants in the 2008 Criminal Procedure Discussion Forum for their very helpful comments on an earlier draft.

1. In February 2008, the American Bar Association's (ABA's) House of Delegates approved changes to Rule 3.8 of its Model Rules of Professional Conduct that require the prosecutor to investigate innocence if the prosecutor "knows of new, credible and material evidence creating a reasonable likelihood" of the innocence of a convicted defendant and to seek to remedy the conviction when the prosecutor "knows of clear and convincing evidence establishing that" the convicted defendant is innocent. MODEL RULES OF PROF'L CONDUCT R. 3.8(g)-(h) (2008). Cf. Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009) (examining whether the disciplinary process, through the requirement that prosecutors "provide competent representation" might further the interest in not convicting the innocent, but ultimately concluding that attention be paid to alternative mechanisms for guiding and controlling prosecutorial behavior).

2. In her article about "framing" the wrongful conviction debate, Professor Susan Bandes describes how, unlike the public's apathy toward arguments that the death penalty is racially discriminatory and does not deter, revelations of innocent defendants being sent to death row had a major impact on public perceptions of injustice and support for reform. See Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5. She observed: "The development that finally roused people to anger, or at least to a willingness to reexamine

reforms can be targeted in ways that promise a different impact for the innocent. My fear is that innocence may become a “wedge issue,”<sup>3</sup> dividing progressives concerned with fairness from those principally concerned with innocence, which may undercut support for some procedural guarantees that do not promise to focus on the deserving accused—the innocent. My goal is to explain in a new context why the right to counsel for all should be strongly supported by those committed to the innocent, just as it has long been supported by those who prize procedural fairness without regard to guilt or innocence.

I concentrate on defenders who represent indigent defendants full-time. I do not challenge the frequent observation that such defenders focus upon what can be proved, rather than guilt or innocence,<sup>4</sup> but I do contend that defenders approach innocence somewhat differently than guilt. With respect to whether defense counsel can “care” about guilt or innocence, I reach the same conclusion that many before me have reached: defense counsel institutionally cannot care about guilt with regard to the degree of their effort or the zealotry of their representation.<sup>5</sup>

As to the obviously related, but also distinct issue of innocence,<sup>6</sup> the same lack of concern holds because a new

---

their beliefs [about capital punishment], was the mounting evidence that innocent people had been sent to death row.” *Id.* at 8–9.

3. A “wedge issue” is defined as “a political issue that divides a candidate’s supporters or the members of a party.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1418 (11th ed. 2004).

4. See Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 509 n.100 (2000) (“In criminal defense, the focus must be on proof, not truth.”).

5. Of course, whether defenders care about guilt rather than proof of guilt, clear knowledge of guilt as a result of a client’s confidential confession to defense counsel certainly affects and restricts the way that counsel can defend the case, even though the confidential statement is not admissible. See MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2002).

6. The statement that innocence is a related but distinct issue from guilt deserves some explanation. If either innocence or guilt is known with certainty, it negates the other position. Thus, in situations of clear evidence, innocence is the opposite of guilt; they are two sides of a coin; they are more than related because one decides the other. However, in situations of uncertainty, the opposite of being guilty is being not guilty. In the vast majority of cases, some degree of uncertainty prevails, and so there are three positions: guilty, not guilty, and innocent. In such cases, the difference engendered by perceiving a defendant or client primarily through the lens of possible innocence as opposed to through the lens of probable guilt is substantial. That difference is one of the subjects of this article.

justification comes into play, even though the institutional imperative may be less absolute.<sup>7</sup> A special focus cannot be given to innocence because defense attorneys have no special and reliable ways to know innocence. They usually have no means to establish innocence definitively. Like others in the criminal justice system, they principally rely on the absence of proof of guilt to mark innocence and, at their peril, use intuition and subjective judgment as problematic guides. To let special care about innocence matter in representing clients would be to deny a full defense to the innocent who lack either readily available objective proof or a compelling persona. However, despite the insuperable difficulties, defense attorneys do, in fact, care about innocence when they believe they have encountered it.<sup>8</sup> The image of the hard-boiled defense attorney unconcerned about innocence is largely and necessarily accurate, but I emphasize that it is not fully accurate.

Defense counsel focus on what is useful to the conduct of their representation that relates to innocence—its proof. When such proof is available, they develop it and present it. Assuredly, when innocence is not present, they defend anyway, but their reaction is connected to the irrelevance of guilt to the duty to represent the client and does not dictate the irrelevance of innocence.

Belief in innocence without proof is a different matter. Unlike prosecutors, defense attorneys lack the power to dismiss a case because they believe the defendant is, or may be, innocent. In the courtroom, their belief is treated as inadmissible, and therefore it is functionally irrelevant. In contrast to guilt, where defense attorneys may have unique personal knowledge because the client unequivocally admitted guilt to them,<sup>9</sup> a client's impassioned protestation of

---

7. Since most charged clients are apparently guilty (otherwise they would not be charged), a defender providing inferior representation based on her perception that the client is likely guilty would be institutionally intolerable since it would disadvantage virtually all clients. If only an occasional client falls into the category of likely innocent, a defender giving extra assistance to that client might be tolerated practically precisely because it is rare or calls forth extra resources, even though if generalized, it is intolerable because of providing inferior representation to the apparently guilty.

8. I cannot empirically prove my assertion, but it is my experience from years of contact with defenders that they are personally and often powerfully affected when they encounter innocence and react differently in those cases.

9. As discussed later in this article, apparently incriminating statements

innocence hardly constitutes knowledge of innocence. Usually, the evidence defense attorneys possess that is not also available to the prosecution merely supports the likelihood of innocence, but does not prove it.

My experience is that defense attorneys do care about innocence when they see it or they think they see it. However, defenders who search among their clients for those who are innocent are inviting personal and professional destruction. A defender's belief in her client's innocence must be backed by evidence; otherwise, it largely only torments the defender and interferes with the performance of the attorney's professional duty to all of her other clients. Furthermore, because this can become disabling, it can harm even a client the defender believes to be innocent.

In the end, I conclude that the concern for innocence will likely continue to be handled individually by attorneys responding to the torment by giving special attention to those clients, and attempting to limit the damage that special attention may cause to others who they represent. I believe there is a theoretical possibility for a systemic response to innocence by providing additional resources where strong objective evidence of innocence exists, but, unfortunately, no practical means of implementation. Moreover, an attempt actually to produce extra resources for particularly worthy defendants is either not feasible or will prove counterproductive. Instead, I suggest that the public

---

by clients that are not unequivocal statements of guilt are indicators of guilt but do not necessarily prove it. See *infra* note 80 and accompanying text. Thus, even a defense attorney's inside knowledge of evidence supporting guilt does not necessarily prove guilt. For example, innocent defendants often change alibis, which is an obvious and valid indicator of fabrication. Ronald Cotton, an innocent defendant who spent years in prison for a crime DNA evidence and the actual perpetrator's confession proved he did not commit, initially gave the police an incorrect alibi. See EDWARD CONNORS ET AL., 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 43-44 (1996); Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 72 n.35 (2003). If his attorney's memory is correct, he provided two additional versions of the alibi to his lawyer. See *Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997), available at <http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/moseley.html>. Innocent defendants may change stories because they initially misremember where they were at the critical time or who they were with, as seems to have been the situation with Cotton. Even if innocent, clients may lie to their attorney because they were with no one and have no alibi.

recognize that any increased concern for innocence should result in more resources for all defenders for all cases. Where not objectively verifiable, innocence will be known by the defendant and perhaps others, but for various reasons, their knowledge will be contestable and discounted. Sometimes, of necessity, the issue of innocence must be left for the jury, and a thorough presentation of all the available evidence by defense counsel with adequate resources to perform the task is our inadequate, but best, response.

In writing this article, I depend heavily on my personal experiences as a defense attorney and tangentially on my love of movies. I practiced law for seven years as a public defender with the Washington, D.C. Public Defender Service (PDS) before I started teaching law.<sup>10</sup> One of my many “favorite” movies is *The Fugitive*,<sup>11</sup> which I believe provides the general attitude of many defense attorneys toward claims of innocence.

In the movie, Dr. Richard Kimble, played by Harrison Ford, is charged with murdering his wife, a crime he vigorously insists he did not commit. He is convicted of the murder and sentenced to be executed. When the bus transporting him to prison to await his execution has an accident, he escapes. Hot on his trail is U.S. Marshal Samuel Gerard, played by Tommy Lee Jones.

Gerard catches up to Kimble at the end of a storm drain that empties into an enormous spillway. A memorable exchange transpires just before Kimble jumps over the edge in a desperate effort to remain free so he can prove his innocence. Kimble pleads, “I didn’t kill my wife.” Gerard replies with the stunning words, “I don’t care.”

Gerard’s response—“I don’t care”—with a slight recasting, described below, captures my position as a public defender in response to the almost inevitable claim by my

---

10. Professor Barbara Babcock has described PDS as “an exemplary institution” that is “characterized by extensive training, reasonable caseloads, and the ability to attract young lawyers with impressive credentials to do the work.” Barbara A. Babcock, Book Review, 53 GEO. WASH. L. REV. 310, 312 (1984–1985) (reviewing JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?”: THE MAKING OF A CRIMINAL LAWYER (1983)). At PDS, I tried cases and argued appeals for individual clients. I also served as Training Director and ultimately Chief of the Trial Division, positions in which I conferred with and advised colleagues regarding their cases.

11. THE FUGITIVE (Warner Bros. 1993).

clients that they were innocent. It is the attitude of, I believe, most conscientious defenders of indigent defendants who do not get to choose their clients.<sup>12</sup> When a client tells his lawyer, as my clients did, even if apparently clearly guilty, “I didn’t do it; I am innocent,” the defense attorney’s reflexive, but unspoken, response is, “I don’t care.” Upon more careful thought, at least three more nuanced responses might be made: (1) “My job is to defend you zealously whether guilty or innocent, and I can’t ethically shortchange anyone, even if what you say is by every demonstrable measure false”; (2) “I don’t care because it cannot matter to my effort if it turns out I do not believe you”; and (3) “I am not a trained lie detector and, moreover, what I believe is treated by the law as irrelevant, so I will ignore your precise claim and convert your statement into an emphatic request to find evidence of innocence or another way to win my case.”

This attitude about the irrelevance of the client’s guilt and, effectively, in most situations ignoring his specific claim of innocence, follows from the ethos that animated one of the early ABA statements about the necessary attitude to defend all those charged with crime. Canon 5 states:

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.<sup>13</sup>

The above is not only a statement of the right of the guilty to a defense, but it is also a statement of the importance of providing a defense to innocent clients, despite the lawyer’s lack of personal belief in their innocence.

This expression of professional authorization took on further meaning when the Supreme Court established, under the Sixth Amendment, a broad right of effective assistance of

---

12. Clients are assigned either by a judge or by an administrator. Typically, such lawyers are not allowed to pick and choose among clients, although they may be limited to specific types of cases based on experience or expertise.

13. CANONS OF PROF’L ETHICS Canon 5 (1908).

counsel for indigent defendants.<sup>14</sup> As supplemented by professional norms first stated in the Canons of Professional Ethics, the duty is to defend everyone, including the guilty, with warm zeal,<sup>15</sup> within the limits of other ethical constraints, such as the requirements of candor to the tribunal.<sup>16</sup> Attorneys are thus understood ethically to have a duty to defend everyone fully and a constitutional obligation to defend at least to a level to satisfy the basic requirements of effective assistance.<sup>17</sup> Generally, to give better representation to the apparently or likely innocent would result in providing the apparently or likely guilty (but perhaps innocent) with second-class treatment. Neither constitutional principles<sup>18</sup> nor ethical mandates appear to provide support for such two-tiered services.

My initial reaction that “I don’t care” about claims of innocence and even more about guilt is consistent with Canon 5, but goes further than the canon’s statement of permission to defend those whom the lawyer might believe to be guilty.

---

14. In *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963), the Court held that state courts are required to provide counsel to indigent criminal defendants charged with felonies under the Sixth Amendment. Its progeny extended the right to misdemeanor cases when a sentence of imprisonment is imposed. See *Alabama v. Shelton*, 535 U.S. 654, 662–72 (2002) (requiring counsel where the defendant is sentenced to imprisonment even that sentence was initially suspended).

15. See CANONS OF PROF’L ETHICS Canon 15 (1908) (directing lawyers to give “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of [the lawyer’s] utmost learning and ability”).

16. See MODEL RULES OF PROF’L CONDUCT R. 3.3 (2008) (imposing duty of candor with the tribunal).

17. More precisely, the effective constitutional requirement is to avoid ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 684–96 (1984) (defining the minimal obligation where counsel is constitutionally guaranteed as that of effective assistance, which is denied when counsel’s performance is deficient and prejudices the client to the extent of denying a fair trial). The failure of *Strickland* to ensure adequate representation is the subject of a substantial literature. See, e.g., Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986). However, this subject is beyond the scope of this article.

18. See *Miranda v. Clark County*, 319 F.3d 465, 469–70 (9th Cir. 2003) (stating that the constitutional requirement is that “every criminal defendant receive adequate representation, regardless of guilt or innocence” in suit against the public defender regarding a policy of using the results of defendants’ polygraph examinations to allocate office investigative and legal resources, which allegedly resulted in inadequate resources for an effective defense for clients who appeared to be guilty).



One powerful argument that I accepted when I was practicing is that it would be intolerable to the system of constitutionally mandated defense if the indigent accused had to first convince his or her own defense attorney of innocence before the client could expect a full defense. The idea that two levels of representation for indigent defendants—a lower level for defendants, perhaps the majority, believed by their lawyers to be guilty and a higher level of effort for those whom the lawyer believed were innocent—was and is repugnant to me.

However, the initial response does not mean that innocence or the client's claim of innocence is irrelevant to the work of the defense attorney. U.S. Marshal Gerard's job was to arrest Kimble, even if he believed he was innocent.<sup>19</sup> Nevertheless, his conduct as the movie progresses shows a professional who clearly did care at an important level about innocence. When he encountered evidence that suggested Kimble was telling the truth during his quest to arrest him, Gerard paid attention to the evidence and sought confirmation. When the weight of that evidence became compelling, Gerard continued with his task of arresting Kimble, but he first protected Kimble's life. After he had taken Kimble into custody, Gerard removed the handcuffs as he drove away, presumably toward resolution of the charges by higher authorities.

One message of this article is the importance of an attitude of the sort "I don't care" about guilt or innocence for defense attorneys whose job is to defend all comers. I examine the enormous practical importance of this attitude to the professional role and emotional well-being of a trial-level public defender. I hope to develop an understanding—even for those concerned primarily, and perhaps exclusively, with innocence—why this response is the necessary initial position that, in many cases, never changes. Another point of this article is to highlight the difficulty of a defense lawyer uniquely knowing that her client is innocent. The client's statement of innocence, even if impassioned and subjectively convincing, constitutes virtually no evidence at all. Moreover,

---

19. Thus, I am arguing that Gerard meant his job did not change even if he believed Kimble, just as a defense attorney's job does not change even if she disbelieves the client.

because belief in innocence without facts to back up that belief is potentially destructive, it is extremely unwise professionally for a defense attorney to allow herself to believe in innocence based on the client's personal persuasiveness. Nevertheless, for defense attorneys, much as it was for Gerard, "I don't care" is not wholly accurate. Defense attorneys may be officially prohibited from caring about guilt, but I observe that they sometimes cannot avoid caring about innocence.

Before I go further, I want to set out an important factual claim: in my experience, those charged with very serious offenses do not readily admit guilt to their attorney, despite assurances of confidentiality. One of my mentors at PDS had an insight, which I am convinced is accurate. He said that I might personally operate under the principle of treating all defendants, guilty or innocent, equally, but my clients did not believe that to be true. He contended that clients believe that defense attorneys will give better representation to clients whom they believe are innocent, and that assumption by clients helps explain why most clients assert their innocence to their attorneys. They could not believe their lawyers would really represent them with full vigor if the lawyer believed the client guilty, so the guilty lied. Clients would say in our initial interview, "I am innocent," which they maintained even as the evidence mounted and the client's explanation of how he or she was innocent had to be changed as more of the prosecution's evidence was revealed.<sup>20</sup> At some point in most cases, when accepting a plea offer presented the best objective outcome for the client, the often quite difficult process of the client acknowledging guilt began.

I emphasize a point I made earlier. An important reason why "I don't care" that a client is innocent is a proper initial response is because I almost never could know whether the claim was true. Often I would have the client's protestations of innocence combined with overwhelming evidence of guilt, but I still had no surefire way to distinguish between reasonable belief in guilt and knowledge of it. But when it

---

20. Professor Margaret Raymond had the same experience as a practicing attorney that I did; her clients almost always proclaimed their innocence. See Margaret Raymond, *The Problem With Innocence*, 49 CLEV. ST. L. REV. 449, 460 (2001). She also assumed the clients did so to win the defense attorney's full commitment to the client's defense. See *id.*

comes to innocence, the uncertainty is generally far more serious. When I initially encountered my clients in lockup before their first court appearance, the prosecution had already made an initial decision to file charges. It had not uncovered evidence of innocence, and although many cases would be dismissed because the evidence was weak, I was unlikely to find clear evidence of innocence that the government had missed. If the client was innocent, the best I would likely be able to produce was some weaknesses in the government's case or evidence of innocence that was equivocal, or subject to challenge.<sup>21</sup> I would typically not be able to corroborate definitively any belief I might have in innocence, and if the amount of effort I expended depended on my belief, I would be giving some clients who were, in fact, innocent a second rate treatment when, if innocence has special importance, they most needed my best efforts. They were the ones with no persuasive evidence to verify their claim, and any diminishment of my effort, based on an assessment by their appointed advocate, would further skew the chances of a proper outcome.

I want to be forthright about my personal motivations. Like most defenders, I was not focused principally or directly on innocence. In common with other defenders as described later,<sup>22</sup> I had multiple motivations, and the chief one was an idea of fairness. For some reason that is part of my personal value system; I believed that everyone, even the clearly guilty, was entitled to an attorney working as hard as possible for their defense. I believe that guardians are needed to keep the system honest. I do not claim that most devoted defense attorneys justify their work to themselves exclusively or primarily as protectors of the innocent. That portrayal would not be true to their multiple motivations and roles, but it would terribly shortchange their importance in protecting the innocent, if the largely necessary "I don't care" attitude were misunderstood as the full and literal understanding of defenders' position, and particularly their function.

---

21. Alibi evidence from those who know the defendant or are related to him is the most likely exculpatory evidence in identification cases, and such evidence is usually subject to rather effective challenge because it depends critically on imperfect human memories from biased witnesses.

22. See *infra* Part V.

During my seven years at PDS, I practiced most days as if I did not care about guilt or innocence.<sup>23</sup> I believe, even in this changed environment that emphasizes innocence, I would largely act the same today. But, although I tried to act as if I did not care about the guilt/innocence issue, I was not neutral in my operating assumptions. Professor Daniel Givelber, who has observed that the criminal justice system, including defense attorneys, assumes that trials are conducted among those who are guilty to determine which of the guilty are convicted.<sup>24</sup> Guilt seemed the realistic operating assumption that *appeared* accurate for most cases.

