

IN PRAISE OF THE GUILTY PROJECT: A CRIMINAL DEFENSE LAWYER'S GROWING ANXIETY ABOUT INNOCENCE PROJECTS

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I. Introduction

There is nothing more compelling than a story about an innocent person wrongly convicted and ultimately vindicated. An ordinary citizen is caught up in the criminal justice system through circumstances beyond his or her control, spends many years in prison, and then one day, with the assistance of a dedicated lawyer, is freed. Like many people, I am drawn to such stories. I have even told one myself.¹

This is the rare crime story with a happy ending. The vindicated person emerges from prison and falls into the loving arms of family and friends. The lawyer is embraced as well. The front page of the local newspaper carries a photograph of the celebration.² Sometimes even the victim is pleased.³

Often, when DNA is behind a vindication, not only is the innocent person exonerated but the true perpetrator is identified.⁴ This is a significant achievement even though it can also lead

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¹ See generally ABBE SMITH, *CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY* (2008) [hereinafter ABBE SMITH, *CASE OF A LIFETIME*] (recounting the story of Patsy Kelly Jarrett, an innocent woman who served nearly thirty years in prison for a murder and robbery she did not commit). Unfortunately, Jarrett will never be fully vindicated because, as in the vast majority of cases, there was no DNA evidence in the case. Her conviction was based on the shaky testimony of a single eyewitness. *Id.* at 26-27.

² Of course, this illustration is simplistic. Many wrongfully convicted lose more than their freedom. They lose family, community, livelihood, reputation, and any semblance of who they once were. See *id.* (describing how during Jarrett's incarceration both of her parents died and, by the time she was released, she had spent more time behind bars than outside of them). Most have a very hard time making the transition back into society. See generally Urban Institute, *Prisoner Reentry*, <http://www.urban.org/Pressroom/prisonerreentry.cfm> (last visited May 30, 2010) (noting the obstacles prisoners face when they are released from prison); JENNIFER GONNERMAN, *LIFE ON THE OUTSIDE: THE PRISON ODYSSEY OF ELAINE BARTLETT* (2004) (telling the story of a mother convicted of being a drug mule under New York's harsh Rockefeller drug laws, and the difficulties she faced when she finally emerged from prison).

³ See generally JENNIFER THOMPSON-CANNINO & RONALD COTTON, *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* (2009) (recounting a victim's rape and her mistakenly identified perpetrator's wrongful conviction, exoneration, and aftermath). Needless to say, the coming together of Thompson-Cannino, the victim, and Ronald Cotton, the mistakenly identified perpetrator, is extraordinary. An exoneration is not usually "redemptive" for victims or their families. It cannot make the crime go away or bring back a loved one.

⁴ See Thomas McGowan, *Innocence Project, Freeing the Innocent and Identifying True Perpetrators*, <http://www.innocenceproject.org/Content/1501.php> (Aug. 1, 2008) (telling the story of a former

apologists for the system—even police and prosecutors implicated in the wrongful conviction—to proudly declare that the system “worked.”⁵

Of course, the system did not exactly “work” for the innocent person who spent years in prison, and it is morally blind—or at least myopic—to suggest otherwise.⁶

Fictional—or fictionalized—stories of innocent people wrongly convicted have always abounded, drawing us to bookstores and movie theaters. From classic dramas like *The Wrong Man*,⁷ *To Kill a Mockingbird*,⁸ and, more recently, *A Lesson before Dying*,⁹ to popular comedies like *My Cousin Vinny*,¹⁰ who does not love a story about innocence? Not to mention true stories about innocence vindicated, like that of Rubin “Hurricane” Carter,¹¹ Ron Williamson,¹² Ronald Cotton,¹³ and many others.¹⁴

The work of lawyers, journalists, and others involved in the “innocence movement”¹⁵—or, as one participant has called it, the “innocence revolution,”¹⁶—has been justly lauded. In the

Texas inmate exonerated by DNA after serving twenty-three years for a rape he did not commit, and noting that in nearly 40% of DNA exonerations the actual perpetrator is identified).

⁵ See, e.g., Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, available at http://www.nytimes.com/2006/01/26/opinion/26marquis.html?_ (Oregon prosecutor and Vice President of the National Association of District Attorneys arguing that the error rate in the criminal justice system is minuscule and the appellate court system sufficiently protects the few innocents wrongly convicted at trial); see also Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 508, 519-20 (2005) (arguing that few of the “exonerated” are innocent and that most have simply “wriggle[d] through some procedural cracks in the justice system”).

⁶ Laurie Aucoin, *Righting Wrongful Convictions*, NW. MAG., Spring 1999, available at <http://www.northwestern.edu/magazine/northwestern/spring99/convictions.htm> (quoting death penalty lawyer Bryan Stevenson: “[t]o be told afterwards that the system works . . . is cruel”).

⁷ THE WRONG MAN (Warner Bros. 1956). This movie, starring Henry Fonda and Vera Miles, was based on the true story of Christopher Emmanuel (“Manny”) Balestrero, a musician who was wrongly identified as a bank robber.

⁸ HARPER LEE, *TO KILL A MOCKINGBIRD* (1960); *TO KILL A MOCKINGBIRD* (Brentwood Prods. 1962).

⁹ ERNEST J. GAINES, *A LESSON BEFORE DYING* (1993); *A LESSON BEFORE DYING* (Ellen M. Krass Prods. 1999).

¹⁰ MY COUSIN VINNY (Palo Vista Prods. 1992).

¹¹ See SAM CHAITON & TERRY SWINTON, *LAZARUS AND THE HURRICANE: THE UNTOLD STORY OF THE FREEING OF RUBIN “HURRICANE” CARTER* (1991); *THE HURRICANE* (Universal Pictures 1999) (film version of *LAZARUS AND THE HURRICANE*, starring Denzel Washington); see also RUBIN “HURRICANE” CARTER, *THE SIXTEENTH ROUND: FROM NUMBER 1 CONTENDER TO #45472* (1974) (Carter’s memoir of his wrongful conviction and incarceration); BOB DYLAN, *Hurricane, on DESIRE* (Columbia Records 1976) (based on Carter’s book).

