

‘A HOUSE DIVIDED’:  
A RESPONSE TO PROFESSOR ABBE SMITH’S *IN PRAISE OF THE GUILTY PROJECT: A  
CRIMINAL DEFENSE LAWYER’S GROWING ANXIETY ABOUT INNOCENCE PROJECTS*

W. TUCKER CARRINGTON\*

INTRODUCTION .....	1
I. A PERSONAL STORY .....	5
II. THE “ARROGANCE OF INNOCENCE” .....	8
III. INNOCENCE AS THE CURRENCY OF CRIMINAL JUSTICE REFORM.....	14
IV. THE ASCENDENCY OF INNOCENCE PROJECTS IN LAW SCHOOL CLINICAL PROGRAMS .....	20
V. CONCLUSION.....	23

INTRODUCTION

Professor Abbe Smith’s<sup>1</sup> recent article, *In Praise of the Guilty Project: A Criminal Defense Lawyer’s Growing Anxiety about Innocence Projects*,<sup>2</sup> is deserving of spirited response. The article advances an important conversation about the philosophical compatibility of innocence projects<sup>3</sup> with “guilty projects”—as she terms law school criminal defender clinics—and, more generally and perhaps more importantly, raises critical questions about the proper place of “innocence movements” within the field of criminal justice.

Professor Smith’s approach in the article is not only provocative, but unique. Most articles that have attempted to assess the value of innocence projects, the work that they perform,<sup>4</sup> and their relative place in the criminal justice system, have tended to take the form of an

---

\* Assistant Professor of Law and Director of the Mississippi Innocence Project and Innocence Clinic, University of Mississippi School of Law. I thank my former professor, colleague, and good friend, Abbe Smith for provoking me; Bradley Hiatt for excellent research assistance; numerous members of the Innocence Network, as well as Professors Wallace J. Mlyniec and Desiree C. Hensley for their thoughtful additions to this conversation; John Grisham for his visionary generosity, and the University of Mississippi School of Law for its efforts toward making equal justice a reality for the State’s innocently condemned.

<sup>1</sup> Professor and Director of the Criminal Defense and Prisoner Advocacy Clinic, Georgetown University Law Center.

<sup>2</sup> Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer’s Growing Anxiety about Innocence Projects*, 13 U. PA. J. L. & SOC. CHANGE 315 (2010) [hereinafter Smith, *In Praise of the Guilty Project*].

<sup>3</sup> To date, there are at least seventy-seven innocence projects nationally, and nine internationally. *Other Projects Around the World*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Other-Projects.php> (last visited Feb. 18, 2011).

<sup>4</sup> Both “innocence projects” and “the work that they do” vary according to their individual missions. As I use the terms, I mean primarily those projects that undertake as their work, in part or in whole, the identification, investigation and litigation of valid claims of post-conviction innocence.

empirically-based back and forth. Those in support of their value have marshaled empirical evidence of the successes—mostly exonerations—while those opposed have claimed that the innocence movement’s greatest triumph was its self-aggrandizing ability to exaggerate both its importance and the seriousness of the injustices it claimed to rectify.<sup>5</sup>

Professor Smith begins her article by immediately conceding that there is now little debate about the impact of innocence work. She readily acknowledges the power of DNA evidence to free the wrongly convicted and, in the process, to raise serious questions about certain fundamental conceptions in our criminal justice system.<sup>6</sup> Almost all of these developments stem from the work of innocence projects or by lawyers who were working in the innocence movement tradition. She notes that unlike virtually any other development in the field of criminal justice, the issue of innocent persons being convicted, perhaps even executed,<sup>7</sup> for crimes that they did not commit contains, according to Professor Lawrence C. Marshall, an uncontested sense of righteous indignation that transcends virtually any partisan divide about issues of race or class that have historically revealed deep divisions in our national conversations.<sup>8</sup> Popular culture has not only been exposed to, but has also been compelled by the development. John Grisham recognized this phenomenon and wrote his first nonfiction book, *The Innocent Man*,<sup>9</sup> about it. It immediately struck a popular nerve and became, like his fictionalized courtroom dramas, a best-seller.

Professor Smith also readily concedes that the impact of innocence work is broader than discrete cases or popular culture. She cites the work of a gubernatorially appointed commission’s investigation of the state of Illinois’ system of capital punishment that led Governor George Ryan to enact a moratorium on executions in 2003 that emptied that state’s death row of 167 of its condemned prisoners.<sup>10</sup> In March of 2011, Illinois officially abolished its death penalty.<sup>11</sup>

---

<sup>5</sup> See Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1552 n.12 (2008) (referring to John McAdams’ argument that death penalty opponents have exaggerated the number of exonerated people by blurring the distinction between factual and legal innocence); 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 (2005).

<sup>6</sup> *Mission Statement*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Feb. 18, 2011) (noting that, to date, 275 people have been exonerated in the United States through post-conviction DNA testing, seventeen of whom served time on death row).

<sup>7</sup> See David Grann, *Trial by Fire*, THE NEW YORKER, Sept. 7, 2009, at 42 (chronicling the case of Cameron Todd Willingham, who was executed for murdering his three children by arson. After Willingham’s execution, the evidence used to prove the arson was found to be extremely faulty).

<sup>8</sup> Lawrence C. Marshall, *Walter C. Reckless Memorial Lecture: The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 577 (2004).

<sup>9</sup> JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006). As Grisham tells the story, he was reading the obituary page of the *New York Times* one day and ran across an article about Ron Williamson, a former minor league baseball player who had been wrongly convicted and sentenced to death in Oklahoma for a rape and murder. Not long after Williamson was freed, he died of health complications. According to Grisham, who many would consider one of the pre-eminent tellers of popular fiction, “Never in my most creative moment could I have come up with a story like this.” Michelle Norris, *Grisham Traces Exoneration of an ‘Innocent Man,’* (NPR Oct. 11, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6248147>.

<sup>10</sup> See Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at A10; COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT (2002), [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/summary\\_recommendations.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf).

<sup>11</sup> Amendment to S.B. 3539, 96<sup>th</sup> Gen. Assemb. (Ill. 2010), available at <http://www.ilga.gov/legislation/fulltext.asp?DocName=09600SB3539ham001&GA=96&SessionId=76&DocTypeId=SB&LegID=&DocNum=3539&GA>

Among the most important justifications for abolition is the significant number of condemned people on the State's death row who were later shown to be innocent.<sup>12</sup>

Professor Smith does not mention it explicitly, but the United States Supreme Court has recently given serious consideration to the question of whether an individual convicted of a crime has a constitutionally based claim to DNA testing.<sup>13</sup> Though the Court did not ultimately recognize the right, Justice Stevens, argued in his dissent that the legitimacy of the claim could be based, among other places, in:

. . . the fact that 46 States and the Federal Government have passed statutes providing access to evidence for DNA testing, and 3 additional states (including Alaska [where Petitioner was incarcerated]) provide similar access through court-made rules alone . . . . The fact that nearly all the States have now recognized some post-conviction right to DNA evidence makes it more, not less, appropriate to recognize a limited federal right to such evidence in cases where litigants are unfairly barred from obtaining relief in state court.<sup>14</sup>

It is safe to say that the discussion at this level may never have occurred—or at least would not have occurred as soon as it did—but for the work of innocence projects and their advocacy.<sup>15</sup>

Rather than focusing on precisely how the innocence movement's impact ought to be measured, Professor Smith takes issue with the ultimate value of the impact itself. In a sense, she questions the impact's legacy by identifying three acute areas of concern: the movement's belief in the supreme righteousness of its calling; its singular focus on innocence as the chief currency in criminal justice reform; and the popularity of innocence projects in law school curriculums to the exclusion of other clinical programs.<sup>16</sup> Her ultimate concern is that these areas are not only defining characteristics, but at some basic level are in conflict with fundamental tenets of indigent

---

ID=10&Session.

<sup>12</sup> Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

<sup>13</sup> Dist. Att'ys Office for the Third Jud. Dist. v. Osborne, 129 S. Ct. 2308 (2009). Osborne, seeking relief under 42 U.S.C. § 1983, argued that the Due Process Clause grants a constitutional right to DNA evidence for testing. *Id.* at 2315. Accordingly, Osborne sought access to biological material for more modern DNA analysis. *Id.* Before the *Osborne* decision, other courts found a constitutional right to access DNA for testing. *E.g.*, McKithen v. Brown, 565 F. Supp. 2d 440, 491-92 (E.D.N.Y. 2008) (finding a right to not suffer criminal sanctions due to prosecutorial deliberate indifference to the potential the individual is innocent and that "such deliberate indifference is expressed by a prosecutor's refusal to allow access to physical evidence for the purpose of DNA testing" when it could be done at a low cost and the results would show innocence beyond a reasonable doubt); *Osborne v. Dist. Att'ys Office for Third Jud. Dist.*, 521 F.3d 1118, 1132 (9th Cir. 2008), *rev'd*, 129 S. Ct. 2308 (2009) ("[W]e . . . hold that Osborne is entitled to assert . . . the due process right to post-conviction access to potentially exculpatory DNA evidence . . ."). More recently, in *Skinner v. Switzer*, 131 S. Ct. 1289 (2011), the Court adhered to *Osborne*, ruling that there is no substantive due process right to such testing, but (and here the *Osborne* decision was silent) that a prisoner has a procedural due process right to post-conviction DNA testing. Further, the Court reasoned that if *Skinner's* suit for DNA testing was in fact successful, it would not "necessarily imply" the invalidity of his conviction. *Id.* (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 125 (2004)). Though the results could possibly be exculpatory, they could also be inconclusive or validate his conviction. *Id.* Therefore, the claim could be brought in a § 1983 civil rights suit, and that suit would be cognizable in federal court. *Id.*

<sup>14</sup> *Osborne*, 129 S. Ct. at 2335 (2009) (Stevens, J., dissenting).

<sup>15</sup> As a practical matter, the Innocence Project was on the brief, and Peter Neufeld, co-founder of the Innocence Project, participated in oral argument. Brief for the Respondent, *Osborne*, 129 S. Ct. 2308 (No. 08-6); Oral Argument at 1, *Osborne*, 129 S. Ct. 2308 (No. 08-6).

<sup>16</sup> Smith, *In Praise of the Guilty Project*, *supra* note 2, at 318 ("In this essay I will discuss three growing concerns about Innocent Projects . . .").

criminal defense.