Both innocent and guilty clients said they were innocent. How is one to know? It is hard as a human being not to develop an opinion on the issue of guilt and, in many cases, innocence. The operating command is to disregard those opinions, which I put in terms of not caring. We know from the DNA exonerations that the assumptions of the system and, no doubt, defenders were inaccurate for a substantial number of defendants. I practiced before those revelations, but even today, after those revelations, the systemic assumption of guilt operates throughout the actors in the system, as admittedly it should based on overall probabilities. Nevertheless, that assumption is in error in some unknowable number of cases. I will make my point even more explicitly. Defense counsel, including myself, have believed some of their innocent clients were guilty and any change in societal attitudes caused by DNA exonerations has not altered that picture.

---

23. However, as the case I describe at the beginning of the next part as that of Innocent Client #1 demonstrates, I did act somewhat differently when I saw what I thought was substantial evidence of innocence.

24. See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1394–95 (1997) (observing that the criminal justice system operates on the general assumption of the guilt of all those charged and challenging the obvious flaws in this assumption).

In jurisdictions where prosecutors are of high quality and act generally ethically, the assumption that defendants are guilty may be stronger. This is because others may assume the prosecutorial screening process has excluded the guilty, and this will be true for the relatively obvious cases. The prosecutors I faced were from the U.S. Attorney's Office and I had a very positive general impression of my opponents. However, as this article argues, innocence is frequently difficult to recognize, and although clearly better than situations where prosecutors do not screen carefully, respect for the quality and ethics of prosecutors leads to a potentially dangerous false sense of confidence.

Some of my explanations regarding the motivations of and justifications for those who defend the indigent are relatively standard. However, I present these explanations to be reexamined at this different time when society and scholars put greater emphasis on innocence. Rather than trial counsel attempting to treat the innocent and guilty differently, my analysis leads instead to a vigorous defense of everyone.

Part I discusses two cases that I had as a public defender where my clients, through flukes, were shown to be innocent. Absent those chance events, the cases would have likely gone to trial and one or both would have been convicted. I discuss my personal reactions then, and my assessment now, of the issues presented by those cases. In Part II, I explore how some issues become wedges that divide progressives in criminal justice issues. I examine one proposal to prohibit the full defense of some clearly guilty clients, which seems to have that unfortunate potential effect for a vigorous defense of all.

In Part III, I turn to one of the prime reasons why any effort to isolate the innocent, with regard to the work of trial-level defenders, is dangerous and, I believe, inevitably misguided. Not even defense lawyers can actually know whether their clients are innocent. This point is frequently stated, but, I suspect, not actually believed even by sophisticated observers. I pay particular attention to the group of clients who may be described as “the usual suspects.” For clients of this type, defense counsel, like others, are likely to believe the client is guilty even if innocent because of prior similar conduct, which renders particularly pernicious any impact subjective belief in guilt may have on attorney zeal.

In Part IV, I work through two sets of problems faced by defenders. The first is the way defenders effectively allocate the scarce resource of their time among the clients within their case load. There, I argue that most attorneys do it in a way that maximizes total client welfare, assuming each client values freedom equally, and attempts to reach the same level of diminishing productivity for each client. The system does not include, nor would it easily accommodate, a component related to guilt or innocence. I also array subjective reactions of lawyers across various levels of objective proof of guilt and illustrate the pernicious potential of concern about guilt to

the role assigned to lawyers to help protect those who are actually innocent but appear guilty. In Part V, I examine the mindset and motivations of attorneys who regularly represent indigent defendants. Lawyers of this type have many ways to support themselves and to justify their efforts. I explore here the difficulty and, perhaps, the impossibility of surviving professionally and personally if concern about the guilt of clients regularly enters a defender's thoughts.

In Part VI, I attempt both to recognize the reality at the individual level—that defense lawyers do, in fact, care deeply about innocence when they encounter apparent evidence of it—and to explore the possibility of a systemic response that would provide additional resources to the defense when strong objective evidence of innocence is found. I conclude, however, that the only effective response would be for the increased concern for innocence to fuel a drive to increase overall funding for defender services. Barring that outcome, unfortunately, only an occasional individual response is practical, even though it is admittedly both inadequate and problematic.

#### I. MY EXPERIENCES WITH INNOCENT CLIENTS AS A TRIAL ATTORNEY

I discuss two cases I handled while at PDS where my clients were arrested and charged, but were shown to be factually innocent. In both cases, the charges were ultimately dismissed. I describe these two cases in some detail and treat another more summarily in a footnote,<sup>25</sup> making alterations to all to avoid revealing client confidences that were not divulged in connection with the dismissals. Because identification issues are at the core of these cases, I note at

---

25. See *infra* note 26. The case is discussed only in a footnote because its lessons are largely duplicative.

All three cases were dismissed because the prosecution was convinced, not only of its inability to prove guilt, but of the client's innocence, an assessment with which I concur. I represented one other client whose case was dismissed after indictment. See *infra* Part III. I treat it somewhat differently in my mind and in this article because I was not confident whether he was innocent or, rather, that he was not guilty because the government's witness was lying about much of her testimony. This case illustrates the difficulty of knowing, even when a defense attorney has strong evidence, that the client is truly innocent rather than not provably guilty by the evidence. I describe this client as "not guilty" rather than "innocent."

the outset that none of the three cases involved cross-racial identifications.

*A. Innocent Client #1: Assault with Intent to Commit Rape and Related Rape Defendant*

The case I am about to describe is truly a scary one. This innocent young man could have spent the rest of his life in prison except for a fluke.

At the time I worked there, new lawyers at PDS began practice handling juvenile delinquency cases. After roughly a year, the training/practice rotation took new attorneys to adult misdemeanors and, very shortly thereafter, to low-grade felonies—no armed offenses, restricted to a maximum of ten years in prison. At this point in my trial experience, I was appointed to represent Innocent Client #1, who was charged with assault with intent to commit rape. He was accused of attempting to rape a young woman whom he threatened and walked to a nearby vacant building. Before he could commit the sexual assault, a curious bystander entered the building, and the man fled. The victim reported the crime immediately, but no one was arrested. A few days later, she hailed a police officer and told him about the earlier crime, pointing out a man she identified as the offender who was sitting on a nearby wall. At the end of the case, I learned she had told a detective that she was confident of her identification because the man was staring at her. She told the officer that she recognized the man, but also told him that she surmised that he must have recognized her from the attempted rape, because she had never otherwise met the man.

A lineup was ordered, and what occurred at the lineup showed that the crime was a gateway to something far more serious than I had expected from my assignment to an attempted sexual assault. Lineups in Washington, D.C. at that time were conducted very professionally. The suspects stood behind one-way glass with cameras filming both them and each witness as he or she entered the room and attempted an identification. The same person managed all lineups. He was not involved in investigating crime and read from a standard script that differed only as to the date, time, location, and type of crime. In the typical lineup, all the men in it were suspects in one or more crimes, and they served as

fillers for the other crimes for which others in the lineup were the suspect.

When I was called forward for the lineup, a young woman entered the room, and the officer read the standard script for the charged crime. When asked whether she recognized anyone in the line who was involved in that crime, she answered yes and confidently picked my client.

Another young woman was then escorted into the lineup room. This time the officer's script concerned a different crime—a rape that occurred a few days after my client's arrest. She too picked my client, but stated that he "looked like" the man who raped her. I was startled in two ways by the second witness. I had no indication that my client was a suspect in any other crime, and if my memory served me, he was in jail at the time of the later crime.

I went back to my office and checked. As I thought, my client was still in jail on the day of the second crime because his mother had not been able to post the bond imposed until the day after that rape occurred. The next morning, I obtained from the police records department the initial police report in the second case. Although the report was not detailed, the description provided of the perpetrator and the way he was dressed matched the information provided to the police by the victim in my case, and he isolated the victim in similar ways in both cases.

Earlier, when I worked in juvenile court, I encountered one innocent client.<sup>26</sup> Although the prosecution's case was not

---

26. I encountered my first innocence case, Innocence Client J (Juvenile), during my first year of practice as I worked in juvenile court. At PDS, after a period of formal training, lawyers began work in juvenile court. The cases assigned to brand-new attorneys often involved serious crimes, but because of the limited nature of maximum sentences in juvenile court, this is where practice began. One of my early cases involved a robbery attempt by an unarmed adolescent male who tried to snatch a woman's purse. She resisted and kept her purse, but called the police. Several days later, she hailed a passing patrol officer to have him arrest a young man she recognized as the assailant.

When I met my client, Innocent Client J, after his arrest, he vigorously denied that he was guilty. He knew nothing about the offense and said he did not do things like that. He said he had no idea who the complainant was because he never saw anyone point him out when he was arrested. All he knew was that one moment he was going about his business outside on the public street near his home, and the next he was placed under arrest.

I investigated his alibi and his background. His alibi was inconclusive. The crime took place after school on an ordinary day some time before the arrest.



particularly strong, I had nothing beyond the protestations of my client to indicate innocence, and with that client, I had no intuition about innocence. Innocent Client #1 struck me differently. The reason was probably because he had been represented a few years earlier by another lawyer in the office. Although that indicated he had a criminal record, the crime was a petty theft, and he was only peripherally involved. The other lawyer suggested that this new crime did not seem to fit the hapless young man she had represented. Even though an attempt and not a completed sexual assault, the new offense seemed far too serious for the naïve and inept person I met in lockup who very much still fit the person she described to me.

Even before the tentative identification, I had sent an investigator to interview his family members, who were serving as his alibi witnesses. "Family alibis" are typically seen as weak evidence by jurors under the theory that almost anyone should be able to get blood relatives to lie for them. They resemble the ancient oath helpers<sup>27</sup> and are something

---

He could not pinpoint what he was doing that day, and likely would have been on his way home from school or in his home without any adult present. He thus had no alibi, but given the time of day and his explanation, I made little of it as a possible indicator of guilt, but much regretted the lack of any helpful evidence.

His background was far more powerful. He had never been arrested and was understood to be one of the good kids in the neighborhood. We would present the best alibi we could but would depend on impressive character evidence. Although the crime was technically an attempted robbery, it was not, in fact, violent, and probation was virtually certain even if the client were convicted.

Rather than going to trial, the prosecution dismissed the case. I received a phone call one day from the prosecutor assigned to the case. He told me that the victim had called him and told him that she had apparently made a mistake. She had encountered the person whom she had pointed out on the street. She assumed in seeing her, the young man would run away or show some sign of encountering his accuser. Instead, he clearly had no idea who she was. On closer inspection and given his totally innocent reaction to her, she realized she had initially identified the wrong person. An adolescent male had attempted to rob her, but it was not the person she had identified earlier. The charges were dropped.

27. Evidence scholar John Henry Wigmore described "oath helpers" as coming from a primitive mode of trial when the persons who attended and "testified" on behalf of the parties were not witnesses, but rather individuals "whose mere oath, taken by the prescribed number of persons and in the proper form, the issue of the cause was determined." 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 896, at 659 (James H. Chadbourne ed., 1970). They were chosen, naturally and usually, from among the relatives and adherents of either party." *Id.* Others have suggested that because of their

like indirect character evidence—the value of the evidence is based largely on how impressive or unimpressive the family members are as people more than precisely what they say. This alibi did not move outside the general category of a family alibi, but it met the second issue raised by all alibis, which is: why would the witnesses remember that the defendant was with them at the specific time of the crime? This defendant was not arrested until days after the crime, on what was called in Washington, D.C., a “second sighting.” Thus, the alibi witnesses were required to remember a night long before the arrest, which they had no contemporaneous reason to associate with a crime that should have been unknown to them.

However, the date should have been independently memorable. The defendant’s sister had just come home from the hospital after giving birth. The family lived in very tight quarters with multiple adults in the same bedroom, in addition to my client, his sister, and the newborn baby. Everyone remembered clearly that the baby was very fussy that night and kept waking them. They knew my client was home the entire night, including the time when the crime occurred. Perhaps stupidly, before I had corroborated the date my client’s sister and her baby were released from the hospital, I asked the investigator to take written witness statements. When we obtained the medical records, they corroborated the date asserted, but I learned that memories of alibi witnesses of an event, like the date of the return home from the hospital, are frequently made in error. Foolishly or not, I had at an early date locked my client’s family into an alibi story that dovetailed perfectly with external independent records.

As soon as I obtained the police report, I sent my investigator to interview the rape victim, who fortunately was willing to talk with him. He came back with a signed statement from her. The statement, which was more detailed than the initial police report, matched up entirely with the attempted rape up to the point the perpetrator fled. I was

---

connection to the accused and the community, the failure to obtain the requisite oath helpers or inadequate oath helpers was a rough indicator that the community knew or believed the accused to be guilty. See Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 SYRACUSE L. REV. 109, 124 (2000).

convinced that the same man had done both crimes, and as a result of my client being in jail when the rape occurred, it could not be him.

My client was charged with the rape, arrested again, jailed on a bond his family could afford, and indicted. His case was assigned to one of the two judges handling the most serious offenses—prosecutions for first-degree murder, rape, and particularly complex serious criminal cases. This particular judge was hostile to the defense and gave very harsh sentences. The client faced trial in a difficult environment, and I was confident that if convicted, he would spend most of the rest of his life in prison.

The veteran Assistant District Attorney assigned to handle the case was conservative in his approach to cases, giving, for example, quite limited discovery, but he was very professional, smart, and fair. I decided to present my client's case of innocence to him because I trusted him to consider the information seriously and fairly. When we met, I told him straight out that I believed my client was innocent. I gave him everything I had developed in the case and told him so, including the signed alibi statements and even some evidence that indirectly could have been harmful if the client went to trial.

In the end, the prosecutor dismissed the case. He told me that the family alibi was interesting, but did not move him. What did move him was the corroboration that the Sex Crimes detectives gave regarding the similarity between the physical descriptions of the perpetrators and the events, coupled with the uniqueness of the statements made by the perpetrator to the victims. I will not go into details and do not know them fully, but he said the sexual modus operandi was quite distinctive and absolutely identical between the crimes up until the unexpected appearance of a witness who caused the perpetrator to flee. The experienced Sex Crimes detectives were absolutely convinced that the same man committed both crimes. The prosecutor said the police had checked and double checked jail records to be sure my client had not actually been released until the day after the rape, and he asked me if I knew anything to the contrary, which I told him I did not.

The prosecutor had told me that he was still troubled by what he considered corroborating evidence for the victim's

identification in my case—that my client had indicated recognition of the victim by staring at her at the time of the second sighting.<sup>28</sup> In the prosecutor’s judgment, that apparent corroboration was not enough to undercut the exonerating effect of the sexual modus operandi evidence, but it bothered him, and he asked for an explanation. When I later asked my client, he responded instantly with an explanation that struck me as totally plausible. However, the prosecutor who had not seen its spontaneity seemed less impressed when I relayed it to him, and I am not at all sure a jury would have believed the explanation. My client admitted that he did indeed stare at the young woman, but not because of recognition. He stared because she was attractive, and he was well aware his appearance was, at best, ordinary. He was not accustomed to having young women stare at him when he was out on the street, and certainly not anyone so attractive.<sup>29</sup> She was staring right at him, and he freely admitted staring back.

This is a particularly frightening case because proof of innocence relied so much on chance. Had Innocent Client #1’s mother posted bond a day earlier, the proof of his innocence—the identical sexual modus operandi—would have been introduced as proof of his guilt rather than his innocence.<sup>30</sup> There was no biological trace evidence left in my case because the sexual assault was interrupted. There should have been trace evidence in the rape case, but in a day before DNA typing, whether it would have exculpated my client, rather than be ambiguous or supportive of guilt, is uncertain. His

---

28. Interestingly, it was exactly the opposite reaction—failure of the previously identified defendant to recognize the victim in a second confrontation—that had led to the exoneration of an earlier juvenile client. *See supra* note 26 and accompanying text.

29. The explanation had instant resonance with me. At lineups, defense counsel is not given names of witnesses. We were trained to write down a description of the witnesses who appear to provide some basis for identifying which ones are the government’s witnesses and later linking lineup responses with witnesses. His perceptions were accurate.

30. Federal Rule of Evidence 404(b) and common law principles that predated the rule permit the introduction of “other crimes” evidence to show identity. *See* FED. R. EVID. 404(b). Thus, the other offense would have been admissible to win a conviction against my client on the assault with intent to rape case, and he would, effectively, have to defend against two accusations simultaneously. Moreover, these cases would likely have been joined for trial because of the similarity of the offenses, and I would have been officially defending two cases in a single trial.

blood type might have been the same as that of the real rapist, or perhaps no blood type would have shown up. I had an alibi for one crime, but whether there would have been an alibi for the rape, had he been released from jail in time to commit it, cannot be known.

Absent some exculpatory scientific evidence or an airtight alibi by witnesses outside his family, my guess is that he would have been convicted despite my best efforts, and those of more senior counsel, who would have assumed first chair in the trial of the joined charges. And, if he had been convicted, whether the biological evidence would have been preserved and someday reexamined is unknowable.

A second scenario would have been less cataclysmic for my client, but illustrative of the problems with being comfortable that the innocent will prevail. My discovery of the proof of innocence rested on the police noticing a possible connection to another crime, but not recognizing that my client was locked up at the time the crime occurred. Had there been no other similar sexual offense committed, had the police simply not noted the similarity between the offenses, or had they assumed no connection because my client could not have committed the crime, Innocent Client #1 would have gone to trial on the single charge of assault with intent to rape, or been faced with taking a guilty plea to avoid the prospect of longer incarceration after a trial with an uncertain outcome. Prosecutors in the U.S. Attorney's Office in Washington, D.C. operated under a principle that they would not prosecute one-witness-eyewitness-identification cases without some corroboration. My client's apparent recognition of the victim would have satisfied the corroboration requirement, and I have no reason to believe the prosecutor would have dismissed on the basis of his family alibi.

#### *B. Troubling Issues Regarding Innocent Client #1*

I have no doubt that many innocent men like Client #1 have spent time in prison, and some are still there today. This young man could have spent his life in jail but for the lineup fluke. Two issues are of prime concern to me. First, if this case had come later in my career at PDS, after I became more jaded, I do not know whether I would have been

impressed by the client's protestations of innocence.<sup>31</sup> Perhaps, I would not have put a high priority on immediately documenting the alibi. This question does not trouble me the way others do regarding Innocent Client #2, which are described later, because my decision to immediately record the family alibi in written statement form apparently had little impact on the prosecutor.

Second, in dealing with the prosecutor, I did assert my personal belief in the defendant's innocence, and I believe that commitment of my credibility mattered. I put my personal reputation on the line. While I assume that I would have done that regardless of when the case occurred in my career, given the "looks like" identification for a crime he could not have committed, I did it in no other case.