¹² See JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006) (nonfiction book about Ron Williamson’s wrongful capital murder conviction in small town Oklahoma).

¹³ See generally THOMPSON-CANNINO & COTTON, *supra* note 3; *Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997) (relating the story of Ronald Cotton’s wrongful conviction for rape in a documentary film format).

¹⁴ See, e.g., BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

¹⁵ See Barry C. Schreck & Peter J. Neufeld, *Toward the Formation of “Innocence Commissions” in America*, 86 JUDICATURE 98, 101-02 (2002); Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 134

relatively few years since prisoners began to be freed because of post-conviction DNA testing,¹⁷ advocates for the innocent have accomplished “breath-taking . . . results.”¹⁸ They have ushered in “an exciting new period of American criminal justice,”¹⁹ a “transformation,”²⁰ that is truly “groundbreaking.”²¹ Some have proclaimed the innocence movement “a new civil rights movement” of the twenty-first century.²²

Because of the publicity attending exonerations, the narrative of innocence—with its tales of bungled or corrupt police work, mistaken or bought witnesses, coerced or false confessions, unethical or incompetent lawyers, and phony science—has caught fire, leading to important legislative changes and some new police practices.²³ Most importantly, the narrative may be trickling down to jurors. Armed with these stories, jurors might view questionable evidence with greater skepticism, and in so doing, ensure that the prosecution meets its burden of proof.²⁴

Given all this—the draw of innocence, the importance of vindicating innocence, the fact that innocence advocacy may have helped level the criminal justice playing field, the *goodness* of defending the innocent²⁵—how can a criminal defense lawyer have the *audacity*, the *nerve* to

(2008); Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 234 (2006) [hereinafter Findley, *The Pedagogy of Innocence*].

¹⁶ Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004) (emphasis added).

¹⁷ See Innocence Project, Know the Cases, <http://www.innocenceproject.org/know> (last visited Apr. 24, 2010) (noting that exonerations began in 1989).

¹⁸ 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, 619 (2005) (“Despite the undisputable fact that the work done by the original Innocence Project and many of its progeny has been extraordinary in its quality and absolutely breath-taking in its results, the proliferation of the institutional form of the law school-based ‘innocence project’ raises some troubling issues within the larger world of criminal and capital defense.”).

¹⁹ Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 237.

²⁰ Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1549 [hereinafter Medwed, *Innocentrism*].

²¹ Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 278 (2004); see also Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 5 n.6 (2009) (referencing forensic scientist Edward T. Blake’s groundbreaking DNA work).

²² See Press Release, Innocence Project, As 100th Innocent Prisoner is Freed by DNA Tests, Innocence Network Convenes to Map the Future of “New Civil Rights Movement” in Criminal Justice (Jan. 17, 2002), <http://www.deathpenaltyinfo.org/article.php?did=280&scid=1>.

²³ See Medwed, *Innocentrism*, *supra* note 20, at 1549-50, 1554-55.

²⁴ See *id.* at 1566-67 (discussing the ways in which defense lawyers can use jurors’ exposure to wrongful convictions). Increased juror demand for high quality scientific evidence may also be the result of the so-called “CSI Effect,” in which the television show *CSI* and its progeny have helped to create new juror expectations regarding evidence at trial, and an increasingly technological society generally. *Id.* at 1567; see also Hon. Donald Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 333 (2006).

²⁵ See generally Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000) (discussing the importance of and challenges in defending the innocent). As to the general “goodness” of defending

complain?²⁶ Why can't Innocence Projects and "Guilty Projects"—the traditional law school criminal defense clinic²⁷—coexist in peace, each making an important contribution? What possible concerns could be raised that are not rooted in envy?

In this essay I will discuss three growing concerns about Innocence Projects: first, the tendency toward innocence "one-upmanship" or arrogance; second, the focus on innocence—especially DNA-proven innocence—as the chief currency in criminal justice reform; and third, the popularity and increasing ascendancy of Innocence Projects at law schools.

II. To My Friends in the Innocence Movement: Giving Credit Where Credit is Due

I acknowledge that people I know and admire run Innocent Projects. Some are dear friends. Most used to be indigent criminal defense lawyers—public defenders, mostly—before they took up the mantle of innocence. A few have expressed discomfort with the nomenclature; they would have preferred to call their program a post-conviction, criminal appellate, or prisoner advocacy clinic. But they acknowledged that they might not be running a program at all if it were not called an Innocence Project.

These are terrific lawyers who are doing important work. Not only are they getting innocent people out of prison, they are casting light on persistent, institutional problems in the criminal justice system, such as inadequate standards and pay for court-appointed counsel, reliance on junk science, lack of safeguards in the use of eyewitness testimony, lack of safeguards in the use of snitch testimony, unreliable "confessions," and resistance by police and prosecutors to disclosing exculpatory material.²⁸

They are also terrific teachers, who think hard about the best way for students to learn about a range of matters—substantive, strategic, ethical—when representing factually innocent prisoners.²⁹ Most teach about and model the values at the heart of criminal defense ethics: hard

innocents, when I mentioned to a good (nonlawyer) friend that I was writing an essay raising concerns about Innocence Projects, she was dismayed. "But everyone loves Innocence Projects," she said.

²⁶ Happily, I am not the only naysayer. See, e.g., Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449 (2001); Steiker & Steiker, *supra* note 18.

²⁷ See Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1984) (making plain that the work of criminal defense lawyers is, by and large, defending the guilty, not the innocent); Stanley A. Goldman, *In Defense of the Damned*, 5 OHIO ST. J. CRIM. L. 611, 613 (2008) ("In the real world . . . criminal defense attorneys spend most of their time representing either those who probably are guilty or whose innocence will never be definitively established.").