I should say at the outset—partly in the interest of disclosure but also in the hope that it adds context and perspective to my critique—that I am a former student and colleague of Professor Smith’s. We have been good friends for years and, maybe more importantly, have collaborated together as counsel on dozens of criminal cases. It is for those reasons, as well as because she has for many years provided insightful commentary about indigent criminal defense work,<sup>17</sup> that I take at face value her criticisms of innocence work. *In Praise of the Guilty Project* identifies and adds to what I believe is—and ought to be—a candid conversation about the rightful place of, as another colleague and long-time clinician describes it simply, “the incredibly complex world of criminal defense.”

That said, I do take issue with the article, and in particular with what I view as a singular problem that affects her entire argument. It derives from the characteristic strength of both the article and her body of work: its keen insights into what it means to be a zealous advocate for the indigent criminally accused. Put another way, as a long-time practicing defender and clinical teacher, Professor Smith struggles, as many long-time defenders have, with reconciling two areas of practice. These areas, criminal defense and innocence work, have aspirations which appear to be twinned, but the methods of achieving them sometimes seem philosophically incompatible.

More particularly, Professor Smith grounds her arguments in anecdote—or anecdotally-based evidence in some instances—and not in empirical evidence. As a general matter there is nothing wrong with this approach. In fact, the article’s discursive quality accounts for its readability and ease with which it can enter into this important overarching and ongoing discussion. However, the article’s critical flaw is not one of identification so much as it is of attribution. Professor Smith has constructed various straw men to stand in place for her lack of empirical evidence and tends to attribute characteristics to the movement that are in actuality only aberrant incidents.

The concerns that she attributes to the innocence movement are legitimate, but they do not derive from the DNA of the movement, as it were, or from innocence work more precisely. Instead, I believe that they are more accurately classified as the by-product of two kinds of tension. The first is the internal tension arising from within the innocence movement itself. I would describe it as a symptom of a serious—and seriously successful—development in the field of criminal justice that is not yet comfortable in its own skin. The second is the tension that arises from the interaction of the innocence movement and other players in the criminal justice system—primarily defenders and prosecutors—virtually all of whom have been around far longer than innocence advocates. These players’ rules and codes of behavior—many of which work and work well—collide with innocence practitioners’ positions that don’t fit into traditional, or sometimes even recognizable, categories of advocacy. What Professor Smith is absolutely correct about, however, and what makes her article such an important contribution, is that to some extent the innocence movement has yet to win the hearts and minds of some in the criminal defense community. The ability of innocence projects separately, or together as a collective body known

---

<sup>17</sup> See ABBE SMITH, *CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER’S STORY* (2008); Abbe Smith, *The Lawyer’s “Conscience” and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479 (2007); Abbe Smith, *The Burdens of Representing the Accused in an Age of Harsh Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 451 (2004); 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 (2004) [hereinafter Smith, *Too Much Heart*]; Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000) [hereinafter Smith, *Defending*].

as the innocence movement, to reconcile these tensions likely holds the answer to the ultimate legacy of the “new civil rights movement of the twenty-first century.”<sup>18</sup>

### I. A PERSONAL STORY

I was recently involved in a case that illustrates precisely these tensions. A couple of years ago I was asked to represent a criminal defendant in a Louisiana parish not far from New Orleans. My client, along with two co-defendants, was charged with murder. This was to be a retrial. All three had been convicted of murder in 1993 and each had been sentenced to serve life in prison at Angola, Louisiana’s state penitentiary.<sup>19</sup> Based on newly discovered evidence, an appellate court had reversed their convictions in 2008.<sup>20</sup>

The specific facts of the case are complicated and mostly beside the point, but there are two aspects that are relevant to this story: the first is that all of the defendants were factually innocent; the second is that when I was asked to join as counsel I had recently become the director of the Mississippi Innocence Project based at the University of Mississippi School of Law. Immediately prior to that I had been a trial lawyer at the Public Defender Service in Washington, D.C. In other words, I had gone from one of Professor Smith’s “guilty projects” directly to an innocence project.<sup>21</sup>

At the first hearing in the case after my appointment, the judge asked all the parties to retire to chambers to discuss the upcoming retrial. Not surprisingly the judge, who seemed like a consummate pragmatist, wanted to discuss the possibility of disposing of the case short of trial. He made clear that he thought that serious consideration ought to be given to working out a solution. He had presided over some of the hearings where defense attorneys had presented evidence of law enforcement malfeasance and our clients’ non-involvement, and my impression was that he may have felt that after spending over a decade and a half in prison, the State might be satisfied in thinking that it had exacted its pound of flesh.

The lead prosecutor, an experienced, senior attorney from the district attorney’s office, reacted slightly differently to the judge’s urging. He immediately seized the opportunity to offer what he viewed as his eminent reasonableness: notwithstanding the State’s earlier successful effort to convict all of the defendants, he would entertain a deal for the first of the defendants to help the prosecution in its case—presumably by agreeing to testify against the other two co-defendants.

When the prosecutor announced his position there was a pregnant pause, after which one

---

<sup>18</sup> Smith, *In Praise of the Guilty Project*, *supra* note 2, at 317 (quoting Press Release, Innocence Project, As 100<sup>th</sup> 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/innocence-project-press-release-100th-innocent-prisoner-freed-dna-tests-innocence-network-convenes-m>).

<sup>19</sup> See *Williams v. Edwards*, 547 F.2d 1206, 1211-12 (5th Cir. 1977) (holding that the conditions at Angola violate the Eighth Amendment); Special Master’s Report at 313, *Williams v. McKeithen*, No. 71-CV-98 (M.D. La. Apr. 28, 1975), available at <http://www.clearinghouse.net/chDocs/public/PC-LA-0001-0001.pdf>; ANNE BUTLER & C. MURRAY HENDERSON, *ANGOLA: LOUISIANA STATE PENITENTIARY A HALF CENTURY OF RAGE AND REFORM* (1995).

<sup>20</sup> Paul Purpura, *Duo Jailed Since ‘92 Due Out on Bond—Men Will be Retried in Westwego Killing*, THE TIMES-PICAYUNE, Sept. 20, 2008, <http://www.nola.com/news/t-p/westbank/index.ssf?/base/news-4/1221888616317830.xml&coll=1>.

<sup>21</sup> I had spent two years supervising and teaching post-graduate fellows and third-year clinic students at Georgetown University Law Center who were assigned misdemeanors and low-level felonies in D.C. Superior Court.

of my co-counsel tried his best to remind the prosecutor that the primary reason we were all sitting where we were, with our clients out on bail pending a re-trial, was because the vast majority of the newly-discovered evidence supported the fact that all of the defendants were innocent. This colleague then recounted a couple of the more compelling pieces of that evidence and suggested that the prosecutor engage in a wholesale reassessment of the case.

What the prosecutor heard was that his case was weak, the defense's strong, and not wanting to waste any more of his time, acted right out of central casting. "Let's just try the case then," he said.

At which point I spoke up.

I suggested to the prosecutor that perhaps the typical approach to negotiating a criminal case was unlikely to advance us toward any sort of satisfactory resolution. Perhaps, I said as reasonably as I could, we explore some other avenue.

I did so with several reservations, however. For one thing, I relished the opportunity to go to trial. It had been a while since I had tried a case. My two colleagues were terrific, skilled lawyers, and a lot of fun besides. My client was a pleasure to work with and represent. We had a compelling case. An acquittal would have been even more gratifying than usual in that it would have also sent a message about the depth of the systemic malfeasance and failure of justice visited on our clients.

On the other hand, the parish is a notoriously difficult one for criminal defendants – especially African-American defendants like ours.<sup>22</sup> This particular parish has a history of supporting white supremacists for national office<sup>23</sup> and most recently made a name for itself by forming armed citizen posses and setting up barricades to prevent New Orleanians fleeing their Katrina-flooded city from making it across the river and into their parish.<sup>24</sup> Our clients had been indicted by an all-white grand jury, which had been selected by a method that was racially biased and in violation of the state and federal constitutions.<sup>25</sup> What's more, it's one of the few jurisdictions in the country that allow for non-unanimous jury verdicts in certain cases.<sup>26</sup> Our

---

<sup>22</sup> Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, N.Y. TIMES, Jan. 5, 2003, at A14 (investigating the "racially tinged, bloodthirsty culture" in Jefferson Parish as evidenced by prosecutors wearing neckties depicting nooses and the Grim Reaper in addition to distributing plaques affixed with hypodermic needles for each lethal injection).

<sup>23</sup> See TYLER BRIDGES, *THE RISE OF DAVID DUKE* (1995) (chronicling the career of David Duke, a former Ku Klux Klan grand wizard who became a Louisiana House Representative).

<sup>24</sup> See Adam Nossiter, *Harry Lee, 75, Outspoken Louisiana Sheriff*, N.Y. TIMES, Oct. 2, 2007, at B6.

<sup>25</sup> *State v. Jacobs*, 13 So. 3d 677, 683 (La. Ct. App. 2009), *rev'd*, 32 So. 3d 227 (La. 2010).

<sup>26</sup> Paul Purpura, *U.S. Supreme Court Declines to Consider Non-unanimous Jury Verdicts*, TIMES-PICAYUNE, Oct. 5, 2009, [www.nola.com/crime/index.ssf/2009/10/us\\_supreme\\_court\\_declines\\_to\\_c.html](http://www.nola.com/crime/index.ssf/2009/10/us_supreme_court_declines_to_c.html) ("Louisiana and Oregon are the only states that allow convictions based on juries that are unanimous in reaching verdicts. Both states require at least 10 or 12 jurors to agree in order to convict."). See *State v. Lee*, 964 So. 2d 967, 973 (La. Ct. App. 2007), *cert. denied*, 129 S. Ct. 130 (2008); *State v. Bowen*, 168 P.3d 1208, 1209 (Or. 2007), *cert. denied*, 130 S. Ct. 52 (2009). See also Michael H. Glasser, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 661 (1997). It is clear that juries in Oregon state courts are using non-unanimous decisions with frequency. OR. OFF. OF PUB. DEF. SERV. APP. DIV., *ON THE FREQUENCY OF NON-UNANIMOUS FELONY VERDICTS IN OREGON: A PRELIMINARY REPORT TO THE OREGON PUBLIC DEFENSE SERVICES COMMISSION 5* (2009), available at <http://www.oregon.gov/OPDS/docs/Reports/PDSCReportNonUnanJuries.pdf?ga=t>. See generally *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972) (holding that a conviction of a crime by less than an unanimous jury does not violate the Sixth Amendment's guarantee of right to trial by jury as applied to the States by the Fourteenth Amendment); *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972) (holding that conviction by a non-unanimous jury can satisfy the burden of proving

clients had already spent the better part of their lives locked up at one of this country's most notorious prisons; they did not relish the possibility of going back.