Did I do anything amiss in making that declaration? In later conversations, one senior attorney worried about my assertion of the client's innocence, because he assumed I would not make a similar claim in my other cases, which was a correct assumption. By expressing my personal belief in Innocent Client #1's case, I indirectly harmed all my other clients for whom I did not make the same statement.<sup>32</sup> I

---

31. One impact of the increased concern with innocence could be that defense lawyers today more readily focus on the possibility of innocence (particularly in eyewitness identification cases) than attorneys did before the DNA exonerations.

32. The concern is that when a lawyer makes a claim about believing a client is innocent, that claim may hurt the lawyer's other clients because if a similar claim is not made for the lawyer's other clients, it indicates that the lawyer does not believe in their innocence. This problem is particularly acute when the statement is made publicly to the press. See Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1665-66 (1996). Disciplinary rules prohibit lawyers' expression of belief in innocence at trial, see MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (2008), and prohibitions against pre-trial publicity have that effect in many situations. See *id.* at R. 3.6(a). Although there is no ethics rule prohibition against my private presentation to the prosecutor, and I said nothing that directly suggested that I did not believe all my other clients to be innocent, the problem of a potential negative impact on other clients remains. There are less direct forms of my statement that prosecutors indicate they have encountered more often than a direct claim of innocence that can have much the same effect. This occurs when a well-known defense attorney asks the prosecutor to take a careful look at the evidence in a particular case, which is the type of formulation I used for Client Not Guilty. See *infra* Part III.C. This formulation is often as much as the defender can accurately say, given my perception that innocence is often hard to know and thus frequently appropriate for that reason. It may lessen the harm to other clients, but that harm results whenever an individual client's case is given special treatment based on likely innocence.

explained my action under the general office policy that, although we had multiple clients, we were instructed to try each case (other than client conflicts) as if it were our only case. Anything we did in one case might, in fact, indirectly affect other cases. For example, declining to volunteer information that we determined privileged, but which the judge clearly expected to be revealed, would likely result in the loss of the judge's trust if it later came to light. The position the office took was to represent each person, as much as possible, as an individual in isolation from all other cases and wait for the damage in other cases to materialize, at which time efforts to ameliorate the damage would be taken. The assessment was that concern about maintaining a good reputation would inevitably lead to tentative advocacy, which would be more damaging to clients than the possible loss of

---

Professor Fred Zacharias has returned to the issue of giving special treatment to the innocent outside of publicly made statements. See Fred C. Zacharias, *Fitting Lying to the Court into the Central Moral Tradition of Lawyering*, 58 CASE W. RES. L. REV. 491 (2008). There he examines Professor Monroe Freedman's hypothetical of how to respond to a judge whose routine practice is to call defense attorneys to the bench at the beginning of trial and ask, "Did he do it or didn't he?" *Id.* at 495 (citing Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 773 (2006)). I do not attempt the complex treatment Zacharias gives this type of challenge to neutral treatment of clients. Zacharias and Freedman are concerned primarily with the impact of the defender's answer to the known guilty and known innocent clients. One of my major points in this article is that defense lawyers frequently do not know that their innocent clients are innocent. Thus, it would be dangerous not only for the guilty, but also for innocent clients, if the answer were generally based on what the lawyer subjectively believes. Because this communication with the judge is taking place just before the case goes to trial, the lawyer and client have made a decision to go to trial with, presumably, a strategy for victory that is shortly to be revealed. In the vast majority of cases, I believe the judge should receive a convincing form of the lawyer's closing argument as to why the client did not do it; if the lawyer has no such argument, a claim of innocence at this point would accomplish virtually nothing of lasting value. For me, the difficult question would come if the judge could take definitive action, and I was convinced that my client was innocent, which was my situation with Innocent Client #1 in meeting with the prosecutor. (I had the combination of substantial exculpatory evidence, client conduct fully consistent with innocence, and an explicit waiver of confidentiality.) I never encountered my reformulation of the hypothetical in practice, but I assume I would have, given a statement that was more than my closing argument and signaled real innocence. Some of my reason for a different treatment is a difficulty with justifying clear lying even founded on client loyalty. By contrast, I can defend directly speaking the truth out of loyalty to a client if it allowed him to walk out of the courtroom a free man and work very hard to minimize the consequences of that action to my other clients.

reputation.<sup>33</sup> I fit my actions into that rubric, but I also defended the action to myself as making the best of the opportunities available to win the case, as I would have done in another form for any of my other clients whether I assumed them innocent or guilty.

*C. Innocent Client #2: An Innocent “Usual Suspect” Charged with Armed Robbery Freed in Favor of Another “Usual Suspect”*

Innocent Client #2 was charged with robbing a group of adult males at gunpoint. He had been arrested some time after the incident based on identification from a set of photographs shown to the victims individually. Why he was placed in the photo array as a suspect for this particular crime was never made clear to me, but he had numerous arrests and several convictions for related offenses. He was

---

33. Practically, the policy I described is likely to instead be something of a compromise of positions both for an office and an individual, taking a position at the aggressive end of a long term debate. Compare ROBERT E. KEETON, TRIAL TACTICS AND METHODS 4 (2d ed. 1973) (“The duty of supporting the client’s cause is sometimes so forcefully stated as to support the argument that . . . a trial lawyer [is] obliged to assert every legal claim or defense available . . . . But the aim of the trial system to achieve justice, the interests of future clients, and your legitimate interest in your own reputation and future effectiveness at the bar compel moderation of that extreme view.”), with ALAN M. DERSHOWITZ, THE BEST DEFENSE 405 (1982) (“Once a criminal defense lawyer begins to worry excessively about his or her reputation for moderation . . . the temptation to sacrifice individual clients—particularly poor or despised ones—can become overwhelming.”). See also Steven Lubet, *The Triage Trilemma*, 34 HOFSTRA L. REV. 673, 673–78 (2006) (arguing that it is untenable to say that a lawyer owes her absolute duty only to the current client, but on the other hand acknowledging that the failure to reveal inside knowledge of innocence for that current client also is difficult to justify, and finding the conflict without clear resolution).

At the individual attorney level, it might, for example, be in a particular client’s interest to act very aggressively, but not unethically, in that client’s case with respect to the prosecutor. An unexpected “sharp practice” could prove outcome determinative. The negative consequences might be felt in all future cases with that prosecutor, or if the conduct were notorious, with all members of the prosecution office, significantly harming all future clients and limiting, if not ending, the lawyer’s usefulness. At the extreme, the approach is untenable both individually and for a defenders’ office. Thus, rather than a policy, it was an approach that located allegiance to the client and vigorous defense somewhere near the Dershowitz position. The approach was to encourage, insofar as it is reasonably possible, an ethos of representing the individual interests of clients; to maintain clear ethical boundaries, yet still encourage aggressive representation; and to put client welfare ahead of personal professional reputation.



at least among the “usual suspects” for such a crime. Altogether, three victims had picked his picture.

He remained in jail, unable to make the bond that had been set. When I interviewed him at the jail shortly after my appointment, he told me that he knew nothing at all about this offense and that he did not know very much about why he had been arrested beyond the little that the police had said about multiple witnesses identifying him. At an early stage of such cases, one always explores whether an alibi is available. I will not go into any detail, but we talked about where he had been at the hour of the robbery, which occurred approximately two weeks before his arrest.

Like many of my clients, this young man was not married and was not holding a steady job. For such individuals, remembering what one did late on a particular night could not be aided by established family routines or calendars of events. With a personal life that lacks organization, clients often have difficulty remembering accurately their whereabouts several weeks earlier on a day that had no special importance to them if they did not commit the crime.

He had told the police that he was elsewhere at the time of the crime—that he had an alibi.<sup>34</sup> His statement to the police was among the expected standard responses: spending the night with a girlfriend, watching television with a family member at the critical time, or spending an evening “hanging out” with friends. We worked on piecing together his memory, and I followed it up with a potential corroborating witness. I then determined whether the person he identified believed he or she was with the defendant; if so, to compare narratives of events; and if they coincided, to seek corroborating detail. The first effort failed; I went back to the client and started the process again.<sup>35</sup>

I do not know how the effort would have turned out, but I know based on my early efforts that I was not looking forward to going to trial with this case. I knew that one or more witnesses would testify on his behalf, but whether I was working on an accurate memory of the time of the crime was

---

34. Because these communications were not disclosed to the prosecution, my treatment of them is purposefully inexact.

35. Some clients realized that they had made a mistake in their statement to the police and this started my investigative process with what might be known in court as Alibi #2.

not clear, and whether the defense would impress anyone was even less clear. In short, I was having no luck developing evidence to establish his innocence and little to support his defense.

My innocent client's memory might have been faulty because of the passage of time, and rather than having a definite memory, he may have been giving the hoped for correct answer because if he was not with the person he named, he did not know where he was at the time of the crime. All he knew was that he did not commit the crime. On the other hand, I assumed he might have remembered quite clearly where he was at that time—committing the charged robbery. Or he might have been alone, or, since he had a criminal record, perhaps involved in some activity, such as drug use, that would hardly be impressive to the jury.

I knew that after my conversations with my client and the witness(es), I had nothing that would impress a jury, and my client was likely to be convicted if the victims/witnesses identified him forcefully and credibly in court. He had a felony criminal record, which under D.C. law was automatically admissible if he testified,<sup>36</sup> and some of his convictions involved both violence and robbery. In addition, he did not have a positive personal situation or employment history, let alone any prospect of presenting good character evidence. Something might have developed in the way of a convincing defense after further effort, but it was not clear to me what it would be, and my client would likely be required to testify, with the resulting impact of his record on the jury's view of him. I had not yet attempted to interview the victims, and an effective defense might have materialized there. The prosecutor had not yet provided details about the photo array shown to the witnesses, so I do not know whether it was particularly suggestive, but experience had taught me that, while there was almost always something suggestive about the photos, suppression was very unlikely. Moreover, juries were not overly impressed with suggestive photos as long as witnesses were confident of their identification and plausible in their testimony.

---

36. See D.C. CODE § 14-305(b)(1) (1981) (admitting all "felonies"—offenses punishable by more than a year—and misdemeanors that involve dishonesty or false statement for the purpose of attacking the credibility of the witness).

To be explicit, I thought he was guilty even though later events showed he was innocent. I began thinking about what type of plea offer I might receive from the prosecution. At least no one had been injured during the crime, but apparently a real gun, with its attendant seriousness, had been used. I believe something on the order of five years of prison time was likely to be the minimum sentence that would result from the prosecutor's offer and the judge's sentence.

I was startled to receive a phone call from the Assistant U.S. Attorney handling the case saying he was dismissing all charges and my client would be released shortly from jail. Why? A pure fluke he said.

He had asked the three witnesses to come to his office in the grand jury section of the U.S. Attorney's Office for interviews. Each came in separately and told him that they now realized they had picked the wrong man's picture. They almost literally confronted their mistake when they recognized the person who actually robbed them sitting in the large witness waiting area they had passed through. The perpetrator was apparently a victim or a witness in another case. The federal prosecutor was fully convinced of the sincerity of their change of heart and had the man they now identified placed under arrest. (I am confident that my client was not behind this change of heart. He was without any apparent resources or family contacts or interested friends to influence anyone from his jail cell.)

Like Innocent Client #1, this client apparently looked like the real culprit. Police suggestiveness may have played a role in the selection, since police actions during photo showings can easily give clues as to whom the officer believes should be picked. However, I have no way to know what caused the erroneous identifications.

#### *D. Troubling Issues Regarding Innocent Client #2*

I have several worries from Innocent Client #2's case that I have not been able to resolve over the years. First, I had no clue this client was innocent. Nothing about the case or the client's behavior set off a signal that this case was different from the mine run. Second, I think I was a first-rate trial lawyer working in an excellent public defender office with relatively substantial defense resources by the standards of

public defenders. While it was early in the development of Innocent Client #2's case, I had yet to strike upon anything that looked like a potentially winning defense. This client was innocent, but nothing about the case appeared different from the standard fare of big city public defenders—a losing case and a guilty client. My third worry has only come to me as societal concern with innocence has increased in the wake of DNA exonerations. I now wonder whether this client may have been representative of a larger group of innocent clients, some of whom I talked into pleading guilty, despite their initial and sometimes prolonged protestations of innocence. I would have pressed them to plead guilty because, as compared with the reduced charges offered in the plea deal, I assessed the prospects at trial to be poor and wanted them to avoid the likely substantial penalty both for being convicted of the lead counts in the indictment and for going to trial.

The first worry—that I had no inkling of innocence—is a concrete part of my justification for not caring particularly about whether I believed my clients were guilty. Sometimes the defense lawyer does truly know the client is guilty, but in a sizeable group of cases, which includes cases where the lawyer believes he or she virtually “knows” the client is guilty, the defense attorney will be wrong, and the client will remarkably be innocent. If I had any thought about it, I believed this client was likely guilty. While I would have had no reason to be confident, I also had no personal basis to challenge the prosecution's apparent evidence of guilt. I clearly had no knowledge or proof of his innocence, and to say that I had an intuition that this client was innocent would give the inverse of my state of mind.

Why I had no such thought in this case, but did in the earlier case, is telling and will be the subject of the next section. In short, my surmise of guilt was substantially based on a character inference supported by my inability to corroborate his asserted defense (inability to prove innocence). Based on his prior record, this client was the type of person who committed crimes of the type charged. Innocent Client #2's prior conviction for similar crimes is not only the likely reason why his photo was shown to the victims, but it is also the reason why it would have been difficult for him to testify, thereby limiting his chances for acquittal. I had a different reaction for Innocent Client #1 in

substantial part because the crime did not appear to fit the man or his prior trivial record. Fortunately, unlike Innocent Client #1, this client would not have spent his life in prison if convicted.

My second concern is the potentially large number of innocent defendants whose cases produced no biological trace evidence and therefore no potentially exculpatory DNA were wrongly convicted. The problem may be linked to the unfortunate fact that some innocent individuals have no compelling defense or winning personal attributes and to problematic types of evidence, such as eyewitness identifications, which are frequently offered and often incorrect. Many of these convictions will not leave definitive trace evidence, and thus, even when erroneous, may not later be examined or corrected.

My guess is that had it not been for the fluke exoneration by the three witnesses, I would have had a very, very serious discussion with this client about entering a guilty plea. Many clients start out saying they are innocent. My response would be a different version of "I don't care." I would tell the client that I found it extremely unfortunate that the government was committed to the client's guilt, but that was the prosecutor's firm conclusion, and that despite my best efforts, which I said would be considerable, the client was very, very likely to be convicted and go to prison for a long time. I suggested that being innocent would not make serving that prison time easier. The client had to face up to the difficult situation he was in and make a smart choice, even if it was an unpleasant one. The client needed to think hard about pleading guilty.<sup>37</sup> Then we would get down to talking about the specific evidence the government had, our potential

---

37. See Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and its Consequences*, 37 AM. CRIM. L. REV. 1363, 1363-65 (2000) (discussing the reality of plea bargaining in punishing protestations of innocence with heavier potential sentences after trial, illustrating the dilemma for one client who recognizes that if he admits that he did something the client denies doing, he will be released, but if he says he did the crime, he can be released on the basis of the generous plea offer). The best and worst defense counsel conversations with clients about guilty pleas unfortunately share many features. Moreover, the incentive to take the plea because of what is effectively a penalty for going to trial is omnipresent. One key distinguishing factor between the conversations with adequate versus inadequate counsel is how much work and careful consideration went into the lawyer's advice on how the prospects after trial and the punishment upon a plea compare.

defenses, and the likely sentence he would receive if he went to trial and was convicted versus the sentence he would receive if he entered a guilty plea. How hard I pushed depended on how much I judged the client stood to gain by pleading guilty as compared with the likelihood of losing at trial and the sentencing consequences of a loss.<sup>38</sup>

My third worry, which is relatively new, is that some of those who initially resisted pleading guilty, claiming to be innocent, but ultimately relenting, were innocent like Innocent Client #2.<sup>39</sup> They may have been innocent, but I did

---

38. I had earned a Masters in Public Policy at Harvard and actually did some crude risk assessment. In addition to the part of my analysis that went according to risk assessment, I had a rule of thumb for what I saw as big mistakes in cases that did not appear to have decent prospects at trial. If the sentence after a plea of guilty would be more than ten years in prison, I spent relatively little time trying to persuade a client to take the plea. But if the difference was between a sentence under which the years served would be in the single digits after a plea, and a much longer sentence that exceeded a decade of imprisonment if the client went to trial, then I worked very hard to get the client to take a guilty plea.

Professor Abbe Smith describes such a situation that occurred in her practice. She represented a client where the plea offer in two drug distribution cases would have resulted in three years of confinement, and she predicted that a conviction after trial on either of two cases covered by the plea deal would in her pre-trial estimate have garnered about thirty years. ABBE SMITH, *CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY* 74–75 (2008). She told the client there was “next to no chance of winning both cases,” which he wishfully understood as meaning he “had a shot” and chose to go to trial on both cases rather than accepting the plea offer. *Id.* at 75. He was convicted in the first trial and received a sentence of twenty-seven years, and the prosecution dismissed the other charge. *Id.* at 76. Smith regrets that she was not more forceful in pushing her client to make what she assessed the logically mandated decision. *See id.* at 75–76. Her sense in that case was mine; I pushed very hard in these types of cases for what I believed was the truth and what I believed was an unpleasant but rational decision.

Innocent Client #2's case would not have quite fit my rule-of-thumb paradigm case because his expected sentence after trial would not have been so high and his sentence after a plea might have approached ten years. However, if nothing had turned up in the defense work and I had gotten a decent plea offer, I would have pushed him rather hard to take the plea.

Since the prosecutor's office did not offer no-contest pleas, the last part of the plea process was to work through with the client that he would have to tell the judge he did the crime and this would have to be the truth. I do not know whether any of my clients who pleaded guilty were innocent and had to say something that was not true.

39. My recent recognition of the larger potential problem stems from DNA exonerations, which have demonstrated that the innocent do plead guilty. *See* Kathy Swedlow, *Pleading Guilty v. Being Guilty: A Case for Broader Access to Post-Conviction DNA Testing*, 41 CRIM. L. BULL. 575, 589 (2005) (noting that among 162 DNA exonerations examined to that point, twelve involved guilty

not believe them. At that time, I did not put their cases together with my experience in Innocent Client #2's case, and perhaps rightly so, because fluke exonerations are rare.

It is perhaps remarkable that this perception is relatively new, but in other ways not so. My lack of belief in innocence and their innocence would not matter to what I consider my proper task if I appraised correctly the strength of the cases that the prosecution would offer and the defense could present. Clients, even if innocent, still made a rational choice to plead guilty. It may be that time served by an innocent person is more painful than the same amount of time by a guilty person, but I do not believe being innocent helps extra time in prison go faster, which makes a decision to go to trial when the chances of acquittal are poor irrational, even if the client is innocent.