²⁸ See also Emilie Lounsberry, *New Jersey Report Calls for Assessing Eyewitness' Validity*, PHILADELPHIA INQUIRER, June 22, 2010, available at http://www.philly.com/inquirer/front_page/20100622_New_Jersey_report_calls_for_assessing_eyewitnesses_validity.html (noting the recognition by some jurisdictions of the need for safeguards against unreliable testimony). See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 123-43 (2007) (discussing prosecutorial misconduct); Norman L. Reimer, *The Culture of Non-Disclosure*, THE CHAMPION, Jan./Feb. 2010, at 7 (same). For a collection of articles and other materials connected to a working conference on improving the disclosure of evidence by police and prosecutors held at the Benjamin N. Cardozo School of Law in 2009, see Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. (forthcoming 2010).

²⁹ See, e.g., Findley, *The Pedagogy of Innocence*, *supra* note 15; Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1135 (2002-2003) [hereinafter Medwed, *Actual Innocents*]. See generally Jan Stiglitz et al., *The Hurricane Meets*

work, loyalty, and passionate commitment—along with the vital importance of thorough investigation.³⁰

Some of my Innocence Project friends will wonder whether I am just being provocative here. I acknowledge that this would not be a wild accusation in view of some of the things I have written.³¹ Although I believe in a certain amount of provocation—no institution, institutional actor, or purported *movement* should be beyond question or critique—this essay is also the product of a genuine, growing concern. Let me now get to that.

III. The Arrogance of Innocence

A couple of years ago, an e-mail flyer made its way across the Internet announcing the renaissance of the Midwestern Innocence Project, sparked by a fund-raising event at which author John Grisham spoke. This led to the Project hiring its first, full-time executive director, and a full-time University of Missouri–Kansas City Law School clinical professor who would serve as legal director.³²

As I read the e-mail flyer from the Midwestern Innocence Project, I became increasingly upset. It said: “The Midwestern Innocence Project is committed to exonerating innocent people who are serving time in prison for a crime they did not commit. We do this by providing pro bono legal and investigative services to inmates with a substantial claim of innocence.”³³ This was fine, but then I read further. In bigger font, it said:

WE DO NOT HELP GUILTY INMATES LESSEN THEIR SENTENCES OR GET OFF ON TECHNICALITIES.³⁴

“Technicalities”? Why would an organization devoted to representing convicted prisoners ever use the term *technicality* to describe the work they perform? Do they mean contesting rulings from criminal trials under *Miranda v. Arizona*,³⁵ *United States v. Wade*,³⁶ or

the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education, 38 CAL. W. L. REV. 413 (2001-2002); Ellen Yankiver Suni, *Ethical Issues for Innocence Projects: An Initial Primer*, 70 UMKC L. REV. 921 (2002).

³⁰ See generally Criminal Justice Section, American Bar Association, *Defense Function*, in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION (3d ed. 1993), available at http://www.abanet.org/crimjust/standards/dfunc_toc.html; Findley, *The Pedagogy of Innocence*, supra note 15, at 241-44 (discussing the centrality of factual investigation in Innocence Projects).

³¹ See, e.g., Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001) [hereinafter Smith, *Can You Be a Good Person and a Good Prosecutor*] (discussing the morality of prosecution under an unduly harsh criminal justice regime).

³² Email newsletter from the Midwestern Innocence Project, “Justice For All” (winter 2008) (on file with author).

³³ *Id.*

³⁴ *Id.*

³⁵ 384 U.S. 436, 498-99 (1966) (requiring that suspects subjected to custodial interrogation be advised of their right to silence and to counsel).

³⁶ 388 U.S. 218, 236-37 (1967) (noting the problem of mistaken identification and holding that a pretrial lineup was a critical stage of the prosecution requiring the assistance of counsel).

Brady v. Maryland?³⁷ Do they mean challenging whether the accused received effective assistance of counsel under the nearly impossible to meet *Strickland v. Washington* standard?³⁸ How could these kinds of challenges be mocked as mere technicalities when Innocence Projects have shown that false confessions, eyewitness mistakes, police and prosecutorial misconduct, and incompetent counsel—the very subjects of these cases—are at the root of so many wrongful convictions?³⁹

Adding insult to injury, the flyer then said: “*Our* clients were in the wrong place at the wrong time and are unfortunate victims of imperfections within the American criminal justice system.”

I do not know the intent behind the flyer, but is this kind of one-upmanship—this self-righteousness and *superiority*—necessary to uncovering individual injustice or promoting criminal justice generally? Why must we feel compelled to identify and distinguish the wheat from the chaff, the “deserving” from the “undeserving” poor,⁴⁰ the “truly suffering” from the “fakers” and “malingerers”? Not to mention that it can almost always be said that criminal defendants—both guilty and not—were “in the wrong place at the wrong time.”⁴¹ By and large, if they were home in bed, they probably wouldn’t be in the fix they find themselves in.⁴²

As to the notion of “misfortune” or “victimhood,” I worry that we as a culture have an increasingly narrow conception of what these things mean. Virtually no one who ends up in criminal court is fortunate. Criminal court, like most poor peoples’ courts, is the land of the unfortunate, the wretched, the cast out. I often tell my students they should thank their lucky stars that they were born with opportunities and ability, because it is a matter of luck that they do not have to live their clients’ lives. I certainly thank mine every time I leave a jail or prison.

The problem with “victimhood” is that it has come to mean only one thing: to be victimized by crime.⁴³ That one thing has been used to ratchet up punishment in this country to a level unheard of in the rest of the western world. Let me also note that victims and perpetrators

³⁷ 373 U.S. 83, 87-88 (1963) (requiring the prosecution to disclose exculpatory and impeaching material that is material either to guilt or punishment).

³⁸ 466 U.S. 668, 687 (1984) (establishing a two-prong test for ineffective assistance of counsel: that counsel’s performance fell below an objective standard of reasonableness and that, but for counsel’s performance, the result would have been different). *Strickland v. Washington* basically gutted the magnificent *Gideon v. Wainwright* decision, 372 U.S. 335 (1963), which held that the Sixth Amendment right to counsel is fundamental in criminal cases and thus requires the appointment of counsel to indigent defendants. *Id.* at 343-45; see also Abbe Smith, *Strickland v. Washington: Gutting Gideon and Providing Cover for Incompetent Counsel*, in *WE DISSENT* 188 (Michael Avery ed., 2009).