I was also aware of a number of additional issues that would stand in the way of an amicable solution. On the one hand, the prosecution had some portion of its office's professionalism at stake, in particular the professional reputation of one of its longest-serving detectives who, during the original investigation, failed to track down leads when they pointed to a suspect other than our three clients. On the other hand, the defendants, after spending almost two decades incarcerated for a crime that they did not commit, were hoping for an outright acquittal so that they could salvage the remainder of their lives. An official exoneration also increased the chances that they would be eligible for monetary compensation.<sup>27</sup> To make matters more difficult still, the case had assumed a fair amount of publicity, especially during the post-trial hearings where serious doubts about the defendants' involvement were being raised and the prosecution's malfeasance exposed.

My single biggest reservation was that I could not immediately offer any workable result, much less a path to get there. The more I spoke about the need for an alternative approach, the harder I had to work to avoid sounding either like the kind of innocence advocate whose position the prosecutor was failing to hear, or the worst kind of accommodationist whose solution results in neither party being able to claim that justice has been done. In the end, about the only thing that my efforts to bridge the gap seemed to accomplish was bringing the meeting to an abrupt end with nothing settled, other than a perfunctory promise to the judge that all the parties would continue to consider various options.

As the meeting broke up, it occurred to me that my colleagues might have been disappointed in me. I felt like I had let down our side to some degree by attempting to engage with the prosecutor after they had tried to make it clear that the engagement should only be on terms that recognized explicitly the possibility of the defendants' innocence. They had lived with the cases significantly longer than I had – for years, really – and so they had much more invested in what we all agreed should be the correct outcome. Good colleagues that they are, though, they winked at me in solidarity as I held the door open on the way out of the judge's chambers.

Last out was the prosecutor who waylaid me for a moment and mentioned, *sotto voce*, that he could tell that I wasn't like all of the other innocence project people – I was not a “zealot” in his words – and he sincerely believed that my attitude might allow the two of us to work together to reach a solution. He even draped an arm around my shoulder in a rather awkward and forced show of cross-cultural solidarity.

He gestured for me to go ahead, which seemed appropriate – stranded as I was between two camps. I was new to innocence work, to what it meant, and still trying to find my rightful

---

guilt beyond a reasonable doubt); Robert Buckhout, et al., *Jury Verdicts: Comparison of 6- vs. 12-Person Juries and Unanimous vs. Majority Decision Rule in a Murder Trial*, 10 BULL. PSYCHONOMIC SOC'Y 175, 175 (1977) (finding that the nonunanimous jury is much more likely to convict than the unanimous jury). Since *Apodaca* and *Johnson*, the Supreme Court has refused to revisit the issue.

<sup>27</sup> LA. REV. STAT. ANN. § 572.8 (2009). At time of publication, twenty-seven states and the District of Columbia have compensation laws for exonerees. *After Exoneration*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/After-Exoneration.php> (last visited Sept. 10, 2011); *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Compensating\\_The\\_Wrongly\\_Convicted.php#](http://www.innocenceproject.org/Content/Compensating_The_Wrongly_Convicted.php#) (last visited Sept. 10, 2011). See generally THE INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION (2010), available at [http://www.innocenceproject.org/docs/Innocence\\_Project\\_Compensation\\_Report.pdf](http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf) (detailing the obstacles to reintegration and monetary compensation for exonerees).

place.

## II. THE “ARROGANCE OF INNOCENCE”<sup>28</sup>

Professor Smith’s first critique of the innocence movement is directed at what she perceives as the innocence movement’s belief in the “superiority” of its mission.<sup>29</sup> According to her, this superiority frequently takes the form of an attitude of “one-upmanship”<sup>30</sup> that trumpets the perceived moral primacy of the work.<sup>31</sup> Her initial concern is that this attitude leads to a distorted and self-aggrandizing value system, one that is primarily concerned with advancing the work’s image rather than with addressing the larger systemic issues that underlie wrongful convictions. As anecdotal evidence Professor Smith points to an e-mail flyer disseminated by an innocence project. Not only did the flyer herald the importance of the work, it also took pains to make sure that a reader understood that freeing the innocent did not mean helping “guilty inmates lessen their sentences or get off on technicalities.”<sup>32</sup>

Professor Smith found the message objectionable for two reasons. First, she believes that the use of the word “technicalities” as a term-of-art denigrates landmark cases like *Miranda v. Arizona*,<sup>33</sup> *Brady v. Maryland*,<sup>34</sup> or *Strickland v. Washington*,<sup>35</sup> and the critical protections that they offer the criminally accused. Second, the message seemed to her to ignore the fact that those same protections are sometimes used as tools by innocence practitioners themselves to expose false confessions, unearth exculpatory evidence, or highlight a claim of ineffective assistance of counsel, all of which are root causes of many wrongful convictions.<sup>36</sup>

My first reaction to this portion of her critique is to agree with her. *Miranda*, *Brady* and *Strickland* are not based on “technicalities.” I would quickly note, though, that in my experience the pejorative use of the term “technicality” in the e-mail flyer is an aberration, and that this sentiment among innocence practitioners is not widely shared, if shared at all. But her critique and my reaction risk missing what I think is a larger point: almost without exception all innocence projects take as the foremost part of their mission the identification and litigation of viable claims of *innocence*.<sup>37</sup> That seems like an obvious point, but it is an important one to recognize and also

<sup>28</sup> Smith, *In Praise of the Guilty Project*, *supra* note 2, at 319.

<sup>29</sup> *Id.* at 320.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 321-22 (“But there is also an arrogance to the ‘innocentrism’ of the innocent movement. They are the righteous ones, the virtuous ones.”).

<sup>32</sup> *Id.* at 319.

<sup>33</sup> *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (holding that statements obtained during interrogation without a full warning of their constitutional rights are inadmissible).

<sup>34</sup> *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (holding that prosecution’s withholding of exculpatory evidence material to guilt or punishment violates the Due Process Clause of the Fourteenth Amendment).

<sup>35</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (holding that the Sixth Amendment’s guarantee of counsel is a guarantee of effective counsel).

<sup>36</sup> Smith, *In Praise of the Guilty Project*, *supra* note 2, at 320; *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php) (last visited Sept. 10, 2011). See also Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 87, 96-97 (2008) (analyzing the types of criminal procedure claims brought by exonerees).

<sup>37</sup> “The Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working



one that criminal defense lawyers tend to misapprehend because it can seem professionally counter-intuitive. I can readily sympathize with their sense of cognitive dissonance, but would suggest that like any successful litigation tactic, context is everything.

For innocence advocates, violations of *Miranda*, *Brady* and *Strickland* are always important, but as they relate to innocence work they are relevant only insofar as they give rise to a claim of actual innocence.<sup>38</sup> In other words, a due process violation – even an egregious one – that offends the body of law for which those cases stand does not necessarily mean that the case is a viable one for innocence projects to pursue unless the client is also factually innocent. Or, put another way, addressing the systemic problems that Professor Smith rightly complains about, and that are also sometimes the cause of many wrongful convictions, is not *necessarily* the concern of innocence projects in the first instance unless and until their client can be shown to be factually innocent.

Before moving on to what I believe to be the most important thrust of Professor Smith's point about the arrogance of innocence work, I have two other brief observations to make that sharpen my reaction to her concern. The innocence movement, consistent with its values and what it believes to be the overriding needs of its putative clients, does not put up many obstacles for individuals or entities that want to declare innocence work as their professional purpose.<sup>39</sup> It should hardly come as a surprise that individuals may occasionally use the fact that they pursue the work as evidence of the work's, and their own, moral superiority.<sup>40</sup> Secondly, there are several other groups whose focus is the freeing of wrongfully incarcerated individuals and who do not have a single attorney or policy person on staff. They do not therefore make it their primary concern – or in some cases, a concern at all – to address overarching issues of criminal justice policy. These groups' primary concern is to free the innocently incarcerated. They have done excellent, and in many instances, groundbreaking work.<sup>41</sup>

---

to redress the causes of wrongful convictions." *About the Innocence Network*, THE INNOCENCE NETWORK, <http://www.innocencenetwork.org> (last visited Sept. 10, 2011).

<sup>38</sup> Note that as far as identified "causes" are concerned, there are no statistics for *Miranda*, *Brady* and *Strickland*. Instead, the statistics that are mentioned most often as being the leading causes of wrongful convictions are eyewitness identification errors, false confessions and prosecutorial or law enforcement misconduct. *See, e.g.*, Sommer Ingram, *Bill to Reduce Wrong Convictions Passes Committee*, KILLEEN DAILY HERALD, Feb. 22, 2011, <http://www.kdhnews.com/news/story.aspx?s=51380> (noting that Texas lawmakers, in a reaction to being the nation's leader in exonerations, have created a bill to amend eyewitness identification procedures to respond to the misidentification problem); *see also Understand the Causes: Eyewitness Misidentification*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Sept. 10, 2011) (explaining that eyewitness misidentification is the most common cause of wrongful convictions in the United States).

<sup>39</sup> Among the basic qualifying criteria for membership in the Innocence Network, an applicant innocence project must demonstrate the following: the organization provides pro bono legal and/or investigative services to individuals seeking to prove their innocence of crimes for which they have been convicted; the organization is a tax exempt organization; and that the organization is housed within, or sponsored by, a nonprofit organization or educational institution. *How to Join*, THE INNOCENCE NETWORK, <http://www.innocencenetwork.org/join.html> (last visited Sept. 10, 2011).

<sup>40</sup> I have spent significant time with all of the groups – defenders, innocence practitioners, and clinicians -- referenced in this portion of the critique. Suffice it to say that innocence practitioners have not yet cornered the market on pomposity.