## II. INNOCENCE AS AN ENABLER FOR PROGRESSIVE CRIMINAL PROCEDURE REFORM OR A "WEDGE ISSUE" WITH POTENTIAL TO DIVIDE SUPPORTERS OF OVERALL FAIRNESS

The problem of erroneous convictions is not new, but the societal perception of such errors has gained salience with the public, apparently because of a group of exonerations resting on scientific proof. Beginning in the 1990s, numerous publicized exonerations resulted from DNA evidence. They involved defendants who had been convicted before DNA technology was available, but for whom biological trace evidence remained to be tested. In particular, these exonerations highlighted the dangers of uncorroborated eyewitness identification evidence.<sup>40</sup>

My perception is that this new recognition has been a boon to fairness concerns, and as a result, a number of procedural reforms affecting those accused of crime have been enacted. Concern for fair treatment is in the American character. However, it is less of a concern to many if

---

pleas).

40. See, e.g., CONNORS ET AL., *supra* note 9, at 15 (noting that eyewitness identifications were involved in all the twenty-eight cases studied other than some of the homicides); JIM DWYER ET AL., *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 246, 365 (2001) (finding erroneous eyewitness testimony involved in seventy-seven percent of the 130 exonerations examined); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76 (2008) (finding erroneous eyewitness testimony in seventy-nine percent of the cases).

procedural protections designed to ensure fair treatment are seen as benefitting indiscriminately the largely guilty overall defendant population more than the innocent.<sup>41</sup> Demonstrations that clearly innocent defendants have been tried, convicted, and imprisoned have created a degree of receptivity to reform that I had not observed previously. As noted earlier, concern for innocence has been an “enabler” for procedural reforms that benefit the accused equally.

So what is the problem I perceive with a focus on innocence? It is the promise of neatly separating the innocent from the guilty.

The focus on innocence could negatively affect those not perceived as likely to be innocent if reforms can be targeted in ways that promise to have different impacts on the innocent as compared with the guilty.<sup>42</sup> In an environment that focuses heavily on innocence in general, and given recent

---

41. In their article, Carol and Jordan Steiker note that, while unfairness to the innocent is not unique in seriousness or importance in the criminal justice system, publicity for injustices to the innocent have had far more impact on the public than other types of injustices. See Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 606 (2005). They speculate as to why this may be the public reaction:

We fear that the power of innocence claims derives in large part from a type of cognitive bias. Individuals tend to overestimate risks of harm that they believe themselves to face and to underestimate risks they view as attaching only to others. Even with our extraordinary incarceration rates, most Americans do not view themselves as potential criminals, and thus most Americans are unlikely to view themselves as subject to the many risks of harm we detailed above. On the other hand, we suspect that many Americans, whether offender or non-offender, can imagine getting erroneously caught in the web of the criminal justice system, even if, as a practical matter, the overall risk is small and overwhelmingly distributed to actual offenders (the usual suspects). This process of identification is fueled by dramatic media accounts of the wrongfully accused and convicted and the comparative lack of public interest in the harms inflicted upon the guilty.

*Id.* See also Raymond, *supra* note 20 (expressing concerns that the focus on innocence may ultimately harm defendants who cannot claim that mantle).

42. Professor Daniel S. Medwed has termed the growing focus on innocence as “innocentrism.” Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1549. He sets out a number of arguments that have been raised against innocence as a focus for critiquing the criminal justice system. *Id.* at 1555–56. Among these criticisms are the concerns of procedural fairness by advocates who fear “innocentrism” may obscure more pervasive flaws. *Id.* at 1555–56, 1566–70. In the end, Medwed concludes that innocence and fairness provide critiques that are largely complementary rather than conflicting. *Id.* at 1570.



suggestions that prosecutors be given new duties regarding those likely to be innocent,<sup>43</sup> it may prove problematic that relatively little new scrutiny has been given to the long-accepted position that defense attorneys are not expected to give different treatment to the those particularly likely to be innocent.<sup>44</sup> In other areas particularly, but here as well, my fear is that innocence may become a “wedge issue,” dividing progressives concerned generally about fairness from those principally concerned about innocence, and that innocence will ultimately undercut support for procedural fairness guarantees that apply to all defendants if reforms can instead be focused more narrowly on the deserving accused—the innocent.<sup>45</sup>

---

43. See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008) (newly adopted amendments); discussion *supra* note 1.

44. Professor Michael Risinger has suggested to me that attitudes toward reforms based on concerns about innocence may usefully be divided into a number of distinct groups. See e-mail from D. Michael Risinger, Professor of Law, Seton Hall University School of Law, to Robert P. Mosteller, Professor of Law, Duke University School of Law (Aug. 22, 2008) (on file with author). The first group includes prosecutors and similar thinkers among academics who fear that any move to protect the charged or convicted innocent better than we now do will lead to intolerable levels of acquitting the guilty. *Id.* The second is comprised of defense attorneys and academics that identify with them, whose ideology is such that they believe that all acquittals are good whether the defendant is in fact guilty or innocent. *Id.* This position is based generally on the social benefits of controlling government abuse by putting the government to strict proof, coupled with a commitment to the adversary system in general, and to the goodness of any proposed reform that makes government proof more difficult, whether correlated with innocence or not. *Id.* The latter position is influenced by the fact that it makes victory at trial or in plea negotiations more likely for them and their clients. *Id.* From this perspective, knowledge of a client's factual innocence and any obligation to act differently as a result, is to be avoided because it would signal the likely guilt of the other clients. *Id.* The third group is comprised of the actual innocence adherents, who may recognize that the costs of acquitting the guilty must be taken into account in system reforms, but who are willing to demand system reforms based on theoretically better ways of separating guilty from innocent, and to give up some “truth defeating” advantages for the mine run of criminal defendants (such as parts of the exclusionary rule and parts of the privilege against self-incrimination, etc.) to get such reforms. *Id.*; D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780–82 (2007) (discussing the first and third groups briefly).

45. As I am discussing “wedge issue” and innocence, I am purposefully using the Merriam-Webster definition, “a political issue that divides a candidate's supporters or the members of a party.” See *supra* note 3 and accompanying text. This definition recognizes that some issues *by their nature* can divide those who ordinarily are allies. As applied to those who are animated by a desire to protect the innocent, I do not intend it to be used as it sometimes is to

If the notion that innocence can be proven definitively leads to a tendency to diminish protections that make no claim to be able to distinguish between the guilty and the innocent, but protect all defendants, the theoretical commitment to providing a vigorous defense for all could suffer. It would, indeed, be ironic if the commitment of the profession to providing legal representation for all defendants, explicitly including the guilty, were to be undercut by a progressive movement that favors giving special protection to the innocent against erroneous conviction. I doubt that will be the outcome, but in this article, I am attempting to examine and explain why the position that general concern about guilt and innocence is incompatible with defense counsel's function and why that function is, in fact, essential to protecting many who are innocent.<sup>46</sup>

*A. Differential Impact of Reforms Based on Innocence Versus Differential Treatment of Defendants by Their Counsel Based on Concern About Innocence*

The impact of reforms frequently varies across defendants, and occasionally reforms will predictably impact the guilty and the innocent differently. Such differences do

---

identify its purposeful exploitation of such an issue by those in an opposition camp. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1950 (4th ed. 2000) (defining "wedge issue" as "[a] sharply divisive political issue, especially one that is raised by a candidate or party in hopes of attracting or disaffecting a portion of an opponent's customary supporters"). That may be a possible use as suggested by Professors Richard Leo and Richard Ofshe. See Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998) (criticizing Professor Paul Cassell's use of the innocent to undermine *Miranda* in Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998)). However, defenders and those who seek protection of the innocent are natural allies who may be split apart involuntarily. They are not adversaries, and within this community, any division that might occur would be both inadvertent and unfortunate.

46. Although hopefully unlikely, defenders can rationally fear the creation of a wedge issue by the well-intended who care exclusively about innocence that, in the end, diminishes respect for the defense of all and thereby hurts many who are innocent. Hopefully, those who focus on innocence and are involved in a noble effort to protect the innocent and who rationally and reasonably care little for the guilty can at least understand the resistance of committed defense counsel to trying to divide the guilty from the innocent as opposed to focusing on ensuring fairness to all.

not necessarily create what I have referred to as a “wedge issue.” Indeed, reforms that are broadly beneficial should be supported even more by progressives if they assist in sorting the innocent from the guilty more accurately.

Professor Richard A. Rosen of the University of North Carolina School of Law was a colleague of mine at PDS. In recent years, he has become a major figure in efforts to free those wrongly convicted. He has advocated reforms that differentially favor the innocent. For example, he has argued that expanding DNA testing should be supported even if it predictably may hurt some defendants—those who are guilty.<sup>47</sup> Similarly, within all defendants, including the guilty, he has argued for reforms that favor the majority who receive modest defense services that could result in loss of advantages *vis-à-vis* the prosecution for those with excellent representation. He argues that broader discovery should be supported because it helps a large number of defendants, even though reciprocal discovery provisions may harm defendants who have particularly able counsel who can outperform the prosecution and may lose their relative advantage.<sup>48</sup> In both of these situations, there are winners and losers, but the benefits are broad, and neither rests on the wedge argument that procedural protections must be eliminated to help the innocent.

*B. Innocence as a “Wedge Issue” in Vigorously Defending All Those Accused of Crime*

By contrast, Professor Randolph Braccialarghe developed an argument that a focus on freeing up more defense resources for the innocent has the potential to become a wedge argument against vigorous defense of all, which includes mostly the guilty, but also some who are innocent.<sup>49</sup> He correctly notes that although the work of most criminal defense attorneys is among those perceived to be guilty, with a focus on successful litigation for all clients rather than acquitting the innocent, the favorable aspect of the defender’s

---

47. See Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 288.

48. *Id.* at 288–89.

49. See Randolph Braccialarghe, *Why Were Perry Mason’s Clients Always Innocent? The Criminal Lawyer’s Moral Dilemma—The Criminal Defendant Who Tells His Lawyer He is Guilty*, 39 VAL. U. L. REV. 65 (2004).

image rests on defense attorneys who help the innocent to triumph, such as the mythical Perry Mason who consistently represented innocent clients.<sup>50</sup>

Braccialarghe's proposal is to shift the focus to the innocent by denying a full defense to some among the guilty. He argues that presently, a defense counsel:

looks at his cases from the perspective of how strong the evidence is against a client and the likelihood of securing an acquittal. Accordingly, a criminal defense attorney's focus is not on justice, not on securing acquittals for his innocent clients, but on securing acquittals for his clients, innocent or guilty. The practical result is that a criminal defense attorney who sees that the state's case is weak will spend his efforts attempting to get an acquittal in that case, and, where the state has more evidence in another case with a greater chance of getting a conviction, the defense attorney, maximizing his own utility if not that of his client, would be more likely to urge that client to plead guilty.

. . . The result is that a defense attorney will spend more of his time representing and attempting to get acquittals for criminal defendants who are guilty where the evidence against them is not as strong, and he will spend less of his time attempting to get acquittals for criminal defendants who are innocent where the state has a stronger case.<sup>51</sup>

---

50. *Id.* at 65–70. He contends that “a criminal defense attorney’s focus is not on justice, not on securing acquittals for his innocent clients, but on securing acquittals for his clients, innocent or guilty.” *Id.* at 75.

51. *Id.* at 75–76. I take issue with a number of points of Braccialarghe’s analysis and observations. It might even seem clear that defense counsel who is not focused on innocence would take to trial cases where the government’s evidence is weak for both the lawyer’s personal and the client’s benefit. I explain elsewhere why plea bargaining incentives may mean that from the client’s perspective, cases with relatively weak government evidence should result in guilty pleas. I also explain elsewhere that ethical defense counsel makes trial decisions that support his or her client’s interest.

Even assuming the lawyer’s personal interest is the only one to be considered, it is not clear that cases with weak government evidence are the ones that will be taken to trial. It may be that lawyers as competitors always want to win and so I cannot refute the argument that a win at trial is preferable. However, if the interest the lawyer is concerned with is reputational (he or she gets no direct financial benefit from a win), then I suggest that winning easy cases is not the way to go. I believe reputation is built most on winning either difficult (those with strong government evidence) or notorious cases. The former is excluded by definition. Some, but not many, notorious

Braccialarghe's solution is to bar, under a modified ethics rule, lawyers from advancing for those guilty clients anything other than a solely legal defense,<sup>52</sup> somehow to encourage defense attorneys to secure admissions of guilt from their guilty clients, and thereby increase guilty pleas.<sup>53</sup> With more guilty clients being forced into guilty pleas, the defense attorneys would, he argues, have more time to defend the innocent regardless of the strength of the prosecution's case.<sup>54</sup>

I find Braccialarghe's proposal, which is no doubt well-intentioned, profoundly misguided in its potential broader impact—an example of a wedge argument against providing a vigorous defense of all those charged with crimes and, more generally, a way to use innocence to undermine the perceived worth of the work of criminal defense attorneys. However, some of his assumptions, which I believe are incorrect,

---

cases that go to trial involve weak government evidence. If the lawyer is trying to maximize income if appointed by the court and paid by the case or the hour, or trying to minimize effort, it is unclear that cases with weak government evidence will be taken to trial rather than pleaded by a lawyer who is not concerned with his or her clients' interest.

52. He proposes a change in ethics rules that would mean criminal defense attorneys would face sanctions, like civil attorneys, for defending clearly non-meritorious cases, specifically arguing for a change to MODEL RULES OF PROF'L CONDUCT R. 3.1 (2008) to remove the allowance for criminal defense attorneys to require every element of the offense to be proven, even if the attorney lacks a non-frivolous basis in fact. Braccialarghe, *supra* note 49, at 72. Others can speak to the merits of the proposed change rather than its potential to develop as a wedge, but my reaction is that, given the unfortunately tepid vigor of many of those who represent the indigent, threatening disciplinary action against defenders for contesting issues hardly seems an appropriate "reform."

Braccialarghe focuses, in particular, on defendants who confess their guilt to their attorney. He would limit defense efforts in such cases to a plea of guilty, the presentation of defense based on legal argument alone, and mitigation at sentencing. *Id.* at 72, 77, 79.

53. Braccialarghe does not explain precisely why, but he appears to assume that defense attorneys will work to obtain not only accurate information, but also admissions of guilt from their clients. *See id.* at 79 (suggesting that defense attorneys would confront defendants about apparent incriminating facts during case preparation and some number of clients would "confess their guilt"). Perhaps all he is assuming is that currently, confessions are frequently made by defendants to their attorneys. If so, he does not explain why knowledgeable clients would continue to confide in their lawyer that they are guilty after his ethics rule revision or why lawyers would seek or obtain as many and apparently more confessions after the change. Perhaps he is assuming that the threat of sanction for defending non-meritorious cases would prod the self-interested in marginally defensible cases with ambiguous declarations by their clients to encourage clarifying admissions.

54. *Id.* at 78–80.

highlight points that deserve careful attention. First, Braccialarghe ignores the impact of his change in the rule on future defendant behavior. Under his system, the lawyer would be prohibited from mounting a defense challenging factual guilt if he or she knows the client is guilty,<sup>55</sup> and such knowledge appears to be solely defined as the defendant admitting guilt to his own lawyer.<sup>56</sup>

If this change in ethics rules were enacted, why would any knowledgeable client admit guilt to his or her attorney? I believe none but the uninformed or gullible would. Indeed, my experience with hundreds of clients is that the situation is not much different than that currently. Most of my clients, and the vast majority of my clients charged with serious offenses, did not admit guilt. I asked for, and they gave me, detailed accounts, some of which turned out to be truthful, some untruthful, some of which were helpful in developing a defense, and some damaging. These factual statements were accompanied by the summary contention, explicit or implicit, that “I am innocent.” The defendant’s story might change, but the explanation was that the previous version had been inaccurate or false and the new one accurate and true.<sup>57</sup>

I came to believe my mentor was correct—defendants could not actually believe they would get the same representation if their lawyer believed they were guilty. The statements of my clients sometimes pushed me in the direction of concluding they were guilty when evaluated against other information I had assembled, but that was my conclusion, not their admission. I had trouble seeing my assessments of my client’s sometimes inconsistent and, arguably, implausible statements as having greater probative

---

55. *Id.* at 74.

56. *Id.* at 78.

57. Braccialarghe argues that guilty clients who admit guilt get an advantage over those who deny guilt to their lawyers presently because the lawyer in the latter case is better able to meet the government’s case. Braccialarghe, *supra* note 49, at 86. He fails to note that many, many facts can be shared while the client denies guilt. Perhaps what he is saying is that under the modified rule he is advocating that punishes the lawyer for presenting clearly non-meritorious cases, the client need not unequivocally admit guilt to be denied a full defense, only that the client must admit some facts that the lawyer concludes proves guilt. *Cf.* *Nix v. Whiteside*, 475 U.S. 157, 171–72 (1986) (accepting that a client’s earlier inconsistent and incriminating version of events sufficiently established that the subsequent version would constitute perjury).

value than strong government evidence, such as my client's signed confession, which he disavowed, or the statement of a government witness, whom I or my investigator interviewed and found credible. My summary is that the category of easily secured confessions by clients in serious cases to their lawyers is small, and it would become vanishingly small if defendants were to learn that their lawyer "threw in the towel" upon receiving the information.

Moreover, it appears to me that Braccialarghe's proposal might reduce, rather than increase, guilty pleas. In our system, defendants cannot be forced to plead guilty. The defense counsel plays a key role in a necessary step of the process—convincing the client that the plea is the right outcome for the case. Here, as elsewhere, defense counsel focuses directly not on guilt or innocence, but on what Braccialarghe criticizes—what can be proven. For most of my clients, guilt was never acknowledged until after I convinced the client that the evidence would likely convict them.<sup>58</sup> My experience, and that of PDS, is that a lawyer won the confidence of the client in his or her judgment by demonstrating an allegiance to the client's case and a respect for his confidences before we began the difficult process of securing his agreement to plead guilty and acknowledgement of guilt. I obviously cannot know what effect would be had by changing the system to one in which any acknowledgement of guilt led to a sudden reduction in the lawyer's role, but it could well lead to more trials because the client cannot afford to candidly discuss the case before deciding to accept the unpleasant result of voluntarily convicting himself.

Braccialarghe's most useful insight is to focus attention on the allocation of defense resources across the defense

---

58. Professor Abbe Smith perceptively notes that despite the criticism that defense counsel receive for their general unconcern with truth, they actually focus very directly on the unpleasant truth in most cases when they confront their clients during sessions that lead to entry of guilty pleas. SMITH, *supra* note 38, at 74. She states:

These sessions can be hard going, often more challenging than going to trial. The most difficult part is telling our clients the truth about their cases and about their lives. We do so even though the truth is often unpleasant and may not endear us to our clients. We struggle with the temptation to soften the blow and allow for more possibilities than truly exist, but we know that we owe our clients the whole truth.