³⁹ See generally Rosen, *supra* note 19 (highlighting the role that mistaken identity, false confessions, and poor representation play in bringing about wrongful convictions).

⁴⁰ See generally HERBERT J. GANS, *THE WAR AGAINST THE POOR* (1995) (offering a critique and analysis of the rhetoric used to describe and stigmatize the poor).

⁴¹ By and large, if they were home in bed, they probably wouldn’t be in the fix they find themselves in.

⁴² Unfortunately, being home in bed is no protection from mistaken identification cases.

⁴³ See e.g., The National Center for Victims of Crime, Trauma of Victimization, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32371> (last visited July 15, 2010).

tend to come from the very same impoverished communities, they often suffer from the same kinds of deprivation, and today's victim may be tomorrow's perpetrator and vice versa.⁴⁴

There is a level of self-righteousness that gets under my skin when people talk about Innocence Projects. I confess that even the name of the organization rankles. That is why I sometimes make a point of saying I run a Guilty Project.

At a conference in 2009, one of the founders of The Innocence Project, Barry Scheck,⁴⁵ remarked that he didn't consider himself a criminal defense lawyer because he had not represented a guilty person in twenty years.⁴⁶

There are understandable rationales for this comment: Scheck may have been joking, or his expressed sentiment may have been the politically savvy thing to say. The Midwestern Innocence Project's Internet flyer and Scheck's remark arguably reflect political reality and organizational savvy. The conservative right often rails against Innocence Projects,⁴⁷ arguing that they exaggerate the number of wrongful convictions, that they try to undo too many convictions, and, ultimately, that they free criminals. In this respect, to the right, Innocence Projects are just like *my* Guilty Project. And yet, at least in principle, protecting the innocent is one of the few things in the criminal justice system that everyone can agree on—the left and the right, defense lawyers and prosecutors, police and the public.

In addition, in view of legislation pending in many states to ensure the preservation of DNA evidence or provide a right of access to DNA evidence by the accused—a signature issue for Innocence Projects⁴⁸—innocence leadership might want to appeal to the broadest possible swath of legislators, many of whom ran for office on an anti-crime platform. Associating themselves with the traditional criminal defense bar—the chief *apologists* for criminals—might not be strategically wise.

But, there is also an arrogance to the “innocentrism”⁴⁹ of the innocence movement. They are the righteous ones, the virtuous ones. Unlike criminal defense lawyers, who are ethically

⁴⁴ See generally Abbe Smith & Ilene Seidman, *Lawyers for the Abused, Lawyers for the Accused: An Interfaith Marriage*, 47 LOY. L. REV. 415 (2001) (noting the shared characteristics of poverty observable in the lives of many clients, whether they are victims of crimes or the accused.).

⁴⁵ Barry Scheck and Peter Neufeld founded The Innocence Project in 1992. See Innocence Project, Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited May 2, 2010). As of June 2010, 255 people in the United States have been exonerated through DNA testing. The exonerated prisoners had served an average of thirteen years before being released. *Id.*

⁴⁶ The remark by Scheck was made at a conference he and I attended at Hofstra University School of Law (*Power, Politics & Public Service: The Legal Ethics of Lawyers in Government*) in September 2009. I consider Scheck a friend and a criminal justice hero. See generally Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 497-509 (1999) (listing eight “heroes, prophets, and saints of criminal defense”). Although Scheck is not among those listed, he could easily have been. See also Raymond, *supra* note 26, at 459 (arguing that a criminal lawyer “should not announce the innocence of a particular client, or even announce more generally that he ‘only represents innocent clients’” as a matter of professional responsibility).

⁴⁷ See Medwed, *Innocentrism*, *supra* note 20, at 1552-55 (responding to criticism from the right that the innocence movement exaggerates the number of wrongful convictions and that proposed reforms will mean more criminals will go unpunished).

⁴⁸ See Innocence Project, Model Legislation, <http://www.innocenceproject.org/fix/Model-Legislation.php> (last visited Apr. 25, 2010) (offering model legislation on DNA testing and evidence preservation).

⁴⁹ Medwed, *Innocentrism*, *supra* note 20, at 1549.

bound to pursue their clients' interests (even if that client is guilty), the innocence advocate looks after *everyone* in the system. As one commentator notes:

In the criminal justice system, neither side wins when an innocent person is convicted. The victim is denied justice because the real culprit remains unpunished. Police and prosecutorial resources are squandered. Public confidence in the system is undermined if and when the mistake is revealed. And, of course, the innocent person who is convicted suffers most of all.⁵⁰

Innocence movement lawyers and their compatriots see this and trumpet it. They are saving the wrongfully convicted and the entire system.

Perhaps this crusading view has led to the construction of a related identity for those working within the innocence movement. Innocence advocates might come to see themselves as not merely righting a specific wrong—vindicating a wrongfully convicted person—but caring for everyone, redressing all systemic wrongs, and doing something that approaches *real justice*. Unlike changeable, whimsical *ordinary justice*—the kind of justice that is in the eyes of the beholder—no one would disagree with this justice.⁵¹

I have written about the problem of arrogance in the culture of prosecution.⁵² The obligation to do justice, and related professional identity plays a role there, too. A similar acculturation process—the “occupational hazard” of defining and being in charge of *justice*⁵³—might be at work here. Innocence advocates with DNA are armed with both justice and certainty, a lethal combination.⁵⁴

This is not to say that criminal defense lawyers do not have our own arrogance; at the very least, we have the arrogance to call others arrogant.⁵⁵ But humility might be a more regular part of the job of defending the guilty. Even the very best defenders lose a lot. And when we do win, there is seldom public acclaim.

⁵⁰ Rosen, *supra* note 19, at 287. In addition, Rosen accurately notes that, with few exceptions, the innocence movement consists largely of lawyers from the criminal defense community. *Id.*

⁵¹ See generally AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2009) (documenting the elusiveness and randomness of justice in courtrooms across America). Many scholars have discussed the malleability of “justice.” See, e.g., MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1999).