<sup>41</sup> Centurion Ministries, for example, whose stated mission is to vindicate and free from prison those who are completely innocent of the crimes for which they have been unjustly convicted for life or death. *See CENTURION MINISTRIES*, <http://www.centurionministries.org/> (last visited Sept. 10, 2011). One such exoneration was of Elmer "Geronimo" Platt. Pratt, a leader of the Los Angeles Black Panther Party in the 1960's, was convicted of murder after the

Professor Smith's primary worry is what she terms the "innocentrism"<sup>42</sup> of the movement. As she uses the term of art, she means the belief of innocence practitioners that they "are the righteous ones, the virtuous ones."<sup>43</sup> More specifically, she contrasts criminal defense attorneys like herself, who are ethically bound to pursue their clients' interests "(even if that client is guilty)"<sup>44</sup> and who owe that client an unalloyed duty of responsibility, with innocence practitioners who act as though their calling is somehow higher because they must "look [ ] after *everyone* in the system."<sup>45</sup>

Though Professor Smith never says as much explicitly, I believe that at its most fundamental level her concern about the "innocentrism" of innocence work boils down to the fear that "innocentrism" threatens – mostly by failing to fulfill – what she would consider to be the central ethos required of those who commit themselves to defending poor people charged with criminal conduct. In practical terms I think her critique asks whether there are tensions, some of which may implicate ethical conduct, that arise in pursuing innocence work if that work is seen to require trying to "look after" more than your single client. If there are, and if innocence practitioners engage in that effort, how do they, she seems to ask, remain the kind of lawyers that she and other commentators have consistently claimed is necessary in this type of practice – the kind who represent their clients with utmost "devotion and zeal."<sup>46</sup>

In parsing her concern, it is worth noting as a preliminary matter that there is no ethical prohibition against representing individual clients who have legal issues that may relate to a larger cause for which the lawyer may be an advocate. Advocacy groups have been engaged in this work for generations, and the Supreme Court itself has spoken to the propriety of the work.<sup>47</sup> Not only is this type of zeal permitted, but it is also, at least when it's mentioned in the same breath as criminal defense, usually followed by a lament for how little of it there is.<sup>48</sup> In my experience,

---

FBI vowed to neutralize him. After twenty-seven years in prison, Pratt was ordered a new trial and exonerated after the state's primary witness was found to be an FBI and LAPD informant who had lied at trial. *Cases*, CENTURION MINISTRIES, <http://www.centurionministries.org/cases/elmer-geranimo-pratt/index.php> (last visited Oct.30, 2011). Another exoneree is Edward Honaker. After Centurion's DNA testing proved Honaker's innocence despite two erroneous eye-witness identifications, Honaker was pardoned by Virginia's Governor in 1994 after serving ten years of two life sentences. *Cases*, CENTURION MINISTRIES, <http://www.centurionministries.org/cases/edward-honaker/index.php> (last visited Oct.30, 2011).

<sup>42</sup> Professor Smith did not coin the term herself. Instead she adopts it from an article by the same name whose author Professor Daniel Medwed, himself an innocence practitioner, writes that, rather than being a hindrance to the progression of procedural and substantive criminal law, the burgeoning focus on innocence complements that work. *See* Medwed, *supra* note 5, at 1549.

<sup>43</sup> Smith, *In Praise of the Guilty Project*, *supra* note 2, at 321.

<sup>44</sup> *Id.* at 322.

<sup>45</sup> *Id.* Interestingly, in an interview done by Institute of International Studies at University of California, Berkeley, Peter Neufeld has this to say about his view of innocence litigation: "I think of our innocence cases as civil rights cases, as much as they are criminal defense cases." *See* Interview by Harry Kreisler with Peter Neufeld, Co-Founder, The Innocence Project, Benjamin Cardozo Sch. of Law, Yeshiva Univ., in Berkeley, Ca. (Apr. 27, 2001), available at <http://globetrotter.berkeley.edu/people/Neufeld/neufeld-con0.html>.

<sup>46</sup> *See* COMM. ON CODE OF PROF'L ETHICS, AMERICAN BAR ASS'N, FINAL REPORT OF COMM. ON CODE OF PROF'L ETHICS, Canon 15, at 579 (1908) (referring to the lawyer's obligation 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").

<sup>47</sup> *See* N.A.A.C.P. v. Button, 371 U.S. 415 (1963) (finding unconstitutional Virginia statutes outlawing certain legal solicitation practices that N.A.A.C.P. lawyers were using to advocate for equal rights).

<sup>48</sup> *See generally* ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE

lack of zeal underlies virtually every wrongful conviction, even those that feature more typical root causes, such as eyewitness misidentification, false confessions, and prosecutorial and law enforcement malfeasance.<sup>49</sup> If it can be said that innocence practitioners' efforts are directed in part to remedy previous representational or systemic shortcomings, then it stands to reason that "looking after" more than one's client would appear to be a problem with zeal—though with too much of it, rather than not enough.

At the risk of being overly-anecdotal, I offer this about the issue of zeal as it affects innocence work: every year there is a moment at the national innocence project conference during which a large number of exonerees, including many of those released during the prior calendar year, appear together to be recognized by all of the conference attendees. The aggregate suffering experienced by that group, mixed with the complex joy of their new freedom and multiplied out for their families and the victims and their families<sup>50</sup>, is impossible to quantify. I have witnessed it several times now, and I never cease to be deeply moved. If we all agree with Blackstone's proposition that it is "better that ten guilty persons escape than that one innocent suffer,"<sup>51</sup> then the freeing of dozens upon dozens of innocent people who have been victimized by a system which purports to value constitutional guarantees over "public safety," or even the truth, is a powerful thing. I can attest to the fact that there is no sweeter sound than a "not guilty" verdict for defense lawyer and client.<sup>52</sup> I can also attest that there is something equally potent and yet also profoundly different when the "not guilty" verdict is delivered decades later for a post-

---

CRIMINAL JUSTICE SYSTEM (1996) (exploring larger issues plaguing the jury system and adversarial process through the O.J. Simpson criminal case); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993) (arguing that legal ethics should allow defense attorneys to aggressively defend their clients in all cases); Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83 (2003) [hereinafter Smith, *Difference in Criminal Defense*] (proclaiming that the zealous representation of a criminal defender is preferable); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995) (explaining the tension between the lawyer's role in promoting client interests and maintaining professional responsibility).

<sup>49</sup> This colloquy between trial judge and defense attorney in a recent Mississippi murder case is illustrative, and in no way aberrant. The defendant was charged with murder and, during the course of his arrest, made an un-Mirandized statement to law enforcement. The following conversation took place when the prosecution announced its intent to introduce the statement at trial:

BY THE COURT: Do you have an objection?

[DEFENSE COUNSEL]: Yes, sir.

BY THE COURT: What's your objection?

[DEFENSE COUNSEL]: It would be just to object to the admissibility, Judge.

BY THE COURT: You've got to give me a reason.

[DEFENSE COUNSEL]: Uh -- we withdraw the objection, Judge.

Transcript, *State v. Gore*, No. 08-CR-050-SC-G, slip op. at 61 (Miss. Cir. Ct. Oct. 6, 2008).

<sup>50</sup> Victims' reactions to exonerations are understandably complex. However, in slightly over one-third of post-conviction DNA exonerations the true perpetrator has been discovered, a development that is by definition of significant import to victims and various advocacy positions for which they may advocate. Press Release, Innocent Project, Proven Innocent by DNA, Roy Brown Is Fully Exonerated: Case Highlights Need for NY Innocence Commission (Mar. 5, 2007), [http://www.innocenceproject.org/Content/Proven\\_Innocent\\_by\\_DNA\\_Roy\\_Brown\\_Is\\_Fully\\_Exonerated.php](http://www.innocenceproject.org/Content/Proven_Innocent_by_DNA_Roy_Brown_Is_Fully_Exonerated.php).

<sup>51</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*358.

<sup>52</sup> Abbe Smith, *Defending the Unpopular Down-Under*, 30 MELB. U. L. REV. 495, 546 (2006).

conviction innocence client. It is a qualitatively different experience because of what it indicates about long-held truisms regarding the quality and fairness of our criminal justice system.

Among those indications is what I consider to be the innocence movement's nearly singular ability to expose definitively the pervasive systemic injustice that infects the criminal justice system. Unlike a "not guilty" verdict, which allows space for disagreement about the delivery of justice, exonerations, especially those that result from post-conviction DNA testing, provide irrefutable proof of institutionally condoned injustice.<sup>53</sup> In some cases, the failures are the result of malfeasance; in others, the cause is some routinized and seemingly benign and ingrained habit of practice or procedure. In either case, however, the cause is immaterial to the depth of the tragedy. Exonerations, of course, are only the tip of the iceberg. For every mistaken eyewitness identification that can be verified and developed into an innocence case, there are numerous others that suffer from the same faulty evidence but which, because there is no DNA, or it has been lost or degraded, or witnesses have died or gone missing, cannot be similarly developed.<sup>54</sup>

Equally compelling is the fact that innocence cases expose appellate courts' inability, even sometimes seeming unwillingness, to identify colorable claims of actual innocence or seriously address their root causes. As early as 1993 in *Herrera v. Collins*<sup>55</sup> the Supreme Court rejected an opportunity to find unconstitutional the execution of an innocent person who had received a full and fair trial.<sup>56</sup> In fact, in her concurrence, Justice O'Connor wrote that "[o]ur society has a high degree of confidence in its criminal trials."<sup>57</sup> It has been a mere decade and a half since *Herrera* was decided and Justice O'Connor wrote those words. What seemed then, at any rate, to be a defensible interpretation of the Constitution paired with an unscientific but nevertheless popular conception of public sentiment, now seems quaint, at best, and if placed against empirical evidence of innocence work, more like a ham-handed effort at creating plausible deniability.

Based on an exhaustive study of the first two hundred reported cases of post-conviction DNA exonerations, Professor Brandon Garrett found that although the petitioners were innocent, few actually presented the claim as one of actual innocence because that claim, according to

---

<sup>53</sup> It should be noted, however, that in some cases there are disagreements, usually between prosecutors and defense attorneys, as to what constitutes an actual exoneration. See, e.g., Maurice Possley, *Exonerated by DNA, Guilty in Official's Eyes; High Court Hopeful's View Troubles Critics*, CHI. TRIB., May 28, 2007, at C4 ("In most of the cases where prosecutors have refused to believe in an exoneration, they have cited evidence that more than one person was involved in the crime to argue that the DNA was left by a second, unidentified offender.").