*Id.*

attorney's case load.<sup>59</sup> He does not look specifically at public defenders, but his treatment of the decision process, while in my experience inaccurate in its specifics, usefully highlights the tradeoffs that must be made and should be acknowledged when a lawyer represents substantial numbers of clients. As quoted above, he asserts that defense lawyers spend their time taking cases to trial that are the weakest government cases, and, in that process, the defense attorney maximizes his own utility and not that of the client.<sup>60</sup> As I develop in Part IV, the allocation of defense attorney effort, because not controlled roughly by the client through payment of a fee, presents many potential conflicts, but is for most defenders not at all, as Braccialarghe contends.<sup>61</sup>

In concluding this Part, I return to the key element of the idea undergirding Braccialarghe's proposal with which I take strong issue: that there is some effective way to isolate either the guilty or the innocent and apply superior procedures to determine guilt. The same core idea animates another scholar's proposal to create a plea of innocence that leads to separate truth and innocence procedures.<sup>62</sup>

---

59. Braccialarghe, *supra* note 49, at 79–80.

60. *See supra* text accompanying note 51.

61. Elsewhere Braccialarghe reveals his low opinion of the mission of defense attorneys, characterizing them as “part of a game” rather than “a search for justice and truth,” and, more pointedly, arguing that among those who would be harmed by his proposals are “lawyers who benefit . . . psychically from acquittal of the guilty.” *See* Braccialarghe, *supra* note 49, at 80, 85–86.

As my typology, which is described in Part V.A, recognizes, defense attorney advocates also recognize the motivational value of the competition or game. I know of many attorneys who do take pride in winning a difficult case, and difficult cases often involve guilty clients—indeed, clearly guilty clients. On the other hand, I personally have known of none who took pride or received psychic benefit from helping a person they thought was guilty win his case. Thus, I do not question the amorality of rewards from winning strong government cases; I do dispute defense lawyers' immorality. Braccialarghe's reference to “lawyers who benefit . . . psychically from acquittal of the guilty” seems to allege that defenders take pleasure from the fact that they have secured the release of the guilty because they are guilty rather than winning or winning the case for their client with whom they have formed a personal relationship. *See id.* at 85–86.

In his quotation, Braccialarghe also includes defense lawyers who benefit “monetarily” from the acquittal of the guilty. *Id.* at 85. I do not doubt that there are lawyers who do benefit monetarily from acquittals of the guilty. For example, wealthy drug dealers are wealthy because of their crime, and some attorneys benefit from successful representation of these guilty clients. My entire focus is on those who work for the indigent.

62. *See* Tim Bakken, *Truth and Innocence Procedures to Free Innocent*



I do not fault the idealism of those who seek these targeted results.<sup>63</sup> My concern remains, however, that such sorting is not practically possible, and that implicitly there is a failure to recognize in them the practical impossibility of knowing and definitively proving innocence for a sizeable number of those who are guilty. Damage will not be done by innovative thinking. But damage can be done if the idea that the innocent can be sorted results in undercutting support for vigorous representation for all, which obviously will include many who are guilty. The problem of knowing when innocence is present will, I believe, remain and I hope will be recognized as a major residual problem after all the sorting of the innocent from the guilty has been accomplished by technological advances, innovative thought, and alternative procedures.

### III. DEFENSE ATTORNEYS ACTUALLY CANNOT ALWAYS TELL THE INNOCENT FROM THE GUILTY

#### *A. The Central Uncertainty of What Constitutes Knowledge of Innocence*

In meeting hundreds of clients and examining their cases, attentive defense attorneys build a knowledge base, which enables most to analyze criminal cases with skill and judgment. One also develops a cynical side and sees the world as a hard place. Optimists—those who believe in the possibility of human perfection and consider most of their clients innocent or perfectible—do not survive long. Although

---

*Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547 (2008); cf. Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 120–29 (2009) (arguing that submitting to interrogation in the current system theoretically provides useful signaling information on innocence that should affect the discount given for pleading guilty and that additional defendant investigational cooperation might be utilized for further signaling).

63. See, e.g., D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1311 (2004) (arguing to create a specialized procedure under which a defendant isolates for careful adjudication one or two factual issues to determine innocence); George C. Thomas III, *"Truth Machines" and Confessions Law in the Year 2046*, 5 OHIO ST. J. CRIM. L. 215, 226–31 (2007) (imagining a truth machine that reveals who among those charged with crime are guilty that would permit the concentration of effort if not the admission of the machine results).

I rationally understood that I could not actually know which clients were the innocent ones, I now recognize that I had a false sense of confidence that I would have a relatively accurate inclination of innocence, which I suspect many defenders share. My suspicion is that this false confidence arose from a self-protective instinct designed to lower the pressure of the work, which was much easier if the system's expectation that all clients were guilty was true.

I do not assume that many of my clients were innocent, but what I have come to appreciate more over time is that I could not tell the innocent from the large percentage that were guilty. This point may be criticized because I have no proof that I had any other innocent client beyond those who were discovered. I do not know. However, the lack of discernable distinction between Innocent Client #2 and many other clients tells me that I cannot know who among a relatively large class of other clients was innocent.

*B. The Special Problem for Innocent Clients Who Lack Overall Innocence*

Before I consider directly the question of whether subjective belief in innocence can matter, I want to note one particularly problematic area. In a recent article about Lee Wayne Hunt, whom I believe is an innocent man imprisoned in North Carolina for over two decades and facing incarceration for the rest of his life for a double murder he did not commit, I focus on the difficulty he faced because he was among the "usual suspects."<sup>64</sup> Assuming he was innocent of the murders, he was clearly no stranger to crime—not an innocent. He was convicted wholly on the basis of informant testimony. The dangers of informant testimony are greatest for those who have some general involvement in crime. Because of prior criminal involvement, the accused may be among the "usual suspects" or may be the principal target. Such prior criminal involvement also provides foundation facts for incriminating accusations against a plausible suspect by informants interested in providing testimony

---

64. See Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 557 (2009).

judged valuable by the prosecution.<sup>65</sup>

Such individuals are more likely to be identified because they are placed in lineups or their photos are routinely shown to victims of roughly similar crimes. My assumption is that Innocent Client #2 was accused because he resembled the robber and had a prior record of such crime, which put his photo in the array shown to the victims. Professor John Blume has written that such individuals, even if innocent, are less likely to testify because of their prior records.<sup>66</sup> Professor Josh Bowers has argued that the innocent among this group suffers a host of disadvantages within the criminal justice system.<sup>67</sup> Professor Michael Risinger contends that the public likely cares less about innocence within this group if it perceives that the person, although innocent in the case at hand, has committed other crimes.<sup>68</sup> His intuition is that significant concern with innocence only applies to this group if the present charged crime is disproportionate in severity to those the suspect is assumed to have previously committed.<sup>69</sup>

In this article, I am adding to the picture of disadvantage the fact that such individuals are also less likely to be believed to be innocent by their own appointed defense counsel. This is the type of prejudice that Canon 5 sought to

---

65. *Id.* at 552.

66. See John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477 (2008) (arguing that the threat of impeachment with their prior convictions, which are frequently available for this type of defendant, frequently causes such defendants not to testify and contributes to their wrongful convictions).

67. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1124–32 (2008) (contending that arrest bias, charging bias, dismissal aversion, and trial biases against the “usual suspects” are far more likely to produce convictions among those with substantial contacts with law enforcement than among those that are strangers to criminal conduct). Professor Bowers posits that “[f]or the typical innocent defendant in the typical case—which . . . is a recidivist facing petty charges—the best resolution is generally a quick plea in exchange for a light, bargained for sentence.” *Id.* at 1119–20. I strongly agree with Bowers’ picture of the particular problems of innocent recidivists and argue that the guilty plea option should often be chosen even for more serious cases.

68. See Risinger, *supra* note 44, at 792–94; see also Bandes, *supra* note 2, at 9–10 (arguing that the public, exacerbated by the press’s preference for simplicity and disdain for ambiguity, supports a view of the innocent accused as morally and factually blameless that fits poorly those with other criminal involvement).

69. See Risinger, *supra* note 44, at 792–94.

avoid by approving representation despite lack of belief in the innocence of the person accused. I can attest that even seasoned defense attorneys are not immune from using character evidence in the form of a prior record for similar offenses to infer guilt. Such thinking is common among ordinary humans because it is one of the ways we simplify into manageable tasks the complications of daily life and cope with the costs and difficulties of obtaining information. Nevertheless, to the degree that defense attorneys act on their subjective beliefs and treat those believed to be guilty—more likely those who have committed crimes before—in an unfavorable way, the “usual suspects” among the attorney’s clients will be shortchanged.

*C. The Difficulty of Distinguishing Innocence from Being Not Guilty*

I also believe there is another level of uncertainty that a defense attorney faces, which I illustrate by the story of another client, whom I call Client Not Guilty. Sometimes, as in the case I am about to discuss, powerful evidence exists that shows the government’s case or its key witness is badly in error. That evidence may show the client’s innocence, or it may rather show the inability of the government to successfully prosecute. For those who care about innocence, this distinction can be very important. Defense attorneys who concentrate on provable guilt do not draw such distinctions, but it is an important additional dimension to the difficulty of knowing when a client is innocent—typically counsel only has contestable evidence showing a likelihood of innocence.

Client Not Guilty was charged with rape. His story to the police, which never varied, was that he and the victim had sex, but it was consensual. He explained that they then had a heated argument after which she summoned the police. He gave the police officer who arrested him the same account. It was not credited by the police.

The evidence that led to the dismissal was the observation of a next door neighbor. The client told me that he had learned that this neighbor had seen him with the complaining witness together sitting and talking before they went inside his apartment where they had sex. The victim’s version of the events to the police excluded any possibility of

that congenial conversation taking place.

I went to the apartment of the neighbor, a woman I judged to be in her sixties, and asked her to tell me what she knew. She stood at her window and described in great detail what she witnessed, which diametrically opposed not only the point that the client related, but substantial additional parts of the victim's story. She was completely convincing to me and I could discern no bias toward or connection with my client.

I carried her information to the prosecutor, asking him to send the detectives assigned to the case to speak with her and inviting him to speak to her personally. I made no claim to him to know what had happened inside the apartment, but it was clear to me, as I suggested it would be to anyone who spoke to this lady and to any jury, that the complaining witness's version of events both leading up to the alleged rape and otherwise was false. The prosecutor subsequently called me and said he was dismissing the charges. He did not tell me whether he concluded that my client was innocent, that his case was untenable, or that he simply was unsure of guilt.

I do not know that this client was innocent, but the neighbor's evidence leads me to strongly suspect it. On the other hand, true victims may lie about parts of the event because they believe it puts them in a bad light. Moreover, the client did have a prior criminal record, although it included no sexual offenses.

Is this a case of innocence? As I have stated, I do not know. For those who care principally or exclusively about innocence, I wonder how it should be categorized.

#### IV. THE ALLOCATION OF DEFENSE RESOURCES AMONG CLIENTS AND THE POSSIBILITY OF SPECIAL ATTENTION FOR THE POTENTIALLY INNOCENT

Because the client does not pay a fee and hire the attorney, a particularly complicated conflict of interest often exists between the lawyers for indigent clients and the clients themselves regarding the amount of effort to be expended on the case.<sup>70</sup> I begin with one dimension of that conflict. Public

---

70. See Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 74-79

defenders receive the same salary whether they try a case or their client enters a plea of guilty, and with a guilty plea, their leisure time should increase. Assuming that at least short run handling of one's case load is all that is required to receive full pay, public defenders have an incentive to have their clients enter guilty pleas even if the client's interest is to go to trial.

Appointed lawyers in some jurisdictions may have roughly the opposite economic incentive—to go to trial rather than to encourage their client to enter a guilty plea and to invest little out-of-court time in preparation.<sup>71</sup> I have observed that for the same input of lawyer's time, trials with minimal effort receive higher remuneration than, for example, guilty pleas after careful preparation and assessment. Under the compensation systems with which I am familiar, hours spent in court have a higher hourly rate than out-of-court time, and claims for in-court hours are almost never rejected or reduced. Not only is the hourly rate lower for out-of-court work, but judges are more likely to question and disallow some of the out-of court hours claimed. In jurisdictions with fee caps for appointed attorneys, the incentive on whether to go to trial with limited investigation, or convince the client to plead guilty with perhaps even more limited investigation, would depend on how lengthy the trial might be and how much space under the cap remained in the particular case.

Both public defenders and court-appointed defense counsel must be vigilant not to let their own interests in maintaining some leisure time or in remuneration interfere with their best judgment on the defendant's decision whether

---

(1993) (noting that even in the best of circumstances the relationship between defendants and their counsel involve serious agency problems, but arguing the conflicts of interest are particularly persistent for indigents because the lawyer must be paid by someone other than the client); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 251–57 (1997) (arguing that one of the fundamental difficulties with indigent defense is that of conflicting performance incentives and that, when clients bear the cost of litigation, a plausible level of rationality exists that is absent when the government pays defense counsel).

71. Professor Bowers recognizes this same problem although he attributes it to “bad lawyers” not associated with any particular funding system. See Bowers, *supra* note 67, at 1150 (arguing that defense attorneys who favor work avoidance over the client's best interests are more likely to hurt their clients at trial rather than through plea bargaining).

to enter a guilty plea or go to trial. The major point is that there are temptations that result from the fact that the client is not paying the lawyer.<sup>72</sup>

As I acknowledge in a typology of defense motivations in Part V, the thrill of prevailing in competition, which is manifest by winning at trial, is one of the ways defense attorneys support themselves in their work. Differently stated, there are reputational benefits from winning trials, so no doubt some defenders take some cases to trial because they anticipate victory. Thus, personal reward for the lawyer rather than the client's best interest might send a weak government case to trial. However, my experience is that at a conscious level, public defenders do examine their judgments to try to keep personal interests from driving case decisions.

They make such decisions not to maximize their own utility, but to maximize total client utility. Admittedly, they do not maximize each client's utility. The lawyer must develop some proxies because the client is paying nothing and therefore cannot insist on fair work for fair pay. Inversely, because clients are paying nothing, their utility would be maximized as to the public defender or appointed lawyer only if the lawyer worked full time on each client's case. Because the client does not pay, he or she is not constrained in wanting more defense effort by its financial cost, which would otherwise be required to compete with other consumption decisions. Instead of a payment scheme allocating resources, the lawyer is required to allocate the scarce resource of her time among clients. I believe it is roughly done by most lawyers as if the clients were rationally allocating their own funds among competing consumption decisions.

*A. Allocation Principles—Equality of Productive Effort in the Context of Anticipated Punishment*

If allocated as described above, that allocation is roughly

---

72. Even if the client is paying, the relationship between expenditure of effort and innocence will not necessarily bear any correlation. However, one level of problems—those associated with the principal agent relationship—are reduced, if not, eliminated. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (1983) (noting that “[c]onflicts of interest (agency costs)” between clients and lawyers are troubling throughout the criminal justice process, but spending little time analyzing different funding arrangements).

the same as would be obtained if all clients had the same amount of money and had an equal aversion to incarceration. I practiced in an excellent public defender office with relatively generous funding, and as a result, I carried a heavy, but manageable, case load of thirty-five active cases. I believed the lawyers at PDS provided the rough quality of representation that middle-class clients would have purchased for themselves. Attorneys roughly allocated their efforts and resources according to the punishment anticipated and the perceived productivity of the work available to be done on the case.

The most immediate consequence is that lawyers spent less time on a misdemeanor than a felony and more work on a serious felony than a lower-grade felony. This allocation of effort was reinforced by the natural result of the police effort in most cases. By the nature of police priorities, issues of proof were typically simpler in misdemeanor than in felony cases. Therefore, defense efforts to investigate and counter the proof would tend to be less in a misdemeanor than a felony case even if it were not rationed according to the punishment anticipated. By this, I mean that the police spend less time investigating minor offenses. As a result, most misdemeanor cases are solved almost immediately by an arrest, or not at all. Such cases are usually cut and dried and require and permit little investigation. By contrast, most police departments will continue working to solve a homicide case until they have exhausted their leads, and even then, it may be re-examined from time to time under "cold case" reviews. Some homicide cases are solved immediately, but many are solved only after extensive investigation. That investigation often produces complicated evidentiary links, esoteric forensic evidence, and challengeable government efforts, such as incentives offered to informants, which can be investigated by the defense and may be the subject of defense evidence.

A middle-class defendant should spend a substantial amount on the defense of any criminal charge, but the amount should vary according to the length of the prison sentence anticipated from a conviction.<sup>73</sup> Perhaps a person

---

73. For a serious felony, I would assume most middle-class defendants would, if necessary, borrow substantial sums to secure a skilled lawyer with



would invest fewer of his or her funds if he or she were guilty, but I suspect most individuals would care about the period of incarceration faced roughly equally, whether innocent or guilty. At PDS, we had articulated nothing at this level of theory, but I believe the lawyers acted as if all defendants had an equal aversion to incarceration.

The next controlling factor in the allocation of time is the usefulness of additional defense work. In all cases, a modicum of discovery and/or investigation should be done so that at least gross defects in the government's case would be found. Similarly, regardless of the seriousness of the case, a lawyer should check out a promising lead, such as an alibi. I believe defenders who have a reasonable amount of resources continue defense preparation, absent some specific time constraint, as long as their conclusion is that it could have a significant impact on the outcome of the case. However, at some point, the defender may decide that the next step, although potentially helpful, has too little likelihood of success to be pursued—the marginal utility is too small. Lawyers operating with limited resources should reach this point sooner in non-serious cases than in serious ones. For example, in every case, the defense could conduct a canvas of the crime neighborhood to try to find witnesses not discovered by the police or send an investigator to the location of a crime committed in a public place at the same time of day that it occurred to ask passersby whether they witnessed the crime. One might do such investigation if one had infinite resources in any case. The reality is that a public defender might undertake such activity in a homicide case,<sup>74</sup> but a public defender would not conduct a neighborhood canvas in a misdemeanor assault case or even the typical armed robbery.

I suggest that if the cost of the effort were included in the

---

sufficient time and defense services to mount a vigorous defense. By contrast, the same client would not likely mortgage the family's future to avoid a misdemeanor conviction. I am assuming clients had the same prior criminal records as they did, which contained far more convictions and arrests than would be true for most middle-class individuals. The threat of embarrassment and reputation impact of even a misdemeanor conviction for someone with no criminal record might cause a middle-class defendant to spend a large sum avoiding conviction, which is a motivation I do not put into my calculus.

74. I found that canvasses in homicide cases sometimes turned up witnesses who saw events somewhat differently than the witnesses found by the police, and frequently these witnesses were extraordinarily helpful to the defense. Other times, new incriminating witnesses were located.

calculus, the rationing system of public defenders produces defense effort that would resemble the effort that middle-class clients would rationally secure for themselves through the payment of legal fees. The system maximizes the utility of the group of clients within the attorney's case load, or at least it is designed to do so. It is not designed to maximize the utility of the attorney.

The allocation is primarily made because public defenders most basically represent our clients as individuals worthy of dignity and respect. The lawyers may do whatever they do in total for the cause of justice, but they accomplish justice one client at a time and focus on the welfare of the individual rather than the cause. Defenders do the best for all comers, innocent or guilty, and they try to help all clients, whatever "help" may mean.