⁵² See Smith, *Can You Be a Good Person and a Good Prosecutor*, *supra* note 31, at 375-79 (discussing the prosecutor’s duty to seek justice and the tendency toward self-importance, vanity, and grandiosity).

⁵³ Wendy Kaminer, *Games Prosecutors Play*, *THE AMERICAN PROSPECT*, Sept. 1, 1999, available at http://www.prospect.org/cs/articles?article=games_prosecutors_play (“The majority of prosecutors, police officers, and federal law enforcement agents are probably fair, ethical, and even compassionate public servants. But arrogance, self-righteousness, and a tendency to push people around are occupational hazards in law enforcement.”).

⁵⁴ See David Feige, *The Dark Side of Innocence*, *N.Y. TIMES*, June 15, 2003 (Magazine), available at <http://www.nytimes.com/2003/06/15/magazine/the-way-we-live-now-6-15-03-essay-the-dark-side-of-innocence.html?pagewanted=1> (noting the “hubris of certainty” in the context of DNA-proven innocence).

⁵⁵ See SMITH, *CASE OF A LIFETIME*, *supra* note 1, at 32-33 (describing the culture of criminal defense).

IV. Is Innocence the Best Currency for Criminal Justice Reform?

There is no question that our criminal justice system is in need of reform. Although the number of wrongful convictions cannot accurately be tallied—DNA is available in only a tiny fraction of criminal cases, and the problems underlying the 250-plus DNA exonerations are not unique to those cases⁵⁶—it is fair to say that serious problems plague our system.

The innocence story is important, because it reminds people of the extraordinary—disgraceful, really—number of people incarcerated in this country. As of the last Justice Department count, 2.3 million people are currently in US jails or prisons.⁵⁷ This is more than any other country in the world in proportion to the general population.⁵⁸ Perhaps the public would be less inclined to lock up so many people if it believed some were innocent. There is some evidence to suggest that, in the wake of DNA exonerations, juries are less inclined to impose death sentences.⁵⁹

At their best, innocence stories include important, related stories about the state of criminal justice in this country: stories about the ever-present problems of mistaken identification, police and prosecutorial misconduct, defense lawyer incompetence, and so on. But, too often, the stories are regarded as isolated, individual tragedies that are ultimately uncovered and fixed by the system.⁶⁰

⁵⁶ See Samuel Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67, 69 (2006), available at <http://www.michiganlawreview.org/articles/souter-passant-scalia-rampant-combat-in-the-em-marsh-em> (observing that “the true number of wrongful convictions is unknown and frustratingly unknowable”); Innocence Project, Know the Cases, <http://www.innocenceproject.org/know> (last visited June 28, 2010) (reporting that, as of June 2010, there have been 255 exonerations due to DNA evidence).

⁵⁷ See Matt Kelley, *U.S. Prison Growth is Slowing*, Change.org: Criminal Justice, Dec. 11, 2009, http://criminaljustice.change.org/blog/view/us_prison_growth_is_slowing (reporting that, according to Justice Department statistics, 2.3 million people were behind bars in 2008).

⁵⁸ Adam Liptak, *Inmate Count in U.S. Dwarfs That of Other Nations*, N.Y. TIMES, Apr. 23, 2008, available at <http://www.nytimes.com/2008/04/23/us/23prison.html>.

⁵⁹ See Laura Sullivan, *Death Row Cases Decline in 2009*, NATIONAL PUBLIC RADIO: MORNING EDITION, Jan. 4, 2010, <http://www.npr.org/templates/story/story.php?storyId=122102218> (reporting that judges and juries handed down fewer death sentences in 2009, making it the year with the fewest people sent to death row since the death penalty was reinstated in 1976); Chris McGreal, *U.S. Imposes Fewer Death Penalties as DNA Evidence See More People Cleared*, THE GUARDIAN, Dec. 18, 2009, available at <http://www.guardian.co.uk/world/2009/dec/18/death-penalty-falls-us> (noting that the number of death sentences in the US fell to 106 in 2009, which was the seventh straight year the number has fallen).

⁶⁰ Unfortunately, the same system often fights claims of innocence, even those based on DNA. First, some prosecutors resist DNA testing. See Innocence Project, Fighting DNA Tests that Can Prove Innocence, <http://www.innocenceproject.org/Content/1998.php> (last visited Apr. 25, 2010). Second, when DNA exonerates a convicted rapist, some prosecutors suddenly change their theory, calling the exonerated man an accomplice even though they had never claimed there was more than one perpetrator. See Rose French, *Tennessee Ex-Death Row Inmate's DNA Not Found on Jeans*, CHATTANOOGA TIMES FREE PRESS, Apr. 2., 2009, available at <http://www.timesfreepress.com/news/2009/apr/02/tennessee-ex-death-row-inmates-dna-not-found-jeans/?print> (recounting the DNA exonerations and attempted retrial of Paul House, on the theory that others were involved in the crime along with House); Innocence Project, Tennessee Man Still on Death Row, <http://www.innocenceproject.org/news/Blog-Search.php?check=true&tag=255> (last visited Apr. 25, 2010) (same).

The dominance of the rhetoric of innocence⁶¹ also comes at the expense of the not-quite-so-innocent but equally unfairly treated. Examples of the not-quite-so-innocent run the gamut. There are criminal defendants who are guilty of something but not the worst thing they are charged with. There are defendants who are guilty of something other than what they are charged with. There are defendants who committed the crime charged but with significant mitigating or extenuating circumstances. There are defendants who committed the crime but they had never done anything like this before, they lost control in a trying situation. There are defendants who committed the crime and it is no wonder in view of how they came into the world and what they endured after. There are defendants who committed the crime and have no excuse whatsoever but, as death penalty lawyer Bryan Stevenson says, “[e]ach of us is more than the worst thing we ever did.”⁶² For every crime there is a story. Good lawyers find the story.

But the defendant with the factual innocence story throws every other defendant under the bus.