<sup>54</sup> See, e.g., *Herrera v. Collins*, 506 U.S. 390 (1993) (holding that showing a defendant's innocence does not entitle that defendant to federal habeas relief); Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927 (2008) (exploring the challenge of acquiring accurate data regarding false convictions and its impact on capital cases); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007) (explaining the inaccuracy of the current wrongful conviction rate and the policy repercussions that arise as a result as well as proposing a remedy to this issue through using 1980's capital rape convictions data); Clarence Page, *The 200th Reason to Test DNA*, CHI. TRIB., Apr. 25, 2007, [http://articles.chicagotribune.com/2007-04-25/news/0704240608\\_1\\_dna-evidence-innocence-project-exonerated](http://articles.chicagotribune.com/2007-04-25/news/0704240608_1_dna-evidence-innocence-project-exonerated) (proposing that DNA testing must be more widely used in the criminal justice system).

<sup>55</sup> *Herrera*, 506 U.S. at 390.

<sup>56</sup> *Id.* at 417 (noting, too, that even if such a claim were to exist, the threshold would be "extraordinarily high").

<sup>57</sup> *Id.* at 420 (O'Connor, J., concurring).

*Herrera*, is not cognizable.<sup>58</sup> As a result, according to Garrett's data, appellate claims do not privilege factual claims or their development.<sup>59</sup> Of the 200 innocence cases examined, not a single case granted relief based on a challenge to an eyewitness identification error or a constitutional claim of forensic evidence problems. Of those who falsely confessed, only half raised claims about the issue, and none received relief.<sup>60</sup>

In sum, innocence work has succeeded unlike any other reformist movement in demonstrating just how profoundly certain inequities are built into the practical structure and doctrine of our criminal justice system itself.<sup>61</sup> Even though efforts have been made to excise race and class from the criminal trial process, in large measure through Supreme Court cases like *Gideon v. Wainwright*<sup>62</sup> and the jurisprudence that is meant to fulfill *Gideon's* promise,<sup>63</sup> the same fundamental inequalities still exist.

Compounding the problem, most are now insulated from criticism or legal challenge because Justice O'Connor's pronouncement not only still holds sway, but has metastasized. Justice Scalia, for example, has written recently that,

This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is "actually" innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged "actual innocence" is constitutionally cognizable.<sup>64</sup>

Were that not enough, he pointed out in a subsequent opinion, without any empirical or other support save his bombast, that "[o]ne cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly . . . . But with regard to the punishment of death in the current American system, that possibility has been reduced to an

---

<sup>58</sup> Professor Garrett notes that there are avenues of relief based on "collateral" claims of innocence or on certain states' constitutional protections. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 77 (2008). See *Miller v. Comm'r of Corr.*, 700 A.2d 1108, 1132 (Conn. 1997) (providing relief in case where "clear and convincing evidence" of actual innocence is present); *People v. Washington*, 665 N.E.2d 1330, 1336-37 (Ill. 1996) (finding that a legitimate claim of innocence raises due process issues under state constitution); Garrett, *supra*, at 110 n.200-201 (citing *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)) (determining that a *Brady* violation is premised upon a factual proffer showing that the exculpatory evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict").

<sup>59</sup> Garrett, *supra* note 58, at 126 (providing a more in-depth discussion of the valuing of procedural claims over factual claims as it applies to innocence cases). See generally William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 37-45 (1997) (discussing the "defense attorneys' incentive to skew their investment in the direction of more constitutional litigation and less litigation about the facts").

<sup>60</sup> Garrett, *supra* note 58, at 60-61.

<sup>61</sup> See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999).

<sup>62</sup> 372 U.S. 335 (1963) (holding that state courts must provide counsel in criminal cases for defendants not able to afford an attorney).

<sup>63</sup> See *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that state prosecutors cannot use peremptory challenges to exclude jurors based on their race); *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing two-part test for claim of in effective counsel).

<sup>64</sup> *In re Davis*, 130 S.Ct. 1, 3 (2009) (Scalia, J., dissenting).

insignificant minimum."<sup>65</sup>

I find Justice Scalia's views, and likely a majority of the Court's, patently offensive for any number of reasons. But chief among them is that it simply flies in the face of what has been true in my experience as a public defender, post-conviction lawyer, and director of an innocence project; as well as what has been made clear through the work of innocence projects. I cared deeply about these issues when I was a public defender to the extent that I could challenge the problems on a case-by-case basis and only to the extent that they were relevant to a particular discrete client.

My current job is by definition different. The mission statement of the project that I direct explicitly states identifying and offering solutions to systemic problems in the State's criminal justice system as one of its goals. To my way of thinking, this is as it should be. In a job where I have the luxury of a low caseload, where I can to some extent pick and choose cases based on their merit and likelihood of success, and where I can indubitably identify the cases that lead to wrongful convictions, I have two choices broadly speaking: to help only my clients, or to offer some help to everyone in the system. Put another way, I can assure myself a job in perpetuity, or I can devote part of each workday to eventually working myself out of a job. I choose the latter.

I am not unaware that ethical conundrums arise when one engages simultaneously in the representation of individual clients and in the pursuit of policy work that flows directly from those cases. But I would submit that whatever ethical issues arise are not so serious as to render the dual pursuit untenable. Many of the innocence lawyers with whom I am best acquainted are hyper-aware of the particular ethical difficulties that arise as one tries both to be a lawyer for a discrete client and an advocate for a larger cause. Almost all of the others, many of whom are new to the work, are keen to be made aware. The Innocence Network itself has recently capitalized on the existing scholarship on these issues<sup>66</sup> to develop a set of ethical and best practice standards for innocence practitioners.<sup>67</sup> Compliance with some of the rules and regulations are prerequisites for membership in the Network; others are meant to flag and provide basic ethical and best practices guidance in certain situations frequently encountered in this practice. To answer Professor Smith, the fact that a group of innocence practitioners felt they were a small enough subset of lawyers that they needed to devise their own set of professional standards is, I suppose, an act of some hubris. The fact that they have been proactive about holding themselves accountable, in my view, is an equally striking act of humility.

### III. INNOCENCE AS THE CURRENCY OF CRIMINAL JUSTICE REFORM

Professor Smith's second concern is that the attention and emphasis given over to the

---

<sup>65</sup> *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring).

<sup>66</sup> See Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 1101 (2006); Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097 (2002-2003). See generally Jan Stiglitz et al., *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413 (2001-2002) (explaining the place that innocence projects have in legal education and in legal practice); Ellen Yankiver Suni, *Ethical Issues for Innocence Projects: An Initial Primer*, 70 UMKC L. REV. 921 (2002) (explaining the importance of innocence projects to adhere to ethical standards of practice in order to be effective).

<sup>67</sup> THE INNOCENCE NETWORK, GUIDE TO ETHICS & BEST PRACTICES FOR INNOCENCE PROJECT PRACTITIONERS (on file with author).

plight of the innocently incarcerated may result, intentionally or not, in affirmative indicia of innocence becoming the *sine qua non* of criminal trials—a tectonic burden shifting, as it were. Various iterations of this complaint have been around for years; they tend to be chimeric and oversimplified.

My initial exposure to the phenomenon came through a case that a colleague of mine at the Public Defender Service in Washington, D.C. tried in which the defendant had been charged with a purse snatching. The incident had occurred on a busy street during the lunch hour. The victim's description of the perpetrator was strong, and the defendant was apprehended several blocks away in possession of the purse. As best he could, my colleague tried to exploit the inconsistencies between the victim's descriptions of the perpetrator and his actual appearance. Of some help to the defense was that for several minutes the perpetrator had been out of everyone's sight, offering the possibility, however slight, that his client may have innocently come into possession of the purse after the real perpetrator abandoned it.<sup>68</sup> The theory was a stretch, to be sure. After only a few minutes of deliberation, however, the jury returned with a "not guilty" verdict. In a brief meeting between the lawyers and the jury after the trial was over, the jury explained that their verdict had been based in part on the fact that the defendant's DNA had not been found on the purse, a fact that neither side had made any mention of one way or the other.

For some period of time after that, there seemed to be ubiquitous complaints, advanced mostly by prosecutors at that point, but now seeping into the defense community, about the so-called "CSI Effect": the belief that absent proof as solid as a DNA match, juries would believe that the prosecution had failed to meet its burden.<sup>69</sup> That concern appears to have dissipated prosecutorial efforts to disabuse juries of the misperception that crimes scenes are commonly awash in testable DNA evidence – that garden-variety property crimes like purse snatchings and auto thefts are hardly the kinds of cases to which law enforcement dispatch their CSI experts.

That would seem to be that the case, except for the fact that in the years since the purse snatching case that I witnessed, DNA technology has advanced to a point where law enforcement can now bring these advancements to bear in routine and previously "un-solvable cases." Not only have new technologies been used in high profile cases – like the use of "touch" DNA to investigate the JonBenet Ramsay murder, for example<sup>70</sup> – but also in ubiquitous pedestrian crimes like property offenses and auto thefts.<sup>71</sup> Statistics from the National Institute of Justice indicate

---

<sup>68</sup> According to singer-songwriter Randy Newman, there is some factual precedent for the claim. Just before Newman performs his song "Naked Man," he introduces it by telling the inspiration-producing story behind it. According to Newman, a New Orleans public defender once represented a man accused of stealing a woman's purse. The man was naked when he was apprehended. His defense was an alibi. He had been romancing another man's wife in her bedroom when, upon hearing the husband return home, jumped out the window without his clothes and took off down the street. On his way he met another man, also naked, who handed him a woman's purse and went on his way. The defendant was left trying to explain the misunderstanding to the police. Sean Elder, *Randy Newman*, SALON (Aug. 24, 1999), <http://www.salon.com/people/bc/1999/08/24/newman>.

<sup>69</sup> See Honorable Donald E. Shelton, *The 'CSI Effect': Does It Really Exist?*, 259 NAT'L INST. JUST. J. 1 (2008); see also Honorable Donald E. Shelton et al., *Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the 'CSI Effect Exist?'* 9 VAND. J. OF ENT. & TECH. L. 331 (2006) (containing the empirical data used in preceding article); Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050 (2006) (arguing that the CSI effect is just as likely to make jurors convict defendants as it is likely to make jurors acquit them).