Under the allocation system I describe, many of the cases involving innocent clients should naturally call forth more effort than those of guilty individuals. This is because cases of innocent clients would often provide more opportunities for productive work. A further general condition for extra effort to be allocated would be that the defenders' office must be adequately funded. The defense attorney must have the time and the resources to pursue reasonable, but non-obvious, leads. Presumably, if the flaws in the government's case were easy to discern and/or the evidence of innocence obvious and clearly available, the erroneous charges would never have been brought. Thus, the defender must not be so over-worked and under supported that she cannot manage to explore even promising possibilities of innocence.

However, I do not want to claim that the allocation system that I describe will produce extra effort for the innocent. For example, a client like Innocent Client #2 may simply have had no alibi because he was alone at the time of the crime, and no amount of effort will produce a non-existent witness. Examining the government's case may be equally unproductive if the true perpetrator simply looks like the defendant, the witnesses are unwilling to be interviewed, and the police conduct was reasonably fair in putting together a non-suggestive identification procedure that resulted in an incorrect selection. By contrast, productive work may be clearly available for guilty clients. For example, a motion to suppress evidence under the Fourth Amendment's

exclusionary rule may promise dismissal of the case if successful and provide opportunities for both productive fact investigation and legal research, even though the client is clearly guilty.<sup>75</sup>

Defenders do not consciously discriminate between clients based on client characteristics, and I believe it is absolutely necessary that they do not discriminate against a client because of their personal assessment that the client is guilty. That is the most profoundly misguided element of Braccialarghe's revision. He wants defense attorneys to attempt to determine which of their clients is guilty and to do it by securing admissions of guilt from the client.<sup>76</sup>

I reject Braccialarghe's argument that public defenders generally go to trial to maximize their own utility.<sup>77</sup> I do not doubt that the practice occurs, but I believe that most defenders, particularly those who are ethically aware, recommend going to trial or taking a plea based on their assessment of what is most likely the best course of action for the client based on the goal of maximizing liberty and minimizing imprisonment. As Braccialarghe suggests, cases

---

75. The allocation system that I describe here differs dramatically on this feature from the one advocated by Professor Darryl K. Brown. One of his principles is in rough accord with what I observed, which is to spend greater effort for clients with the most at stake. See Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 818 (2004) [hereinafter Brown, *Institutional Design*]. Another is not. He would not allocate resources to cases based on the likelihood of litigation success, such as success in excluding evidence, but based on the likelihood of factual innocence based on clues from DNA exonerations. See *id.* at 816; see also *id.* at 808, 826–28; Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 BRANDEIS L. J. 207 (2003–2004) (suggesting similar criteria for rationing defender services, which is inevitably done and done poorly because done covertly).

One of the key elements of defender work is representing clients. I would find it very difficult to be a defender and justify failure to perform highly productive, ethical work for a client, such as a motion to suppress illegally obtained evidence, because the client is guilty. On the other hand, looking for evidence of innocence based on clues from empirical evidence in the DNA exonerations may simply be smart lawyering and is consistent with my observation that many times, the cases of innocent clients will provide areas for fruitful work. Defenders do and, I believe, are well advised to look for what they can prove regarding innocence rather than what they believe. More significantly, I fear that the suggestion that we can triage inadequate overall defense resources to concentrate effectively on likely innocent clients presents a threat even to the support defenders enjoy today.

76. See *supra* note 52 and accompanying text.

77. See *supra* text accompanying note 51.

where the government's evidence of guilt is weak are more likely to be taken to trial and those cases where the evidence is strong are more likely to end in guilty pleas. This pattern also likely correlates with trials for the innocent and guilty pleas for the guilty.

However, defense counsel, if acting ethically and intelligently, helps the client assess risk and likely outcomes. If the government's case is weak, but still one that it will not dismiss, the defense counsel should help the client assess the risk of conviction at trial, evaluate the likely sentence upon conviction, and compare that prediction with the government's plea offer. The prosecution often makes more generous plea offers in weak cases, and it was frequently my experience that some of the toughest decisions occurred where there was a considerable chance of acquittal, but the sentence, perhaps because of a mandatory minimum, would be quite high upon conviction. For example, a person who was arguably a marginal aider and abettor in a homicide might face a mandatory twenty years in prison if convicted of first-degree murder along with the active perpetrators. Although the prosecutor may refuse to dismiss, she may give a plea offer of manslaughter and, given a previously clean record, the client might face only a relatively short expected sentence of three years or so in prison.

I encouraged guilty pleas in relatively weak government cases, such as the marginally involved defendant in a first-degree murder, where the certainty of limited incarceration under the plea offer was better than I assessed the expected value of incarceration after a trial, roughly multiplying the percentage chance of conviction at trial by the anticipated sentence upon conviction. By contrast, I had no ethical alternative other than expending the tremendous time and energy of going to trial even when the prospects at trial were poor, but the plea offer guaranteed a lengthy prison sentence and my client wanted to pursue his constitutional right to trial by jury. I pushed hardest for the client to take the plea offer, not necessarily in the strongest government cases, but in the cases where the client was being most irrational in terms of his, not my, utility.<sup>78</sup> I spent the least effort on cases

---

78. Professor Abbe Smith describes just such a situation that occurred in her practice. See SMITH, *supra* note 38, at 75-76. Her client turned down a

where the prosecutor offered a generous plea with a short deadline for accepting or rejecting the offer (often expiring at the scheduled date for the preliminary hearing which was only a week or so after the client's arrest) on a relatively minor felony to a defendant with little or no criminal record.

In the effort of the defense attorney to allocate time and resources properly and in advising clients whether to accept guilty pleas or go to trial, the assessment of something close to guilt is constantly on the defense lawyer's mind. However, the defender is not determining whether he or she believes the client is guilty. The defender is assessing the likelihood the client will be proven guilty. The system becomes dangerously pernicious, I believe, if the lawyer's belief in guilt is allowed to enter the calculation to limit effort. Again, my perception is not new; however, whether it remains valid in a world where innocence is now frequently the focus of discussion, it is important to re-examine, and if correct, re-affirm. As developed in the following sections, my reexamination convinces me that my long-accepted position is both sound and almost necessary.

*B. The Incompatibility of Subjective Disbelief of the Client with Defending All Those Accused of Crime*

I suggest examining some simple arrays of assessments of guilt that will help illustrate the incompatibility of defender assessments of guilt and vigorous advocacy for all those who may be innocent. The contemporary focus on innocence drives that element of the defense attorney's potential roles to the forefront, and it is quickly obvious that an attorney's focus on whether he or she believes the client is guilty would be particularly damaging to those whose innocence is difficult to discern.

The major components that might go into a defense counsel's assessments of guilt are (1) the defense attorney's

---

plea offer that would have resulted in a few years in prison in favor of going to trial on two strong cases with a conviction in either resulting, she predicted, in a sentence of roughly thirty years in prison. *Id.* at 75. The client was convicted in the first trial and received a sentence close to her prediction. *Id.* She acknowledges her continued regret at not having been more forceful in convincing the client to take the plea offer. *Id.* Her sense in that case is in accord with mine. I pushed very, very hard in these types of cases for what I assumed was the truth and what I knew was an unpleasant but rational decision.

objective assessment of the strength of the government's evidence and her objective assessment of the strength of the defense evidence, and (2) the defense attorney's subjective assessment of the client's guilt or innocence. Statements by the client to the lawyer always have an impact on the attorney's subjective assessment. Information by the client can add to or limit the defense evidence in that the client can be a witness and identify potential defense evidence or her admissions can eliminate the client as a potential witness. I include the defendant's information within the defense attorney's objective assessment of the evidence. Direct and indirect admissions of guilt go there as well. However, my experience is that defendants explicitly only deny guilt in serious cases, and such protestations of innocence and other factors go into the defense attorney's subjective evaluation of guilt and particularly innocence.

With the primary dimension on the horizontal axis of the objective strength of the objective evidence, I array defense counsel's assessment of guilt or innocence in a series of situations. Moving from left to right goes from strong objective evidence of guilt to strong evidence of innocence. It begins with a rational assessment of this evidence by the defense attorney. Moving down the chart brings in the subjective evaluations based on reactions to the client by defense attorneys. Next, the same rational lawyer reacts to protestations of innocence by a persuasive client. Finally, this lawyer assesses the case for an unpersuasive client.

I believe the chart helps visualize the problems that would arise if defense counsel frequently let their personal assessments of guilt or innocence affect the level of the effort. I begin by recognizing the important point that while innocence will more likely be found toward the right side of the chart, cases at any position on the chart may involve innocent clients. Thus, any reduction in defense effort based on reactions to the evidence or the client is problematic not only for those who champion procedural protections, but because it can result in the innocent being convicted. Thus, anytime uncertainty or belief in guilt is listed in the last three rows as the lawyer's reaction, there is a potential problem if it results in diminished effort, and if innocence appears and produces greater efforts, it threatens to sap other clients of an adequate defense, particularly if it appears

frequently.

Table 1. The effect of objective evidence on a defense attorney's perception of a client's guilt or innocence.

	Strength of Objective Evidence of Guilt				
	Extremely Strong Evidence of Guilt	Strong Evidence of Guilt	Middling Evidence of Guilt	Weak Evidence of Guilt	Clear & Convincing Evidence of Innocence
Defendant's Statement to Defense Counsel	Deny (Perhaps Admit)	Deny	Deny	Deny	Deny
Typical Rational Assessment by Defense Attorney	Guilty (Guilty)	Guilty	Uncertain	Uncertain/Innocent	Innocent
Subjective Assessment with Persuasive Client	Uncertain (Guilty)	Innocent	Innocent	Innocent	Innocent
Subjective Assessment with Unpersuasive Client	Guilty (Guilty)	Guilty	Guilty/ Uncertain	Uncertain	Uncertain/ Innocent

If the focus is on innocence, generally the possibility of defender assessment resulting in unjust convictions is less worrisome at the far left and far right of the chart. This is because these situations tend largely to take care of themselves. Those on the left side overwhelmingly, but not exclusively, involve guilty defendants, and defenders who work on their cases hopefully do so because they do not care about guilt and work to keep the system honest. Those on the right side more likely involve innocent defendants, although the vast majority are guilty, but the perception of a strong defense case and defending potentially innocent clients should typically call forth a strong defense effort, and many clients will correctly accept the generous plea deals offered by the prosecution in these weak cases.

The middle part of the chart is the most problematic. The most questionable situations occur here, and despite the defendant's protestations of innocence, lawyers rationally evaluating the case would conclude the client was likely guilty. This conclusion can be reached by a rational defense attorney, even where objective evidence of guilt is middling. I place Innocent Client #2 in this area since his case was

objectively in the middle part of the chart, and he was relatively unpersuasive in part because of his past record. This same rational lawyer would certainly reach the subjective conclusion of guilt if her client were unpersuasive, but might reach that conclusion when the objective evidence was weaker still.<sup>79</sup>

The potential problem with caring about innocence is illustrated by the reactions of the rational lawyer to the persuasive client, which could produce a privileged status for such clients if the defender generally responds with special care for those perceived to be potentially innocent. I suggest through the listed reactions in the final row that even when the objective evidence of guilt is relatively strong, a persuasive client can cause a defender to break out of the normal operating premise of guilt and subjectively contemplate innocence.

Admittedly, there may be insider knowledge that is not within the category of prosecution or defense evidence short of a confession that gives weight to raw subjective reactions. Many of those markers, however, will be ambiguous. The facts of Innocent Client #2's case, again, present a useful illustration. A rational defense attorney might appropriately begin to question the truthfulness of her client's claims of innocence if his defense could not be verified with other witnesses. For example, if the defense is an alibi, doubt might begin when the defendant's companion recalls events on the critical evening entirely differently. Or the companion might remember it the same, but the episode of the television show the defendant and/or the witness remember watching might not have played the night in question. Or the critical event to date the alibi—the arrival of his sister's newborn—might have been a day later or a day earlier than he claimed. When such conflicting information is revealed, the defendant might change alibis; the alibi witness(es) might remember they watched a different television program together, which did air at the critical time; or the client might acknowledge being at the scene, but deny being involved. Throughout, the client might nevertheless be steadfast in insisting that he is

---

79. The same set of results should be produced in the last two rows based on the general biases of defense counsel rather than the different persuasiveness of the client. If the attorney is easily convinced, the next to last row is reproduced; if the defender is skeptical, then the last row is reproduced.



innocent.<sup>80</sup> The truth, however, remains unclear in all these situations.

Theoretically, some modification of the defense counsel role would likely be possible in cases where an apparently sane and rational defendant confesses her guilt to her defense attorney, which I assume happens most often in cases with strong objective evidence of guilt.<sup>81</sup> Indeed such a process frequently occurs in the current system as lawyers move clients in hopeless cases from initial protestations of innocence toward guilty pleas. As Braccialarghe notes, the British system imposes substantial constraints on attorneys when the defendant has confessed guilt,<sup>82</sup> and our Supreme Court has indicated ethical constraints can be considered in determining what constitutes effective assistance of counsel.<sup>83</sup> The American right to a trial by jury under the Sixth Amendment is not dependent on any judicial determination that guilt and innocence is even slightly debatable.<sup>84</sup> With the unrestricted right to trial, there would also be a right to counsel to assure that the trial is fair, provide procedural regularity, and an ultimate jury determination of guilt. Presumably, however, the role of the lawyer could be modified when the defendant has freely admitted his guilt that would limit the range of defenses counsel could assist in offering

---

80. As noted earlier, Ronald Cotton's case, which is well known in the innocence community, involved a client who presented multiple alibis. See *supra* note 9 and accompanying text. The first was given at the time of his arrest to the police, who disproved his story. *Frontline: What Jennifer Saw*, *supra* note 9. According to his trial lawyer, he presented two others to him, creating a difficult situation regarding his client's credibility: "The alibi defense is not credible if it was inconsistent." *Id.* Ultimately, the defense introduced a family alibi, which was not received well by the jury: "I believe the jury felt his family was trying to protect him . . ." *Id.*

81. This possibility is shown on the chart by the use of parentheses.

82. Braccialarghe, *supra* note 49, at 82 (referencing the code of conduct for the bar of England and Wales).

83. See *Nix v. Whiteside*, 475 U.S. 157, 174-75 (1986) (ruling that the defendant's right to effective assistance of counsel was not violated where the lawyer concluded the client would perjure himself if he testified that he acted in self defense [because of prior inconsistent statement to the attorney regarding whether the defendant had seen a weapon in the victim's possession] and threatened to inform the trial court of the apparent perjury and to withdraw and impeach the client's statement, as permitted under state ethics rules, if the client took the stand).

84. See *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (stating derisively that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty").

that would not offend the right to trial or the right to assistance of counsel.

In this article, I am far more concerned with reality and practicality than theoretical possibilities. “Knowing” that one’s client is guilty is theoretically easy to imagine, and it is frequently the situation for defenders. However, actually knowing that the client is guilty and knowing when one knows, rather than the lawyer believing that she knows when she only has strong reason to suspect, can be situations that are difficult to clearly distinguish. Although I will acknowledge it is not always impossible to determine guilt to a substantial degree of certainty, true certainty of guilt, rather than some relatively high likelihood of it, is absent from the vast majority of cases. The overwhelming sense of guilt can crowd out the thoughts of innocence, which is often very much harder to corroborate.

I contend that defense lawyers clearly cannot care about guilt and do their critical job as guardians of the innocent. It is almost as threatening to the innocent for defense attorneys to care about innocence when it makes its way into the picture. The danger in caring about innocence, which at first is counterintuitive, holds true nevertheless because many of the innocent lack clear indicators of their innocence or characteristics of personal persuasion to make up for their lack of proof. Those who care intensely about innocence should applaud the ignoring of guilt (and innocence) in most cases by defense attorneys at the trial level rather than questioning or criticizing it. If there is to be a group of lawyers who will do the task of defending vigorously, they must be given some room to care individually and intensely about their clients and defense efforts recognized as valid and meritorious service even for the majority who are predictably guilty.

#### V. THE JOB AND MINDSET OF THOSE ASSIGNED TO DEFEND ALL COMERS—THE ALMOST NECESSARY ABSENCE OF CONCENTRATION ON QUESTIONS OF GUILT (AND INNOCENCE)

Before I examine whether defense attorneys caring about guilt and innocence is consistent with their protective function as vigorous advocates, I begin with the sociology of those who work as full time defenders of the accused. For those who find the role of the public defender or appointed

counsel to defend people who are mostly guilty a necessary—but not a particularly noble—role, the question of how such lawyers sustain themselves will be of scant interest. For those who consider an adequate defense for the great mass of defendants who are indigent to be a cornerstone of our country's aspirational commitment to equal justice, the personal and professional survival of thousands of defense attorneys committed to zealous advocacy has enormous practical impact.

#### A. *A Typology of Defender Motivations*

In assessing the possible impact that a focus on guilt and innocence might have on defenders, some typology of the motivations of defenders is helpful. I suggest there are four major categories: (1) The Tester of Factual or Legal Guilt, (2) The Rights Protector, (3) The Protector of and Aid to the Downtrodden, and (4) The Competitor.<sup>85</sup>

The first category—The Tester of Factual or Legal Guilt—is the one most directly involved in this article. The motivation of these lawyers roughly centers on the arguments that determining facts is often difficult, leading to inherent uncertainty as to factual guilt, and thus, despite the good faith efforts of prosecutors, conviction of the innocent remains a reality. As a result, defense lawyers are needed to protect the factually innocent. Even if we know what happened, many cases turn on issues of human motivation and responsibility, which may remain uncertain or which may properly be viewed from different perspectives. Thus, lawyers also play this role, even when the issue is legal guilt rather than factual innocence. Finally, in death penalty cases, defense attorneys are critical to reaching an appropriate judgment as to punishment.<sup>86</sup>

---

85. I am deeply indebted to Professor Barbara Babcock's insights in framing these categories. See Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177-78 (1983-1984) (describing categories of motivation). She presents five types of motivation: (1) The Garbage Collector's Reason, (2) The Legalistic or Positivist's Reason, (3) The Political Activist's Reason, (4) The Social Worker's Reason, and (5) The Egotist's Reason. *Id.* I reordered the categories and have changed the titles to give them a more contemporary feel (the description is a quarter-of-a-century old) and to state the purposes more positively.

86. Professor Babcock labeled this category "The Legalistic or Positivist's Reason" and put no emphasis on the difficulty of determining factual guilt. *Id.*

The second category—The Rights Protector—houses arguments flowing from the command of the Sixth Amendment under our adversarial system for equal justice and the contention that in protecting those least loved, defenders support the foundation of the liberties of all. The third category—The Protector of the Downtrodden—contains elements of social work and political cause.<sup>87</sup> Most of those charged with crimes come from impoverished backgrounds and present a host of social maladies. Somewhere in the mix of motivations to enter defender work is likely at least the potential for empathy for defendants who typically come from impoverished backgrounds and may be members of racial minority groups. Few defenders are likely drawn to the work to perform a social work function, but in reality, much of a defender's work has this function. For those who endure, success in the social work function often becomes a fulfilling element of the job. The fourth category—The Competitor—captures the personal ego satisfaction that sustains litigators. It is the selfish joy of winning. For defenders, this joy may be more infrequent because the prosecution typically has the stronger case, but the victories are more enjoyable when they come to an underdog.