These not-quite-innocents—the ones whose lawyer too often had no file, had hardly met them, conducted no investigation, and could barely try a shoplifting case much less a capital murder—have no story unless they are also innocent. If they are not factually innocent, it does not matter whether they were coerced into confessing by a ruthless detective, prosecuted by an unscrupulous DA, or represented by a public defender carrying 900 cases.⁶³

Compared to a story of factual innocence, these other stories will evoke a “cry me a river” eye-roll by prosecutors, judges, and the general public. The innocent will become the enemy of everyone else at every stage: pretrial, trial, sentencing, post-conviction, and parole.

Factual, DNA-proven innocence poses a threat to the fundamental legal principles underlying our system of justice, in particular to the *presumption of innocence*. The more we focus on those who can actually be proved innocent, the more we undercut the right of everyone to be presumed innocent unless the state proves otherwise.⁶⁴ Our system of justice emphasizes proof, not truth, because of the value we place on individual liberty and our abiding skepticism of state power.⁶⁵ To check that power we give the benefit of every reasonable doubt to the accused even if he or she *did it*. Thus, if proof is lacking, a factually guilty person may nonetheless be legally not guilty. A single-minded focus on factual innocence threatens this important safeguard, this check on the hubris of power.⁶⁶

⁶¹ See William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 387-88 (1995); see also Rosen, *supra* note 19, at 237-42.

⁶² See SMITH, CASE OF A LIFETIME, *supra* note 1, at 227.

⁶³ See Marie-Pierre Py, *Public Defender System Fails Georgians and Their Lawyers*, THE ATLANTA JOURNAL-CONSTITUTION, Mar. 30, 2009, at 6A (a young public defender noting that, in thirteen months, she closed 900 cases, including felonies, and carried approximately 270 open cases at a time).

⁶⁴ See Feige, *supra* note 54 (“The obsessive focus on innocence runs the risk of eclipsing what should be the central issue of the criminal justice system—protecting the rights of everyone.”).

⁶⁵ See Alexander Volokh, *nGuilty Men*, 146 U. PA. L. REV. 173, 174 (1998) (creatively deconstructing Blackstone’s maxim that, it is “better that ten guilty persons escape, than that one innocent suffer”).

⁶⁶ See Goldman, *supra* note 27, at 622 (“How arrogant, lazy, and dangerously convinced of their own infallibility would police, prosecutors, and courts become if defendants had no advocate?”). *But see* Medwed, *Innocentrism*, *supra* note 20, at 1566-70 (arguing that a focus on factual innocence need not diminish “not guilty” and is not at odds with traditional criminal defense strategies).

A focus on factual, DNA-proven innocence also threatens to change the discourse about wrongful convictions. Convictions are wrongful even if the convicted person is guilty when there is demonstrable unfairness. Imprisonment is wrongful if the person in prison is serving a sentence disproportionate to the circumstances of the crime or who the person is or has become. Factual innocence has never been the gravamen of a wrongful conviction, and should not be.⁶⁷

We are only a few years away from the fiftieth anniversary of the *Gideon* decision⁶⁸ and we have still not begun to fulfill its promise.⁶⁹ We continue to be a country in which there is rich man's justice and poor man's justice.⁷⁰ A focus on innocence alone will not breathe life into the right to counsel for the poor accused or convicted.

I worry, too, about what will happen when the DNA-exonerations dry up—as they one day will—and all the testing is on the front end. Will people say we do not need to look at these so-called systemic problems anymore because there are no innocent people in prison?

And then there is the question of prison. If we get all the innocent people out, does that mean prisons are no longer the brutal, dehumanizing places we know them to be?⁷¹ Does it mean that the other-than-innocent people left in these institutions *deserve* to be there, and are unworthy of further concern?⁷² Perhaps, too, with the innocent out, we do not have to think about either the conditions of confinement or the circumstances that lead some to prison and others to college.⁷³

⁶⁷ See generally Steiker & Steiker, *supra* note 18, 596-607 (questioning the normative distinctiveness of innocence as a problem in the administration of capital punishment in comparison with other, more endemic problems).

⁶⁸ *Gideon*, 466 U.S. at 343-45 (guaranteeing the right to counsel in criminal cases).

⁶⁹ See THE NATIONAL RIGHT TO COUNSEL COMMITTEE, THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 52-101 (2009), <http://www.constitutionproject.org/manage/file/139.pdf> [hereinafter CONSTITUTION PROJECT] (documenting the continuing indigent criminal defense "crisis," because of underfunding, excessive caseloads, and other systemic problems); see also Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 741 (2006) (arguing that the quality of representation in criminal cases in the U.S. is a "product of fortuity . . . economic status, and . . . jurisdiction").

⁷⁰ See CONSTITUTION PROJECT, *supra* note 69, at 29-31, 50-64; see also David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762-63 (1993) (arguing that there are "two worlds of criminal defense" in the U.S., one for the poor and one for rich, and noting that the vast majority of defendants are represented by court-appointed lawyers who can barely "engage in individualized advocacy, let alone zealous advocacy"); Uphoff, *supra* note 69, at 744-67 (discussing the uneven right to counsel and the role of class in criminal defense).

⁷¹ See, e.g., JOSEPH T. HALLINAN, *GOING UP THE RIVER: TRAVELS IN A PRISON NATION* (2003) (exploring life in and around American prisons, including an Illinois super-max prison); T.J. PARSELL, *FISH: A MEMOIR OF A BOY IN A MAN'S PRISON* (2007) (memoir about a seventeen-year-old boy doing time in an adult prison); CRISTINA RATHBONE, *A WORLD APART: WOMEN, PRISON, AND LIFE BEHIND BARS* (2006) (journalist recounting day-to-day life for women in Massachusetts' Framingham Prison); see also TED CONOVER, *NEWJACK: GUARDING SING SING* (2001) (journalist's undercover account of prison life at Sing Sing Prison from a guard's perspective).

⁷² See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 911-12 (2009) (noting that the state owes a duty of care to prisoners not because of a prisoner's guilt or innocence but because of the state's choice to punish by incarceration); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 462-69 (2005) (discussing the conditions under which a state may legitimately limit citizens' freedom within a liberal democratic society).