<sup>70</sup> Catherine Tsai, *Prosecutor: DNA Clears JonBenet Ramsey's Family*, BREITBART, (July 9, 2008.), [http://www.breitbart.com/article.php?id=D91QJ8SO1&show\\_article=1](http://www.breitbart.com/article.php?id=D91QJ8SO1&show_article=1).

<sup>71</sup> Edwin Zedlewski & Mary B. Murphy, *DNA Analysis for "Minor" Crimes: A Major Benefit for Law*

that anecdotal law enforcement reporting found that law enforcement officers doubled their arrest rates when DNA evidence was collected at property crime scenes and that DNA evidence was twice as effective at identifying suspects in property crimes as fingerprint evidence.<sup>72</sup>

The larger point is that in many cases, Professor Smith's concern that "the innocent will become the enemy of everyone else at every stage" is a development that is not the fault of innocence work.<sup>73</sup> It is simply a fact of the inevitability of scientific advancement and that advancement's intrusion into popular culture. It is also true that for virtually every "advancement" toward "the perfect," there are collateral consequences that arguably inure unintended recipients to the benefit. This is true of DNA technology. Even though the use of DNA has, as Professor Smith says, created a variety of "gold standard" proof, it has also simultaneously exposed the bogus credentials of formerly accepted fields of forensic science, like fingerprint, bite mark, and arson.<sup>74</sup> This phenomenon was fully documented in a 2010 National Academies of Science Report<sup>75</sup> that exhaustively reviewed the bona fides of several forensic disciplines and, with the exception of the science of DNA, found that many lacked basic foundational principles qualifying them as valid forensic sciences.<sup>76</sup> Even DNA evidence is subject to considered review because, as one of the leading scholars in this area Erin Murphy<sup>77</sup> has documented, the science is not immune to some of the same vagaries that compromised softer or pseudo-science disciplines.<sup>78</sup>

The broadest of Professor Smith's concerns regarding the pitfalls of innocence becoming the currency of criminal justice reform is her worry that such efforts will have deleterious effects on criminal defendants generally. She has plenty of support for that concern. In 2005 in *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*,<sup>79</sup> Professors Carol and Jordan Steiker suggest that criminal justice reformist movements including the innocence movement may, in their efforts to ensure meaningful constitutional guarantees for criminal defendants, inadvertently cause a narrowing of those protections.<sup>80</sup>

---

*Enforcement*, NAT'L INST. JUST., 2 (2006), <http://www.ncjrs.gov/pdffiles1/jr000253.pdf>.

<sup>72</sup> NAT'L INST. OF JUSTICE, OFF. OF JUSTICE PROGRAMS, DNA & PROPERTY CRIMES (2010).

<sup>73</sup> Smith, *In Praise of the Guilty Project*, *supra* note 2, at 324. Professor Smith also complains that the defendant with the factual innocence claim "throws every other defendant under the bus." *Id.* At the risk of being snide, throwing people under the bus is a time-tested criminal defense tactic that has nothing to do with the rise of innocence projects.

<sup>74</sup> Mark Hansen, *The Uncertain Science of Evidence*, 91 A.B.A.J. 48, 48-53 (July 2005).

<sup>75</sup> NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009).

<sup>76</sup> *Id.* at 4, 14. The report also proposes the creation of a federally sponsored entity that would set and enforce national standards for forensic sciences. *Id.* at 16-21.

<sup>77</sup> Professor of Law, New York University School of Law. Before she became a professor, Murphy was a public defender in Washington, D.C.

<sup>78</sup> Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721 (2007); see also FORENSIC DNA EVIDENCE INTERPRETATION (John Buckleton et al. eds., 2005); Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291 (2010); Yun S. Song et al., *Average Probability that a "Cold Hit" in a DNA Database Search Results in an Erroneous Attribution*, 54 J. FORENSIC SCI. 22 (2009).

<sup>79</sup> Streiker & Streiker, *supra* note 5, at 587.

<sup>80</sup> Interestingly, advances in DNA technology, including the ability of law enforcement agencies to access



Among other data, the Steikers' article traces the years-long broad and varied backlash against the Warren Court's expansion of federal constitutional protections for state criminal defendants. Specifically, the later Burger and Rehnquist Courts reacted by crafting "rules of constitutional adjudication" that focused "on truth-seeking rather than vindication of constitutional rights per se."<sup>81</sup> The result, according to them, was that there was a substantial impact on "constitutional standards regarding ineffective assistance of counsel and prosecutorial duties to disclose exculpatory evidence . . . ."<sup>82</sup> This development was followed by a series of decisions that narrowed the relief available through federal habeas corpus.<sup>83</sup> Congress followed suit in 1996 by amending the federal habeas statute in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>84</sup> The combined result was a movement away from the Warren Court's view that the criminal process was "an appropriate venue for addressing claims of police and prosecutorial misconduct or for promoting abstract values (such as dignity, fairness, or equality)" and toward "a larger movement to make accurate determination of guilt or innocence the paramount or exclusive value in constitutional criminal procedure."<sup>85</sup>

I readily concede that there has been a reaction against the Warren Court's efforts to extend the availability of federal rights to state criminal defendants, but unlike earlier innocence-oriented cases that were used as grist for those reforms, the volume and frequency of post-conviction DNA exonerations in recent years has irrevocably changed the landscape of the argument. When *The Seduction of Innocence* was published in 2005, for example, there had been one hundred and fifty-eight post-conviction DNA exonerations.<sup>86</sup> At the time of this writing there have now been two hundred and seventy-four; new exonerations are documented every week.<sup>87</sup> These numbers do not include non-DNA post-conviction exonerations, many of which provide even more compelling evidence of the pathologies that infect our justice system.

Additionally, in a place like Mississippi, where I work, one could fairly claim that there has been no backlash because the very conception presupposes that there is something tangible to

---

data bases of collected DNA profiles, has given rise to civil rights issues that were not contemplated until recently. The contours of this area of the law are still being decided, as are the constantly evolving forensic uses of DNA technology. See, e.g., *United States v. Mitchell*, 681 F. Supp. 2d 597, 611 (W.D. Pa. 2009) (holding that "42 U.S.C. § 14135a, and its accompanying regulations, requiring a charged defendant to submit a DNA sample for analysis and inclusion in CODIS without independent suspicion or a warrant unreasonably intrudes on such defendant's expectation of privacy and is invalid under the Fourth Amendment to the United States Constitution"). The Third Circuit scheduled an en banc hearing to decide the issue. Shannon P. Duffy, *En Banc 3<sup>rd</sup> Circuit Set to Hear DNA Samples Case*, LAW.COM, (Oct. 26, 2010), <http://www.law.com/jsp/article.jsp?id=1202473906320>. The case was argued in February of 2011.

<sup>81</sup> Streiker & Streiker, *supra* note 6, at 609.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 609-11 (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977) (constricting petitioners' ability to overcome non-compliance with state post-conviction procedure); *McCleskey v. Zant*, 499 U.S. 467 (1991) (narrowing petitioners' ability to bring previously un-presented post-convictions claims and applying "cause and prejudice" standard to new claims not presented in previous petition); *Kuhlman v. Wilson*, 477 U.S. 436 (1986) (narrowing petitioners' ability to re-bring claims in successor petitions)).

<sup>84</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

<sup>85</sup> Streiker & Steiker, *supra* note 5, at 612.

<sup>86</sup> *Id.*; CHRISTOPHER REINHART, CT. OFF. OF LEG. RESEARCH, EXONERATIONS (2005) ("According to the Death Penalty Information Center (DPIC), as of February 28, 2005, there have been 119 exonerations of death row inmates in 25 states since 1973.").

<sup>87</sup> *Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php) (last visited Feb. 28, 2011).

backlash against. The sad fact of the matter is that in a regional criminal justice system, as Douglas Blackmon documents in *Slavery By Another Name*, that for decades was predicated on “[s]wift, uncomplicated adjudication” to ensure that African Americans were essentially re-enslaved, the legacy of that system is still present.<sup>88</sup> Even though Mississippi locks up more of its citizens per capita than any state other than Louisiana, it has no statewide public defender system. A recent study indicated that 42% of felony cases in rural Quitman County, Mississippi were resolved by guilty plea on the day of arraignment.<sup>89</sup> Even as late as 2007, the “innocence revolution” as Professor Smith and others refer to it, had not reached Mississippi. Of the then just under 200 post-conviction DNA exonerations, none had occurred in Mississippi. Though almost every other state in the nation had recognized the value of preserving DNA and creating legal mechanisms for prisoners to request post-conviction testing claims, Mississippi had not seen fit to address these accepted trends either legislatively or otherwise.

Now, five years later, Mississippi has experienced twelve exonerations, one of which involved a prisoner who had been on death row. Beginning in 2008, the Mississippi Legislature passed comprehensive DNA preservation and testing laws,<sup>90</sup> one provision of which allows prisoners who pleaded guilty to nonetheless seek DNA testing in their cases.<sup>91</sup> Not only is this provision not a feature of most state DNA testing statutes, some state courts have specifically held that prisoners who pleaded guilty are prohibited from requesting testing.<sup>92</sup> Just last year four Mississippi prisoners were exonerated – one posthumously – after relying on this provision to seek DNA testing in their cases. In one case, the defendants had confessed and then pleaded guilty in order to avoid the death penalty. They had been incarcerated for close to three decades.<sup>93</sup>

Similarly, in the last several years (and since the publication of the Steikers’ article in 2005) innocence projects have been able to advocate successfully for significant legislative reform as well as other policy changes at various law enforcement or other municipal entities.<sup>94</sup> Because erroneous eyewitness identifications – or, more to the point, flawed identification procedures – have been implicated in such a significant portion of wrongful convictions, innocence projects have moved to pass sweeping reformist legislation that is aimed directly at correcting systemic problems. Innocence projects have been successful in submitting and

---

<sup>88</sup> DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 66 (2008) (exhaustively accounting the continuing *de facto* enslavement of black laborers in the South after Reconstruction).

<sup>89</sup> STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AMERICAN BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION’S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS* (2004), <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>. See also NAACP LEGAL DEF. & EDUC. FUND, INC., *ASSEMBLY LINE JUSTICE: MISSISSIPPI’S INDIGENT DEFENSE CRISIS* 17 (2003) (describing the high caseloads of contract defenders and resulting inadequate representation given to indigent defendants in Mississippi).