When I worked at the Washington, D.C. PDS from 1976 until 1983, we did not talk frequently about innocence. In

---

at 177. I see her characterization as somewhat anachronistic and reflective of a time before irrefutable DNA exonerations raised the salience of factual innocence. Perspectives, even among defense attorneys, on issues of innocence change. Although the difference is largely one of focus for Babcock, the change of perspective on the likelihood of factual innocence can be placed in perspective by going back in history further and looking to the often quoted statement of Judge Learned Hand set out below:

Why . . . [the defendant] should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see . . . . Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.

United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). I find Hand's statement no longer recognizable, given the DNA exonerations and Babcock's lack of focus on potential factual innocence surprising to a contemporary reader.

87. Professor Babcock divided this category into two: "The Political Activist's Reason" and "The Social Worker's Reason." Babcock, *supra* note 85, at 178. Having a separate Political Activist's category was more understandable in the period shortly after the civil rights movement of the 1960s and 1970s, and it remains appropriate for many who defend death penalty cases. My sense of contemporary motivation is that the overtly political element is, at present, substantially less strong for ordinary defenders.

justifying our work to ourselves, we did not concentrate on what I have termed the role of Tester of Factual or Legal Guilt,<sup>88</sup> which I highlight because it is that role that justifies the defense attorney's vigorous defense of all to acquit the unidentified innocents. As I noted, I acted somewhat differently for Innocent Client #1 because I believed he was innocent, but what I did can properly be viewed as simply the appropriate tactical response to the particular case, rather than a suggestion of general difference in treatment of apparently innocent clients. My inquiry in this section is whether full-time public defenders and active appointed counsel can survive professionally and personally and act generally upon their belief in the innocence of clients. This is relevant to the question of whether there could be a general or special duty of care for some class of clients where innocence is believed or particularly likely.

### *B. The Professional and Personal Motivations that Sustain Defenders*

At PDS, as I assume with public defenders generally, we had no clearly articulated justifications for our work either at an office-wide level or individually. I saw and felt elements of all four of the motivational categories described above. The most common articulation was the systemic justification set out in the second category—"The Protector of Rights." We certainly believed that a major consequence and purpose of our work was to keep the criminal justice process honest, which should help those who are innocent, but our focus was on the immediate goal of maintaining a fair process. We were, in this way, lawyers working for a cause.<sup>89</sup> Thus,

---

88. I have no reason to believe conversations have changed much from my time until today. However, in one specific, although I assume minor, way, conversations with defendants have changed in Washington, D.C. to specifically discuss innocence. The conversation is the result of the Innocence Protection Act of 2001, which gives the defendant a personal right for DNA testing and defense attorneys regularly discuss that right with clients. See D.C. CODE § 22-4131 (2002). Attorneys have an obligation to inform their clients of the right to have DNA tests performed that might support claims of innocence that the client makes. *Id.*

89. See Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 359 (2006). On the other hand, it seems to me that, for some defense attorneys who specialize in areas such as Innocence Projects or capital defense, the overall cause may motivate and sustain. Professor Bandes does not find the "cause lawyering" label as particularly useful in capturing the

working for a larger cause is somewhere in their motivation, but for most defenders, that is not what sustains them on a day-to-day basis.

In her insightful article, *Repression and Denial in Criminal Lawyering*, Professor Susan Bandes examines the emotional and psychological impact upon defenders of representing largely, but not universally, guilty individuals, many of whom have caused pain to others and face the prospect of harsh punishment themselves.<sup>90</sup> On the support side of the ledger, Bandes, drawing from numerous personal accounts of defenders, notes the central focus and sustaining motivation is the client: “One common thread among those who maintain a commitment to defense work is the importance of the connection to one’s client, and the importance of keeping his needs concrete and immediate.”<sup>91</sup>

As Professor Bandes describes, the lawyers at the Public Defender Service most centrally represented people in need—we had clients and saw ourselves as their vigorous and loyal lawyers.<sup>92</sup> Representing clients is the obvious centerpiece of what public defenders do. Lawyers, no doubt, go into defender work because they are drawn to a general cause, but the sense of mission at PDS was not felt immediately as being to a cause—the cause of justice—but to individual clients.<sup>93</sup>

---

motivation of capital defenders, who often work a case or client at a time rather than viewing their efforts systemically about capital punishment. *Id.* Moreover, the cause may be vague or multifaceted and is captured in the concept of the continued fight rather than the success of a cause: “They may be energized by challenging, and preferably thwarting, authority, by fighting for the underdog, or by their political commitments.” *Id.*

90. *See generally id.*

91. *Id.* at 357. *See also id.* at 347–48 (quoting David Feige, *How to Defend Someone You Know Is Guilty*, N.Y. TIMES, Apr. 8, 2001, § 6 (Magazine) at 59–60) (“I care about the person I know . . . It is his tears I see, his hand I hold and his mother I console.”). Bandes described her own emotional support for her work when she worked as an appellate defender as follows:

We felt loyalty to each other, and turned to each other for support.

Most of all, we felt loyalty to our clients. We knew them and their families as human beings, we cared about them, and we drew much of our strength and motivation from their desperate need for our help.

Our clients’ needs were serious, immediate, and palpable.

Bandes, *supra* note 89, at 350.

92. One pedantic way to describe the work of PDS and other public defenders is that of a service agency, helping our clients negotiate with a hostile government agency, which was interlaced with our sense that our work facilitated our client in maintaining some level of autonomy.

93. Among one of her many powerful insights, Professor Abbe Smith notes

We defended the guilty and innocent alike, but we tried to win cases and more particularly to do our best for our clients, whom we saw principally as clients and individuals rather than consciously recognizing them as either guilty or innocent clients.

Recognizing a special duty for the apparently or likely innocent would, I believe, be so inconsistent with the moral imperative that helps criminal defense attorneys continue their work that it would be professionally and personally destructive. Professor Givelber writes of the positive advantage of focusing on the contest rather than the merits because most clients are guilty.<sup>94</sup> If one treated defending the likely guilty as explicitly a second order priority, one could reasonably assume loss of morale for defense attorneys.<sup>95</sup> Only occasionally would a defense lawyer have the opportunity to do what would be considered “first priority” work on an innocent person’s case,<sup>96</sup> or perhaps the perception of the work would change from coldly realistic (“I don’t care”) to blindly unrealistic (“Most of my clients are

---

that “for the criminal defense lawyer, the client comes first” ahead of other lofty concerns, including the difficult to discern matter of objective truth. See SMITH, *supra* note 38, at 68.

94. See Givelber, *supra* note 24, at 1395–96 (arguing that defense counsel have an interest in a status quo that does not concentrate on acquitting the innocent because the present system, which attempts to try cases among the guilty, likely results in more overall acquittals than might a system targeted on the innocent, because some criminal defense attorneys are attracted to the present contest of wits and will involved in winning acquittals against the odds, and because the common role of defense counsel is to represent the guilty).

95. Professor Givelber has argued:

Moreover, because cases of falsely convicted innocents may appear indistinguishable from those of the correctly convicted guilty, defense counsel may not be able to tell the difference . . . Ideology matters as well. At a minimum, defense counsel view their role as forcing their government to secure convictions in an open and lawful manner. Securing acquittals for the guilty serves the important end of forcing the government to follow its own rules even its treatment of the most despised members of the community . . . Defense counsel may also subscribe to the dominant assumption [to assume guilt] because any other view might render their work emotionally and practically unsupportable.”

Daniel Givelber, *Lost Innocence: Speculation and Data about the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1171 (2005).

96. See Raymond, *supra* note 20, at 457–61 (expressing concern about the impact of the innocence movement on ordinary defense attorneys who are not publicly acclaimed and who may feel, along with apparently guilty clients, left behind).

innocent”).<sup>97</sup>

Professor Bandes also examines various mechanisms by which criminal defense lawyers “distance themselves from certain aspects of their work, either temporarily or more permanently, while keeping other aspects salient.”<sup>98</sup> Despite various defense mechanisms, one real problem is “burnout,” which illustrates a reason for not trying to “know” whether a client is guilty. Indeed, avoiding such concern is highly useful and arguably essential for professional survival.

Professor Barbara Babcock, who spent a number of years at PDS,<sup>99</sup> explains:

The defender goes down the treacherous path of burnout once she concerns herself with guilt or innocence.

The defender must suspend belief (or disbelief) in every case, and must be disinterested in either freeing the guilty or protecting the innocent. Any other attitude inevitably leads to corruption of the defender’s role because most of the accused are guilty. Once the defender consciously recognizes this fact, her work becomes insupportable and she is disabled.<sup>100</sup>

Babcock emphatically means that defenders cannot care about guilt or innocence. She appears to believe that the defender cannot recognize that she is doing the work because of the first motivation that I have described—The Tester of Factual or Legal Guilt. Referring to the statement, “Better That Many Guilty Go Free Rather Than One Innocent Should Suffer,” she states: “These antique words imply that the job of the defender is to protect the innocent, even if, in the process, she participates in the freeing of the guilty. This is simply wrong.”<sup>101</sup>

---

97. See DERSHOWITZ, *supra* note 33, at 117 (understating the likelihood somewhat, “[n]o full-time criminal lawyer represents a significant number of innocent clients”, but asserting correctly, I believe, that the average defense attorney has relatively few innocent clients, and, I would add, will not recognize even those she has).

98. Bandes, *supra* note 89, at 351.

99. Babcock, *supra* note 85, at 175 n.\* (explaining that she practiced as a criminal defense attorney for eight years, working the first two in Edward Bennett Williams’s firm and then moving to PDS).

100. See Babcock, *supra* note 10, at 314–15. See also Babcock, *supra* note 85, at 180 (observing that “the fundamental mind-set of most criminal defense lawyers toward defending the guilty is one of staggering indifference to the question”).

101. See Babcock, *supra* note 10, at 314.



She goes on to state:

The defender cannot view herself as part of a system—even one with the quixotic ideal of freeing the guilty in order to protect the innocent. Once part of the system, the inevitable next step is for the defender to do what everyone else in the system does: assume the guilt of the accused and act accordingly. This means thinking of plea bargains rather than defenses . . . and ultimately collaborating completely by questioning the worth of the defender's work. Only by staying outside the system altogether can the defender act effectively and avoid the self-doubt and ambivalence that leads to burnout.<sup>102</sup>

I believe that Babcock overstates the danger of ever caring about either innocence or guilt. I agree that innocence and its absence, guilt, cannot be the motive of the work; discerning it cannot be the quest. Innocence cannot generally be known in the cases that successfully make their way through the system. But if I am correct that occasionally attention may be paid to innocence, Babcock is mostly right. She powerfully presents the almost certainly correct point that regular focus, and certainly fixation, on that issue will lead to professional destruction for trial-level defense attorneys.

*C. Defense Attorneys Who Specialize in Innocence and Trial Lawyers Who Encounter Evidence of the Innocence of Defendants Other than Their Clients*

It is not that defense counsel lack direct professional concern about innocence. Prominent lawyers, such as Barry Scheck, are publicly involved in Innocence Projects, but their work is principally focused on post-conviction litigation—freeing the wrongly convicted. Also, occasional news stories are published about lawyers who find evidence of other clients' innocence during the representation of their own clients.

I have written about the difficult situation Staples Hughes faced in the Lee Wayne Hunt case when Hughes's client, Jerry Cashwell, confessed that he alone had committed the murders for which Hunt was also then being prosecuted, and for which he was convicted and sentenced to life in

---

102. *Id.* at 315.

prison.<sup>103</sup> Hughes decided to reveal the information after his client's suicide decades later, but he had never tried to do so while his client was alive because he understood that the revelation might harm his client's interests. Therefore, the revelation would have been contrary to his ethical obligation. Nevertheless, Hughes was haunted by the knowledge and the responsibility his duty placed on him for the extended incarceration of a man whom he knew to have been involved in criminal activity, but was innocent of the murders for which he had been convicted.<sup>104</sup>

The standard understanding, which Hughes did not challenge, is that evidence of the innocence of another does not justify harming the interests of the lawyer's own client by divulging otherwise protected secrets. Indeed, the prosecution and the trial judge agreed. Hughes's testimony was excluded from consideration by the trial court on Hunt's motion for a new trial because, *inter alia*, the court agreed with the prosecution's argument that such testimony violated Hughes's ethical duty to maintain client's confidences and secrets and his client's attorney-client privilege, both of which require lawyers to keep their clients' secrets inviolate without an explicit exception for testimony supporting the innocence.<sup>105</sup> Within that limitation, a modest change in ethics obligations could be fashioned that allows or requires the revelation of innocence upon the death of the client<sup>106</sup> or it could require revelation and include a form of immunity, prohibiting government use against the client revealing the information.<sup>107</sup>

---

103. See Mosteller, *supra* note 64, at 535–44.

104. See *id.* at 537.

105. See *id.* at 540–44.

106. The ABA Ethics, Gideon & Professionalism Committee are considering a proposal drafted by co-chairs Professors Bruce Green and Ellen Yaroshevsky to permit a lawyer to reveal the confidences of a deceased client if the lawyer reasonably believes such revelation is necessary to prevent or rectify the wrongful conviction of another. See Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, 23 CRIM. JUST. 46, 46–49 (2008). The rule could also be expanded to require the attorney to request a waiver from his or her client when the client possessed evidence exculpating another and when circumstances other than death diminished the impact of the disclosure.

107. In addition to its problematic nature as an alternative to privilege, requiring disclosure and providing protection to the client who incriminates herself is quite unlikely, given prosecutorial protestation that it would open the door to manufactured claims of innocence by a third party.

These almost surgical alterations in defense counsel obligations to recognize the importance of innocence when it does not directly or substantially harm the lawyer's client are important, but they have little clear impact on day-to-day defense work. The suggestive alterations are, however, instructive about the growing view that innocence is, perhaps, the primary justice system concern and should alter defense counsel impact when compatible with their core functions. But they give way and continue to support defense counsel in maintaining their own clients' confidences if important to protecting their clients' interests, even when doing so denies exculpatory information to a non-client. The duty to protect one's client at the cost of another who may be innocent, however, does not conflict with giving defense attorneys special duties to protect, with greater rigor, their own clients who are likely innocent. Unfortunately, none of the new rules speaks to the primary impediments to treating those perceived as likely innocent with special care, which is the difficulty of knowing which cases involve the innocent absent a stunning admission (as occurred in the Hunt case), and absent such knowledge, shortchanging other potentially innocent clients as a consequence of giving special attention to some simply because they are believed to be innocent.

#### VI. THE POSSIBILITY OF SPECIAL CONCERN FOR THE INNOCENT

I began work on this article because I wanted to reexamine my long-accepted personal view, formed while I worked as a public defender, that I could not care about whether I believed my client to be guilty or innocent. I have reached the conclusion that my earlier formed view is fundamentally sound with respect to the day-to-day work of public defenders. As a matter of theory, caring about guilt and caring about innocence must equally be prohibited.

If resources are fixed, there can be no extra effort for any case based on the apparent innocence of the defendant if all clients are to be treated the same. Equality is destroyed just as surely by increasing the effort for the apparently innocent as it is by reducing it for the apparently guilty. That theoretical conclusion, however, may not wholly decide the issue in the practical world because the individual lawyer effectively, or the system officially, might add resources for the cases of the apparently innocent.

A. *The Individual Solution—More Work and Less Sleep*

One might support a practical solution on the individual defender level by occasionally increasing the time, effort, and resources devoted to the case when the prospect of innocence is observed. Regardless of what well-resourced offices, such as PDS, do, no one can seriously contend that current efforts by those assigned to represent indigent defendants are uniformly excellent. Defender services are woefully underfunded in many jurisdictions. Many indigent defendants do not receive what would be termed the “full treatment” in any retail setting. If the standard actual practice is realistically far short of warm zeal, should it not be possible to expect and, indeed, require that the “full treatment,” or at least warm zeal, be exerted as to some cases, specifically for those reasonably believed to be innocent?

The discussion in the previous section leads me to the conclusion that generally caring about subjective reactions to issues of guilt and, yes, of innocence, are incompatible with sound defender work if applied broadly. The effort called forth must relate to objective factors, such as the likelihood that the effort would have some appreciable effect on the outcome of the case with regard to punishment imposed. Allocations based broadly on belief in innocence will take the system down a slippery slope that begins with an initial informal trial by the attorney to determine which defendants are convincing enough to warrant full representation. The change in practice will surely have an effect on shaping the statements made by clients to their lawyers and further constrain the information conveyed by defendants to their lawyers.

On the other hand, one should not ignore human reactions. I believe that most defense attorneys do have special concern for innocent clients.<sup>108</sup> As a psychological

---

108. Professor Babcock describes the defense attorney trying the case of a client she believes is innocent as follows: “Those rare trials of a defendant whom the lawyer truly believes to be innocent . . . are grueling and frightening experiences, in which the usual will to win is elevated to a desperate desire to succeed.” Babcock, *supra* note 85, at 180. Professor Abbe Smith states that “there is a stunning change of perspective when a lawyer represents an innocent person. Suddenly there is nothing more important than the truth, nothing more sacred . . . Lawyers with innocent clients can become downright desperate about the truth.” SMITH, *supra* note 38, at 83.

defense mechanism, they may not want to engage broadly and frequently in the thought that clients may be innocent because it will raise the emotional stakes. It is much more comfortable not to have a clear opinion on guilt or innocence—to assume that all the clients are individuals worthy of a defense, but equal on the guilt/innocence dimension. However, when defenders do reach the conclusion of innocence, my anecdotal information and my personal belief is that they typically do more for those clients, and they try to accomplish this result by doing more for those clients rather than less for the others. They consciously choose individually to try to expand the resources available. This is how I think it is ordinarily understood and justified. The effort is to avoid shortchanging any other client because of the belief in innocence of one client, but to add extra hours to the work day by staying up later or getting up earlier, thereby expanding the total effort and providing some additional effort to the apparently innocent client.