⁷³ See generally WES MOORE, *THE OTHER WES MOORE* (2010) (telling the story of a young man who shares the same name, age, and background, as Rhodes Scholar Wes Moore, who was raised by a single

Innocence has been important currency in criminal justice reform, but it cannot be the only one. Too much of a focus on innocence can lead to de-emphasizing and devaluing other significant systemic problems.

V. The Ascendancy of Innocence Projects in Law Schools and What They Teach Students About Criminal Justice, Social Justice, and Themselves

Innocence Projects are increasingly popular in law schools. This makes sense for all of the reasons discussed in the Introduction. Innocence cases are compelling and intrinsically meaningful. Young law students are often looking for meaning in the generally cloistered legal academy. They want to know that, as lawyers, they can do something that matters, something *good*.

This is a fine thing, but there are hazards.

I worry that students in Innocence Projects representing only factually innocent people will think they can have a career in which, like Abraham Lincoln or Perry Mason, they represent only innocent people. Worse, I worry that they will come to think that it is somehow beneath them—as law students and lawyers—to represent people who actually did something wrong or bad.

One of the most important lessons students learn in a criminal defense clinic is that they are not so different from their clients, no matter who the client is or what he or she may have done. Students come away recognizing that we all make mistakes, do stupid things, lose our tempers, give in to temptation or greed, and fall in with the wrong crowd.⁷⁴ This is a transformative revelation for some. You cannot teach this generosity of spirit or lack of judgment when you represent only factually innocent people who have been wronged by the system. It is too easy to identify with an innocent person.⁷⁵ It is so much richer and more complicated to identify with a guilty one.⁷⁶ There is a *craft* to representing the guilty.⁷⁷

mother in the Baltimore ghetto, but is serving a life sentence for killing a police officer); JOHN EDGAR WIDEMAN, *BROTHERS AND KEEPERS* (1984) (comparing the life of John Edgar Wideman, Rhodes Scholar, novelist, and professor, who grew up in the Pittsburgh ghetto, with that of his brother, who is serving a life sentence for murder).

⁷⁴ See Babcock, *supra* note 27, at 179 (discussing the joy of learning from defending a woman “with a life as different from [the author’s] as could be imagined”).

⁷⁵ See Findley, *The Pedagogy of Innocence*, *supra* note 15, at 264 (arguing that Innocence Project students “gain the perspective of those citizens who have been . . . banished from our communities . . . [and] come to see the humanity of individuals convicted of the most heinous crimes”). But note that these are *innocent people* convicted of heinous crimes and banished.

⁷⁶ See David Segal, *It’s Complicated*, N.Y. TIMES, May 2, 2010, at WK1 (discussing an increasingly complex modern world and noting that “a nagging sense of incomprehension is a perennial feature of the human experience”). I believe that this nagging *incomprehension*—exemplified by the fact that good people can do bad things, a fact which students in a criminal defense clinic inevitably encounter—makes criminal defense clinics the perfect setting for productive learning. See also Jane H. Aiken, *Striving to Teach “Justice, Fairness, and Morality,”* 4 CLINICAL L. REV. 1, 24 (1997) (discussing the use of “disorienting moments” to teach social justice); Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 302-04 (2001) (same); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 51-52 (1995) (same).

I understand that innocent prisoners are in trouble and need and deserve excellent lawyers. I am not suggesting that no one represent them. Perhaps law professors who do not want to get their hands dirty—those who cannot handle the rough and tumble of criminal defense—should take Innocence Project cases.⁷⁸

I worry that, because case selection or “screening” is the first thing that happens in Innocence Projects, students are being trained to be judges and juries, not advocates. First, they decide who is innocent. Then they defend them. The criteria for selection are, overwhelmingly, whether a client is innocent and whether students can prove it.⁷⁹

This picking and choosing in the first instance—this *rationing* of access to justice—is not necessarily a good thing for young lawyers. It invariably emphasizes the idea that some clients are more deserving of the students’ efforts than others—based on exactly how innocent they are.⁸⁰ But, as George Sharswood wrote in the middle of the nineteenth century, the defendant has the “right to all the ingenuity and eloquence he can command in his defence . . . even if he has committed a wrong.”⁸¹ To do otherwise, said Sharswood, would “usurp[] the functions of both judge and jury.”⁸²

How will prospective defenders—a career path for many Innocence Project students—learn to defend without blinking or balking, usually without ever knowing the “truth,” if their training is all about picking worthy cases? If a lawyer is on the fence about taking on a case because it does not pass some kind of worthiness test, he or she may well be ambivalent and half-hearted about every aspect of client representation. This attitude undoubtedly underlies the bad lawyering at the root of many wrongful convictions: feckless or beleaguered lawyers feeling that their client is guilty anyway, so what the hell?

The right to counsel—and to high quality representation—cannot depend upon whether or not a lawyer believes the client is innocent. I worry that Innocence Projects fail to equip prospective lawyers with the tools, sensibility, and stamina to represent guilty, flawed people—people like most of us. This will translate into whatever legal career the student ends up choosing, not simply criminal defense. If you teach young lawyers that only some clients are deserving of representation, they might also think that some clients deserve a little more zealous representation than others.⁸³

⁷⁷ See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1251-59 (2004) (discussing the craft in high volume public defense).

⁷⁸ I acknowledge that this is unfair, and that innocence cases can feel like any other post-conviction challenge. This is because *the other side seldom sees these cases as innocence cases*.

⁷⁹ See Medwed, *Actual Innocents*, *supra* note 29, at 1103-09 (describing case selection criteria for Second Look Program, an Innocence Project clinic at Brooklyn Law School).

⁸⁰ See *id.* at 1104 (“[W]e aimed to deploy our resources to what we perceived to be the *most deserving cases* and, not incidentally, make ourselves more attractive in grant proposals to prospective benefactors.”) (emphasis added).

⁸¹ GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 39 (Philadelphia: T. & J.W. Johnson 1860).

⁸² *Id.* at 27.

⁸³ See Findley, *The Pedagogy of Innocence*, *supra* note 15, at 257 (recognizing that “the focus on innocence runs the risk of implicitly teaching students that only innocent prisoners are deserving of zealous legal representation”).