<sup>90</sup> MISS. CODE ANN. § 99-49-1 (West 2010).

<sup>91</sup> *Id.*

<sup>92</sup> See *People v. Byrdsong*, 33 A.D.3d 175, 179-80 (N.Y. App. Div. 2006), *appeal denied*, 7 N.Y.3d 900 (2006) (holding that defendant was not entitled to post-conviction DNA testing because he had pled guilty); *People v. Allen*, 47 A.D.3d 543 (N.Y. App. Div. 2008) (holding that because the ultimate judgment was based on defendant’s guilty plea, defendant was not entitled to post-conviction DNA testing).

<sup>93</sup> Campbell Robertson, *30 Years Later, Freedom in a Case With Tragedy for All Involved*, N.Y. TIMES, Sept. 16, 2010, <http://www.nytimes.com/2010/09/17/us/17exonerate.html>.

<sup>94</sup> See, e.g., *81<sup>st</sup> Legislative Session*, THE INNOCENCE PROJECT OF TEXAS, <http://ipoftexas.org/index.php?action=8-1st-legislative-session> (last visited Feb. 28, 2011).

advocating for the passage of eyewitness identification reform in eleven states<sup>95</sup> and are working in almost every other state or jurisdictions within particular states to affect the same types of reform. Projects have also worked to pass legislation aimed at obligating law enforcement agencies to record and/or videotape interrogations.<sup>96</sup> In addition to these legislative measures, innocence project personnel have been working with state prosecutors' associations and the ABA to craft and adopt Model Rule 3.8, which deals specifically with prosecutorial obligations, particularly when they arise in the context of an innocence case.<sup>97</sup> On the federal level, Congress passed sweeping reform in 2004 with passage of the "Justice for All" Act, which provided for among other things, access to post-conviction DNA testing for federal prisoners, compensation for federal exonerees, funding initiatives to encourage states to implement meaningful DNA preservation and testing protocols, as well as baseline requirements for defense counsel competence in death penalty cases.<sup>98</sup>

At first glance it may appear as though this reformist agenda begins and ends with "innocence" as its genesis and thereafter the distinctive marker of a valid claim for relief. However, the reforms mentioned above, many of which were passed by state legislatures, redound frequently to the benefit of criminal defendants who do not have a claim of innocence more than those that do. But the other point is that, notwithstanding the passage of these reforms, there still exists a fundamental resistance to the meaning and worth of legitimate innocence claims by the U.S. Supreme Court. To argue now, as Professor Smith does, that the pursuit of innocence cases and the reforms that follow may result in a damaging litmus test for most criminally accused seems in this current atmosphere more than slightly precious. Nothing to date seems to have moved the bloc of the Court that is averse to the realities of the criminal justice system's institutionalized inequities. Not even its own tragic mistakes. Take for example the seminal case of *Arizona v. Youngblood*.<sup>99</sup>

In 1983 a ten year-old boy was abducted from a Pima County, Arizona carnival and repeatedly sodomized. Hospital personnel collected evidence and completed a rape kit provided by Tucson law enforcement. Thereafter, however, the material was not tested completely and some of the evidence was improperly stored causing it to degrade. Youngblood was identified by the victim and convicted at trial. When he challenged law enforcement's handling of the evidence that he claimed would have exonerated him, the Court held that routine or negligent destruction was of no constitutional import and that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of

---

<sup>95</sup> This list of states includes: Georgia (H.R. Res. 352, 149th Gen. Assemb., Reg. Sess. (Ga. 2007) (creating the House Study Committee on Eyewitness Identification Procedures)); Illinois (725 ILL. COMP. STAT. 5/17A (West 2010)); Maryland (MD. CODE ANN., PUB. SAFETY § 3-506 (West 2010)); New Jersey (JOHN J. FARMER, ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001), [http://www.innocenceproject.org/docs/NJ\\_eyewitness.pdf](http://www.innocenceproject.org/docs/NJ_eyewitness.pdf)); North Carolina (N.C. GEN. STAT. ANN. § 15A-284.52 (West 2010)); Ohio (OHIO REV. CODE ANN. § 2933.83 (West 2010)); Rhode Island (R.I. GEN. LAWS ANN. § 12-1-16 (West 2010)); Vermont (VT. STAT. ANN. tit. 13, § 182 (West 2010)); Virginia (VA. CODE ANN. § 19.2-390.02 (West 2010)); West Virginia (W. VA. CODE ANN. § 62-1E-1, 1-3 (West 2010)); Wisconsin (WIS. STAT. ANN. § 175.50 (West 2011)).

<sup>96</sup> See generally *False Confessions & Mandatory Recording of Interrogations*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/False-Confessions.php> (last visited December 29, 2010) (providing jurisdictions that have undertaken reform measures to record interrogations).

<sup>97</sup> MODEL CODE OF PROF'L CONDUCT R. 3.8 (2010), available at [http://www.abanet.org/cpr/pic/3\\_8.pdf](http://www.abanet.org/cpr/pic/3_8.pdf).

<sup>98</sup> See Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004).

<sup>99</sup> *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) (holding that without a showing of bad faith there was no denial of due process to criminal defendants when law enforcement failed to preserve evidence).

due process of law.”<sup>100</sup> In a vigorous dissent, Justice Blackmun wrote that the provision of due process must surely require something more than simply avoiding bad faith action, noting wryly that a failure of justice is not mitigated simply because the police were inept but otherwise uncorrupted.<sup>101</sup> Youngblood served his sentence and was released but re-imprisoned in 1999 for failing to register as a sex offender. In 2000, more advanced DNA technology allowed the degraded semen sample to be tested. The results exonerated Youngblood and implicated the real perpetrator, who was subsequently convicted and sentenced to twenty-four years. *Youngblood* is still the law of the land.

Among the lessons that *Youngblood* is able to teach is that recent efforts designed to narrow the ability for prisoners to gain relief through post-conviction claims – whether they be through states’ efforts to narrow or through federal statutes like AEDPA – have resulted in creating a series of impediments that have, whatever else their proponents may claim, prohibited just claims from being adjudicated. These types of claims are certainly not limited to clients with claims of innocence, and despite what some have argued about innocence projects “diluting” the “core conception of innocence,” the reality is much more nuanced than that.<sup>102</sup> Innocence cases like *Youngblood*, if they have done anything, have sharpened the attention that ought to be paid to a spectrum of post-conviction statutory schemes that are failing.

Yet, despite both the rhetorical and empirical power of this data, the Supreme Court remains intractable. When, in 2009, the Court had another opportunity to consider argument regarding access to post-conviction DNA testing – this time in *Osborne* where the biological material had been carefully preserved – the Court again denied access by relying on the specious and empirically unsupported view that inmates, armed with the constitutional right to seek DNA testing would “game” the system and wreak havoc if “given a never-before-recognized constitutional right to rummage through the state’s genetic-evidence locker.”<sup>103</sup> “Gaming” the system is indeed a legitimate worry, though it is the Supreme Court that is the malefactor and appears unlikely to have the temerity to admit that in the near future. It has been due in large part to innocence work that the Court’s hypocrisy has been exposed. While the Court’s unwillingness to take corrective action should be of significant concern, least among them it seems to me is the worry that continued innocence reform efforts might result in a backlash.

#### IV. THE ASCENDENCY OF INNOCENCE PROJECTS IN LAW SCHOOL CLINICAL PROGRAMS

Professor Smith, a long-time clinical professor – and as importantly for this portion of her article, an articulate and thoughtful proponent of clinical legal education<sup>104</sup> – cites several worries about the growing prevalence of innocence projects as a clinical education option at law schools.<sup>105</sup> Her worries boil down to two related concerns: (1) that law students who participate

<sup>100</sup> *Id.* at 58.

<sup>101</sup> *Id.* at 66-67 (Blackmun, J., dissenting).

<sup>102</sup> See, e.g., Emily Hughes, *Innocence Unmodified*, 89 N. C. L. REV. 1083, 1089 (2011).

<sup>103</sup> Dist. Atty’s Off. for Third Jud. Dist. v. Osborne, 129 S.Ct. 2308, 2328 (2009).

<sup>104</sup> See generally Smith, *Difference in Criminal Defense*, *supra* note 48 (discussing how the difference between civil and criminal cases creates a difference in legal ethics). See also Smith, *Too Much Heart*, *supra* note 16 (discussing the craft in high volume public defense and attributes of public defenders).

<sup>105</sup> *Other Projects Around the World*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Other-Projects.php> (last visited Feb. 28, 2011) (listing innocence projects at universities around the world).

in innocence clinics will fail to learn the specific skill set and empathic qualities normally associated with good defense work, and, (2) that it comes close to being unconscionable to start an innocence clinic that provides a very select service to a very select set of clients when there are so many other, deserving clients, both those facing criminal charges and those who have civil legal needs, who have no access at all to legal counsel.<sup>106</sup>

If the available statistics mean anything, then Professor Smith's appears to have no need to worry. Of the 131 schools that reported to the Center for Applied Legal Education's recent survey on applied legal education, nineteen reported having innocence clinics (out of a total of 809 clinics, of which 63 were criminal defense clinics.)<sup>107</sup> Since that time, the Innocence Network has received four applications from clinic-based innocence projects. Each was granted membership; none replaced a pre-existing criminal defense clinic. In addition, for many law schools, creating a new clinic, particularly one that requires frequent and close supervision like criminal defense clinics, is simply not a feasible proposition. To begin, such clinics are quite expensive to start and to maintain.<sup>108</sup> Even where expenses are not an issue, many schools are not ideally situated to provide the sort of atmosphere conducive to starting such clinics. And as much as we might not like to admit it, there are also political realities both in and out of law schools' control that can make maintaining existing clinics hard enough, not to mention establishing new ones.<sup>109</sup>

Most central to Professor Smith's concern about the ascendancy of innocence clinics is her belief that students who participate in them are not exposed to the core values that successful guilty projects offer to their students, namely the experience that students who represent "guilty" clients undergo when they realize their clients are not so very different, ultimately, from

---

<sup>106</sup> For information regarding the current crisis in statewide indigent criminal defense, see, for example, THE SPANGENBERG GROUP, ABA INFORMATION PROGRAM, STATEWIDE INDIGENT DEFENSE SYSTEMS: 2005 (2005), <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.pdf> (providing state-by-state information on existing public defender programs and oversight). For the same issues regarding the crises in civil representation, see, for example, William Glaberson, *Top New York Judge Urges Greater Legal Rights for the Poor*, N.Y. TIMES, May 3, 2010, <http://www.nytimes.com/2010/05/04/nyregion/04court.html> (discussing a judge's need for lawyers representing indigents in civil cases); Carol J. Williams, *California Gives the Poor a New Legal Right*, L.A. TIMES, Oct. 17, 2009, <http://articles.latimes.com/2009/oct/17/local/me-civil-gideon17> (discussing a new law under which the state will provide lawyers in key civil cases, such as those dealing with eviction and domestic abuse, and explaining that advocates think underprivileged litigants will get a better shot at justice); Sargent Shriver Civil Counsel Act, CAL. GOV'T CODE §68650 (West 2009) (establishing funding for a pilot project that will provide indigents a lawyer in certain civil cases).