However, shortchanging the defense of other clients not perceived as innocent can and will ultimately occur. Attempting to produce additional effort for apparently innocent clients is impractical if it is a regular occurrence. Only a limited number of extra hours are available in the already busy life of a typical public defender. I make no claim that criminal defense attorneys work harder than prosecutors or civil practitioners. My claim is that defense attorneys already have more cases and more productive work than time allows. Many of us have had jobs where we are supposed to spend a percentage of our time on one task, say one-third, and the remaining time, say two-thirds, on another discrete task. The problem, however, was that the first task, if properly done, could easily be a full-time job. The work day obviously could not be expanded to accommodate all of the productive work within the job description, and the lawyer shortchanged both tasks, but likely did proportionately more work on the primary task. Shortchanging always effectively occurs, or alternatively, productive work that reduces punishment is replaced by belief in innocence as the determiner of effort. This recognition that inequality results from caring more about even the occasional innocent clients does not suggest that it will not remain the chosen course of conduct for many defense attorneys or that it is inevitably corrupting. In the

practical world, it is likely the only accommodation that is tolerable, but differential effort based on perception of innocence remains fraught with the danger of corrupting the essential role of guardian of a fair trial for all, including the unperceived innocent clients, in addition to its potential for psychological and physical damage.<sup>109</sup>

*B. The Systemic Solution—Expanding Resources for Clients Where Objective Evidence Makes Innocence Significantly Likely*

Should defense attorneys ever be required to care about innocence? Although I have expressed skepticism that frequent extra effort because of merely a subjective belief in the innocence of some clients is practical, objective evidence of innocence does justify such additional effort. However, this solution only works if, as a consequence of the objective showing of innocence, the total of defense resources is increased rather than taken from, thereby reducing resources available to, other clients. The reason is that we will inevitably omit truly innocent defendants from the preferred group, and to the extent creating a preferred group reduces their defense effort, we will have gained reductions in erroneous convictions of the innocent in one group by an increase in such convictions in another.<sup>110</sup>

The recent proposed amendment to prosecutorial ethical duties regarding the innocent could provide a guide for when extra effort might be required. In February 2008, the ABA House of Delegates adopted an amendment to the ABA Model Rules of Professional Conduct that requires the prosecutor to seek to remedy a conviction if the prosecutor “knows of clear and convincing evidence establishing” the innocence of a convicted defendant.<sup>111</sup> When there is clear and convincing

---

109. See *supra* Part V.B (discussing the potential burnout impact of caring about innocence).

110. Critics of this analysis will note that tradeoffs virtually always must be made outside and the question is whether more would be gained in overall innocence protection. My argument throughout this article is based on the factual premise that innocence is often mixed among the apparently guilty, even for defense attorneys, and that clear markers are absent. I believe this is one of the key lessons from the DNA exonerations: while they occurred in certain classes of cases more often than other, they were very often indistinguishable on the basis of then observable factors from other prosecutions.

111. See MODEL RULES OF PROF'L CONDUCT R. 3.8(h) (2008). The ABA

evidence of innocence, defense attorneys could, and perhaps should, have a special duty to care and to act more vigorously and with greater support.

This high standard applicable to prosecutors in the post-conviction setting might, at first blush, appear to be an unusual selection. I suggest, however, that it is appropriate. In the post-conviction setting, the prosecution's appropriate posture is ordinarily to support the result reached at trial for a host of reasons. However, actual knowledge of clear and convincing evidence of guilt reasonably alters the prosecutor's responsibility. Similarly, at the trial stage, giving different treatment based on subjective assessments of guilt or innocence is incompatible with the defender's responsibility to represent all comers effectively. Nevertheless, once this high showing is made, an exception can also be justified if joined with the provision of extra resources.

The important point here is that the additional effort should not detract from the duties to other clients. One could argue that when the evidence of innocence rises to this level, it is more than a personal duty of the attorney. It might be a duty, but it should be a systemic imperative, not an individual lawyer imperative. Defense counsel's duty to provide a fair trial for all other clients is not diminished because of the objective likelihood of the innocence of one.

The operating charter of the public defender agency and/or the duties of judges in approving resources should be amended to provide additional resources in this situation. Innocence is a proper justification for the expansion of defense resources beyond the level otherwise authorized. In *Ake v. Oklahoma*, the Court ruled that certain defense services are a constitutional right because they are the basic tools to an adequate defense.<sup>112</sup> Where this showing of

---

revision also imposed a responsibility to investigate innocence if the prosecutor "knows of new, credible and material evidence creating a reasonable likelihood" of innocence. *Id.* at R. 3.8(g). Such an objective showing should already call for vigorous effort by the defense since it is couched in terms of productive evidence that would likely be outcome determinative, *see supra* Part IV.A, which would already call forth a vigorous defense effort and would justify the approval of additional defense services under *Ake v. Oklahoma*, 470 U.S. 68 (1985).

112. *See Ake*, 470 U.S. at 77 (reversing a conviction and death sentence and requiring, *inter alia*, the government to provide access to a psychiatrist on the issue of his sanity at the time of the offense, in a situation where the record showed strong evidence of significant psychiatric impairment and insanity was the defense offered at trial).

innocence is made, additional resources should be provided to aid in investigation and preparation of the case. These should be resources beyond the constitutional minimum mandated by *Ake* and beyond those generally available to defendants under statute or administrative regulations because innocence is a value that should be given weight by the justice system. This is not a re-shuffling of resources already allocated. Rather, innocence should call forth the provision of additional resources.

Thus, I believe a theoretical exception could be developed to the general rule of equal treatment of clients based on strong objective evidence of innocence. However, on closer inspection, I conclude that it would be practically insignificant or unworkable and likely counterproductive. It would be practically insignificant because, in most situations where the defense has such evidence, the prosecution would independently reach the conclusion not to prosecute.<sup>113</sup> In other cases, the normal human reaction of defense counsel to follow productive leads and to care about innocence in such cases will produce the same extra effort that I describe.

Thus, this proposal is of relatively little practical importance, but it could be of meaningful assistance if the criminal justice system were to develop ways to provide extra

---

113. One might wonder why there would be a prosecution if the defense concludes that, from an objective standpoint, there is clear and convincing evidence of innocence, or why this should be a directive for more defense services rather than an additional directive to the prosecution. Should the prosecution not dismiss the case, and should the defense attorney not merely provide the evidence to the prosecution? An objective determination is not a universal one. Some defense attorneys provide exculpatory evidence to prosecutors whom they believe will evaluate it fairly if they consider a decision not to prosecute is a viable possibility. In other situations, counsel anticipates that the reaction of the prosecution will be to turn a blind eye to the possibility of innocence and to use advanced notice of the evidence to prepare an inculpatory explanation. For example, in the Duke lacrosse case, defense counsel for Reade Seligmann provided documentary evidence of an apparently "air tight" alibi to District Attorney Mike Nifong, only to have him indict their client and send an investigator to re-interview the victim, producing a changed version of the crime that undercut the effectiveness of the alibi. See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 *FORDHAM L. REV.* 1337, 1402–03, 1405–06 (2007). It is not only in extreme cases, such as the Duke lacrosse case, or with unethical prosecutors like Mike Nifong, who respond aggressively to proffers of innocence: many other defense attorneys have found their apparently "air tight" alibis undercut when they revealed them to the prosecution, and victims revised their time lines for the crime.



resources to the defense of the objectively likely innocent.<sup>114</sup> The special duty should only be discussed if it is paired with a responsibility for funding sources to provide extra funding beyond that normally allocated when such a case is encountered. However, I have difficulty imagining how the objective showing could be made to any suitable fact-finder. Presenting enough evidence to establish such a showing would be practically impossible to a judge. Defense secrets would likely need to be revealed and the time consumed would be extraordinary in most situations. Without an adversary to provide balance and assure the judge that no significant contrary evidence exists in the case, no court could be confident that it had a fair perspective and, therefore, could not know whether the evidence was sufficient under a clear and convincing standard.

An administrative body that oversees the public defender office could maintain confidentiality, but its determination would lack a full presentation of the government's proof and any determination that strong objective evidence of innocence existed might not be dispassionate. Granting extra funds based on a finding of objective evidence of innocence might be seen as, or actually become, a way to expand the agency's budget. If the funds are not secured as extra resources ordered by an accepted neutral decision maker, such as a judge, the effect would likely be simply to reallocate the budgeted funds already available to the defense.<sup>115</sup>

I come to the conclusion that, although theoretically

---

114. Professor Darryl K. Brown has suggested rationing defense resources based in part on the lessons from DNA about features of cases where exonerations appeared to concentrate. See Brown, *Institutional Design*, *supra* note 75, at 808, 821–28. Leaving aside the issue of whether DNA exonerations provide a representative picture of the unknown and unknowable group of wrongfully convicted defendants, his suggestion may provide a useful guide to defense attorneys in targeting efforts that may develop evidence of innocence. As a justification or excuse for why adequate funding is not or should not be provided to fully defend others who may also be innocent, which I fear, the proposal would be terribly misused.

115. The situation for prosecution review of a case after conviction is very different. First, the trial evidence is known and new evidence can be evaluated with regard to the earlier produced evidence. Finding a neutral fact-finder remains a problem, but at least the duty under the rule to act, and the natural bias to maintain the status quo, work in opposite directions and act as something of an automatic check rather than being mutually reinforcing, and budget expanding, as the determination of the public defender hierarchy would be.

possible to benefit the innocent by expanding defense resources where supported by strong objective evidence, the effort would likely be damaging. My instinct is that requiring the defense to give special services to the likely innocent would invite the creation of a “wedge issue” regarding defender funding. Any effort to distinguish between the likely innocent and other defendants regarding funding will almost inevitably lead to reduction in funding for the group of guilty defendants. If there is any way to separate the cases worthy of special funding, the ostensible removal of the most meritorious cases from the body of cases where indigent funding is required will likely lead to a reduction in funding for the great mass of cases. I cannot be certain that extra funds would not be granted to cases where the defendant was likely innocent without making a compensating reduction in another part of the overall allocation of funds for indigent defense. However, like the approach that would restrict defense efforts for the clearly guilty, an effort to give additional services to those that are very likely innocent would almost necessarily undermine the broad appeal and the political support of the current system of indigent defense.

*C. Breaking Down Stereotypes and Recognizing that Expanded Support for All Defenders is Critical to Protecting the Innocent*

I want now to look beyond the potential “wedge issue” and suggest the embrace of innocence as the prime concern and as providing the missing support for long-needed additional resources to defend all indigent defendants.<sup>116</sup> I recognize that this will be a difficult task. “Hard boiled” public defenders, among which I include myself, may feel that couching support for defense services on the basis of protecting the innocent approaches the disingenuous and may

---

116. Arguing for increased support for public defenders is at least strongly optimistic and more likely unrealistic. Budget cuts to states and localities associated with the economic downturn appear to be producing cutbacks in funding. See Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (describing litigation in seven jurisdictions by public defenders to limit caseloads based on reduced government funding and rising caseloads). But at least those concerned about innocence should add their voices to those advocating adequate, and eventually expanded, resources.

ultimately prove counterproductive as a wedge argument later develops and turns the effort against itself. Defenders do represent clients for multiple other reasons beyond innocence, and they clearly represent defendants who are demonstrably guilty. Nevertheless, in the new environment that emphasizes the importance of procedures that protect the innocent, the importance of well-funded defender services is the most important way that unidentified innocent defendants can be protected.<sup>117</sup>

Moreover, to date, there is scant evidence that the argument has been accepted that more funds for the defense are needed because innocent defendants have been convicted in intolerably high numbers. Notorious cases involving the conviction of the innocent do seem to have been important in achieving more targeted reforms, such as the enactment of legislation authorizing DNA testing,<sup>118</sup> development of new identification protocols,<sup>119</sup> and enactment of expanded discovery.<sup>120</sup> Recognition of these erroneous convictions has not led to more generous funding for defense services

---

117. Others have noted the potential of contemporary concern for the innocent who have been wrongfully convicted to support greater funding for indigent defense services. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1036, 1128 (2006) (arguing that concern expressed regarding wrongful convictions can be a compelling argument for having functionally strong defense representation and recommending publicity regarding the failure of the system and assembly line justice for the innocent to build a constituency for reform of the inadequate indigent defense systems); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 261 (2004) (noting that publicity regarding wrongful convictions uncovered through DNA evidence has enhanced the public's concern for accuracy in criminal convictions and might permit reframing the defense funding issue as an investment in accuracy).

118. See Innocence Protection Act of 2004, 18 U.S.C. §§ 3600–3600A (2006), 42 U.S.C. § 14163 (2006) (providing both a right to defendants to secure DNA testing and providing greater defense services in state capital punishment cases).

119. See Mosteller, *supra* note 113, at 1388–92 (describing how DNA exonerations demonstrated the weaknesses of eyewitness identification evidence and helped produce an innocence-based identification protocol).

120. See Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 272–76 (2008) (discussing how in North Carolina, concern about the apparently erroneous conviction of Alan Gell, which was uncovered because of a post-conviction discovery statute applicable only to death penalty cases, led the legislature to similarly expand discovery in all felony cases).

generally. Instead, the impact appears to be targeted on reforms that would benefit the innocent, except for death penalty litigation where additional funds have been provided by Congress to increase the overall level of representation.<sup>121</sup> The argument that more is needed across the board to help protect against errors, if broadly made, has not been received.

Nevertheless, the argument is sound. When innocence is unknowable as an objective matter, we depend upon the jury to discern the truth. My argument in this article is that knowledge of innocence is far less available than is implicitly assumed. We can often know who the clearly guilty are, and in the vast majority of cases, they plead guilty. Sometimes through trace evidence, we gain knowledge that a defendant is among the clearly guilty. Finding the actually innocent among those who are not clearly guilty is often a matter of luck, generally a matter of hard work, and I believe more often than we want to admit, a matter of uncertainty. That process of sorting these difficult cases usually only works if the facts are adequately gathered and examined. When we turn, as we must, to the judgment of twelve jurors, the efficacy of the decision process depends upon full and effective presentation on both sides. I do not claim that prosecutor's offices are lavishly funded, for they are not, but across much of America, defenders are woefully underfunded.<sup>122</sup> For innocence to be protected in that group of cases where it is objectively unknowable, adequate funding for defense services is the greatest need and the most pressing reform.

Because of the importance of adequate defense services to the unidentified innocent, those who focus on procedures designed to highlight the innocent should recognize support for broader defender funding as supportive of their general commitment to the innocent, although not targeted. The procedures supported by this group of reformers tend to help subclasses of defendants whose cases have certain factual features, such as biological trace evidence, which may be linked to specific individuals and will exonerate others by

---

121. See Innocence Protection Act of 2004 § 14163 (providing funding for enhanced defense services in state capital punishment case).

122. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1045 (2006) ("By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced.")

DNA profiling. I believe that all of these efforts assume there is a knowledgeable and equipped defender to help the system fairly apply the new procedures. As these specific reforms move forward and if they gain momentum, I suggest that reformers explicitly support expanded funding for defense counsel and their support services to ensure the system's efficient operation and to provide some protection to the innocent defendants whose cases fit into no special category, who lack obvious signs of innocence, and who might have committed crimes in the past so they appear among the "usual suspects."<sup>123</sup>

### CONCLUSION

In this article, I reexamine the foundation for the attitude of trial-level public defenders that they are not concerned whether they believe their clients are guilty. Of course, that implies they are not concerned even if they believe their clients are innocent. I contend, however, that the former is the most important position. If the subjective determination of guilt mattered, then one would assume a lower level of representation would be given to those whose protestations of innocence were disbelieved.

I find no basis to rethink that position, even though innocence is now a prime concern of the public. Innocent Client #2 and the myriad of others like him who appear guilty and have no compelling defense are the poster children for maintaining the traditional posture of unconcern with guilt. Indeed, the justification for defense counsel's lack of concern about guilt is that it clearly puts one person—the client's lawyer—in a duty-bound position to try to challenge the government's case. For those in the situation of Innocent

---

123. In his book, Professor George Thomas focuses on the failures of our justice system to protect the innocent. GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* (2008). He proposes a number of innovations, but begins with a radical proposal to fix the inadequate system of representation for the accused: he would create a group of criminal law specialists who would represent both sides. *Id.* at 187–96. Although Thomas's proposal is not along the lines that I suggest to increase defender resources, it has a kinship, in that he puts the need for quality counsel at the center of his innocence reforms. See also George C. Thomas III, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts that Haunt the Criminal Justice Systems*, 2008 UTAH L. REV. 25 (providing a more extensive treatment of the counsel argument that adequate and equal representation of the defendant is critical to protecting the innocent).

Client #2, but who do not receive his miraculous exoneration, the defense attorney who provides a vigorous defense with its opportunity to uncover evidence of innocence, even when she would have no reason to believe innocence likely, remains the client's major hope.

Prosecutors are duty bound to care about innocence in part because even their subjective beliefs have a different impact. First, they can act on their beliefs. They can dismiss a case if they judge it to lack merit. The defense attorney cannot. The subjective judgment can affect professional conduct for the prosecutor; it cannot result in lessening defense effort for a client because his lawyer's intuition does not discern innocence. Like U.S. Marshal Gerard in arresting Kimble, the defense attorney must defend regardless of her subjective belief.

On the other hand, I suggest that defenders do care about innocence even though they theoretically cannot. While defenders' first and general response is not to care about either guilt or innocence, they individually only strictly hold the line at not caring about guilt. We already have a rough proxy for a rule of special attention to the innocent in the expected human response of defense attorneys when likely innocence is encountered. In *The Fugitive*, it turns out that U.S. Marshal Gerard does, in fact, care when he sees a basis to doubt of Kimble's guilt, and Gerard becomes Kimble's most important ally once he concludes that Kimble is innocent. However, that never keeps Gerard from doing his job and arresting Kimble. "I don't care" operates to mean that he must arrest Kimble, but it doesn't mean that if convinced of the truth of the claim of innocence, he will ignore the critical truth. Perhaps the best we can do is to depend upon the morality of defense attorneys to go the extra mile when they believe they see innocence.

Thus, I offer no solution to the apparent anomaly that while the public and other actors in the criminal justice system are increasingly focused on innocence, defense attorneys cannot care at all about guilt and cannot treat innocence as a central professional concern. Why? Because an attitude of not caring about either is the only way defense attorneys can survive personally and professionally and functionally perform their critical work of protecting the innocent. The contrary arguments for role reformulation

work no better today than earlier, but despite the difficulties, defenders do respond to innocence when they occasionally believe they see it. Moreover, adhering to the goal of equal treatment of defendants, regardless of defense attorneys' subjective views of their guilt or innocence, remains the primary protection for those who are innocent because too often innocence is not only unknowable, but comes with no clear markers even for insiders.

I have discussed that recognizing a limited duty of the defense attorney to act with greater vigor fits our system if it is based on substantial objective evidence in the small subclass of cases where the defense discovers pre-trial the possibility of something approaching objective proof of innocence. However, the theoretical proposal fails because of insuperable difficulties with making a showing of objective evidence of clear and convincing evidence of innocence. Also, the key requirement that such additional responsibility by the defense attorney must mean additional resources beyond those otherwise available cannot be satisfied. Unfortunately, little prospect exists for additional allocation of funds for criminal defense that is truly additional rather than a de facto reallocation of the funds that otherwise would have been allocated if the focus is on further supporting only the innocent among those charged.

In the end, the innocence movement should, as it did for death penalty cases,<sup>124</sup> provide the emphasis for long-needed additional resources for defender programs. More often than guilt, innocence is unknown and unknowable on the basis of objective evidence. Defending the innocent cannot be the animating force of indigent defenders, or they lose their ability to defend fully those who are innocent, but have no real proof of it, and little other than their expected claim "I didn't do it." Despite their apparent indifference to the claim, the defenders' role as uncritical champion for these innocent defendants is essential, and to be effective, they must be supported by adequate resources.

---

124. See *supra* note 121 and accompanying text.