Of particular concern is arming young lawyers with the perspective, values, and “sustaining narratives” to become indigent criminal defenders who will not give up or burn out, something that is desperately needed.⁸⁴ We do not seem to be able to make a dent in the quality of indigent defense in many parts of the country, and we too often lose devoted, zealous defenders whose expertise and experience might make a difference in these punitive times.⁸⁵ I do not believe that students cutting their teeth on factual innocence cases only will help them to cope with high caseloads or hostile prosecutors, judges, and general public, later on.

Moreover, the innocence movement has yet to take on some of the most pervasive and important problems with criminal justice in this country, including the ubiquity of plea bargaining, which is often preceded by little or no investigation,⁸⁶ and the increasing power and discretion of prosecutors in investigation, charging, diversionary programs, whether the accused receives a jury or bench trial, and punishment.⁸⁷

No doubt there are answers to all these questions, and thoughtful teachers and lawyers running Innocence Projects have addressed them in myriad ways.⁸⁸ But thoughtful teachers, lawyers, and law school administrators should also question the decision to create and fund an Innocence Project at all. There are trade-offs whether or not a law school replaces its existing criminal defense clinic with an Innocence Project,⁸⁹ or whether or not there is outside funding for such a Project so as not to threaten an existing program.⁹⁰ The question then, is why *this* clinic with its very few, very special clients, in a time when literally millions of people are incarcerated in this country with no access to lawyers,⁹¹ and millions of people are struggling on the outside with consumer, disability, family, housing, and job problems, and no access to lawyers?⁹²

⁸⁴ Steiker & Steiker, *supra* note 18, at 621.

⁸⁵ See generally Py, *supra* note 63.

⁸⁶ See Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1225 (2005); see also Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 (2005) (book review noting that 95.4% of adjudicated federal criminal cases are pleas of guilty or nolo contendere); Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 866 n.17 (2004) (noting that in some jurisdictions, 99% of adjudicated criminal cases are guilty pleas).

⁸⁷ This has been the author’s experience practicing criminal law in Pennsylvania, New York, Massachusetts, Maryland, and the District of Columbia. See also Siegel, *supra* note 86, at 1231-37 (describing the extraordinary power prosecutors wield in criminal cases in South Carolina).

⁸⁸ See Findley, *The Pedagogy of Innocence*, *supra* note 15, at 250-61 (discussing how Innocence Projects teach ethics and values); Suni, *supra* note 29, at 930-69 (analyzing professional responsibility issues in Innocence Projects).

⁸⁹ See Suni, *supra* note 29, at 928 (noting that “full representation” Innocence Projects have usually been converted from existing defender clinics).

⁹⁰ See Medwed, *Actual Innocents*, *supra* note 29, at 1104 (noting that the decision to restrict the Second Look Program Clinic, Brooklyn Law School’s Innocence Project, to claims of actual innocence was partly to “make ourselves more attractive in grant proposals to prospective benefactors”).

⁹¹ See generally MUMIA ABU-JAMAL, *JAILHOUSE LAWYER: PRISONERS REPRESENTING PRISONERS V. THE USA* (2009) (accounting of efforts, by longtime avowedly innocent death row inmate and jailhouse lawyers, on behalf of prisoners who cannot obtain actual lawyers).

⁹² See Brennan Center for Justice, Letter in Support of Civil Access to Justice Act (S. 718, H.R. 3764) (Feb. 12, 2010), <http://www.brennancenter.org/content/resource/CAJACoalitionLtr/> (detailing the need for funding for lawyers to aid low-income individuals in civil cases).

VI. Conclusion

Innocence Projects have more than made their mark in the criminal justice world. The 250-plus exonerations and accompanying publicity have cast a light on the conditions that give rise to wrongful convictions and have created a unique opportunity for reform. The work of Innocence Projects has galvanized a generation of law students, captivated the nation, and forever altered the way we think about criminal justice.

It is impossible not to recognize the importance of defending the innocent and freeing them from wrongful imprisonment.

But, compelling as these cases are, the conviction of innocents is not the only thing wrong with our criminal justice system. It may not even be the worst problem. We are the harshest, most punitive country on earth when it comes to incarceration, both in terms of numbers and the length of time we lock people up.⁹³ Mass incarceration—with its particular impact on impoverished nonwhite communities⁹⁴—has become a hallmark of American life. Moreover, the conditions of confinement in U.S. prisons are so brutal that few prisoners emerge with the tools to make it on the outside.⁹⁵

Getting innocents out of prison has done nothing to change this misguided approach to criminal justice.⁹⁶ Indeed, it may distract us from it.

There are important political, moral, and educational concerns raised by the growing dominance of the innocence movement in a time when so many are locked up and forsaken. I have tried to address some of these in this essay. Let us not forget about the guilty.

⁹³ See *supra* notes 56-58 and accompanying text.

⁹⁴ See generally Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL'Y REV. 283 (2009) (discussing the impact of the current emphasis on incarceration on low-income communities and communities of color); TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007) (same); NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* (2005) (same).

⁹⁵ See generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Medea Chesney-Lind eds., 2002) (exploring the consequences of thirty years of harsh sentencing practices on prisoners, former prisoners, their families and communities); Sharon Dolovich, *Confronting the Costs of Incarceration—Forward: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237 (2009) (arguing that the U.S. criminal justice system relies too heavily on incarceration, which has become increasingly brutal); Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in *THE TRAUMA OF PSYCHOLOGICAL TORTURE* 127, 129 (Almerindo E. Ojeda ed., 2008) (describing how lengthy imprisonment “breaks” prisoners, leaving them with “a very high risk of recidivism”).

⁹⁶ See Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 307-11 (2009) (arguing that mass incarceration is not terribly effective at reducing crime or promoting public safety); Shawn D. Bushway & Raymond Paternoster, *The Impact of Prison on Crime*, in *DO PRISONS MAKE US SAFER? The Benefits and Costs of the Prison Boom*, 119, 144-45 (Steven Raphael & Michael A. Stoll eds., 2009) (noting the lack of evidence that our current criminal justice practices prevent crime).