<sup>107</sup> David A. Santacroce & Robert R. Kuehn, *Report on the 2007-2008 Survey*, Center for the Study of Applied Legal Education, <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf> (providing quantitative information on U.S. law school clinics and clinic educators).

<sup>108</sup> See Melissa L. Breger & Theresa A. Hughes, *Advancing the Future of Family Violence Law Pedagogy: The Founding of a Law School Clinic*, 41 U. MICH. J.L. REFORM 167 (2007). See generally Donald N. Duquette, *Developing a Child Advocacy Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J.L. REFORM 1 (1997).

<sup>109</sup> For a good discussion of the political implications that sometimes arise with law school clinics, see generally, David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209 (2003). For a discussion of the particular problems encountered by Tulane Law School Environmental Clinic see Peter Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235 (1999). University of Maryland law school clinics have also come under political scrutiny. See Karen Sloan, *Partial Victory for Law Clinic in Fight with Legislature*, THE NAT'L L. J., April 5, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202447502486&slreturn=1>; Karen Sloan, *Independence of Maryland Law School Clinic Is Challenged by Lawmakers*, THE NAT'L L. J., March 29, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202447072923>.

themselves. “This is a transformative revelation for some,” she writes, and, “[y]ou 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.”<sup>110</sup>

I could not disagree more. To begin with, I don’t think that it’s “too easy” to identify with the innocence clients whom I have represented.<sup>111</sup> In fact, I think it’s extraordinarily difficult. I should probably pause and admit that I have never felt that it was particularly easy for me to identify with the hundreds of “guilty” clients I represented when I was a public defender either. I suppose I need to admit that it’s possible that the lessons I was supposed to have learned as a clinical student never took. In my case, my “transformative experience,” such as it was, had more to do with my continual amazement by just how different my life was from most of my clients’. Unlike the “there but for the grace of God go I” realization, I was so far removed from the life experiences of my clients that we may have been from different planets. And this in Washington, D.C., a relatively provincial city,<sup>112</sup> where my clients and I were sometimes only physically separated by a block or two.

I also take issue with her claim from a much more practical pedagogical standpoint. Identifying, investigating and litigating claims of innocence contain all of the base ingredients for the type of experience Professor Smith claims as the purview of “guilty projects.” First of all, innocent clients do not generally spring, fully formed, like a post-conviction Aphrodite out of some state’s department of corrections database. All of the cases that we agree to consider are post-conviction cases. To read the appellate opinions on these cases is to read a record that is replete with a version of guilt. From a purely factual perspective, the trial record is generally no better. What interests us is a rape kit that may never have been submitted for testing in a “stranger on stranger” sexual assault, or a recanting witness who had been a co-defendant who had gotten a deal. Those facts standing alone do not mean by any stretch that the person is innocent – only that there exist hallmarks of possible innocence in a case that may or may not turn out to be – after significant work – a viable case. Until that point, though, students are working on a “guilty” person’s case.<sup>113</sup>

Secondly, Professor Smith writes that the case-screening process by which many innocence projects choose cases to work on amounts to a “rationing” of access to justice because

---

<sup>110</sup> Smith, *In Praise of the Guilty Project*, *supra* note 2, at 326. For a discussion of this phenomenon, see also Smith, *Too Much Heart*, *supra* note 16, at 1203, 1251-59 (2004); Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 302-04 (2001) (discussing the process of promoting a desire for justice work in law students); Jane Harris Aiken, *Striving to Teach “Justice, Fairness, and Morality,”* 4 CLINICAL L. REV. 1 (1997) (discussing how to teach clinical legal students values associated with promoting justice); 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) (discussing the role of teachers in law clinics in promoting social justice learning).

<sup>111</sup> Smith, *In Praise of the Guilty Project*, *supra* note 2, at 326 n.75. Smith cites to a comment made by an innocence practitioner in support of her position. See Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 264 (2006) (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”, and then adds this editorial note: “But note that these are *innocent people* convicted of heinous crimes and banished.”)

<sup>112</sup> In his Washington based novel of manners, *The Last of the Southern Girls*, Willie Morris wrote that about the town that “[i]t had all the illusions of a large city, compounded by the sources and appurtenances of national authority, which gave it its character. Yet strip off these layers and there, for any outsider to see, lay the quintessential American small town.” WILLIE MORRIS, *THE LAST OF THE SOUTHERN GIRLS* 3 (1973).

<sup>113</sup> See generally, Findley, *supra* note 111, at 264.

it emphasizes that some clients are more deserving than others, an exercise that is at odds with what she argues new lawyers should be learning.<sup>114</sup> In virtually every innocence clinic with which I'm familiar, the screening process takes place within a very explicit context. In my clinic, students do not interact with a live case until they have attended several initial classes, all of which are devoted to a discussion of what I refer to as the "ethos" of criminal defense work. We read several articles and have (usually) vigorous discussions about what it means to be a criminal defense attorney. One of the goals of the discussion is for the students to realize that one of the foremost skills that a defense lawyer can bring to bear on the client's case is the ability not to stand in judgment.<sup>115</sup> My students, like those in criminal defense clinics in which I have taught, struggle to find their comfort zone, but none take issue with the basic precepts of this claim or any others about what is required to zealously defend a client. By the time they are ready to be introduced to the cases we are working on as *innocence practitioners* they are very much aware of the fact that they are, in essence, being judgmental; the irony is not lost on them.

And then they are introduced to their cases. Or more accurately the train wrecks that pass as cases handled by lawyers who have made the rationing of justice their daily bread and butter. In case after case on which students work, lawyers have routinely failed to provide even the most basic required services. What engages the students is exactly what Professor Smith says elsewhere in her scholarship is the true import of legal clinics: the teaching and valuing of craft.<sup>116</sup> For the students handling innocence cases, the fact that the client may be innocent is, ultimately, of little consequence – in the same way that actual innocence is of little practical legal consequence to a defense attorney who is facing a trial. What outrages them is not that an innocent person was locked up unjustly – that outrage is, for them, *sui generis*. What these soon-to-be lawyers are engaged by are the causes of the injustice. When they see defense lawyers waiving opening statements, conducting an entire trial without an articulable defense theory, inculcating their clients during an unpracticed cross examination, they are outraged.<sup>117</sup> This is not the profession that they signed up for; it is my hope that wherever they end up, in whatever type of practice, they will not countenance it. They have become, in other words, ready for justice.<sup>118</sup>

## V. CONCLUSION

After a lengthy meeting among the defense attorneys in the Louisiana murder case, we decided on a strategy: rather than dealing at arm's length with the prosecution in a case where we felt like we had a tactical advantage, we would capitalize on our position, take advantage of the growing recognition that convicting the innocent was a not uncommon reality, and present to the prosecution almost all of the additional exculpatory evidence that defense investigators had gathered over the years. It was an unorthodox approach. On the one hand it took the best of

---

<sup>114</sup> Smith, *In Praise of the Guilty Project*, *supra* note 2, at 326.

<sup>115</sup> See Smith, *Defending*, *supra* note 16, at 928 ("[The right to counsel] also makes plain one of the most important things a defense lawyer can offer a client accused of a terrible crime: suspension of judgment.").

<sup>116</sup> See Smith, *Too Much Heart*, *supra* note 16, at 1251-59 (2004) ("[A] central part of the craft of defending is pushing the criminal justice system to step up . . . . We are the lone voice in the courtroom urging that the right thing be done--not necessarily the easy thing, but the right thing--as a matter of law and as a matter of humanity. At the very least, we make sure an injustice does not go unnoticed.").

<sup>117</sup> See generally, Findley, *supra* note 111.

<sup>118</sup> See generally Aiken, *supra* note 110 (discussing the developmental process of teaching clinical law students how to be ready to do justice work).

good, smart – zealous – defense lawyering, and married it to a certain type of calculated risk that derived in part from our confidence in ourselves as a defense team and our unwavering commitment to our clients’ innocence. One might just say that we were arrogant and that we were using innocence as the currency in our negotiations.

It is also worth noting that all of the lawyers were either the products of robust criminal defense clinical programs or adherents to the model of zealous, client-centered representation that they claim as their hallmarks. We were also at that moment in time representing “guilty” clients. Though it is true that they were also factually innocent, it was also true that under the most serious of the circumstances our clients faced, the distinction was a purely semantic one. We had no DNA to test; no faulty eyewitness identification to rely on; no confession to claim was false. We were ready to proceed on the case the old-fashioned way: by trying the hell out of it.

My client had been out of jail on bond during his first trial. When he received word that the jury had returned with its verdict, he fled. He eventually turned himself in, and at his sentencing, repeatedly tried to tell the court and anyone else who would listen that he and his co-defendants were innocent. No one seemed to care. Not his defense attorney, who had engaged in egregious misconduct, nor the prosecutors who had failed to divulge exculpatory evidence, based much of their case on a cooperator, and felt confident about the verdict. The only person who was moved to action was the judge. He ordered that my client’s mouth be taped shut.

Because, in his words, he wasn’t prepared “to go out like that,” my client became an exercise fanatic in the hope that he might turn an un-survivable sentence into a survivable one. He logged thousands of miles running in place in his jail cell before any of us could find it in ourselves to stop and listen long enough to what he had been trying to say about his case and about a system that condoned it.

In September of 2010 the district attorney’s office dismissed the indictment against all of our clients.